



**COUNTY OF ORANGE
WELL STANDARDS ADVISORY BOARD**

MEMBERS
ROY L. HERNDON, CHAIRMAN
JOHN M. GREGG
NABIL B. SABA
JAMES FORTUNA
MICHAEL GRISSO

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A G E N D A

**WELL STANDARDS ADVISORY BOARD (WSAB)
REGULAR MEETING**

Wednesday, July 3, 2024, 1:00 P.M.

**Health Care Agency
Environmental Health Division
Crystal Cove Conference Room
1241 E. Dyer Road, Ste. 120, Santa Ana, Ca 92705**

This agenda contains a brief description of each item to be considered. Except as provided by law, no action shall be taken on any item not appearing in the agenda. To speak on any item, make a verbal request through the Chairperson following the Chairperson's invitation from the public to speak on the item. Once acknowledged and prompted by the Chairperson, you may begin to speak. When addressing the Well Standards Advisory Board, it is requested that you state your name, city of residence, and occupation for the record. Speakers may address the Well Standards Advisory Board on any item on the agenda for up to three minutes. PowerPoint and video presentation must be requested in advance of the meeting through the Orange County Health Care Agency by contacting Hisham Elmishad, at Helmishad@ochca.com.

You may request supporting documentation distributed to the Well Standards Advisory Board as related to the agenda items by contacting Hisham Elmishad, at Helmishad@ochca.com.

The agenda is available online at <https://www.ochealthinfo.com/about-hca/public-health-services/environmental-health-division>.

In compliance with the American with Disabilities Act, those requiring reasonable accommodations for this meeting should notify the Orange County Health Care Agency prior to the meeting at Helmishad@ochca.com.

A G E N D A

1. Approve Well Standards Advisory Board Minutes of the May 31, 2024 Regular Meeting

2. Well Permit Appeal regarding Embee Processing, LLC
(Continued from 5/31/2024)

3. Public Comments

At this time members of the public may address the WSAB on any matter not on the agenda but within the subject matter jurisdiction of the Board.

4. Adjournment



COUNTY OF ORANGE
WELL STANDARDS ADVISORY BOARD

SUMMARY ACTION MINUTES

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WELL STANDARDS ADVISORY BOARD (WSAB)
REGULAR MEETING SUMMARY ACTION MINUTES

Friday, May 31, 2024, 10:00 A.M.
Health Care Agency (HCA)
Environmental Health Division
Crystal Cove Conference Room
1241 E. Dyer Road, Ste. 120, Santa Ana, Ca 92705

Board Members

In Attendance:

Roy L. Herndon, Orange County Water District, Chairman
John M. Gregg, Gregg Drilling and Testing, Inc.
James Fortuna, Orange County Public Works
Nabil B. Saba, City of Santa Ana, Public Works Water Dept.
Michael Grisso, City of Tustin, Public Works Water Dept.

Chairman Roy Herndon called the meeting to order at 10:06 A.M.

1. Approve Well Standards Advisory Board Minutes of the October 30, 2023 Regular Meeting

On the motion of Nabil Saba, seconded by John Gregg, the WSAB unanimously approved the minutes of the October 30, 2023 regular meeting as amended to add language to the last bullet on page 2, to clarify that HCA did cancel the permit at the meeting.

2. Well Permit Appeal regarding Embee Processing, LLC

- Angus McGrath, of Stantec Consulting Services, Inc., provided the oral presentation on behalf of the applicant demonstrating that efforts for remediation of legacy soil contamination at the project site would best be achieved through In Situ Thermal Remediation with the drilling of angled wells to place electrodes at a depth of 60-feet and proposes abandoning the wells with the devices in place after remediation is complete. The applicant seeks an exemption from the Well Standards for construction of the wells and for the abandonment in place due to site specific conditions.

- David Obrand, County Counsel for HCA, and Juan Anzora, HCA Environmental Health Specialist, provided the oral presentation on behalf of HCA and explained that HCA is constrained by the Orange County Well Ordinance and the Well Standards which places a ministerial duty to apply the Well Standards to all well construction permits. They further explained that the proposed angled wells did not meet the Well Standards and had already applied an exemption to the Well Standards with respect to construction of the wells. At issue is the method of abandonment at completion of remediation work because the Well Standards require that any wells constructed in a known contamination area, and which were not constructed according to Well Standards, must be completely destroyed and cannot be abandoned in place.
- Angus McGrath, and Troy Robinson, the drilling contractor for the applicant, indicated that due to the angled construction of the wells and site conditions, that the over-drilling required to completely destroy the wells is not feasible. Pete Nyquist, counsel for the applicant, suggested adding language to permit provisions to say that accounting for the unusual site conditions that render compliance with standards unfeasible, that all wells shall be destroyed to the maximum extent possible and in a manner fully protective of human health and the environment.
- Julia Woo, County Counsel for the WSAB, outlined the actions the WSAB could take to either a.) deny the appeal finding that HCA acted within its discretion to deny the permit under the Well Standards, b.) grant the appeal finding that HCA was incorrect in denying the permit and that HCA has the discretion to grant an exemption to the destruction standards, or c.) continue the hearing to a later date to provide the parties more time to reach consensus on potential alternatives and to provide additional information to the WSAB before making its final determination.
- On the motion of Nabil Saba, Seconded by Michael Grisso, the board voted unanimously to continue the appeal hearing to 1:00 P.M. on July 3, 2024, to provide opportunity for the well designer and HCA to discuss any options that may be acceptable to both parties; and requested HCA provide clarity on the WSAB's authority to grant exemptions with respect to destruction or abandonment of wells and also to provide information on what Los Angeles does under similar scenarios.

3. Public Comments

None

4. Adjournment

Chairman Roy Herndon adjourned the meeting at 12:42 P.M.



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June 26, 2024

Embee Processing
c/o Greg Hoehn
Principal Consultant
Stantec
2999 Oak Road, Suite 800
Walnut Creek, CA 94597-7966
Greg.Hoehn@stantec.com

Wells Standards Advisory Board
1241 E. Dyer Road, Suite 120
Santa Ana, CA 92705
c/o Valerie Sanchez, Deputy Clerk of the Board
Valerie.Sanchez@ocgov.com

Re: Respondent HCA's Supplemental Letter Brief in Opposition to Petitioner Embee Processing, LLC's Opening Brief

Dear WSAB Board Members:

This letter brief is submitted on behalf of the Orange County Health Care Agency ("HCA") in opposition to Petitioner Embee Processing, LLC's ("Petitioner" or "Applicant") appeal to the denied permit application to install monitoring wells, electrodes, and temperature monitoring points ("devices") at the sites located at 2139 South Santa Fe Street, 2148 South Hathaway Street, and 2150 South Santa Fe Street in the City of Santa Ana. This board requested supplemental briefing regarding the following issues:

1. What is the Board's discretion in an appeal?
2. How are applications for similar well construction and destruction treated in neighboring jurisdictions?

HCA will briefly address each of these issues below.

1. Board's Discretion

County of Orange Ordinance, No. 2607, sec. 4-5-28¹ makes clear that the Board may only

¹ "If the Board finds that a permit was improperly denied or canceled, it shall order the Health Officer to issue or reinstate such permit."

overrule HCA's decision to deny a well permit application if the decision was made improperly. Although not an exact equivalent, this appears to be very similar to an appellate court's "abuse of discretion" standard applied when reviewing trial court decisions. "[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)." (See *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000.)) In this appeal, there is no named question of law or question of fact. Here, the question is simply: did HCA deny the permit application improperly?

To be clear, HCA acted in accordance with its ministerial duty in denying Petitioner's application. Indeed, HCA's has a ministerial duty in following the strict requirements contained in the Well Standards. However, in part the denial was mandatory because HCA exercised limited discretion approving a construction variance. The Well Standards specifically provides and restricts for this limited discretion which was properly exercised by HCA in this case. (Monitoring Well Standards, Part I, Section 3.) In a situation where an agency is involved in a process of carrying out the State's prerogative and applies its own assessment of the situation leading to the determination of which ministerial duty it must perform, a reviewing court is "limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking evidentiary support." (*Fair Education Santa Barbara v. Santa Barbara Unified School Dist.* 72 Cal.App.5th 884, 894 (2021) (citation omitted).) In other words, a review is limited to correct any abuse of discretion performed by HCA. (*Id.* at 895.)

"Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (*Westlands Water District v. All Persons Interested* 95 Cal.App.5th 98, 132, *quoting In re Marriage of Connolly* 23 Cal.3d 590, 598 (1979).) "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." (*Id.* at 132-33, *quoting Denham v. Superior Court* 2 Cal.3d 557, 566 (1970).) Thus, "[t]his deferential standard is often difficult to satisfy." (*Id.* at 132.)

Accordingly, the Board's discretion to overturn HCA's decision is limited to a finding that HCA clearly exceeded its limited discretion in carrying out the ultimate ministerial duty to deny the permit applications.

2. Actions by Neighboring Counties

The Board also requested to learn how other jurisdictions handle the destruction of Applicant's devices, including In Situ Thermal Remediation ("ISTR"). There is no clear method to research this issue independently, yet HCA proactively sent an inquiry to the Well Standards Technical Advisory Committee ("TAC") on June 3, 2024, to ask other Health Officers

Respondent HCA's Supplemental Letter Brief in Opposition to Petitioner Embee Processing, LLC's Opening Brief.

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throughout the state if they permitted ISTR and if so, how do they handle destruction. Only three counties responded to the inquiry. Sacramento advised that they do permit ISTR devices and require their proper destruction, matching the Well Standards. San Diego County responded that they do permit ISTR and the destruction standard is to have such devices destroyed under permit by overdrilling, matching the Well Standards. Riverside County does not permit ISTR devices and defers all such work back to the regulators and applicants.

3. Conclusion

For all of the reasons above, and all prior briefs and argument, HCA requests that this Board deny Applicant's appeal.

Very truly yours,

LEON J. PAGE
COUNTY COUNSEL



By

David A. Obrand, Deputy

cc: Juan Anzora
Hisham Elmishad
Lauren Robinson