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BEFORE THE WATER QUALITY APPEALS BOARD
DEPARTMENT OF ADMINISTRATION
IN AND FOR THE STATE OF ARIZONA

TOWN OF FLORENCE, a political subdivision of the State of Arizona; SWVP-GTIS MR, LLC, a Delaware limited liability company; and PULTE HOME CORPORATION, a Michigan corporation,
Appellants,
v.
ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent.

FLORENCE COPPER INC., a Nevada corporation,
Intervenor.

Case No. 16-002-WQAB

PROPOSED BOARD ORDER

This matter came before this Water Quality Appeals Board (“Board”) on March 6, 2017 for an administrative hearing on the Town of Florence’s, SWVP-GTIS MR, LLC’s, and Pulte Home Corporation’s (collectively, “Appellants”) Notice of Appeal dated September 1, 2016 (“Notice of Appeal”). Having considered the written and oral testimony submitted by the Parties, the legal filings and arguments made by the Parties, and the administrative record in this matter, the Board issues the following Order.

I. FINDINGS OF FACT

A. The Prior Appeal

1. On or about March 6, 2012, Curis Resources (Arizona) Inc. (“Curis”), now known as Florence Copper Inc. (“Florence Copper”), filed an application for a Temporary Individual Aquifer Protection Permit (“APP”) with the Arizona Department of Environmental Quality (“Department” or “ADEQ”) to operate a short-term, small-scale production test facility (“PTF”). The purpose of the PTF is to develop data and

1 information for an APP application for a full-scale in-situ copper recovery commercial
2 mine.

3 2. Following final review, on July 13, 2013, the Department issued Temporary
4 APP No. P-106360 Other Amendment (“2013 Temporary APP”) to Florence Copper for
5 the PTF.

6 3. On or about August 2, 2013, the Town of Florence (“Town”), SWVP-GTIS
7 MR, LLC (“SWVP”), Johnson Utilities, LLC (“Johnson”) and Pulte Home Corporation
8 (“Pulte”) filed an Amended Notice of Appeal (“2013 Appeal”) with the Board and
9 appealed the Department's issuance of the 2013 Temporary APP.

10 4. The Board referred the 2013 Appeal to the Office of Administrative
11 Hearings (“OAH”) for an evidentiary hearing. OAH held 34 days of hearing in April and
12 May 2014. On September 20, 2014, the Administrative Law Judge (“ALJ”) issued her
13 Decision (“2014 ALJ Decision”).

14 5. The 2014 ALJ Decision overturned five issues identified in the following
15 Sections of the Conclusions of Law of the 2014 ALJ Decision: § 3.6 (BHP Report);
16 § 3.7.3.2.1 (Monitoring); § 3.7.3.3 (Monitoring); § 3.8 (PMA and POCs); and § 3.9.4
17 (Closure Reporting).

18 6. On November 10, 2014, the Board held a hearing and considered the 2014
19 ALJ Decision. On November 14, 2014, the Board issued its Order (“2014 Board Order”)
20 adopting all 419 Findings of Fact of the 2014 ALJ Decision, and 72 of the 73 Conclusions
21 of Law (“COL”). The Board remanded the matter to the Department for further
22 proceedings.

23 **B. The Remand and Significant Amendment**

24 7. On January 15, 2015, the Department instructed Florence Copper to prepare
25 and submit an application for significant amendment to the 2013 Temporary APP to
26 address the five remanded issues.

1 8. Florence Copper submitted its Application for a Significant Amendment to
2 the 2013 Temporary APP on April 1, 2015 (“Application”) that addressed all five of the
3 issues remanded to the Department.

4 9. Consistent with its standard permitting process, the Department reviewed
5 the Application, had questions, and requested clarification and additional information
6 from Florence Copper through two requests for additional information. Florence Copper
7 responded to the requests for additional information by letters dated September 14, 2015
8 and January 25, 2016 and provided all of the additional data, information, and documents
9 requested by the Department. Also consistent with the standard permitting process,
10 Florence Copper submitted additional information and data to ADEQ via email on
11 October 23, 2015 and December 14, 2015 after receiving requests from ADEQ for that
12 information.

13 10. After completing its review of the Application and the additional
14 information submitted by Florence Copper, the Department issued a draft version of the
15 Significant Amendment on April 14, 2016.

16 11. The Department then accepted public comment on the draft Significant
17 Amendment from April 14, 2016 through May 20, 2016.

18 12. The Department conducted a noticed public hearing on the Significant
19 Amendment at Florence High School on May 19, 2016.

20 13. The Department prepared a summary and response to the public comments,
21 and granted the Significant Amendment to Florence Copper on July 29, 2016.

22 14. The Department advised Florence Copper that the Significant Amendment
23 would be signed as soon as it received all fees associated with the Significant
24 Amendment. Florence Copper paid the required fees on August 3, 2016.

25 15. ADEQ finalized, signed, and issued the Significant Amendment to the 2013
26 Temporary APP to Florence Copper on August 3, 2016 (the “2016 Significant
27 Amendment”).
28

1 16. The 2016 Significant Amendment establishes the PMA for the PTF well
2 block (“PTF PMA”) as the in-situ injection and recovery well block and an area that
3 extends 500 feet radially outward from the outermost wells of the PTF well block, as
4 identified in Attachment 3 of the Application

5 17. Based on Arizona’s Mining BADCT Guidance Manual, Section 3.4.5.3.1.,
6 the cone of depression will operate as the primary hydraulic barrier for the in-situ copper
7 recovery operation.

8 18. The PTF PMA coincides with the Area of Review established in the UIC
9 Permit (*i.e.*, “project area plus a circumscribing area the width of which is the lateral
10 distance from the perimeter of the project area, in which the pressures of the injection
11 zone may cause the migration of the injection and/or formation fluid into an underground
12 source of drinking water.” 40 C.F.R. § 146.6(a)(ii)).

13 19. The 2016 Significant Amendment establishes two new Point of Compliance
14 (“POC”) wells and utilizes four existing POC wells for the PTF PMA. The two new POC
15 wells (M54-O and M54-LBF) will be located at the PTF PMA boundary, as identified in
16 Attachment 3 of the Application. The four existing POC wells (M14-GL, M15-GU,
17 M22-O, and M23-UBF) are located within 350 feet of the PTF PMA boundary and
18 between the nearest sources of drinking water and the PTF well block. These existing
19 wells are currently active POC locations under APP No. P-101704. Florence Copper
20 estimates the cost to drill new POC wells of similar depth would be approximately
21 \$377,667 in addition to potential well abandonment expenses and cost associated with
22 assessment, clearance, and treatment of cultural resources.

23 a. Florence Copper provided a revised geochemical model report and
24 revised rinsing flow sheet as Attachment 4 of the Application, and The Department
25 reviewed and evaluated the revised geochemical model report and revised rinsing flow
26 sheet.

1 **C. The Current Appeal**

2 20. On September 1, 2016, the Appellants filed their Notice of Appeal of the
3 Significant Amendment with the Board (“2016 Appeal”). Florence Copper was
4 subsequently granted intervention in the 2016 Appeal.

5 21. Appellants’ Notice of Appeal contained 21 issues identified as Issues A – U
6 and discussed in further detail below.

7 22. On September 21, 2016, the Department filed an Answer to the Notice of
8 Appeal and Motion to Strike a Portion of the Claims as Vague pursuant to Arizona
9 Administrative Code R2-17-107(B) and Arizona Rule of Civil Procedure 8(a)(2). The
10 Parties fully briefed the Motion to the Board.

11 23. Florence Copper filed its Answer to the Notice of Appeal on September 21,
12 2016. Florence Copper filed a Motion to Dismiss on September 28, 2016, which the
13 Parties also fully briefed to the Board.

14 24. Florence Copper also filed a Motion asking the Board to Conduct Appeal
15 Hearing or in the Alternative to Set Forth the Issues for Determination for OAH on
16 Referral and Provide Instructions on October 7, 2016. The Department joined in the
17 Motion on October 11, 2016.

18 **D. The Appeal’s Procedure**

19 25. On October 13, 2016, the Board considered the 2016 Appeal and pending
20 motions before the Board. After considering the pending motions and hearing the legal
21 and technical arguments made by the Parties, the Board directed the Parties to submit
22 technical memoranda identifying the changes made in the 2016 Significant Amendment to
23 address the Board’s remand to the Department in the 2013 Appeal to assist it in
24 identifying the issues for which an administrative hearing would be required.

25 26. The Parties submitted to the Board technical memoranda and legal
26 arguments Specifically, the Parties submitted the following: Florence Copper Inc.’s Brief
27 Outlining the Changes that the Arizona Department of Environmental Quality Made in the
28 Significant Amendment (November 14, 2016); Arizona Department of Environmental

1 Quality's Notice of Errata and Memorandum of Issues Appealed (November 15, 2016);
2 and Appellants' Response Brief Re Issues on Appeal (November 21, 2016) . The Board
3 then considered the technical memoranda and legal arguments at its regular meeting on
4 December 14, 2016.

5 27. The Board considered the changes made to the Significant Amendment in
6 response to the five issues that the Board remanded to the Department in the 2013 Appeal,
7 in the following Sections of the Conclusions of Law of the 2014 ALJ Decision: § 3.6
8 (BHP Report); § 3.7.3.2.1 (Monitoring); § 3.7.3.3 (Monitoring); § 3.8 (PMA and POCs);
9 and § 3.9.4 (Closure Reporting).

10 28. Based upon the technical memoranda and legal arguments made by the
11 Parties and a review of the changes to the 2016 Significant Amendment, the Board
12 concluded that it needed no further written or oral testimony from the parties on the issues
13 raised in Sections 3.6 (BHP Report) and 3.9.4 (Closure Reporting) of the Conclusions of
14 Law of the 2014 ALJ Decision.

15 29. The Board determined that it would allow additional written and oral
16 testimony.

17 30. The Board issued a Board Procedural Order dated December 19, 2016
18 ("Board Procedural Order") that permitted additional written testimony from the Parties'
19 expert witnesses on the outstanding technical issues, allowed additional legal argument on
20 those issues, and set a hearing to develop an additional factual record on the issues
21 identified in Sections 3.7.3.2.1 (Monitoring); 3.7.3.3 (Monitoring); and 3.8 (PMA and
22 POCs) of the Conclusions of Law of the 2014 ALJ Decision.

23 31. All of the Parties consented to the Board Procedural Order at the Board's
24 meeting on December 14, 2016 and then in writing to the Board.

25 **E. The UIC Permit**

26 32. On December 20, 2016, the U.S. Environmental Protection Agency ("EPA")
27 issued Class III Underground Injection Control Permit No. R9UIC-AZ3-FY11-1 to
28 Florence Copper (the "UIC Permit") for the PTF.

1 **F. The Withdrawn Issues**

2 33. As described in the following paragraphs, Appellants have withdrawn
3 several issues in their Notice of Appeal.

4 34. When the Parties briefed the Department and Florence Copper's motions to
5 dismiss, Appellants withdrew Issue S, which alleged that the Department failed to
6 properly investigate potential physical impacts of Florence Copper's pumping to public
7 water resources in the Florence area.

8 35. On January 17, 2017, Appellants filed a Notice of Partial Withdrawal of
9 Issues on Appeal and withdrew all of the monitoring issues identified in Sections
10 3.7.3.2.1, 3.7.3.3. of the 2014 ALJ Decision, with the exception of 3.7.3.2.1 (electrical
11 conductivity significant alert level reflected in Table 4.1-8 of the Significant Amendment)
12 of the 2014 ALJ Decision.

13 36. Appellants acknowledged that they would waive any right to appeal these
14 monitoring issues as to this version of the permit, but explicitly retained the right to appeal
15 any such issues regarding any future modified permit or any other permit. Because
16 Appellants withdrew these issues, they were not considered further by the Board.

17 **G. The Administrative Hearing**

18 37. The Board conducted an administrative hearing on March 6, 2017 to
19 develop the factual record for the remaining issues identified in Sections 3.8 (PMA and
20 POC), 3.7.3.2.1 (Monitoring), and 3.7.3.3 (Monitoring) of the Conclusions of Law in the
21 2014 ALJ Decision.

22 38. The following witnesses testified before the Board at the administrative
23 hearing on behalf of the Parties: Lee Wilson, Ph.D., on behalf of the Appellants; Maribeth
24 Greenslade, P.E., on behalf of the Department; and Mark Nicholls, R.G., and Philip
25 Lagas, R.G., on behalf of Florence Copper.

26 39. The following exhibits were accepted by the Board at the administrative
27 hearing: Exhibit 1 (Affidavit of Lee Wilson, Ph.D. in Support of Appellants); Exhibit 2
28 (Rebuttal Affidavit of Lee Wilson, Ph.D. in Support of Appellants); Exhibit 3 (Affidavit

1 of Maribeth Greenslade, P.E.); Exhibit 4 (Notice of Errata to the Affidavit of Maribeth
2 Greenslade, P.E.); Exhibit 5 (Rebuttal Affidavit of Maribeth Greenslade, P.E.); Exhibit 6
3 (Affidavit of Mark Nicholls, R.G.); Exhibit 7 (Responsive Affidavit of Mark Nicholls,
4 R.G.); Exhibit 8 (Affidavit of Philip Lagas, R.G.); Exhibit 9 (Responsive Affidavit of
5 Philip Lagas, R.G.); and Exhibit 10 (Photo of Monitor Well Location (Revised) Proposed
6 Test Facility from UIC Permit Application).

7 40. Having considered the written and oral testimony submitted by the Parties,
8 the legal filings and arguments made by the Parties, and the administrative record in this
9 matter, the Board now finds and concludes as follows regarding the issues that it
10 remanded to the Department, which are identified in the Conclusions of Law § 3.6 (BHP
11 Report); § 3.7.3.2.1 (Monitoring); § 3.7.3.3 (Monitoring); § 3.8 (PMA and POCs); and §
12 3.9.4 (Closure Reporting) of the 2014 ALJ Decision.

13 **II. CONCLUSIONS OF LAW**

14 41. The Board has jurisdiction to hear Appellants' Appeal pursuant to A.R.S. §
15 49-323(A). The Board must affirm ADEQ's decision to grant the Significant Amendment
16 unless the decision was "arbitrary, unreasonable, unlawful or based upon a technical
17 judgment that is clearly invalid." A.R.S. § 49-324(C).

18 **A. Section 3.6 (BHP Report) (Notice of Appeal - Issues A, I, J, and K)**

19 42. The Board remanded Conclusion of Law § 3.6 (BHP Report) in the 2014
20 ALJ Decision to the Department for further consideration after the 2013 Appeal. The
21 Conclusion of Law states in relevant part:

22 COL § 3.6. ...BHP's draft reports and the reports' conclusions about hydraulic
23 control and migration of fluid during the 1997-1998 pilot project should be
24 considered to gauge whether the terms that ADEQ approved in the Temporary
APP were arbitrary, unreasonable, unlawful, or based upon a technical judgment
that was clearly invalid.

25
26 43. After considering the legal filings and arguments made by the Parties, the
27 administrative record in this matter, and the terms and conditions of the 2016 Significant
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1 Amendment, the Board concluded the Department had addressed the Board's remand of
2 Conclusion of Law § 3.6 (BHP Report) in the 2014 ALJ Decision.

3 44. Specifically, the Board concluded that Florence Copper provided all
4 relevant BHP draft reports to the Department as Attachment 1 of the Application. The
5 Board further concluded that the Department considered the relevant BHP draft reports in
6 development of the terms of the 2016 Significant Amendment

7 45. For the reasons set forth above, the Board concluded that the Appellants did
8 not establish that the Department's consideration of the BHP draft reports was arbitrary,
9 unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.

10 **B. Sections 3.7.3.2.1 (Monitoring) and 3.7.3.3 (Monitoring) (Notice of
11 Appeal – Issues A and P)**

12 46. The Board remanded Conclusions of Law § 3.7.3.2.1 and § 3.7.3.3 in the
13 2014 ALJ Decision to the Department for further consideration after the 2013 Appeal. The
14 Conclusions of Law states in relevant part:

15 COL § 3.7.3.2.1. "...Appellants established that the Temporary APP does not
16 require meaningful monitoring of possible vertical migration through electric
17 conductivity sensors or a hydrosleeve in the LBFU in the PTF well field or require
18 any contingency action if such migration is identified. Therefore, Appellants
19 established that ADEQ's issuance of the Temporary APP without requiring
20 meaningful monitoring of vertical excursions of fluid into the LBFU was arbitrary,
21 unreasonable, and based upon a technical judgment was clearly invalid because it
22 did not comply with A.R.S. § 49-243(B)(1) and BADCT § 3.4.4.2." (footnotes
23 omitted).

24 COL § 3.7.3.3. "...ADEQ should have heeded the warning in BADCT § 3.4.4.2
25 and required meaningful monitoring of potential short circuits in the Temporary
26 APP. In light of the uncertainties about whether the oxide zone is equivalent
27 porous media, a single monitoring well between the PTF well field and the POC
28 wells does not adequately monitor whether FCI's maintenance of hydraulic
control, as defined by the Temporary APP, will effectively prevent migration of
fluid. Therefore, ADEQ's issuance of the Temporary APP that required only a
single monitoring well downgradient to detect vertical and horizontal migration of
in-situ solution during the two-year term of the PTF was unreasonable and based
on a technical judgment that was clearly invalid." (footnote omitted).

47. Omitted

48. As discussed above, Appellants withdrew all issues associated with the

1 Board's remand of Conclusions of Law § 3.7.3.2.1 and § 3.7.3.3 in the 2014 ALJ Decision
2 except for their claim that the alert level established for fluid electrical conductivity
3 shown in Table 4.1-8 of the 2016 Significant Amendment is flawed.

4 49. After considering the legal filings and arguments made by the Parties, the
5 administrative record in this matter, and the terms and conditions of the 2016 Significant
6 Amendment, the Board concluded that the alert level established for Fluid Electrical
7 Conductivity in Table 4.1-8 of the 2016 Significant Amendment was appropriately set.

8 50. For the reasons set forth above, the Board concluded that the Appellants did
9 not establish that the alert level established for fluid electrical conductivity shown in
10 Table 4.1-8 of the 2016 Significant Amendment (*i.e.*, "Observation Well Conductivity
11 Equal to or Greater than Injection Well Conductivity") was arbitrary, unreasonable,
12 unlawful, or based upon a technical judgment that was clearly invalid.

13 **C. Section 3.8 (PMA and POCs)**

14 51. The Board remanded Conclusion of Law § 3.8 (PMA and POCs) in the 2014
15 ALJ Decision to the Department for further consideration. The Conclusion of Law states
16 in relevant part:

17 COL § 3.8. "...[T]he PMA and the location of the POC wells described in the
18 application and permitted by the Temporary APP were arbitrary, unreasonable,
and unlawful.

19 52. After considering the written and oral testimony submitted by the Parties,
20 legal filings and arguments made by the Parties, the administrative record in this matter,
21 and the terms and conditions of the 2016 Significant Amendment, the Board concluded
22 that the Department has addressed the Board's remand of Conclusion of Law § 3.8 (PMA
23 and POCs) in the 2014 ALJ Decision.

24 53. After considering the legal filings and arguments made by the Parties, the
25 administrative record in this matter, and the terms and conditions of the 2016 Significant
26 Amendment, the Board concluded that the Department and Florence Copper have
27 established that: (1) the PTF PMA complies with A.R.S. § 49-244; (2) the PTF PMA was
28

1 based upon modeling prepared by Florence Copper and has a sound technical basis;
2 (3) the cone of depression will serve as a barrier for the PTF PMA pursuant to A.R.S.
3 § 49-244(1) and is the presumptive BADCT for in-situ mining pursuant to Section
4 3.4.5.3.1 of the Arizona BADCT Manual; (4) the Department incorporated provisions into
5 the 2016 Significant Amendment that required the BADCT cone of depression to be
6 established, maintained, and monitored; and (5) the PTF PMA coincides with the Area of
7 Review established in the UIC Permit, which rationally and reasonably provides a single
8 regulatory boundary for both the 2016 Significant Amendment and the UIC Permit.

9 54. For the reasons set forth above, the Board concluded that the Appellants did
10 not establish that the revised PTF PMA in the 2016 Significant Amendment was arbitrary,
11 unreasonable, unlawful, or based upon a technical judgment that was clearly invalid.

12 55. Regarding the 2016 Significant Amendment's POCs, after considering the
13 written and oral testimony submitted by the Parties, legal filings and arguments made by
14 the Parties, the administrative record in this matter, and the terms and conditions of the
15 2016 Significant Amendment, the Board concluded that the Department and Florence
16 Copper established that: (1) the POCs identified in the 2016 Significant Amendment
17 comply with A.R.S. § 49-244; (2) Florence Copper's proposed locations of two new POC
18 wells (*i.e.*, M54-O and M54-LBF) coincide with the PTF PMA boundary consistent with
19 A.R.S. § 49-244(1)(a); (3) Florence Copper demonstrated that it was substantially less
20 costly to utilize and operate the four existing POC wells (*i.e.*, M14-GL, M15-GU,
21 M22-O, and M23-UBF) proposed for the PTF well block that are currently active POC
22 locations and are located within 350-feet of the PTF PMA boundary rather than drill new
23 wells in accordance with A.R.S. § 49-244(2)(b); and (4) Florence Copper demonstrated
24 that vadose zone attenuation is not applicable at the PTF and that the proposed POC wells
25 would be protective of down gradient drinking water sources in accordance with A.R.S.
26 § 49-244(b)(2).

27 56. For the reasons set forth above, the Board concluded that the Department
28 and Florence Copper established that the POCs in the 2016 Significant Amendment

1 comply with Arizona law and were rational, reasonable, lawful, and based upon sound
2 technical judgment. Therefore, Appellants did not establish that the POCs in the 2016
3 Significant Amendment were arbitrary, unreasonable, unlawful, or based upon a technical
4 judgment that was clearly invalid.

5 **D. Section 3.9.4 (Closure Reporting)**

6 57. The Board remanded Conclusion of Law § 3.6 (BHP Report) in the 2014
7 ALJ Decision to the Department for further consideration. The Conclusion of Law states
8 in relevant part:

9 COL § 3.9.4. ... [A]fter FCI told ADEQ that FCI had different plans for closure
10 than it had described in the sealed geochemical model and rinsing flow sheet in its
11 application, ADEQ's issuance of the Temporary APP and/or failure to require FCI
12 to formally amend the application was unreasonable, arbitrary, and unlawful.

13 58. After considering the legal filings and arguments made by the Parties, the
14 administrative record in this matter, and the terms and conditions of the 2016 Significant
15 Amendment, the Board concludes the Department has addressed the Board's remand of
16 the issues identified in Conclusion of Law § 3.9.4 (Closure Reporting) in the 2014 ALJ
17 Decision.

18 59. Omitted.

19 60. For the reasons set forth above, the Board concludes that the Appellants did
20 not establish that the Department's decision to issue the 2016 Significant Amendment
21 after receiving and considering the revised geochemical model report and revised rinsing
22 flow sheet from Florence Copper was arbitrary, unreasonable, unlawful, or based upon a
23 technical judgment that was clearly invalid.

24 **E. Other Issues**

25 As to all other issues raised in Appellants' Notice of Appeal, including public
26 participation issues, Appellants did not establish that the Department's actions were
27 arbitrary, unreasonable, unlawful, or based upon a technical judgment that is clearly
28 invalid.

1 **III. ORDER**

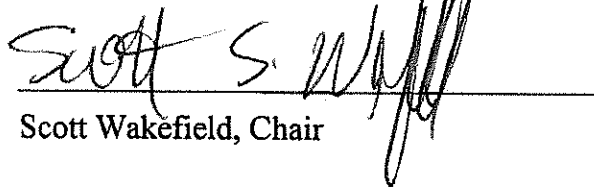
2 Based on the foregoing Findings of Fact and Conclusions of Law, IT IS
3 **ORDERED** that Appellants' Notice of Appeal is denied in its entirety and dismissed.

4 **IV. NOTICE OF REHEARING AND APPEAL RIGHTS**

5 Any party may move for a rehearing or review of this Order. Pursuant to A.R.S.
6 § 41-1092.09 and A.A.C. R2-17-126, the motions must be filed with the Board within
7 thirty-five (35) days from the date of mailing if the Order was served via certified mail.
8 The petition must set forth legally sufficient reasons for granting the rehearing or review.
9 The filing of a petition for rehearing or review is **not** required to preserve any rights of
10 appeal to the Superior Court that the party may wish to pursue.

11
12 DATED this 10th day of April 2017.

13 **WATER QUALITY APPEALS BOARD**

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16 _____
17 Scott Wakefield, Chair

1 A copy of the foregoing was mailed via
2 electronic mail and U.S. mail this 10th
3 day of April, 2017 to:

4 WATER QUALITY APPEALS BOARD:

5 Scott S. Wakefield
6 Gail M. Clement
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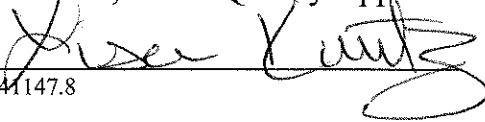
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1 A copy of the foregoing was mailed via inter-agency mail
this 16 day of April 2017

2
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7 By: Lisa Kautz
8 Clerk, Water Quality Appeals Board

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