



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Executive Office

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Arnold Schwarzenegger
Governor

March 28, 2007

VIA U.S. MAIL AND EMAIL

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Dear Messrs. Diaz, Duchesneau, Hunsucker, León, Sommer, and Wyatt:

**RULINGS ISSUED IN RESPONSE TO PRE-HEARING MOTIONS FILED IN THE MATTER OF PERCHLORATE CONAMINATION AT A 160-ACRE SITE IN THE RIALTO AREA: RULING ON EMHART'S MOTION AND OBJECTION NO. 4
SWRCB/OCC FILE A-1824**

The State Water Resources Control Board (State Water Board) received numerous pre-hearing motions from the designated parties in accordance with the procedures set forth in the Notice of Public Hearing In the Matter of Perchlorate Contamination at a 160-acre Site in the Rialto Area (SWRCB/OCC FILE A-1824) dated February 23, 2007. All motions are posted on the State Water Board's web page (<http://www.waterboards.ca.gov/wqpetitions/a1824motions.html>).

As the Hearing Officer for the evidentiary hearing on this matter, I issued rulings on several of the pre-hearing motions on March 8, 2007 and March 20, 2007. I am issuing an additional ruling at this time on the Emhart parties' motion and objection number 4. The ruling is being issued in the interest of efficiency for the parties and to allow for orderly discovery and progression to a hearing. Further rulings may be forthcoming.

California Environmental Protection Agency

A motion was filed to stay the proceedings pending discovery and a determination by the State Water Board that there has been compliance with certain requirements pertaining to separation of functions and ex parte communications. The motion was filed by Emhart Industries, Kwikset Locks, Inc. Kwikset Corporation, and Black & Decker (U.S.) Inc. (Emhart) and joined by Goodrich Corporation and Pyro Spectaculars, Inc. The motion was styled as Emhart's "Motion and Objection Number 4: Stay All Proceedings Pending Discovery and Determination of Compliance with (1) the Separation of Prosecutorial and Adjudicatory Function Requirements in Government Code Section 11425.10(a)(4); and (2) the Prohibition Against Ex Parte Communications in Government Code Section 11425.10(a)(8)."

This motion and objection claims that the proceedings should be stayed pending discovery and a determination by the State Water Board that the Hearing Officer and Advisory Team have complied with: (1) separation of prosecutorial and adjudicatory functions per Government Code, section 11425.10, subdivision (a)(4); (2) prohibition against ex parte communication per Government Code, sections 11425.10, subdivision (a)(8) and 11430; and (3) the Office of Chief Counsel Guidance "Transmittal of Ex Parte Communications Questions and Answers Document" dated July 25, 2006 ("OCC Ex Parte Q&A"). **The motion is granted, in part, as to its request for disclosure of ex parte communications, denied as moot with respect to the stay request, and denied in all other respects.**

The motion identifies several bases for the motion. They include: the due process requirements of Chapter 4.5 of Administrative Procedure Act (APA) that set minimum requirements (Gov. Code, § 11425.10); court decisions requiring separation of prosecutorial and adjudicatory functions in a specific proceeding (*Nightlife Partners Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91; *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817 [an employee engaged in prosecuting cannot participate or advise in decision or agency review]; and the OCC Ex Parte Q&A.

Initially, none of the materials in the motion support a claim of any irregularity in adjudicative proceeding pending before the State Water Board. The motion seeks a stay for an opportunity to proceed with discovery in this regard. The Hearing Officer notes that California places a continuing duty on an administrative agency to proceed in accordance with the law. (Code Civ. Proc., § 1094.5.) Adjudicative proceedings, such as the instant proceeding, place an affirmative duty on the agency to adhere to a separation of function and on the presiding officer to affirmatively disclose ex parte communications in accordance with the APA. (Gov. Code, §§ 11425.10, subd. (a)(4) [separation of functions] 11425.10(a)(8) and 11430.50 [ex parte communication prohibition and disclosure].)

SEPARATION OF FUNCTIONS

On the face of the materials concerning this matter (A-1824), all evidence in the record indicates that the State Water Board has maintained a separation of functions. Neither the Hearing Officer, nor the staff assisting me, have participated in the investigation and prosecution of this matter. The matter has been investigated and prosecuted in the Santa Ana Regional Water Quality Control Board (Santa Ana Water Board) with staff from that office. The Santa Ana Water Board staff are not advisors to the State Water Board and do not serve in that role.

There is one exception to the general statement that Santa Ana Water Board staff have investigated and prosecuted the action. That exception concerns certain attorneys who have either previously been in the Office of Chief Counsel (Jorge Leon) or are presently in the Office of Chief Counsel (Ted Cobb and Erik Spiess). The Chief Counsel has addressed the necessary separation of function by issuing a memorandum outlining the unique circumstances requiring a separation of functions memorandum in this proceeding and detailing that separation of function. (Memorandum from Michael Lauffer to Tam Doduc re Hearing Team Advisors and Separation of Functions (Feb. 13, 2007).) Neither the Hearing Officer nor my advisors have participated in the investigation and prosecution of this matter. Further, the advising staff in the Office of Chief Counsel have been screened from other staff in that office in accordance with the February 13, 2007 memorandum. The State Water Board has maintained an appropriate division between the advocacy and adjudicative function.

There is no basis to stay the proceedings for discovery concerning the separation of functions. In this respect, the motion and objection is denied.

EX PARTE COMMUNICATIONS

The motion also seeks a broad investigation of communications pertaining to this adjudicative proceeding and prior adjudicative proceedings. To the extent the motion requests an investigation by the State Water Board concerning ex parte communications in this proceeding, the motion is granted. In all other respects, the motion is denied.

The Office of Chief Counsel has routinely advised the Hearing Officer and interested persons of the prohibition on ex parte communications in this matter. (E-mails from Elizabeth Jennings (Feb. 7, 2007 and Feb. 13, 2007) clarifying that all communications must be to all parties; Hearing Notice and Revised Hearing Notice clarifying that all communications must be to all parties.) A similar direction to State Water Board members occurred last September, when there was no pending proceeding because the parties had recently placed their petitions in abeyance. (E-mail from Michael Lauffer to State Water Board Members (Sep. 13, 2006).) The requirements were also captured broadly in the OCC Ex Parte Q&A issued on July 25, 2006.

The Hearing Officer's Advisory Team has conducted a review of materials since this adjudicative proceeding commenced and the time immediately preceding the pendency of this adjudicative proceeding.¹ As part of this review, the Advisory Team identified five communications that are not ex parte communications, but that I am nonetheless disclosing in an abundance of caution. The materials disclosed include:

1. A communication from attorneys at Allen Matkins to Michael Lauffer (State Water Board Chief Counsel) that purported to be a confidential settlement offer to the State Water Board pertaining to the Rialto perchlorate investigation. The communication was received in the summer of 2006 when the State Water Board was sitting as an adjudicative body on a petition filed on behalf of Emhart Industries. Mr. Lauffer skimmed the document, determined

¹ As noted above, even five months preceding this proceeding, the Chief Counsel had advised State Water Board members to avoid communications concerning the Rialto-Area perchlorate investigation with the Santa Ana Water Board staff and persons interested in the Rialto-Area perchlorate investigation.

it was an inappropriate ex parte communication in the then-pending proceeding, stopped reviewing it, and directed his assistant to return the document to Allen Matkins. The document was not retained by the Office of Chief Counsel, was not reviewed by any persons at the State Water Board besides Mr. Lauffer, and Mr. Lauffer has no recollection of the specific contents of the offer. This communication is not an ex parte communication in this adjudicative proceeding, but is being disclosed in an abundance of caution.

2. A PowerPoint presentation presented to the Water Quality Coordinating Committee on October 31, 2006 by a coalition of environmental justice organizations. As part of an overview of environmental justice issues statewide, the presentation included a general description of the organizations' involvement in the Rialto perchlorate investigation. A copy of the PowerPoint is attached to this ruling as Attachment #1. This communication is not an ex parte communication in this adjudicative proceeding, but is being disclosed in an abundance of caution.
3. An e-mail from Gerard Thibeault to Tom Howard (Acting Executive Director) sent on February 2, 2007 communicating the Santa Ana Water Board's frustration with a letter Mr. Howard sent on January 30, 2007. A copy of the e-mail is attached to this ruling as Attachment #2. The e-mail is likely not an ex parte communication because the adjudicative proceeding was not pending, but it would be appropriate to consider the proceeding impending.
4. A letter from Senators McLeod and Carter sent to Tam Doduc on February 7, 2007 requesting State Water Board involvement in the Rialto-Area perchlorate investigation. The letter came two days after Mr. Howard indicated that the State Water Board would take this matter up on its own motion. A copy of the letter is attached to this ruling as Attachment #3. The letter is likely not an ex parte communication because it does not concern a matter in the proceeding, but is being disclosed in an abundance of caution.
5. A letter from Tam Doduc sent to Senators McLeod and Carter on March 27, 2007 responding to the Senators' letter, identifying the status of the proceeding, and reiterating the adjudicative nature of the proceeding. A copy of these letters is attached to this ruling as Attachment #4. The letter is not an ex parte communication because it does not concern a matter in the proceeding and is not a communication to the adjudicator, but is being disclosed in an abundance of caution and consistent with Government Code section 11430.50, subdivision (a)(1).
6. An e-mail from Linda Adams (Cal/EPA) to Tam Doduc sent on March 22, 2007 requesting a person to attend a meeting with persons interested in the Rialto-Area perchlorate contamination. A copy of the e-mail is attached to this ruling as Attachment #5. The e-mail is not an ex parte communication because it does not concern a matter in the proceeding and is routine and non-controversial in that it requests an appropriate staff person to participate in a briefing. The e-mail is being disclosed in an abundance of caution.
7. An e-mail from Michael Lauffer to Jorge Leon (Advocacy Team) sent on March 22, 2007 requesting a representative of the advocacy team attend the meeting referenced in disclosure #6. A copy of the e-mail is attached to this ruling as Attachment #6. The e-mail is

not an ex parte communication because it does not concern a matter in the proceeding, is routine and non-controversial in that it requests an appropriate staff person to participate in a briefing, and is not a communication to the adjudicator. The e-mail is being disclosed in an abundance of caution.

8. An e-mail from Jorge Leon to Michael Lauffer sent on March 22, 2007 agreeing to attend the meeting referenced in disclosure #6. A copy of the e-mail is attached to this ruling as Attachment #7. The e-mail is not an ex parte communication because it does not concern a matter in the proceeding, and is routine and non-controversial in that it requests an appropriate staff person to participate in a briefing. The e-mail is being disclosed in an abundance of caution.
9. An e-mail from Tam Doduc to Linda Adams sent March 22, 2007 indicating that prosecution staff will attend the briefing. (The e-mail incorrectly identifies Jorge Leon as a member of the Office of Chief Counsel.) A copy of the e-mail is attached to this ruling as Attachment #8. The e-mail is not an ex parte communication because it does not concern a matter in the proceeding and is routine and non-controversial in that it identifies an appropriate staff person to participate in a briefing. The e-mail is being disclosed in an abundance of caution.

Pursuant to Government Code, section 11430.50, subdivision (c), the parties have ten days from the date of this ruling to comment on item 3, 4 and 5 above. During the 10-day period afforded by subdivision (c), I will also entertain any comments on the other items disclosed above. The above materials will be entered into the administrative record of the proceeding, but will not be part of the evidentiary record on which any decision is based.

The obligations of Government Code, sections 11430.10-11430.80 are continuing. The Hearing Officer and her advisory will make any further disclosures required by the APA if there are subsequent, ex parte communications. Further, all parties are reminded that for abuses of the ex parte communication provisions of the APA, there is explicit authority for the Hearing Officer to issue contempt sanctions. (Gov. Code, § 11455.10.) Parties must communicate with the advisory team in writing, with copies to all parties.

BIAS

There has not been any showing of bias by the Hearing Officer or by any member of the Advisory Team. There is no basis for staying the hearing or compelling discovery of the Advisory Team. The motion is denied as it pertains to claims of bias.

The motion claims the following facts compel granting the motion. The first allegation is the Hearing Officer's disclosure at the pre-hearing conference. The disclosure related only to general information about perchlorate and the fact that there were requests for action in this matter. She clarified she had had no direct communications. Knowledge about issues, and even positions on those general issues, does not constitute bias or denial of due process. (*Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781.) There is also a statement in the motion about the hearing notice being issued the day after the pre-hearing conference. There is no explanation about impropriety nor does this timing imply such. At the pre-hearing conference it was made clear the matter would move ahead promptly.

The second alleged basis for bias is Karen O'Haire's participation in a prior State Water Board petition. The basis for this claim is her authoring a petition dismissal memo concerning a Water Code, section 13267 order that was later overturned by a court. Correspondence from Elizabeth M. Jennings to Robert Wyatt sent on August 8, 2006 responded to this allegation. Ms. O'Haire wrote a non-reviewable advisory memo suggesting dismissal of petition. The fact that the court later said a hearing was required is irrelevant. Her determination was, based on the petition alone, that a case was made for Water Code, section 13267 order. That petition did not concern a cleanup and abatement order, as is at issue in this proceeding. Moreover, this determination does not exhibit any bias. Views on an issue do not constitute bias. (*Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781.)

Further, there is no basis for the outcome proposed by the motion. The APA contemplates that persons may serve in an adjudicative role in successive stages or in a different proceeding. (Accord Gov. Code, § 11425.30, subd. (b)(1).) As the motion relates to bias and Ms. O'Haire's authorship of a memorandum in a prior proceeding, the motion is denied.

As Hearing Officer, I reserve the right to make further revisions to these rulings in the future. If you have any questions on the above matter please direct them to Elizabeth Miller Jennings, Senior Staff Counsel IV, in the Office of the Chief Counsel at bjennings@waterboards.ca.gov.

Sincerely,

Tam M. Doduc
Board Chair

Enclosures

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cc: Continued next page

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Lyris List

Perchlorate Email Distribution List

Attachment #1



Environmental Justice and State Water Policy

Environmental Justice Coalition for Water

Presented at the Water Quality Coordinating Committee of the State and Regional Water Quality Control Boards

October 31st, 2006

The Environmental Justice Coalition for Water

Our overarching goals are to improve water quality and to improve people's lives.

We build capacity in low income and communities of color so they can represent their own water-related interests at the State and local levels.




Water Injustices throughout California

The intersection of Water Boards and Environmental Justice

State Board

Ensuring accountability across agencies

Leadership to address the disproportionate needs of impacted communities

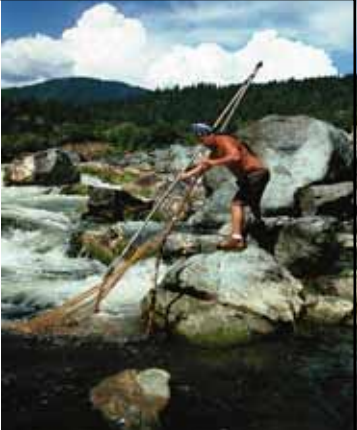




Lack of clean drinking water due to groundwater contamination

- Central Valley
- Central Coast
- Santa Ana
- Los Angeles

Inclusion of cultural and ceremonial water quality needs

- North Coast
- Lahontan





Subsistence fishing needs within TMDLs

San Francisco Bay

San Diego Bay

North Coast



Colorado River Basin

The Benefits of Working with Environmental Justice Communities



Policies will be better informed

Water Board meetings may be more expeditious

You will be better able to fulfill your statutory charge

Environmental Justice in State Code

"The fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."

CA Government Code Section 65040.12

"The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following:

(a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state."

CA Public Resources Code Section 71110.0

Achieving Fair Treatment Requires Addressing Inequities



Identify Impacted Communities

Assess and redress existing disproportionate impacts

Avoid policies imposing additional negative impacts

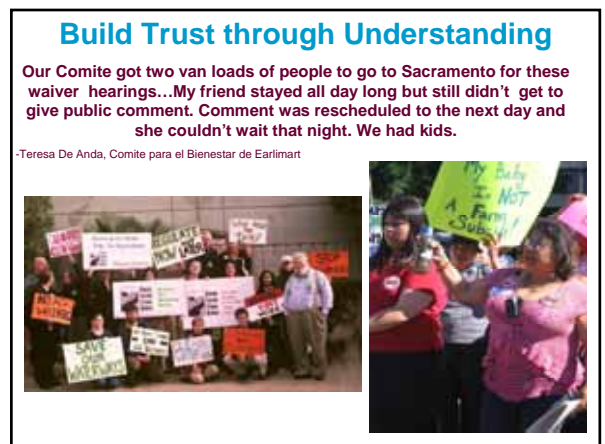
Ensure proportionate benefits

Build trust with EJ communities

Build Trust through Understanding

Our Comite got two van loads of people to go to Sacramento for these waiver hearings...My friend stayed all day long but still didn't get to give public comment. Comment was rescheduled to the next day and she couldn't wait that night. We had kids.

-Teresa De Anda, Comite para el Bienestar de Earlimart



Accommodate Resource Limitations



- Recognize and accommodate time constraints
- Hold meetings in impacted communities, near public transportation
- Make childcare available
- Distribute information in various forms
- Provide technical assistance

Address Language Barriers



- Provide translation at meetings
- Respect different communication styles



Ensure Meaningful Public Participation

- Ensure that participation is not simply to meet procedural requirements
- Respect community member expertise



EJCW Member Panelists

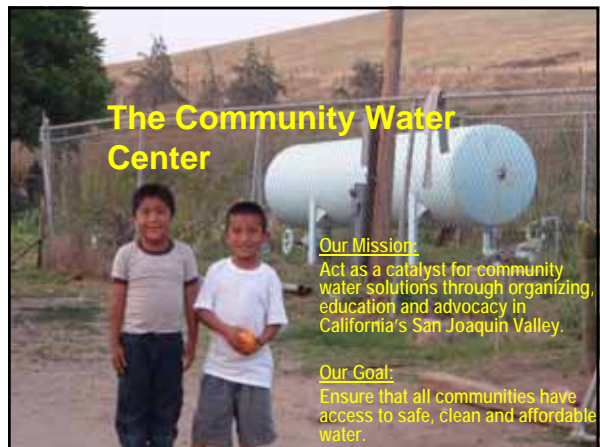
- Laurel Firestone
Community Water Center
- Davin Diaz
Center on Community Action and Environmental Justice

Securing Safe Water for Central Valley Communities



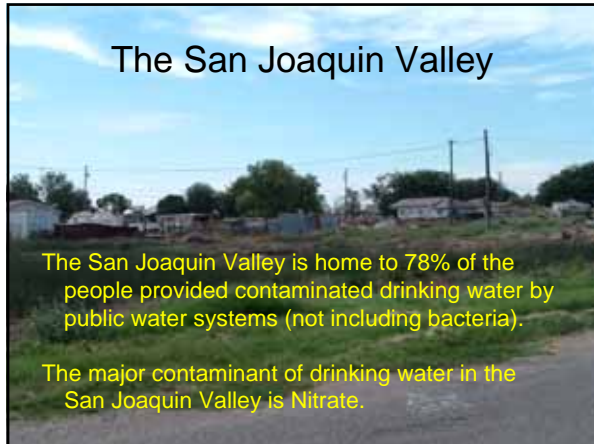
By
Laurel Firestone & Susana De Anda
Community Water Center

The Community Water Center



Our Mission:
Act as a catalyst for community water solutions through organizing, education and advocacy in California's San Joaquin Valley.

Our Goal:
Ensure that all communities have access to safe, clean and affordable water.

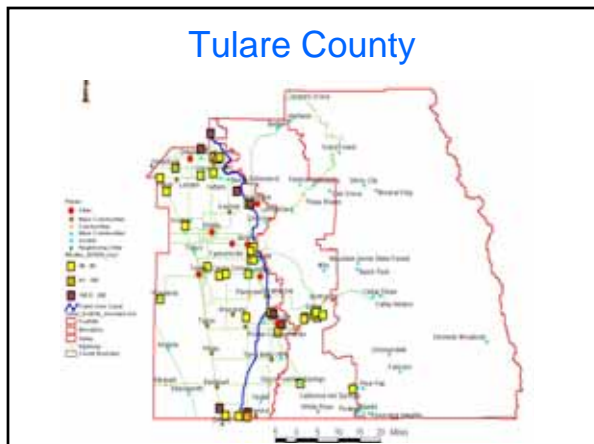
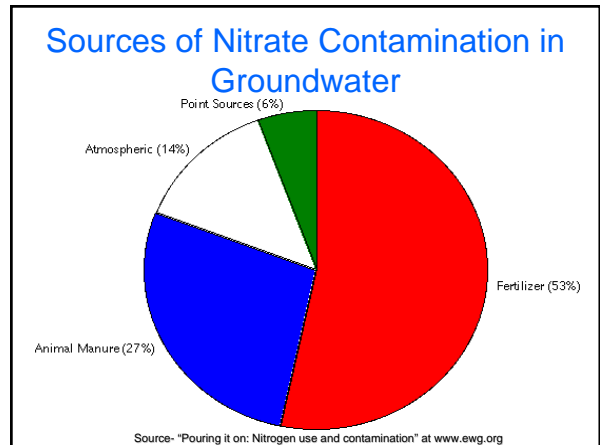


Drinking Water in Tulare County

- More than 20% of public community drinking water systems in Tulare County have ongoing safe drinking water violations, most of which are due to nitrate.
- Private Well testing in Tulare County indicates that 40% of private wells have nitrate over legal levels.
- Many families have to pay up to 10% of their household income for drinking water.

Nitrate in Groundwater

- Nitrate is an acute contaminant that can cause stillborn babies and blue baby syndrome
- It has also been linked to cancer in adults.
- Nitrate is the largest cause of well closure in State.
- Nitrate contamination at high levels is caused by human activities – mostly fertilizer and manure.



Ducor

- Town of approximately 800 people, predominantly Latino farmworkers.
- Had to drill new well because of nitrate contamination.
- Cost over \$1 million and had to raise water rates.
- Now rely on aquifer with high sulfur and manganese.

Tonyville

- Town of approximately 150 people, predominantly Latino farmworkers.
- Given well water with nitrates above legal level for 3 months out of every year.
- Other 9 months receives treated canal water with illegal levels of trihalomethanes.




These are the people affected by regional and state water decisions.

Challenges to Participation



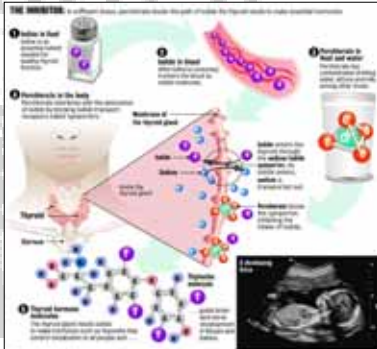
- **Geographic Barriers**
 - Communities have to take two days off of work to participate in meetings in Sacramento. (600 miles round trip)
- **Stakeholder process is not inclusive**
 - Ex. General WDR for CAFOs
 - Sacramento Meetings, Public Release
- **Language Barriers**
 - Translation necessary when over a third of the region is predominantly Spanish-speaking.



For more information check out
www.communitywatercenter.org

Perchlorate in the Rialto/Colton Basin

- Perchlorate harms the thyroid function in women with low levels of iodine in their bodies – a condition in 36 percent of U.S. women. The thyroid controls metabolism, and guides fetal brain and nerve development
- Perchlorate is used to create rocket fuel, ammunition, road flares, and fireworks.
- 1952—the manufacturing of rockets and fireworks begins in Rialto



Perchlorate in the Rialto/Colton Basin

- 1997—perchlorate is discovered in the groundwater
- By 2003 a total of 21 drinking water wells in the Rialto Area had been shutdown
- Cleanup is estimated to be \$200 to \$300 million by Rialto City
- October 2006—SARWCQB releases a draft of a CAO to Goodrich Corp., Pyro Spectaculars, Inc., and Kwikset Locks, Inc., Emhart Industries, Inc., Kwikset Corp., and Black & Decker Inc.

Rialto Residents Testify in Opposition to an Order the Board Signed with a Discharger in November 2005



Rialto Residents Present the Regional Water Quality Control Board a Cleanup Plan in April 2006



Three Things Each of You Can Do



www.ejcw.org

Attachment #2

From: Gerard Thibeault
To: Tom Howard, Tom Howard
Date: 2/2/2007 11:39:08 AM
Subject: Re: Fwd: Australians to Turn to Recycled Water

Bulletin!!!

Waiting to hear from you, but our board just set 2/16 as a hearing date to appoint a hearing panel. If you do something to take this over, then fine. If not, our board is ticked and we'll just deal with the bias charges. Good luck.

Everyone is talking about the effect of the "Howard" letter, but I continue to repeat that Howard didn't write the letter, most likely. I'm sure it came from the attorneys, or Bd Mbrs (??), but nonetheless, it killed us. Our process was vetted thru OCC, and then we hear that you strongly suggest something is wrong. What a project this has been!!!!

Good luck on this. GJT

Gerard Thibeault
CRWQCB, Santa Ana Region
Sent By Blackberry
-----Original Message-----
From: Tom Howard
To: Gerard Thibeault <gthibeault@waterboards.ca.gov>
Cc: Tam M. Doduc <TDoduc@waterboards.ca.gov>

Sent: 2/2/2007 10:56:27 AM
Subject: Re: Fwd: Australians to Turn to Recycled Water

This is a priority for the SWB. We will announce in the next couple of days how we will move forward. Our intent is to minimize any delay.

>>> Gerard Thibeault Friday, February 02, 2007 10:54 AM >>>
We are in a board meeting at this moment. Everyone is very, very grumpy. Can we tell them anything?

Gerard Thibeault
CRWQCB, Santa Ana Region
Sent By Blackberry
-----Original Message-----
From: Tom Howard
To: Gerard Thibeault <gthibeault@waterboards.ca.gov>

Sent: 2/2/2007 10:45:09 AM
Subject: Re: Fwd: Australians to Turn to Recycled Water

Yes, it was the same proposal. Gary and I spent the day with them along with other people knowledgeable in public outreach, regulation and recycling technology. It was an interesting day.

By the way, I received your letter on the perchlorate hearing. We will be making an announcement in the next day or two about what we will do next.

>>> Gerard Thibeault Wednesday, January 31, 2007 9:25 AM >>>
Was it re the same proposal? If so, what an interesting coincidence.

>>> Tom Howard 1/31/2007 9:13 AM >>>
Funny, Gary and I spent all day Monday at a meeting with the Australians regarding their plans

>>> Gerard Thibeault Tuesday, January 30, 2007 3:08 PM >>>

Tom...Attached is an email I got from my daughter's boyfriend. Inside is a link to a New York Times article on recycled water. You might want to give some thought about whether to incorporate this concept into your development of the state's recycled water policy.... Jerry

Attachment #3

California State Senate

STATE CAPITOL
SACRAMENTO, CA 95814
(916) 651-4032

SENATOR
GLORIA NEGRETE MCLEOD
THIRTY-SECOND SENATE DISTRICT



Ms. Tam Dudoc
Chair, State Water Resources Board
1001 I Street
Sacramento, CA 95814

February 7, 2007

Dear Chair Dudoc,

We are writing with great concern about the ongoing perchlorate contamination of the Inland Empire's water supply. There have been on going discussions between the Santa Ana Regional Water Quality Control Board (SARWQCB), the members of the community and the polluters that had been overseen by the board's representative, a Hearing Officer, Walter Pettit. With Mr. Pettit's resignation, it is increasingly important for the State Water Control Board to get involved.

Perchlorate contamination is a matter of public health and safety. This protracted process has taken far too long while citizens of Rialto and Colton continue to suffer each day with contaminated perchlorate and the inaction of SARWQCB. The time has come for the State Water Control Board to step in, fulfill its mission and take firm action against the polluters to protect and ensure the health of these Californians. We strongly urge you to give this issue the attention it deserves and assign the appropriate fulltime staff to work with the polluters and our affected communities to reach a solution.

Thank you for your attention to this important matter. If there are any questions or concerns, please feel free to contact us at our offices.

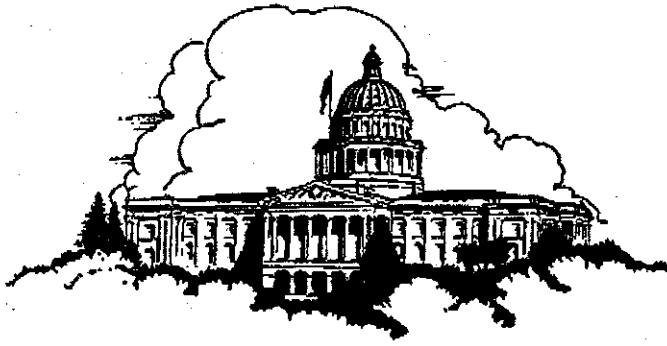
Respectfully,

Handwritten signature of Gloria Negrete McLeod in black ink.

Gloria Negrete McLeod
32nd Senate District
(916) 651-4032

Handwritten signature of Wilmer Amina Carter in black ink.

Wilmer Amina Carter
62nd Assembly District
(916) 319-2062



**Senator
Gloria Negrete McLeod
32nd Senate District**

FACSIMILE TRANSMISSION

Date: 2-7-07 **Pages to follow including cover:** 2

To: CHAIR TAM DUOC

Fax Number: 341-5252

From:

- Senator Gloria Negrete McLeod**
- Terra Grantham
- Andrew Langley
- Lucia Valencia
- Brent Aboudara
- Don Wilcox

Regarding: PERMORATE CONTAMINATION

Notes:

State Capitol, Sacramento, CA 95814
Phone: (916) 651-4032 Fax: (916) 445-0128

Attachment #4



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Executive Office

Tam M. Doduc, Board Chair
1001 I Street • Sacramento, California 95814 • (916) 341-5615
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100
Fax (916) 341-5621 • <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

March 27, 2007

The Honorable Wilmer Amina Carter
California State Assembly
State Capitol, Room 2175
Sacramento, California 95814

Dear Assembly Member Carter:

PERCHLORATE CONTAMINATION OF THE INLAND EMPIRE'S WATER SUPPLY

Thank you for your letter of February 7, 2007 regarding the perchlorate contamination of groundwater in the Rialto and Colton area. I appreciate your interest and concern regarding this important issue.

In your letter, you requested that the State Water Resources Control Board (State Water Board) give this issue the attention it deserves. The State Water Board has decided to review this matter on its own motion, and will be holding a public hearing. In considering this issue, the State Water Board is sitting in a quasi-judicial capacity. Principles of due process and California's Administrative Procedure Act prohibit interested persons from communicating privately with a decisionmaker about an issue in a pending adjudicative proceeding. Therefore, I cannot discuss the issues in this matter or your letter while the matter is pending before the State Water Board. However, like my colleagues, I carefully consider all water quality matters and public comments.

I will be acting as the hearing officer on this issue. The hearing will be held on May 8-10, 2007 and May 15-17, 2007 at a location to be determined. That location will be posted on our web site (<http://www.waterboards.ca.gov/board.html>) when arrangements are finalized. The hearing schedule will be as follows:

Tuesday, May 8:	10:00 a.m. – 9:00 p.m. (with two 60- minute breaks)
Wednesday, May 9:	10:00 a.m. – 9:00 p.m. (with two 60- minute breaks)
Thursday, May 10:	9:00 a.m. – 5:00 p.m. (with one 60- minute break)
Tuesday, May 15:	10:00 a.m. – 9:00 p.m. (with two 60- minute breaks)

California Environmental Protection Agency



March 27, 2007

Wednesday, May 16: 10:00 a.m. – 9:00 p.m. (with two 60- minute breaks)
Thursday, May 17: 9:00 a.m. – 5:00 p.m. (with one 60- minute break)

I invite you or your staff to attend this hearing if you would like to do so. If you have further questions, please feel free to contact Mr. Robert Egel, Legislative Director, State Water Board, at (916) 341-5251.

Sincerely,



Tam M. Doduc
Board Chair

cc: The Honorable Gloria Negrete McLeod
California State Assembly
State Capitol, Room 4040
Sacramento, California 95814

Mr. Chris Kahn
Legislative Secretary
Governor's Office
State Capitol
Sacramento, California 95814

Mr. Robert Egel
Legislative Director
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

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Arnold Schwarzenegger
Governor

March 27, 2007

The Honorable Gloria Negrete McLeod
California State Assembly
State Capitol, Room 4040
Sacramento, California 95814

Dear Senator Negrete McLeod:

PERCHLORATE CONTAMINATION OF THE INLAND EMPIRE'S WATER SUPPLY

Thank you for your letter of February 7, 2007 regarding the perchlorate contamination of groundwater in the Rialto and Colton area. I appreciate your interest and concern regarding this important issue.

In your letter, you requested that the State Water Resources Control Board (State Water Board) give this issue the attention it deserves. The State Water Board has decided to review this matter on its own motion, and will be holding a public hearing. In considering this issue, the State Water Board is sitting in a quasi-judicial capacity. Principles of due process and California's Administrative Procedure Act prohibit interested persons from communicating privately with a decisionmaker about an issue in a pending adjudicative proceeding. Therefore, I cannot discuss the issues in this matter or your letter while the matter is pending before the State Water Board. However, like my colleagues, I carefully consider all water quality matters and public comments.

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California Environmental Protection Agency

March 27, 2007

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Sincerely,



Tam M. Doduc
Board Chair

cc: The Honorable Wilmer Amina Carter
California State Assembly
State Capitol, Room 2175
Sacramento, California 95814

Mr. Chris Kahn
Legislative Secretary
Governor's Office
State Capitol
Sacramento, California 95814

Mr. Robert Egel
Legislative Director
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814

Attachment #5

From: "Adams, Linda" <ladams@calepa.ca.gov>
To: "Yonekura, Janice" <JYonekura@calepa.ca.gov>, "Maureen Gorsen" <mgorsen@dtsc.ca.gov>, "Tuck, Cindy" <ctuck@calepa.ca.gov>, "Tam Doduc " <tdoduc@waterboards.ca.gov>
Date: 3/22/2007 12:09:02 PM
Subject: Updated: Pete Wilson, Barry Groveman, Mr. Bradbury - discuss the perchlorate contamination in the Inland Empire (Rialto Colton) (Gorsen)

When: Monday, March 26, 2007 12:00 PM-1:30 PM (GMT-08:00) Pacific Time (US & Canada).
Where: Room 2540

~~*~*~*~*~*~*~*~*

<<RE: Request for Secty Adams/Gorsen, Maureen>> Tam - I realize you may not be able to attend this meeting; however, would you please send the appropriate staff to attend. Thank you.

CC: "Deb Bourgeois" <dbourgeois@waterboards.ca.gov>

Attachment #6

From: Michael Lauffer
To: Leon, Jorge
Date: 3/22/2007 1:47:50 PM
Subject: Fwd: Fw: Updated: Pete Wilson, Barry Groveman, Mr. Bradbury - discuss the perchlorate contamination in

Jorge,

The Secretary has requested that someone from the Water Boards attend this meeting. Since the adjudicative team can not participate for obvious reasons, would you be able to attend? From your work on the site, you would already be able to explain the lay of the land (should it be necessary), and from the SWRCB's hearing notices and rulings, you could explain the procedures before the SWRCB.

Thanks,
-maml

Michael A.M. Lauffer, Chief Counsel
Office of the Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828

Phone: 916.341.5183
Facsimile: 916.341.5199
Internet: mlauffer@waterboards.ca.gov

Attachment #7

From: Jorge Leon
To: Lauffer, Michael
Date: 3/22/2007 2:27:20 PM
Subject: Re: Fwd: Fw: Updated: Pete Wilson, Barry Groveman, Mr. Bradbury - discuss the perchlorate contaminatio

Michael, I will attend. Barry Groveman has made a pitch about the matter to each of those who have held the Secretary of Cal EPA position in the last five years. I suppose it's Ms Adams' turn.

Jorge A. Leon
Senior Staff Counsel
Office of Enforcement
State Water Resources Control Board
1001 I St., Sacramento, CA 95814
Phone: (916) 341-5180
Fax: (916) 341-5284
jleon@waterboards.ca.gov

>>> Michael Lauffer 3/22/2007 1:47 PM >>>
Jorge,

The Secretary has requested that someone from the Water Boards attend this meeting. Since the adjudicative team can not participate for obvious reasons, would you be able to attend? From your work on the site, you would already be able to explain the lay of the land (should it be necessary), and from the SWRCB's hearing notices and rulings, you could explain the procedures before the SWRCB.

Thanks,
-maml

Michael A.M. Lauffer, Chief Counsel
Office of the Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828

Phone: 916.341.5183
Facsimile: 916.341.5199
Internet: mlauffer@waterboards.ca.gov

Attachment #8

From: Tam M. Doduc
To: Adams, Linda; Gorsen, Maureen; mlluch@calepa.ca.gov; Tuck, Cindy; Yonekura, Janice
Date: 3/22/2007 1:47:19 PM
Subject: Re: Updated: Pete Wilson, Barry Groveman, Mr. Bradbury - discuss the perchlorate contamination in the

Jorge Leon from the Office of Chief Counsel will attend for the Water Boards. Thanks.

Tam M. Doduc, P.E.
State Water Resources Control Board
(916) 341-5611

>>> "Adams, Linda" <ladams@calepa.ca.gov> 3/22/2007 12:08 PM >>>
When: Monday, March 26, 2007 12:00 PM-1:30 PM (GMT-08:00) Pacific Time (US & Canada).
Where: Room 2540

~~*~*~*~*~*~*~*~*

<<RE: Request for Secty Adams/Gorsen, Maureen>> Tam - I realize you may not be able to attend this meeting; however, would you please send the appropriate staff to attend. Thank you.

CC: Bourgeois, Deborah; jleon@waterboards.ca.gov; Lauffer, Michael

Attachment #9



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>

Arnold Schwarzenegger
Governor

VIA U.S. MAIL & EMAIL

Mr. Robert D. Wyatt
rwatt@allenmatkins.com
Allen Matkins Leck Gamble Mallory & Natsis LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074

Dear Mr. Wyatt:

EMHART INDUSTRIES, INC., ET AL. V. REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION ET AL. SWRCB/OCC FILE NOS. A-1732, A-1732(a), A-1732(b), A-1732(c), AND A-1732(d)

I am writing in response to your letter dated August 2, 2006, and addressed to Ms. Cantú and Mr. Lauffer. You have made numerous requests and statements in your letter. It would be difficult to answer all of the requests or to comment on all of your statements. Thus, I will attempt to respond in general, but anything I do not address does not mean either that I refuse to answer or that I agree with your statements.

You have requested that the petitions you filed on behalf of Emhart et al. be placed in abeyance. The general basis for this request appears to be your view that your clients are actively investigating the site and that there is no current requirement from the Santa Ana Water Board for them to take any further action. Before putting the petitions in abeyance or making any determination whether there is any reason for the State Water Board to act, I request that the appropriate representatives of the Santa Ana Water Board confirm whether they agree that the site investigation is proceeding. If they do not agree, they should briefly respond to Mr. Wyatt's statements in pages 3 – 4. (Any response is due within 2 weeks of this letter. Until I make a determination on whether to place the petitions in abeyance, the request for your clients to submit a complete petition is suspended.)

You state that a current federal lawsuit will resolve the same issues that the Santa Ana Water Board's Advocacy Team seek to adjudicate. I would like a *brief* response or explanation from both you and the Advocacy Team as to whether this federal court action will determine liability of your clients under California law, and specifically applicable provisions of the Water Code. I do not seek all of the pleadings and papers in that suit, but rather a succinct review of the issues before the court. (This response will be necessary only in the event that the State Water Board takes further action. I will let you and the Advocacy Team know if a response is required.)

I confirm that your clients do not agree to the Advocacy Team's proposal for an administrative law judge to hear these matters.

California Environmental Protection Agency

I understand that you believe a hearing before the State Water Board is unnecessary and would take much longer than one day.

In her July 14, 2006 letter, Ms. O'Haire of this office requested submission of complete petitions. Specifically, she requested points and authorities, as required by California Code of Regulations, title 23, section 2050. Ms. O'Haire also stated that, following submission of the complete petitions and responses thereto, the Executive Director would determine how to proceed. In your letter, you claim that your petitions were directed to the State Water Board and that you do not believe either the Chief Counsel or the Executive Director has authority to act on the petitions. I can assure you that actions that may be taken by the State Water Board or by its representatives will proceed in a lawful manner and in accordance with the delegations that are provided for under the Water Code and state law.

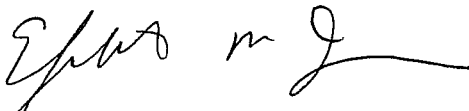
You requested that the State Water Board direct the Santa Ana Water Board's Executive Officer to prepare the administrative record. The State Water Board's regulations provide that the Regional Board shall file its administrative record within 30 days following the State Water Board's letter finding that the petition is complete. (Cal. Code Regs., tit. 23, § 2050.5(a).) Thus, your client is obligated to prepare a complete petition prior to submission of the administrative record. Regarding your request for certain documents to be included in the administrative record, should the Santa Ana Water Board submit a record you do not believe is complete, you may renew your request at that time.

You have requested that the Office of Chief Counsel demonstrate that its employees assigned to advise the Santa Ana Water Board and the State Water Board have kept their roles separate within the Office. The Office of Chief Counsel maintains a separation of functions between Regional Board representation and State Water Board advice on water quality petitions. This separation of function is maintained in all petition matters. Since approximately 2002, the Office of Chief Counsel has assigned water quality attorneys to two different units reporting to two different Assistant Chief Counsels. One of the water quality attorney units is assigned to represent the State Water Board. These attorneys advise the State Water Board and process petitions filed pursuant to Water Code section 13320. The other water quality attorney unit consists of attorneys who represent the regional water boards. The State Board Water Quality Branch provides a group of attorneys whose attorney-client relationship is exclusively to the State Water Board. By providing independent review, the State Water Board and the State Board Water Quality Branch provide meaningful due process and consideration of arguments raised in petitions. Attorneys in the State Board Water Quality Branch will not have allegiance with or conflicting loyalties to the regional water boards. The Assistant Chief Counsel for the Regional Board Services Branch assigns attorneys to specific regions. To the extent other attorneys are needed to assist within a region, they are drawn from other attorneys within the Regional Board Services Branch. Care is taken to preserve the independence of State Board Water Quality Branch attorneys. In this regard, members of the two branches do not discuss any pending petitions. In the matter of the various petitions concerning your clients, Ted Cobb, who is currently the State Board Water Quality Branch Assistant Chief Counsel, was formerly counsel to the Santa Ana Water Board. He has continued to advise that Board and is not involved in any review of these matters by the State Water Board, nor is he included in any conversations or email.

In your letter, you claim that because Ms. O'Haire handled an earlier petition filed by your client that she has "prejudged" the issues against your clients in the current petitions. (Ms. O'Haire is the staff counsel who was assigned the earlier petition.) Your claims are not supportable. In the matter of A-1527, the issue was the propriety of a technical report order issued pursuant to Water Code section 13267. The memorandum you attached, from Craig M. Wilson, makes clear that its determination is based upon interpretation of that statute. The current petitions concern a cleanup and abatement order, presumably issued pursuant to Water Code section 13304. Without opining on the issues in your petition, it is obvious that the threshold and pertinent findings for issuance of a cleanup and abatement order are not the same as those for a technical report order. Your position would, for example, mean that a judge who heard one case with a certain plaintiff or defendant could never again decide a matter where that entity is a party. Such a result is absurd. There is nothing in the memorandum that displays any bias against your clients or prejudgment of the propriety of a cleanup and abatement order. Ms. O'Haire reports directly to me regarding these petitions.

Finally, you describe certain email correspondence with a prior member of the State Water Board. Should the State Water Board have occasion to act upon your petitions, or on its own motion, the Office of Chief Counsel will conduct a due diligence review to ensure that any State Water Board members who might have had *ex parte* communications concerning your clients or this site disclose those communications and, if appropriate, do not participate in any part of the review. For your information, enclosed is a memorandum from our Chief Counsel to Board members explaining the applicable *ex parte* communications restrictions and requirements.

Sincerely,



Elizabeth Miller Jennings
Staff Counsel IV

Enclosure

cc: Ms. Linda H. Biagioni
Vice President, Emhart Industries, Inc.
Vice President for Environmental
Affairs, Black & Decker Corporation
701 East Joppa Road
Towson, MD 21286

Ms. Lorraine M. Sedlak
Director, Health, Safety and Environmental
Kwikset Corporation
19701 Da Vinci
Lake Forest, CA 92610

cc: Continued next page

Mr. Robert D. Wyatt

- 4 -

cc: James L. Meeder, Esq. **[via U.S. mail & email]**
jmeeder@allenmatkins.com
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Mr. Kurt Berchtold **[via email only]**
Santa Ana Regional Water Quality
Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3339

Mr. Jorge León **[via email only]**
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
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Danielle Sakai, Esq. **[via U.S. mail & email]**
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Mr. Gerard Thibeault **[via email only]**
Executive Officer
Santa Ana Regional Water Quality
Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3339

Ted Cobb, Esq. **[via email only]**
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State Water Resources Control Board
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P.O. Box 100
Sacramento, CA 95812-0100

Interested Parties List