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14 BEFORE THE
15 STATE WATER RESOURCES CONTROL BOARD
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18 In Re Draft Cease and Desist Orders against
19 the United States Bureau of Reclamation
20 and the California Department of Water
21 Resources and Reconsider the Conditional
22 Approval of the April 25, 2005 Water
Quality Response Plan for use of Joint
Points of Diversion by the United States
Bureau of Reclamation and the California
Department of Water Resources

**DECLARATION OF JON D. RUBIN IN
SUPPORT OF PETITION TO
DISQUALIFY AND STRIKE EVIDENCE
PLEADINGS**

23
24 I, Jon D. Rubin, declare as follows:

25 1. I am an attorney licensed to practice in California and am counsel for Petitioners
26 San Luis & Delta-Mendota Water Authority and Westlands Water District in the above-captioned
27 proceeding.

28 2. Attached hereto as Exhibit 1 is a true and correct copy of the September 7, 2005

1 meeting minutes for the State Water Resources Control Board.

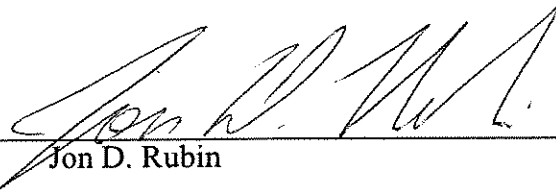
2 3. Attached hereto as Exhibit 2 is a true and correct copy of the September 22, 2005
3 meeting minutes for the State Water Resources Control Board.

4 4. Attached hereto as Exhibit 3 is a true and correct copy of the October 20, 2005
5 meeting minutes for the State Water Resources Control Board.

6 5. Attached hereto as Exhibit 4 is a true and correct copy of an electronic mailing I
7 received from Sherri Stock, State Water Resources Control Board staff member.

8 6. Attached hereto as Exhibit 5 is a true and correct copy of the final order issued by
9 the California Superior Court in *Morongo Band Of Mission Indians v. State Water Resources*
10 *Control Board*, Case No. 04CS00535.

11 I declare under penalty of perjury that the foregoing is true and correct, and, if called as a
12 witness in this matter I could and would so testify. Executed this 31st day of January 2006 in
13 Sacramento, California.

14
15 By 
Jon D. Rubin

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STATE WATER BOARD
BOARD MEETING MINUTES
September 7, 2005

Copies of the resolutions can be obtained by calling (916) 341-5600 or downloading from our web site at <http://www.waterboards.ca.gov/resdec/index.html#resdec>.

CALL TO ORDER

Arthur G. Baggett, Jr., called the meeting to order on September 7, 2005 at 10:11 am in the Sierra Hearing Room, 1001 I Street, Sacramento, California.

ALL BOARD MEMBERS PRESENT

Arthur G. Baggett, Jr., Chair; Peter S. Silva, Vice Chair; and Richard Katz, Tam M. Doduc, Gerald D. Secundy, Members

STAFF PRESENT

Celeste Cantú, Executive Director; Ted Cobb, (Acting) Chief Counsel; Tom Howard, Deputy Director; Beth Jines, (Acting) Deputy Director; Debbie Irvin, Clerk to the Board; Joanne Cox, Greg Frantz, Phil Zenter, Phil Isorena, Erin Mustain, Joanna Jensen, Chris Beegan, Bruce Fujimoto, and Rik Rasmussen, Division of Water Quality; Vicky Whitney, Division of Water Rights; Michael Levy, Erin Mahaney, Sheila Vassey, and Barbara Leidigh, Office of Chief Counsel; Christopher Stevens, and Allan Patton, Division of Financial Assistance; Selica Potter and Liz Kanter, Office of Public Affairs

OTHERS PRESENT

Aaron Moreno representing Assemblyman Joseph Canciamilla; Ivan Karnezis, Cal/Trans; John Muller, Bruce Wolfe, and Thomas Mumley, San Francisco Water Board; Jon Bishop, Los Angeles Water Board; Lesley Dobalian and John Robertus, San Diego Water Board; Bill Jennings, Watershed Enforcers; Susan Schwartz, Friends of Five Creeks; Rey León, Latino Issues Forum; Andria Ventura, Clean Water Action; Doug Lovell, Federation of Fly Fishers; Sherri Norris, International Indian Treaty Council; Alisha Deen, Environmental Justice Coalition for Water; Sejal Choksi, Baykeeper; Michael Warburton, Public Trust Alliance; Steve Macaulay, California Urban Water Agencies; David Beckman, Natural Resources Defense Council; Alexis Strauss and David Smith, U.S. Environmental Protection Agency; Michele Plá, Bay Area Clean Water Agencies; Councilmember Steve Cho, City of Fremont; Roland Dias, Oro Loma Sanitation District and East Bay Dischargers Authority; Richard Halket, Dublin San Ramon Services District; Major Chris Hussin, U.S. Army Corps of Engineers, San Francisco District; Wendell Kido, Sacramento Regional County Sanitation District; Bobbi Larson, CASA; Chuck Weir, East Bay Dischargers Authority and Tri-TAC; Anijali Lathi and Jennifer Toy, Union Sanitation District; William B. Patterson, East Bay Municipal Utility District; Craig Johns, Partnership for Sound Science in Environmental Policy; Warren Tellefson, Central Valley Clean Water Association; John Amdur, Port of Oakland; Jay Ach, Port of San Francisco; Walt Gill, Chevron Texaco; Steven Oberman, Shell; Kevin Buchan, WSPA; Peter McGaw, Contra Costa Council; Christine Boudreau, Anchor Environmental

MISCELLANEOUS

Chairman Baggett assured the public that no one would be laid off from ag waiver staffing and that the Board is committed to the program. A written document for the public is forthcoming. Chairman Baggett asked Ms. Cantu to give a response.

PUBLIC FORUM

Mr. Karnezis presented a TMDL Guidance Manual to the Board.

Mr. Jennings addressed the Board about news articles published in the Sacramento Bee and the Stockton Record. Chairman Baggett stated that there were a lot of misleading facts in the articles and assured Mr. Jennings that there will be a follow-up letter from the State Water Board with an update on how the ag waiver issue.

STATE WATER BOARD
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WATER QUALITY

1. Consideration of a resolution amending the Water Quality Control Plan for the San Francisco Bay Region to establish a total maximum daily load for mercury in the San Francisco Bay

Ms. Cox presented the item to the Board saying 37 comment letters were entered into the record. One of the commenter's noted that the notice of opportunity for comments stated that comment letters **should be** no more than 5 pages rather than **must be**. Member Secundy stated that next time there will be clarification while reminding the public that a deadline must be adhered to.

Mr. Levy requested that the commenter who submitted 300 pages of studies with their comments might want to summarize orally.

Mr. Muller addressed the Board.

Mr. Wolfe addressed the Board and wanted to reiterate their comments, as submitted, where they welcome the adoption of Version 1 in which they believe is most protective of the Bay of the 3 versions, and would most effectively restore the Bay for mercury. The adoption would support their approach to use sound science to provide evidence and support for everything they do in the TMDL.

Ms. Strauss addressed the Board on behalf of and USEPA is support in Version 2. Ms. Strauss wanted to provide a brief update based on comments that Board members had made in earlier hearings. The reason that USEPA supports Version 2 is for the changes that it may bring to strengthen the TMDL in its implementation provisions.

Member Secundy, thanked Ms. Strauss on submitting the comment letter addressing dredging saying it was very educational. Member Doduc expressed concern about the implementation and wants it to be consistent with the Long-Term Management Strategy (LTMS) and the Clean Water Act suggesting that instead of removing the sections pertaining to dredging, they look at Ms. Strauss's suggestion of rewording.

Ms. Strauss concluded by saying that all the LTMS agencies, Regional Boards, Core of Engineers, and dredging communities meet frequently and are attuned to the Regional Board Basin Plan, TMDL, and Clean Water Act requirements.

Chairman Baggett concurred.

Mr. McCauley addressed the Board.

Messes. Plá, Lathi, and Larson addressed the Board supporting Version 1.

Mr. Moreno addressed the Board on behalf of Assemblyman Joseph Canciamilla.

Mssrs. Cho, Johns, Ach, Gill, Oberman, Kido, and Buchan addressed the Board supporting Version 1.

Mr. Dias addressed the Board and was concerned about the rate of the fees.

Mr. Beckman addressed the Board.

Messes. Choksi and Deen addressed the Board supporting the remand.

Mr. Warburton addressed the Board supporting the remand.

Member Katz asked staff for clarification about what the minimum time was we could give if we remand?

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Ms. Cox replied 1 year if there is a peer review and 9 months minimum without peer review. Ms. Cantu stated 6 months.

Messes. Norris, Schwartz, and Ventura addressed the Board supporting Version 2.

Mssrs. Leon and Lovell addressed the Board supporting Version 2.

Mr. McGaw addressed the Board opposing the remand.

Chair Baggett asked his peers for suggestions, comments saying he feels the language for dredging needs to be modified. Member Katz wanted the time to be modified to 6 months. Member Doduc referred to Version 2, number 7E, requesting, "*Ensure in-Bay disposal of dredged material containing mercury complies with the requirements of the Long Term Management Strategy*", and make the same change to #5 under Resolve.

Member Silva voted no to Version 2 and expressed his concern that the Regional Boards are micromanaging on issuing the wasteload allocation.

Mr. Cobb reminded the Board there should be a motion to actually discuss one of the proposals.

Member Katz made a motion for Version 2 with the LTMS amendment; Member Secundy seconds the motion.

Member Doduc wanted to reiterate Ms. Strauss's comment that staff should clarify Finding 7G under Resolve 10.

Member Secundy wants the definition of 'fair share' to refer to the discharger's proportional contribution to the impairment and to put it under Finding 7.

Member Baggett called a recess so staff could make the changes.

RECONVENED (1:30 p.m.)

Mr. Robertus addressed the Board and gave a power point presentation on dredging project.

Mr. Levy addressed the Board presenting the revised Version 2.

Motion: The Board adopted the proposed resolution as **Resolution 2005-0060**.
Member Silva opposed.

2. Consideration of a resolution authorizing funding from the State Water Pollution Cleanup And Abatement Account for contract support services for the development of sediment quality objectives (SQO), and authorizing the Executive Director to negotiate and execute contracts for the development of SQO

Mr. Patton addressed the Board on the funding issue for the cleanup and abatement account.

Mr. Jennings addressed the Board thanking Chris Beegan for his work on SQO stating his support but suggests that a technical committee overseeing the development of sediment quality objectives be formed to develop a subset with a special emphasis on Delta knowledge.

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Chairman Baggett added that he and Member Doduc have completed a round of hearings with water quality standards, which lasted a year and that was one of the things that clearly came of that process; that we need a much more comprehensive unit working with ag waiver discharge and WDRs, and how we bring all these pieces together

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0061**

3. Consideration of adoption of modifications to Water Quality Order No. 2004-0009-DWQ, Statewide General NPDES permit for the discharge of pesticides for aquatic weed control (to add a discharger and an herbicide)

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0062**

ADJOURNED

The Board meeting adjourned at 2:00 p.m.

STATE WATER BOARD
BOARD MEETING MINUTES
September 22, 2005

Copies of the resolutions, water quality, and water rights orders can be obtained from Debbie Irvin at (916) 341-5600 or downloading from our web site at <http://www.waterboards.ca.gov/resdec/index.html#resdec>.

CALL TO ORDER

Chair Doduc's first meeting as Chair, called the meeting to order on September 22, 2005 at 1:10 p.m. in the Coastal Hearing Room, 1001 I Street, Sacramento, California.

BOARD MEMBERS PRESENT

Arthur G. Baggett, Jr., Chair; Peter S. Silva, Vice Chair; and Richard Katz, Tam M. Doduc, Gerald D. Secundy, Members

STAFF PRESENT

Celeste Cantú, Executive Director; Michael Lauffer, Chief Counsel; Tom Howard, Deputy Director; Beth Jines, (Acting) Deputy Director; Debbie Irvin, Clerk to the Board; Greg Frantz, Joanna Jensen, and Phil Isorena, Department of Water Quality; Mark Rentz, Department of Pesticides;

OTHERS PRESENT

Robert Martin, Napa County Flood Control and Water; Linda Sheehan, California Coastkeeper Alliance; Joans Minton, Planning and Conservation League; Cathy Crothers, Department of Water Resources; John Herrick, South Delta Water Agency; David Meek, Port of San Diego; Lou Filipovich

CUSTOMER SERVICE AWARD

Jerrold Bolds and Barbara Evoy presented the awards.

PUBLIC FORUM

Mr. Filipovich addressed the Board and gave out handouts.

Mr. Rentz addressed the Board and gave out DPR's Groundwater Protection Program handouts.

ADJOURNED

1:35 p.m., return by closed session.

OPEN SESSION-RECONVENED 1:55 p.m.

INFORMATIONAL ITEM – EXECUTIVE DIRECTOR'S REPORT

1. Informational presentation by Celeste Cantú, Executive Director, on the Surface Waters Ambient Monitoring Program

CONSENT AGENDA (Items 2-12)

FINANCIAL ASSISTANCE

2. Consideration of a resolution amending the *Policy for Implementing the State Revolving Fund (SRF) for Construction of Wastewater Treatment Facilities* to incorporate the principles of sustainability into projects funded through the SRF

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0063**

3. Consideration of a resolution authorizing the California Infrastructure and Economic Development Bank to sell \$300 million in revenue bonds for the Clean Water State Revolving Fund Loan Program

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Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0064**

4. Consideration of a resolution authorizing an appointment to the advisory committee for wastewater treatment plant operator certification and training

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0065**

WATER QUALITY

5. Consideration of a resolution authorizing the Executive Director to apply for a fiscal year (FY) 2006-08 Clean Water Act section 106 water pollution control program grant in the amount of 27 million, plus any carry-over FY 2005-06/2006-07 grant funds; and to negotiate and amend the grants and workplans

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0066**

6. Consideration of a petition by the Purves Family Trust for underground storage tank closure at 797 Ventura Street in Fillmore

Motion: The Board unanimously adopted the proposed resolution.
Water Quality Order 2005-0011-UST

(**Items 7 & 8, Taken Off Consent**)

7. Consideration of a resolution amending the Water Quality Control Plan for the San Diego Region to establish a total maximum daily load for dissolved copper in Shelter Island Yacht Basin

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0071**

WATER QUALITY

8. Consideration of a resolution amending the Water Quality Control Plan for the Los Angeles Region to establish a total maximum daily load for bacteria in the Malibu Creek watershed

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0072**

WATER QUALITY

9. Consideration of a resolution amending the Water Quality Control Plan for the Los Angeles Region to establish a total maximum daily load for toxicity, chlorpyrifos, and diazinon in the Calleguas Creek watershed and Mugu Lagoon

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0067**

10. Consideration of a resolution amending the Water Quality Control Plan for the Los Angeles Region to establish a total maximum daily load for organochlorine pesticides, polychlorinated biphenyls, and siltation in the Calleguas Creek watershed and Mugu Lagoon

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0068**

WATER RIGHTS

11. Consideration of a resolution adopting proposed emergency regulations revising the Board's Water Right and Water Quality Certification Fee Schedules

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0069**

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12. Consideration of a proposed resolution authorizing the Executive Director to negotiate and execute contracts responding to California Water Code Section 1259.4 (AB 2121) regarding the development of the principles and guidelines for State policy for water quality control for northern coastal streams

Motion: The Board unanimously adopted the proposed resolution. **Resolution 2005-0070**

REGULAR AGENDA (Item 13)

WATER RIGHTS

13. Consideration of a proposed order granting reconsideration of the approval of the Water Quality Response Plan for use by the Department of Water Resources and the United States Bureau of Reclamation of each other's points of diversion in the southern Sacramento-San Joaquin Delta

Motion: The Board unanimously adopted the proposed resolution. **Water Right Order 2005-0012**

STATE WATER BOARD
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October 20, 2005

Copies of the resolutions and water quality order can be obtained by calling (916) 341-5600 or downloading from our web site at <http://www.waterboards.ca.gov/resdec/index.html#resdec>.

CALL TO ORDER

Tam M. Doduc, Chair called the meeting to order on October 20, 2005 at 10:11 am in the Coastal Hearing Room, 1001 I Street, Sacramento, California.

BOARD MEMBERS PRESENT

Tam M. Doduc, Arthur G. Baggett, Jr., Richard Katz, and Gerald D. Secundy

BOARD MEMBERS ABSENT

Peter S. Silva

STAFF PRESENT

Celeste Cantú, Executive Director; Michael Lauffer, Chief Counsel; Tom Howard, Deputy Director; Beth Jines, acting Deputy Director; Andy Sawyer, Steve Blum, Lori Brock, Michael Levy, and Barbara Leidigh, Office of Chief Counsel; Debbie Irvin, Clerk to the Board; Stan Martinson, John Ladd, Joanne Cox, Ken Harris, Craig J. Wilson, Greg Frantz, Joanna Jensen, and Rik Rasmussen, Division of Water Quality; Michael Levy, and Barbara Leidigh, Office of Chief Counsel; Shahla Farahnak, Division of Financial Assistance; Liz Kanter, Office of Public Affairs; Jonathan Bishop, Los Angeles Water Board; Les Grober and Mark Gowdy, Central Valley Water Board

OTHERS PRESENT

Paul Minasian, San Joaquin River Exchange Contractors; Lisa Carlson, City of Los Angeles; Alexis Strauss, U.S. EPA; Sharon Green, Sanitation Districts of Los Angeles County; Steve Arita, WSPA; Richard Watson, City of Bellflower; Gerald Greene, City of Downing; Susan Paulsen, Coalition for Practical Regulation (CPR); Ken Farfsing, City of Signal Hill/CPR; Rodney Andersen, City of Burbank; Maria Hoye, Universal Studios; Kirsten James, Heal the Bay; Keith Jones, California Department of Transportation; Craig Brown, Center for Creative Land Recycling; Linda Sheehan, California Coastkeeper Alliance; John Davis, Bureau of Reclamation; Tim O'Laughlin, San Joaquin River Water Authority; and John Herrick, South Delta Water Agency

PUBLIC FORUM

Alexis Strauss, U.S. EPA addressed the Board.

MINUTES

The September 7, 2005 Board meeting minutes were adopted.

INFORMATIONAL ITEM – EXECUTIVE DIRECTOR'S REPORT

1. Celeste Cantú, Executive Director, showed a PowerPoint and gave a presentation on the Surface Waters Ambient Monitoring Program and also on the CIWQS Program.

Ms. Sheehan addressed the Board.

CONSENT AGENDA (Items 2-4)

Consent items 2 through 4 were unanimously adopted by the Board; motion made by Member Katz and seconded by Member Secundy.

FINANCIAL ASSISTANCE

2. Consideration of a resolution adopting the Integrated Coastal Watershed Management Planning Grant Funding List and concurrence with the Integrated Regional Water Management Planning Grant Funding List approved by the Department of Water Resources

Motion: The Board unanimously adopted the proposed resolution with the exclusion of the grant to the San Joaquin Contractors. The Board unanimously felt that the grant did not meet the legal

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requirements of Prop. 50 and would put the Board's authority on the river in jeopardy.

Resolution 2005-0073

WATER QUALITY

3. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Lahontan Region removing the municipal and domestic supply (MUN) beneficial use designation from surface waters of Owens Lake, Inyo County

Motion: The Board unanimously adopted the proposed resolution.

Resolution 2005-0074

4. Consideration of rescission of State Water Resources Control Board Water Quality Order No. 2005-0010-DWQ, NPDES No. CA0103209, National Pollutant Discharge Elimination System Permit for the California Department of Fish and Game Silver King Creek Rotenone Project, Alpine County

Motion: The Board unanimously adopted the proposed order.

Water Quality Order 2005-0012-DWQ

REGULAR AGENDA (Items 5-10)

FINANCIAL ASSISTANCE

5. Consideration of a resolution to adopt emergency regulations to implement the *Orphan Site Cleanup Sub account* established by Assembly Bill 1906 (Lowenthal)

Lori Brock presented the item to the Board.

Motion: The Board unanimously adopted the proposed resolution.

Resolution 2005-0075

WATER QUALITY

6. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Los Angeles Region to incorporate a total maximum daily load for toxic pollutants in sediment in Ballona Creek Estuary

Mr. Lauffer recused himself from Items 6, 7, and 8; Andy Sawyer acting Chief Counsel.

Ms. James and Mr. Bishop addressed the Board.

Motion: The Board unanimously adopted the proposed resolution.

Resolution 2005-0076

7. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Los Angeles Region to establish a total maximum daily load for metals for the Los Angeles River and its tributaries

Mr. Frantz presented the item to the Board. Ms. Cantú said the Board is looking into having a joint scoping meeting with the Air Resources Board in January or February 2006. Member Secundy requested Ms. Strauss to comment.

Mr. Bishop addressed the Board clarifying the City of Bellflower was removed from the list of responsible agencies.

Msses. Hoyer, Paulson, Becker, and Green addressed the Board. Mssrs. Andersen, Farfaring, Greene, Watson, and Arita addressed the Board.

Mr. Levy clarified the background on the trash TMDL. Mr. Sawyer gave three options for how the water boards could adopt TMDLs.

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Motion: The Board adopted the proposed resolution, with changes, by a 3-1 vote. Member Secundy made the motion; Member Katz seconded the motion.

Member Baggett opposed adoption.

Resolution 2005-0077

8. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Los Angeles Region to establish a total maximum daily load for metals in Ballona

Mr. Frantz presented the item to the Board.

Motion: The Board adopted the proposed resolution, with changes, by a 3-1 vote. Member Secundy made the motion; Member Katz seconded the motion.

Member Baggett opposed adoption.

Resolution 2005-0078

9. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to control factors contributing to dissolved oxygen impairment in the Stockton Deep Water Ship Channel

Ms. Jensen presented the item to the Board. Mssrs. Minasian, O'Laughlin, and Herrick addressed the Board. Mr. Grober said 2 public hearings have been held.

The Board opted to accept the late comments from USBR and Mr. Minasian. The Board also voted to hold this item over to the November 16, 2005 Board meeting, extending the written comment period through October 31, 2005; motion by Member Katz, seconded by Member Secundy.

10. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Central Valley Region to incorporate a total maximum daily load for the control of salt and boron discharges into the Lower San Joaquin River Channel

The Board also voted to hold this item over to the November 16, 2005 Board meeting, extending the written comment period through October 31, 2005; motion by Member Katz, seconded by Member Secundy.

ADJOURNED

The Board meeting adjourned at 1:10 p.m.

Rubin, Jon

From: Sherri Stock [SStock@waterboards.ca.gov]
Sent: Wednesday, August 17, 2005 3:12 PM
To: WhitnieH@acwanet.com; laurakingmoon@aol.com; afrancois@cfbf.com; rstack@cvpwater.org; sdanna@dannaanddanna.com; Jackson_gualco@gualcogroup.com; ponate@mwdh2o.com; AAS3@PGE.com; kathym@rcrcnet.org; Art Baggett; cbonham@tu.org; crothers@water.ca.gov; Tom Howard; Vicky Whitney
Cc: steveh@acwanet.com; Robert.Colivas@boe.ca.gov; bpauli@cfbf.com; fetherid@ebmud.com; rkanouse@ebmud.com; Shawnee_Patterson@gualcogroup.com; ahome@iid.com; ekgrubaugh@iid.com; jrubin@kmtg.com; allens@mid.org; cuwaexec@mindspring.com; dguy@norcalwater.org; sdiaz@norcalwater.org; JRR9@PGE.com; dkatz@tu.org; Andy Sawyer; Erin Mahaney; Jim Kassel; John O'Hagan; Steve Herrera
Subject: Agenda/Draft Regs for Ad Hoc Stakeholders Meeting on 8/23/05



8-23-05 Draft Fee
older Meetins (2005-06)

Ladies and Gentlemen:

Attached is the Agenda and draft regulations for fiscal year 05-06 for the ad hoc Stakeholders meeting on Tuesday, August 23, 2005, from 2:00 to 4:30 p.m. Please submit any proposals to Jim Kassel jkassel@waterboards.ca.gov by 10:00 a.m. on Monday, August 22, 2005, to ensure time to consider them before the meeting.

For those of you who indicated that you wish to attend the meeting via conference call, the phone number is (916) 255-4044.

If you have any questions, please contact me at sstock@waterboards.ca.gov.

Thank you,

Sherri Stock
State Water Resources Control Board
Division of Water Rights
Phone: 916-341-5347
sstock@waterboards.ca.gov

MORONGO BAND OF MISSION INDIANS v. STATE WATER RESOURCES CONTROL BOARD.
Case No. 04cs00535.

HEARING: 10:00 a.m. 01/13/2006. Petition for Writ of Mandate.

COURT'S RULING UNDER SUBMISSION: Petition is GRANTED.

The Petition for Writ of Administrative Mandamus came on regularly for hearing in Department 16 at 11:00 a.m. on January 13, 2006, with Stuart Somach appearing for Petitioner Morongo Band of Mission Indians, and Matthew Goldman appearing for Respondent State Water Resources Control Board. The court, having reviewed and considered the pleadings on file and having heard and considered the arguments of counsel, hereby affirms its tentative ruling, with modifications, as indicated below.

This lawsuit challenges the State Water Resources Control Board's (the "Board") Order WRO 2004-0034 denying the Morongo Band of Mission Indian's ("Petitioner") petition to disqualify the Enforcement Team assigned to the proposed revocation action of License 659. Petitioner's petition to disqualify the "Enforcement Team" is based on the undisputed fact that one member of the Enforcement Team assigned to prosecute the proposed revocation of Petitioner's water rights license -- namely, staff counsel Samantha Olson -- simultaneously was advising the Board in her role as a member of the "Hearing Team" in an unrelated matter pending before the Board. Petitioner contends that under the holding of *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, it is unconstitutional for an attorney acting as a prosecutor simultaneously to act as an adviser to the Board, even if the matters are unrelated.

Respondent Board argues that *Quintero* was wrongly decided and in conflict with established law that administrative decision-makers are accorded a presumption of impartiality absent specific evidence of actual bias. In addition, Respondent Board argues that even if *Quintero* was rightly decided, that case is distinguishable because the circumstances considered by the Court in *Quintero* are factually and legally distinct from those presented to this Court.

Discussion

This Court may apply its independent judgment to determine whether the administrative procedures in place at the Water Board provide the procedural safeguards required by constitutional due process. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 89; *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 542.) Applying its independent judgment, the Court concludes that the Board abused its discretion in denying the petition to disqualify one member of its Enforcement Team—attorney Olson-- and that this petition for writ of mandate should be granted.

This case turns on whether the holding in *Quintero* is on point and controlling of the disposition in this action. If *Quintero* is on point, then the petition for writ of mandate must be granted. The Court rejects Respondent Board's invitation to consider whether *Quintero* was rightly decided. It is not this Court's role to make such a determination. With very limited exceptions not applicable here, the doctrine of *stare decisis* requires that all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) The Supreme Court declined to review *Quintero* or to order it depublished, and therefore this Court will follow *Quintero* if it is on point.

In *Quintero*, the Fourth District Court of Appeal held that procedural due process is violated by an attorney's concurrent representation of both the agency and the litigants appearing before it. (*Quintero*, supra, at p. 817.)

It is important to know the facts of *Quintero* in order to fully understand its holding. The plaintiff in *Quintero* had appealed from a judgment denying his petition for a writ of mandate to reverse an order terminating his employment with the City of Santa Ana. The plaintiff challenged the validity of the termination on several grounds, including his assertion that the administrative hearing violated due process because a deputy city attorney who had represented the City before the City's personnel board had at times also acted as counsel for the board, thereby creating an appearance of bias and unfairness. Plaintiff complained that in ruling against his challenge, the trial court had improperly required him to prove "actual bias" on the part of the board.

The Court in *Quintero* recited the general rule that in an administrative action, procedural due process entitles a party to a hearing before a "reasonably impartial, noninvolved reviewer." (*Id.* at p. 812.) The Court found that the law governing due process in administrative proceedings has been evolving over the last several decades. (*Id.* at p. 814.) Earlier cases, it noted, had concluded that overlapping investigatory, prosecutorial and adjudicatory functions do not amount to a constitutional violation absent "specific evidence of bias." (*Id.* at p. 814.) However, it noted that since those earlier cases had been decided, there had been a "rising concern over too close a connection between an advocate and the decisionmaker." (*Id.*) As a result, more recent cases held that even in the absence of actual bias, due process is violated if "in light of the particular facts 'experience teaches that the probability of actual bias on the part of the . . . decisionmaker is too high to be constitutionally tolerable.'" (*Id.* at p. 813.) According to the Court, due process demands not only the absence of "actual bias," but also "an appearance of fairness and the absence of even a probability of outside influence on the adjudication." (*Id.* at p.814.)

The *Quintero* court discussed *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92. In *Nightlife*, that Court held that when counsel performs as an advocate in a given case, due process prohibits the attorney from advising the decisionmaking body in the same case.

In *Quintero*, the Court found no evidence that the deputy city attorney had acted in an advisory and prosecutorial function in the same case. However, the Court found that the deputy city attorney's "other interactions with the Board" gave the appearance of unfairness and suggested the probability of unfair influence. The Court held:

"For the Board to allow its legal adviser to also act as an advocate before it creates a substantial risk that the Board's judgment in the case before it will be skewed in favor of the prosecution. The chance that the Board will show a preference toward [the deputy city attorney], even 'perhaps unconsciously' is present and unacceptable." (*Quintero, supra*, at p.817.)

In *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, the Fourth District Court of Appeal ruled that different attorneys in the same law office (in that case, the County Counsel's office) may act as an advocate for one party in a contested hearing while at the same time serving as a legal adviser for the decisionmaker provided there is "an adequate separation of the two roles and the attorneys performing them" (i.e., the adviser for the decisionmaker is adequately screened from contact with the advocate). The *Quintero* Court approved the holding in *Howitt*. However, the *Quintero* Court clarified *Howitt*:

"What is inappropriate is one person simultaneously performing both functions. That is not to say that once a city attorney has appeared in an advisory role, he or she cannot subsequently act as a prosecutor, or vice versa. But the attorney may occupy only one position at a time and must not switch roles from one meeting to the next." (*Quintero, supra*, at p. 817.)

In *Quintero*, it does not appear there was any direct evidence establishing that the deputy city attorney served as an adviser to the board at the same time that the attorney was appearing before the board as an advocate. The evidence showed that the city attorney's advice to the board had been given before -- and in some cases years before -- the plaintiff's September 2000 termination hearing.¹ Indeed, the defendants in *Quintero* argued that the city attorney had never really represented the board, contending that the appearance statements in the other matters were erroneous and should have shown that the attorney represented only the City. (*Id.* at p. 815.) The Court, however, refused to allow the defendants to contradict written documents listing the city attorney as the board's legal adviser. Based on the totality of the circumstances, the Court found that the evidence demonstrated that the city attorney "clearly had an ongoing relationship with the board beyond just appearing as counsel for a party," and that this created the appearance that the city attorney was acting on behalf of the board. (*Id.* at p. 816.) The Court found this was enough to show a probability of actual bias: "It would only be natural for the Board members, who have looked to [the deputy city attorney] for advice and guidance, to give more credence to his arguments when deciding plaintiff's case. Whether or not

¹ The case indicates that one matter in which the deputy city attorney purportedly represented both the city and the board was remanded to the board for further hearings at the same time *Quintero's* case was being tried before the board, but there is no indication in the decision that the deputy city attorney appeared to represent either the board or the city at that hearing.

they actually did is irrelevant; the appearance of unfairness is sufficient to invalidate the hearing." (*Id.* at p.816.)

As discussed above, the *Quintero* Court did not foreclose the possibility that an attorney might represent a board in an advisory role and subsequently represent litigants who appear before it, or vice versa, provided there is an "adequate separation of the two roles and the attorneys performing them." (*Id.* at p. 817.)

At the hearing on the instant writ petition, counsel for Respondent asked for guidance how much "separation" is required before an attorney who has occupied one role may occupy the other. The *Quintero* Court established a bright-line rule that one attorney may not occupy more than one position at one time. However, when this bright-line rule is not triggered, *Quintero* establishes that the test for an impermissible "probability of actual bias" is based on the "totality of the circumstances." Thus, under the holding of *Quintero*, it will be up to agencies in the first instance to carefully identify and then evaluate the facts to determine when the probability of actual bias in a case is too high to be constitutionally tolerable. In some cases a separation of one day may be acceptable. In others, the nature of the relationship may preclude an individual from ever serving in both capacities, even at different times.

In the instant matter, the facts fall squarely within *Quintero's* bright-line rule that an attorney may not simultaneously represent both a board and the litigants who appear before it, even on different matters. The evidence shows that at the same time that Ms. Olson was employed in a prosecutorial role as a member of the Enforcement Team in Petitioner's water rights dispute, she also was acting in an advisory role as a member of the Hearing Team in the Lower American River proceeding. The relevant dates are set forth in the Declaration Re SWRCB Practice and Procedure in Water Rights Enforcement Actions. The Declaration is not sufficiently detailed for the Court to determine the precise dates that Ms. Olson began or ended her various assignments. However, it is clear from the Declaration that Ms. Olson was assigned to act as the Board's adviser in the Lower American River proceeding, and that the Lower American River proceeding was before the Board from at least May 2002, through January 2005. It also is clear from the Declaration that Ms. Olson was assigned to prosecute the enforcement action against Petitioner in or about August 2003, and that she continues to occupy this position. Respondent so affirmed these dates at the time of hearing. Thus, from at least August 2003 though January 2005, Ms. Olson concurrently occupied both the position of adviser and prosecutor. This is prohibited by *Quintero*.

At the hearing, the Board argued that even if Ms. Olson nominally was representing both the Board and the Enforcement Team, she did not perform any substantive work during the period of her concurrent representation and therefore the Board contends the holding in *Quintero* should not apply. This Court does not agree. *Quintero* provides a clear rule that one attorney may not simultaneously occupy positions as both an adviser and a prosecutor. Such a bright-line rule is necessary and desirable to prevent unwanted intrusions by agencies and courts into the nature and scope of an attorney's work product and attorney-client relationships. Accordingly, even if the record

here were sufficient for the Court to conclude that Ms. Olson did not give any substantive advice to the Board during the period that she was assigned to the Enforcement Team (or vice versa) -- which evidence is not in the record-- the Court nevertheless would conclude that the mere fact that Ms. Olson simultaneously occupied both positions gives rise to an impermissible appearance of unfairness.

The Court finds that the Water Board abused its discretion in denying the petition to disqualify, at least insofar as it sought to disqualify Ms. Olson from further participation with the Enforcement Team. Because the hearing on the proposed revocation of Petitioner's water rights license has not yet occurred, the risk that the Water Board will be biased in favor of the Enforcement Team's position based on Ms. Olson's participation can and should be avoided. The petition for writ of mandate shall be granted and a writ of mandate shall issue directing Respondent to set aside its Order WRO 2004-0034 and compelling Respondent to disqualify Ms. Olson from the Enforcement Team.

On the other hand, because no evidence was presented that any other members of the Enforcement Team (Mark Stretars and Doug Roderick) should be similarly disqualified, the Court finds that the Board did not abuse its discretion in denying the petition to disqualify as to those members. Thus, although Petitioner's petition for writ of mandate shall be granted, this Court's writ of mandate shall not require the Water Board to disqualify the entire Enforcement Team, as requested in the moving papers, but rather only Ms. Olson.

Petitioner is directed to prepare a formal judgment and order, attaching the Court's ruling as an exhibit, and writ; submit them to opposing counsel for approval as to form; and thereafter submit them to the Court in accordance with Rule of Court 391. Petitioner shall be entitled to recover its costs upon appropriate application. The Court retains jurisdiction to consider any request for costs, which shall comply with the Code of Civil Procedure and all state and local rules.