

MINUTES OF SPECIAL MEETING
ORANGE COUNTY WATER DISTRICT
March 12, 2015, 8:30 a.m.

President Green called to order the March 12, 2015 special meeting of the Board of Directors of the Orange County Water District at 8:30 a.m. in the Boardroom in Fountain Valley. Following the Pledge of Allegiance to the Flag, the Assistant District Secretary called the roll as follows.

OCWD Directors

Philip Anthony
Denis Bilodeau
Shawn Dewane
Jan Flory
Cathy Green
Dina Nguyen
Roman Reyna
Stephen Sheldon (arrived 8:58 a.m.)
Harry Sidhu
Roger Yoh

Staff

Michael Markus, General Manager
Joel Kuperberg, General Counsel
Judy-Rae Karlsen, Assistant District Secretary
Randy Fick, Roy Herndon, William Hunt,
John Kennedy, Michael Wehner

Others

Scott Sommer – Special Counsel
Steven Elie – Musick Peeler & Garrett LLP
Don Calkins – City of Anaheim
Dave Schickling – City of Fullerton

VISITOR PARTICIPATION

There were no persons wishing to address the Board.

MATTERS FOR CONSIDERATION

1. Rescission of the Board's February 18, 2015 Direction to Staff and Consultants to Negotiate a National Contingency Plan Oversight Agreement with the Environmental Protection Agency

General Counsel Joel Kuperberg stated the District received a letter on February 27, 2015 from the law firm Musick, Peeler & Garrett, LLP that alleged the District violated the open meeting provisions of the Brown Act at the February 18, 2015 Board meeting. He briefly reviewed the contents of the letter, summarized the alleged Brown Act violation, and discussed the potential threat of litigation if the District did not take action to cure and correct the alleged violation. Mr. Kuperberg recommended the Board take a formal action to rescind the action taken on February 18, 2015, and he would subsequently send written notice to the law firm of Musick, Peeler & Garrett, LLP notifying them of the action taken. He responded to questions about his recommended action and stated that while the District does not concede that its actions violated the Brown Act or any other law, Government Code section 54960.1 allows the Board of Directors to rescind its February 18, 2015 action and thereby cure the alleged violation.

Musick, Peeler and Garrett LLP attorney Steven J. Elie stated his client (Arnold Engineering Company) was concerned about the closed session action that was announced in open session at the February 18, 2015 Board meeting. He admonished General Counsel Kuperberg for referring to his client as a North Basin polluter.

Director Dewane requested that Mr. Kuperberg clarify the process for the reporting of closed session discussions. Mr. Kuperberg stated the Board may only consider matters that are authorized closed session discussions and that are properly agendaized and posted. He noted that items

discussed in closed session may involve decisions that are not required to be reported out. Mr. Kuperberg also clarified that when the Board rescinds the February 18, 2015 Board action, the Board retains full and unrestricted authority and discretion to reconsider giving direction to staff to negotiate a United States Environmental Protection Agency (U.S. EPA) oversight agreement.

Upon motion by Director Anthony, seconded by Director Flory, the following resolution was unanimously adopted [9-0].

RESOLUTION NO. 15-3-28
 RESCINDING FEBRUARY 18, 2015 DIRECTION TO STAFF TO NEGOTIATE A
 NATIONAL CONTINGENCY PLAN (NCP) OVERSIGHT AGREEMENT WITH U.S. EPA

WHEREAS, at its February 18, 2015 meeting the Board of Directors of the District directed District staff and consultants to negotiate with the United States Environmental Protection Agency (“U.S. EPA”) an agreement by which U.S. EPA would be the oversight entity for the District’s proposed National Contingency Plan (“NCP”) process for the “North Basin Groundwater Contamination Cleanup Project;” and

WHEREAS, the District subsequently received a letter from the law firm of Musick, Peeler & Garrett, attorneys for defendant Arnold Engineering Company in the *OCWD v. Northrop, et al* litigation, alleging that the District violated the open meeting provisions of the Brown Act, Government Code Section 54950, *et seq.*, when the Board took the above action on February 18, 2015 directing staff to negotiate an U.S. EPA oversight agreement; and

WHEREAS, the February 27, 2015 letter from the attorneys for Arnold Engineering Company threatens to file a lawsuit against the District if the Board of Directors does not rescind its February 18, 2015 action; and

WHEREAS, while the District does not concede that its actions violated the Brown Act or any other law, Government Code section 54960.1 authorizes the Board of Directors to rescind its February 18, 2015 action and thereby moot any threatened litigation, while retaining full and unrestricted authority and discretion thereafter to agendize and consider the issue of its direction to staff to negotiate an U.S. EPA oversight agreement;

NOW, THEREFORE, the Board of Directors of the Orange County Water District does hereby resolve as follows:

Section 1: The Board of Directors’ February 18, 2015 direction to District staff and consultants to negotiate with U.S. EPA an agreement by which U.S. EPA would be the oversight entity for the District’s proposed NCP process for the “North Basin Groundwater Contamination Cleanup Project,” is hereby rescinded.

Section 2: In accordance with Government Code Section 54960.1(f), the Board’s action by this Resolution to cure and correct the February 18, 2015 direction to staff regarding the negotiation of an U.S. EPA oversight agreement shall not be construed or admissible as evidence of a violation of the Brown Act.

Section 3: The District's General Counsel is hereby authorized and directed to inform the attorneys for the Arnold Engineering Company in writing of this action of the Board of Directors.

Ayes: Anthony, Bilodeau, Dewane, Flory, Green, Nguyen, Reyna, Sidhu, Yoh
Absent: Sheldon

Director Flory asked if the Brown Act has a mandate for descriptions of closed session items on meeting agendas. Mr. Kuperberg advised there is a provision in the Brown Act that sets forth minimum standards for describing closed session agenda items and the District follows those statutory provisions. Director Dewane asked for clarification of the process that must now be followed as a result of rescinding the Board action that gave staff direction. Mr. Kuperberg advised the Brown Act sets forth a procedure for curing and correcting an alleged violation of the Brown Act, however the law does not address the actions taken by staff prior to a cure and correct provision. He also stated there is no implication in the law that the actions taken by staff must be reversed or are otherwise suspect.

Director Sheldon arrived at 8:58 a.m. during the following discussion.

2. Authorization to Negotiate a Draft Oversight Agreement with the U.S. Environmental Protection Agency for the North Basin Groundwater Contamination

Executive Director of Operations William Hunt reported that in accordance with Board direction, staff has implemented a National Contingency Plan (NCP) protocol for investigative work and remedial actions at North Basin Groundwater contamination sites. He stated the established protocol incorporates the need for regulatory oversight, and to satisfy that requirement staff is seeking Board authorization to meet with the United States Environmental Protection Agency (U.S. EPA) and negotiate a draft oversight agreement. He briefly explained the clean-up strategy, the various roles of each agency involved, and the proposed remedial action plan.

Mr. Elie stated his client's concerns and advised against pursuing U.S. EPA regulatory oversight at this time if the District has an interest in negotiating future settlements. Mr. Elie noted that the District has already been found to be a polluter of the groundwater basin (perchlorate). He also expressed concerns that the NCP process is not an open and public process.

Mr. Kuperberg advised that the trial court in the North Basin case made a finding that recharging the water from Metropolitan Water District into the groundwater basin near Fullerton constituted pollution because the water contained perchlorate. He noted the finding is currently under appeal and the District is under no judicial or regulatory mandate to clean up the perchlorate, however there are public health goals for maximum contaminant levels.

District Special Legal Counsel Scott Sommer discussed the perchlorate issue and advised that perchlorate is very different than volatile organic compound (VOC) contamination.

Mr. Elie stated the only reason perchlorate became an issue was because the District Special Legal Counsel took the position throughout the lawsuit that the defendants would be liable for all ancillary damages and would also be required to pay for perchlorate clean up. He advised the estimated damage claim was \$200 million. Mr. Elie expressed his client's concerns about the NCP process. He stated that perchlorate will continue to be an issue, and once the U.S. EPA becomes

involved the District will no longer be able to maintain control of the clean-up process. Mr. Elie responded to questions and stated there is a strong possibility that the District's extraction well project that involved cross contamination may be evidence for a future decision that the District is also a potential responsible party.

Mr. Hunt answered questions from the Board about current litigation; he reviewed the list of defendants in the North Basin litigation; the location of known plumes within the boundary of the North Basin contamination area; and presented a status report on groundwater production wells. He advised the next steps are; 1) Meet with the U.S. EPA; 2) Discuss established NCP protocols; and 3) Negotiate a draft oversight agreement that incorporates the necessary terms and conditions for regulatory oversight. Mr. Hunt advised the draft oversight agreement will be brought back to the Board for review prior to approval.

Director Dewane stated his objections to the NCP protocol that requires the involvement of the U.S. EPA and stated the complex remediation of groundwater basin contamination plumes will be compounded by a potential superfund designation in Orange County. Director Sidhu stated his objections to ongoing litigation. Directors Flory and Sheldon agreed with the recommended action to negotiate the oversight agreement with the US EPA, but also recommended the District continue to participate in settlement negotiations. Board discussion ensued and the following action was taken.

MOTION NO. 15-50

AUTHORIZING NEGOTIATIONS WITH THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (USEPA) FOR AN AGREEMENT THAT ESTABLISHES THE US EPA AS THE OVERSIGHT ENTITY FOR THE NATIONAL CONTINGENCY PLAN (NCP) PROCESS FOR THE NORTH BASIN GROUNDWATER CONTAMINATION CLEANUP PROJECT; AND THE DISTRICT MAY CONCURRENTLY ENTER INTO BONA FIDE SETTLEMENT NEGOTIATIONS WITH RESPONSIBLE DEFENDANTS FOR GROUNDWATER CONTAMINATION CLEANUP COSTS

Upon motion by Director Flory, seconded by Director Anthony and carried with Director Sidhu voting "No" and Director Green abstaining [8-1-1], negotiation of an Agreement with the U.S. Environmental Protection Agency (US EPA) that establishes the US EPA as the oversight entity for the National Contingency Plan (NCP) process for the North Basin Groundwater contamination cleanup project is hereby approved; and furthermore, the District may concurrently enter into bona fide settlement negotiations with defendants for groundwater contamination cleanup costs.

Ayes: Anthony, Bilodeau, Dewane, Flory, Nguyen, Reyna, Sheldon, Yoh
 Noes: Sidhu
 Abstain: Green

DIRECTOR REPORTS

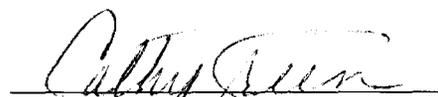
Director Anthony requested that staff give a presentation on the groundwater basin contamination plume near the City of Fullerton. Director Dewane requested that information be presented in open session at a future Board meeting.

ADJOURNMENT

There being no further business to come before the Board, the meeting was adjourned at 9:46 a.m.



Judy-Rae Karlsen, Assistant District Secretary



Cathy Green, President