

House Natural Resources Committee, Water and Power Subcommittee  
*"Sustainable Water Supplies/or the West: Part 1-Protecting Groundwater Resources"*  
Testimony of Phil Wyels  
California State Water Resources Control Board, April 10, 2007

Thank you for the invitation to testify before the Water and Power Subcommittee of the .House Natural Resources Committee. My name is Phil Wyels. I am an Assistant Chief Counsel for the California State Water Resources Control Board; my duties include providing legal counsel and representation to the nine California Regional Water Quality Control Boards. My testimony today will focus on two primary issues. First, I will describe those agencies' general approach in overseeing remediation of groundwater pollution, including requiring the persons responsible for creating the pollution to provide replacement water supplies to affected water users. Second, I will explain those agencies' roles in addressing the Rialto-area perchlorate groundwater contamination.

In California, the agencies that have primary responsibility over the quality of the state's water resources are the State Water Resources Control Board and the nine California Regional Water Quality Control Boards, which are commonly referred to as the State Water Board and the Regional Water Boards. The Water Boards are comprised of gubernatorial appointees who oversee a professional staff that includes engineers, geologists, and scientists. The Water Boards have broad quasi-legislative and quasi-adjudicative authority to regulate all discharges of waste that can affect the quality of the state's groundwater or surface waters. This includes administering both the federal Clean Water Act's National Pollutant Discharge Elimination System permit program, as well as a state's Porter-Cologne permit program that regulates discharges that are beyond the scope of the NPDES permit program. In addition, the Water Boards have the authority under state law to compel persons who have caused or permitted discharges of waste that have resulted in water pollution or contamination to investigate and remediate their discharges. When exercising that authority in situations where the discharge of waste has adversely affected other entities' water supplies, the Water Boards can require those persons who discharged the waste to provide replacement water supplies to the affected water users.

As a general rule, it is the Regional Water Boards that conduct most of the direct regulation of waste discharges and oversight of groundwater remediation, while the State Water Board hears appeals from parties challenging the Regional Water Boards' orders. Occasionally, however, the State Water Board itself will act as the finder of facts and issue orders in the first instance. In addition to the Water Boards, there are several local, state, and federal agencies that play varying roles in overseeing investigation and remediation of various types of contamination in California.

When the Water Boards are exercising their authorities to compel investigation and remediation of groundwater pollution, they are acting in a quasi-judicial capacity. They conduct an adjudicative hearing to determine whether the weight of the evidence supports a finding that the potential responsible parties did in fact discharge the waste that resulted in the groundwater pollution. After the Water Board determines which parties are responsible for the investigation and remediation, the Water Board continues to maintain jurisdiction to oversee the investigation and remediation, including approving the final cleanup plan and setting final groundwater cleanup levels.

On those occasions where the groundwater pollution has directly affected an existing water supply, the Water Boards have the authority to require the responsible parties to provide

replacement water supplies to the affected water suppliers. This can be in the form of providing wellhead treatment, paying money to the water suppliers so that they can obtain additional water, or directly obtaining additional water for the suppliers. The state law that provides this authority was amended in 2004, and now specifies that any replacement water is required to be the same quality that the groundwater was prior to the discharge of waste. Incidentally, State Senator Nell Soto, who has been heavily involved in the local perchlorate groundwater pollution issues, sponsored that amendment to California Water Code section 13304.

One issue of particular relevance in discussing the requirement for responsible parties to provide replacement water supplies is the necessary level of pollution in the supply wells before the responsible parties are required to provide replacement water. The State Water Board issued a precedential order in 2005 that resolved an appeal filed by Olin Corporation, a perchlorate discharger south of San Jose. The State Water Board decided that, as a matter of policy, the Regional Water Boards should only require the responsible parties to provide replacement water supplies for public health purposes if the pollutant concentrations at the supply wells exceed drinking water standards. Where drinking water standards have not yet been adopted; as with perchlorate, the State Water Board directed the Regional Water Boards to defer to the expertise of the California Office of Environmental Health Hazard Assessment (OEHHA), a sister state agency that conducts human health risk assessments. OEHHA had determined that perchlorate in drinking water does not pose adverse effects on human health at or below 6 micrograms per liter, so the State Water Board concluded that the dischargers should not have to provide replacement water supplies for human health purposes until the perchlorate at the supply wells was above 6 micrograms per liter. The California Department of Health Services recently proposed to adopt a state Maximum Contaminant Level of 6 micrograms per liter for perchlorate.

The State Water Board's precedential Olin order left open the possibility, however, that the Regional Water Boards could require replacement water supplies at lower pollutant levels if necessary to protect other uses of water or if necessary to prevent the acceleration, of the groundwater plume's migration due to the operation of municipal water supply wells. On occasion, the Regional Water Boards have found it necessary to restrict the use of water supply wells where the continued pumping of those wells is causing nearby groundwater plumes to spread. In these cases, the responsible parties, notably including the Department of Defense, have generally been very resistant to providing replacement water supplies. As you might imagine, the Regional Water Boards have typically found that it is much more cost effective to prevent the spreading of the pollution.

With respect to the local perchlorate plume, the Santa Ana Regional Water Board has been devoting much of its staffs' resources to this very important problem over the last several years. The Regional Water Board staff, in cooperation with the City of Rialto, has been collecting evidence and developing a case to determine which entities are responsible for the pollution, especially from a 160-acre site in Rialto that is believed to be one of the primary source areas. The original intent was for the Regional Water Board staff to present this information to the Regional Water Board at an adjudicatory hearing. The potential responsible parties filed numerous appeals with the State Water Board and the courts prior to the hearing, however, and the State Water Board decided earlier this year that it would take over responsibility for conducting the hearing. That hearing is scheduled to take six full days, starting next month. At the conclusion of the hearing, I expect that the State Water Board will issue an order determining

which parties are responsible for investigation and remediation of that major source area. The State Water Board is also being asked to order some or all of those responsible parties to provide replacement water supplies to the affected water supply users.

The State Water Board has named six parties to the adjudicatory hearing. Those parties are the Santa Ana Regional Water Board staff who are advocating for the adoption of an order, the City of Rialto, which has been providing invaluable assistance to the Regional Water Board staff, two local environmental justice organizations, and the potential responsible parties. Because this is a judge-like hearing, there is an ethical wall between all of the parties and the State Water Board. Therefore, as an attorney that represents the Regional Water Boards, I am not in a position to know how the State Water Board views the evidence that has been submitted to it to date. I do expect, however, based on the potential responsible parties' tactics to date, that the hearing will be heavily contested and that some, if not all, of the parties will turn to the courts to attempt to overturn any State Water Board order that concludes that they are responsible for the perchlorate pollution.

In the meantime, the Regional Water Board is grateful for the tremendous support that the City of Rialto has provided by way of its federal litigation against a multitude of potential responsible parties. Through that litigation, for example, Rialto has been able to take literally hundreds of depositions of former employees of some of the potential responsible parties, and in so doing has helped develop key evidence regarding historic perchlorate handling practices. The Regional Water Board also appreciates the assistance that the United States Environmental Protection Agency has provided, and hopes that it will be able to continue in its support role. Unfortunately, my understanding is that the Department of Defense has been uncooperative at the Rialto site, so any encouragement that the Subcommittee can provide in that regard would be very much appreciated by the Regional Water Board staff.

Once again, thank you for the opportunity to provide this testimony to the Subcommittee, and I would be pleased to answer any questions you might have.