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Director

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: August 12, 2009

To: Bill Jennings

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 18(S)**
(CTU2009-0615-02)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a document titled "Developing Protective Hardness-Based Metal Effluent Limitations."

On June 15, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a document titled "Developing Protective Hardness-Based Metal Effluent Limitations" (Document) constitutes an underground regulation. You allege that the California Regional Water Quality Control Board, Central Valley Region, (Regional Board) uses the methodology set forth in the Document to determine the terms of National Pollutant Discharge Elimination System (NPDES) permits.¹

Government Code section 11340.5 states:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Such a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is an "underground regulation."²

¹ NPDES permits are a type of waste discharge requirement permit that regulates discharges to land that could affect groundwater quality. The methodology described in the challenged document would establish water quality standards for seven metals that vary as a function of hardness.

² An "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a): "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the [Administrative Procedure Act] and is not subject to an express statutory exemption from adoption pursuant to the [Administrative Procedure Act].

You state in your petition that the Regional Board uses or requires the use of the methodology in the Document to develop NPDES permits. You included in your petition a list of several permits that you state were prepared by using the methodology in the Document. The Document was drafted by Robert W. Emerick, Ph.D., P.E., of ECO:LOGIC Engineering and John E. Pedri, P.E., the Director of Public Works, City of Lincoln, California. The authors do not appear to be employees, agents or contractors of the Regional Board. The permits do not reference the Document. Further, there is nothing in the permits to demonstrate that the Document forms the basis for the permits, or that the Document is used for any other purpose related to the permits. As there appears to be nothing connecting the Document to the permits, OAL cannot determine from the information in your petition or the identified permits whether or not the Regional Board has issued, utilized, enforced or attempted to enforce the methodology in the Document.

For these reasons, OAL cannot determine whether the Regional Board has actually issued, utilized, enforced, or attempted to enforce the methodology challenged in the Document, and therefore, whether it is a guideline, criterion, instruction, order, or standard of general application that has not been adopted pursuant to the Administrative Procedure Act. OAL cannot, therefore, determine whether the Document is an underground regulation. If, at any time, you can provide evidence to demonstrate that the Regional Board has issued, utilized, enforced, or attempted to enforce the methodology challenged in the Document, you may submit a new petition containing the additional evidence.

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



SUSAN LAPSLEY
Director



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