

June 1, 2015

VIA FIRST CLASS AND ELECTRONIC MAIL

State Water Resources Control Board  
Office of Chief Counsel  
Jeannette L. Bashaw, Legal Analyst  
P.O. Box 100  
Sacramento, CA 95812-0100

Re: Petition for Review, Petition for Stay, and Petition To Submit Supplemental Evidence and To Conduct a Hearing – In the Matter of Cleanup and Abatement Order No. R4-2011-0046, Former Kast Property Tank Farm (SCP No. 1230, Site ID No. 2040330, File No. 11-043)

Dear Ms. Bashaw:

We represent Barclay Hollander Corporation (“Barclay”). By letter dated April 30, 2015, the Regional Board issued the Revised CAO, naming Barclay as a discharger to an existing CAO that named Shell as a discharger on March 11, 2011. Pursuant to sections 13320 and 13321 of the Water Code and sections 2050, 2050.6 and 2053 of title 23 of the Code of Regulations, we hereby submit to the State Water Resources Control Board (“Board”) the enclosed:

1. Petition for Review of Cleanup and Abatement Order No. R4-2011-0046 Requiring Shell Oil Company and Barclay Hollander Corporation to Cleanup and Abate Waste Discharged to Waters of the State Pursuant to California Water Code Section 13304 At the Former Kast Property Tank Farm, Carson, California (File No. 97-043) (“Revised CAO”) and Exhibits A-D attached thereto;

2. Petition for Stay of Effective Date of Revised Cleanup and Abatement Order No. R4-2011-0046 Pursuant to Cal. Water Code § 13321 and Cal. Code Regs. Tit. 23, § 2053;

3. Petition for (1) Consideration of Evidence not Previously Considered and (2) Hearing on Revised Cleanup and Abatement Order No. R4-2011-0046 Pursuant to Title 23 C.C.R. Section 2050.6;

4. Declaration of Jeffrey V. Dagdigian, Ph.D. in Support of Petition for Review of Revised Cleanup and Abatement Order R4-2011-0046; Petition for Stay of Revised Cleanup and Abatement Order R4-2011-0046; Request for State Board Consideration of Additional Evidence and attached Exhibit A with Attachments 1 and 2 to Exhibit A;

# GIBSON DUNN

Jeannette L. Bashaw

June 1, 2015

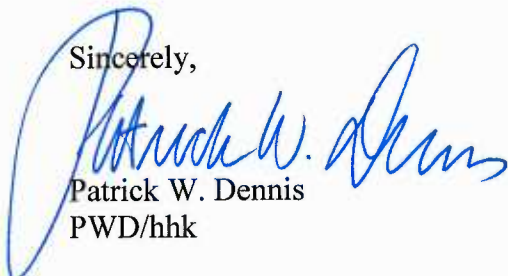
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5. The Authenticating Declaration of Patrick Dennis in Support of Petition for Review of Revised Cleanup and Abatement Order No. R4-2011-0046, Petition for Stay of Effective Date of Revised Cleanup and Abatement Order No. R4-2011-0046, and Petition to Submit Supplemental Evidence and for Hearing on Revised Cleanup and Abatement Order No. R4-2011-0046 and attached Exhibits E-VVV; and

6. The Declaration of Patrick Dennis in Support of Petition for Review of Revised Cleanup and Abatement Order R4-2011-0046; Petition for Stay of Revised Cleanup and Abatement Order R4-2011-0046; Request for State Board Consideration of Additional Evidence and a Hearing.

We respectfully request that this entire submission, and any further supplemental submissions by us, be included in the public record for this matter and be given the full consideration of the State Board and its staff.

Sincerely,



Patrick W. Dennis  
PWD/hhk

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13 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

14  
15 In the Matter of Revised Cleanup and  
16 Abatement Order No. R4-2011-0046 Re-  
quiring Shell Oil Company and Barclay  
17 Hollander Corporation to Cleanup and  
Abate Waste Discharged to Waters of the  
18 State Pursuant to California Water Code  
Section 13304 at the Former Kast Property  
19 Tank Farm, Carson, California (File No.  
97-043)

**PETITION FOR REVIEW OF REVISED  
CLEANUP AND ABATEMENT ORDER  
NO. R4-2011-0046 PURSUANT TO WATER  
CODE § 13320 AND 23 C.C.R. § 2050**

**[Wat. Code, § 13320, 23 C.C.R. § 2050]**

1 Pursuant to section 13320 of the California Water Code and section 2050 of Title 23 of the  
2 California Code of Regulations (CCR), Barclay Hollander Corporation (“Barclay” or “Petitioner”)  
3 hereby petitions the State Water Resources Control Board (“State Board”) to review and vacate the  
4 Revised Cleanup and Abatement Order No. R4-2011-0046 (“Revised CAO”), issued by Deborah  
5 Smith, Chief Deputy Executive Officer of the California Regional Water Quality Control Board for  
6 the Los Angeles Region (“Regional Board”) on April 30, 2015. The Revised CAO was issued pursu-  
7 ant to California Water Code section 13304 and entitled Revised Cleanup and Abatement Order  
8 No. R4-2011-0046 Requiring Shell Oil Company and Barclay Hollander Corporation to Cleanup and  
9 Abate Waste Discharged to Waters of the State Pursuant to California Water Code section 13304 at  
10 the Former Kast Property Tank Farm, Carson, California (File No. 97-043).

11 **I. NAME AND ADDRESS OF PETITIONER**

12 Barclay Hollander Corporation  
13 c/o Patrick W. Dennis  
14 Gibson, Dunn & Crutcher LLP  
15 333 South Grand Avenue  
16 Los Angeles, CA 90071-3197  
17 Telephone: 213.229.7000  
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19 **II. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD  
20 WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY  
21 OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH  
22 IS REFERRED TO IN THE PETITION**

23 The State Board is requested to review the Regional Board’s issuance of the Revised CAO. A  
24 true and correct copy of this order is attached to this Petition as Exhibit A. Additionally, true and  
25 correct copies of the following orders and draft orders of the Regional Board, which are referred to in  
26 this Petition, are attached hereto: Cleanup and Abatement Order No. R4-2011-0046, dated March 11,  
27 2011 (“CAO”), attached to this Petition as Exhibit B; Draft Cleanup and Abatement Order No. R4-  
28 2011-0046, dated October 31, 2013 (“Draft CAO”), attached to this Petition as Exhibit C; and Re-  
vised Draft Cleanup and Abatement Order No. R4-2011-0046, dated December 8, 2014 (“Revised  
Draft CAO”), attached to this Petition as Exhibit D.

1                   **III. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED**  
2                   **TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO**  
3                   **ACT**

4                   The date of the Regional Board’s issuance of the Revised CAO is April 30, 2015.

5                   **IV. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION**  
6                   **OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER**

7                   As set forth in detail in the Statement of Points and Authorities (see Part VII, *infra*), the issu-  
8                   ance of the Revised CAO by the Regional Board was inappropriate and improper for the following  
9                   reasons: (1) the Regional Board failed to afford Barclay the due process to which it was entitled un-  
10                  der the United States and California Constitutions and the California Administrative Procedure Act  
11                  (“APA”), Govt. Code, §§ 11340 *et seq.*; (2) the Regional Board’s finding that Barclay is liable under  
12                  section 13304(a) of the Water Code for “spread[ing] the waste” or “contribut[ing] to the migration of  
13                  the waste” is not supported by evidence; (3) the Regional Board’s finding that Barclay merely  
14                  “spread the waste” or “contributed to the migration of the waste” does not support liability under sec-  
15                  tion 13304(a) of the Water Code; and (4) Barclay is exempt from liability under section 13304 be-  
16                  cause all of the acts for which the Revised CAO purports to hold it responsible occurred before 1981,  
17                  were lawful at the time, and are therefore protected by the safe harbor of section 13304(j) of the Wa-  
18                  ter Code.

19                  **V. THE MANNER IN WHICH PETITIONER IS AGGRIEVED**

20                  Petitioner is aggrieved because of the reasons set forth in Section IV above.

21                  **VI. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH**  
22                  **PETITIONER REQUESTS**

23                  Petitioner respectfully requests that the State Board accept this Petition and vacate the Re-  
24                  vised CAO.

25                  **VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**  
26                  **ISSUES RAISED IN THE PETITION**

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1 **I. Introduction**

2 The Porter-Cologne Water Quality Control Act (“Porter-Cologne”) limits the jurisdiction of  
3 both the State Board and the nine Regional Water Quality Control Boards, of which the Regional  
4 Board is one. Water Code section 13304(a), which is part of Porter-Cologne, provides in part: “Any  
5 person who has discharged or discharges waste into the waters of this state in violation of any waste  
6 discharge requirement or other order or prohibition issued by a regional board or the state board, or  
7 who has caused or permitted . . . waste to be discharged or deposited where it is, or probably will be,  
8 discharged into the waters of the state and creates . . . a condition of pollution or nuisance, shall upon  
9 order of the regional board, clean up the waste or abate the effects of the waste. . . .” (Wat. Code,  
10 § 13304, subd. (a).) Barclay is not liable under any of these criteria.

11 It is beyond dispute that Shell Oil Company (“Shell”), not Barclay, discharged 100% of the  
12 petroleum hydrocarbon contaminants at the Kast Property in what is now Carson, California (“Prop-  
13 erty” or “Site”). After 40 years of storing oil in leaky reservoirs, Shell sold the Property to a prede-  
14 cessor of Barclay without disclosing the leaks. The developers built houses on the Property and sold  
15 them in the late 1960s and early 1970s. In 2008, after discovering contamination nearby, the Region-  
16 al Board directed Shell to conduct environmental testing at the Site, which revealed the presence of  
17 petroleum hydrocarbons. In 2011, the Regional Board named Shell as the responsible party. With no  
18 basis to challenge the CAO, Shell began pressuring (and illegally paying for) the Regional Board to  
19 investigate and name Barclay as another responsible party, first alleging—without a shred of evi-  
20 dence—that Barclay brought contaminated fill soil onto the Property. Later, other parties with a  
21 purely financial interest in having Barclay named—parties to litigation pending in the Los Angeles  
22 County Superior Court of which the staff and Regional Board are aware (the “Acosta Litigation”<sup>1</sup> and  
23 the “Carson Litigation”<sup>2</sup>)—joined forces with Shell to improperly influence the Regional Board to  
24 name Barclay for their own financial gain.

25 The Revised CAO is the result of an unfair process that denied Barclay due process. It is un-  
26 supported by the evidence, it is contrary to clearly established law, and it must be vacated.

27 <sup>1</sup> See *Adelino Acosta, et al. v. Shell Oil Company, et al.*, Case No. NC053643 and Related Cases.

28 <sup>2</sup> See *City of Carson v. Shell Oil Company et al.*, Case No. BC499369.

1           **A.       Barclay Was Denied Due Process.**

2           The Revised CAO is the product of a fundamentally flawed and unfair proceeding—paid for  
3 by Shell, a party adverse to Barclay—that deprived Barclay of due process. Under the United States  
4 and California Constitutions and the APA, Barclay’s due process rights were violated by the Regional  
5 Board.

6           First, Barclay was denied due process because Shell—an adverse party which pressured the  
7 Regional Board solely because it had a direct financial interest in having Barclay named—was ille-  
8 gally reimbursing the Regional Board for the efforts that the Prosecution Team, including their coun-  
9 sel, spent considering whether to name Barclay, building an administrative record to do so, and draft-  
10 ing the necessary documents, including the Revised Draft CAO itself and the recommendation to  
11 Smith to name Barclay. (Part V.A.1, *infra*.) As a result of these payments—unauthorized and illegal  
12 under the Cost Recovery Program—the Regional Board had a financial incentive to investigate and  
13 name Barclay, a violation of Barclay’s due process rights. (Wat. Code, § 13304, subd. (c); *People v.*  
14 *Vasquez* (2006) 39 Cal.4th 47, 64 [holding that “pecuniary conflicts of interests on a judge’s or pros-  
15 ecutor’s part pose a constitutionally more significant threat to a fair trial than do personal conflicts of  
16 interest”].)

17           Second, Barclay’s right to an impartial adjudicator was violated because the Regional Board  
18 failed to adequately separate its adjudicative and prosecutorial functions and because Sam Unger, the  
19 Executive Officer of the Regional Board and the leader of the Prosecution Team, appointed Deborah  
20 Smith, his direct subordinate, as adjudicator. (Part V.A.2, *infra*; Govt. Code, §§ 11425.10,  
21 subd. (a)(4), 11425.30, subd. (a)(2).) Indeed, Unger confirmed in his deposition that “there was nev-  
22 er really any establishment of the [prosecutorial] team, per se.” (Ex. E [Unger Dep.] at 197:12-19.)  
23 And Smith assumed the role of prosecutor—a separate and independent due process violation (Govt.  
24 Code, §§ 11425.10, subd. (a)(4), 11425.30, subd. (a)(1)—when she modified the Draft Revised CAO,  
25 without notice to Barclay, to include new and previously undisclosed purported facts and purported  
26 violations of law.

27           Third, the Regional Board’s nearly five-year delay in naming Barclay to the CAO deprived  
28 Barclay of any opportunity to challenge the Remedial Action Plan (“RAP”) to which Shell, the

1 *Acosta* Plaintiffs, and the City of Carson agreed, but with which Barclay disagrees. Subjecting Bar-  
2 clay to pay for or implement a RAP that it opposes and that it had no role in crafting (and no reason  
3 to do so at the time) would be a profound violation of due process. (Part V.A.3, *infra*; Govt. Code  
4 § 11425.10, subd. (a)(1).)

5 Fourth, in issuing the Revised CAO, the Regional Board failed to develop and rely upon an  
6 adequate administrative record, and what record exists does not support naming Barclay. (Part  
7 V.A.4, *infra*; Govt. Code, §§ 11425.10, subd. (a)(6), 11425.50.)

8 Fifth, in developing the inadequate administrative record that does exist, the Regional Board  
9 used biased and unfair procedures, which repeatedly favored Shell and the *Acosta* Plaintiffs and dis-  
10 favored Barclay. (Part V.A.5, *infra*.) This included extensive improper ex parte contacts with repre-  
11 sentatives of adverse parties, who provided the Prosecution Team with responses to Barclay’s com-  
12 ments and other information of which Barclay had no notice and to which it had no opportunity to  
13 respond. (*Id.*)

14 And sixth, the Regional Board failed to hold an evidentiary hearing, which due process and  
15 the State Board counsel require under these circumstances. (Part V.A.6, *infra*.)

16 **B. The Revised CAO’s Findings Do Not Support Liability Under Porter-Cologne.**

17 The Revised CAO’s findings lack evidentiary support and a factual basis. The Revised CAO  
18 both misstates critical facts and fails to support its findings with evidence. The law requires more.

19 **1. The Revised CAO Is Wrong On The Facts.**

20 The Revised CAO bases its determination that Barclay is a responsible party in part on its  
21 finding that Barclay had “explicit *knowledge* of . . . the presence of residual petroleum hydrocarbons  
22 and conducted various activities, including partially dismantling the concrete in the reservoirs and  
23 grading the onsite materials. These activities spread the waste at the site, and contributed to the mi-  
24 gration of the waste through soil and groundwater.” (Ex. A [Revised CAO] at p. 10, italics added.)<sup>3</sup>  
25 Yet there is no evidence that Barclay knowingly “spread the waste” or “contributed to the migration  
26 of the waste” in any manner that caused or contributed towards the conditions that mandate the clean-

27 <sup>3</sup> Exs. A-D refer to exhibits attached to the Petition for Review, filed concurrently on June 1, 2015.  
28 Exs. E-UUU refer to exhibits attached to the Authenticating Declaration of Patrick W. Dennis in  
Support of Petition for Review, filed concurrently on June 1, 2015.

1 up today. Indeed, all of the available evidence shows that Barclay spread fill soil that it did not be-  
2 lieve had any petroleum when it graded the Site. In the *Acosta* Litigation, the only four surviving  
3 eyewitnesses to Barclay’s placement and compaction of the berm fill soil testified that they had a  
4 good vantage point from which to observe the soil as it was spread out broadly in shallow lifts, and  
5 they saw no oil and detected no oil in the soil; it was clean when put in place. There is no evidence to  
6 the contrary. (See Part V.B.1, *infra*.)

7 Moreover, Dr. Jeffrey Dagdigian, an expert on the movement of oil in the environment, has  
8 determined that the fill soil placed by Barclay in the areas located above the former reservoir bottoms  
9 became contaminated only after it was put there when contamination left by Shell moved upward into  
10 the clean fill soil through capillary action, buoyancy, and other upward pressures. Dr. Dagdigian has  
11 gathered and reviewed substantial evidence that lead to his conclusions, but the most compelling  
12 proof of Dr. Dagdigian’s opinion arrived in the form of a 1997 report prepared for the Regional  
13 Board by Shell as part of the approval process for the decommissioning of two similar oil reservoirs.  
14 The report described an upward movement of similar contaminants through soil in nearly identical  
15 circumstances. Specifically, Shell Reservoirs 1 and 2 were built at the same time as the reservoirs at  
16 issue here, constructed in the same concrete-and-berm style, and operated as storage receptacles for  
17 30 years longer than Shell Reservoirs 5, 6, and 7 at the Site. Shell’s 1997 report confirms that Reser-  
18 voirs 1 and 2 leaked in the same manner as those located at the Site—i.e., contaminants escaped  
19 through weak points in the bottoms of the reservoirs, leaving high concentrations of contamination in  
20 the deeper soil for many years until it was able to migrate upward when the reservoir bottom was  
21 broken up and fill soil was compacted on top of it. Because the burden of proving Barclay’s respon-  
22 sibility is on the Regional Board, the Revised CAO cannot be issued in contravention of this expert  
23 evidence without proof that the facts are to the contrary, but the Revised CAO is silent on the subject.  
24 (See Part V.B.1.b, *infra*.)

25 **2. The Revised CAO Is Wrong On The Law.**

26 Even if the Revised CAO’s finding had been supported by evidence, which is not the case,  
27 there is no State Board precedent for holding Barclay liable for supposedly “spread[ing] the waste” or  
28 “contribut[ing] to the migration of the waste.” The Revised CAO cites State Board decisions that, in

1 rare circumstances inapplicable here, hold current owners and former owners who were in possession  
2 of property at the time of a discharge responsible for the clean-up and abatement of contaminants dis-  
3 charged by others. (Ex. A [Revised CAO] at p. 11, fn. 13.) Barclay is neither. Barclay is not a cur-  
4 rent owner nor did any discharges occur during its brief prior ownership of the Property. The undis-  
5 puted facts are that Shell contaminated the Property before selling it to Barclay's predecessor. Ac-  
6 cordingly, the Revised CAO goes beyond the limits of the Regional Board's jurisdiction, as estab-  
7 lished by section 13304(a) and as interpreted by State Board precedent. (See Part V.B.2.a, *infra*.)

8         There is also controlling case law holding that after contaminants have already been dis-  
9 charged, there is no liability under section 13304(a) for inadvertently causing those contaminants to  
10 be moved to another location through an action intended to achieve an innocent purpose. (*Redev.*  
11 *Agency of the City of Stockton v. BNSF Ry. Co.* (9th Cir. 2011) 643 F.3d 668, 677-78.) In *City of*  
12 *Stockton*, a railroad had installed a french drain under a track for water drainage, but that had the un-  
13 intended effect of serving as a conduit for the transport from one property to another of petroleum  
14 contaminants that had been discharged from a neighboring facility. (*Id.*) The court held that the rail-  
15 road had no liability as a "discharger" under section 13304(a) on those facts. The same rule applies  
16 for Barclay, which, assuming the Regional Board's incorrect facts were true, would have only moved  
17 contaminants that had already been discharged by Shell for the innocent purpose of refilling the res-  
18 ervoirs to bring them to grade and in a manner that would promote adequate drainage. (See Part  
19 V.B.2.b, *infra*.)

20         Moreover, the plain meaning of the statute limits the jurisdiction of the Regional Boards to is-  
21 sue clean-up and abatement orders only to dischargers. It therefore prohibits orders such as the Re-  
22 vised CAO, which require someone who has discharged nothing to be responsible for the discharges  
23 of someone else. Over fifteen years ago, however, the State Board adopted an interpretation of this  
24 language that departed from the statute's plain meaning when it held owners accountable for clean-up  
25 and abatement of contamination discharged by someone else.

26         Following enactment of Porter-Cologne, which became effective in 1970, until enactment of  
27 the 1980 amendments, which became effective January 1, 1981, not a single State Board decision  
28 held a non-discharging owner responsible for the discharges of others under section 13304(a). Our

1 review of the legislative history of the 1980 amendments to Porter-Cologne found no mention even of  
2 the idea of expanding the categories of persons that could be subject to a Regional Board order de-  
3 spite the fact that, at about the same time, the terms “owners, operators and arrangers” were specifi-  
4 cally being adopted to define responsible persons in CERCLA and its California equivalent, the Haz-  
5 arduous Substances Account Act (“HSAA”), which were enacted, respectively, in 1980 and 1981. In  
6 other words, there was no change in the language of section 13304(a) to justify the change in the  
7 State Board’s interpretation; nor is there anything in the legislative history of the 1980 amendments  
8 to section 13304 to support the State Board’s view.

9 The State Board decisions cited in the Revised CAO that purport to expand the definition of  
10 what it means to “cause or permit . . . waste to be discharged” have never been tested in any reported  
11 decisions of the California Courts of Appeal or the California Supreme Court, but we intend to test  
12 them in this case if necessary. There are so many reasons why it is wrong to hold Barclay responsi-  
13 ble on the evidence before the Regional Board that it hardly seems fitting to bring up a ground as  
14 fundamental as statutory interpretation. But we do so, in part, because it provides us with the oppor-  
15 tunity to emphasize that holding Barclay responsible as described in the Revised CAO requires an  
16 unprecedented and unsupported expansion of State Board precedent. The Regional Board should not  
17 have expanded the rules laid down by State Board precedent because those precedents need to be nar-  
18 rowed, not expanded, insofar as they are based on the State Board’s indefensible departure from the  
19 plain meaning of section 13304(a). (See Part V.B.2.c, *infra*.)

20 **C. Barclay Is Protected By The Safe Harbor Of Water Code Section 13304(j).**

21 Even if Barclay could be properly identified as a discharger under section 13304(a), which is  
22 not the case, Barclay nevertheless has no liability under Porter-Cologne because its conduct was law-  
23 ful at the time. Water Code section 13304(j) provides: “This section does not impose any new liabil-  
24 ity for acts occurring before January 1, 1981, if the acts were not in violation of existing laws or regu-  
25 lations at the time they occurred.” (Wat. Code, § 13304, subd. (j).)

26 All of Barclay’s activities at issue here occurred well before 1981 so the burden of proof is on  
27 the Regional Board to establish Barclay’s liability in light of section 13304(j), and the Revised CAO  
28 fails to meet that burden. The Revised CAO makes only the conclusory statement that “[i]ncluding

1 [Barclay] as a responsible party is consistent with Water Code section 13304(j) because Lomita or  
2 [Barclay]’s actions that resulted in creating pollution and nuisance were unlawful since at least  
3 1949.” (Ex. A [Revised CAO] at p. 11.) In support, the Revised CAO cites in a footnote three code  
4 provisions that Barclay allegedly violated: Health and Safety Code section 5411, Fish and Game  
5 Code section 5650, and Los Angeles County Code section 20.36.010. (*Id.* at p. 11, fn.14.) The Re-  
6 vised CAO does not cite any specific provisions or elements of those laws or any case or interpretive  
7 authority as to how they were enforced in 1965-66, much less any relevant evidence to satisfy the  
8 Regional Board’s burden of proof that Barclay’s acts from 1965-66 were indeed in violation of any  
9 existing laws at the time they occurred.

10 In fact, the evidence establishes that Barclay complied with existing laws at the time. Multi-  
11 ple public agencies oversaw Barclay’s development of the Carousel project, and all confirmed that  
12 there were no “violation[s] of existing laws or regulations at the time” Carousel was graded and built  
13 in the late 1960s. Two of these agencies, the Los Angeles County Engineer, governed by the County  
14 Building Code, U.B.C. § 7014, subd. (c) (1965), and the California State Real Estate Commissioner,  
15 governed by the Subdivided Lands Law, Business & Professions Code §§ 11000-11200, were re-  
16 quired by statute to confirm whether the project complied with applicable laws, and they confirmed  
17 it. The Planning Commission and Regional Board of Supervisors also held public hearings before  
18 giving subdivision map approval and granting Barclay’s request for a zoning change. All of these  
19 agencies were well informed about the project and exercised their discretion to approve it. Indeed,  
20 every soils report was reviewed by the County Engineer, including the memorandum in which the  
21 soils engineer observed “oil stains” as part of its investigation of soil permeability. Each agency  
22 signed off on the project. Because the Real Estate Commissioner and County Engineer were required  
23 to confirm compliance with the law, sign-off meant that Barclay was found to be in compliance with  
24 the laws then in existence. And because the Planning Commission and its staff were familiar with  
25 applicable law, it is inconceivable that they would have approved Barclay’s subdivision map and a  
26 zoning change from heavy industrial (M-2) to residential (R-1) if they had believed Barclay had vio-  
27 lated any laws. In contrast, the lack of the Regional Board’s familiarity with the applicable laws at  
28 the time is clear given that the Revised CAO asserts Barclay violated Fish and Game Code section

1 5650, despite the fact that section did not apply to groundwater contamination at the time. (Part  
2 V.C.2.b, *infra*.) These facts alone establish that all of the elements for safe harbor protections under  
3 section 13304(j) have been met, and the Revised CAO identifies no evidence to contradict these facts  
4 or otherwise meet the Regional Board’s burden of proof.

5 Section 13304(j) was adopted to protect compliant dischargers against the effects of the 1980  
6 amendments to Porter-Cologne. Those amendments allowed the Regional Boards to hold dischargers  
7 responsible for cleaning up and abating the consequences of past discharges, and without the safe  
8 harbor, previously-compliant dischargers would be liable under the amendments for the contaminat-  
9 ing effects of their otherwise lawful discharges.

10 If Barclay was a discharger, and it was not, then it was a discharger in compliance with all  
11 then-applicable laws, and is therefore protected by the safe harbor provision under section 13304(j).  
12 (See Part V.C, *infra*.)

## 13 II. Factual Background

14 “To meet the requirement of fairness, the Regional Board, before acting on . . . proposed or-  
15 ders, must ensure that there is a factual and legal basis in the record for its decision and must indicate  
16 its reasoning and the factual basis for its decision to the affected parties.” (*In the Matter of Project*  
17 *Alpha*, State Board Order No. WQ 74-1, at \*3; see also *Topanga Ass’n for a Scenic Cmty. v. City of*  
18 *L.A.* (1974) 11 Cal.3d 506, 514-15 [an agency “must render findings sufficient both to enable the par-  
19 ties to determine whether and on what basis they should seek review and, in the event of review, to  
20 apprise a reviewing court of the [legal] basis for the [agency’s] action,” and the findings must “bridge  
21 the analytic gap between the raw evidence and ultimate decision or order,” disclosing “the analytic  
22 route the . . . agency traveled from evidence to action”]; *City of Brentwood v. Centr. Valley Reg’l Wa-*  
23 *ter Quality Control Bd.* (2004) 123 Cal.App.4th 714, 720 [Regional Boards bear the burden of prov-  
24 ing the elements of an offense under Porter-Cologne].)

25 The Revised CAO does not satisfy these requirements. It purports to recite the facts concern-  
26 ing Barclay’s activities at the Site on pages 4 and 10-11, but these descriptions gloss over the details  
27 in ways that mischaracterize the facts, utterly failing to “bridge the analytical gap between the raw  
28



1 evidence and ultimate decision or order.” There is a significant disparity between what is thus de-  
2 scribed in the Revised CAO and what the evidence shows.

3 This lack of clarity is exacerbated by the failure to cite evidence in anything but the most gen-  
4 eral terms. Although the Revised CAO occasionally refers to “the record” in general terms, there is  
5 no reference to admitting evidence, identification of a record, or specification of what parts of any  
6 evidence or record are relied upon to support finding Barclay to be a responsible party under sec-  
7 tion 13304(a).<sup>4</sup> When asked for factual support at their depositions, members of the Regional  
8 Board’s Prosecution Team were repeatedly unable to point to any specific documents or witness tes-  
9 timony to support the Regional Board’s factual assertions. (Ex. F [Ayalew Dep.] at 73:10-74:3,  
10 74:18-76:16, 159:6-9, 243:22-244:5, 84:15-22, 229:22-230:5, 109:18-110:3, 166:17-20; Ex. E [Unger  
11 Dep.] at 213:2-217:20, 97:8-14, 232:20-233:15, 234:7-10, 235:5-12.) Such “conclusory findings  
12 without reference to the record are inadequate.” (*Envtl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry &*  
13 *Fire Prot.* (2008) 44 Cal.4th 459, 517, citation omitted.)

14 In light of these crippling shortcomings in the Revised CAO, below is a summary of the his-  
15 torical and procedural facts in this matter. If anything in the statement of facts below is contrary to  
16 any of the findings in the Revised CAO, it should be treated as an objection to the findings, for each  
17 of the facts below is supported by substantial evidence. The Revised CAO does not refer to any evi-  
18 dence in the record that contradicts these facts, and Barclay is not aware of any.<sup>5</sup>

19  
20 <sup>4</sup> The Regional Board’s decision must be based “exclusively on evidence of record in the proceed-  
21 ing and on matters officially noticed in the proceeding.” (Govt. Code, § 11425.50, subd. (c); see  
22 also Govt. Code, § 11425.10, subd. (a)(6) [“The decision shall be in writing, be based on the rec-  
23 ord, and include a statement of the factual and legal basis of the decision as provided in section  
24 11425.50.”].) It is axiomatic that evidence must be admitted, and therefore be admissible, to form  
25 part of the record. (See Govt. Code, § 11513 [providing rules governing admissibility of evi-  
26 dence in administrative adjudications].)

27 <sup>5</sup> The law places the burden of proof on the Regional Board to establish that Barclay meets the def-  
28 inition of a “discharger” in Water Code section 13304(a) before it may issue a clean-up and  
abatement order naming Barclay. (*City of Brentwood v. Center Valley Reg’l Water Quality Con-  
trol Bd.* (2004) 123 Cal.App. 714, 720.) Accordingly, even were the Regional Board to disregard  
the evidence cited in support of the facts presented below, which it should not do because the evi-  
dence is both overwhelming and credible, disregarding competent evidence alone would not be  
enough to sustain liability, for the Regional Board must also have affirmative evidence to sustain  
its findings, and there is none. (See, e.g., *Schutte & Koerting, Inc. v. Reg’l Water Quality Control  
Bd.* (2007) 158 Cal.App.4th 1373, 1383-84 [citing Civ. Proc. Code, § 1094.5(c) and stating abuse  
of discretion is established if the administrative order “is not supported by the findings, or the  
findings are not supported by the evidence”].)

### III. Historical Facts

The following chronology summarizes the evidence relating to work performed at the Site.<sup>6</sup>

#### A. **Between 1923 And 1928 Shell Purchased The Site And Constructed Three Large Reservoirs On It.**

- In 1923 Shell purchased the Site from Mary Kast, and thereafter referred to this oil storage facility as the Kast Tank Farm or the Kast Property. (Ex. TTT [1/21/14 ltr.] at Tab 16 [SOC 1-3].)
- Between approximately 1924 and 1928 Shell excavated three large reservoirs on the Site using the soil from the excavation to form the reservoir berms. (*Id.* at Tab 137 [1923 Ground level photo]; Tab 138 [1928 Aerial Photograph].)
  - The inside of each reservoir was lined with concrete about four inches thick, which was “reinforced” with thin wiring, and covered with a roof. (*Id.* at Tab 7 [Bach Dep.] at 34:7-35:11; 40:22-41:15; Tab 8 [Vollmer Dep.] at 104:10-105:16.)
  - The three reservoirs had a combined reported capacity of 3.5 million barrels. (*Id.* at Tab 60 [COLA 1].)
  - Additional soil taken from the Site was used to form so-called “safety berms” between each tank and another berm around the perimeter of the entire property. The purpose of the safety berms was to contain the contents of the reservoirs in the event of a breach of one of the primary berms. (*Id.* at Tab 7 [Bach Dep.] at 48:12-49:20, 42:3-17.)
  - In 1966 the reservoirs were described as follows:
    - “The earthen walls of the reservoir are generally about fifteen feet in height and have a slope ratio of 1-1/2:1.”
    - “The bottom and sides of the reservoir are lined with a four inch blanket of reinforced concrete.”
    - “The reservoirs are nearly 30 feet deep and covered by wood roofs.” (*Id.* at Tab 66 [CARSON 348-354].)

#### B. **Shell Actively Operated The Site As An Oil Storage Facility From 1928 Until 1959.**

- The Site was an integral part of Shell’s refinery facilities, some of which were located less than a mile away along Lomita Boulevard at a refinery that was sometimes called the “Shell Wilmington Refinery.” (*Id.* at Tab 4 [Schultz Dep.] at 68:13-69:3, 69:17-70:23.)
- Shell numbered the reservoirs on the Site beginning from the south at Lomita Boulevard, and moving toward the north, as Reservoir 6, Reservoir 5, and Reservoir 7, respectively. (*Id.* at Tab 60 [COLA 1]; *id.* at Tab 8 [Vollmer Dep.] at 34:25-35:12, 36:4-9, 36:19-37:3.)

<sup>6</sup> All of the fact citations in this section refer to documents submitted with Barclay’s January 21, 2014 submission to the Regional Board, attached to the Declaration of Patrick W. Dennis in Support of Petition For Review as Exhibit TTT. This exhibit includes Barclay’s letter, Tabs 1-359, the Dagdigian Report, the Shepardson Report, and the Williams Report.

- 1       □ Reservoirs 1 through 4 were located at the Shell Wilmington Refinery and were constructed  
2       by Shell at around the same period in the 1920s as Reservoirs 5, 6, and 7. (*Id.* at [Dagdigian  
3       Report] at p. 3.)
- 4       • Although available information indicates that the reservoirs were primarily used to store crude  
5       oil, there is evidence that other materials, including heavy 160 degree flash point oil, heavy oils,  
6       and bunker fuels were also stored in the reservoirs. (*Id.* at Tab 25 [SOC 120577]; Tab 26 [SOC  
7       120575]; Tab 28 [SOC 120556]; Tab 330 [8/31/2010 Shell Chemical Storage and Use Question-  
8       naire].)
- 9       • The reservoirs leaked during Shell’s operations.
- 10       □ The pattern of contamination now known to exist in columns of high-concentration petroleum  
11       hydrocarbons beneath the bottoms of the reservoirs shows that most of the contamination  
12       leaked from joints where the concrete walls and floors in the reservoirs were joined. (*Id.* at  
13       [Dagdigian Report] at p. 31.)
- 14       □ Shell has produced two documents in the *Acosta* Litigation that confirm these leaks were  
15       known by Shell as early as 1943. (*Id.* at Tab 23 [SOC 120589-590] at 120589 [“Reservoir  
16       No. 6 . . . 1943 Repair leak in concrete lining”]; Tab 22 [SOC 120591-594] at 120593 [“Res-  
17       ervoir No. 6 . . . 1943 Repair leak in concrete lining”].)
- 18       □ In fact, Reservoir 6, which Shell reported to be leaking in 1943, was also reported by Shell to  
19       be leaking 16 years later in 1959. (*Id.* at Tab 24 [SOC 120584-585] at 120584.)
- 20       • Shell ceased its active operation of the Site in 1959. (*Id.* at Tab 26 [SOC 120575] [“The reser-  
21       voirs are essentially empty at this time, and are held on the basis of stand-by storage.”].)
- 22       □ While documents indicate that Shell kept the property available even after that time for poten-  
23       tial use as a standby storage facility, there is no evidence as to whether it actually used the  
24       Site again or, if it did, for what purpose.
- 25       □ Throughout the late 1950s and early 1960s, Shell received various offers to purchase or oth-  
26       erwise use the Site. Shell organized inspections of the Site for potential purchasers and ob-  
27       tained appraisals of the likely value of the Site during this time. (*Id.* at Tab 48 [SOC 120536];  
28       Tab 29 [SOC 120544-120545].)
- 29       □ In 1959, someone at Shell, in an internal memo, pointed out that the Site was no longer being  
30       used for crude oil storage purposes and Reservoir 7 “constitute[s] an *attractive nuisance*  
31       which is a matter of some concern to Wilmington Refinery officials because of the possibility  
32       of children entering and being injured or killed.” (*Id.* at Tab 24 [SOC 120584-120585] at  
33       120585, italics added.)

34       **C. Activity Increased At The Site After A Tragic Death Occurred In March 1965.**

- 35       • In March 1965 there was an unfortunate accident at the Site resulting in the death of a young  
36       child. (*Id.* at Tab 1 [Harkavy Dep.] at 286:12-23, Ex. 38.)
- 37       □ Changes were made between January 1965 and September 1965 that served to eliminate  
38       sumps and other low points on the property. Shell owned the Site at the time and presumably  
39       did this work. (*Id.* at [Dagdigian Report] at pp. 92, 95-97; Tab 7 [Bach Dep.] at 35:24-40:5;  
40       Tab 8 [Vollmer Dep.] at 34:25-39:5, 87:2-88:13 [“the berm that runs right through there... had  
41       been removed already”].)

1           **D.     Barclay Signed An Agreement To Purchase The Site From Shell On October 20,**  
2           **1965.**

- 3     • Richard Barclay signed a formal offer to purchase the Site from Shell on October 20, 1965.<sup>7</sup> (*Id.*  
4     at Tab 33 [SOC 22-23].) Terms of the agreement included, among other things:
- 5         □ All underground pipes on the property to be removed.
  - 6         □ Close of escrow contingent on zone changing from heavy industrial (M-2) to residential (R-  
7         1).
  - 8         □ Barclay to obtain engineering report on the Site.
- 9     • Barclay was not told at the time of purchase (nor at any other time) about leaks in the reservoirs.  
10    (*Id.* at Tab 2 [Curci Dep.] at 52:8-23; Tab 7 [Bach Dep.] at 64:16-65:16; Tab 8 [Vollmer Dep.] at  
11    67:1-11.)

12           **E.     Between December 15, 1965 And January 1966, After Shell Gives Barclay Per-**  
13           **mission, Barclay's Soils Engineer Entered The Site, And Barclay's Supervisor**  
14           **And Grading Contractor Followed Later In January 1966.**

- 15     • In a letter dated December 15, 1965, Shell gave Barclay permission to enter the Site to begin de-  
16     commissioning the former reservoirs so that the land could be used for residential housing. (*Id.* at  
17     Tab 42 [SOC 58-61].)
- 18     • Barclay's soils engineer, Pacific Soils Engineering, Inc. ("Pacific Soils") entered the property  
19     sometime before January 7, 1966 to perform its preliminary soils investigation. (*Id.* at Tab 66  
20     [CARSON 348-354].)
- 21         □ In the Preliminary Soils Report, dated January 7, 1966, Pacific Soils indicates the "results of  
22         [its] field investigation." (*Id.* at Tab 66 [CARSON 348-354] at 348.) That investigation took  
23         place between December 15, 1965, the date of the letter in which Shell gave Barclay permis-  
24         sion to have its contractors enter the Site, and January 7, 1966, the date of the report.
  - 25         □ The Preliminary Soils Report states that "[w]ork is underway at the present time to waste  
26         from the site the water and sludge present in the reservoirs." (*Id.*)
  - 27         □ A second soils report was issued on January 27, 1966, modifying the first in certain respects.  
28         (*Id.* at Tab 44 [CAR 293-294].)

21     <sup>7</sup> As described in our 2011 Letter, at this time, Richard Barclay was representing a development  
22     business, which acted through Lomita Development as the purchaser of the Site. (Ex. TTT  
23     [1/21/14 Ltr.] at Tab 2 [Curci Dep.] at 31:14-32:6, 46:9-47:8, 296:6-297:25; Tab 1 [Harkavy  
24     Dep.] at 69:16-22.) Lomita Development was a joint venture formed between entities controlled  
25     by Richard Barclay, his brothers Donald and Robert, Mike Hollander, and Shurl Curci. (*Id.* at  
26     Tab 134 [BHC 50-82]; Tab 43 [SOC 71-72].) All of these entities were rolled up into a corpora-  
27     tion that was later incorporated as the entity now named Barclay Hollander Corporation, which  
28     was acquired by Castle & Cooke, Inc. in 1969, and Castle & Cooke, Inc. later changed its name to  
Dole Food Company, Inc. (*Id.* at Tab 133 [BHC 3-6]; Tab 135 [BHC 106-107]; Tab 136 [BHC  
133-134]; Tab 355 [Amended Statement and Designation by Foreign Corporation dated  
8/12/1991].) The Revised CAO properly does not name Dole as a responsible party since Dole  
had nothing to do with the Carousel development; it is only Barclay's present-day corporate par-  
ent. (*Id.* at Tab 333 [9/15/2011 Ltr.] at pp. 12-13.) Accordingly, it would have been improper to  
name Dole in the Revised CAO no matter what the outcome with respect to Barclay. (*Id.* at Tab  
333 [9/15/2011 Ltr.] at pp. 23-25.)

- 1 • Barclay’s grading contractor, Lee Vollmer, and Barclay’s job supervisor at that time, George  
2 Bach, both recall in their sworn testimony that they arrived to begin demolition and grading oper-  
3 ations in late January 1966. (*Id.* at Tab 7 [Bach Dep.] at 37:19-24; 50:7-12; 318:12-21; 320:14-  
4 18; Tab 8 [Vollmer Dep.] at 36:10-14; 37:16-19; 92:20-23; 146:25-147:3; 275:18-23.)
- 5 • Both Bach and Vollmer also recall that Reservoirs 5 and 6 were completely clean when they ar-  
6 rived; Reservoir 6 (next to Lomita Boulevard) and Reservoir 5 (the middle reservoir) had no re-  
7 sidual materials remaining in them. (*Id.* at Tab 8 [Vollmer Dep.] at 34:25-35:12; 37:7-15;  
8 141:17-142:4; Tab 7 [Bach Dep.] at 40:12-24, 50:18-51:1.) “[B]oth of them were very clean, re-  
9 ally . . . [j]ust plain concrete . . . [and] looked like they had never been used for anything. They  
10 were that clean” and required no further work to rid them of oil or other materials. (*Id.* at Tab 8  
11 [Vollmer Dep.] at 34:25-35:12; 37:7-15; 141:17-142:4.)
- 12     ▫ In a letter to Barclay dated October 25, 1965, however, Shell indicated that certain quantities  
13 of liquids remained in all three of the reservoirs at the Site. (*Id.* at Tab 36 [SOC 45-46] at 45.)
- 14 • It is not known who removed the residual materials that had been reported in the October 25,  
15 1965 letter to be present in Reservoirs 5 and 6, but which was no longer present when Vollmer  
16 and Bach arrived in January. Nor does the soils report dated January 7, 1966 identify who was  
17 performing the “work” during the time of its own preliminary soils investigation (12/15/65 to  
18 1/7/66), which it reported was “underway at the present time to waste from the site the water and  
19 sludge present in the reservoirs.”

**F. The Pacific Soils January 7, 1966 Preliminary Soils Report Set The Stage For  
Demolition And Burial Of The Concrete In Place, Followed By Spreading And  
Compaction Of Berm Soil In Former Reservoirs, None Of Which Demonstrates  
“Explicit Knowledge” By Barclay Of Contamination.**

- 20 • Pacific Soils issued its “Preliminary Soils Report” on January 7, 1966. (*Id.* at Tab 66 [CARSON  
21 348-354].)
- 22 • The “preliminary soils investigation” described in the Preliminary Soils Report included the fol-  
23 lowing:
  - 24     ▫ “Due to the low permeability of the surface soils, water tends to pond in the topographically  
25 low areas of the tract.” (*Id.* at p. 349.)
  - 26     ▫ “An old sump, reported to be only three feet in depth” was identified immediately to the east  
27 of Reservoir 5. (*Id.*)
  - 28     ▫ Eight 24-inch borings were taken, ranging in depth from 21 to 35 feet. (*Id.*) Logs of the bor-  
ings were attached. (*Id.* at pp. 352-54.) There was no mention of oil in the logs.
  - “In addition, several cuts were made in the earth berms thereby allowing the material to be  
classified.” (*Id.* at p. 349.) There was no mention of oil in this berm soil anywhere in the  
construction files.
- The Preliminary Soils Report also “includes . . . recommendations for developing the parcel of  
property.” (*Id.* at p. 348.) These included the following:
  - “In order to develop the property it will be necessary to fill in the reservoirs and flatten the ex-  
isting berms.” (*Id.* at p. 349.)
  - Pacific Soils provided two options for disposing of the concrete lining: “The concrete lining  
of the reservoirs may either be [1] wasted from the site or [2] buried in the fill.” (*Id.*)

- 1       □ Although the decision to bury the concrete as the means of disposal had not yet been made, it
  - 2       is Pacific Soils' discussion of what would be required if this second alternative were adopted
  - 3       that formed the basis on which the requirements for handling the concrete were eventually
  - 4       built by Pacific Soils and the County Engineer. In this introduction to the subject of burying
  - 5       the concrete as a means of disposal, Pacific Soils recommended that if a decision was made to
  - 6       bury the concrete in place, the following safeguards would be needed:
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- The concrete must be broken up "so as not to impede percolation of subsurface water." (*Id.* at 350.)
    - The concrete must be "buried deep enough in the fill so as not to interfere with future construction" and "[n]o concrete shall be placed within 4 feet from the final finished grade." (*Id.*)
  - Because the developers eventually chose to bury the concrete in place, various aspects of this protocol, with a few modifications, were carried forward and repeated in soils reports dated January 27, 1966, January 31, 1966, and March 11, 1966. (*Id.* at Tab 44 [CAR 293-294]; Tab 68 [CARSON 259]; Tab 74 [CARSON 251-258].)
  - This protocol does not differ significantly from the ones used for decommissioning reservoirs at the time in other nearby locations and is consistent with the protocol used for decommissioning Reservoirs 1 and 2 at the Shell Refinery even as recently as the mid-1990s, which was approved by this Regional Board. (*Id.* at [Shepardson Report] at pp. 25-28; [Dagdigian Report] at pp. 20, 101.)

**G. The County Engineer Took Firm Control Of The Oversight Of Demolition And Grading Of The Former Reservoirs Between January 28 And February 4, 1966.**

- On January 28, 1966, Eugene Zeller, the head of the County Engineer's Grading Office, issued a hand-written Grading Correction Sheet commenting on Pacific Soils' reports dated January 7 and 27, 1966. (*Id.* at Tab 67 [CARSON 293].)
  - Zeller approved the plan to leave the ripped concrete in place. He imposed as conditions that Barclay "crack the slab for purposes of drainage and compaction," as Pacific Soils had recommended, and he added a new condition of approval that "[a] called inspection is required for concrete placement." (*Id.*)
  - Zeller also required Barclay to bury the concrete even farther below ground than Pacific Soils recommended, requiring a minimum of seven feet of soil above the ripped concrete tank bottoms instead of the four feet recommended by Pacific Soils. (*Id.* at Tab 67 [CARSON 293] ("No concrete shall be placed in the fill within 7' of finish grade.")) Zeller testified that the County was "impos[ing] a more strict requirement than what the soils engineer recommended." (*Id.* at Tab 9 [Zeller Dep.] at 34:1-9; 37:23-38:7.)
- The requirement for a "called inspection" establishes that the County Engineer exercised considerable oversight over this project. In his deposition, Zeller explained that the County Engineer's office "wanted to be out there to see how they were doing it before . . . [the reservoir] was all filled up" with fill soil. (*Id.* at Tab 9 [Zeller Dep.] at 38:17-25; 39:20-40:22.)
  - Each time Barclay or its subcontractors undertook to place the broken concrete at the bottom of a reservoir before covering it with fill soil, it was necessary to notify the County Engineer's office so that an inspector could be present to observe. (*Id.* at Tab 9 [Zeller Dep.] at 40:14-22.) In other words, the County Engineer's office supervised this process closely. (*Id.* at Tab 8 [Vollmer Dep.] at 109:6-11.)

- 1 • On January 31, 1966, Pacific Soils issued another soils report memorandum making the changes  
2 Zeller required and complying with the requirements. (*Id.* at Tab 68 [CARSON 259].)
- 3 • The County Engineer inspector in the field with whom Zeller communicated was Bill Berg. (*Id.*  
4 at Tab 9 [Zeller Dep.] at 40:23-41:6; 41:24-44:3.)
- 5 • In a hand written memorandum from Zeller to Bill Berg dated February 2, 1966, only five days  
6 after the date of the Grading Correction Sheet, Zeller gave the following direction to Berg: “The  
7 site of this grading will eventually be a subdivision. Extensive concrete will be placed in the fill  
8 (see Notes 27-30 and reports). Please contact me when concrete is to be placed in fill.” (*Id.* at  
9 Tab 69 [CARSON 274].)
- 10 ➤ Zeller testified that the purpose of this note was to make sure that Berg, who was the inspector  
11 in the field, was aware of Zeller’s directive that an inspector from the County Engineer be  
12 present during concrete placement “to see how it complied or how they were dealing with it in  
13 reference to the submitted soils engineer’s plans.” (*Id.* at Tab 9 [Zeller Dep.] at 44:8-13.)
- 14 ➤ Berg was the County Engineer’s “most accomplished grading inspector.” (*Id.* at Tab 9 [Zeller  
15 Dep.] at 42:19-43:2.)
- 16 ➤ Berg would not have approved any procedures if he thought they would cause conditions to  
17 become unsafe for future homeowners at the Site. (*Id.* at Tab 9 [Zeller Dep.] at 45:10-24.)
- 18 • Thereafter, the County Engineer had an inspector in the field each time there was concrete place-  
19 ment, and Barclay’s grading contractor testified that they “did come [to the site] on a several-  
20 times-a-week basis.” (*Id.* at Tab 12 [Anderson Dep.] at 38:14-39:20; Tab 8 [Vollmer Dep.] at  
21 71:13-72:1; 112:6-12.)

22 **H. Despite Intermittent Delays, A Shell Inspector Confirmed In A Memorandum**  
23 **Dated August 15, 1966 That The Last Of The Residual Materials Left Behind By**  
24 **Shell In Reservoir 7 Had Been Removed Completely.**

- 25 • When Barclay arrived at the Site to begin grading, the only reservoir where residual materials still  
26 remained was Reservoir 7. (*Id.* at Tab 66 [CARSON 348-354] at 350; Tab 2 [Curci Dep.] at  
27 86:22-87:17; Tab 7 [Bach Dep.] at 96:20-97:1; 117:13-119:3; Tab 8 [Vollmer Dep.] at 37:7-24).
- 28 • Shell sent inspectors to the property to check on progress until Barclay’s work on the reservoirs  
was completed. A Shell memorandum confirmed in April 1966 that Reservoirs 5 and 6 were  
“empty” and “clean.” (*Id.* at Tab 47 [SOC 120420-120421] at 120420.)
- Reporting on the status of the reservoir work, a Shell inspector confirmed that Reservoirs 5 and 6  
were empty in May 1966. (*Id.* at Tab 49 [SOC 120418-120419].)
- Removal of the materials from Reservoir 7 was achieved as follows:
  - Readily-flowing liquid in the reservoir was siphoned out with vacuum trucks provided by  
Barclay’s subcontractor, Chancellor & Ogden. (*Id.* at Tab 8 [Vollmer Dep.] at 153:11-21,  
159:24-160:3; Tab 7 [Bach Dep.] at 135:12-25.) Using hoses to connect the liquid to their  
vacuum trucks, Chancellor & Ogden siphoned out as much liquid as they were able, but most-  
ly only water was removed, leaving a “tarry substance,” an oil-based “gunk” reportedly simi-  
lar to what could be seen at the “La Brea Tar Pits” in the bottom of Reservoir 7, and which  
was too thick for the vacuum trucks to siphon up without assistance. (*Id.* at Tab 7 [Bach  
Dep.] at 117:3-118:3; Tab 8 [Vollmer Dep.] at 162:4-9; 163:1-9; 249:12-17.)
  - That assistance was provided by the grading operator, Vollmer Engineering, which used  
earthmoving equipment to create a small dam or berm out of sand and soil and used that to

1 “crowd” the thick “gunk” toward the Chancellor & Ogden vacuum trucks until it formed a  
2 critical mass. (*Id.* at Tab 8 [Vollmer Dep.] at 165:2-166:18.) Then a heating coil was  
3 used to lower the viscosity of the mass so that it could be siphoned up into the trucks and  
4 taken offsite for disposal. (*Id.* at Tab 7 [Bach Dep.] at 117:13-118:3.) All of the remain-  
ing liquid and waste materials from inside Reservoir 7 were taken off site in this manner.  
(*Id.* at Tab 7 [Bach Dep.] at 119:15-22; Tab 8 [Vollmer Dep.] at 151:21-152:3; 153:11-21;  
159:14-160:3.)

5 ➤ The make-shift soil berm used to “crowd” the liquid was pushed across the top of the con-  
6 crete tank bottom and “any of the dirt that had been contaminated with the gunk was  
7 hauled off-site.” (*Id.* at Tab 7 [Bach Dep.] at 117:13-119:3; Tab 8 [Vollmer Dep.] at  
166:5-18; 167:13-18.)

8 □ By July 1, 1966, a Shell inspector reported only “a shallow layer of oil” in Reservoir 7. (*Id.* at  
9 Tab 50 [SOC 120415].) By August 15, 1966, the remainder of the material had been cleaned  
up entirely, and Shell reported internally in a memorandum that “[a]ll of the oil has been re-  
moved from the reservoirs.” (*Id.* at Tab 52 [SOC 120410].)

### 10 **I. The Concrete Floors Were Ripped Only After They Were Clean, And The Fact** 11 **That They Were Ripped Has Been Confirmed By Multiple Sources.**

- 12 • Arriving in late January 1966, Barclay personnel found a relatively clean Site.
  - 13 □ Witnesses testified that areas that had previously been designated as oil sumps on maps were  
14 no longer active sumps. (*Id.* at Tab 7 [Bach Dep.] at 136:17-137:16; 139:24-140:16; 319:14-  
321:3; Tab 8 [Vollmer Dep.] at 134:2-17; 144:18-145:16; 278:22-280:22.)
  - 15 □ They saw no ponding of oil and no oil sumps. (*Id.* at Tab 8 [Vollmer Dep.] at 96:7-11 (“What  
16 I remember is that there [was] no open ponding anywhere”), 95:11-96:2 (“I don’t recall seeing  
any ponds anywhere”), 276:4-10 (“I never saw any oil.”); Tab 7 [Bach Dep.] at 35:24-36:10;  
38:7-17 (“there was no liquid in there”), 113:15-114:1 (“I never saw ponding.”).)
- 17 • While Barclay was removing the materials from Reservoir 7, it also began the grading work on  
18 Reservoirs 5 and 6, which were already clean. (*Id.* at Tab 8 [Vollmer Dep.] at 34:25-35:12; 37:7-  
19 15; 141:17-142:4; Tab 7 [Bach Dep.] at 40:12-24, 50:18-51:1; 128:22-130:12; Tab 47 [SOC  
120420-120421]; Tab 344 [CARSON 463-464; CARSON 467-469; CARSON 477]; Tab 348  
[County of Los Angeles supervised grading certifications for 28086 dated 3/1/1967, 4/3/1967,  
20 and 4/17/1967].)
  - 21 □ Only after the materials in Reservoir 7 had been removed was the concrete ripped in the man-  
ner described for Reservoirs 5 and 6. (*Id.* at Tab 8 [Vollmer Dep.] at 86:2-87:1; 136:6-  
138:19; Tab 7 [Bach Dep.] at 161:22-165:12.)
  - 22 □ A witness provided this description of the process: “break up or crack the existing [bottom]  
23 slab, . . . and then to bring down the concrete that was lining the sides broken up and mix that  
24 with soil and make a . . . layer of material . . . [t]he soil and the broken-up concrete from the  
25 side walls, that was approximately 1 foot thick. And that was all compacted and watered and  
compacted in place, and then additional fill placed over the top of it.” (*Id.* at Tab 7 [Bach  
Dep.] at 163:5-17.)
  - 26 □ Once the side walls were brought down, the “weight of the . . . [f]ifty-ton Caterpillar D9 bull-  
27 dozer crushed it up pretty good” and then they used “a vibrating sheep’s foot . . . to effectively  
28 concentrate the dirt . . . between any cracks in the distribution of the concrete that was on the  
top of the original floor.” (*Id.* at Tab 8 [Vollmer Dep.] at 136:15-137:6.)



- 1       □ The fundamental reason for breaking the concrete was so that “when you're finished [it]  
2       would allow moisture, water, rainwater to ultimately seep through the concrete floor and not  
3       create any problems in terms of it being overly wet underneath houses that would be built  
4       there.” (*Id.* at Tab 8 [Vollmer Dep.] at 100:25-102:7.)
- 5       • Not only do all of the witnesses confirm that the concrete was broken up, but there is significant  
6       documentary evidence corroborating their recollections. (*Id.* at Tab 62 [CARSON 411]; Tab 118  
7       [CARSON 419]; Tab 69 [CARSON 274]; Tab 66 [CARSON 348-354] at 349-350; Tab 44 [CAR  
8       293-294]; Tab 74 [CARSON 251-258]; Tab 87 [CARSON 378-380]; Tab 100 [CARSON 445-  
9       450]; Tab 99 [CARSON 430-433]; Tab 102 [CARSON 397-403]; Tab 108 [CARSON 387-391];  
10       Tab 110 [CARSON 340-344]; Tab 105 [CARSON 552-557].)
- 11       • In addition:
- 12       □ Berg approved the broken concrete following his personal inspection. (*Id.* at Tab 62 [CAR-  
13       SON 411]; *id.* at Tab 118 [CARSON 419].)
- 14       □ Pacific Soils confirms in its reports that the trenching was performed. (*Id.* at Tab 74 [CAR-  
15       SON 251-258] at 252 (“Nearly 6000 lineal feet of trench were punched through the concrete  
16       floor using a truck mounted rig.”); Tab 87 [CARSON 378-380] at 379 (“Two of the punched  
17       trenches mentioned in the referenced report ran through the test area.”).)
- 18       □ All of the supervised compaction reports located in the City of Carson’s files confirm that  
19       “[p]rior to placement of compacted fill in the reservoir . . . trenches were punched through the  
20       concrete floor . . . Broken concrete, from the reservoir wall, was placed in the reservoir bot-  
21       tom. The concrete was thoroughly mixed with soil, watered and compacted in-place with a  
22       vibratory roller.” (*Id.* at Tab 108 [CARSON 387-391] at 387-388; Tab 110 [CARSON 340-  
23       344] at 341; Tab 99 [CARSON 430-433] at 430; Tab 102 [CARSON 397-403] at 397-398;  
24       Tab 105 [CARSON 552-557] at 552-553; Tab 100 [CARSON 445-450] at 445-446.)
- 25       • The purpose of cracking the concrete was to avoid drainage problems, and the fact that there nev-  
26       er were drainage problems at Carousel is strong evidence that the concrete protocol was followed.  
27       (*Id.* at Tab 10 [Banfield Dep.] at 55:6-56:7.)
- 28       • Pacific Soils also provided specific measurements to confirm that concrete was buried below at  
least seven feet of fill, some of which confirmed that in some locations there was over seven feet  
of soil above each tank bottom. (*Id.* at Tab 105 [CARSON 552-557] at 553.)
- Pacific Soils documented compliance with its protocols in the Final Report it prepared for each  
tract, where it confirmed in each instance that the method of concrete burial was performed ac-  
cording to the protocol. (*Id.* at Tab 110 [CARSON 340-344]; Tab 105 [CARSON 552-557].)
- In one instance in Reservoir 5, Barclay contractors completely removed the concrete tank floors  
where a 7 foot fill cover was not possible. (*Id.* at Tab 110 [CARSON 340-344] at 341.)

**J.       Between February and August 1966, During Grading Of The Site, Barclay Im-  
plemented A Protocol For Removing Oil-Saturated Soil From The Site.**

- Barclay and its contractors instituted a protocol for segregating and removing from the Site any  
oil saturated soil that was found. (*Id.* at Tab 7 [Bach Dep.] at 326:4-327:1; Tab 8 [Vollmer Dep.]  
at 167:13-18.)
- The concern at that time was that oil-saturated soil would not provide an adequate foundation  
for building because it would not compact sufficiently to support a structure. (*Id.* at Tab 7  
[Bach Dep.] at 105:8-110:11; Tab 8 [Vollmer Dep.] at 238:20-239:12.)

- 1       □ There were no concerns regarding the potential human health hazards caused by oil-saturated  
2 soil. (*Id.* at Tab 7 [Bach Dep.] at 73:6-75:14; Tab 8 [Vollmer Dep.] at 239:13-24; [Williams  
3 Report] at 12-21.)
- 4       □ If any soil “was questionable, [Barclay] would put it into the stockpile and get rid of it” off  
5 site. (*Id.* at Tab 7 [Bach Dep.] at 106:19-107:16.) No oil-saturated soil was kept on site. (*Id.*  
6 at 110:13-111:7.)
- 7       □ There is only one instance of firsthand testimony regarding a specific incident where oil-  
8 saturated soil was encountered on site. That soil was, however, removed from the site in ac-  
9 cordance with that procedure. (*Id.* at 114:2-115:6; 55:16-56:8.)

10       **K.     The Only Report Of Oil In Any Pacific Soils Report Is Found In A Memorandum**  
11       **Dated March 11, 1966 Describing The Results of A “Drainage Study” Where**  
12       **“Oil Stains” And “Oily” Soil Were Encountered In Borings To Test Soil Permea-**  
13       **bility.**

- 14       • As another safeguard against drainage problems arising from disposal of the concrete in place,  
15 Pacific Soils performed a drainage study, which it reported on in a March 11, 1966 memorandum.  
16 (*Id.* at Tab 74 [CARSON 251-258].) As part of the drainage study, Pacific Soils tested the per-  
17 meability of the soil beneath the reservoir floor. Six borings were dug beneath the recently ripped  
18 concrete floor, and the logs of those borings, attached to the memorandum, reveal references to  
19 “oil stain[s],” “oily” soil, and smells of oil and petroleum. (*Id.* at 255-56.) Based on these six  
20 logs, Pacific Soils reported that “the first three feet found directly beneath the slab tend to be silty  
21 and clayey sands which are highly oil stained.” (*Id.* at 252.)
- 22       □ “The purpose of this investigation,” the memorandum explains, “was to determine the extent  
23 and type of subdrainage system necessary because of the existing bottom slab.” (*Id.* at 251.)  
24 Because of the results of the study, it was determined that no subdrainage system was neces-  
25 sary. (*Id.* at 253.)
- 26       □ Soil extracted from four of those borings was taken to the lab and tested for permeability. (*Id.*  
27 at 251.)
- 28       □ “The laboratory results show[ed] that even though the soils [we]re oil stained they [we]re still  
permeable.” (*Id.* at 252.)
- Based on these lab results and certain identified assumptions, which it “considered conserva-  
tive,” Pacific Soils concluded that “the available drainage area is sufficient to handle all ex-  
pected percolating water.” (*Id.* at 253.)
- A test in the field later confirmed these laboratory results. (*Id.* at Tab 7 [Bach Dep.] at  
183:12-184:3.)
- The memorandum says nothing further about the oil stains—nothing about further investiga-  
tion, no concern about toxicity or human health, and no mention of the possibility that the “oil  
stains,” which show less oil as one goes deeper, are evidence of a larger contamination. (*Id.*  
at Tab 74 [CARSON 251-258].) Eventually, the oil stains were left where they were found,  
buried no less than seven feet below the surface. (*Id.* at Tab 87 [CARSON 378-380].)
- The County Engineer was fully aware of the oil stains and participated in consideration of their  
possible effect on permeability. The memorandum dated March 11, 1966 was copied in triplicate  
to the County Engineer, naming Eugene Zeller’s boss. (Tab 74 [CARSON 251-258] at 253.)  
Zeller testified that any document sent to his boss would have come also to him and he therefore  
would have seen it. (*Id.* at Tab 9 [Zeller Dep.] at 71:16-72:19.) Bach, a licensed engineer em-  
ployed by Barclay, recalls discussing the oil stains with Bill Berg, the inspector for the County

1 Engineer at the Site during the field test performed to confirm the results of the laboratory test.  
2 (*Id.* at Tab 7 [Bach Dep.] at 182:15-185-20.)

- 3 • Barclay did not view the “oil stains” as significant either in amount or effect. (*Id.* at Tab 7 [Bach  
4 Dep.] at 347:1-22; 350:15-351:5.)
  - 5 □ Specifically, Bach, who at the time had reviewed the March 11, 1966 memorandum and dis-  
6 cussed it with the soils engineer who made the physical observations reported in the docu-  
7 ments, concluded that “none of it was really significant at that time” and “[o]ther than [verifying  
8 we had percolation], there wasn’t anything that we were really concerned about.” (*Id.* at  
9 Tab 7 [Bach Dep.] at 347:8-22.)

7 **L. In Reservoir 6, After The Concrete Floor Had Been Ripped, The Walls Broken  
8 On Top Of The Floor, And A Vibrating Sheep’s Foot Used To Settle Berm Soil  
9 Into The Cracks, Barclay Began Spreading More Clean Fill Soil In 8-Inch Lifts  
10 On Top Of The Broken Concrete In A Portion Of The Former Reservoir.**

- 10 • The soil used to fill the former reservoirs came from the reservoir berms, and was spread in 8 to  
11 12-inch lifts and compacted until the ground surface was brought to level grade. (*Id.* at Tab 7  
12 [Bach Dep.] at 142:11-19; 143:8-11; Tab 8 [Vollmer Dep.] 86:2-87:1; 117:13-118:10; 137:14-  
13 138:19; Tab 102 [CARSON 397-403] at 397-398; Tab 87 [CARSON 378-380] at 378-379; Tab  
14 100 [CARSON 445-450] at 445-446; Tab 105 [CARSON 552-557] at 552-553; Tab 110 [CAR-  
15 SON 340-344] at 340-341; Tab 99 [CARSON 430-433] at 430-431; Tab 108 [CARSON 387-  
16 391] at 387-388.)
- 17 • The fill soil used to place compacted fill in the former reservoirs was taken first from the primary  
18 berms forming each reservoir, which was used until the reservoirs reached “what elevation it was  
19 needed to bring . . . the tank to [daylight grade]” and soils from other areas of the property were  
20 only used to achieve “finish grade.” (*Id.* at Tab 12 [Anderson Dep.] at 20:9-21:1; 27:1-31:5.)
- 21 • All of the witnesses who were physically present during grading in the former reservoirs testified  
22 that the fill soil taken from the berms was clean when they put it in place. Only four individuals  
23 are still living, who still have the capacity to testify, and who were present during this grading and  
24 compaction process. All four have given deposition testimony in the Litigation, under oath and  
25 subject to cross-examination by lawyers for both Shell and plaintiffs. All four of them testified  
26 that they had a clear view of the soil each time one of the shallow lifts was spread, and they saw  
27 no oil in the fill soil. (*Id.* at Tab 7 [Bach Dep.] at 105:8-107:16; 143:23-144:4; Tab 8 [Lee  
28 Vollmer Dep.] at 86:2-87:1; Tab 12 [Anderson Dep.] at 35:9-36:8; Tab 13 [Al Vollmer Dep.] at  
44:3-15.)

21 **M. Title Passed On October 1, 1966; Rough Grading Was Completed By the End of  
22 1968; And Grading Bonds Were Released By January 23, 1970.**

- 23 • Barclay’s designee took title to the Site on October 1, 1966. (*Id.* at Tab 340 [SOC 120814].)
- 24 • Based on the date of the last compaction tests reported in Pacific Soils’ soils reports, the three  
25 reservoirs were completely filled in to level grade by May 1968. (*Id.* at Tab 108 [CARSON 387-  
26 391]; Tab 102 [CARSON 397-403]; Tab 99 [CARSON 430-433]; Tab 100 [CARSON 445-450];  
27 Tab 105 [CARSON 552-557]; Tab 110 [CARSON 340-344]; Tab 112 [CARSON 345-347]; Tab  
28 123 [1/30/1967 report for Tract 28086]; Tab 125 [3/10/1967 report for Tract 28086].) Certain  
compaction tests post-date May 1968 and were completed by November of 1968, but these tests  
relate to installation of utilities as opposed to filling in the reservoir profiles. (*Id.* at Tab 112  
[CARSON 345-347].) Rough grading to fill in the reservoirs and bring the property up to the  
rough grade level was completed approximately in November 1968, based on the date available  
documents show the County approved all rough grading at the site. (*Id.* at Tab 341 [CARSON  
275]; Tab 344 [CARSON 463-464, 467-469, 477]; Tab 348 [County of Los Angeles supervised

1 grading certifications for Tract 28086 dated 3/1/1967, 4/3/1967, and 4/17/1967].) The last date  
2 showing final grading approval on the documents retained in files of the County is in August  
3 1969. (*Id.* at Tab 342 [CARSON 278-282, 285]; Tab 343 [CARSON 283]; Tab 344 [CARSON  
4 463-464, 467-469, 477]; Tab 345 [CARSON 421, 465-466, 470-472, 478-483]; Tab 346 [CAR-  
5 SON 473-476]; Tab 347 [CARSON 562, 565, 567-570]; Tab 348 [County of Los Angeles super-  
6 vised grading certifications for Tract 28086]; Tab 349 [County of Los Angeles final grading certi-  
7 fication for Tract 28086].)

- 8 • The County Engineer released all remaining grading bonds by January 23, 1970,<sup>8</sup> which signified  
9 “[c]ompletion of the job and final approval by the inspector” and that the “project was not being  
10 left in a hazardous condition.” (*Id.* at Tab 6 [Nehrenberg Dep.] at 90:18-91:9.) By that date, Bar-  
11 clay, Pacific Soils, and the County Engineer had determined that conditions in the soil were safe  
12 to proceed with construction of the residential subdivision. (*Id.* at Tab 55 [CAR 112]; Tab 117  
13 [CARSON 320]; Tab 116 [CARSON 422]; Tab 114 [CARSON 455]; Tab 6 [Nehrenberg Dep.]  
14 at 90:18-91:9; [Williams Report] at 35-36, 57; [Shepardson Report] at 9.)

#### 15 **IV. Procedural Facts**

##### 16 **A. The Regional Board Orders Shell To Investigate The Site.**

17 On May 8, 2008, the Regional Board issued a Water Code Section 13267 Order to Shell re-  
18 quiring an investigation of the Site. (*Id.* at Tab 328 [May 8, 2008 Section 13267 Regional Board Or-  
19 der to Shell].) In response to that 2008 Order, with the assistance of its consultants URS and Geosyn-  
20 tec, Shell has conducted a series of investigations to evaluate impacts associated with the former oil  
21 storage operations at the Site. (Ex. F [Ayalew Dep.] at Ex. 12 [URS 9/29/2010 Plume Delineation  
22 Report].) These investigations were begun in 2008 and are continuing through the present day and  
23 now subject to the CAO. They resulted in considerable data, which have been provided to the Re-  
24 gional Board in publicly available reports. That data have revealed the presence of residual petrole-  
25 um hydrocarbons both in the deep soil beneath the former reservoir bottoms (“Deep Contamination”)  
26 and in the shallow zone above the former reservoir bottoms (“Shallow Contamination”). (*Id.* at 6-1.)  
27 As discussed below, these recently-discovered residual petroleum hydrocarbons, both shallow and  
28 deep, were not known to Barclay during the limited time it owned and redeveloped the Site. (Ex.  
TTT [1/21/14 Ltr.] at [Dagdigian Report] at pp. 6-8.)

<sup>8</sup> Files produced by Shell and the City of Carson include Bond Releases for three of the four tracts.  
(*Id.* at Tab 55 [CAR 112]; Tab 117 [CARSON 320]; Tab 116 [CARSON 422]; Tab 114 [CAR-  
SON 455].) While we do not have a Bond Release for Tract 28086, we have the associated white  
papers, which provide assurance that grading was properly completed and any required bonds re-  
leased.

1           **B.       The Acosta Plaintiffs File Suit Against Shell, Barclay And Others.**

2           In October 2009, over 1,400 current and former residents of the Site filed suit against Shell,  
3           Barclay, Dole Food Company, and others, alleging claims for property damages and personal injuries  
4           based on Shell’s contamination of the Site. (Ex. UUU.) In January 2013, the City of Carson filed its  
5           own suit against the same defendants, alleging public nuisance and seeking remediation of the prop-  
6           erty. (Ex. UUU [Complaint].)

7           **C.       Shell Demands That The Regional Board Name Dole And Barclay As Dis-**  
8           **chargers.**

9           On July 28, 2010, Shell sent a letter to the Regional Board urging it to name Dole and Barclay  
10          as dischargers. (Ex. TTT [1/21/14 Ltr.] at Tab 132 [7/28/10 Ltr.] at p. 1.) The factual investigations  
11          by Shell revealed that most of the contamination was located beneath the former reservoir bottoms,  
12          where oil had apparently leaked from the reservoirs during Shell’s operations. (Ex. C [Draft CAO] at  
13          p. 5 [“The CPT/ROSY logs also showed that the highest apparent soil impacts occurred at depths of  
14          12 feet bgs, 36 feet bgs, and 40 feet bgs.”].) Shell claimed, however, that contaminants were also  
15          found in the fill soil, which had been placed by Barclay above the former reservoir bottoms and with-  
16          in the perimeters of the former reservoirs. (Ex. TTT [1/21/14 Ltr.] at Tab 132 [7/28/10 Ltr.] at p. 1.)  
17          While Shell did not deny its own status as a discharger, it asked the Regional Board to name Barclay  
18          as a discharger as well because, according to Shell, Barclay brought contaminated fill soil to the Site.  
19          (*Id.* at pp. 10-11.) But as Barclay’s submissions to the Regional Board have shown, Shell’s accusa-  
20          tion was false. (Ex. TTT [1/21/14 Ltr.] at Tab 333 [9/15/11 Ltr.] at pp. 8-9.) In fact, as the filing of  
21          Shell’s lawsuit against Barclay later confirmed, Shell’s real reason for asking to have Barclay named  
22          was to get someone other than Shell to pick up the tab for cleaning up Shell’s mess.

23          **D.       The Regional Board Issues The CAO And It Becomes Final As To Shell.**

24          On March 11, 2011, the Regional Board issued the CAO naming Shell as a responsible party.  
25          (Ex. B [CAO].) Shell never sought review of the CAO, and it became final on April 11, 2011. (Wat.  
26          Code, § 13320, subd. (a).) Less than two weeks later, on April 22, 2011, the Regional Board issued a  
27          Water Code Section 13267 letter to Dole and Barclay, requesting further information regarding  
28          Shell’s allegations. (Ex. TTT [1/21/14 Ltr.] at Tab 332 [4/22/11 ltr.] at p. 1.) By letter dated Sep-

1   tember 15, 2011 (“2011 Letter”), Gibson Dunn, representing Dole and Barclay, refuted Shell’s false  
2   allegations and demonstrated that no new fill soil had been brought onto the Site by the developer,  
3   Barclay. (Ex. TTT [1/21/14 Ltr.] at Tab 333 [9/15/11 ltr.] at pp. 8-9.) This fact—that no fill soil was  
4   brought onto the Site by the developer—has since been confirmed by all other witnesses who have a  
5   recollection of the events. (Ex. TTT [1/21/14 Ltr.] at Tab 7 [Bach Dep.] at 143:8-22; *id.* at Tab 8  
6   [Vollmer Dep.] at 167:13-168:5; 136:6-138:19.) It is thus now clear that all contaminants at the Site  
7   had been discharged by Shell during its 40 plus years of operations, and not by Barclay’s develop-  
8   ment of the Site. (Ex. TTT [1/21/14 Ltr.] at Tab 333 [9/15/11 Ltr.] at pp. 6-9; see also Ex. F [Ayalew  
9   Dep.] at 65:19-66:5 [“In my opinion Barclay Hollander did not bring contaminants into the site.”].)

10           **E.       The Regional Board Charges Shell For Its Time Investigating Barclay.**

11           After refuting Shell’s charges in 2011, Barclay received no further communications from the  
12   Regional Board for nearly two years. In the meantime, Shell was investigating the Site under the  
13   CAO. Thus, as far as Barclay knew, the matter had been put to rest. Indeed, a lawyer for the Re-  
14   gional Board’s Prosecution Team has acknowledged that once the CAO against Shell became final,  
15   the Regional Board had what it needed to move forward with clean-up of the Kast site: “Shell never  
16   petitioned or challenged the original cleanup and abatement order. So they’ll – they’re still responsi-  
17   ble, regardless of who else might be added.” (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional Board  
18   Meeting Tr.] at p. 15.)

19           Notwithstanding, beginning sometime in late 2013, the Regional Board re-opened its investi-  
20   gation of Barclay, illegally charging its staff’s time for that work to Shell. In 2008, the State Board’s  
21   Site Cleanup Program (“SCP”) began invoicing Shell for the Regional Board’s “oversight” work.  
22   (Ex. G [Site Detail Report] at p. 1.) Ostensibly, the invoices were being submitted as part of the State  
23   Board’s Cost Recovery Program for Spills, Leaks, Investigations, and Site Cleanups (“Cost Recovery  
24   Program”), which the State Board instituted pursuant to section 13304(c)(1) of the Water Code. But  
25   recently obtained time entries and invoices (obtained pursuant to a court order and despite the Re-  
26   gional Board’s objections and motion to quash), indicate that the Regional Board billed Shell for  
27   more than just cleanup and abatement costs.

1           The documents establish that the Regional Board billed Shell for the time it spent considering  
2 whether to name Barclay as discharger, the time it spent building an administrative record to do so,  
3 and the time it spent drafting the necessary documents to do so—including even the Revised CAO.  
4 (Ex. G [Site Detail Report] at pp. 11, 34, 38, 82-83.) Prosecutor Teklewold Ayalew testified that  
5 “[w]henever [he] work[s] on the [Kast Property Tank Farm] project,” “Shell is paying for [it].”  
6 (Ex. F [Ayalew Dep.] at 179:8-180:1, italics added.) When asked whether that included the time he  
7 spent considering whether to name Barclay, Ayalew confirmed that time was billed to “*Shell’s ac-*  
8 *count yes.*” (*Id.* at 179:23-180:1, italics added.) A comparison of the Regional Board’s Prosecution  
9 Team’s time entries and the invoices that the State Board sent to Shell confirm that the Regional  
10 Board sought reimbursement from Shell for the time it spent investigating and naming Barclay as a  
11 discharger. (Ex. G [Site Detail Report] at pp. 11, 34, 38, 82-83.) Indeed, the Regional Board even  
12 charged Shell for the time it spent responding to subpoenas that Barclay served in the *Acosta* Litiga-  
13 tion that were seeking information about Shell’s illegal payments to the Regional Board. (See, e.g.,  
14 Ex. F [Ayalew Dep.] at Ex. 3 at p. 4 [noting Ayalew’s time discussing the subpoenas with  
15 McChesney was billed to Shell].)

16           **F.       The July 2013 Notification.**

17           In July 2013, the Regional Board’s counsel informally advised Barclay of the possibility that  
18 an amended order naming Barclay would be circulated for comment. (See Ex. TTT [1/21/14 Ltr.] at  
19 p. 24.) After receiving the July 2013 correspondence from the Regional Board, Barclay presented to  
20 the Regional Board staff much of the same evidence Barclay later submitted in response to the Draft  
21 CAO. (*Id.*) Staff members showed particular interest in the source of contaminants in the fill soil  
22 above the former reservoir bottoms—the fill soil that was put in place by Barclay from 1966 to 1968  
23 to fill in the three former oil reservoirs. (See *id.* at p. 24.) That focus carried over to the Revised  
24 CAO, which contains a finding that Barclay had “explicit knowledge of . . . the presence of residual  
25 petroleum hydrocarbons, and conducted various activities, including partially dismantling the con-  
26 crete in the reservoirs and grading the onsite materials. These activities *spread the waste* at the site,  
27 and *contributed to the migration of the waste* through soil and groundwater.” (Ex. A [Revised CAO]  
28 at p. 10, italics added.)

1           **1. Dr. Jeffrey Dagdigian, An Expert In The Fate And Transport Of Petroleum Hydrocarbons, Explains How The Fill Soil Placed By Barclay In The Former Reservoirs First Became Contaminated Only After Compaction Was Complete Through Upward Movement of Contaminants That Had Been Located Beneath The Reservoir Floor Bottoms Without Barclay’s Knowledge.**

2  
3  
4           In response to this focus on the source of contamination in the fill soil placed by Barclay in  
5 the reservoirs, counsel for Barclay introduced the staff to Dr. Jeffrey Dagdigian of Waterstone Envi-  
6 ronmental, an expert in the movement of petroleum hydrocarbons in the soil. Dr. Dagdigian ex-  
7 plained why the evidence showed that Barclay did not knowingly “spread the waste around” when it  
8 moved soil from the reservoir berms into the former reservoirs.

9           Counsel for Barclay also provided the Regional Board with evidence that all of the eyewit-  
10 nesses to those grading operations reported that they saw no oil in the soil, including providing the  
11 Regional Board with deposition testimony from the only individuals who had testified on the subject,  
12 Lee Vollmer, George Bach, Al Vollmer, and Lowell Anderson, all of whom testified that the fill soil  
13 was clean. (Ex. TTT [1/21/14 Ltr.] at Tab 7 [Bach Dep.] at 105:8-107:16; 143:23-144:4; *id.* at Tab 8  
14 [Vollmer Dep.] at 86:2-87:1; *id.* at Tab 12 [Anderson Dep.] at 35:9-36:8; *id.* at Tab 13 [Al Vollmer  
15 Dep.] at 43:25-44:15.) All four men testified that they had good vantages from which to observe the  
16 soil taken from the berms after it had been spread, and they were in a position to see oil contamina-  
17 tion if there had been any. (*Id.* at Tab 12 [Anderson Dep.] at 35:24-36:8; *id.* at Tab 13 [Al Vollmer  
18 Dep.] at 44:7-19.) The testimony of all four witnesses was given in deposition subject to cross-  
19 examination by lawyers for Shell and the *Acosta* Plaintiffs. Each one of the four witnesses testified  
20 that they did not see any oil in the fill soil. These are the only four living witnesses who actively par-  
21 ticipated in the grading and decommissioning of the tanks at the Site, and their testimony is unani-  
22 mous on the subject.

23           Moreover, as shown in the chronology above, there were soil samples taken from the berm  
24 soil as part of the preliminary soils investigation, and while it was not the purpose of that sampling to  
25 look for oil, the cuts taken from the berms provided yet another opportunity for a trained eye to see  
26 oil contamination in the berm soil if it was there. (See Part III.F, *supra*). Yet no mention is made of  
27 oil in any of the soils reports other than the “oil stains” referenced on page 4 of the Revised CAO,  
28 which were found beneath the reservoir floors, not in the berm soil. Although there were many soils



1 reports prepared after those samples were taken, and hundreds of pages of documents placed in the  
2 construction file after that, not one page of those documents says anything about oil in the berm soil.  
3 This corroborates the testimony of the four eyewitnesses. (Ex. TTT [1/21/14 Ltr.] at Tab 66 [CAR-  
4 SON 348-54]; *id.* at [Shepardson Report] at p. 26.)

5 With this uncontradicted evidence from the *Acosta* Litigation as background, Dr. Dagdigian  
6 spent nearly four hours with various members of the Regional Board's staff demonstrating how it is  
7 possible, indeed likely, for both to be true at the same time: (1) the eyewitnesses testified that they  
8 saw no oil in the fill soil when they put it in place and compacted it, yet (2) it is contaminated today.  
9 The answer, according to Dr. Dagdigian, is that the Deep Contamination is the source of the Shallow  
10 Contamination. (Ex. TTT [1/21/14 Ltr.] at [Dagdigian Report] at p. 141.) In fact, Dr. Dagdigian ex-  
11 plained why that is the only explanation that makes sense out of all of the facts that are known.

12 According to Dr. Dagdigian, after Barclay placed and compacted clean fill on top of the bro-  
13 ken reservoir bottoms, contamination that had remained immediately beneath the reservoir bottoms at  
14 high concentrations was able to move upward through openings that had been ripped in the former  
15 reservoir concrete bottoms and around the bottoms in the places where the walls had been removed.  
16 (*Id.* at p. 116.) At high concentrations, these contaminants moved into the clean fill via capillary ac-  
17 tion, and also aided by buoyancy whenever water from irrigation or rain was introduced. (*Id.* at p.  
18 142.) That this occurred is demonstrated by the pattern of contamination shown by the data, which  
19 confirms that higher concentrations are found just above the former reservoir bottoms with smaller  
20 amounts as one ascends in the fill soil, in a reverse of the pattern that occurs when the source of con-  
21 tamination comes from the top and migrates down. (*Id.* at p. 116.)

22 All of this was explained in more detail in Dr. Dagdigian's report, which was provided to the  
23 Regional Board. (*Id.* at pp. 124-128.) There, he cited scientific literature confirming that the upward  
24 movement of oil and other liquids has been shown to have occurred at other sites, proven in the la-  
25 boratory and accepted by regulatory agencies, including both EPA and California's Regional Boards.  
26 (*Id.* at pp. 142-159.) Dr. Dagdigian further explained how he ruled out the theory that contaminated  
27 berm soil could have been a significant source of the Shallow Contamination because the regular pat-  
28 terns of contamination observed in the fill soil were inconsistent with the random distribution of con-

1 tamination that would have occurred if the berm soil had already been contaminated when it was  
2 spread in lifts. (*Id.* at pp. 80-82, 117-121, 173.)

3 No other narrative explains the evidence as comprehensively as does Dr. Dagdigian’s opinion.  
4 It is established that the berm soil was not contaminated when Barclay moved it from the reservoir  
5 berm to the floor of the reservoir because: (1) those who spread it saw no oil; (2) those who tested it  
6 reported no oil; (3) the patterns of contamination observed by Dr. Dagdigian are not consistent with  
7 the theory that contaminated berm soil was the source of the Shallow Contamination; and (4) the pat-  
8 terns of contamination demonstrate that it is much more likely that the source of the current contami-  
9 nation in the shallow fill above the reservoir bottoms came from the bottom up. (*Id.* at pp. 166-167,  
10 173.)

11 By contrast, the Revised CAO cites no evidence to support its finding that Barclay had “ex-  
12 plicit knowledge” of “residual petroleum hydrocarbons” but engaged in grading activities that  
13 “spread the waste” despite that knowledge; indeed, the finding is contradicted by the same facts that  
14 provide such a comprehensive fit with Dr. Dagdigian’s conclusions.

15 **2. In 1997 Shell Sent The Regional Board “A Report To Complete A Repair Of The**  
16 **Backfill Of Reservoirs No. 1 And No. 2,” Which The Regional Board Approved,**  
17 **Describing Upward Movement Of Oil In Nearly Identical Circumstances.**

18 In support of his analysis, Dr. Dagdigian provided an August 1997 report produced by a Shell  
19 consultant, Brown and Caldwell, to this Regional Board, which demonstrates that the very same type  
20 of reservoir can leak during its years of operation, leaving a build-up of high-concentration hydrocar-  
21 bon contamination beneath the reservoir floor where it will remain available to upward movement  
22 into newly placed fill soil if the reservoir floor is broken up and the fill soil is spread and compacted  
23 on top of the broken concrete in the manner that Barclay did at Reservoirs 5, 6 and 7.<sup>9</sup> (Ex. TTT  
[1/21/14 Ltr.] at Tab 163 [1997 Report].)

24 The 1997 report is focused on Shell Reservoirs 1 and 2, located at Shell’s former Wilmington  
25 Oil Refinery, about one mile east of the Site on Lomita Boulevard. Reservoirs 1 and 2 were con-  
26 structed at about the same time as Reservoirs 5, 6, and 7; they are nearly identical to the three reser-  
27

28 <sup>9</sup> The report refers to another report from 1996, which likely has additional details. Dr. Dagdigian  
asked the Regional Board if he could have a copy, but the Regional Board was unable to locate it.

1 voirs at the Site except that they were operated for almost twice the time period—68 years—as the  
2 reservoirs at the Site (some 36 years), and were decommissioned beginning in 1991. (Ex. TTT  
3 [1/21/14 Ltr.] at Tab 163 [1997 Report] at Appendix A, at p. 1.) As part of the 1991 decommission-  
4 ing, it was discovered that Reservoirs 1 and 2 had leaked, just as Reservoirs 5, 6, and 7 leaked, con-  
5 taminating the soil below their floors with hydrocarbons which, over time, built up high concentra-  
6 tions beneath the reservoirs. At Reservoirs 1 and 2, after the concrete was broken up and placed on  
7 the reservoir bottoms, the berm soil was used as fill and compacted on top of the former reservoir  
8 bottoms. A semi-permeable clay cap was placed near the top of the fill before about two more feet of  
9 dirt was placed on it. (*Id.* at Appendix B, Amendment No. 1, at pp. 1-2; Chapter 3, Low Permeability  
10 Cap Construction.) Within a year after the clay cap was put in place, however, petroleum hydrocar-  
11 bons had seeped up to the cap then migrated around it to the surface. (*Id.* at Appendix B, Amend-  
12 ment No. 1, at p. 2.)

13 This answered a number of questions posed by Regional Board staff who had appeared skept-  
14 ical about Dr. Dagdigian’s conclusions. First, it proved that oil does indeed travel upward in soil.  
15 Second, oil can travel a substantial distance. Third, oil moving upward will also move sideways  
16 along the path of least resistance (or the upward path with greater capillary forces). Some staff mem-  
17 bers questioned how patterns of contamination showing columns that are not always shaped in a  
18 straight vertical line from an opening in the concrete bottom could occur, and sideways movement  
19 along a path of least resistance seemed the logical explanation. Theory met fact in Reservoirs 1 and 2  
20 when the upward movement of oil was stopped at the clay cap but then the oil moved sideways many  
21 feet to the edge of the cap, around the edge and upward again until it seeped out of the surface.

22 Once again, by finding that Barclay engaged in “spreading around” contaminants in fill soil,  
23 the Revised CAO is based upon facts that are the exact opposite of what the foregoing evidence  
24 shows. Shell’s 1997 report is further, overwhelming proof that Dr. Dagdigian is right. Because the  
25 Revised CAO offers no evidence of its own to support what appears to be an essential basis for its  
26 conclusions—that Barclay knowingly moved contaminants around at the Site—it does not provide a  
27 lawful basis for holding Barclay responsible for clean-up and abatement of Shell’s discharge.  
28

1           **G.       The Regional Board Issues The Proposed Draft Order.**

2           Disregarding the overwhelming proof that Dr. Dagdigian was correct and the absence of evi-  
3           dence showing that Barclay knowingly moved contaminants around at the Property, the Regional  
4           Board, while being paid for its time illegally by Shell, sent a letter dated October 31, 2013, which at-  
5           tached a Notice of Opportunity to Submit Comments on Proposed Draft Order in the Matter of  
6           Cleanup and Abatement Order No. R4-2011-0046, Former Kast Property Tank Farm (SCP No. 1230,  
7           Site ID No. 2040330, File No. 11-043). (Ex. J [10/31/13 Notice of Opportunity to Submit Com-  
8           ments] at p. 2.) The Draft CAO added Barclay as an additional responsible party. On January 21,  
9           2014, Gibson Dunn responded on behalf of Barclay, setting forth the factual and legal reasons why  
10          Barclay cannot be held responsible for Shell’s contamination and should not be added to the CAO.  
11          (Ex. TTT [1/21/14 Ltr.] )

12           **1.       The Draft CAO Mischaracterized Barclay’s Activities At The Site.**

13          On page 4 of the Draft CAO an attempt was made to summarize a part of the history of the  
14          Site as follows:

15           In 1965, prior to the purchase of the property from Shell, Richard Barclay and/or Bar-  
16           clay Hollander Curci requested permission from Shell to remove the liquid waste and  
17           petroleum residue from the property and to begin to grade the property for develop-  
18           ment. Shell agreed to allow the activities with some conditions, including that “all  
19           work done by or for [Barclay Hollander Curci] be done in a good, lawful and work-  
20           manlike manner.” After purchasing the property in 1966, Lomita, as the owner of the  
21           property, actively participated in the decommissioning and grading activities. Lomita  
22           conducted the waste removal and grading activities and obtained the required permits  
23           from the County. Available information indicates that by August 15, 1966 all three  
24           reservoirs had been fully cleaned out. The Pacific Soils Engineering Reports dated  
25           January 7, 1966; March 11, 1966; July 31, 1967; and June 11, 1968 [FN omitted] doc-  
26           umented that: (1) Lomita emptied and demolished the reservoirs, and graded the Site  
27           prior to it developing the Site as residential housing; (2) part of the concrete floor of  
28           the central reservoir was removed by Lomita from the Site; and (3) where the reservoir  
            bottoms were left in place, Lomita made 8-inch wide circular trenches in concentric  
            circles approximately 15 feet apart to permit water drainage to allow the percolation of  
            water and sludge present in the reservoirs into the subsurface. Various documents  
            from the soil engineer describe the process of removing water and sludge in the reser-  
            voirs, burying concrete and compacting the concrete and soil, and drilling holes in the  
            concrete fill must be at least seven feet below grade. Boring logs beneath the concrete  
            slab in Reservoir 7 were “highly oil stained” and that soils in the borings had a “petro-  
            leum odor, however the amount of actual oil contained in the soil is unknown.” [FN  
            omitted] One of the soil engineering reports also indicated that soil used to fill in the  
            reservoirs and return the Property to its natural grade came from the berms surround-  
            ing each reservoir and surrounding the perimeter of the Property. [FN omitted]

(Ex. C [Draft CAO] at p. 4.)

1           When this factual summary is compared to the historical chronology presented above, there  
2 can be no question that the Draft CAO did not accurately portray what occurred at the Site because it  
3 omitted important details and was ambiguous about sequencing. Most egregious was the assertion  
4 that the concrete floors of the reservoirs were broken “to allow the percolation of water *and sludge*  
5 present in the reservoirs *into the subsurface.*” (*Id.*, italics added.) While “percolation of water” was  
6 an objective of the trenching, it was clear from the first moment it was raised in the Preliminary Soils  
7 Report dated January 7, 1966, that the objective of such percolation was precipitation after the grad-  
8 ing had occurred; it was never a part of the process to clean out residual materials “present in the res-  
9 ervoirs.” (Part III.K, *supra.*) Also, there is no evidence that any sludge was “present in the reser-  
10 voirs” by the time the trenching took place or that Barclay or anyone else ever intended to “allow the  
11 percolation of . . . *sludge* . . . into the subsurface” through the concrete. The only evidence on this  
12 subject shows that when Barclay arrived in late January 1966, Reservoirs 5 and 6 were already clean;  
13 that Barclay’s subcontractor, Chancellor & Ogden, cleaned out residual materials from Reservoir 7  
14 with the assistance of the grading contractor, Vollmer Engineering; and that no ripping took place in  
15 any of the reservoir bottoms until they were cleaned out. (Part III.I, *supra.*)

16           There is no evidence that any sludge ever contaminated the sub-floor area, or any other area  
17 of the Site during the time Barclay was on Site. (*Id.*) Accordingly, the following statement is simply  
18 false and there is no evidence to support it: “Lomita made 8-inch wide circular trenches in concentric  
19 circles approximately 15 feet apart to . . . allow the percolation of . . . sludge present in the reservoirs  
20 into the subsurface.” (Ex. C [Draft CAO] at p. 4.) Since these and other findings were considered  
21 important enough to include in the Draft CAO and were demonstrably false, Barclay respectfully re-  
22 quested that the Draft CAO be reconsidered top to bottom and that Barclay be excluded as a respon-  
23 sible party from any further order. (Ex. TTT [1/21/14 Ltr.] at pp. 82-84.) However, when the Re-  
24 gional Board later issued the Revised CAO, these unsupported statements remained unchanged. (See  
25 Ex. A [Revised CAO] at p. 4.)  
26  
27  
28



1 different during the late 1960s from what they are today. (Ex. TTT [1/21/14 Ltr.] at [Shepardson Re-  
2 port] at pp. 26, 29-30.)

3 To supplement his own knowledge and memory, Shepardson conducted empirical research.  
4 Using old maps, he identified no fewer than eleven sites in the South Bay area of Los Angeles Coun-  
5 ty where residential subdivisions had been built on property where oil operations were previously  
6 conducted. The homes were built about the same time as the Carousel subdivision, and searching  
7 records retained by local governments, Shepardson obtained soils engineering reports and other doc-  
8 uments from those eleven projects.

9 Shepardson found that Barclay acted well within the standard of practice and standard of care  
10 for soils engineers engaged in similar activities in the area at the time. First, it was common at the  
11 eleven sites he reviewed for developers to leave oil in the ground at residential subdivisions; in some  
12 cases, contaminated soil was blended with clean soil to facilitate compaction. (*Id.* at p. 25.) When  
13 oil was taken off site, as Barclay did during grading at the Carousel project, it reflected a judgment by  
14 the soils engineer that the soils could not be used for competent compaction; no decisions concerning  
15 the handling of oil in the eleven examples reflected concern about the toxicity of oil pollution. (*Id.* at  
16 pp. 25-26.) Based on that empirical research and his own experience, Shepardson concluded that it  
17 was well within the standard of practice and standard of care at the time for Pacific Soils to allow,  
18 with the County Engineer's approval, that the "oil stains" be buried in place even without an express  
19 recommendation. Indeed, much larger quantities of oil were allowed to remain at residential sites  
20 reviewed by Shepardson. (*Id.*) Nor did the observation of oil stains beneath the floor in Reservoir 6  
21 trigger the need for further investigation. (*Id.* at p. 5.) According to Shepardson, the only purpose of  
22 any investigation that he observed in the eleven examples was to assure competence of the soil for  
23 residential construction purposes, and Barclay did not need to do more than it did to achieve that. (*Id.*  
24 at pp. 25-28.)

25 Gibson Dunn, on behalf of Barclay, also asked another expert, Marcia Williams, to bring her  
26 knowledge of historical changes in environmental law, regulation and public knowledge to bear on  
27 the questions presented by the Revised CAO. Ms. Williams began working at the U.S. EPA in 1970  
28 and stayed there until 1988. Since then she has worked for private industry and in private consulting,

1 but always focused on environmental law and public knowledge of environmental subjects. A career  
2 divided between government service and private consulting has provided Ms. Williams with a deep  
3 appreciation for the disparity between what was known and focused upon by environmental regula-  
4 tors in one era compared to another. In the opinion of Ms. Williams, Barclay’s activities developing  
5 the Site during the late 1960s “were compliant with existing laws and regulations including the Dick-  
6 ey Act” and therefore Barclay “would not qualify as a discharger under the current Water Code.”  
7 (Ex. TTT [1/21/14 Ltr.] at [Williams Report] at p. 65; Part III.C., *supra*.) In addition, based on her  
8 thorough evaluation of historical evidence, Ms. Williams concludes that Barclay had “no reason to be  
9 aware of the presence of soil or groundwater conditions constituting a nuisance or pollution that re-  
10 quired abatement at the time it purchased or developed the Kast property.” (Ex. TTT [1/21/14 Ltr.] at  
11 [Williams Report] at p. 12.)

12 Ms. Williams cites historical evidence demonstrating that in 1966 environmental diligence  
13 was virtually an unknown practice in the circumstances presented here; there were no Phase 1 or  
14 Phase 2 environmental site investigations, and the technology and expertise to conduct such investi-  
15 gations was rudimentary. “At the time the Kast property transaction occurred, there was no guidance  
16 on how to go about conducting an environmental assessment on the Kast property and the concept of  
17 such an assessment had not yet been developed.” (*Id.* at p. 48.) Moreover, the technical disciplines  
18 for obtaining and evaluating the information had not yet been developed, and even the framework for  
19 developing a useful risk assessment did not exist. (*Id.* at pp. 40, 47.) Consequently, Barclay did not  
20 even have the tools to evaluate what was known in a way that would have caused Barclay to conclude  
21 that further steps had to be taken by an owner in these circumstances. (*Id.* at pp. 40-48.)

22 Surprisingly, the Prosecution Team devoted very little attention to Shepardson’s or Williams’  
23 opinions, generally claiming that they were “irrelevant” to their assignment. (Ex. F [Ayalew Dep.] at  
24 36:4-37:20, 47:12-48:19.) But that would be consistent with the Prosecution Team’s repeated testi-  
25 mony that they paid no attention to whether Barclay violated any law. (Ex. S at Attachment 14 at pp.  
26 13-16; Ex. E [Unger Dep.] at 63:7-15, 64:5-65:6, 66:10-67:23, 70:25-72:8; Ex. F [Ayalew Dep.] at  
27 41:2-22.)



1                   **b.     Barclay Obtained All Necessary Approvals From Public Agencies, None**  
2                   **Of Which Required Environmental Investigation, And None Of Which**  
3                   **Showed Concern That The Property May Be Unsafe For Residents.**

4                   When Barclay obtained its zoning and subdivision map approvals from the Planning Commis-  
5                   sion, it was not a secret to anyone that Barclay was converting the former oil storage facility on the  
6                   Site into a residential subdivision. (Ex. TTT [1/21/14 Ltr.] at Tab 75 [CARSON 818-820] at p. 819.)  
7                   During the land use approval process, no one from the surrounding community, the public at large,  
8                   nor any of the public planning agencies expressed any concern about the risk that contamination from  
9                   the prior use of the Site would make conditions unsafe for Carousel residents. These actions of the  
10                  public planning agencies demonstrate louder than words that an assumption that some might try to  
11                  make today—that toxic pollution is a natural and obvious consequence of over 30 years of oil storage  
12                  operations—was not on anyone’s mind when Carousel was being built during the late 1960s. Nor did  
13                  Barclay or anyone else at the time believe that oil was something that made conditions unsafe for res-  
14                  idents at Carousel.

15                                   **(i)     The Planning Commission And Regional Board Of Supervisors**  
16                                   **Approved Barclay’s Zoning Change Applications Following Public**  
17                                   **Hearings.**

18                  The zoning change required approvals from both the Planning Commission and the Regional  
19                  Board of Supervisors. (Ex. TTT [1/21/14 Ltr.] at Tab 72 [CARSON 370-374]; Tab 91 [CARSON  
20                  790].) Throughout the rezoning process, multiple hearings were held, allowing the public access to  
21                  information about the project and an opportunity to comment on the proposed zoning change. (Ex.  
22                  TTT [1/21/14 Ltr.] at Tab 75 [CARSON 818-820]; *id.* at Tab 91 [CARSON 791]; *id.* at Tab 355  
23                  [CARSON 786-787]; *id.* at Tab 90 [CARSON 721-722]; *id.* at Tab 53 [SOC 120811].) It was no se-  
24                  cret that the Carousel development was being built on the site of a former oil tank farm. A public  
25                  hearing request on a related zoning issue specified that residential development was being built on  
26                  property with “existing hazardous oil storage tanks.” (*Id.* at Tab 63 [CARSON 870-873].) The Plan-  
27                  ning Commission was fully aware that “[t]he subject property is developed” from “an oil company  
28                  tank farm” into a residential subdivision. (*Id.* at Tab 64 [CARSON 863-865]; *id.* at Tab 70 [CAR-  
SON 859]; *id.* at Tab 71 [CARSON 845-846].)



1 One resident made this plea:

2 I've lived in the area since birth. I went to Wilmington Jr. High School the first year it  
3 was open in the first ninth grade class. At that time the land now under question by  
4 your commission was *old oil tanks*. Now I'm a mother of two children and am *very*  
5 *happy to see this land being leveled for new homes*. I understand there is a question  
6 "Homes against Industry" – Please not Industry – We need homes, "attractive homes"  
7 to enhance Wilmington. We love our little city and want to continue to rear our chil-  
8 dren here. Please let us have some lovely homes. I cannot be with you on the day of  
9 the hearing for we will be north on our vacation. But we do want and pray for a more  
10 attractive and happier Wilmington.

11 (*Id.* at Tab 76 [CARSON 726-739] at pp. 735-36, italics added.) Another resident wrote, "[w]e pur-  
12 chased our home in this [neighboring] tract as it is the only area with new homes of this value and  
13 with the belief that the oil tanks were to be removed and new homes built immediately." (*Id.* at Tab  
14 76 [CARSON 726-739] at p. 729.)

15 Opponents of Barclay's rezoning application likewise did not raise even the possibility that  
16 pollution from the prior use might affect resident safety. (*Id.* at Tab 80 [CARSON 718-720]; *id.* at  
17 Tab 82 [CARSON 794]; *id.* at Tab [CARSON 795]; *id.* at Tab 84 [CARSON 801]; *id.* at Tab 78  
18 [CARSON 802]; *id.* at Tab 79 [CARSON 803-805]; *id.* at Tab 81 [CARSON 812-814].) This is sig-  
19 nificant because opponents, motivated by their desire to prevent the project, made the best arguments  
20 they could to try to persuade public agencies to disallow Barclay from proceeding with its project. A  
21 good example is a letter from Purex Corporation, which opposed the Carousel project because its  
22 subsidiary, Turco, owned "approximately 30 acres of land which directly abuts on the west side" of  
23 the proposed Carousel development. (*Id.* at Tab 79 [CARSON 803-805] at 803.) Purex foresaw the  
24 advantages of an oil storage facility, which would not protest the noise and odors that would accom-  
25 pany Turco's anticipated expansion, over the human inhabitants of the residential use proposed by  
26 Barclay. (*Id.* at Tab 79 [CARSON 803-805].) Purex argued that rezoning should be denied, among  
27 other reasons, because of *safety* and *health* risks to residents of the proposed residential development.  
28 Yet Purex did not contend that those safety and health risks included possible pollution or other im-  
acts from operations at the former oil storage facility; indeed, Purex did not mention oil at all. In-  
stead, Purex argued that the "human health" concerns were attributable exclusively to "[t]he noise,  
truck traffic, and lights upon Purex's land required for its [own] manufacturing operations," which

1 Purex feared “would . . . [cause] loss of sleep and the impairment of the health of the residents” at  
2 Carousel. (*Id.* at p. 804.)

3 Purex threatened the Planning Commission (and Barclay) that “[f]amilies purchasing [Carou-  
4 sel] residences would not realize this unsuitability for residential use until such purchase had actually  
5 taken place,” and therefore Carousel homebuyers “will be defrauded.” (*Id.*) Having thus speculated  
6 improperly and without evidence that Barclay and the Planning Commission would conceal facts  
7 from purchasers, the facts Purex expected them to conceal were *not* the *prior use* of the property as  
8 an oil storage facility, which it did not mention at all, but rather, according to Purex, the *planned ex-*  
9 *pansion of its Turco factory.* (*Id.* at Tab 79 [CARSON 803-805].) It was inconsequential to Purex in  
10 1966 that the Carousel homes were being built on a former oil tank farm. No one, not even the high-  
11 ly motivated opponents of the residential development, thought that toxic pollution was an inherent  
12 risk of building homes on this property.

13 **(iii) The Planning Commission Did Not Require Any Environmental**  
14 **Diligence When It Approved Barclay’s Subdivision Map.**

15 The Planning Commission conditionally approved Barclay’s Tentative Tract Map on Febru-  
16 ary 23, 1966. (*Id.* at Tab 73 [CARSON 363-367] at 363.) A subsequent approval was obtained on  
17 November 1, 1966. (*Id.* at Tab 72 [CARSON 370-374] at 370.) Both approvals referred to the fact  
18 that the concrete lining in the former oil storage reservoirs (called “sumps” in the approval orders)  
19 would be broken up and buried in place beneath compacted fill. (*Id.* at Tab 73 [CARSON 363-367]  
20 at 366; *Id.* at Tab 72 [CARSON 370-374] at 372.) In granting both approvals, the Planning Commis-  
21 sion imposed a number of conditions on Barclay. (*Id.* Tab 73 [CARSON 363-367]; *id.* at Tab 72  
22 [CARSON 370-374]; see also Govt. Code § 66415; Los Angeles County, Cal., Ord. No. 4478 art. 2  
23 § 12 (1945).) None of those conditions were directed toward mitigating potential adverse effects  
24 from the prior use of the property on future residents. (Ex. TTT [1/21/14 Ltr.] at Tab 73 [CARSON  
25 363-367]; *id.* at Tab 72 [CARSON 370-374].) Neither approval order required Barclay to investigate  
26 whether the Site had become contaminated when it was an oil storage operation. (*Id.* at Tab 73  
27 [CARSON 363-367]; *id.* at Tab 72 [CARSON 370-374].) And the lack of any requirement for an  
28 environmental investigation was consistent with the development standards of the day. (*Id.* at [Wil-

1 liams Report] at pp. 21-22, 35, 40, 70; *id.* at [Shepardson Report] at pp. 26, 29-30.) There was no  
2 legal or industry standard that would have required such investigations in 1966. (*Id.* at [Williams  
3 Report] at pp. 21-22, 35, 40, 70; *id.* at [Shepardson Report] at pp. 26, 29-30.) In fact, had the City of  
4 Carson or the County of Los Angeles suggested that such an investigation needed to occur, it would  
5 have been requiring well-beyond what was being done at that time in the development community.  
6 (See *id.* at [Williams Report] at pp. 21-22, 35, 40, 70; see also *id.* at [Shepardson Report] at pp. 26,  
7 29-30.)

8 **(iv) The Department Of Real Estate Issued Final Reports Allowing**  
9 **Barclay To Sell Carousel Homes, Knowing The Former Use Of The**  
10 **Property And Everything Else Its Diligence Revealed.**

11 At all times relevant to this case, the Carousel development was governed by the Subdivided  
12 Lands Law (“SLL”), California Business & Professions Code §§ 11000-11200 [enacted 1943]. The  
13 State Real Estate Commissioner (“Commissioner”) “administers the Subdivided Lands Law to pro-  
14 tect purchasers from fraud, misrepresentation, or deceit in the initial sale of subdivided property.”  
15 See Cal. Bus. & Prof. Code § 11018.2. (Ex. TTT [1/21/14 Ltr.] at Tab 339 [Department of Real Es-  
16 tate Reference Book] at p. 445.)

17 Under the SLL, no home at Carousel could be offered for sale by Barclay until the Commis-  
18 sioner had issued a final public report, sometimes referred to as a “White Report.” (Bus. & Prof.  
19 Code § 11018.2; Department of Real Estate Subdivision Public Report Application Guide, 35 (2011)  
20 [listing “appropriate color” for public reports].) The staff of the Department of Real Estate (“DRE”)  
21 prepares the final public report for the Commissioner. (See Bus. & Prof. Code § 11018.2; Ex. TTT  
22 [1/21/14 Ltr.] at Tab 339 [Department of Real Estate Reference Book ] at p. 445.) The “public report  
23 includes important information and disclosures concerning the subdivision offering.” (Ex. TTT  
24 [1/21/14 Ltr.] at Tab 339 [Department of Real Estate Reference Book] at p. 445.) “The Commission-  
25 er does not issue the final public report until the subdivider has met all statutory requirements, includ-  
26 ing . . . a showing that the lots . . . can be used for the purpose for which they are being offered.”  
27 (*Id.*) Copies of the White Report for all tracts included in the Carousel subdivision were included  
28 with Barclay’s submissions below. (Ex. TTT [1/21/14 Ltr.] at Tab 335 [White Reports for Tracts

1 28441 (8/1/1967), 28564 (2/21/1968), 24836 (1/22/1969), and 28086 (5/22/1967)].) These demon-  
2 strate that the Commissioner, with full information about the project, which included access to all of  
3 the associated files and records, determined Carousel to be fully compliant with all applicable laws  
4 and regulations as required by the SLL.

5 **(v) The Area Surrounding The Site Was “Oil Country,” Where Close**  
6 **Proximity Of Humans And Oil Was Common And Not Viewed As**  
7 **Unsafe During The Late 1960s.**

8 At the time Barclay was developing the Site, it was common to have oil storage facilities and  
9 oil refineries located near, indeed immediately adjacent to, residences, schools, and sports fields. In  
10 fact, just before Barclay purchased the Site, large numbers of homes had been built and sold right up  
11 to the property line of the eastern border of the Site, completing a residential build-out that had begun  
12 working toward the three reservoirs from the east since at least 1958. (Ex. TTT [1/21/14 Ltr.] at Tab  
13 336 [Tract maps for Tracts 21144, 29377 and 24605].) It is telling that the proximity of the visible  
14 reservoirs, the berms of which reportedly extended fifteen feet above the surface, was not preventing  
15 sales of residences on the open market. There had also been an expansion of residential housing to  
16 the north of the Site. (*Id.* at Tab 75 [CARSON 818-820].)

17 To the south, across Lomita Boulevard, homes were being built on individual lots, many of  
18 which had oil wells on them. (*Id.* at Tab 4 [Schultz Dep.] at 17:10-17:15; 47:8-50:25.) That neigh-  
19 borhood was zoned “R-1-O,” which allowed single family residences to be built on the same lot as an  
20 oil well. (*Id.* at 17:15-18:2, 30:5-31:24, 32:4-14.) Indeed, oil wells are an important part of the histo-  
21 ry of Carson. Next door to the southwest of the Site, next to Lomita Boulevard, the former Schultz  
22 property had multiple uses in 1966; a family residence existed on the same lot as an oil well, and both  
23 of those shared the lot with the family business. (*Id.* at Tab 4 [Schultz Dep.] 20:23-21:10, 23:16-25:7,  
24 27:22-28:13; *id.* at Tab 353 [Schultz Ex. 3]; *id.* at Tab 354 [Schultz Ex. 4].) That well had a sump  
25 next to it, which was a shallow hole used by maintenance crews when working on the well; they  
26 would place waste oil in the hole and allow it to seep into the ground. (*Id.* at Tab 4 [Schultz Dep.] at  
27 29:8-21; 74:4-75:23.) Two other oil wells were found on the industrial properties to the west of the  
28 former Schultz property. (*Id.* at Tab 4 [Schultz Dep.] at 30:5-31:24.) Across the street was (and still

1 is) the Wilmington Intermediate School, and next to the playground were three more oil wells. (*Id.* at  
2 Tab 4 [Schultz Dep.] at 17:10-18:2, 30:5-31, 32:4-14; *id.* at Tab 352 [Schultz Ex. 1].)

3 It is not surprising that oil wells were plentiful in what would soon become the City of Carson  
4 since that area was built in significant part on the oil industry. Carson was located in an area that  
5 some referred to as “oil country” because of its obvious ties with oil production. (*Id.* at Tab 5 [Smith  
6 Dep.] at 32:13-33:24, 40:20-40:25, 41:1-9.) In 1966 there was still ample evidence of that history.  
7 At the corner of Lomita and Main Street, just one block from the Carousel site, was the fully opera-  
8 tional Fletcher Oil Refinery, built in 1939. (*Id.* at Tab 359 [My Carson Your Carson] at 65; *id.* at Tab  
9 4 [Schultz Dep.] at 63:25-65:20, 113:20-115:6; *id.* at Tab 355 [CARSON 786-787]; *id.* at Tab 5  
10 [Smith Dep.] at 97:14-98:16.) There was a significant explosion at that refinery on March 27, 1969,  
11 while the homes at Carousel were still being sold. (*Id.* at Tab 350 [Los Angeles Times Article,  
12 March 28, 1969]; *id.* at Tab 351 [Daily Breeze Article, March 28, 1969]; *id.* at Tab 358 [Los Angeles  
13 Times Article, March 29, 1969].) Located between the refinery and the Carousel subdivision was a  
14 business called Oil Transport Company, which provided trucking services for hauling petroleum hy-  
15 drocarbons for the energy industry. (*Id.* at Tab 4 [Schultz Dep.] at 30:5-31:24.)

16 This community environment is consistent with the undisputed evidence that no one at Bar-  
17 clay believed that oil was toxic to humans: “[T]he state of the knowledge at that time was that . . . oil  
18 certainly was not a hazardous material to health.” (*Id.* at Tab 2 [Curci Dep.] at 215:1-15.) “[N]o, at  
19 the time it was not considered harmful and I didn’t consider it harmful.” (*Id.* at Tab 7 [Bach Dep.] at  
20 75:6-14.) “In the late 1960s, early 1970s, oil wasn’t the bad word it may be today, and it wouldn’t  
21 have been a concern—the same concern . . . at that point in time as it might be today.” (*Id.* at Tab 1  
22 [Harkavy Dep.] at 111:11-112:10.) This attitude that oil was not toxic was corroborated by Mrs.  
23 Schultz, when she recalled her childhood in nearby Torrance where boys built rafts to float atop huge  
24 sumps of waste oil and she and her friends chewed tar, which was nothing but dried oil, as though it  
25 were bubble gum. (*Id.* at Tab 4 [Schultz Dep.] at 152:2-17.)

26 This co-existence of residential living and open oil operations may seem unusual by today’s  
27 standards, but there was no sense at the time that such co-existence was problematic in any way. As  
28 explained by Ms. Williams in her report, at the time when the Property was being developed and

1 houses were being sold, no one in the environmental, public health or legal community was even  
2 considering the possible health effects of exposure to petroleum-related contaminants such as ben-  
3 zene. (*Id.* at [Williams Report] at pp. 12-21.) Concerns about most environmental issues, particular-  
4 ly those related to petroleum releases, were just not as important as other concerns, such as pesticides,  
5 back in 1967. (*Id.* at pp. 21-39.) Nearly two years after the last house in the Carousel tract was sold,  
6 the United States Environmental Protection Agency (“EPA”) studied oil dumped in backyards from  
7 automobile motor oil change outs and concluded that data simply did not exist to allow a quantitative  
8 assessment of human health risks resulting from exposure to oil contamination in the soil. (*Id.* at p.  
9 17.) Further, around the time of Barclay’s work on the Site, it was common for virgin and waste oil  
10 to be used to coat roadways to prevent dust and that practice was not viewed as one giving rise to any  
11 health concerns. (*Id.* at pp. 12-15.) And this lack of concern regarding human contact with oil con-  
12 tamination lasted a long time even after that, as regulators were far more concerned about other con-  
13 taminants and other exposure pathways. (*Id.* at pp. 21-31.) The EPA and other regulators still do not  
14 regulate petroleum in the same way as they do other chemicals. (See, e.g. CERCLA, 42 U.S.C. §  
15 9601(14) [“The term [hazardous substance] does not include petroleum, including crude oil or any  
16 fraction thereof which is not otherwise specifically listed or designated as a hazardous substance . .  
17 .”]; HSAA, Health & Saf. Code, § 25317 [“‘Hazardous substance’ does not include...Petroleum, in-  
18 cluding crude oil or any fraction thereof . . .”].) It is within this context that Barclay entered the Site  
19 to begin decommissioning the tanks.

20 Despite all of this evidence that Barclay provided to the Regional Board indicating that Bar-  
21 clay’s conduct was lawful and complied with the environmental standards of the time in which it was  
22 active at the Site, the Regional Board ultimately still issued the Revised CAO naming Barclay, and  
23 the Regional Board’s factual findings remained largely unchanged.

24 **H. The Regional Board Is Put Under Intense Political Pressure To Name Barclay To**  
25 **The Order By Entities Who Have a Financial Stake in the Outcome.**

26 On January 22 2014, Eric Boyd, the Deputy District Director for Congresswoman Janice  
27 Hahn, emailed Unger about an upcoming meeting with Carousel residents. (Ex. E [Unger Dep.] at  
28 Ex. 18 [1/22/14 email from E. Boyd to S. Unger].) Bob Bowcock, a consultant hired by Tom Girardi,



1 counsel for the *Acosta* Plaintiffs, was copied on the email. At the meeting the next day, Congress-  
2 woman Hahn said she was going to “call the ‘head of the WaterBoard [sic]’ [Sam Unger] tomorrow.”  
3 (Ex. E [Unger Dep.] at Ex. 19 [PRA-RWQCB-002633].) At the same meeting, Bowcock told resi-  
4 dents that Unger was “afraid of Hahn”, “afraid of Shell”, and that Unger and the Regional Board  
5 were “complacent and enabling Shell to behave badly.” (*Id.* at [PRA-RWQCB-2638].) Notably,  
6 counsel for the *Acosta* Plaintiffs is a significant financial contributor to Congresswoman Hahn. Gir-  
7 ardi, and other lawyers representing the *Acosta* Plaintiffs, are also significant contributors to the Po-  
8 litical Action Committee of the American Association for Justice’s Political Action Committee,  
9 which in turn is one of Congresswoman Hahn’s largest contributors. (Ex. K; Ex. E [Unger Dep.] at  
10 Ex. 20 at p. 1.) Later, when the trial court judge overseeing the *Acosta* Litigation determined that  
11 Shell’s \$236 million settlement with the *Acosta* Plaintiffs was in “good faith” under California law,  
12 Congressman Hahn posted a congratulatory message to the Plaintiffs on her Facebook page. (Ex. E  
13 [Unger Dep.] at Ex. 21.)

14 **I. The Comment Period On the Draft CAO Closes, Shell Sues Barclay, And Shell**  
15 **And The *Acosta* Plaintiffs Continue To Communicate With The Regional Board.**

16 The comment period on the Draft CAO officially closed on January 21, 2014, with Barclay  
17 being the only entity to provide any comments.<sup>10</sup> Notwithstanding, representatives of Shell and the  
18 *Acosta* Plaintiffs continued to communicate ex parte with the Regional Board after the comment pe-  
19 riod closed, trying to persuade the Prosecution Team to name Barclay. Then, on May 6, 2014, Shell  
20 sued Barclay for contribution and indemnity, seeking its “costs and expenses” in complying with the  
21 CAO, which Shell alleged were “in excess of \$40 million.” (Ex. P [5/6/14 Shell Complaint] at p. 2.)  
22 Days later, on May 9, 2014, Bowcock, the *Acosta* Plaintiffs lawyers’ consultant, emailed Shell’s  
23 complaint to Unger, Executive Officer of the Regional Board and a member of the Prosecution Team.  
24 (Ex. E [Unger Dep.] at Ex. 13.) And just a few days after that, on May 14, 2014, there was a meeting

25 <sup>10</sup> Initially, the comment period was set to close on December 6, 2013. (Ex. J [10/31 Draft CAO  
26 Ltr.] at p. 2.) On November 8, 2013, counsel for Barclay asked the Regional Board for an exten-  
27 sion until January 13, 2014. (Ex. L [11/8/13 Ltr.] at p. 1.) On November 15, 2013, the Regional  
28 Board approved this extension. (Ex. M [11/15/13 Ltr.] at p. 1.) On January 6, 2014, counsel for  
Barclay wrote to the Board again asking for an extension until January 21, in order to submit  
comments after the deposition of Al Vollmer. (Ex. N [1/6/14 Ltr.] at pp. 1-2.) On January 8,  
2014, the Regional Board granted the extension and the comment period officially closed on Jan-  
uary 21, 2014. (Ex. O [1/8/14 Ltr.] at pp. 1-2.)

1 attended by members of the Prosecution Team and representatives of Shell to discuss “the Dole is-  
2 sue.” (Ex. F [Ayalew Dep.] at 185:24-187:1; Ex. E [Unger Dep.] at Ex. 14.) The evidence suggests  
3 that at the meeting, with members of the Prosecution Team having their time reimbursed by Shell to  
4 sit in the meeting, Shell’s experts tried “to refute the hypothesis” of Barclay’s expert in order to con-  
5 vince the Prosecution Team to name Barclay on the order. (Ex. F [Ayalew Dep.] at 189:3-9 [“Q. Do  
6 you remember anything Johnson said about the possibility of naming Barclay or Dole on the order?  
7 A. From my recollection -- I may be wrong but I think his presentation was trying to refute the hy-  
8 pothesis that was ordered by Waterstone, the Barclay technical hypothesis of capillary ride buoyancy  
9 (rise.)”].)

10 **J. The Regional Board Reopens The Comment Period For Shell.**

11 On June 3, 2014, two weeks after meeting with Shell, the Regional Board reopened the com-  
12 ment period on the Draft CAO specifically “to provide an opportunity for Shell to submit comments.”  
13 (Ex. S [12/8/14 Memo] at p. 4; Ex. T [6/3/14 Notice of Opportunity for Additional Comment].) Even  
14 the Regional Board staff time to draft the re-opening notice for Shell was paid for by Shell. (Ex. F  
15 [Ayalew Dep.] at Ex. 3.) Shell submitted comments on June 16, 2014. Shell’s comments were the  
16 only response to Barclay’s January 21, 2014 submission, and they responded only to a few, narrow  
17 points, specifically regarding the Waterstone report. On June 30, 2014, Barclay timely responded to  
18 Shell’s submission, refuting the issues raised by Shell and noting that the remaining technical and  
19 legal points made in Barclay’s January 21, 2014 letter and the associated attachments were uncon-  
20 tested by Shell and everyone else. (Ex. U [6/30/14 Ltr.] at p. 1.)

21 **K. The Regional Board Continues To Communicate With, And Invites Comments**  
22 **From, The Acosta Plaintiffs.**

23 The second comment period closed on June 30, 2014. Notwithstanding, representatives of  
24 Shell and the *Acosta* Plaintiffs continued to communicate ex parte with the Regional Board after that  
25 date, urging them to name Barclay on the order. By way of example, on July 9, 2014, Unger emailed  
26 Bowcock (the *Acosta* Plaintiffs’ consultant) and asked him to “*let us [Unger and Teklewold Ayalew]*  
27 *know if you have any comments*” on Shell’s June 16, 2014 submission. (Ex. E [Unger Dep.] at Ex. 15  
28 at [PRA-RWQCB-007030], italics added.) Later, Unger assured Bowcock that while “there will be

1 an ‘official’ comment period *we can talk whenever you wish.*” (*Id.*, italics added.) Shortly thereafter,  
2 Bowcock replied:

3 *Is the Board going to issue a COA to Dole? If so when?*

4 These documents are embarrassing to the profession. . . *can you believe a professional*  
5 *like Dr. Dagdigian would actually prostitute himself and spend six (6) pages of a*  
6 *technical report defending a liar like George Bach Appendix A . . . makes me ill.*

7 Bottom line . . . as I have said from the beginning, *it doesn’t take a rocket scientist to*  
8 *see they (Shell & Dole) were co-conspirators in the development of the site.*

9 I’ll get to our comments soon... it’s just such a flood of garbage documents.

10 *Our fear is that Dole causes further delay. How do we prevent that?*

11 (*Id.* at PRA-RWQCB-007029, italics added.) That same day, Bowcock also sent Unger comments on  
12 Barclay’s submissions, stating that the declaration of Jeffrey Dagdigian is “SHAMEFUL,” that the  
13 declaration of George Bach is “dishonest,” that Barclay has “clearly manipulated and compound[ed]  
14 liar’s lies,” and that Barclay should be “added as a responsible Party to the Cleanup and Abatement  
15 Order.” (Ex. E [Unger Dep.] at Ex. 14 at PRA-RWQCB-004012.)

16 **L. Shell Submits A Revised Remedial Action Plan, And The Acosta Plaintiffs And**  
17 **The City Of Carson Settle With Shell.**

18 On June 30, 2014, after submitting a RAP that was rejected by the Regional Board, Shell  
19 submitted a revised RAP (Ex. V [6/30/14 Shell Revised RAP]), and on October 15, 2014, Shell sub-  
20 mitted an addendum to the revised RAP (Ex. W [10/14/14 Shell Addendum to Revised RAP]). The  
21 revised RAP requires, among other things, excavation up to 5 feet below ground surface “at approxi-  
22 mately 207 properties,” and excavation up to 5-10 feet below ground surface at approximately 85  
23 homes. (Ex. V [6/30/14 Revised RAP] at pp. 3-4.) In turn, the addendum to the revised RAP pro-  
24 vides that displaced residents will be accommodated and compensated if their homes are sold at less  
25 than fair market value. (Ex. W [10/15/14 Addendum to Revised RAP].) Shell estimates that it will  
26 cost \$146 million to implement the RAP. (*Id.* at p. 3 at Table 6-1.)

27 As recently as March 2014, the *Acosta* Plaintiffs’ counsel had described Shell’s proposed  
28 RAP as a “joke,” and called Shell “disgusting” and “despicable” for proposing it. (Ex. X [3/24/14  
Daily Breeze Article].) Similarly, when Shell’s revised RAP was first announced, the City of Carson  
claimed it was insufficient to secure the “Carousel residents’ health, safety and welfare.” (Ex. Y

1 [9/7/14 Daily Breeze Article] at p. 2.) Yet, on October 21, 2014, Shell announced to the parties in the  
2 *Acosta* Litigation that it had reached a tentative settlement with the *Acosta* Plaintiffs and the City of  
3 Carson. (Ex. PPP [12/12/14 Decl.]) From that day on, it appears that no *Acosta* Plaintiffs, Girardi  
4 consultants like Bowcock, or the City of Carson offered any criticism of Shell’s RAP to the Regional  
5 Board.

6 On or about November 10, 2014, Girardi Keese LLP, on behalf of the *Acosta* Plaintiffs, for-  
7 mally entered into settlement with Shell. Under the agreement, Shell agreed to pay \$90 million to  
8 Girardi Keese LLP in “full and final settlement of all Claims,” (Ex. Z [*Acosta* Agreement] § 3.2), and  
9 to implement the RAP (*id.* at § 4.8). At the same time, the City of Carson, also represented by Gir-  
10 ardi Keese LLP, entered into a settlement with Shell. Under the agreement, Shell and the City of  
11 Carson agreed to “Mutual Releases” in which each party released the other from “any and all  
12 Claim(s)” related to the City of Carson’s lawsuit against Shell and the Water Board proceedings.  
13 (Ex. AA [*Carson* Agreement] § 3.4.) Shell also agreed, as part of the settlement, to remediate the  
14 Site. (*Id.* § 4.9.) Critically, as part of the *Acosta* settlement, the *Acosta* Plaintiffs agreed “to cooper-  
15 ate in good faith in the ongoing regulatory proceedings overseen by the Water Board” (Ex. Z [*Acosta*  
16 Agreement] § 3.6), and to “waive and release any rights to challenge any decision of the Water Board  
17 in evaluating and approving the RAP for the Carousel Tract.” (*Ibid.*) Likewise, the City of Carson’s  
18 settlement required the City to “cooperate in good faith” in the Water Board proceedings and “im-  
19 plementation of the RAP.” (Ex. AA [*Carson* Agreement] § 3.5.)

20 News of the settlements, including Shell’s agreement to implement the revised RAP, quickly  
21 spread. In late November and early December 2014, The Los Angeles Business Journal, The Daily  
22 Breeze, PressTelegram.com, and RoyalDutchShellPlc.com all reported that Shell had offered “\$90  
23 million to settle a lawsuit brought by Girardi & Keese on behalf of the 1,491 current and former resi-  
24 dents of the Carousel Tract.” (Exs. BB-DD [Articles]; Ex. E [Unger Dep.] at Ex. 17.) The Daily  
25 Breeze article quoted the *Acosta* Plaintiffs’ counsel and a Shell spokesperson regarding the settle-  
26 ment, and described “a confidential letter to residents from Girardi & Keese” stating that “the \$90  
27 million would be split between attorneys and residents, with a court-appointed ‘special master’ to de-  
28

1 termine how much each plaintiff will receive based on their personal injury and property damage  
2 claims.” (Ex. CC [Article].)

3 **M. The *Acosta* Plaintiffs Designate The Regional Board Prosecution Team As Ex-**  
4 **erts And Submit As Evidence The Revised CAO.**

5 On November 14, 2014, the *Acosta* Plaintiffs served their expert disclosures for the Phase II  
6 experts on movement of contaminants, exposure, and dose issues. (Ex. EE [11/14/14 Disclosure].)  
7 In their disclosures, the *Acosta* Plaintiffs identified four members of the Prosecution Team as “non-  
8 retained expert[s]”: Samuel Unger, Paula Rasmussen, Thizar Williams, and Teklewold Ayalew. (*Id.*  
9 at pp. 2-3.) Critically, the *Acosta* Plaintiffs designated each member of the Prosecution Team as ex-  
10 perts *even though the Revised Draft CAO had not been issued and even though they had no way of*  
11 *knowing based on the public record that Barclay would be recommended by the Prosecution Team*  
12 *for inclusion on the order some three weeks later.*

13 **N. The Prosecution Team Learns Of The Settlement With Shell.**

14 On November 24, 2014, Albert Robles, the current Mayor of the City of Carson and then a  
15 member of the City Council, emailed Unger a news article about the settlement. (Ex. E [Unger  
16 Dep.] at Ex. 17.) The City of Carson, of course, was then (and still is) an adverse party to Barclay in  
17 the *Carson* Litigation, making the communication particularly inappropriate. Robles wrote: “FYI  
18 sam. Talk to you soon.” (*Id.*) Unger then forwarded the email to Ayalew, instructing him to “dig up  
19 this article and send to [the prosecution] team.” (*Id.*) Minutes later, Ayalew circulated the email to  
20 the entire Prosecution Team. (*Id.*)

21 **O. The Prosecution Team Recommends Approval Of The Revised CAO.**

22 Approximately two weeks later, on December 8, 2014, the Regional Board released a memo-  
23 randum from Unger to Deborah Smith, Chief Deputy Executive Officer. (Ex. S [12/8/14 Memo].)  
24 The Memorandum recommended that Smith, who reports to Unger, approve and issue the Revised  
25 CAO naming Barclay as a responsible party by January 9, 2014, the same day that the comment peri-  
26 od on Shell’s proposed RAP was set to close. (*Id.* at pp. 2, 5.) Unger set that aggressive deadline  
27 even though he undoubtedly knew that Smith was heading out of town on a year-end vacation and  
28

1 would not return until after the holidays, giving her effectively about a week to review the extensive  
2 file with all the comments from Barclay and approve the Revised Draft CAO. (Dennis Decl. ¶ 36.)

3 As part of the recommendation, the Prosecution Team staff produced a 98-page chart purport-  
4 ing to respond to the comments submitted by Barclay and others regarding the naming of Barclay as a  
5 responsible party. (Ex. S [12/8/14 Memo] at Attachment 14; see also *id.* at pp. 4-5 [providing sum-  
6 mary of factual conclusions from Prosecution Team staff].) The December 8 Memorandum identi-  
7 fied Samuel Unger, Paula Rasmussen, Thizar Tintut-Williams, and Teklewold Ayalew, among oth-  
8 ers, as Regional Board staff who participated in the preparation of the Revised CAO. (*Id.* at p. 1.)  
9 Notably, Shell illegally paid for the Regional Board’s staff time to prepare the 98-page chart to try to  
10 support their decision. (Ex. F [Ayalew Dep.] at Ex. 3.)

11 **P. Barclay’s Requests to Submit Evidence And For A Hearing Are Denied.**

12 On December 24, 2014, Gibson Dunn, on behalf of Barclay, wrote Smith, asking to  
13 “(1) submit additional critical evidence, that was previously unavailable, and that must be considered  
14 by [the Regional Board] before making any decision on this issue; and (2) schedule a formal hearing  
15 before you in order to give Barclay an opportunity to present the key evidence directly to you and to  
16 explain why Barclay is not a ‘discharger’ under the Water Code.” (Ex. HH [12/24/14 Ltr.] at p. 2.)

17 On January 6, 2015, Gibson Dunn, on behalf of Barclay, submitted another letter, this time explain-  
18 ing in greater detail the importance of the new evidence, attaching that evidence, and repeating its  
19 request for a hearing. (Ex. N [1/6/15 Ltr.]) On January 15, 2015, Frances McChensey wrote to  
20 Smith, stating that she had no opinion on whether Smith should hold a hearing, but that she opposed  
21 the consideration of any additional evidence. (Ex. MM [1/15/15 Ltr.]) Remarkably, McChesney  
22 stated that Barclay should have submitted the Waterstone 3-D model in the fall of 2014, *after* the  
23 close of the official comment period. (*Id.* at 2.) On January 16, 2015, Gibson Dunn, on behalf of  
24 Barclay, submitted another letter, clarifying the scope of its request that the Regional Board to con-  
25 sider additional evidence and repeating the request for a hearing. (Ex. NN [1/16/15 Ltr.] at pp 1-2.)

26 On February 27, 2015, Smith agreed to accept the 2014 Bach deposition transcript into the  
27 record, but rejected all of the other evidence presented by Barclay, and denied Barclay’s requests for  
28 a hearing. (Ex. GG [2/27/15 Ltr.] at pp. 1-2.)

1           **Q.     The *Acosta* Plaintiffs File The Revised CAO In The *Acosta* Litigation.**

2           On December 22, 2014, the Plaintiffs in the *Acosta* Litigation submitted a supplemental dis-  
3 closure of their Phase II experts. (Ex. at FF [12/22/14 Supplemental Disclosure].) As part of this  
4 supplemental disclosure, the *Acosta* Plaintiffs submitted rebuttal reports by two of their experts,  
5 Lorne Everett and Mark Kram, which relied on the December 8, 2014 opinions of the Prosecution  
6 Team staff, and their recommendations. For example, Dr. Everett used the December 8 memoran-  
7 dum and associated chart from the Prosecution Team staff as evidence that “the professional envi-  
8 ronmental scientists and engineers at the State of California (Regional Board Water Quality Control  
9 Board) agree with” his opinions concerning Barclay’s liability. (Ex. RR [12/22/14 Everett Rebuttal  
10 Report] at p. 2; see also Ex. SS [Kram 12/18/14 Rebuttal Report] at p. 19 [“the RWQCB (2014c)  
11 characterizes Dr. Dagdigian’s upward mobility theory as ‘*speculative and incomplete*’ [and] ques-  
12 tions the theoretical underpinnings used to support the theory”].)

13           Since then, the *Acosta* Plaintiffs’ counsel and experts have continued to submit declarations  
14 relying upon the factual conclusions of the Prosecution Team staff. For instance, on January 22,  
15 2015, the *Acosta* Plaintiffs submitted declarations that rely upon the Prosecution Team staff’s factual  
16 conclusions as “evidence” purportedly establishing Barclay’s liability. (Ex. TT [1/22/15 Finnerty  
17 Decl.] at ¶¶ 8 [“The Water Board documents contain information that is pertinent to this case.”];  
18 Ex. UU [1/22/15 Koffman Decl.] at ¶ 1-10, 13 [“These documents . . . further strongly support my  
19 previous position that Developer Defendants discovered a substantial amount of contamination within  
20 the soil of the oil tank farm prior to development.”]; Ex. VV [1/22/15 Cheremisinoff Decl.] at ¶¶ 8-  
21 13, 15-23, 26 (“In accordance with comments submitted by the Los Angeles Regional Water Quality  
22 Control Board, it is my opinion that the Developer Defendants qualify as a discharger pursuant to  
23 Water Code section 13304 and should be treated as such in this litigation.”]; Ex. WW [1/23/15 Suppl.  
24 Wallace Decl.] at ¶ 19 [“The Water Board’s conclusion is based on evidence that amply illustrates  
25 Barclay Hollander Corporation’s actions and inactions pertaining to the demolition of the Kast prop-  
26 erty tank farm and development of the Carousel Housing tract.”].)

1           **R.     Barclay Seeks Discovery From The Regional Board.**

2           On January 8, 2015, Barclay issued subpoenas in the *Acosta* Litigation for documents and  
3 depositions of the four members of the Prosecution Team designated as “non-retained experts” by the  
4 *Acosta* Plaintiffs: Samuel Unger, Teklewold Ayalew, Paula Rasmussen, and Thizar Tintut-Williams.  
5 Although the Regional Board sought to quash the subpoenas, the court ordered the Regional Board to  
6 produce documents and allow depositions of two of the members of the Prosecution Team—Unger  
7 and Ayalew—thus far. On April 22, 2015, Barclay submitted a letter to Smith requesting that Smith  
8 defer determining whether to name Barclay until after the pending depositions—scheduled for early  
9 May and just weeks away—had occurred. (Ex. XX [4/22/15 Ltr.] )

10           **S.     Deborah Smith Unilaterally Changes The Revised Draft CAO Before Issuing It.**

11           The Revised CAO was issued on April 30, 2015. (Ex. A [Revised CAO].) In a cover letter  
12 accompanying the Revised CAO, Smith noted that the Regional Board declined to postpone its deci-  
13 sion until after receipt of the transcripts from Unger’s and Ayalew’s depositions as requested by Bar-  
14 clay, claiming that “substantial additional time would be necessary to obtain certified transcripts and  
15 allow parties and interested persons a reasonable time to review and respond to the testimony[.]”  
16 (Ex. OO [4/30/15 Cover Ltr.] ) Thus, Smith refused to wait a few more weeks for this additional  
17 probative evidence, despite the fact that expediting the naming of Barclay to the CAO at that point  
18 would have no effect on the actual cleanup procedures of the site, since Shell had already been named  
19 in the CAO, and was already complying with it (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional  
20 Board Meeting Tr.] at 15:3-9), and the comment period on the RAP had closed.

21           While many of the Revised Draft CAO’s unsupported findings, discussed above, remained  
22 unchanged, the Revised CAO includes a number of changes that were made without any notice to  
23 Barclay or an opportunity to comment. The Revised Draft CAO circulated on December 8, 2014 in-  
24 cluded this statement: “Available information indicates that by August 15, 1966, all three reservoirs  
25 had been fully cleaned out of liquid residue.” (Ex. D [Revised Draft CAO] at p. 5.) In the Revised  
26 CAO, this sentence now states that “all three reservoirs had been emptied of liquid residue.” (Ex. A  
27 [Revised CAO] at p. 4.) Ayalew testified that he wrote in the Draft CAO that all the reservoirs had  
28 been “fully cleaned out.” (Ex. F [Ayalew Dep.] at 141:23-143:22.) He testified that this information



1 was extracted from the Pacific Soils reports from the time. (Ex. F [Ayalew Dep.] at 142:25-143:22.)  
2 The Revised CAO by Deborah Smith does not explain, or provide a record citation, to support this  
3 change. (See Ex. A [Revised CAO] at p. 4.)

4 The Revised CAO also includes findings that Barclay violated various code provisions that  
5 had not ever been mentioned in the Revised Draft CAO prepared by the Prosecution Team. The Re-  
6 vised CAO states that Barclay’s actions violated the Fish and Game Code section 5650 and Los An-  
7 geles County Code section 20.36.010. (Ex. A [Revised CAO] at p. 11, fn. 14.) The Revised Draft  
8 CAO recommended by the Prosecution Team did not mention any of these alleged violations. (Ex. D  
9 [Revised Draft CAO].) Both Unger and Ayalew testified that they had no part in researching or de-  
10 termining whether Barclay violated these acts or any others. (Ex. F [Ayalew Dep.] at 60:16-61:10,  
11 61:14-21; Ex. E [Unger Dep.] at 56:19-24, 70:7-14.)

#### 12 V. Legal Argument

13 There is no dispute that Shell is the only discharger of the contaminants being remediated un-  
14 der the current order. The Revised CAO therefore makes no finding that Barclay actually “dis-  
15 charged” waste, in the usual sense that it “relieve[d] . . . a charge, load or burden” (*Lake Madrone*  
16 *Water Dist. v. State Water Res. Control Bd.* (1989) 209 Cal.App.3d 163, 174 [quoting WEBSTER’S  
17 NEW INT’L DICT. 644 (3d ed. 1961)]), and does not find that Barclay “deposited” waste, as most peo-  
18 ple understand that term—“the act of depositing . . . something laid, placed, or thrown down’.”  
19 (*People ex rel. Younger v. Super. Ct.* (1976) 16 Cal. 3d 30, 43 [quoting WEBSTER’S THIRD INT’L  
20 DICT., UNABRIDGED (1963)]). The Revised CAO thus is based on something other than literal com-  
21 pliance with the language in the statute that defines the Regional Board’s jurisdiction. (Wat. Code,  
22 § 13304, subd. (a) [authorizing the Regional Boards to issue clean-up and abatement orders against  
23 “[a]ny person who has discharged or discharges waste into the waters of this state in violation of any  
24 waste discharge requirement or other order or prohibition issued by a regional board or the state  
25 board, or who *caused or permitted* . . . any waste to be *discharged* or *deposited* where it is, or proba-  
26 bly will be, *discharged* into the waters of the state.”], italics added.)

27 Instead, the Revised CAO seeks to justify holding Barclay responsible for clean-up and  
28 abatement of contamination that it did not discharge or even know about on the basis of its finding

1 that Barclay “conducted various activities, including partially dismantling the concrete in the reser-  
2 voirs and grading the onsite materials. These activities spread the waste at the site, and contributed to  
3 the migration of the waste through soil and groundwater.” (Ex. A [Revised CAO] at p. 11.) The Re-  
4 vised CAO should be vacated for four separate and independent reasons:

5 (1) The Regional Board denied Barclay due process. First, Barclay was denied due process  
6 because Shell—an adverse party which pressured the Regional Board to name Barclay and which had  
7 a direct financial interest in having Barclay named—was illegally reimbursing the Regional Board for  
8 the efforts the Prosecution Team spent considering whether to name Barclay, building an administra-  
9 tive record to do so, and drafting the necessary documents, including the Revised Draft CAO itself  
10 and the recommendation to Smith to name Barclay. As a result of these payments—unauthorized and  
11 illegal under the Cost Recovery Program—the Regional Board had a financial incentive to make staff  
12 available to investigate and name Barclay, which violates Barclay’s due process rights. (Part V.A.1,  
13 *infra*.) Second, Barclay’s right to an impartial adjudicator was not respected because the Regional  
14 Board failed to adequately separate its adjudicative and prosecutorial functions and because Sam Un-  
15 ger, the Executive Officer of the Regional and the purported leader of the Prosecution Team, appoint-  
16 ed Deborah Smith, his direct subordinate, as presiding officer. (Part V.A.2, *infra*; Govt. Code,  
17 §§ 11425.10, subd. (a)(4), 11425.30, subd. (a)(2).) Third, the Regional Board’s nearly five-year de-  
18 lay in naming Barclay to the CAO deprived Barclay of any opportunity to challenge the RAP that  
19 Shell, the *Acosta* Plaintiffs, and the City of Carson agreed upon as part of an omnibus settlement  
20 agreement, but with which Barclay disagrees. Subjecting Barclay to pay for or implement a RAP that  
21 it opposes and that it had no role in crafting (nor any reason to do so) would be a profound violation  
22 of due process. (Part V.A.3, *infra*; Govt. Code § 11425.10, subd. (a)(1).) Fourth, in issuing the Re-  
23 vised CAO, the Regional Board failed to create and rely upon an adequate administrative record, and  
24 what record exists does not support naming Barclay. (Part V.A.4, *infra*; Govt. Code, §§ 11425.10,  
25 subd. (a)(6), 11425.50.) Fifth, in developing the limited and inadequate administrative record that  
26 does exist, the Regional Board used biased and unfair procedures, which repeatedly favored Shell and  
27 the *Acosta* Plaintiffs and disfavored Barclay. (Part V.A.5, *infra*.) This included extensive improper  
28 *ex parte* contacts with representatives of adverse parties, who provided the Prosecution Team with

1 responses to Barclay’s comments and other information of which Barclay had no notice and to which  
2 it had no opportunity to respond. (*Id.*) And sixth, the Regional Board failed to hold an evidentiary  
3 hearing, which due process requires under the circumstances present here. (Part V.A.6, *infra.*)

4 (2) The Regional Board’s finding that Barclay is liable as a discharger under section 13304(a)  
5 for “spread[ing] the waste” and “contribut[ing] to the migration of the waste through the soil and  
6 groundwater” is not supported by the evidence. The Regional Board must have affirmative evidence  
7 to sustain its findings, and there is none. (Part V.B.1, *infra*; see also, e.g., *Schutte & Koerting, Inc. v.*  
8 *Reg’l Water Quality Control Bd.* (2007) 158 Cal.App.4th 1373, 1383-1384 [citing Cal. Civ. Proc.  
9 Code § 1094.5, subd. (c) and stating abuse of discretion is established if the administrative order “is  
10 not supported by the findings, or the findings are not supported by the evidence”].)

11 (3) The Regional Board’s finding that Barclay is liable as a discharger under section 13304(a)  
12 for “spread[ing] the waste” and “contribut[ing] to the migration of the waste through the soil and  
13 groundwater” is not supported by the law. Even if the quoted finding had been supported by evi-  
14 dence, which is not the case, inadvertently spreading contaminants already discharged by someone  
15 else while engaged in activity intended for another, innocent purpose does not give rise to liability  
16 under Water Code section 13304(a). No decision of the State Board has ever found a party responsi-  
17 ble as a discharger for such conduct, and judicial precedent likewise prohibits an interpretation of  
18 section 13304(a) that would be required to hold Barclay responsible for such conduct. (*Redev. Agen-*  
19 *cy of City of Stockton v. BNSF Ry. Co.* (9th Cir. 2011) 643 F.3d 668, 677-678.) Moreover, the plain  
20 meaning of the statute limits the jurisdiction of the Regional Boards to issue clean-up and abatement  
21 orders only to dischargers. It therefore prohibits orders—such as the Revised CAO—which require  
22 someone who has discharged nothing to be responsible for the discharges of someone else. (Part  
23 V.B.2, *infra.*)

24 (4) Even if Barclay could be properly identified as a discharger under section 13304(a), which  
25 is not the case, Barclay is exempt from liability under the safe harbor provided in section 13304(j)  
26 because the acts for which the Revised CAO hold Barclay responsible took place in the late 1960s  
27 and did not violate the laws and regulations that existed at the time. The Regional Board Failed to  
28

1 meet its burden of proof that Barclay violated any laws in existence at the time, and the affirmative  
2 evidence establishes that the safe harbor should apply. (Part V.C, *infra*.)

3 **A. The Regional Board Denied Barclay Due Process Of Law.**

4 The State Board recognizes that the issuance of cleanup and abatement orders is an action that  
5 is “of an adjudicative nature” and therefore governed by due process protections of the United States  
6 and California Constitutions and the rules for administration adjudications in the APA. (Ex. KK  
7 [State Water Resources Control Board, Office of Chief Counsel, M. A.M. Lauffer Chief Counsel  
8 Memorandum (Aug. 2, 2006)]; *In the Matter of the Petitions of California Department Of Transpor-*  
9 *tation And MCM Construction, Inc.*, State Board Order No. WQ 2014-0015, at \*4-5 [acknowledging  
10 that “distinct prosecution and advisory teams” are required “to comply with the separation of func-  
11 *tions and ex parte communication requirements of [the APA’s] adjudicative provisions, and the due*  
12 *process provisions of the United States and California constitutions.”].)*

13 “The constitutional guarantee of due process requires an administrative agency conducting ad-  
14 judicative proceedings to act as a fair and impartial tribunal.” (*Nick v. City of Lake Forest* (2014) 232  
15 Cal.App.4th 871, 887.) “A fair tribunal is one in which the judge or other decision maker is free of  
16 bias for or against a party.” (*Morongo Band of Mission Indians v. State Water Resources Control*  
17 *Board* (2009) 45 Cal.4th 731, 737.) “Although administrative decision makers are ordinarily pre-  
18 sumed to be impartial, a bias resulting in the denial of a fair hearing may arise when an administrative  
19 agency fails to adequately separate its prosecutory and adjudicatory functions in the same proceed-  
20 ing.” (*Nick v. City of Lake Forest, supra*, 232 Cal.App. at p. 887.) Moreover, “[v]iolation of this due  
21 process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situa-  
22 tion ‘in which experience teaches that the probability of actual bias on the part of the judge or deci-  
23 sionmaker is too high to be constitutionally tolerable.’” (*Morongo Band of Mission Indians v. State*  
24 *Water Resources Control Board, supra*, 45 Cal.4th at p. 737, quoting *Withrow v. Larkin* (1975) 421  
25 U.S. 35, 47.) ““Of all the types of bias that can affect adjudication, pecuniary interest has long re-  
26 ceived the most unequivocal condemnation and the least forgiving scrutiny.”” (*Today’s Fresh Start,*  
27 *Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 215, quoting *Haas v. County*  
28 *of San Bernardino* (2002) 27 Cal.4th 1017, 1025.)

1 The APA codifies many of these same due process rights, but in some instances goes further.  
2 For instance, consistent with constitutional requirement of due process, section 11425.10, subdivision  
3 (a)(4) of the Government Code provides that “the adjudicative function shall be separated from the  
4 investigative, prosecutorial, and advocacy functions within the agency.” (Govt. Code, § 11425.10,  
5 subd. (a)(4).) But section 11425.30, subdivision (a)(2), goes further, providing that “[a] person may  
6 not serve as presiding officer in an adjudicative proceeding in any of the following circumstanc-  
7 es: . . . (2) The person is subject to the authority, direction, or discretion of a person who has served  
8 as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.” (Govt. Code,  
9 § 11425.30, subd. (a)(2).) The APA also requires a decision “in writing” that “includes a statement  
10 of the factual and legal basis for the decision.” (Govt. Code, § 11425.50, subd. (a).)

11 **1. The Regional Board Illegally Invoiced Shell, An Adverse Party With A Financial**  
12 **Interest In Naming Barclay, For Its Time Investigating And Naming Barclay.**

13 The Revised CAO is the product of a fundamentally flawed and unfair proceeding—illegally  
14 paid for by Shell, a party adverse to Barclay—that deprived Barclay of due process. Under the guise  
15 of “cost recovery,” Shell literally paid for the Regional Board to follow its bidding to investigate and  
16 name Barclay as a discharger. Any suggestion that the Cost Recovery Program authorized the Re-  
17 gional Board to seek reimbursement from Shell for investigating and naming Barclay is refuted by  
18 the bare language of section 13304, subdivision (c) of the Water Code, and by fundamental principles  
19 of constitutional due process.

20 Shell’s payments to the Regional Board in connection with the investigation and naming of  
21 Barclay were unquestionably illegal. No court has ever held that section 13304, subdivision (c) per-  
22 mits the Regional Board to recover its costs in investigating, evaluating, and determining who should  
23 be named as a discharger—let alone where the cost recovery is sought from a party that already has  
24 been named as a discharger and that has a direct financial interest in having one or more additional  
25 dischargers named. Indeed, the statute clearly provides that recovery is limited to costs incurred in  
26 connection with “remedial activities”: where “*necessary remedial action* is taken by a governmental  
27 agency,” a discharger is “liable to that governmental agency to the extent of the reasonable costs ac-  
28 tually incurred in *cleaning up* the waste, *abating* the effects of the waste, *supervising cleanup or*

1 *abatement* activities, or *taking other remedial action*.” (Wat. Code, § 13304, subd. (c), italics added.)  
2 Being paid to investigate and name another party as a discharger, at the urging of a party *already*  
3 *named* as a discharger, is plainly not “cleaning up waste”, “abating the effects of the waste”, “super-  
4 vising cleanup or abatement activities”, or “taking other remedial action.” Indeed, McChesney and  
5 Unger have both admitted that naming Barclay would have no effect on “cleaning up waste”, “abat-  
6 ing the effects of the waste”, “supervising cleanup or abatement activities”, or “taking other remedial  
7 action.” because Shell was already on the hook for the clean-up regardless of whether Barclay was  
8 ultimately named. (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional Board Meeting Tr.] at 15; Ex. E  
9 [Unger Dep.] at 191:20-192:6 [“Q. And Ms. McChensney says: oh, none. The – Shell never peti-  
10 tioned or challenged the original cleanup and abatement order, so they’re still responsible regardless  
11 of who else may be added. . . Do you agree with Ms. McChesney’s statement? A. Yes.”].)

12       Regardless, Shell’s payments violated Barclay’s due process rights. The United States Su-  
13 preme Court has long recognized that a “scheme injecting a personal interest, financial or otherwise,  
14 into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial de-  
15 cision and in some contexts raise serious constitutional questions.” (*Marshall v. Jerrico, Inc.* (1980)  
16 446 U.S. 238, 249-50.) Likewise, the California Supreme Court has recognized that “pecuniary con-  
17 flicts of interests on a judge’s or prosecutor’s part pose a constitutionally more significant threat to a  
18 fair trial than do personal conflicts of interest.” (*People v. Vasquez* (2006) 39 Cal.4th 47, 64.) More  
19 recently, in *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, the California Supreme  
20 Court reaffirmed the “bedrock principle that a government attorney prosecuting a public action on  
21 behalf of the government must not be motivated solely by a desire to win a case, but instead owes a  
22 duty to the public to ensure that justice will be done,” and that “[a] fair prosecution and outcome in a  
23 proceeding brought in the name of the public is a matter of vital concern both for defendants and for  
24 the public, whose interests are represented by the government and to whom a duty is owed to ensure  
25 that the judicial process remains fair and untainted by an improper motivation on the part of attorneys  
26 representing the government.” (*Id.* at p. 57.)

27       The California Supreme Court addressed the propriety of private-party financing of govern-  
28 ment proceedings in *People v. Eubanks* (1997) 14 Cal.4th 580. The Court affirmed, inter alia, the

1 lower court’s finding that it was an impermissible conflict of interest where a victim paid a prosecu-  
2 tor’s expenses. (*Id.* at p. 598.) The court stressed that a disinterested prosecutor was one who was  
3 not “under the influence or control of an interested individual” or “under the influence of others who  
4 have . . . an axe to grind” against a particular entity. (*Id.* at p. 590.) Subsequently, in *County of Santa*  
5 *Clara*, the Supreme Court held that the hiring of private contingent-fee counsel to assist government  
6 attorneys in prosecuting public-nuisance abatement actions did not violate due process—despite the  
7 obvious conflict of interest—because “neutral, conflict-free government attorneys retain[ed] the pow-  
8 er to control and supervise the litigation.” (*County of Santa Clara v. Superior Court, supra*, 50  
9 Cal.4th at p. 58.) The court distinguished *Eubanks* on the grounds that the case before it did not in-  
10 volve “a party with a strong personal interest in the outcome of the case and an expectation that the  
11 provision of financial assistance would incentivize the public attorneys to pursue the [financing par-  
12 ties’] desired outcome even if justice demanded a contrary course of action.”<sup>11</sup> (*County of Santa*  
13 *Clara v. Superior Court, supra*, 50 Cal.4th at p. 59, fn. 13.)

14 The facts here present the very circumstance absent in *County of Santa Clara*. The Regional  
15 Board was billing *Shell* for its own staff’s efforts spent investigating and naming *Barclay*, at the same  
16 time *Shell* had a substantial financial interest in having *Barclay* named on the CAO. *Shell* had been  
17 named in the original CAO; *Barclay* had not. *Shell* had demanded that the Regional Board name  
18 *Barclay* as a discharger, and had even filed suit against *Barclay* seeking indemnification and contribu-  
19 tion with respect to its alleged “costs and expenses” in complying with the CAO and implementing  
20 the RAP. Clearly, *Shell* was seeking to have *Barclay* named as a discharger to support its meritless  
21 claims for contribution and indemnification. The Regional Board—and specifically *Sam Unger*—  
22 knew that *Shell* had filed suit against *Barclay* for the express purpose of recovering its alleged “costs”  
23 in complying with the CAO including implementing the RAP, but nonetheless sought (and obtained)

24 <sup>11</sup> In *County of Santa Clara*, the Supreme Court expressly held that “a heightened standard of neu-  
25 trality is required for attorneys prosecuting public-nuisance cases on behalf of the government.”  
26 (*Id.* at p. 57.) Because proceedings before the Regional Board are analogous to actions for  
27 abatement of a public nuisance (see *Santa Clara Valley Water District v. Olin Corp.* (N.D.Cal.  
28 2009) 655 F.Supp.2d 1048, 1064 [“Section 13304 is to be read in light of the common law princi-  
ples of nuisance”]), that standard squarely applies here (see *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90 [“Just as in a judicial proceeding, due process in an adminis-  
trative hearing also demands an *appearance* of fairness and the absence of even a *probability* of  
outside influence on the adjudication”], italics in original).

1 reimbursement from Shell for the time its prosecutorial staff spent investigating and naming Barclay  
2 at Shell’s urging. Under the circumstances, Shell surely had the expectation—later proven well-  
3 founded—“that [its] provision of financial assistance would incentivize the [Regional Board] to pur-  
4 sue [its] desired outcome even if justice demanded a contrary course of action.” (*Id.*)

5 Without question, Shell’s “financial assistance” incentivized the Regional Board to allocate  
6 precious staff time to investigating and naming Barclay. Unger testified that the Site Cleanup Unit’s  
7 staff is “burdened from a workload standpoint” (Ex. E [Unger Dep.] at 117:2-13), and that as a result,  
8 the Site Cleanup Unit’s time is almost always allocated to an entity from which the costs can be re-  
9 covered under the Cost Recovery Program. (Ex. E [Unger Dep.] at 205:4-9 [“Q. And some of those  
10 projects have a cost recovery program component to them but not all? A Nearly all of them, as much  
11 as -- I don't know of any that -- I know very few, if any -- I can't think of one that does not have a  
12 cost component – cost recovery component to it.”].) Unger further testified that cost recovery of staff  
13 time devoted to the Kast Property project began at some point “prior to the issuance of the 2011 or-  
14 der.” (Ex. E [Unger Dep.] at 28:5-10.) Staff working on the Kast Property project would enter their  
15 time into a software program and electronically submit it to the State Board. (Ex. E [Unger Dep.] at  
16 32:3-14; Ex. F [Ayalew Dep.] at 180:11-181:23.) As such, Shell’s illegal payments clearly diverted  
17 scarce Regional Board staff resources from their true mission of cleaning up water resources to build-  
18 ing an administrative record that would help Shell, Carson, and the *Acosta* Plaintiffs financially. As  
19 Unger and Frances McChesney, the Prosecution Team’s counsel, both stated, there was absolutely no  
20 reason to name Barclay on the CAO to achieve the Site’s clean-up—“None.” (Ex. E [Unger Dep.] at  
21 Ex. 22 [6/12/14 Regional Board Meeting Tr.] at 15; Ex. E [Unger Dep.] at 191:20-192:6 [“Q. And  
22 Ms. McChensney says: oh, none. The – Shell never petitioned or challenged the original cleanup and  
23 abatement order, so they’re still responsible regardless of who else may be added. . . Do you agree  
24 with Ms. McChesney’s statement? A. Yes.”].)

25 Shell’s illegal payments reimbursed the Regional Board for the time its staff spent in a wide  
26 variety of tasks they undertook in order to name Barclay. Unbeknownst to Barclay at the time,  
27 Shell’s illegal payments paid for the Prosecution Team’s staff (1) to sit in meetings with Barclay,  
28 (2) to sit in meetings with Shell while Shell was pressing the very same staff to name Barclay, (3) to



1 engage in purportedly privileged discussions with counsel (whose time was also paid for by Shell)  
2 about naming Barclay, (4) to draft the actual order, and (5) to prepare the 98-page Response to Bar-  
3 clay's comments. (Ex. F [Ayalew Dep.] at Ex. 3.) All of that staff time was bought and paid for by  
4 Shell illegally. The payments also reimbursed the Regional Board staff to develop purported "find-  
5 ings" that the *Acosta* Plaintiffs' experts now seek to use against Barclay's experts in the *Acosta* Liti-  
6 gation. (Ex. G [Site Detail Report] at pp. 11, 34, 38, 82-83.) While the *Acosta* Plaintiffs have styled  
7 the Regional Board staff as "non-retained" experts, they are in fact "retained" by Shell to aid in both  
8 Shell's and the *Acosta* Plaintiffs' separate lawsuits against Barclay.

9 Plainly, the result of this arrangement is that Shell was reimbursing the Regional Board for  
10 the time it spent investigating and naming Barclay as a discharger. Ayalew confirmed that  
11 "[w]henever [he] work[s] on the [*Kast Property Tank Farm*] project," "*Shell is paying for [it].*"  
12 (Ex. F [Ayalew Dep.] at 179:8-21, italics added.) When asked whether he billed Shell for the time he  
13 spent considering whether to name Barclay as a discharger, Ayalew conceded that time was billed to  
14 "*Shell's account yes.*" (*Id.* at 179:22-180:1, italics added.) Indeed, Ayalew even billed Shell for the  
15 time he spent responding to Barclay's subpoenas in the *Acosta* Litigation. (Ex. F [Ayalew Dep.] at  
16 Ex. 3.)

17 Only Shell's substantial illegal financial inducements can explain why the Regional Board  
18 was willing to devote so many resources from an already "burdened" staff to name a party to an  
19 amended order that, according to the Regional Board's own counsel, will have no impact going for-  
20 ward on the clean-up of the Site. (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional Board meeting  
21 Tr.] at 15:3-9.) Absent Shell's illegal payments, the Regional Board staff never would have been  
22 able to spend the time (nor have the need to spend the time) attempting to build a record to name  
23 Barclay, and the "burdened" site cleanup unit staff could have devoted their scarce time to getting  
24 other sites cleaned up. Even though Unger knew that naming Barclay had nothing to do with improv-  
25 ing water quality (Ex. E [Unger Dep.] at 117:2-13, 205:4-9), he diverted valuable staff time away  
26 from the Regional Board's main mission to further Shell's and the *Acosta* Plaintiffs' cost recovery  
27 efforts and did so using illegal payments from Shell.

1           Simply put, Shell’s illegal payments to the Regional Board created both the appearance and  
2 the probability of outside influence—precisely what due process forbids. (*Nightlife Partners v. City*  
3 *of Beverly Hills, supra*, 108 Cal.App.4th at p. 90; see also *Hambarian v. Superior Court* (2002) 27  
4 Cal.4th 826, 837 [“One risk of [private support of government prosecutions is that] the prosecution  
5 itself could be used as a strategic weapon to disrupt and distract a competitor for reasons wholly unre-  
6 lated to the public administration of justice.”].)

7           For this reason alone, the Revised CAO must be vacated.

8           **2.       The Composition And Functioning Of The Prosecution And Advisory Teams**  
9           **Violated Due Process.**

10           Constitutional due process requires a decision made by a fair tribunal. (*Withrow v. Larkin*  
11 (1975) 421 U.S. 35, 46.) Due process is violated where the decision maker is actually biased or  
12 where “experience teaches that the probability of actual bias on the part of the judge or decision mak-  
13 er is too high to be constitutionally tolerable.” (*Id.* at p. 47.) “[A] bias resulting in the denial of a fair  
14 hearing may arise when an administrative agency fails to adequately separate its prosecutory and ad-  
15 judicatory functions in the same proceeding.” (*Nick v. City of Lake Forest* (2014) 232 Cal.App.4th  
16 871, 887.) “The overlap of these conflicting roles in the same proceeding violates due process be-  
17 cause it creates an appearance of unfairness and a probability of outside influence.” (*Ibid.*) Separate  
18 and apart from the constitutional requirement of due process, the APA also requires that “the prose-  
19 cutory and, to a lesser extent, investigatory, aspects of administrative matters must be adequately sep-  
20 arated from the adjudicatory function.” (*Nightlife Partners v. City of Beverly Hills* (2003) 108  
21 Cal.App.4th 81, 91-92. See also *Morongo Band of Mission Indians v. State Water Resources Control*  
22 *Bd.* (2009) 45 Cal.4th 731, 738; Govt. Code, § 11425.10, subd. (a)(4) [“During the conduct of admin-  
23 istrative proceedings, the adjudicative function must be separated from the investigative, prosecutorial,  
24 and advocacy functions within an agency.”].)

25           The proceedings below violated the required separation between adjudicative and prosecuto-  
26 rial functions in three distinct ways. First, from the start, there was no clear division between the  
27 Prosecution and Advisory/Adjudicatory Teams. In investigating and issuing the Revised CAO, the  
28 Regional Board loosely divided its staff into two teams: the Advisory/Adjudicatory Team and the

1 Prosecution Team. But this rough division was never memorialized in writing or clearly communi-  
2 cated to staff, and lacked the separation of functions required by due process and the APA—  
3 “circumstances [that] creat[ed] an unacceptable risk of bias.” (*Morongo Band of Mission Indians v.*  
4 *State Water Resources Control Board*, *supra*, 45 Cal.4th at p. 741; cf. *In the Matter of the Petitions of*  
5 *California Department Of Transportation And MCM Construction, Inc.*, State Board Order No. WQ  
6 2014-0015, at \*4-5 [finding that the North Coast Water Board complied with the “separation of func-  
7 tions” requirements of the APA and due process because it “established distinct prosecution and ad-  
8 visory teams.”].)

9 Key members of the Prosecution Team—Unger and Ayalew—were unable to identify when  
10 the teams were formed or who was on them. (Ex. E [Unger Dep.] at 35:8-9 [“Q. When was the pros-  
11 ecutorial team established? A. I can’t recall when it was established.”]; Ex. F [Ayalew Dep.] at  
12 26:18-24 [“Q. Was there some point in time when you were told there’s going to be a prosecutorial  
13 team in connection with considering whether to name Barclay on the order? A. That’s correct,  
14 yes. . . . That was at a meeting. I don’t remember the date. Sorry.”].) Surprisingly, Ayalew testified  
15 that he thought Deborah Smith, the adjudicator, was actually the prosecutor (Ex. F [Ayalew Dep.] at  
16 15:15-24 [“Q. Do you know who is part of the prosecutorial team? . . . A. Deborah Smith. Q. And  
17 she is part of the prosecutorial team; isn’t that right? A. As far as I know, yes.”]), and that he thought  
18 Unger was not even a member of either team (Ex. F [Ayalew Dep.] at 18:19-21; 20:15-18 [Q. Is Mr.  
19 Unger on either the prosecutorial team or the advisory team? A. No as far as I know.”].) Unger, in  
20 turn, testified that “there was never really any establishment of the [prosecutorial] team, per se.” (Ex.  
21 E [Unger Dep.] at 197:12-19.) Indeed, according to Unger, “[m]ost of the staff who were working  
22 day to day on the Carousel project de facto served as the prosecuting – prosecutorial team.” (*Id.* at  
23 37:5-10.) Plainly, when even the team members of the prosecutorial and adjudicatory teams do not  
24 even which side of the divide they are on, the required separation of functions is missing.

25 Second, no formalities were observed in creating the teams. Unger described the Prosecution  
26 Team in 2011 as “de facto.” (*Id.* at 37:5-16.) There was no formal establishment of a Prosecution  
27 Team and any member of the Site Cleanup Unit could be called upon to render views about naming  
28 Barclay at any time. (*Id.* at 35:22-36:1 [“Q. Is there any -- is there anything in writing that estab-

1 lished the prosecutorial team here? A. memo, an email, something like that that said we're going to  
2 have a prosecutorial team and here's what it is? A. Not that I can recall.”); Ex. F [Ayalew Dep. 27:6-  
3 9] (Q. Did you get anything in writing instructing you that there was going to be a prosecutorial team  
4 to consider naming Barclay in this matter? A. Not that I can recall, no.”.) There was also no written  
5 guidance establishing a Prosecution Team or an Advisory Team. (*Id.* at 35:22-36:1 [“Q. Is there any  
6 -- is there anything in writing that established the prosecutorial team here? A memo, an email, some-  
7 thing like that that said we're going to have a prosecutorial team and here's what it is? A. Not that I  
8 can recall.”]; *id.* at 37:21-24 [“Q. Was there any written instruction issued to the de facto prosecution  
9 team not to have conversations with Ms. Smith? A. Not that I can recall.”]; Ex. F [Ayalew Dep.] at  
10 27:6-9 [Q. Did you get anything in writing instructing you that there was going to be a prosecutorial  
11 team to consider naming Barclay in this matter? A. Not that I can recall, no.”].) Unger also testified  
12 that he could not remember any written instructions concerning ex parte communications with Debo-  
13 rah Smith. (Ex. E [Unger Dep.] at 37:21-24 [“Q. Was there any written instruction issued to the de  
14 facto prosecution team not to have conversations with Ms. Smith? A. Not that I can recall.”].) The  
15 Regional Board’s wholesale failure to observe *any* formalities in the creation of the prosecutorial and  
16 advisory teams is inconsistent with a finding that the required separation of functions is present.

17 Third, aside from the lack of clarity regarding the formation and composition of the teams,  
18 there was an underlying structural defect in the assignment of responsibilities. The Prosecution Team  
19 included Unger, the Executive Officer of the entire Regional Board. Unger is effectively the head of  
20 the agency, and every staffer in the agency ultimately answers to him. Expecting any of Unger’s  
21 subordinates to evaluate a recommendation from him but not to be persuaded by his position over  
22 them to adopt his recommendation is a circumstance in “which experience teaches that the probabil-  
23 ity of actual bias on the part of the judge or decision maker is too high to be constitutionally tolera-  
24 ble.” (*Withrow v. Larkin, supra*, 421 U.S. at p. 47.) Obviously, any recommendation coming from  
25 Unger would have carried extraordinary weight with any staff member assigned the role of adjudica-  
26 tor, “creat[ing] an unacceptable risk of bias.” (*Morongo Band of Mission Indians v. State Water Re-*  
27 *sources Control Board, supra*, 45 Cal.4th at p. 741.)

1 Here, that “unacceptable risk of bias” was exacerbated by the selection of Deborah Smith,  
2 Unger’s subordinate, as the adjudicator. Smith reports directly to Unger; he is her immediate superi-  
3 or. (Ex. E [Unger Dep.] at 39:13-20 [“Q. Between 2011 and today did Ms. Smith report to you in the  
4 chain of command at the regional board? A. Yes. . . . Q. In the organization chart, she reports directly  
5 to you in the chart; right? A. Yes.”].) The APA expressly provides that “[a] person may not serve as  
6 presiding officer in an adjudicative proceeding” if “the person is subject to the authority, direction, or  
7 discretion of a person who has served as an investigator, *prosecutor*, or advocate in the proceeding or  
8 its preadjudicative stage.” (Govt. Code, § 11425.30, subd. (a)(2), italics added.) Notwithstanding,  
9 Unger—the prosecutor who signed the recommendation to Smith that she name Barclay—designated  
10 Smith—his direct subordinate—as the presiding officer, a clear and direct violation of sec-  
11 tion 11425.30, subsection (a)(2) of the Government Code. (Ex. E [Unger Dep.] at 39:3-12 [“Q. You  
12 mentioned that by 2011, when the cleanup and abatement order was issued here, you understood Ms.  
13 Smith was in the advisory capacity; right? A. Yes. Q. My question for you is, do you recall who de-  
14 cided she should be in that capacity for this matter? A. It was a decision that senior staff and our  
15 counsel decided. Q. You're part of senior staff, are you not? A. Yes, I am.”].) Under the circum-  
16 stances, “the probability of actual bias on the part of the judge or decisionmaker [was] too high to be  
17 constitutionally tolerable.” (*Withrow v. Larkin, supra*, 421 U.S. at p. 47.) As the Supreme Court has  
18 recognized, “[T]here is a serious risk of actual bias— based on objective and reasonable percep-  
19 tions—when a person with a personal stake in a particular case had a significant and disproportionate  
20 influence in placing the judge on the case[.]” which is precisely what Unger did when he designated  
21 his subordinate as the adjudicator. (*Caperton v. AT Massey Coal Co., Inc.* (2009) 556 U.S. 868, 884.)  
22 Indeed, Smith’s inexplicable and ex parte last-minute editing of the Revised CAO to add purported  
23 violations of law, and changes in the facts, to the Revised CAO—a prosecutorial, not adjudicatory,  
24 function—just confirms her lack of impartiality and independence, her failure to understand or exe-  
25 cute the advisory function with which she was entrusted, and the Regional Board’s wholesale failure  
26 to adequately separate the adjudicative and prosecutorial functions.

27 Smith’s inexplicable and ex parte last-minute editing of the Revised CAO confirms the biased  
28 and unfair nature of this structure. The Revised Draft CAO from the Prosecution Team stated that

1 the reservoirs had been “fully cleaned out.” (Ex. D [Revised Draft CAO] at p. 5.) But without any  
2 evidentiary foundation, or notice to Barclay, whatsoever, Smith changed the sentence to say that the  
3 reservoirs had been “emptied.” (Ex. A [Revised CAO] at p. 4.] Smith also added more purported  
4 “violations” of law that are nowhere to be found in the Revised Draft CAO. (*Id.* at p. 11, fn. 14.)  
5 Smith’s obvious zeal to please her superior and make his recommended order even more supportive  
6 of naming Barclay confirms her lack of impartiality and independence, and her failure to understand  
7 or execute the advisory function with which she was entrusted. This kind of obvious and improper  
8 bias in the selection of an adjudicator and prosecutor is specifically prohibited under the APA.  
9 Moreover, the fact that Smith added violations to the CAO—a prosecutorial function—while in a  
10 purportedly adjudicative capacity is further evidence of the Regional Board’s blurred lines and lack  
11 of defined teams that clearly violates the APA.

12 For this reason alone, the Revised CAO must be vacated.

13 **3. The Five-Year Delay In Naming Barclay To The Revised CAO Deprived It Of**  
14 **Any Meaningful Opportunity To Participate In The Development Of The RAP.**

15 Due process requires an opportunity to be heard ““at a meaningful time and in a meaningful  
16 manner.”” (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th  
17 197, 212, quoting *Armstrong v. Manzoa* (1965) 380 U.S. 545, 552; see also *Cleveland Bd. of Educ. v.*  
18 *Loudermill* (1985) 470 U.S. 532, 546 [“The essential requirements of due process . . . are notice and  
19 an opportunity to respond. The opportunity to present reasons, either in person or in writing, why  
20 proposed action should not be taken is a fundamental due process requirement.”]; *Arnett v. Kennedy*  
21 (1974) 416 U.S. 134, 178 [“A fundamental requirement of due process is the opportunity to be heard.  
22 It is an opportunity which must be granted at a meaningful time and in a meaningful manner,” inter-  
23 nal citations omitted].) Here, by deliberately delaying the naming of Barclay until after the RAP was  
24 developed by Shell and the comment period closed, Barclay was denied the opportunity to be heard  
25 on the RAP and as a result Barclay is now purportedly on the hook for a RAP it had no meaningful  
26 chance (nor reason) to contest.

27 After initially beginning its investigation in 2008, in mid-2010 the Regional Board was urged  
28 by Shell to name Barclay, and it chose not to do so. (Ex. TTT [1/21/14 Ltr.] at Tab 131 [6/9/10 Ltr.]

1 at p. 1.) Next, the Regional Board requested detailed information from Barclay in 2011 using Water  
2 Code section 13267. (Ex. XX [4/22/11 Request from Water Board].) After the Regional Board re-  
3 ceived that information, it again chose not to name Barclay. (Ex. TTT [1/21/14 Ltr.] at Tab 333  
4 [9/15/11 Dole Submission].) Then, in October 2013, after nearly two years of complete silence from  
5 the Regional Board with respect to Barclay, the Regional Board sought public comment on naming  
6 Barclay. (Ex. J [10/31/13 Notice from Regional Board].) Barclay was the only member of the public  
7 to comment, and Barclay submitted a comprehensive package of both legal and technical information  
8 in January 2014 refuting any possible basis to name Barclay. (Ex. TTT [1/21/14 Ltr.].) Neither Shell  
9 nor the *Acosta* Plaintiffs advocated that Barclay be named during the official comment period.

10 In June 2014, at the apparent behest of Shell, the Prosecution Team suddenly “re-opened” the  
11 comment period on the October 2013 Draft CAO. (Ex. T [6/3/14 Notice from Regional Board].)  
12 There is no other explanation than that Shell, having failed to submit comments during the comment  
13 period that ended in January of 2014, desired to put comments in the record. Shell put in selected  
14 comments—only technical, not legal, and only responding to a few of Barclay’s technical comments.  
15 (Ex. II [6/16/14 Shell Submission].) Barclay dutifully submitted a response to those comments,  
16 pointing out that Shell had failed to address any of its legal arguments and many of the technical  
17 comments contained in Barclay’s January 2014 submission. (Ex. U [6/30/14 Barclay Submission].)

18 On December 8, 2014—nearly six months later and only after Shell settled with the *Acosta*  
19 Plaintiffs and the City of Carson—Unger issued a public recommendation to Smith to name Barclay.  
20 (Ex. S [12/8/14 Memo].) Unger’s deadline for Smith was January 9, 2015—the very same day that  
21 the comment period on the RAP closed, which, by virtue of being a product of Shell’s settlement with  
22 the *Acosta* Plaintiffs, requires more remediation than necessary. (See *id.* at pp. 2, 5.) Consistent with  
23 Unger’s recommendation, Smith did not issue the Revised CAO until April 30, 2015—after the  
24 comment period on the RAP closed, depriving Barclay of any opportunity to challenge the RAP to  
25 which Shell, the *Acosta* Plaintiffs, and the City of Carson agreed.

26 To be clear, the Regional Board never should have named Barclay. There is no legal or factu-  
27 al basis for doing so. But the Regional Board’s apparently deliberate decision to do so only after the  
28 comment period on the RAP closed is a separate and independent ground for vacating the Revised

1 CAO. There is no precedent for naming someone to an enforcement order that would require them to  
2 pay for a clean-up long after someone else’s RAP has been approved. Even beyond that, there is no  
3 precedent where the public agency has been on notice to investigate that entity since before the origi-  
4 nal order was issued and has twice solicited detailed information from the entity and chose not to  
5 name it. The five-year delay clearly prejudiced Barclay, as it must now oppose implementation of a  
6 RAP that was crafted by its adversaries.

7 For this reason alone, the Revised CAO must be vacated.<sup>12</sup>

8 **4. The Administrative Record Lacks An Evidentiary Basis For Naming Barclay.**

9 “To meet the requirement of fairness, the Regional Board . . . must ensure that there is a fac-  
10 tual and legal basis in the record for its decision and must indicate its reasoning and the factual basis  
11 for its decision to the affected parties.” (*In the Matter of Project Alpha*, State Board Order No. WQ  
12 74-1, at \*3.) The findings must “bridge the analytic gap between the raw evidence and ultimate deci-  
13 sion or order,” disclosing “the analytic route the . . . agency traveled from evidence to action.”  
14 (*Topanga Ass’n for a Scenic Cmty. v. City of L.A.* (1974) 11 Cal.3d 506, 514-515.) Indeed, the APA  
15 specifically requires that the Revised CAO contain “a statement of the factual and legal basis for the  
16 decision,” and further provides that if “the statement is no more than mere repetition or paraphrase of  
17 the relevant statute or regulation, the statement shall be accompanied by a concise and explicit state-  
18 ment of the underlying facts of record that support the decision.” (Govt. Code, § 11425.50,

19 <sup>12</sup> The Regional Board’s five-year delay also triggers the equitable doctrine of laches. California  
20 has long recognized that laches may bar an administrative proceeding. (*City of Oakland v. Public*  
21 *Employees’ Retirement System* (2002) 95 Cal.App.4th 29, 51; see also *Brown v. State Personnel*  
22 *Bd.* (1985) 166 Cal.App.3d 1151, 1158.) As in the litigation context, the “defense of laches re-  
23 quires unreasonable delay plus either acquiescence in the act about which plaintiff complains or  
24 prejudice to the defendant resulting from the delay.” (*Conti v. Board of Civil Service Commis-*  
25 *sioners* (1969) 1 Cal.3d 351, 359.) In the administrative context, courts “will ‘borrow’ a closely  
26 analogous civil statute of limitations.” (*City of Oakland v. Public Employees’ Retirement System,*  
27 *supra*, 95 Cal.App.4th at p. 51.) When they do so, “it is to avoid unfairness due to delay by the  
28 public agency against whom laches was asserted.” (*Ibid.*) Here, the most closely analogous stat-  
ute of limitations is the three-year limitations period on nuisance claims. (See Code Civ. Proc.,  
§ 338, subd. (b).) The Regional Board began its investigation on May 8, 2008 (Ex. TTT  
[1/21/Ltr.] at Tab 328 [May 8, 2008 Notice from Regional Board]), but did not name Barclay un-  
til April 30, 2005—nearly seven years later, far exceeding the analogous three-year limitations  
period. (Ex. A [Revised CAO].) Moreover, the Regional Board’s extraordinary delay plainly  
prejudiced Barclay by preventing it from participating in the development of the RAP, the finan-  
cial burdens of which the Regional Board and Shell may now seek to impose on Barclay.



1 subd. (a).) “This enables the parties to determine whether, and on what basis, to seek review of a re-  
2 gional water board’s decision,” and “helps to encourage orderly analysis and reduce the likelihood of  
3 unfounded decisions.” (*In the Matter of the Petition of Foothill/Eastern Transportation Corridor*  
4 *Agency*, State Board Order No. WQ 2014-0154, at \*27.)

5 The Revised CAO does not satisfy any of these requirements. The Regional Board has not  
6 “ensure[d] that there is a factual and legal basis in the record.” To the contrary, the Revised Draft  
7 CAO sent to Smith on December 8, 2014 fails to include a list of the evidence in the administrative  
8 record supporting its findings (Ex. D [Revised Draft CAO]), and both Ayalew and Unger repeatedly  
9 testified that they did not know where the evidence was collected to support key findings. (Ex. F  
10 [Ayalew Dep.] at 73:10-74:3, 74:18-76:16, 159:6-9, 243:22-244:5, 84:15-22, 229:22-230:5, 109:18-  
11 110:3, 166:17-20; Ex. E [Unger Dep.] at 213:2-217:20, 97:8-14, 232:20-233:15, 234:7-10, 235:5-12.)  
12 Moreover, the Revised CAO does not contain “a statement of the factual and legal basis” for the Re-  
13 gional Board’s findings. For example, the Revised CAO does not provide a factual basis for the Re-  
14 gional Board’s findings that Barclay “spread the waste,” or “contributed to the migration of the  
15 waste.”<sup>13</sup> The Revised CAO also does not contain a statement of the legal basis for finding Barclay  
16 liable as a discharger. The Revised CAO states only that the finding “is consistent with orders of the  
17 State Water Resources Control Board” and then cites State Board cases that do not at all support the  
18 Regional Board’s finding.<sup>14</sup> Further, the Revised CAO does not even quote the statutes, let alone  
19 provide any factual or legal basis, for its finding that Barclay violated Health and Safety Code section  
20 5411, Fish and Game Code section 5650, or Los Angeles County Code section 20.36.010. Both Un-  
21 ger and Ayalew testified that they had no part in researching or determining whether Barclay was in  
22 compliance with existing laws at the time of its activities at the Site. (Ex. F [Ayalew Dep.] at 60:21-  
23 25; 61:3-10; 61:14-21; Ex. E [Unger Dep.] at 56:19-24; 70:7-14.) Instead, Frances McChesney, the  
24 Prosecution Team’s legal counsel, made those determinations. (Ex. E [Unger Dep.] at 55:2-58:18  
25 [“Q. Are you the one who drew those conclusions about alleged violations of the Dickey Act? A. No.

26 <sup>13</sup> See Part V.B.1, *infra*, discussing in further detail the lack of evidence in support of the Regional  
27 Board’s findings.

28 <sup>14</sup> See Part V.B.2, *infra*, discussing and distinguishing in further detail the State Board orders cited  
by the Regional Board.

1 Q. And do you know who on the prosecutorial team did? A. Our counsel, Frances McChesney.”.)  
2 When asked for the factual and legal basis for these determinations—which the Regional Board is  
3 required to provide—Unger refused to answer on the grounds of the attorney-client privilege. (*Id.*)  
4 This is plainly insufficient under the APA.

5 Even more egregious, the Revised CAO alleges the violations of Fish and Game Code section  
6 5650 and Los Angeles County Code section 20.36.010 for the first time.<sup>15</sup> (Cf. Ex. A [Revised CAO]  
7 at p. 11, fn. 14 with Ex. D [Revised Draft CAO].) Smith did not provide any basis or reasoning for  
8 including these additional alleged violations which were not part of the Revised Draft CAO sent to  
9 her by the Prosecution Team. The inclusion of these findings—for which Barclay had no notice or  
10 opportunity to respond, and for which the Regional Board has refused to provide any factual or legal  
11 basis—violates “the first and most universally recognized requirement of due process,” namely, that a  
12 defendant have “real notice of the true nature of the charge against him.” (*Smith v. O’Grady* (1941)  
13 312 U.S. 329, 334; see also *In the Matter of Project Alpha*, State Board Order No. WQ 74-1, at \*3  
14 [“To meet the requirement of fairness, the Regional Board . . . must ensure that there is a factual and  
15 legal basis in the record for its decision and must indicate its reasoning and the factual basis for its  
16 decision to the affected parties”].)

17 The Revised CAO that was issued on April 30, 2015 also includes a number of other changes  
18 beyond simply naming Barclay. (Ex. A [Revised CAO].) The Revised Draft CAO circulated on De-  
19 cember 8, 2014 included this statement: “Available information indicates that by August 15, 1966,  
20 all three reservoirs had been fully cleaned out of liquid residue.” (Ex. D [Revised Draft CAO] at p.  
21 5.) However, in the Revised CAO, Smith altered this statement to read “all three reservoirs had been  
22 emptied of liquid residue.” (Ex. A [Revised CAO] at p. 4.) Smith’s change has no support in the  
23 record. Ayalew testified that he wrote in the Revised Draft CAO that all the reservoirs had been “ful-  
24 ly cleaned out.” (Ex. F [Ayalew Dep.] at 141:23-143:22.) He testified that this information was ex-  
25 tracted from the Pacific Soils reports from the time (Ex. F [Ayalew Dep.] at 142:25-143:22), and in-  
26 deed the statement is supported by contemporaneous eyewitness testimony under oath and contempo-  
27 raneously-generated documents. Without explanation or evidentiary support, Smith deleted it from

28 <sup>15</sup> These code provisions are not enforced by the Regional Board and are not in the Water Code.

1 the final order. (Ex. A [Revised CAO] at p. 4.) Barclay now has no opportunity to respond or com-  
2 ment upon this purported “finding,” which is not supported by the evidence and was not recommend-  
3 ed by the Prosecution Team.

4 The Prosecution Team’s Response to Comments purports to rebut comments made by Barclay  
5 but it does not refer to specific evidence in support of the Prosecution Team’s key findings, or the  
6 evidence it cites to does not support the Prosecution Team’s contention. In fact, in some cases that  
7 evidence is directly contrary. For example, in the Response to Comments there is a reference to the  
8 Prosecution Team’s belief that Barclay left petroleum hydrocarbons on the floors of the reservoirs  
9 when, in fact, all contemporaneous, eyewitness testimony directly refutes that conclusion. (Ex. TTT  
10 [1/21/14 Ltr.] at Tab 8 [Vollmer Dep.] at 34:25-35:12, 37:7-15, 141:17-142:4; *id.* at Tab 7 [Bach  
11 Dep.] at 40:12-24, 50:18-51:1, 128:22-130:12; *id.* at Tab 47 [SOC 120420-120421]; *id.* at Tab 344  
12 [CARSON 463-464, CARSON 467-469, CARSON 477]; *id.* at Tab 348 [County of Los Angeles su-  
13 pervised grading certifications for 28086 dated 3/1/1967, 4/3/1967, and 4/17/1967].) In the Response  
14 to Comments, the Prosecution Team actually quotes one of those eyewitnesses and that testimony  
15 directly refutes (instead of supports) the Prosecution Team’s contention. (Ex. S at Attachment 14 at  
16 pp. 24-26, 33.) Such clearly unsupported “findings” cannot support the naming of Barclay.

17 Finally, although the Prosecution Team has admitted it substantially relied on an unsworn,  
18 hearsay statement that counsel for the *Acosta* Plaintiffs prepared for George Bach in 2011 (*Id.* at pp.  
19 24, 26); Ex. E [Unger Dep.] at 106:6-21; Ex. F [Ayalew Dep.] at 71:19-72:6 [“Q. Did you read his  
20 2014 deposition? A. Yes, I did. Q. Did you read it before December 8 of 2014? A. No. Q. So when  
21 you made the recommendation and did the response to comments in this Exhibit 9, you had not read  
22 Mr. Bach’s deposition; right? From 2014? A. The 2014 -- yes, I did not read.”]), the Revised CAO  
23 fails to mention any reliance on George Bach’s statement, let alone detail the Regional Board’s basis  
24 for relying on it despite Bach’s 2014 deposition testimony repudiating the statement and explaining  
25 the suspect circumstances under which it was drafted. (See Ex. U [6/30/14 Ltr.] at p. 4).<sup>16</sup> While  
26 Smith allowed Bach’s 2014 deposition into the record, it does not appear that anyone considered it.  
27 (Ex. GG [2/27/15 Ltr.]; Ex. HH [12/24/14 Ltr.]) This clearly violates the APA’s requirement that the

28 <sup>16</sup> The unsworn 2011 Bach statement is discussed in greater detail below. Part V.B.1.b, *infra*.

1 factual bases for credibility determinations be set forth with specificity. (See Govt. Code,  
2 § 11425.50, subd. (b) [“If the factual basis for the decision includes a determination based substan-  
3 tially on the credibility of a witness, the statement shall identify any specific evidence of the observed  
4 demeanor, manner, or attitude of the witness that supports the determination.”].)

5 The Regional Board’s decision to prefer the incompetent and inadmissible 2011 statement  
6 over credible and admissible evidence also violates the APA and the State Board’s own regulations.  
7 Under both the APA and the State Board’s regulations, hearsay evidence—such as that contained in  
8 the 2011 unsworn statement which is not the product of Bach’s personal knowledge—“may be used  
9 for the purpose of supplementing or explaining other evidence *but shall not be sufficient in itself to*  
10 *support a finding unless it would be admissible over objection in civil actions.*” (Govt. Code,  
11 § 11513, subds. (c), (d), italics added); Cal. Code Regs. tit. 23, § 648.5.1 [incorporating Govt. Code  
12 § 11513 by reference]; see also, e.g., *Molenda v. Dept. of Motor Vehicles* (2009) 172 Cal.App.4th  
13 974, 996 [“The mere admissibility of evidence at an administrative hearing does not confer the status  
14 of ‘sufficiency’ to support a finding absent other competent evidence”], citation omitted; *Daniels v.*  
15 *Dept. of Motor Vehicles* (1983) 33 Cal.3d 532 [noting that Gov. Code § 11515 “render[s] hearsay evi-  
16 dence insufficient in itself to support a finding”]; see also Evid. Code, § 1200 [defining hearsay evi-  
17 dence].)

18 For these reasons as well, the Revised CAO must be vacated.

19 **5. The Prosecution And Advisory Teams Favored Shell And The *Acosta* Plaintiffs**  
20 **And Disfavored Barclay.**

21 Separate and apart from the illegal and unconstitutional payments, Shell’s and the *Acosta*  
22 Plaintiffs’ relationship with the Regional Board is deeply problematic in other important respects.  
23 The Regional Board provided Barclay two specific opportunities to comment on the Draft CAO nam-  
24 ing it, and Barclay did so within the prescribed comment periods. The two comment periods were the  
25 October 31, 2013 and June 3, 2014 notices to all interested parties. (Ex. J [10/31/13 Notice from Re-  
26 gional Board]; Ex. T [6/3/14 Notice from Regional Board].) No other parties submitted comments in  
27 response to the October 31, 2013 notice, and the Draft CAO was not changed in response to Bar-  
28

1 clay's comments by June 2014. Therefore, there was no reason in June 2014 to "re-open" the public  
2 comment period. However, the Prosecution Team did so, apparently in response to Shell's demands.

3 After receiving the June 3, 2014 order, Barclay again respected the boundaries of the pro-  
4 scribed comment periods and submitted responsive comments to Shell's on the due date. (Ex. U  
5 [6/30/14 Barclay Response].) According to the Prosecution Team's December 8, 2014 memoranda,  
6 those are the only comment periods. (Ex. S [12/8/14 Memo].) Based on the submissions to the offi-  
7 cial comment periods, there should only be one comment from Shell (Ex. II [6/16/14 Ltr.]) and two  
8 comments from Barclay (Ex. TTT [1/21/14 Ltr.]; Ex. U [6/30/14 Ltr.]). However, even after the  
9 comment periods closed, Unger repeatedly communicated on an *ex parte* basis with Bowcock, the  
10 *Acosta* Plaintiffs' consultant. (Ex. E [Unger Dep.] at 22:4-23, 162:5-14.) Indeed, Unger openly in-  
11 vited these *ex parte* communications by offering Bowcock the opportunity to "talk whenever you  
12 wish." (Ex. E [Unger Dep.] at *id.* at 162:5-14; Ex. 15 at PRA-RWQCB-007029.) In those communi-  
13 cations, Bowcock criticized Barclay's submissions and demanded that Barclay be named as a dis-  
14 charger. (Ex. E [Unger Dep.] at Ex. 14; *id.* at Ex. 15.) Unger also communicated with a member of  
15 the Carson City Council, even though the City of Carson was an adverse party. (Ex. E [Unger Dep.]  
16 at Ex. 17.) These improper *ex parte*, post-comment period communications were never disclosed to  
17 Barclay, and Barclay was never given the opportunity to respond. Moreover, the State Board has  
18 specific guidelines establishing the purpose behind preventing *ex parte* contacts. (Ex. JJ [State Water  
19 Resources Control Board, Office of Chief Counsel, M. A.M. Lauffer Chief Counsel Memorandum  
20 (Apr. 25, 2013)] at p. 2 ["*Ex parte* communications may contribute to public cynicism that decisions  
21 are based more on special access and influence than on the facts, the laws, and the exercise of discre-  
22 tion to promote the public interest."].)

23 Unger also met with representatives of Shell on May 14, 2014 after the close of the initial  
24 comment period to discuss naming Barclay as a discharger. (Ex. F [Ayalew Dep.] at 185:24-187:1;  
25 Ex. E [Unger Dep.] at Ex. 14.) Shortly after that meeting, the Regional Board re-opened the com-  
26 ment period solely for the purpose of giving Shell the opportunity to respond to Barclay's submis-  
27 sions. (See Ex. S [12/8/14 Memo].) Even more egregious, in his December 2014 letter recommend-  
28 ing the adoption of the Revised Draft CAO, Unger asked Smith to issue a decision on the very same

1 day that the comment period for the revised RAP was set to close, which would have made Barclay  
2 responsible to pay for a RAP prepared by its adversary over which it had no say and that Shell had  
3 already agreed with the Plaintiffs to implement. (*Id.*; Ex. LL [11/3/14 Regional Board Summary of  
4 Proposed RAP] at p. 4.)

5 Finally, Congresswoman Hahn encouraged the Regional Board to add Barclay. (Ex. E [Unger  
6 Dep.] at Ex. 21.) Given the quasi-judicial nature of the Regional Board’s proceedings, Congress-  
7 woman Hahn’s contacts with the Regional Board raise the appearance of impropriety. (See, e.g.,  
8 *Pillsbury Co. v. FTC* (5th Cir. 1966) 354 F.2d 952, 963 [“Common justice to a litigant requires that  
9 we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the  
10 United States Senate, however innocent they intended their conduct to be, to arrive at the ultimate  
11 conclusion which they did reach.”].) Moreover, the *Acosta* Plaintiffs’ consultant, Bowcock, stated  
12 that Unger was “afraid of Hahn.” (Ex. E [Unger Dep.] at Ex. 19 at PRA-RWQCB-2638.) Hahn’s  
13 ties to counsel for the *Acosta* Plaintiffs are no secret. As discussed, lead counsel for the *Acosta* Plain-  
14 tiffs is a significant individual contributor to Congresswoman Hahn’s political ambitions, and a sig-  
15 nificant contributor to AAJ PAC, which in turn is also one of Congresswoman Hahn’s largest con-  
16 tributors. (Ex. E [Unger Dep.] at Ex. 20.) By naming Barclay, the Regional Board was able to satis-  
17 fy the demands of Shell, the *Acosta* Plaintiffs, and the City of Carson and appease Congresswoman  
18 Hahn. Taken together, the aforementioned facts raise genuine questions about the impartiality of the  
19 Prosecution Team. (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 582 [“The due pro-  
20 cess guaranty of a fair and impartial administrative decisionmaker . . . [is] violated . . . if the official  
21 or officials who take part in the proceedings are demonstrably biased or if, in the least, circumstances  
22 such as personal or financial interest strongly suggest a lack of impartiality”].)

23 By contrast, the record is replete with instances where Barclay’s attempts to plead its case  
24 were blocked at every turn. For example, Frances McChesney claimed in her January 2015 letter that  
25 Barclay should have submitted the Waterstone 3-D model in the fall of 2014. (Ex. MM [1/15/15  
26 Ltr.].) However, submitting the model at that time would have been inappropriate since it would  
27 have necessarily occurred after the close of the official comment period. McChesney used that ar-  
28 gument to urge Deborah Smith to prevent the adjudicator from considering that key model, and Smith

1 obligingly agreed to keep it out of the record. (Ex. GG [2/27/15 Ltr.]) Yet, at the same time, Unger  
2 was inviting Bowcock, Girardi Keese’s representative, to meet with him at any time to discuss nam-  
3 ing Barclay on the order, regardless of the close of the “official” comment period. (Ex. E [Unger  
4 Dep.] at 162:5-14.)

5 Barclay, continuing to respect the boundaries and guidelines set by the Regional Board,  
6 sought to submit more critical evidence to Smith in December 2014. (Ex. HH [12/24/14] at p. 2; Ex.  
7 N [1/6/15 Ltr.]; Ex. NN [1/16/15 Ltr.]) Those requests were denied. (Ex. GG [2/27/15 Ltr.])  
8 Smith’s justifications for the denial were arbitrary and baseless. For example, Smith claimed that the  
9 Waterstone expert report was a model derived from “litigation in which the Water Board was not a  
10 party.” (*Id.*) It is impossible to reconcile Smith’s rejection of evidence merely because it was part of  
11 litigation to which the Water Board was not a party with the Prosecution Team’s eagerness to assist  
12 Shell and the *Acosta* Plaintiffs in manufacturing evidence (the Revised CAO) for litigation to which  
13 the Water Board was not a party. The fact that the Regional Board was not a party to the *Acosta* Liti-  
14 gation never stopped Unger from listening to Shell who had just sued Barclay in May of 2014 when  
15 Unger suddenly “re-opened” the comment period for Shell, or from inviting Bowcock to meet with  
16 him any time when Bowcock was a known consultant for the *Acosta* Plaintiffs.

17 Barclay again requested that Smith wait to name Barclay until additional evidence was ready  
18 for Smith’s review, this time on the basis of the deposition transcripts of Unger and Ayalew. (Ex.  
19 NN [1/16/15 Ltr.]) Although Smith initially stated she would later consider reviewing the tran-  
20 scripts, she ultimately summarily decided not to wait for the transcripts before issuing the CAO—  
21 even though Barclay informed her that the depositions were only a couple of weeks away. (Ex. OO  
22 [4/30/15 Ltr.] at p. 2.) Yet as Barclay had predicted, the depositions of Unger and Ayalew revealed  
23 many material facts that she should have considered in making her decision. Particularly informative  
24 was the fact that the Regional Board Prosecution Team’s work had been illegally paid for by Shell –  
25 a fact that, had Smith been aware of it, should have convinced her that the process was tainted and  
26 that she could not rely on the Prosecution Team’s independence. (Ex. F [Ayalew Dep.] at 179:8-21.)  
27 Similarly, both Unger and Ayalew testified that they were aware of no violations of law by Barclay—  
28 another fact that should have affected Smith’s decision and certainly should have dissuaded her from

1 coming up with even more violations of law. (Ex. E [Unger Dep.] at 63:7-15, 64:5-65:6, 66:10-  
2 67:23; Ex. F [Ayalew Dep.] at 40:19-41:22.) Both Unger and Ayalew further testified that the Coun-  
3 ty’s oversight of Barclay’s activities was “irrelevant” their considerations. (*Id.*) Had Smith been  
4 aware of that testimony she could not have possibly justified adding two more violations of law – es-  
5 pecially one claiming a violation of a County ordinance. (Ex. A [Revised CAO].) After all, the  
6 Board’s own Prosecution Team had just testified under oath that it considered Barclay’s adherence to  
7 County requirements to be irrelevant to their recommendation to name Barclay on the order and they  
8 had drawn no conclusions in that regard.

9 **6. The Regional Board’s Failure To Hold A Formal Hearing Violated Barclay’s Due**  
10 **Process Rights.**

11 Although the State Board has acknowledged that “informal hearings may be used in place of  
12 formal hearings in some instances,” the State Board has stated that the informal process may only “be  
13 used where significant facts are not in issue and the proceeding held is to determine only what conse-  
14 quences flow from those facts.” (Ex. KK [State Water Resources Control Board, Office of Chief  
15 Counsel, M. A.M. Lauffer Chief Counsel Memorandum (Aug. 2, 2006)] at p. 3.) “In deciding  
16 whether to use the informal process, a water board should consider how many parties are involved,  
17 whether any of the parties have requested a more formal process, how many interested persons there  
18 are, how complex the issues facing the water board may be, and how important a formal record may  
19 be if petitions and appeals result.” (*Id.*)

20 Here, Barclay twice requested a formal hearing in order to (1) present new evidence; (2) pre-  
21 sent legal argument on the question of whether Barclay qualifies as a “discharger” under section  
22 13304(a); and (3) cross-examine witnesses who disagree with the technical reports submitted by Bar-  
23 clay and who have relied on the unsworn statement of George Bach rather than his sworn deposition  
24 testimony. (Ex. HH [12/24/14 Ltr.] at p. 2; Ex. N [1/6/15 Ltr.]; Ex. NN [1/16/15 Ltr.].) This is by no  
25 means a case “where significant facts are not in issue and the proceeding held is to determine only  
26 what consequences flow from those facts.” The correspondence between Barclay and the Regional  
27 Board long before the hearing requests were made make clear that there were significant and complex  
28 factual disputes at issue. (*E.g.*, Ex. TTT [1/21/14]; Ex. S at Attachment 15; Dagdigian Decl. at Ex. A



1 [Waterstone Response to Comments].) Moreover, the need for a formal record due to the likelihood  
2 of an appeal was clear. (Ex.HH [12/24/14 Ltr.] at p. 5.)

3           Nonetheless, despite Barclay’s repeated requests, the Regional Board refused to conduct a  
4 formal hearing on whether to name Barclay as a discharger on the CAO. (Ex. GG [2/27/15 Ltr.].) In  
5 rejecting Barclay’s repeated requests, Smith ignored the guidelines set forth by the State Board, in-  
6 stead reasoning—incorrectly—that “the factual questions raised by the Revised Draft CAO are pri-  
7 marily technical and therefore, fit to be addressed through written expert reports and written rebut-  
8 tal.”<sup>17</sup> (*Id.* at p. 2.) But the State Board makes no distinction regarding whether the disputed facts are  
9 “technical in nature”—the key is whether the facts at issue are “significant.” There can be no ques-  
10 tion that the factual disputes at issue here are significant. Indeed, the factual disputes go to the very  
11 heart of whether Barclay qualifies as a discharger at all. Smith also completely ignored Barclay’s  
12 need to cross-examine witnesses. (See Ex. GG [2/27/15 Ltr.].) The Regional Board’s failure to pro-  
13 vide a formal hearing in this case deprived Barclay of due process, deprived Barclay of a formal rec-  
14 ord to assist in the event of appeal, and resulted in a Revised CAO which names Barclay without any  
15 basis in fact or law.<sup>18</sup>

16           Past cases challenging actions of the Water Board emphasize the importance of providing a  
17 hearing to the party named on the CAO. In determining whether an agency has provided sufficient  
18 due process, California law applies a four-factor balancing test, weighing: “(1) the private interest  
19 that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest  
20 through the procedures used, and the probable value, if any, of additional or substitute procedural  
21 safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequenc-  
22 es of the action and in enabling them to present their side of the story before a responsible govern-  
23 mental official, and (4) the governmental interest, including the function involved and the fiscal and  
24 administrative burdens that the additional or substitute procedural requirement would entail.” (*Salee-*

25  
26 <sup>17</sup> The 85-page legal brief submitted by Barclay on January 21, 2014 included multiple critical and  
27 purely “legal” issues. There can be no rationale for Smith’s arbitrary suggestion that the issues  
28 were just “technical.”

<sup>18</sup> See Part V.B, *infra*, for a detailed discussion of why the Revised CAO is not supported by the  
evidence or the law.

1 *by v. State Bar* (1985) 39 Cal.3d 547, 565.) Here, the four-factor balancing test makes clear that the  
2 Regional Board deprived Barclay of due process by failing to hold a formal hearing. First, the poten-  
3 tial impact of the Revised CAO on Barclay’s private interest is severe. The Regional Board may hold  
4 Barclay responsible (financially or otherwise) for the implementation of a RAP valued by Shell at  
5 nearly \$150 million, a RAP that it had no role in developing (nor any reason to do so), and the *Acosta*  
6 Plaintiffs and Shell will certainly attempt to use the Revised CAO to impute liability for millions or  
7 hundreds of millions of dollars onto Barclay. Second, the risk of an erroneous deprivation of proper-  
8 ty here is unacceptably high, due to the fundamentally flawed processes used by the Regional Board  
9 to investigate and name Barclay. Third, the Regional Board failed to inform Barclay of the true na-  
10 ture, grounds, and consequences of its action, and did not provide Barclay with a fair opportunity to  
11 present its side of the story. Finally, conducting a hearing would not have created any additional bur-  
12 den on the Regional Board (especially in light of the fact that Shell was paying for the Regional  
13 Board’s work), and holding a hearing would not have caused any delay to the Regional Board’s goal  
14 of cleaning up the Kast Property. (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional Board Meeting  
15 Tr.] at 15:3-9; Ex. E [Unger Dep.] at 191:20-192:6 [“Q. And Ms. McChensney says: oh, none. The –  
16 Shell never petitioned or challenged the original cleanup and abatement order, so they’re still respon-  
17 sible regardless of who else may be added. . . Do you agree with Ms. McChesney’s statement? A.  
18 Yes.”].) To deny a hearing on the merits in light of such facts clearly violated Barclay’s due process  
19 rights.

20 This is not a case like *Machado v. State Water Resources Control Board*, where the California  
21 Courts of Appeal held that a post-CAO hearing was sufficient to satisfy Machado’s due process  
22 rights. (90 Cal.App.4th 720, 725.) In that case, the trial court disagreed with Machado’s argument  
23 that it was entitled to a hearing *before* the CAO had been issued, but held that the dairy was at least  
24 entitled to a hearing *after* the CAO had been issued. (*Id.*) The Court of Appeal affirmed. (*Id.*) In  
25 rejecting Machado’s argument that it was entitled to a hearing before the issuance of the CAO, the  
26 court noted that the CAO did not impose criminal or civil penalties; rather, “[i]ts effect is much more  
27 limited.” (*Id.* at p. 726.) “The order prohibits the discharge of polluted water, requires inspections to  
28 ensure compliance with previously issued WDR’s, and calls for modifications of the wastewater dis-

1 tribution system to prevent any further unlawful discharges. While these measures create obligations  
2 for the Dairy, they do not affect the fundamental nature of its business.” (*Id.*) The court also noted  
3 that “[t]he need for immediate action to clean up or abate waste discharge is obvious: Unlawful dis-  
4 charges threaten public health and safety, and pose significant risk to the environment.” (*Id.* at p.  
5 727.) Here, by comparison, the potential impact on Barclay is not “limited.” As discussed above, the  
6 potential financial impact on Barclay is severe. Moreover, unlike in *Machado*, there was no need for  
7 the Regional Board to rush to issue an order without a hearing, because there were no ongoing dis-  
8 charges, and as noted by the Regional Board itself, the addition of Barclay to the CAO had no effect  
9 on the actual cleanup procedures of the site, since Shell had already been named and the CAO and  
10 was already complying with it. (Ex. E [Unger dep.] at Ex. 22 [6/12/14 Regional Board Meeting Tr.]  
11 at 15:3-9.) A post-CAO hearing by the Regional Board here will not suffice to remedy the violation  
12 of Barclay’s due process rights.

13 **B. The Regional Board’s Findings Are Not Supported By The Evidence And Do Not**  
14 **Support Liability Under Porter-Cologne.**

15 Given the lack of due process provided to Barclay as discussed above, it is not surprising that  
16 the Regional Board issued the Revised CAO containing findings that are not supported by the evi-  
17 dence or the law. The law places the burden of proof on the Regional Board to establish that Barclay  
18 meets the definition of a “discharger” in California Water Code section 13304(a) before it may issue  
19 a clean-up and abatement order naming Barclay. (*City of Brentwood v. Center Valley Reg’l Water*  
20 *Quality Control Bd.* (2004) 123 Cal.App.714, 720.) “To meet the requirement of fairness, the Re-  
21 gional Board, before acting on . . . proposed orders, must ensure that there is a factual and legal basis  
22 in the record for its decision and must indicate its reasoning and the factual basis for its decision to  
23 the affected parties.” (*In the Matter of Project Alpha*, State Board Order No. WQ 74-1, at \*3; see al-  
24 so *Topanga Ass’n for a Scenic Cmty. v. City of L.A.* (1974) 11 Cal.3d 506, 514-515 [an agency “must  
25 render findings sufficient both to enable the parties to determine whether and on what basis they  
26 should seek review and, in the event of review, to apprise a reviewing court of the [legal] basis for the  
27 [agency’s] action,” and the findings must “bridge the analytic gap between the raw evidence and ul-  
28 timate decision or order,” disclosing “the analytic route the . . . agency traveled from evidence to ac-

tion”]; *City of Brentwood v. Centr. Valley Reg’l Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 720 [Regional Boards bear the burden of proving the elements of an offense under Porter-Cologne].)

Neither the Revised CAO, nor the administrative record, satisfies these requirements. The Regional Board has not “ensure[d] that there is a factual and legal basis in the record.” The Revised CAO’s findings are not supported by the evidence, and even if they were, the findings do not support Barclay’s liability under section 13304(a). Moreover, even if the Regional Board did have a factual or legal basis for its finding that Barclay is liable under section 13304(a) (and it does not), the Regional Board has failed to meet its burden of demonstrating that Barclay is not exempt from liability under the safe harbor of section 13304(j). Not only is there no factual or legal basis in the record for arguing that Barclay was in violation of any then-existing laws, the affirmative evidence actually proves the opposite: Barclay is exempt from liability under section 13304(a) because Barclay was in compliance with all existing laws at the time of its activities at the Site. Therefore, the Revised CAO cannot stand. (See, e.g., *Schutte & Koerting, Inc. v. Reg’l Water Quality Control Bd.* (2007) 158 Cal.App.4th 1373, 1383-1384 [stating abuse of discretion is established if the administrative order “is not supported by the findings, or the findings are not supported by the evidence”], citing Cal. Civ. Proc. Code, § 1094.5, subd. (c).)

**1. The Regional Board’s Finding That Barclay Is Liable Under Section 13304(a) For Knowingly “Spread[ing] The Waste” or “Contribut[ing] To The Migration Of The Waste” Is Not Supported By Evidence.**

The Regional Board seeks to justify holding Barclay responsible for clean-up and abatement of contamination that it did not discharge or even know about on the basis of its finding that Barclay “purchased the Site with explicit knowledge of . . . the presence of residual petroleum hydrocarbons, and conducted various activities, including partially dismantling the concrete in the reservoirs and grading the onsite materials. These activities *spread the waste* at the site, and *contributed to the migration of the waste* through soil and groundwater.” (Ex. A [Revised CAO] at p. 10, italics added.) The Revised CAO purports to recite the facts concerning Barclay’s activities at the Site on pages 4 and 10-11, but these descriptions gloss over the details in a way that mischaracterize the facts, utterly

1 failing to “bridge the analytical gap between the raw evidence and ultimate decision or order.” There  
2 is a significant disparity between what is described in the Revised CAO and what the evidence  
3 shows.

4 This lack of clarity is exacerbated by the failure to cite evidence in anything but the most gen-  
5 eral terms. Although the Revised CAO occasionally refers to “the record” in general terms, there is  
6 no reference to admitting evidence, identification of a record, or specification of what parts of any  
7 evidence or record are relied upon to support finding Barclay to be a responsible party under section  
8 13304(a). The Revised Draft CAO sent to Smith on December 8, 2014 notably failed to provide a  
9 specific list of evidence in the administrative record, (Ex. D [Revised Draft CAO]), and when asked  
10 for factual support at their depositions, members of the Regional Board’s Prosecution Team were re-  
11 peatedly unable to point to any specific documents or witness testimony to support the Regional  
12 Board’s factual assertions. (Ex. F [Ayalew Dep.] at 73:10-74:3, 74:18-76:16, 159:6-9, 243:22-244:5,  
13 84:15-22, 229:22-230:5, 109:18-110:3, 166:17; Ex. E [Unger Dep.] at 213:2-217:20, 97:8-14,  
14 232:20-233:15, 234:7-10, 235:5-12.) “[M]ere conclusory findings without reference to the record are  
15 inadequate.” (*Envil. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.* (2008) 44 Cal.4th 459,  
16 517, citation omitted.)

17 **a. There Is No Evidence That Barclay Knowingly “Spread The Waste” Or**  
18 **“Contributed To The Migration Of The Waste.”**

19 The reason for the Regional Board’s failure to properly cite evidence is clear: there is no evi-  
20 dence to support its findings that Barclay knowingly “spread the waste” and “contributed to the mi-  
21 gration of the waste.” Indeed, all of the available evidence shows that Barclay spread fill soil that it  
22 did not believe had any petroleum when it graded the Site. Even if the fill soil used for compaction  
23 was already contaminated before Barclay moved it from the berm (for which there is no evidence),  
24 there is absolutely no evidence to contradict the fact that Barclay had no knowledge of its presence.

25 **(i) There Is No Evidence That Barclay Knowingly “Spread The**  
26 **Waste.”**

27 In the *Acosta* Litigation, the last four surviving witnesses to Barclay’s placement and compac-  
28 tion of the berm fill soil testified under oath that they saw no oil in the soil. (Ex. TTT [1/21/14 Ltr.]

1 at Tab 7 [Bach Dep.] at 105:8-107:16, 143:23-144:4; *id.* at Tab 8 [Vollmer Dep.] at 86:2-87:1; *id.* at  
2 Tab 12 [Anderson Dep.] at 35:9-36:8; *id.* at Tab 13 [Al Vollmer Dep.] at 43:25-44:15.) All four men  
3 testified that they had good vantages from which to observe the soil taken from the berms after it had  
4 been spread, and they were in a position to see oil contamination if there had been any. (*Id.* at Tab 12  
5 [Anderson Dep.] at 35:24-36:8; *id.* at Tab 13 [Al Vollmer Dep.] at 44:7-19.) Those who were asked  
6 about odors testified that there were no petroleum odors in the berm soil. (*Id.* at Tab 12 [Anderson  
7 Dep.] at 36:9-12; *id.* at Tab 13 [A. Vollmer Dep.] at 60:4-6; 110:19-111:2.) The same is true for ob-  
8 servations of soil beneath the reservoir bottoms seen when the concrete floors were being ripped. All  
9 of the eye-witnesses who observed the soil beneath the slabs on the reservoir bottoms observed no  
10 petroleum hydrocarbons beneath the ripped concrete. (*Id.* at Tab 7 [Bach Dep.] at 188:15-189:1; *id.*  
11 at Tab 8 [L. Vollmer Dep.] at 97:18-98:3; *id.* at Tab 12 [Anderson Dep.] at 42:4-12; *id.* at Tab 13 [A.  
12 Vollmer Dep.] at 61:18-62:7, 62:19-22, 109:14-110:11.) The testimony of all four witnesses was  
13 given in deposition subject to cross-examination by lawyers for Shell and the *Acosta* Plaintiffs.  
14 These are the only four known living witnesses who actively participated in the grading and decom-  
15 missioning of the tanks at the Site, and their testimony is unanimous on the subject.

16 Moreover, as shown above, there were soil samples taken from the berm soil as part of the  
17 preliminary soils investigation, and while it was not the purpose of that sampling to look for oil, the  
18 cuts taken from the berms provided yet another opportunity for a trained eye to see oil contamination  
19 in the berm soil if it was there. (Part III.F, *supra.*) Although there were many soils reports prepared  
20 after those samples were taken, and hundreds of pages of documents placed in the construction file  
21 after that, not one page of those documents says anything about oil in the berm soil. This corrobo-  
22 rates the testimony of the four eyewitnesses. (Ex. TTT [1/21/14 Ltr.] at Tab 66 [CARSON 348-54];  
23 *id.* at [Shepardson Report] at p. 26.)

24 Despite all of this evidence, the Responses to Comments and deposition testimony of Unger  
25 and Ayalew indicate that the Prosecution Team relied on unsupported and unreasonable inferences  
26 for its conclusion that Barclay knowingly left petroleum-impacted soil at the site. (Dr. Dagdigian  
27 Decl. ¶¶ 26, 34.) For example, Ayalew stated that when Barclay’s on-site contractors testified that  
28 they removed all “gunk” that was not suitable to serve as fill soil, this justified an inference that those

1 contractors knowingly left petroleum-impacted soil at the Kast Site so long as it was suitable for  
2 “fill.” (Ex. F [Ayalew Dep.] at 238:11-240:9.) Further, in the Responses to Comments, the Prosecu-  
3 tion Team asserted that because Barclay only screened soils for geotechnical soundness and visible  
4 petroleum saturation, its activities left in place and caused redistribution of fill soils impacted at low-  
5 er concentration levels. (Ex. S at Attachment 14 at p. 17.) There is no evidence in the record to sup-  
6 port either of these inferences, and the Prosecution Team did not point to any. Moreover, these infer-  
7 ences are directly contrary to the uniform eyewitness testimony discussed above that only visibly  
8 clean soil was used for fill.

9 (ii) **Barclay Did Not “Contribute To The Migration Of The Waste: or**  
10 **“Allow The Percolation Of . . . Sludge Present In The Reservoirs**  
11 **Into The Subsurface.”**

12 Nor is there any evidence to support the Revised CAO’s assertion that Barclay’s actions “con-  
13 tributed to the migration of the waste” or that the concrete floors of the reservoirs were broken “to  
14 allow the percolation of water *and sludge* present in the reservoirs *into the subsurface.*” (Ex. A [Re-  
15 vised CAO] at p. 4, italics added.) While “percolation of water” was an objective of the trenching, it  
16 was clear from the first moment it was raised in the Preliminary Soils Report dated January 7, 1966,  
17 that the objective of such percolation was precipitation after the grading had occurred; it was never a  
18 part of the process to clean out residual materials “present in the reservoirs.” (Part III.I, *supra.*)  
19 There is no evidence that any sludge was “present in the reservoirs” by the time the trenching took  
20 place or that Barclay or anyone else ever intended to “allow the percolation of . . . *sludge* . . . into the  
21 subsurface” through the concrete. The only evidence on this subject shows that when Barclay arrived  
22 in late January 1966, Reservoirs 5 and 6 were already clean (as reported by Shell documents); that  
23 Barclay’s subcontractor, Chancellor & Ogden, cleaned out residual materials from Reservoir 7 with  
24 the assistance of the grading contractor, Vollmer Engineering; and that no ripping took place in any  
25 of the reservoir bottoms until they were fully cleaned out.<sup>19</sup> (Part III.I, *supra.*) There is no evidence

26 <sup>19</sup> The Draft Revised CAO included this statement: “Available information indicates that by August  
27 15, 1966, all three reservoirs had been *fully cleaned out* of liquid residue.” (Ex. D [Draft Revised  
28 CAO] at p. 5.) However, the Revised CAO altered this statement to read “all three reservoirs had  
been *emptied* of liquid residue.” (Ex. A [Revised CAO] at p. 4.) Ayalew testified that he wrote in  
the draft CAO that all the reservoirs had been “fully cleaned out.” (Ex. F [Ayalew Dep.] at  
141:23-143:22.) He testified that this information was extracted from the Pacific Soils reports  
[Footnote continued on next page]

1 that any sludge ever contaminated the sub-floor area, or any other area of the Site during the time  
2 Barclay was on Site. (*Id.*)

3 Despite the lack of any evidence indicating that “sludge” was left in the reservoirs at the time,  
4 in the Responses to Comments, the Prosecution Team stated that photographs from the 2010 trench-  
5 ing of the property at 24403 Ravenna “revealed the presence of a concrete slab that contained petro-  
6 leum hydrocarbons on the concrete slab surface” and “showed concrete slabs that are continuous and  
7 intact with significant staining overlain by sludge or hydrocarbon saturated residual soil or oily soil.”  
8 (Ex. S at Attachment 14 at pp. 86-88.) According to the Prosecution Team, these photos prove that  
9 Barclay did not remove all of the sludge from Reservoir 7. (See *id.*) However, Dr. Dagdigian and his  
10 staff reviewed the photos and “found no evidence to support the Regional Board’s statements.” (Dr.  
11 Dagdigian Decl. ¶ 27.) Dr. Dagdigian further noted that “the URS reports for the 24403 Ravenna in-  
12 vestigations . . . refutes the Regional Board’s claim that a concrete slab uncovered at that location  
13 was ‘overlain by sludge or hydrocarbon saturated residual soil or oily soil,’ and instead provides  
14 strong support for” Dr. Dagdigian’s theory of upward migration. (*Id.*)

15 Ayalew confirmed the Prosecution Team’s faulty reliance on alleged “sludge” at 24403 Ra-  
16 venna to support its assertion that Barclay knowingly left petroleum hydrocarbons at the Kast Site.  
17 (Ex. F [Ayalew Dep.] at 146:3-149:9.) Ayalew stated that his only evidence for this assertion was his  
18 own field observations and the photographs at 24403 Ravenna (which he took). (*Id.*) However,  
19 Ayalew conceded that no analysis was performed to test whether this “sludge” actually contained pe-  
20 troleum hydrocarbons. (*Id.*) Moreover, Ayalew’s claim is further undermined by his confused appli-  
21 cation of the word “sludge.” At certain points in his deposition, Ayalew appeared to testify that any  
22 soil impacted with petroleum hydrocarbons should be considered “sludge.” (*Id.* at 155:25-156:12.)  
23 However, under further questioning, he was unable to provide any reference for such a definition (*Id.*  
24 at 159:6-9), and later reversed course by stating that he did not “establish correlation between sludge  
25 and higher concentrations.” (*Id.* at 161:14-20.) After admitting that he does not actually know what  
26 qualifies as “sludge” or whether the material he saw at 24403 Ravenna was indeed “sludge,” Ayalew

27 [Footnote continued from previous page]

28 from the time. (*Id.* at 142:25-143:22.) Without explanation or evidentiary support for this  
change, Smith deleted it from the final order. (Ex. A [Revised CAO] at p. 4.)



1 was otherwise unable to point to any specific evidence to support the Regional Board’s allegations  
2 that Barclay knowingly left petroleum hydrocarbon “sludge” in the former reservoirs. (*Id.* at 153:7-  
3 155:4-23.)

4 The Prosecution Team also relied on an unsupported assertion that Barclay’s “ripping” of the  
5 concrete reservoir floors “resulted in bringing soil from beneath the reservoir floor to the surface,  
6 which was then mixed with the broken concrete and incorporated into the fill materials above the res-  
7 ervoir floor.” (Ex. S at Attachment 14 at pp. 35-39; Ex. F [Ayalew Dep.] at 227:13-228:7.) However,  
8 as explained in Dr. Dagdigian’s November 2014 Expert Report, the ripping tool that Barclay’s con-  
9 tractors used would not have pulled up soil from beneath the reservoir floors. (Ex. AAA [Dag-  
10 digian’s November 2014 Report] at Appendix B, pp. 5-6; Dr. Dagdigian’s Decl. ¶ 23.) The Prosecu-  
11 tion Team’s assertion is also contradicted by sworn testimony from the eyewitnesses at the site who  
12 described the process by which the former reservoir walls and floors were broken up, mixed with  
13 clean soil from the berms, and subsequently compacted. Thus, contrary to the unsupported assertion  
14 of the Prosecution Team, Barclay’s ripping would not have caused soils beneath the floors to mix into  
15 the fill material, and eyewitness testimony shows that no such mixing occurred.

16 **(iii) There Is No Evidence That Barclay’s Acts “Contributed To The**  
17 **Migration Of Waste” Into The Groundwater.**

18 Although the Revised CAO does not contain any factual basis for the Regional Board’s find-  
19 ing that Barclay’s acts “contributed to the migration of the waste into . . . groundwater” (Ex. A [Re-  
20 vised CAO] at p. 10), in the Responses to Comments, the Prosecution Team asserted that Barclay  
21 “contributed to the water pollution and nuisance conditions” through its “breaking up [of] the con-  
22 crete and moving soil.” (Ex. S at Attachment 14 at p. 11.) In particular, Unger and Ayalew claimed  
23 that Barclay’s work on the concrete floor of Reservoir 5 contributed to groundwater contamination  
24 detected at Monitoring Well 03 and Monitoring Well 12. (Ex. E [Unger Dep.] at 213:2-217:20; Ex. F  
25 [Ayalew Dep.] at 117:19-125:3, 133:6-136:13.) However, Shell’s consultants have previously  
26 demonstrated that the groundwater contamination from petroleum hydrocarbons originated from the  
27 floor joints and sidewalls of Shell’s former reservoirs. (Ex. F [Ayalew Dep.] at Ex. 12 [9/29/10 URS  
28 Corporation Plume Delineation Report] at pp. 4-34; Dr. Dagdigian Decl. ¶ 25.) It is undisputed Bar-

1 clay did not operate in these locations. Ayalew’s claim that Barclay is responsible for this groundwa-  
2 ter contamination because it operated “nearby” is untenable in light of the clear contamination trails  
3 presented in Shell’s data that emanate exclusively from the former sidewalls and reservoir joints, and  
4 the fact that the direction of groundwater flow from the center of Reservoir 5 is away from Monitor-  
5 ing Well 03 and Monitoring Well 12, not towards it. (Dr. Dagdigian Decl. ¶ 39.)

6 **b. The Regional Board’s Reliance on The 2011 Unsworn Statement of**  
7 **George Bach Is Improper.**

8 Despite all of the evidence to the contrary, the Response to Comments indicates the Prosecu-  
9 tion’s conclusion that the “contamination pattern presently on site likely resulted from site develop-  
10 ment activities of fill and grading with site soils” is based on its belief that during redevelopment  
11 there was evidence of petroleum hydrocarbon odors in the berm soils and observable impacts to soil  
12 directly beneath the reservoir floors. (Ex. S at Attachment 14 at pp. 17, 44.) But the prosecution’s  
13 only evidence for these propositions (besides the unsupported inferences already discussed above) is  
14 the unsworn, hearsay statement signed by Bach on May 13, 2011 (“2011 Statement”). (*Id.*; Ex. F  
15 [Ayalew Dep.] at 89:16-90:19; Ex. E [Unger Dep.] at 105:2-105:10.)

16 However, as the Regional Board is well aware, Bach has directly refuted the factual assertions  
17 which the Regional Board attributes to his 2011 Statement. (Ex. HH [12/24/2014 Ltr.] at pp. 3-4.) In  
18 November 2014, while testifying under oath and subject to cross-examination by lawyers for Shell  
19 and Plaintiffs in the *Acosta* Litigation, Bach testified unequivocally that (1) he did not see or smell oil  
20 in the berm soil that was used as fill or in other soils on the property (Ex. N [1/6/15 Ltr.] at Ex. A  
21 [Bach Dep.] at 126:16-127:1, 127:19-129:6, 130:4-132:11); (2) he did not observe oil in the soil be-  
22 low reservoir floors (*id.* at 130:4-132:11), and (3) he saw no ponding of oil onsite (*id.* at 135:4-  
23 136:10).

24 Bach explained in the November 2014 deposition that the 2011 Statement was written without  
25 the benefit of looking at documents generated at the time the Kast Site was developed. He stated,  
26 “The statements in here are what I believed to be true after 25–40 years of not looking at it. It’s what  
27 I could recall at that time with no reference material, just out of my head.” (Ex. N [1/6/15 Ltr.] at Ex.  
28 A [Bach Dep.] at 117:17-21.) Bach also explained that some of the statements were written because

1 the *Acosta* Plaintiffs’ counsel asked him to speculate. (*Id.* at 138:9-12 [“These were written because I  
2 was asked to speculate about where [contamination] might be found.”].) Once he had the opportunity  
3 to review documents, his recollection was refreshed and he could offer an accurate account of his  
4 first-hand knowledge.

5 Bach’s 2014 testimony makes clear that the 2011 Statement is not competent or reliable evi-  
6 dence under the Evidence Code. First, it is hearsay not subject to any recognized hearsay exception.  
7 (Evid. Code, § 1200.) Second, it was not signed under penalty of perjury. (Evid. Code, § 710.)  
8 Third, Bach does not have personal knowledge of many things discussed in the 2011 Statement  
9 (Evid. Code, § 702, subd. (a)), and indeed much of it is based on speculation (Evid. Code, §§ 702,  
10 800; see, e.g., Ex. N [1/6/15 Ltr.] at Ex. A [Bach Dep.] at 138:9-12 [“These were written because I  
11 was asked to speculate about where [contamination] might be found.”].) The 2011 Statement would  
12 not be admissible under the most basic rules of evidence, and no California court would permit reli-  
13 ance on it to support a finding of fact. (See, e.g., *Fishbaugh v. Fishbaugh* (1940) 15 Cal.2d 445, 457  
14 [basing conclusions upon inadmissible evidence may constitute sufficient ground for a reversal of  
15 judgment]; *Estate of Pierce* (1948) 32 Cal.2d 265, 277 [noting that once “the inadmissibility of the  
16 evidence came to light . . . it was the duty of the trial court to disregard the inadmissible portion of  
17 the evidence”].)

18 Bach’s 2014 testimony makes clear that the Regional Board’s reliance on his 2011 unsworn  
19 statement is arbitrary and without basis, particularly in light of the robust compilation of admissible  
20 evidence in the Regional Board’s possession related to Bach and the subjects he addresses. (See  
21 *Houghtaling v. Super. Ct.* (1993) 17 Cal.App.4th 1128, 1141 [“recognizing the “centuries old eviden-  
22 tiary doctrine that only trustworthy and reliable evidence should be considered”]; *Ojala v. Bohlin*  
23 (1960) 178 Cal.App.2d 292, 304 [“Resort must be had to the best evidence that is available”].) Yet,  
24 the Regional Board disregarded all other evidence—including Bach’s 2014 sworn testimony and the  
25 sworn testimony of the other percipient witnesses—and relied solely on the inadmissible 2011 State-  
26 ment to support its finding that there were odors in the berm soils and observable impacts to soil be-  
27 neath the reservoir floors on the 2011. (Ex. E [Unger Dep.] at 105:2-105:10, 106:6-21, 108:1-110:1;  
28 Ex. F [Ayalew Dep.] at 71:11-72:6, 89:16-90:19.) Smith even allowed the 2014 deposition into the

1 record (Ex. GG [2/27/15 Ltr.]), but nowhere explains—as she was required to—her basis for finding  
2 the 2011 unsworn Bach statement more credible than Bach’s 2014 sworn testimony. (See Govt.  
3 Code, § 11425.50, subd. (b) [“If the factual basis for the decision includes a determination based sub-  
4 stantially on the credibility of a witness, the statement shall identify any specific evidence of the ob-  
5 served demeanor, manner, or attitude of the witness that supports the determination.”].) The Region-  
6 al Board’s wholesale failure to address the 2014 Bach Deposition testimony and willfully blind reli-  
7 ance on the inadmissible 2011 Statement—which is plainly inferior evidence—is just another exam-  
8 ple of the arbitrary, erratic, Alice in Wonderland-like proceedings below, the sole purpose of which  
9 appears to have been naming Barclay by any means necessary and regardless of the evidence.

10           c.       **All Available Evidence Supports Determination That Shallow Contamina-**  
11                   **tion At The Site Has Been Caused By The Upward Migration Of The**  
12                   **Deep Contamination.**

13           Without any direct evidence there was oil in the berm soil at the time of Barclay’s operations  
14 at the Kast Site, the Regional Board instead draws the unsupported conclusion that the shallow con-  
15 tamination at the Site was caused by Barclay’s grading of the fill soil. However, Dr. Jeffrey Dag-  
16 digian, an expert on the movement of oil in the environment, has determined that the fill soil placed  
17 by Barclay in the areas located above the former reservoir bottoms became contaminated (and re-  
18 quired remediation) only after it was put there when contamination, previously undetected beneath  
19 the former reservoir bottoms by Shell, moved upward into the clean fill soil through capillary action,  
20 buoyancy and other pressures in the vadose zone.

21           According to Dr. Dagdigian, after Barclay placed and compacted clean fill on top of the bro-  
22 ken reservoir bottoms, contamination that had remained immediately beneath the reservoir bottoms at  
23 high concentrations was able to move upward through openings that had been ripped in the former  
24 reservoir concrete bottoms and around the bottoms in the places where the walls had been removed.  
25 (Ex TTT [1/21/14 Ltr.] at [Dagdigian Report] at p. 116.) At high concentrations, these contaminants  
26 moved into the clean fill via capillary action, by buoyancy whenever water from irrigation or rain was  
27 introduced, and other naturally-occurring pressures in the vadose zone. (*Id.* at p. 142.) That this oc-  
28 curred is demonstrated by the pattern of contamination shown by the data, which confirms that higher  
concentrations are found just above the former reservoir bottoms with smaller amounts as one as-

1 cends in the fill soil, in a reverse of the pattern that occurs when the source of contamination comes  
2 from the top and migrates down. (*Id.* at p. 116.)

3 The Regional Board staff reviewed Dr. Dagdigian’s opinion and—while it agreed that capil-  
4 lary action is responsible for some upward movement of petroleum hydrocarbons at the Site—it nev-  
5 ertheless concluded that such upward migration “cannot account for the larger portion of the petrole-  
6 um hydrocarbons found in shallow surface soils across the Site.” (Ex. S at Attachment 14 at p. 4.)  
7 This conclusion disregards the comprehensive reports prepared by Dr. Dagdigian in which he ex-  
8 panded on his opinion concerning the role of buoyancy in the upward movement of contaminants as  
9 well as pressure and fluid saturation. (See, e.g., Ex. U [6/30/14 Barclay Submission] at [Dagdigian  
10 Declaration and Technical Response to Shell]; Ex. AAA [Expert Report of Jeffrey V. Dagdigian,  
11 Ph.D. (November 14, 2014)]; Ex. PP [Rebuttal Report of Jeffrey V. Dagdigian, Ph.D. in Response to  
12 the Plaintiffs’ Expert Reports (December 22, 2014)]; Declaration of Jeffrey V. Dagdigian, Ph.D.  
13 (June 1, 2015) (“Dr. Dagdigian Decl.”).)

14 Most notably, Dr. Dagdigian’s November 2014 Report contained the results of a three-  
15 dimensional (“3-D”) model that Dr. Dagdigian developed using three million lines of data from the  
16 Site. (Dr. Dagdigian Decl., ¶ 10; Ex. AAA [November 2014 Report] at p. 36.) Although the Re-  
17 gional Board inexplicably refused to admit this additional evidence (Ex. GG [2/27/15 Ltr.]), this  
18 model provides additional clarity of the patterns of petroleum hydrocarbons in the relevant areas,  
19 yielding compelling evidence consistent with the theory of upward migration. Previous analyses of  
20 the distribution of petroleum hydrocarbons at the Site that were reviewed by the Regional Board were  
21 based on a two-dimensional (“2-D”) model generated by Shell’s consultant, Geosyntec, using a less  
22 complete dataset than that employed by Dr. Dagdigian. (Ex. QQ [4/29/11 Geosyntec Report].) Dr.  
23 Dagdigian’s 3-D model demonstrates the limitations of this 2-D model and brings to light significant  
24 information not previously available to the Regional Board. (Dr. Dagdigian Decl., ¶¶ 10-19.) As Dr.  
25 Dagdigian explained, the benefit of the 3-D model over the 2-D model is that it interpolates concen-  
26 trations of TPHd between all sample depths in all directions, providing a more accurate representa-  
27 tion of the lateral and vertical extent of impacted soil. (*Id.*, ¶ 11.) The 3-D model confirms Dr. Dag-  
28 digian’s opinion regarding upward migration because it shows a pattern of highest petroleum hydro-

1 carbon concentrations close to the original release locations at or beneath the former reservoir floors  
2 and near the intersections of the floors and sidewalls and lower concentrations at shallower depths;  
3 the contaminant concentration pattern follows vertical and lateral pathways that, combined, confirm  
4 an overall upward migration pathway within the former reservoir footprints and also into the directly  
5 adjacent surrounding soil that once constituted the lower portions of the berms. (*Id.*, ¶ 11; Ex AAA  
6 [November 2014 Report] at pp. 36-37.)

7 Dr. Dagdigian’s Report and Rebuttal Report also refute the alternative explanation provided  
8 by the prosecutor for the current distribution of petroleum hydrocarbons at the Site. To provide justi-  
9 fication for its recommendation to name Barclay to the CAO, the prosecutor concluded that “the cur-  
10 rent contamination pattern in the Site soil is explained by the procedure Barclay used to backfill and  
11 compact berm soil into the former reservoirs which resulted in a random pattern which characterizes  
12 the present hydrocarbons onsite.” (Ex. S at Attachment 14 at p. 43.) However, the prosecutor’s  
13 characterization of the true, current distribution of petroleum hydrocarbons at the Site as random is  
14 inaccurate. Dr. Dagdigian’s Report and 3-D model shows that the pattern of hydrocarbons onsite is  
15 not “random,” and so could not have been created by Barclay’s backfilling procedures. Dr. Dag-  
16 digian demonstrates that the pattern of petroleum hydrocarbons requiring abatement today is instead  
17 correlated with releases that occurred during Shell’s operations. (Ex. AAA [November 2014 Report]  
18 at pp. 27, 29-30; Dr. Dagdigian Decl., ¶ 24.) 3-D representation of lateral and vertical petroleum hy-  
19 drocarbon impacts to soil reveals that in many cases what looks to be what the Regional Board staff  
20 calls “highly variable” patterns of distribution in Geosyntec’s 2-D modeling (Ex. S at Attachment 14  
21 at p. 54) is not variable at all, but is fully explained by a more accurate picture of the contaminant  
22 migration pathways due to forces including capillary action, buoyancy, and pressure. (Dr. Dagdigian  
23 Decl., ¶¶ 11-18.) In Dr. Dagdigian’s Rebuttal Report, Dr. Dagdigian explained that the procedure  
24 used by Barclay would have resulted in homogenized soils and randomly distributed hydrocarbons,  
25 which is definitely not the pattern seen on the Site today or reflected in the 10,000 soil sample anal-  
26 yses of TPHd and three million lines of data that support Dr. Dagdigian’s theory. (Ex. RR [Dag-  
27 digian Dec. 2014 Report] at p. 3.)

1 Dr. Dagdigian's reports and declarations directly refute the Prosecution Team's rejection of  
2 the upward migration theory. The Prosecution Team relies solely on its analysis that capillary action  
3 could only account for "limited" upward migration of petroleum hydrocarbons at the Site. (See, e.g.,  
4 Ex. S at Attachment 14 at pp. 46-48.) This was the very same position taken by Dr. Johnson, an ex-  
5 pert retained by Shell, who submitted a letter to the Regional Board in June 2014. (Ex. II [6/16/14  
6 Ltr.] at Attachment 2.) Dr. Dagdigian responded to Dr. Johnson's letter by pointing out that while he  
7 was correct that capillary action could only account for vertical movement of a certain amount, the  
8 remainder of the distance of upward migration was accounted for by buoyancy and other forces. (Ex.  
9 U [6/30/2014 Ltr.] at [Dagdigian's Response to Shell] at pp. 3-27) Dr. Johnson understood this be-  
10 cause he was careful to limit his letter to a comment only on capillary action and he did not comment  
11 on the entirety of Dr. Dagdigian's theory of upward migration, and, for example, offered no response  
12 to Dr. Dagdigian's buoyancy opinion. However, giving everyone the benefit of the doubt, Dr. Dag-  
13 digian explained in detail in his June 30, 2014 report how buoyancy worked in the specific environ-  
14 ment of the Carousel site, where sometimes petroleum hydrocarbons would wick upward through ca-  
15 pillary action and come to rest; then rain or irrigation would cause an area to become flooded thereby  
16 causing the petroleum hydrocarbons to move further upward in the saturated ground. (*Id.*) Over the  
17 ensuing 40 years since the redevelopment, those combined forces explain the additional vertical mi-  
18 gration seen in the contaminant distribution today.

19 When asked about this evidence at their depositions, Unger and Ayalew both testified that  
20 their disregard of the upward migration theory is largely based on their belief that capillary rise can-  
21 not explain the movement of petroleum hydrocarbons in soils at the Subject Property. (Ex. E [Unger  
22 Dep.] at 218:7-232:9; Ex. F [Ayalew Dep.] at 216:18-217:19.) However, as Dr. Dagdigian's reports  
23 and declarations have repeatedly explained, "upward migration theory does not rely solely on capil-  
24 lary pressure; it is one of several factors that affect vertical mobility of petroleum hydrocarbons," in-  
25 cluding buoyancy and other forces. (Dagdigian Decl. ¶ 40.) Unger and Ayalew admitted that they  
26 did not attempt to calculate the potential rise of petroleum hydrocarbons through buoyancy, (Ex. E  
27 [Unger Dep.] at 218:7-232:9; Ex. F [Ayalew Dep.] at 212:23-214:23.), and that they were unaware of  
28 any data indicating saturated soil conditions (which are necessary for buoyancy) (Ex. E [Unger Dep.]

1 at 218:7-232:9; Ex. F [Ayalew Dep.] at 216:18-217:19) despite the fact that these conditions are doc-  
2 umented in numerous boring logs prepared by URS and during trenching performed by Shell's con-  
3 sultants (Dagdikian Decl. ¶ 39). Ayalew ultimately agreed that a localized area of saturated soil, cre-  
4 ated by through irrigation or rainfall, can cause buoyancy as much as a perched water zone. (Ex. F  
5 [Ayalew Dep.] at 220:19-221:6.) Dr. Dagdikian has confirmed that data indicate that these localized  
6 saturated conditions are present across the Kast Site. (Dagdikian Decl. ¶ 43.)

7 Ayalew's testimony also confirmed that the Regional Board refused to consider important da-  
8 ta from Shell's 1997 Report regarding former Reservoirs 1 and 2. As discussed above (Part IV.F.2,  
9 *supra*), Shell decommissioned Reservoirs 1 and 2 in the 1990s through methods substantially similar  
10 to Barclay Hollander's at the Kast Site in the 1960s. At Reservoirs 1 and 2, after the concrete was  
11 broken up and placed on the reservoir bottoms, the berm soil was used as fill and compacted on top  
12 of the former reservoir bottoms. (*Id.*) A semi-permeable clay cap was placed near the top of the fill  
13 before about two more feet of dirt was placed on it. (*Id.*) Within a year after the clay cap was put in  
14 place, however, petroleum hydrocarbons had seeped up to the cap then migrated around it to the sur-  
15 face. (*Id.*) As explained in Barclay's January 21, 2014 submission to the Regional Board, upward  
16 migration theory met fact in Reservoirs 1 and 2 when the upward movement of oil was stopped at the  
17 clay cap but then the oil moved sideways to the edge of the cap, around the edge and upward again  
18 until it seeped out of the surface. (Ex. TTT [1/21/14 Ltr.] at p. 29.) When questioned about the Re-  
19 gional Board's consideration of data from this comparable location, Ayalew refused to comment oth-  
20 er than testifying, with little explanation or elaboration, that these conditions do not exist at the Kast  
21 Site. (Ex. F [Ayalew Dep.] at 251:14-252:14.)

22 No other narrative explains all the evidence as completely as does Dr. Dagdikian's opinion. It  
23 is established that the berm soil was not known to be contaminated when Barclay moved it from the  
24 reservoir berm to the floor of the reservoir because: (1) those who spread it saw no oil; (2) those who  
25 tested it reported no oil; (3) the patterns of contamination observed by Dr. Dagdikian are not con-  
26 sistent with the theory that contaminated berm soil was the source of the Shallow Contamination; and  
27 (4) the patterns of contamination demonstrate that it is much more likely that the source of the current  
28 contamination in the shallow fill above the reservoir bottoms came from the bottom up. (Ex. TTT



1 [1/21/14 Ltr.] at [Dagdigian Report] at pp. 166-167, 173; Dr. Dagdigian Decl., ¶¶ 21-24; Part IV.B.1,  
2 *supra.*)

3 By contrast, the Revised CAO cites no evidence to support its finding that Barclay had “ex-  
4 plicit knowledge” of “residual petroleum hydrocarbons” but engaged in grading activities that  
5 “spread the waste” despite that knowledge; indeed, the finding is contradicted by the same facts that  
6 provide such a direct fit with Dr. Dagdigian’s conclusions.

7 **2. The Regional Board’s Finding That Barclay “Spread The Waste” Or “Contrib-**  
8 **uted To The Migration Of The Waste” Does Not Support Liability Under Section**  
9 **13304(a).**

10 Even if there were any evidence that Barclay “spread the waste” or “contributed to the migra-  
11 tion of the waste” (which there is not), “spreading waste” or “contributing to the migration of waste”  
12 that has already been discharged by another does not make one a discharger under section 13304(a).  
13 No State Board order has ever so found, and both Ninth Circuit precedent and the plain meaning of  
14 the statute confirm that merely “spreading waste” or “contributing to the migration of waste” do not  
15 constitute a discharge for purposes of liability under section 13304(a).

16 **a. The Regional Board’s Finding Is Inconsistent With State Board Precedent**  
17 **Because No State Board Decision Has Ever Held That “Spread[ing] The**  
18 **Waste” Or “Contribut[ing] To The Migration Of The Waste” Constitutes**  
19 **A “Discharge” Under Section 13304(a).**

20 The Revised CAO does not cite to a single State Board order that holds a former owner liable  
21 for “spread[ing] the waste” or “contribut[ing] to the migration of the waste.” Indeed, there are none.  
22 Instead, the Revised CAO asserts that “[i]ncluding [Barclay] as a responsible party in this Order is  
23 consistent with orders of the State Water Resources Control Board . . . naming former owners who  
24 had knowledge of the activities that resulted in the discharge and the legal ability to control the con-  
25 tinuing discharge.” (Ex. A [Revised CAO] at p. 11.) The assertion then refers to footnote 13, which  
26 cites six orders (collectively “Decisions”) of the State Board. These decisions, in rare circumstances  
27 inapplicable here, hold either current owners or former owners who were in possession of property at  
28 the time of a discharge responsible for the clean-up and abatement of contaminants discharged by  
others. Barclay is neither. Barclay is not a current owner nor did any discharges occur during its pri-  
or ownership of the property. The undisputed facts are that Shell contaminated the property before

1 selling it to Barclay. Accordingly, the Revised CAO goes beyond the limits of a Regional Board’s  
2 jurisdiction set by section 13304(a) and as interpreted by State Board precedent.

3 In the Draft CAO released on October 31, 2013, the Regional Board cited four State Board  
4 decisions as consistent with the draft order’s assertion of liability against Barclay. In its January 21,  
5 2014 submission to the Regional Board, Barclay explained in detail how none of the four State Water  
6 Board decisions cited here in short form as *Wenwest*,<sup>20</sup> *Spitzer*,<sup>21</sup> *Sinnes*,<sup>22</sup> and *Zoecon*,<sup>23</sup> support the  
7 imposition of liability here. (Ex. TTT [1/21/14 Ltr.] at pp. 45-51.) Barclay explained that in all of  
8 these decisions, the only prior owners who were held liable had either actively participated in the dis-  
9 charge or the discharge occurred while they were owners.<sup>24</sup> (*Id.*) The State Board recognized this as  
10 an important distinction: “No order issued by [the State] Board has held responsible for a cleanup a  
11 former landowner who had no part in the activity which resulted in the discharge of waste and whose  
12

<sup>20</sup> *In the Matter of Wenwest, Inc., et al.*, State Board Order No. WQ 92-13 (“*Wenwest*”).

<sup>21</sup> *In the Matter of Arthur Spitzer, et al.*, State Board Order No. WQ 89-8 (“*Spitzer*”).

<sup>22</sup> *In the Matter of Stinnes-Western Chemical Corp.*, State Board Order No. WQ 86-16 (“*Stinnes*”).

<sup>23</sup> *In the Matter of Zoecon Corp.*, State Board Order No. WQ 86-2 (“*Zoecon*”). *Zoecon* did not in-  
15 volve a challenge to a clean-up and abatement order arising under section 13304(a), but rather  
16 addressed who could be named as a discharger in a Waste Discharge Requirement (“WDR”). In  
17 *Zoecon*, a current owner was held liable under section 13263 for a Waste Discharge Requirement  
18 as a result of the ongoing discharge caused by the movement of waste from soils to groundwater.  
19 *Id.* at \*4. In recommending the issuance of the Revised CAO, the prosecutor argued that Barclay  
20 should be considered a discharger based on the passive migration of waste from the contamina-  
21 tion previously released by Shell based on *Zoecon*. (Ex. S at Attachment 14 at pp. 10-11). In re-  
22 lying upon this case, the prosecutor ignores that, after the decision in *Zoecon*, the State Board has  
23 specifically distinguished former landowners from current landowners when considering whether  
24 to impose liability based solely on the ongoing movement of contaminants within an already con-  
25 taminated property:

We have applied to current landowners the obligation to prevent an ongoing discharge caused  
26 by the movement of the pollutants on their property, even if they had nothing whatever to do  
27 with putting it there. . . . The same policy and legal arguments do not necessarily apply to  
28 former landowners.

*Wenwest*, WQ 92-13, at \*5.

<sup>24</sup> *Stinnes*, WQ 86-16, at \*5 (prior owner was a chemical company, and during its ownership period,  
it stored chemicals in large underground storage tanks, and leaks from those very tanks were de-  
termined to be a source of the contaminant plume in the groundwater at issue); *Zoecon*, WQ 86-2,  
at \*2 (former owner had deposited waste in a shallow sludge pond, which resulted in contaminant  
runoff that was the subject of the order); *Wenwest*, WQ 92-13, at \*4 (unrebutted analysis from  
consultant showed discharges must have taken place during prior owner’s ownership); *Spitzer*,  
WQ 89-8 (prior owner owned property when the discharges took place and prior owner had built  
the relevant seepage pit and made it available to tenants for discharges).

1 ownership interest did not cover the time during which the activity was taking place.” (*Wenwest*, Or-  
2 der No. WQ 92-13, at \*5.) That statement is true today, 22 years after the State Board clarified in  
3 *Wenwest* its interpretation of section 13304(a): the State Board has never held a prior owner respon-  
4 sible for contamination *discharged by someone else* when *the discharge did not occur during its*  
5 *ownership*.

6 In response, in the final version of the Revised CAO the Regional Board included two addi-  
7 tional State Board decisions that were not in the draft version that was the subject of the January 21,  
8 2014 submission. (Ex. A [Revised CAO] at p. 11, fn.13 [citing *In the Matter of Cnty. of San Diego*,  
9 State Board Order No. WQ 96-2, and *In the Matter of The BOC Group, Inc.*, State Board Order No.  
10 WQ 89-13].) Neither case provides a basis for Barclay’s liability here. In *The BOC Group*, BOC  
11 argued that it owned and sold the property without ever detecting or having reason to detect the rele-  
12 vant underground storage tank that leaked, and therefore it was not liable for the pollution because it  
13 was an “innocent prior owner.” (*The BOC Group*, WQ 89-13, at \*4.) However, the State Board con-  
14 cluded that BOC was the only party who could have placed the tank on the property because the  
15 property was undeveloped prior to BOC’s ownership, and therefore it was proper to hold BOC liable.  
16 Thus, BOC was held liable because it was established that BOC had actually installed the tank that  
17 ultimately caused the discharge. There is no similar evidence here. As discussed above, it is undis-  
18 puted that Barclay did not bring any contaminants onto the Site—only Shell did so. (Part III.E, *su-*  
19 *pra*; Ex. F [Ayalew Dep.] at 65:19-66:5.)

20 In *County of San Diego*, a community development commission (“CDC”) purchased a former,  
21 non-operative land fill in the 1980s that it later sold to a development company. However, prior to  
22 selling the property, the CDC filed a Waste Discharge Requirement (“WDR”), as it was required to  
23 do by law at the time, which imposed certain post-closing responsibilities on CDC that made it a dis-  
24 charger. Thus, CDC’s liability was based on CDC’s unique status, not as a former owner. Here,  
25 Barclay was not required to file a WDR for the type of activities Barclay performed at the site in the  
26 1960s, and thus Barclay did not assume any responsibilities that qualified it as a discharger. (Ex.  
27 TTT [1/21/14 Ltr.] at [Williams Report] at p. 58.)

1           Therefore, none of the Decisions cited by the Regional Board support holding Barclay re-  
2           sponsible as a former owner. Not only are Barclay’s circumstances unlike all of the persons held re-  
3           sponsible in the Decisions cited in the Revised CAO, but when the Regional Board applied to Barclay  
4           the same test that was applied in *Wenwest*, it should have concluded that Barclay is *not* responsible  
5           under section 13304(a). (See *Wenwest*, Order No. WQ 92-13, at \*4.)

6           The Regional Board has argued that Barclay is still liable regardless of *Wenwest* because Bar-  
7           clay “did take actions during their [sic] ownership to make the matter worse.” (Ex. S at Attachment  
8           14 at pp. 10-11.) The Regional Board does not explain what conditions were worsened as a result of  
9           Barclay’s actions, but merely asserts that “Barclay owned the property and actually moved the waste  
10          to where it is currently located.” Even assuming that Barclay’s actions affected the current distribu-  
11          tion of the contamination on the property, none of the decisions cited above support imposing liabil-  
12          ity for “mov[ing] the waste.”

13                           **b.       The Regional Board’s Finding Is Inconsistent With Ninth Circuit Prece-**  
14                           **dent Because The Ninth Circuit Has Confirmed That Redistributing Dis-**  
15                           **charge Is Not Itself A “Discharge” Under Section 13304(a).**

16           The Ninth Circuit has also confirmed that merely redistributing someone else’s discharged  
17          contamination is not, itself, a “discharge.” (*Redev. Agency of the City of Stockton v. BNSF Railway*  
18          *Co.* (9th Cir. 2011) 643 F.3d 668, 677-678.)

19           In *City of Stockton*, the defendant was a group of railroads (“Railroads”), which had con-  
20          structed and maintained a french drain beneath its tracks to enhance soil stability by improving water  
21          drainage. (*Id.* at p. 671.) Unknown to the Railroads, petroleum contamination caused by several  
22          spills at a neighboring property, the L&M bulk petroleum facility, was channeled to yet another prop-  
23          erty through the french drain constructed by the Railroads, which acted as a conduit. That contami-  
24          nation was later discovered during development. (*Id.* at p. 672.) Plaintiff Redevelopment Agency,  
25          which had once owned the contaminated site and indemnified the developer against pollution loss,  
26          sued the Railroads for liability under causes of action for common law nuisance and violations of the  
27          Polanco Redevelopment Act, California Health and Safety Code section 33459 *et seq.* (“Polanco  
28          Act”). (*Id.*) The United States District Court ruled on cross-motions for summary judgment that the

1 Railroads were liable for the pollution both under common law nuisance and the Water Code provi-  
2 sions cross-referenced in the Polanco Act. (*Id.*) The Polanco Act incorporates Water Code section  
3 13304(a) by reference, providing that the Railroads were liable based on proof that they had “caused  
4 or permitted . . . any waste to be discharged” where it is, or probably will be discharged into the wa-  
5 ters of the state. (See Health & Saf. Code, § 33459, subd. (h); Wat. Code, § 13304.)

6 The Court of Appeals reversed, first rejecting the common law nuisance claim and then hold-  
7 ing that there had been no violation of the Water Code provisions incorporated by reference into the  
8 Polanco Act. It rejected the finding of the District Court that the Railroads had met the requirements  
9 of a discharger under section 13304(a) on two grounds. First, the Railroads were not a “discharger”  
10 within the meaning of Section 13304(a) because the contaminants had already been discharged by  
11 L&H. (*City of Stockton, supra*, 643 F.3d at p. 677.) Second, the Court of Appeals held that “even if  
12 the emission of contamination from the french drain is the appropriate ‘discharge’ to consider, the  
13 Railroads are not liable” under Water Code section 13304(a). (*Id.*) While the trial court had correct-  
14 ly attempted to construe “section 13304 . . . harmoniously with the law of nuisance,” the Court of  
15 Appeals found that it had “construed nuisance liability too broadly.” (*Id.*) “Just as but-for causation  
16 is insufficient to impose liability for [creating] a nuisance, it is insufficient to impose liability for a  
17 discharge under section 13304.”<sup>25</sup> (*Id.*) In rejecting the District Court’s findings on common law  
18 nuisance, the Court of Appeals had already, as a matter of nuisance law, “decline[d] to hold that an  
19 otherwise innocent party who builds or installs a conduit or structure for an unrelated purpose which  
20 *happens to affect the distribution of contamination released by someone else* is nonetheless liable for

21 <sup>25</sup> The analogy to nuisance law was limited to the court’s holding that the Railroads did not “cre-  
22 ate . . . the nuisance.” (*City of Stockton, supra*, 643 F.3d at p. 673.) In rejecting liability based on  
23 the common law nuisance claim, the Court of Appeals observed that on the facts before it, there  
24 were two possible ways for plaintiffs to prove nuisance liability: (1) by proving that the Rail-  
25 roads “created the nuisance,” and (2) by proof that they “unreasonably as possessors of the Prop-  
26 erty . . . fail[ed] to discover and abate the nuisance.” (*Id.*) Because the Railroads had owned the  
27 contaminated property at one time, they had potential nuisance liability under both prongs (1) and  
28 (2), which the court rejected for different reasons. (*Id.* at pp. 674-677.) But when it “harmo-  
nized” nuisance law with section 13304(a), the Court of Appeal relied only on its analysis of the  
Railroads’ potential nuisance liability under prong (1), not prong (2), making it clear that prong  
(2) has nothing to do with section 13304(a). (*Id.* at pp. 677-678.) Therefore, the possessor of  
land’s “failure to abate” basis of nuisance liability is not applicable, even by analogy, to the de-  
termination of whether one is a “discharger” under Water Code section 13304(a).

1 ‘creating or assisting in the creation’ of a nuisance. Such a result defies semantics, the law, and  
2 common sense.” (*Id.* at p. 675, emphasis added; compare *Lake Madrone Water Dist., supra*, 209  
3 Cal.App.3d at pp. 169, 174 [finding a “discharge” where a dam accumulated and released sediment,  
4 and noting that the dam was “not a mere conduit through which a [hazardous substance] passes”].)  
5 The court then applied those same principles to hold that the Railroads had not become a “dis-  
6 charger” under section 13304(a) just because their conduit had facilitated the movement of contami-  
7 nants discharged by someone else from one property onto another:

8         The Railroads’ involvement with the petroleum *spill* [at the L&M site] was not only  
9 remote, it was nonexistent; and their involvement with the emission of contamination  
10 from the french drain was entirely passive and unknowing. As explained in our nui-  
11 sance analysis, the Railroads engaged in no active, affirmative or knowing conduct  
with regard to the passage of contamination through the french drain and into the soil.  
Therefore, the Railroads did not “cause or permit” the discharge under section 13304,  
and they are not liable under the Water Code provision of the Polanco Act.

12 (*City of Stockton, supra*, 643 F.3d at p. 678, italics in original.)

13         Here, as with the Railroads, it “is undisputed that [Barclay] did not in any way cause or permit  
14 the initial discharge of petroleum at the . . . Site.” (*Id.* at p. 677.) Barclay’s activities, too, were for  
15 the purposes of drainage and soil stability—“conduct . . . wholly unrelated to the contamination.”  
16 (*Id.* at p. 674.) Like the Railroads, Barclay’s “involvement with the petroleum *spill* was not only re-  
17 mote, it was nonexistent . . . . Therefore, [Barclay] did not ‘cause or permit’ the discharge under  
18 13304.” (*Id.* at p. 678, italics in original.) The *City of Stockton* court declined to hold the Railroads  
19 liable under Water Code section 13304(a), even though their activities actually brought the petroleum  
20 contamination to the plaintiff’s property. Here, Barclay’s activities have not even done that much.  
21 By placing and grading fill soil that was already on the property, Barclay, at most, created pathways  
22 for existing contamination to move around the same property on which the pollution originated. And  
23 Barclay did so to promote better soil compaction and water drainage. The Ninth Circuit decision  
24 confirms that the passive act of unknowingly moving contaminants discharged by someone else from  
25 one place to another is not itself a discharge and cannot form the basis for liability under section  
26 13304(a).

27         Despite this precedent, when asked at a deposition whether the term “discharge” includes  
28 moving soil around that has already been contaminated, the Regional Board’s prosecutor unequivoco-

1 cally answered, “Yes.” (Ex. E [Unger Dep.] at 59:9-18 [“Q. Is it your understanding that the term  
2 "discharge" includes moving soil around that has petroleum hydrocarbons in it? A. Yes.”].) The Re-  
3 gional Board’s definition of “discharge” amounts to an overreach that will not garner deference from  
4 the courts. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 [A “stat-  
5 ute’s legal meaning and effect [are] questions lying within the constitutional domain of the courts”;  
6 thus “agency interpretations [have a] diminished power to bind . . . [and] command[] a commensura-  
7 bly lesser degree of judicial deference.”].)

8 **c. The Regional Board’s Finding Is Inconsistent With The Plain Meaning of**  
9 **Section 13304(a) Which Makes Clear That “Spreading Waste” and “Con-**  
10 **tributing To Migration Of Waste” Does Not Constitute A “Discharge.”**

11 **(i) The Regional Board Is Required To Apply The Plain Meaning of**  
12 **Section 13304(a).**

13 Under “[w]ell-established rules of statutory construction,” the Regional Boards are obligated  
14 to “first examine the words themselves because the statutory language is generally the most reliable  
15 indicator of legislative intent. The words of the statute should be given their ordinary and usual  
16 meaning and should be construed in their statutory context.” (*Modesto Redev. Agency v. Super. Ct.*  
17 (2004) 119 Cal.App.4th 28, 36-37 [determining the meaning of “causes or permits” within section  
18 13304 and citing *Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 715-716]; see also  
19 *People ex rel. Younger v. Super. Ct.* (1976) 16 Cal.3d 30, 43 [When interpreting a statute, “we must  
20 first *look to the words* themselves and must interpret them ‘according to the usual, ordinary import of  
21 the language employed in framing them.’”] internal citations omitted, italics added.)

22 When specifying the persons against whom the Regional Boards may issue orders, the Legis-  
23 lature chose clear, forceful words: “Any person who has *discharged or discharges wastes* into the  
24 waters of this state” are the opening words of section 13304(a) (italics added). Clarity is not dimin-  
25 ished when the next clause of the statute resumes its definition of the persons covered: “or who has  
26 *caused or permitted . . . waste to be discharged or deposited* where it is, or probably will be, *dis-*  
27 *charged* into the waters of the state and creates, or threatens to create, a condition of pollution or nui-  
28 sance.” (Wat. Code, § 13304, subd. (a), italics added.) “Thus, as used in Section 13304, ‘discharge’  
means: ‘to relieve of a charge, load or burden; . . . to give outlet to: pour forth: EMIT.’” (*Lake Ma-*

1 *drone Water Dist.*, 209 Cal.App.3d at p. 174 [quoting WEBSTER’S NEW INT’L DICT. 644 (3d ed.  
2 1961)] italics and omissions in original.) Within the context of Porter-Cologne, “deposit” means “the  
3 act of depositing . . . something laid, placed, or thrown down.” (*Younger, supra*, 16 Cal.3d at p. 43  
4 [quoting WEBSTER’S 3D INT’L DICT., UNABRIDGED (1963)].<sup>26</sup> It makes sense, then, that Porter-  
5 Cologne would adopt the plain meaning definition of “discharge” when its predecessor, the Dickey  
6 Act, was understood in the same way. (Ex. TTT [1/21/14 Ltr.] at [Williams Report] at pp. 59-60 [cit-  
7 ing Attorney General Opinions that define “discharge” as a verb meaning, “to emit; to give outlet to;  
8 to pour forth” and as a noun meaning “[a] flowing or issuing out”].)

9         Statutory rules of construction further obligate the State Board to avoid interpretations that are  
10 discordant with other provisions of Porter-Cologne. The court in *Modesto Redevelopment Agency*  
11 looked to the legislative history of “causes or permits” language in Water Code section 13350 to dis-  
12 cern the meaning of the same language within section 13340, and determined that there is “no indica-  
13 tion the Legislature intended the words ‘causes or permits’ within the Porter-Cologne Act to encom-  
14 pass those whose involvement with a spill was remote and passive.” (119 Cal.App.4th at pp. 36, 44  
15 “[W]ords should be given the same meaning throughout a code unless the Legislature has indicated  
16 otherwise.”], citing *Hassan v. Mercy American River Hosp.*, *supra*, 31 Cal.4th at pp. 715-716). The  
17 court found that “causes or permits” in section 13350—and, therefore, section 13304—“was intended  
18 to encourage hazardous waste handlers to be careful in their operations and to avoid spills. Persons  
19 who had *no active involvement in activities leading to a discharge do not appear to fall in this cate-*  
20 *gory.*” (*Id.* at p. 43, italics added.)

21         Under the plain meaning of this statute, Barclay is not liable under section 13304(a) because it  
22 did not “discharge” anything, nor did it permit anyone else to discharge at the Site, and the Regional

23  
24 <sup>26</sup> In *Zocon*, the State Board distinguishes the definition of “discharge” in Water Code section  
25 13263(a), a provision which concerns the issuing of WDRs for prospective discharges, from  
26 *Younger*’s definition of “deposit” within section 13350(a), a provision which imposes penalties  
27 for discharges. (State Board Order No. WQ 86-2, at \*5-6.) The State Board explained that the  
28 reasoning in *Younger* did not apply because “[a]n enforcement action is not being taken” in the  
case of issuing WDRs. *Id.* at \*6. To the contrary, section 13304(a) is an enforcement provision,  
and the court’s definition of “deposit” within section 13350(a) should be applied harmoniously  
with section 13304(a).



1 Board is therefore without jurisdiction to order it to participate in clean-up and abatement of contam-  
2 inants discharged by its predecessor owner pursuant to section 13304(a).

3 **(ii) The Ninth Circuit Has Recognized The Plain Meaning of “Dis-**  
4 **charge” in Section 13304(a).**

5 The plain meaning of section 13304(a) was recognized in *City of Stockton*, where the Ninth  
6 Circuit Court of Appeals reversed entry of summary judgment in favor of plaintiffs on a violation of  
7 the Water Code provisions of the Polanco Act. (643 F.3d 668.) The defendants had built a french  
8 drain to allow water to drain under a railroad track, but this had the unforeseen and unwanted conse-  
9 quence of allowing petroleum contaminants to move through the conduit onto another property. (*Id.*  
10 at pp. 671-72.) The Ninth Circuit held that the defendants were not responsible under Water Code  
11 section 13304(a) on alternative grounds. (*Id.* at pp. 677-678.) Although the second ground is dis-  
12 cussed in detail in Part III.B., *supra*, it is the first ground that is significant here: defendants had not  
13 discharged anything because someone else had already discharged the contaminants. Although the  
14 Court of Appeals was prepared to consider the unique circumstances in which the conduit might pro-  
15 vide a second point of discharge, the Court made clear it had no doubt at all that section 13304(a)  
16 limits the jurisdiction of the Regional Boards to dischargers and no other categories. (*Id.* at p. 677.)

17 This is dramatically different from the interpretation of section 13304(a) developed by the  
18 State Board during the 1980s and early 1990s, when it expanded the definition of dischargers to in-  
19 clude owners who do not discharge but are nevertheless responsible for clean-up and abatement of  
20 contaminants discharged by someone else. For example, as discussed in Part V.B.2, *supra*, in the de-  
21 cisions relied upon in footnote 13 of the Revised CAO, more than half of the parties held responsible  
22 did not actively participate in the discharge of contaminants. The reasons given for such expansive  
23 redefining of the jurisdictional scope of the Regional Boards were not linked to the intent of the State  
24 Legislature. In *Zoecon*, for example, current owners, who had nothing to do with the discharge of  
25 contaminants, were nevertheless held responsible for cleanup and abatement because of the practical  
26 consideration that they were “in the position of being well suited to carrying out the needed onsite  
27 cleanup”—a convenience rationale not found anywhere in the words of the statute. (State Board Or-  
28 der No. WQ 86-2, at \*10.) These and other decisions like them wander beyond the plain meaning of

1 the statute to expand the jurisdiction of the State and Regional Boards well beyond intended limits.  
2 (*Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal.4th 287, 300 [quoting *Physicians & Surgeons*  
3 *Labs., Inc. v. Dep't of Health Servs.* (1992) 6 Cal.App.4th 968, 982 [“[T]he rulemaking authority of  
4 an agency is circumscribed by the substantive provisions of the law governing the agency. . . .  
5 [R]egulations that alter or amend the statute or enlarge or impair its scope are void.”]; see also *Whit-*  
6 *comb Hotel, Inc. v. Cal. Emp't Comm'n* (1944) 24 Cal.2d 753, 757 [“An administrative officer may  
7 not make a rule or regulation that alters or enlarges the terms of a legislative enactment.”].)

8 **(iii) The Legislative History Of The 1980 Amendments To Porter-**  
9 **Cologne Support The Plain Meaning Interpretation Of Section**  
10 **13304(a).**

11 If the plain meaning of the statute requires an explanation, it can be found in the legislative  
12 history of the 1980 amendments to Porter-Cologne, which became effective on January 1, 1981.  
13 When Porter-Cologne became effective in 1970, it authorized the State and Regional Boards to initi-  
14 ate enforcement actions against a person who “causes or permits” a discharge. The language of sec-  
15 tion 13304(a) was therefore identical to what it is now except that the verbs in the pre-1981 version  
16 were in the present tense only. (Compare Porter-Cologne Water Quality Control Act, Stats. 1969,  
17 Ch. 482, § 13304, subd. (a), with Wat. Code, § 13304, subd. (a).]

18 Under the present-tense language in effect before the 1980 amendments, the Regional Boards  
19 regulated ongoing discharges. State Board decisions from the decade in which Porter-Cologne oper-  
20 ated in this manner reveal that the exclusive focus was on true and active dischargers. A typical State  
21 Board decision under pre-1981 Porter-Cologne is found in *In the Matter of United States Steel Cor-*  
22 *poration*, State Board Order No. WQ 71-9. There U.S. Steel discharged industrial waste from the  
23 manufacturing of fabricated iron and steel products, which entered a slough at its shore from three  
24 outfalls. (*Id.* at \*2.) The Regional Board established waste discharge requirements in 1964 and  
25 1970. (*Id.*) Subsequently, the Regional Board found U.S. Steel to be in violation of these  
26 WDRs. (*Id.* at \*2-3.) The State Board found the continued violation and threatened violation of  
27 these WDRs to support the issuance of a cease and desist order (“CDO”), and concluded that the Re-  
28 gional Board’s decision to issue a CDO was appropriate and proper. (*Id.* at \*4.) Other examples are

1 *In the Matter of Crestline Sanitation District*, State Board Order No. 78-12 [sustaining CDO concern-  
2 ing discharges of untreated sewage in violation of WDRs], and *Order Requiring the City of Antioch*  
3 *to Cease & Desist*, State Board Order No. 77-14 [CDO issued to the City of Antioch for threatening  
4 to violate WDRs and for failing to submit a time schedule for implementing secondary treatment for  
5 discharges to the sewage system]. All State Board decisions interpreting section 13304(a) prior to  
6 January 1, 1981 were like these three examples in that they all involved enforcement against current  
7 dischargers.

8 In 1980, section 13304(a) was amended, adding the past tense “has discharged” and “has  
9 caused or permitted,” to allow the Regional Boards to hold dischargers responsible for clean-up and  
10 abatement of contaminants caused by past discharges when they did not violate a prior order.

11 The State Board, which advocated for the amendments, explained that the “enforcement pro-  
12 visions of the [currently worded] Porter-Cologne Act address only present or threatened future *dis-*  
13 *charges* . . . they do not apply to those *discharges* which are transitory or have a broken *flow path* be-  
14 tween the *point of discharge* and the pollution point. Consequently, *illicit discharges* which have  
15 ceased prior to discovery as well as *transitory discharges* are *not subject to [enforcement]*.” (State  
16 Water Resources Control Board, Request for Approval of Proposed Legislation (Nov. 6, 1979), italics  
17 added.)

18 Importantly, the language that had placed the focus on dischargers was *not changed* at all; on-  
19 ly the tense of the verbs was changed, expanding the number of ways in which a *discharger* may be  
20 held accountable but not varying the category of persons who may be held accountable. Section  
21 13304(a) still referred to “discharges” just as it did before; words such as “owner” or “operator” were  
22 not added. In fact, no changes at all were made to expand the category of persons who could be in-  
23 cluded as the subject of a clean-up and abatement order, and nothing in the legislative history sug-  
24 gests that it was even considered.

25 The State Board pushed for amendments to section 13304(a) to clarify that a cleanup and  
26 abatement order could issue for such discharges, and expected that the provision would most affect  
27 “those industries which have *improperly spilled or disposed* of hazardous wastes in the past but  
28 which have ceased prior to discovery . . . [and also] local agencies that have allowed *improper dis-*

1 *posal* to occur in the past at waste disposal facilities.” (*Id.*, italics added.) Speaker of the Assembly  
2 and author of the bill, Leo McCarthy, too, explained the intent of the 1980 Porter-Cologne amend-  
3 ment in terms of the “polluter,” which in his example refers to someone who has “unlawfully dis-  
4 charged waste”: “For example, assume a *polluter* in the past has *unlawfully discharged* waste to an  
5 unlined pond overlying a groundwater basin. Even though the *discharge* to the pond has ceased, the  
6 harmful materials may continue to seep into the underlying groundwater. In such a situation it is not  
7 clear that the Regional Board can require *the polluter* to clean up.” (Authors Statement for AB2700,  
8 italics added.) The repeated use of the words “dischargers” and “discharging” in this correspondence  
9 from the legislative history demonstrates that no one was even considering a change from past prac-  
10 tices, where the focus was exclusively on dischargers; it was taken for granted that the exclusive ju-  
11 risdiction would remain limited to dischargers while the focus of each conversation was on the sub-  
12 jects of the legislative amendments.

13         So the legislative history shows that the sights of the State Legislature were set squarely on  
14 the discharger when it adopted the 1980 amendments to Porter-Cologne. The jurisdiction of the re-  
15 gional boards was limited to dischargers because *dischargers* were the subject of WDRs, and viola-  
16 tors of those WDRs were noncompliant *dischargers*. The Legislature certainly had the power to ex-  
17 pand the Regional Boards’ authority to include categories of persons in addition to dischargers, but  
18 that would have required a change in language. The word “owner,” for example, could have been  
19 used if the Legislature had wished to allow the regional boards to order owners to clean-up and abate  
20 contaminants discharged by someone else. But the Legislature did not change the language in that  
21 manner even though it certainly had an example available in the CERCLA law first enacted in 1980  
22 by the United States Congress, 42 U.S.C. § 9601 *et seq.*, and the California equivalent adopted in  
23 1981, the Hazardous Substances Account Act (“HSAA”), Health & Saf. Code § 25300 *et seq.*, both  
24 of which designate “owners, operators and arrangers” the responsible parties for clean-up and reme-  
25 diation of designated sites. Those terms have been comprehensively defined by statute and case law.  
26 The omission of any of them could not have been an accident or oversight. It is beyond the power of  
27 the State Board to refashion the scope of its own authority to conform to the HSAA or other law  
28 when the Legislature has not done so. (See, e.g., Health & Saf. Code § 25187, subd. (b)(5) [provid-

1 ing for enforcement against “present and prior owners” of hazardous waste facilities]; Health & Saf.  
2 Code § 25360.3, subd. (c)(2) [providing for recovery actions against property owners for the release  
3 of a hazardous substance, including for a “release [that] occurred before the date that the owner ac-  
4 quired the property”]; Authors Statement for AB2700 [1980 amendments to Health & Safety Code  
5 permit DTSC to issue an order to “owners...and any prior owners of the site”]; *City of Stockton, su-*  
6 *pra*, 643 F.3d at pp. 677-678 [applying different standards when determining if the defendant had lia-  
7 bility under Polanco Act, which would allow recovery if defendant had been liable under either (1)  
8 the Water Code § 13304(a), which requires that defendant “actively or knowingly caused or permit-  
9 ted the contamination,” or (2) CERCLA, which only requires proof of passive ownership].)

10 The State Board decisions cited in footnote 13 of the Revised CAO were wrong to go beyond  
11 dischargers in their interpretation of section 13304(a), and the Regional Board compounded that error  
12 by taking the unprecedented step of making a former owner, Barclay, responsible for cleaning up and  
13 abating contaminants that—unbeknownst to its—were discharged by its predecessor before it pur-  
14 chased the property.

15 **C. Barclay Is Exempt From Liability Under Porter-Cologne Because All Of The**  
16 **Acts For Which The Revised CAO Holds It Responsible Occurred Before 1981**  
17 **And Are Therefore Protected By The Safe Harbor Of Section 13304(j).**

18 Even if there was evidence or legal authority to support the Regional Board’s finding that  
19 Barclay knowingly “spread[] the waste” or “contributed to the migration of waste” (and there is not),  
20 Barclay is nonetheless exempt from liability under Porter-Cologne because all of the acts for which  
21 the Revised CAO holds it responsible are protected by the safe harbor of section 13304(j). Section  
22 13304(j) of the California Water Code precludes the 1980 amendments to section 13304(a) from cre-  
23 ating “any new liability for acts occurring before January 1, 1981, if the acts were not in violation of  
24 existing laws or regulations at the time they occurred.” (Wat. Code, § 13304, subd. (j).)<sup>27</sup>

25 <sup>27</sup> The 1980 amendments to the Porter Cologne Act only changed some of the verbs in section  
26 13304(a) from being limited to the present tense to include the past tense so that the Regional  
27 Boards gained authority to order dischargers to undertake clean-up and abatement of past dis-  
28 charges in certain circumstances. The amendments thus added the word “discharged” at the be-  
beginning and added “caused or permitted.” This left formerly compliant dischargers open to pos-  
sible liability if the amended section 13304(a) were enforced to clean up contamination that had  
been lawfully discharged at the time. Therefore, section 13304(j) was added at the same time to  
[Footnote continued on next page]

1 Because it is beyond dispute that all of Barclay’s alleged activities occurred well before 1981,  
2 the burden of proof is on the Regional Board to establish Barclay’s liability in light of section  
3 13304(j), and the Revised CAO utterly fails to meet that burden. Besides the failure of the Revised  
4 CAO to satisfy the burden of proving that Barclay is not entitled to the safe harbor provided by sec-  
5 tion 13304(j), the uncontradicted evidence provided to the Regional Board establishes affirmatively  
6 that Barclay’s “acts were not in violation of existing laws or regulations at the time they occurred.”

7 **1. The Regional Board Failed To Meet Its Burden Of Proof That Barclay Is Not Ex-**  
8 **empt From Liability Under Section 13304(j).**

9 The Revised CAO makes only the conclusory statement that “[i]ncluding [Barclay] as a re-  
10 sponsible party is consistent with Water Code section 13304(j) because Lomita or [Barclay]’s actions  
11 that resulted in creating pollution and nuisance were unlawful since at least 1949.” (Ex. A [Revised  
12 CAO] at 11.) In support, the Revised CAO cites in a footnote three code provisions that Barclay al-  
13 legedly violated: Health and Safety Code section 5411, Fish and Game Code section 5650, and Los  
14 Angeles County Code section 20.36.010. (*Id.* at 11, fn.14.) However, the Regional Board does not  
15 have authority to assert violations of these code provisions: none of these code provisions are en-  
16 forced by the Regional Board or listed in the Water Code. But even if it did have such authority, the  
17 Revised CAO does not cite any evidence to support its conclusion that Barclay’s alleged activities at  
18 the Site from 1965-66 violated these provisions. Nor does it analyze the relevant statutory language  
19 at the time. Moreover, the Draft Revised CAO did not even mention violations of the Fish and Game  
20 Code section 5650 or Los Angeles County Code section 20.36.010, so Barclay had no opportunity to  
21 respond to the Board’s unsupported conclusion that Barclay violated those laws.

22 Even now, Barclay does not know what basis the Regional Board had for finding that Barclay  
23 violated these code provisions. When questioned about these findings in his deposition, the Regional  
24 Board’s lead prosecutor testified that the Prosecution Team did not make these findings; their counsel  
25 did. (Ex. E [Unger Dep.] at 64:5-65:6 [“Q. Okay. As part of your work on the prosecution side, did  
26 you or anybody at your direction attempt to evaluate any of the laws that were in effect in 1965 and

27 [Footnote continued from previous page]

28 provide an exemption from enforcement against past dischargers where the discharges occurred  
before 1981 and did not at that time constitute a violation of then-existing law.

1 1966 to determine if Barclay violated those laws? A. My understanding is that our counsel did that  
2 research.”].) And when he was asked to identify the factual and legal basis for these findings, Unger  
3 refused to answer on the grounds of privilege. (*Id.* at 55:2-58:18 [“Q. So just so we have a record, if I  
4 were to ask you about what you and Ms. McChesney discussed in terms of how she came to a con-  
5 clusion that Barclay violated the Dickey Act, am I correct you won't be able to answer it based on the  
6 instruction of your lawyer? [. . .] A. Yes, I will follow -- I will follow the advice of my counsel.”].)

7 The Regional Board cannot hide behind a claim of privilege to justify the lack of any eviden-  
8 tiary support for its finding that Barclay violated these code provisions. The Regional Board is re-  
9 quired to “ensure that there is a factual and legal basis in the record for its decision *and must indicate*  
10 *its reasoning and the factual basis for its decision to the affected parties.*” (*In the Matter of Project*  
11 *Alpha*, State Board Order No. WQ 74-1, at \*3, italics added.) Because the Regional Board has failed  
12 to “indicate its reasoning and the factual basis for its decision,” the Regional Board’s finding that  
13 Barclay violated existing laws cannot stand.

14 **2. Barclay Was “Not In Violation Of Any Laws Or Regulations” Cited By The Re-**  
15 **gional Board.**

16 While it is not Barclay’s burden to prove that it is entitled to a safe harbor under section  
17 13304(j), the evidence makes clear that Barclay’s acts did not violate any of the regulations cited by  
18 the Regional Board.

19 **a. Barclay’s Acts Did Not Violate Health & Safety Code Section 5411.**

20 Health and Safety Code section 5411 provides: “No person shall discharge sewage or other  
21 waste, or the effluent of treated sewage or other waste, in any manner which will result in contamina-  
22 tion, pollution or a nuisance.” The Regional Board has not cited to any evidence to prove that Bar-  
23 clay committed a “discharge,” and indeed there is none. As discussed above, it is undisputed that  
24 Shell was the sole discharger of contaminants at the Site.

25 In its January 21, 2014 submission to the Regional Board, Barclay explained that during the  
26 1960s, this statute was applied against people who engaged in discharges, in the usual sense of that  
27 term, not against non-discharging owners like Barclay. (Ex. TTT [1/21/14 Ltr.] at pp. 72-73.) More-  
28 over, Barclay explained that in the 1960s, section 5411 was enforced for disposal of sewage and simi-

1 lar contaminants, not oil. (See *Thompson v. Kraft Cheese Co. of Cal.* (1930) 210 Cal. 171, 173 [en-  
2 forcing section 5411 against cheese factory for discharge of dirty water that comes from floor clean-  
3 ing]; *People v. City of L.A.* (1948) 83 Cal.App. 2d 627, 638 [injunction restraining the plaintiff cities  
4 from discharging sewage that is injurious to the public health into the salt waters of the state].) Bar-  
5 clay explained that there are no published decisions in which section 5411 was enforced against non-  
6 dischargers, and while oil was not expressly exempted from section 5411, there are no pre-1972 cases  
7 in which the discharge of oil was found to be a violation of that provision. In short, there is no evi-  
8 dence or other basis from which to conclude that anything Barclay did during its work at the Kast  
9 Site violated Health and Safety Code section 5411 as the provision was interpreted and enforced at  
10 the time. (See also Ex. TTT [1/21/14 ltr.] at [Williams Report] at pp. 58-59, fn.150.) The Regional  
11 Board has not offered any evidence to the contrary, and therefore there is no basis for the Regional  
12 Board to assert that Barclay's acts have violated Health and Safety Code section 5411.

13 **b. Barclay's Acts Did Not Violate Fish & Game Code Section 5650.**

14 During the time period when Barclay owned the property, section 5650 provided: "It is un-  
15 lawful to deposit in, permit to pass into, or place where it can pass into the waters of this State any of  
16 the following: (a) Any petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen, or residu-  
17 ary product of petroleum, or carbonaceous material or substance; (b) Any refuse, liquid or solid, from  
18 any refinery, gas house, tannery, distillery, chemical works, mill or factory of any kind; (c) Any saw-  
19 dust, shavings, slabs, or edgings; (d) Any factory refuse, lime, or slag; (e) Any cocculus indicus; [or]  
20 (f) Any substance or materials deleterious to fish, plant life, or bird life." (Stats. 1957, c. 456, p. 1394  
21 § 5650.)

22 The Regional Board has not cited any evidence that Barclay "deposited" or "permitted to  
23 pass" any of the substances in subdivisions (a) through (f) into "waters of this State." However, even  
24 if the Regional Board's unsupported assertion that Barclay's acts "contributed to the migration of  
25 waste into soil and groundwater" were true (and it is not), such actions would not constitute a viola-  
26 tion of section 5650. Under the Fish and Game Code, "waters of this State" does not include  
27 groundwater. (See, e.g., 48 Ops. Atty. Gen. 23, 24, 30 (1966).) Section 5650 was enacted to protect  
28 fish, and to comport with the purpose of the statute, "waters of this State" must be defined as waters



1 that contain fish. In 1966, while interpreting section 5650 in the context of pesticide deposits in arti-  
2 ficially constructed irrigation canals, the Attorney General issued an opinion concluding that “in con-  
3 structed channels *where fish would not occur naturally, there would be no violation of section 5650 if*  
4 *fish have been excluded* from the sections where the deleterious material or substances retain their  
5 harmful effects.” (48 Ops. Atty. Gen. 23, 24, 30 (1966), italics added.) It follows that because the  
6 groundwater at issue in this matter has no “fish therein” such waters are not “waters of this State” for  
7 purposes of the Fish and Game Code and would not have been considered by the State to be “waters  
8 of this state” at the time of Barclay’s activities at the site. Thus, Barclay’s acts could not have violat-  
9 ed section 5650.<sup>28</sup>

10 Had the Prosecution Team identified Fish and Game Code section 5650 in earlier drafts of the  
11 CAO when it was put out for public comment, Barclay could have pointed out that it simply does not  
12 apply in this setting, and the Prosecution Team could have made an informed decision whether they  
13 still thought Barclay violated that statute and then provided some reasoning. Here, by contrast, with  
14 Smith as the adjudicator and making an apparent unilateral and uninformed decision to add that sec-  
15 tion into the order as it went final, Barclay was deprived of any opportunity to point out that it could  
16 not have violated Fish and Game Code section 5650. Smith’s eagerness to please her superior and  
17 help out by adding more violations of law, without any support, analysis, or opportunity for Barclay  
18 to comment just highlights the due process violations and the lack of any proper administrative record  
19 to support the allegation that Barclay violated Fish and Game Code section 5650.

20 **c. Barclay’s Acts Did Not Violate Los Angeles County Code 20.36.010.**

21 In language similar to section 13304(a), the Los Angeles County Code 20.36.010 provides:  
22 “A person shall not discharge or deposit or cause or suffer to be discharged or deposited at any time

23 <sup>28</sup> See also *People v. Miles* (1904) 143 Cal. 636, 641-642 (addressing Penal Code section 636, a  
24 companion statute to Penal Code section 635, which was the predecessor of section 5650, and  
25 holding: “The dominion of the state for the purpose of protecting its sovereign rights to the fish  
26 within its waters, and their preservation . . . extends to all waters within the state, public or pri-  
27 vate, wherein these animals are habited or accustomed to resort for spawning or other purposes,  
28 and through which they have freedom of passage to and from the public fishing-grounds of the  
state. To the extent that the waters are the common passageway for fish . . . they are deemed for  
such purposes public waters, and subject to all laws of the state regulating the right of fishing.”),  
italics added, quoting *People v. Truckee Lumber Co.* (1897) 116 Cal. 397).

1 or allow the continued existence of a deposit of any material which may create a public nuisance, or  
2 menace to the public health or safety, or which may pollute underground or surface waters, or which  
3 may cause damage to any storm-drain channel or public or private property.”

4 As discussed above, the Prosecution Team cited no evidence to prove that Barclay’s acts vio-  
5 lated this ordinance. Moreover, the Prosecution Team has repeatedly stated that Barclay’s compli-  
6 ance with the Los Angeles County Building Code, U.B.C. § 7014(c) (1965), is irrelevant. (Ex. S at  
7 Attachment 14 at p. 81; Ex. F [Ayalew Dep.] at 36:4-37:20, 47:12-48:19, 56:9-22). The Prosecution  
8 Team’s statements that Barclay’s compliance with the Building Code is irrelevant is inconsistent with  
9 a finding that Barclay violated Los Angeles County Code 20.36.010, because under the Building  
10 Code, the Los Angeles County Engineer was required by statute to confirm that the Carousel Project  
11 complied with applicable laws, and the Los Angeles County Engineer confirmed it. (Ex. E [Unger  
12 Dep.] at 66:10-67:23.) The Prosecution Team has also repeatedly stated that the expert reports of  
13 Don Shepardson and Marcia Williams (Part IV.G.2, *supra*) were irrelevant—despite the fact that  
14 those opinions go right to the heart of just what the law was at the time and further prove that Barclay  
15 was in compliance with then-existing laws. (Ex. S at Attachment 14 at pp. 79-82; Ex. E [Unger Dep.]  
16 at 32:5-33:15, 239:7-21.) Thus, contrary to the unsupported assertion in the Revised CAO, the only  
17 evidence in the record confirms that Barclay complied with Los Angeles County Code 20.36.010.

18 And, again, Ms. Smith’s unilateral, arbitrary and unsupported decision to add yet another code  
19 section with which she has no familiarity or experience and suddenly claim Barclay violated it, too,  
20 simply highlights the unfair, biased and prejudicial determinations made by the Regional Board when  
21 it named Barclay. There is no rationale to explain how, with the involvement of the Los Angeles  
22 County engineers and planners who approved every step Barclay took towards this redevelopment,  
23 that somehow the County failed to find that Barclay violated section 20.36.010 but today, some 50  
24 years later, a Water Board staffer can make that determination and need not offer any analysis, sup-  
25 port, facts, nor any opportunity for Barclay to comment on it, before it becomes part of a final order.

26 **3. Barclay Complied With The Dickey Act, Which Was The Law Applicable At The**  
27 **Time The Carousel Project Was Being Developed.**

1           The fact that the Revised CAO wrongly asserts that Barclay violated code provisions it has no  
2 authority to enforce, while failing to mention the Dickey Act—which was the predecessor to Porter-  
3 Cologne and the applicable law at the time—is telling. Barclay’s compliance with the Dickey Act is  
4 further evidence that Barclay was not in violation of existing laws or regulations at the time. At the  
5 time Barclay was performing its development work on the reservoirs at the Site, the determination  
6 whether it was engaging in a discharge and whether that discharge was compliant with applicable law  
7 was determined under the Dickey Act of 1949. As shown below, Barclay was fully compliant with  
8 the Dickey Act as it was applied at the time.

9           The Dickey Act was enacted in 1949. (Stats. 1949, ch. 1549, § 1, p. 2782). It continued to  
10 govern the jurisdiction of the State and Regional Water Boards until it was replaced by the Porter-  
11 Cologne Act, which first became effective on January 1, 1970 (after all of the acts by Barclay that are  
12 referenced in the Revised CAO had taken place at the Site). (Stats. 1969, ch. 482, § 18, p. 1051; Wa-  
13 ter Code §§ 13000 *et seq.*). It is, therefore, the applicable Water Code provision governing all of the  
14 acts upon which the Revised CAO is based.<sup>29</sup>

15           Barclay “was in compliance with the Dickey Act” given the nature of its activities and the  
16 “environmental understanding of oil and oil pollution at that time.” (Ex. TTT [1/21/14 Ltr.] at [Wil-  
17 liams Report] at p. 57.) As explained by Marcia Williams, an expert in the evolution of environmen-  
18 tal laws and regulations, and in public knowledge about environmental subjects, for the Regional  
19 Board of that era to have authority over Barclay’s conduct under the Dickey Act, three requirements  
20 had to be met: (1) Barclay’s activities must have constituted a “discharge” within the meaning of the  
21 Dickey Act; (2) “the discharge must have been of a sewage or industrial waste”; and (3) the discharge  
22 must have caused or threatened a condition of pollution or nuisance. (*Id.* at p. 58.) According to Ms.  
23 Williams, none of these three prongs are satisfied under the definitions applied at the time. (*Id.* at p.  
24 58.) Barclay did not engage in a “discharge” as the term was used at the time. (*Id.* at pp. 59-61.)

25 <sup>29</sup> Barclay completed the last filling and compacting operations in the former reservoir in 1968.  
26 (Ex. TTT[1/21/14] at Tab 108 [CARSON 387-391]; *id.* at Tab 102 [CARSON 397-403]; *id.* at  
27 Tab 99 [CARSON 430-433]; *id.* at Tab 100 [CARSON 445-450]; *id.* at Tab 105 [CARSON 552-  
28 557]; *id.* at Tab 110 [CARSON 340-344]; *id.* at Tab 112 [CARSON 345-347]; *id.* at Tab 123  
[1/30/1967 report for Tract 28086]; *id.* at Tab 125 [3/10/1967 report for Tract 28086].); Part  
II.A.13, *supra.*)

1 Nor was oil-impacted soil regarded as “sewage and industrial waste” under the Dickey Act if the soil  
2 was used for construction purposes. (*Id.* at p. 61.)

3 Citing a contemporaneous opinion of the California Attorney General’s Office, Ms. Williams  
4 points out that under the Dickey Act, “discharge” “was understood as the plain meaning of the word,”  
5 which did not include grading, compaction and other construction work. (*Id.* at p. 60.) The attorney  
6 general’s opinion also used the terms “flowing or issuing out” to describe “discharge,” and Ms. Wil-  
7 liams demonstrated through her analysis of contemporaneous evidence that “given the nature of the  
8 understanding and concern regarding oil in the pre-1970 period, the mere presence of oil stains in  
9 soils during [Barclay’s] redevelopment project would not have been considered a ‘flowing or issuing  
10 out’ at the time. (*Id.*)

11 Also, even a discharger would not have violated the Dickey Act unless it was also proven that  
12 its conduct would have been regarded as causing pollution or nuisance to the waters of the state. (*Id.*  
13 at pp. 61-62.) This, too, is not a standard that can be based on present-day notions of what constitutes  
14 a nuisance: “the application of nuisance under the Dickey Act was ‘restricted to nuisances arising  
15 from the discharge of waste materials into water.’” (*Id.* at p. 62.) And when it came to releases of  
16 oil, water at that time only meant surface water. (*Id.* at p. 64.) “[T]he authors of the Dickey Act be-  
17 lieved that oil wastes were rarely a concern at that time unless there was evidence of discharge into  
18 surface waters.” (*Id.*) Ms. Williams concluded that Barclay’s conduct would not have qualified as a  
19 violation of the Dickey Act on that ground either. (*Id.*)

20 If the State or Regional Boards had regarded conduct like Barclay’s as a discharge, developers  
21 in Barclay’s circumstances would have been required by the Dickey Act to obtain waste discharge  
22 requirements, or WDRs, from the applicable regional board in order to engage in redevelopment ac-  
23 tivities. (Ex. TTT [1/21/14 Ltr.] at [Williams Report] at p. 64.) To test her conclusion that Barclay’s  
24 activities were not considered a discharge, Ms. Williams reviewed complete files of WDRs issued by  
25 the Los Angeles and Santa Ana regional boards for the following years: Los Angeles, 1970 and  
26 1971; Santa Ana, 1968 and 1969.<sup>30</sup> (*Id.* at pp. 64-65.) This review revealed that no WDRs were is-

27 <sup>30</sup> These files were copied by Ms. Williams several years ago when performing another assignment.  
28 The complete records are no longer available from the Regional Boards, but Ms. Williams has  
agreed to make her copies available upon request.

1 sued to anyone performing work like Barclay's, confirming Ms. Williams' conclusion that Barclay's  
2 conduct was not viewed as a discharge during the applicable timeframe. (*Id.* at p. 65.)

3 Marcia Williams thus confirms, (1) "[Barclay] would not have been understood to be causing  
4 pollution or nuisance to the waters of the state," (2) Barclay's activities did not constitute a "dis-  
5 charge" as the term was understood at the time, and (3) Barclay would not have been required to noti-  
6 fy the Regional Board of a discharge nor was Barclay subject to WDRs; therefore, Barclay's actions  
7 could not have caused a violation of the Dickey Act. (*Id.* at p. 58 [noting also at 60 that "movement  
8 of soil from one location of a construction site to another [is not a discharge] when that soil continues  
9 to be used and is not placed into water."].) At the time Shell used the Site to store crude oil, "there  
10 was no requirement [under the Dickey Act] to report inadvertent, and potentially unknown, releases  
11 of oil from the tanks to the subsurface." (*Id.* at p. 29.) Moreover, crude oil and its organic constitu-  
12 ents were not among the constituents of concern with respect to groundwater degradation in Califor-  
13 nia at the time. (*Id.*) Accordingly, Barclay could not be in violation of the Dickey Act for merely  
14 acquiring the Site that was contaminated by oil and then re-grading and compacting it in preparation  
15 for residential development.

16 The Revised CAO does not mention the Dickey Act, nor does it provide any evidence or  
17 analysis to contradict the compelling analysis of Ms. Williams. Therefore, the Revised CAO pro-  
18 vides no basis from which to conclude that Barclay's "acts" in the late 1960s "were" "in violation of  
19 existing laws or regulations at the time they occurred." (Water Code § 13304, subd. (j).)

20 **4. Public Agencies In A Position To Know Both The Law And The Material Facts**  
21 **At The Time Prove Barclay's Compliance With Then-Existing Law.**

22 In addition to Barclay's compliance with the Dickey Act, evidence from public agencies in a  
23 position to know both the law and the material facts at the time proves that Barclay complied with  
24 then-existing law. From the outset of the Carousel project, multiple public agencies gave Barclay's  
25 actions to develop the Carousel project close oversight and confirmed that there were no "violation[s]  
26 of existing laws or regulations at the time" Carousel was graded and built in the late 1960s.

27 **a. The Los Angeles County Engineer Confirmed Barclay's Compliance With**  
28 **Then-Existing Laws.**

1 At the time of the Carousel project, the County Engineer was responsible for assuring compli-  
2 ance with all laws. (U.B.C. § 7014, subd. (c) (1965).) Although there were no provisions for envi-  
3 ronmental review in the County’s building code at the time, this merely describes the state of the law  
4 at the time and does not alter the importance of the County Engineer’s determination that Barclay  
5 complied with the laws then in effect. (Ex. TTT [1/21/14 Ltr.] at Tab 7 [Bach Dep.] at 286:14-  
6 287:10; *id.* at Tab 2 [Curci Dep.] at 22:15-23:1; *id.* at Tab 6 [Nehrenberg Dep.] at 42:8-43:12.)

7 The County Engineer’s review for legal compliance was not conducted in the dark; as de-  
8 scribed in Part III.G, *supra*, the County Engineer was thoroughly involved in every phase of the pro-  
9 cess with a frequent presence at the Site. There is ample evidence that the County Engineer was  
10 aware of all relevant facts, and there is no evidence of any material facts of which it was not aware.  
11 Indeed, because the soils reports provided the directions for the grading contractor and others in the  
12 field to grade and fill the reservoirs and the County Engineer, in turn, reviewed and directed changes  
13 in the soils reports, there are no significant facts known to Barclay that were not also known to both  
14 the County Engineer and the soils engineer. (See Part III.G, *supra*.) For example, the County Engi-  
15 neer is shown on the memorandum dated March 11, 1966 as being one of two recipients specified to  
16 receive three copies, the other being Barclay. (Ex. TTT [1/21/14] at Tab 74 [CARSON 251-258].)  
17 The March 11, 1966 memorandum, of course, is where Pacific Soils reported to Barclay and the  
18 County Engineer that it had observed “oil stains” in six borings taken in Reservoir 6 to ascertain the  
19 permeability of the soil beneath the former tank bottom. (*Id.*) The County Engineer signed off on  
20 compliance with every legal requirement of the project, including the decision to leave the “oil  
21 stains” undisturbed beneath the concrete floor of Reservoir 6. The evidence concerning the County  
22 Engineer thus stands as un rebutted proof that Barclay is entitled to exemption from liability under  
23 Porter-Cologne pursuant to section 13304(j).

24 **b. The California State Real Estate Commissioner Confirmed Barclay’s**  
25 **Compliance With Then-Existing Law.**

26 During the 1960s, the California State Real Estate Commissioner was tasked under the Subdi-  
27 vided Lands Law with reviewing every subdivision of a certain size, and the Commissioner was pro-  
28 vided staff from the Department of Real Estate to carry out its diligence. (Bus. & Prof. Code

1 §§ 11000-11200.) Under the Subdivided Lands Law, one of the Commissioner's (and DRE's) re-  
2 sponsibilities was to assure compliance with the law. (Ex. TTT [1/21/14] at Tab 339 [Department of  
3 Real Estate Reference Book].) As already shown, the White Report evidencing compliance was is-  
4 sued for every Tract in the Carousel subdivision. (Part II.E.2.d, *supra*.) This alone proves that the  
5 requirements of section 13304(j) are satisfied.

6 **c. The Los Angeles County Planning Commission Confirms Barclay's Com-**  
7 **pliance With Then-Existing Laws.**

8 Finally, both the County Regional Planning Commission and the Board of Supervisors ap-  
9 proved a number of major land use planning choices required both by California law and County Or-  
10 dinance, including subdivision map approval and a zoning change from heavy industrial (M-2) to res-  
11 idential (R-1). Both involved public hearings and both were addressed twice. (Part IV.G.2, *supra*.)  
12 The County of Los Angeles was then (and still is) the largest in California by population, and the land  
13 use planning agencies and their staffs were at that time among the most sophisticated in the nation.  
14 ([lacounty.gov](http://www.lacounty.gov), Residents, <http://www.lacounty.gov/wps/portal/lac/residents> (last visited Jan. 19,  
15 2014).) When making these land use approvals, it is clear that both the Planning Commission and the  
16 Supervisors were fully aware that Barclay was converting a former oil tank farm into a residential  
17 neighborhood, and the details of how that was going to be accomplished were spelled out in the doc-  
18 uments. (Ex. TTT [1/21/14] at Tab 73 [CARSON 363-367]; *id.* at Tab 72 [CARSON 370-374]; *id.* at  
19 Tab 355 [CARSON 786-787]; *id.* at Tab 91 [CARSON 790].) If those agencies had believed there  
20 was something unlawful being done in any aspect of the project before them, they would not have  
21 given the approvals that they did.

22 To determine whether there was a violation of a law or regulation 50 years ago, we need only  
23 look at the unbiased judgments of agencies from those times that were accustomed to making such  
24 determinations, had been given the responsibility to enforce the applicable laws, knew the laws well,  
25 and also knew this project well. It is impossible to imagine a better source for information on this  
26 issue than the California Department of Real Estate and the Los Angeles County Engineer Depart-  
27 ment, and when both agencies agree that there was legal compliance by Barclay, they must be cor-  
28 rect. The County Engineer's affirmation of legal compliance, for example, is more reliable than a

1 retroactive assessment ever could be since it represented the collective decision of individuals who  
2 were experienced in making such decisions in that specific era. These individuals were then familiar  
3 with the laws deemed by regulatory officials to be most important for public safety and how those  
4 laws were being interpreted at that time in the context of building and safety practices with which  
5 they were personally familiar, and they applied the specific facts from the Carousel Site to those laws  
6 and determined there were no violations.

7 The decisions of the Planning Commission and Board of Supervisors corroborate the County  
8 Engineer and State Real Estate Commissioner. Those agencies too knew the applicable laws and had  
9 knowledgeable, competent staffs to review this project. If they had believed there were violations of  
10 law at Carousel, they would not have given the approvals they did. The uncontested evidence is  
11 therefore clear that Barclay's acts "were not in violation of existing laws or regulations at the time  
12 they occurred." If Barclay was a discharger, and it was not, then it was a discharger in compliance  
13 with all then-applicable laws, and is therefore protected by the safe harbor under section 13304(j).

#### 14 **VI. Conclusion**

15 For all of the foregoing reasons, the Revised CAO should be vacated.

#### 16 **VIII. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPRO- 17 PRIATE REGIONAL BOARD AND TO THE DISCHARGER, IF NOT THE 18 PETITIONER**

19 A true and complete copy of this Petition, without attachment, was sent by First Class Mail to  
20 Deborah Smith, Chief Deputy Executive Officer, Regional Water Quality Control Board, Los Ange-  
21 les Region, 320 W. 4th Street, Suite 200, Los Angeles, California 90013. A copy of this Petition was  
22 also sent by First Class Mail to counsel for the Discharger Shell Oil Company: Deanne Miller, Mor-  
23 gan, Lewis & Bockius LLP, 300 S. Grand Avenue, 22nd Floor, Los Angeles, California 90071-3132.

#### 24 **IX. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS 25 RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL 26 BOARD, OR AN EXPLANATION OF WHY THE PETITIONER WAS NOT 27 REQUIRED OR WAS UNABLE TO RAISE THESE SUBSTANTIVE ISSUES 28 OR OBJECTIONS BEFORE THE REGIONAL BOARD**

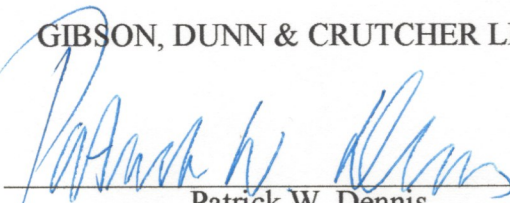
27 With the exception of the issues raised in Part V.A of the Statement of Points and Authorities  
28 (Section VII, *supra*), and the issues raised regarding Fish and Game Code section 5650 and Los An-



1 geles County Code section 20.36.010 in Part V.C of the Statement of Points and Authorities (Section  
2 VII, *supra*), all of the substantive issues and objections in Section VII were raised in submissions  
3 provided to the Regional Board on September 15, 2011, January 21, 2014, June 30, 2014, December  
4 24, 2014, January 6, 2015, April 2, 2015, and April 22, 2015. After the Prosecution Team issued its  
5 recommendation on December 8, 2014, Barclay requested that the Regional Board consider previous-  
6 ly unavailable evidence and requested a formal hearing. (Ex. HH [12/24/14 Ltr.]) The Regional  
7 Board largely refused to consider Barclay's additional evidence and refused to grant Barclay's re-  
8 quest for a formal hearing. (Ex. GG [2/27/15 Ltr.]) Because the Revised CAO was issued without a  
9 hearing or opportunity to submit supplemental comments, Barclay will submit this evidence and in-  
10 formation and a request for an evidentiary hearing to the State Board in supplemental pleadings.  
11 Moreover, Barclay was not required or able to raise the new issues in Part V.A and Part V.C to the  
12 Regional Board in its prior submissions because those issues only became evident and materialized  
13 after the Regional Board issued the Revised CAO naming Barclay. Until that point, Barclay did not  
14 know it would be named by Smith, had no insight into the activities of the Prosecution Team, did not  
15 know that Smith would reject Barclay's request to delay the decision until after the depositions of the  
16 Prosecution Team members, and did not know that Smith had unilaterally added additional un-  
17 supported findings (as discussed in Parts V.A and V.C) until the issuance of the Revised CAO. (See  
18 Ex. OO [4/30/15 Ltr.]  
19  
20

21 DATED: May 31, 2015

GIBSON, DUNN & CRUTCHER LLP

22  
23 By:   
Patrick W. Dennis

24  
25 Attorneys for Petitioner,  
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13 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**  
14

15 In the Matter of Revised Cleanup and  
16 Abatement Order No. R4-2011-0046 Re-  
17 quiring Shell Oil Company and Barclay  
Hollander Corporation to Cleanup and  
18 Abate Waste Discharged to Waters of the  
State Pursuant to California Water Code  
Section 13304 at the Former Kast Property  
19 Tank Farm, Carson, California (File No.  
97-043)

**PETITION FOR STAY OF EFFECTIVE  
DATE OF REVISED CLEANUP AND  
ABATEMENT ORDER NO. R4-2011-0046  
PURSUANT TO CAL. WATER CODE  
§ 13321 AND CAL. CODE REGS. TIT. 23,  
§ 2053**

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## I. SUMMARY

This petition seeks to stay an April 30, 2015 amendment to a 2011 Clean-up and Abatement Order naming a real estate developer as a “discharger” of petroleum that was brought to and left on the property by Shell Oil Company. The amendment to the CAO comes some four years after it was first instituted, was not issued to protect water quality, is contrary to law, and should be stayed and ultimately vacated. Shell operated a leaky petroleum tank farm in what is now the City of Carson for decades and then sold it to a developer in the late 1960s without disclosing what it knew about the contamination. Shell was named a discharger in 2011 and is obligated to fund, and has been funding, the remediation. Thus, adding a developer that constructed homes during a brief window of time that closed more than 40 years ago advances in no respect either the funding or the execution of the remediation—as the staff of the Regional Board has conceded. On the contrary, it threatens to complicate and perhaps to delay or derail it.

But advancing water quality or cleanup was not the amendment’s purpose. Rather, the purpose of the amendment adding the developer, Barclay Hollander Corporation (“Barclay” or “Petitioner”), was to satisfy the litigation demands of Shell Oil, which pressured and literally paid for the staff of the Regional Board<sup>1</sup> to investigate Barclay and issue the amendment. It was also intended to stop the drumbeat of political pressure brought to bear on the Regional Board by contingency fee lawyers who are representing individual plaintiffs and the City of Carson in ongoing litigation in Los Angeles Superior Court. Both Shell and the plaintiffs’ lawyers will undoubtedly seek to misuse the amendment to wrongly attempt to reap millions in collateral litigation—indeed, they already have attempted to do so.

As an official act issued to further the financial interests of the sole discharger, Shell, and private litigants and their counsel, rather than to advance the remediation, the amendment is clearly contrary to existing law. Moreover, the process that produced the amendment’s adoption was rife with disabling irregularities, including opening a special comment period for Shell alone and appointing as decisionmaker a Regional Board employee who is the chief prosecutor’s subordinate. In view of

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<sup>1</sup> “Regional Board” refers to the Regional Water Quality Control Board for the Los Angeles Region, and “State Board” refers to the State Water Resources Control Board.



1 these disturbing circumstances, the imminent risk of harm to Petitioner, and the absence of any risk  
2 of harm to the general public, Petitioner urges the State Board to hold an evidentiary hearing in order  
3 to evaluate directly the evidence of improper conduct that resulted in the issuance of the amendment  
4 and decide whether a stay is appropriate pending a decision on the merits.<sup>2</sup>

5 Shell's strategy of attempting to tar Barclay with the fruits of Shell's own conduct was born  
6 of the fact that Shell has no real defense to liability. It is beyond dispute that Shell, not Barclay, dis-  
7 charged 100% of the petroleum hydrocarbon contaminants at the Former Kast Property Tank Farm in  
8 what is now Carson, California (the "Property"). After 40 years of storing oil in leaky reservoirs,  
9 Shell sold the Property to a Barclay predecessor without disclosing the leaks. The developers built  
10 houses on the Property and sold them in the late 1960s and early 1970s. In May 2008, after discover-  
11 ing contamination nearby, the Regional Board directed Shell to conduct environmental testing at the  
12 Property, which revealed the presence of petroleum hydrocarbons. Shell did not—and could not—  
13 dispute that its operations resulted in the discharge of contaminants, and on March 11, 2011 the Re-  
14 gional Board issued the CAO naming Shell as the party responsible for remediating the contamina-  
15 tion. Shell never appealed the CAO and remains subject to it.

16 With no basis to challenge the CAO, Shell began pressuring (and illegally paying for) the Re-  
17 gional Board to investigate and name Barclay as another responsible party, alleging—without a shred  
18 of evidence—that Barclay brought contaminated fill soil onto the Property, a claim that even the Re-  
19 gional Board rejected. Later, other parties with a financial interest in having Barclay named—  
20 including the individual plaintiffs in the tort action (the "Acosta Plaintiffs") and the City of Carson—  
21 joined forces with Shell to improperly influence the Regional Board to name Barclay for their own  
22 financial gain. As a direct result of that improper influence, on October 31, 2013, the Regional Board  
23 issued the Proposed Draft Revised CAO, which anticipated adding Barclay as a responsible party.  
24 (Ex. C [Proposed Draft Order].<sup>3</sup>)

25  
26 <sup>2</sup> "Regional Board" refers to the Regional Water Quality Control Board for the Los Angeles Re-  
27 gion, and "State Board" refers to the State Water Resources Control Board.

28 <sup>3</sup> Exhibits A-D are attached to the Petition for Review, filed concurrently on June 1, 2015. Exhib-  
its E-VVV are attached to the Authenticating Declaration of Patrick W. Dennis, filed concurrently  
on June 1, 2015.

1           Barclay submitted the only public comments in the comment period that followed. Behind  
2 the scenes, Shell and representatives of the *Acosta* Plaintiffs put intense pressure on the Regional  
3 Board to name Barclay on the order. Succumbing to that pressure, the Regional Board reopened the  
4 comment period on June 3, 2014 for the sole purpose of allowing Shell to submit comments, which it  
5 had failed to do previously. The special Shell comment period closed on June 30, 2014, but the pres-  
6 sure (and illegal payments) did not. Even after the comment period closed, the Regional Board con-  
7 tinued to have improper ex parte communications with representatives of the *Acosta* Plaintiffs and the  
8 City of Carson action.

9           Ultimately, on December 8, 2014, the prosecutorial staff, led by the Executive Officer of the  
10 Regional Board, Sam Unger, and with input from its counsel, Frances McChesney (the “Prosecution  
11 Team”), recommended that Barclay be named a discharger (in the “Draft Revised CAO”). On April  
12 29, 2015, nearly five months later, after Barclay’s request to supplement the record and for a hearing  
13 to be conducted were summarily denied, and with depositions of Regional Board prosecutorial staff  
14 on the immediate horizon, Deborah Smith, the Chief Deputy Executive Officer, issued the Revised  
15 CAO.<sup>4</sup> Without explanation, Smith made numerous substantive changes to the Draft Revised CAO  
16 before issuing the Revised CAO, including deleting potentially exculpatory fact findings and adding  
17 entirely new fact findings claiming that Barclay violated laws never mentioned in the Draft Revised  
18 CAO and that are not even enforced by regional boards or the State Board.

19           On June 1, 2015, Petitioner timely filed a Petition to Review the Revised CAO with the State  
20 Board. By this contemporaneously-filed Petition, Barclay seeks an emergency stay of the Revised  
21 CAO pending the adjudication of Barclay’s Petition for Review. In connection with this Petition,  
22 Barclay incorporates, as though fully set forth herein, the June 1, 2015 Petition for Review, including  
23 all exhibits attached thereto. Barclay files this Petition under section 13321 of the California Water  
24 Code, and in accordance with section 2053 of Title 23 of the California Code of Regulations, on the  
25 following grounds:

26 \_\_\_\_\_  
27 <sup>4</sup> Revised Cleanup and Abatement Order No. R4-2011-0046 Requiring Shell Oil Company and  
28 Barclay Hollander Corporation to Cleanup and Abate Waste Discharged to Waters of the State Pursuant to California Water Code Section 13304 at the Former Kast Property Tank Farm, Carson, California (File No. 97-043).

1           1.       *Petitioner will be substantially harmed if a stay is not granted:* If a stay is not grant-  
2 ed, Petitioner will be substantially harmed because (1) the Revised CAO—which is the product of a  
3 flawed and unfair proceeding illegally paid for by Shell, a party adverse to Barclay, that deprived  
4 Barclay of due process—has been, and will continue to be, misused by the *Acosta* Plaintiffs that is set  
5 for trial in November 2015, at which time Barclay’s Petition will still be under review; (2) the Re-  
6 vised CAO—which Shell pressured and paid for the Regional Board to issue—will be misused by  
7 Shell in its action for indemnity and contribution against Barclay, which is currently pending in Los  
8 Angeles Superior Court; (3) the Revised CAO will be misused in a separate public nuisance action  
9 filed by the City of Carson (the “*Carson* Litigation”), which is represented by the same attorneys as  
10 the *Acosta* Plaintiffs; and (4) because the Regional Board may attempt to enforce the Revised CAO  
11 directly against Barclay, thereby requiring Barclay, among other things, to implement, or pay for the  
12 implementation of, Shell’s Remedial Action Plan (“RAP”) that it opposes and had no role in crafting.

13           2.       *Other interested parties and the public interest will not be substantially harmed by the*  
14 *stay:* Staying the Revised CAO will not harm—substantially or otherwise—the public interest or  
15 other interested parties. While the Revised CAO purports to add Barclay as a responsible party, it  
16 does not modify Shell’s obligations under the original CAO, which Shell never challenged and to  
17 which it has been subject since March 2011. (See Ex. A [Revised CAO] at p. 2 [“This Order is not  
18 being revised to delete tasks already completed by Shell”].) Indeed, the Regional Board’s Executive  
19 Officer (Sam Unger) and its counsel for the Prosecution Team (Frances McChesney) have each con-  
20 firmed that Shell remains responsible for investigating the contamination and remediating the Proper-  
21 ty—regardless of what happens with Barclay. (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional  
22 Board Meeting Tr.] at 15; Ex. E [Unger Dep.] at 191:20-192:6 [“Q. And Ms. McChensney says: oh,  
23 none. The – Shell never petitioned or challenged the original cleanup and abatement order, so they’re  
24 still responsible regardless of who else may be added. . . . Do you agree with Ms. McChesney’s  
25 statement? A. Yes.”].) Separate and apart from the CAO, Shell has entered into settlement agree-  
26 ments with the *Acosta* Plaintiffs and the City of Carson by which it is contractually bound to remedi-  
27 ate the Property. As such, staying the Revised CAO will have no effect on Shell’s obligation to re-  
28 mediate the Property, and thus will not harm the public interest or other interested parties.

1           3.       *Substantial questions of fact or law exist regarding the Revised CAO:* As detailed in  
2 Barclay’s Petition for Review, substantial questions of fact or law exist regarding the propriety of the  
3 Revised CAO.

4           *First*, Barclay’s Petition for Review raises substantial questions of law regarding Barclay’s  
5 due process rights. In the Petition for Review, Barclay sets forth six separate and distinct due process  
6 violations, any one of which is sufficient to vacate the Revised CAO.

7           (1)       Barclay was denied due process because Shell, an adverse party with a direct financial  
8 interest, pressured the Regional Board to name Barclay and illegally reimbursed the Regional Board  
9 for the Prosecution Team’s efforts. The reimbursements were not, as required by law, costs incurred  
10 in “cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activi-  
11 ties, or taking other remedial action.” (Wat. Code, § 13304, subd. (c).) Rather, the reimbursements  
12 included time spent considering whether to name Barclay, building an administrative record to do so,  
13 drafting the supporting documents, including the Draft Revised CAO itself and the very written rec-  
14 ommendation to Smith to name Barclay, and even the Regional Board’s work in responding to Bar-  
15 clay’s discovery in the *Acosta* action. (Ex. F [Ayalew Dep.] at Ex. 3; Ex. F [Ayalew Dep.] at 179:23-  
16 180:1 [Q. Got it, okay. So am I correct that time you spend considering whether to put Barclay on  
17 the order, is that time that is put into that account? A. On Shell’s account yes.”]; Ex. DDD [Chart of  
18 invoices].) As a result of these payments—unauthorized and illegal under the Cost Recovery Pro-  
19 gram—the Regional Board had a financial incentive to devote its Site Cleanup Staff to investigate  
20 and name Barclay, a violation of Barclay’s due process rights. (*People v. Vasquez* (2006) 39 Cal.4th  
21 47, 64 [holding that “pecuniary conflicts of interests on a judge’s or prosecutor’s part pose a constitu-  
22 tionally more significant threat to a fair trial than do personal conflicts of interest”]; Wat. Code,  
23 § 13304, subd. (c).)

24           (2)       Barclay’s due process rights were also violated because the Regional Board failed to  
25 separate its adjudicative and prosecutorial functions. (Govt. Code, § 11425.10, subd. (a)(4) [“the ad-  
26 judicative function *must* be separated from the investigative, prosecutorial, and advocacy functions  
27 within an agency”], italics added.) Sam Unger, the Executive Officer of the Regional Board and  
28 leader of the Prosecution Team, testified that “there was never really any establishment of the [prose-

1 cutorial] team, per se.” (Ex. E [Unger Dep.] at 197:12-19.) Compounding the lack of a clear division  
2 of roles, Unger appointed Deborah Smith, his direct subordinate, as adjudicator—a clear violation of  
3 the California Administrative Procedures Act (“APA”). (Ex. E [Unger Dep.] at 39:13-20 [“Q. Be-  
4 tween 2011 and today did Ms. Smith report to you in the chain of command at the regional board? A.  
5 Yes. Q. In fact, were you her direct report? A. Yes.]; Govt. Code, § 11425.30, subd. (a)(2).) Smith  
6 then assumed the role of prosecutor—a separate and independent due process violation (Govt. Code,  
7 §§ 11425.10, subd. (a)(4), 11425.30, subd. (a)(1))—when she modified the Draft Revised CAO,  
8 without notice to Barclay, to include new and previously undisclosed purported facts and purported  
9 violations of law.

10 (3) The Regional Board’s investigation began in May 2008, but it did not issue the Draft  
11 Revised CAO until December 2014—nearly seven years later. Despite that extraordinary delay,  
12 when he issued the Draft Revised CAO on December 8, 2014, Unger demanded that Smith, his sub-  
13 ordinate, issue her order only a few weeks later on January 9, 2015—the exact day that the comment  
14 period on the RAP was closing—even though he undoubtedly knew she was out of the office and on  
15 vacation over the holidays and thus would have just a few days to review the extensive file. Con-  
16 sistent with Unger’s recommendation, Smith did not issue the Revised CAO until after the RAP  
17 comment period closed, depriving Barclay of any opportunity to challenge the RAP (after Smith  
18 made her decision) that Shell developed to appease the *Acosta* Plaintiffs and the City of Carson, who  
19 both agreed to “cooperate in good faith” with Shell regarding the approval and implementation of the  
20 RAP. (Ex. Z [*Acosta* Agreement] § 3.6; Ex. AA [*Carson* Agreement] § 3.5, but with which Barclay  
21 disagrees. Requiring Barclay to pay for or implement a RAP it opposes and had no role in crafting  
22 would be a profound violation of due process. (Ex. TTT [1/21/14 Ltr.] at Tab 328 [May 8, 2008 Sec-  
23 tion 13267 Regional Board Order]; Ex. A [Revised CAO]; Ex. LL [11/3/14 Regional Board Sum-  
24 mary of Proposed RAP] at p. 4; Govt. Code, § 11425.10, subd. (a)(1).)

25 (4) In issuing the Revised CAO, the Regional Board failed to develop and rely upon an  
26 adequate administrative record, and what record exists does not support naming Barclay. (Ex. F  
27 [Ayalew Dep.] at 66:5-68:12; 69:11-25, 70:17-72:16, 140:11-14, 217:9-20, 80:3-9, 204:13-205:4,  
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1 105:10-19, 146:18-21; Ex. E [Unger Dep.] at 213:2-217:20, 97:8-14, 232:20-233:15, 234:7-10,  
2 235:5-12; Govt. Code, §§ 11425.10, subd. (a)(6), 11425.50.)

3 (5) In developing the inadequate administrative record that does exist, the Regional Board  
4 used biased and unfair procedures, which repeatedly favored Shell and the Acosta Plaintiffs and dis-  
5 favored Barclay. (See, e.g., Ex. T [6/3/14 Notice of Opportunity for Additional Comment]; Ex. S  
6 [12/8/14 Memo]; Ex. GG [2/27/15 Ltr.].) This included extensive improper ex parte communications  
7 with representatives of parties financially motivated to be adverse to Barclay, who provided the Pros-  
8 ecution Team with information that was never disclosed to Barclay and to which Barclay had no op-  
9 portunity to respond. (Ex. E [Unger Dep.] at 22:4-23; *id.* at Ex. 15.)

10 (6) The Regional Board failed to hold an evidentiary hearing, which due process and  
11 guidance from the State Board's Chief Counsel require under these circumstances. (Ex. KK [State  
12 Water Resources Control Board, Office of Chief Counsel, M. A.M. Lauffer Chief Counsel Memo-  
13 randum (Aug. 2, 2006)] at p. 3; Ex. GG [2/27/15 Ltr.].)

14 *Second*, Barclay's Petition for Review raises substantial questions of fact regarding the merits  
15 of the Regional Board's finding that Barclay is a "discharger." The Regional Board claimed that  
16 Barclay is liable under section 13304(a) of the Water Code for "spread[ing] the waste" or "con-  
17 tribut[ing] to the migration of the waste." (Ex. A [Revised CAO] at p. 10.) But the undisputed testi-  
18 mony of all living eyewitnesses and the unrebutted expert testimony of Dr. Jeffrey Dagdigian conclu-  
19 sively establish that Barclay spread fill soil that it did not believe had any petroleum when it graded  
20 the site, and that the oil contamination on the site is attributable to the oil that leaked from Shell's  
21 reservoirs. Ignoring this evidence, which was unrefuted, in violation of the APA and the State  
22 Board's own regulations, the Regional Board instead relied on an unsworn, hearsay statement that  
23 George Bach signed at the direction of counsel for the *Acosta* Plaintiffs and that Mr. Bach later repu-  
24 diated. (Govt. Code, § 11513, subds. (c), (d); Cal. Code Regs. tit. 23, § 648.5.1; see also, e.g., *Mo-*  
25 *lenda v. Dept. of Motor Vehicles* (2009) 172 Cal.App.4th 974, 996 ["The mere admissibility of evi-  
26 dence at an administrative hearing does not confer the status of 'sufficiency' to support a finding ab-  
27 sent other competent evidence"], citation omitted; *Daniels v. Dept. of Motor Vehicles* (1983) 33

1 Cal.3d 532 [noting that Govt. Code, § 11515 “render[s] hearsay evidence insufficient in itself to sup-  
2 port a finding”]; see also Evid. Code, § 1200.)

3 *Third*, Barclay’s Petition for Review raises substantial questions of law regarding the merits  
4 of the Regional Board’s finding that Barclay was a “discharger.” The Regional Board’s finding that  
5 Barclay is a “discharger” because it “spread the waste” or “contributed to the migration of the waste”  
6 is inconsistent with the law. The State Board has never held a former owner liable as a “discharger”  
7 for merely “spread[ing]” the waste or “contributing to the migration of the waste” discharged by  
8 someone else. This was recently confirmed by the Ninth Circuit, which took “issue with the charac-  
9 terization of the emission of the contamination” from a conduit “as the relevant ‘discharge,’” when it  
10 merely moved “the waste that had been initially released into the environment” by another party.  
11 (*Redev. Agency of the City of Stockton v. BNSF Railway Co.* (9th Cir. 2011) 643 F.3d 668, 677.)

12 Separately, even assuming that Barclay could be held responsible as a “discharger” (which it  
13 cannot), Barclay is protected from liability by the safe harbor provisions of section 13304(j) of the  
14 Water Code. It is undisputed that Barclay’s involvement with the Property concluded well before  
15 1981. And the Revised CAO does not establish that Barclay violated any laws that were enforced by  
16 the Water Board at the time the Property was developed. Rather, the Revised CAO purports to find  
17 violations of statutes and ordinances that are not enforced by the Water Board, but provides no factu-  
18 al basis, nor any legal analysis, for those findings. Moreover, the Revised CAO ignores both expert  
19 evidence and legal analysis that demonstrates that Barclay complied with all then-applicable laws,  
20 including the fact that the public agencies actually charged with enforcing them were aware of Bar-  
21 clay’s activities and determined that Barclay was not in violation of their requirements. The Regional  
22 Board’s *post hoc* determination that Barclay violated laws that the Regional Board does not even in-  
23 terpret or enforce cannot overcome these facts.

24 4. *The Petition for Review is supported by an affidavit of person having knowledge of*  
25 *facts alleged:* Concurrently filed herewith is the Declaration of Patrick W. Dennis in Support of Bar-  
26 clay’s Petition for Stay. Mr. Dennis is an attorney with the law firm of Gibson, Dunn & Crutcher  
27 LLP (“Gibson Dunn”), counsel of record for Barclay in these proceedings, and has personal  
28 knowledge of the facts alleged herein.

1 For these reasons and those set forth below, Barclay hereby requests that the State Board, pur-  
2 suant to Water Code section 13321, immediately stay the effective day of the Revised CAO, until  
3 Barclay's Petition for Review has been finally ruled upon or adjudicated by the State Board and all  
4 other appeals, if any, have been exhausted.

## 5 II. FACTUAL BACKGROUND

### 6 A. The Regional Board Order Shell To Investigate The Property.

7 On May 8, 2008, the Regional Board issued a Water Code Section 13267 Order to Shell re-  
8 quiring an investigation of the Property. (Ex. TTT [1/21/14 Ltr.] at Tab 328 [5/8/2008 13267 Or-  
9 der].) In response, with the assistance of its consultants URS and Geosyntec, Shell conducted a series  
10 of investigations to evaluate impacts associated with the former oil storage operations at the Property.  
11 (Ex. F [Ayalew Dep.] at Ex. 12.) These investigations resulted in considerable data, which have been  
12 provided to the Regional Board in publicly available reports. That data has revealed the presence of  
13 residual petroleum hydrocarbons both in the deep soil beneath the former reservoir bottoms ("Deep  
14 Contamination") and in the shallow zone above the former reservoir bottoms ("Shallow Contamina-  
15 tion"). (*Id.* at 6-1.) As discussed below, these recently discovered residual petroleum hydrocarbons,  
16 both shallow and deep, were not known to Barclay during the limited time it owned and redeveloped  
17 the Property. (Ex. TTT [1/21/14 Ltr.] at [Dagdigian Report] at pp. 6-8.)

### 18 B. The Acosta Plaintiffs File Suit Against Shell, Barclay And Others.

19 In October 2009, over 1,400 current and former residents of the Property filed suit against  
20 Shell, Barclay, Dole Food Company ("Dole"), and others, alleging claims for property damages and  
21 personal injuries based on Shell's contamination of the Property. (See *Adelino Acosta, et al. v. Shell*  
22 *Oil Company, et al*, Case No. NC053643 and Related Cases (the "Acosta Litigation").) In January  
23 2013, the City of Carson filed its own suit against the same defendants, alleging public nuisance and  
24 seeking remediation of the Property. (See *City of Carson v. Shell Oil Company et al.*, Case No.  
25 BC499369 (the "Carson Litigation").)

### 26 C. Shell Demands That The Regional Board Name Dole And Barclay As Dischargers.

27 On July 28, 2010, Shell sent a letter to the Regional Board urging it to name Dole and Barclay  
28 as dischargers. (Ex. TTT [1/21/14 Ltr.] at Tab 132 [7/28/10 Ltr.] at p. 1.) The factual investigations



1 by Shell revealed that most of the contamination was located beneath the former reservoir bottoms,  
2 where oil had leaked from the reservoirs during Shell’s operations. (Ex. C [Draft CAO] at p. 5 [“The  
3 CPT/ROSY logs also showed that the highest apparent soil impacts occurred at depths of 12 feet bgs,  
4 36 feet bgs, and 40 feet bgs.”].) Shell claimed, however, that contaminants were also found in the fill  
5 soil, which had been placed by Barclay above the former reservoir bottoms and within the perimeters  
6 of the former reservoirs. (Ex. TTT [1/21/14 Ltr.] at Tab 132 [7/28/10 Ltr.] at p. 1.) While Shell did  
7 not deny its own status as a discharger, it asked the Regional Board to name Barclay as a discharger  
8 as well because, according to Shell, Barclay brought contaminated fill soil to the Property. (*Id.* at pp.  
9 10-11.) But as Barclay’s submissions to the Regional Board have shown, Shell’s accusation was  
10 false. (Ex. TTT [1/21/14 Ltr.] at Tab 333 [9/15/11 Ltr.] at pp. 8-9.) In fact, as the filing of Shell’s  
11 lawsuit against Barclay later confirmed, Shell’s real reason for asking to have Barclay named was to  
12 get someone other than Shell to pick up the tab for cleaning up Shell’s mess.

13 **D. The Regional Board Issues The CAO And It Becomes Final As To Shell.**

14 On March 11, 2011, the Regional Board issued the CAO naming Shell as a responsible party.  
15 (Ex. B [CAO].) Shell never sought review of the CAO, and it became final on April 11, 2011. (Wat.  
16 Code, § 13320, subd. (a).) Less than two weeks later, on April 22, 2011, the Regional Board issued a  
17 Water Code Section 13267 letter to Dole and Barclay, requesting further information regarding  
18 Shell’s allegations. (Ex. TTT [1/21/14 Ltr.] at Tab 332 [4/22/11 Ltr.] at p. 1.) By letter dated Sep-  
19 tember 15, 2011 (“2011 Letter”), Gibson Dunn, representing Dole and Barclay, refuted Shell’s false  
20 allegations and demonstrated that no new fill soil had been brought onto the Property by the develop-  
21 er, Barclay. (Ex. TTT [1/21/14 Ltr.] at Tab 333 [9/15/11 ltr.] at pp. 8-9.) This fact—that no fill soil  
22 was brought onto the Property by the developer—has since been confirmed by all other witnesses  
23 who have a recollection of the events. (Ex. TTT [1/21/14 Ltr.] at Tab 7 [Bach Dep.] at 143:8-22; *id.*  
24 at Tab 8 [Vollmer Dep.] at 167:13-168:5, 136:6-138:19.) It is thus now clear that all contaminants at  
25 the Property had been discharged by Shell during its 40 plus years of operations, and not by Barclay’s  
26 development of the Property. (Ex. TTT [1/21/14 Ltr.] at Tab 333 [9/15/11 Ltr.] at pp. 6-9; see also  
27 Ex. F [Ayalew Dep.] at 61:19-62:7 [“In my opinion Barclay Hollander did not bring contaminants  
28 into the site.”].)

1 **E. The Regional Board Charges Shell For Its Time Investigating Barclay.**

2 After refuting Shell’s charges in 2011, Barclay received no further communications from the  
3 Regional Board for nearly two years. In the meantime, Shell was investigating the Property under the  
4 CAO. Thus, as far as Barclay knew, the matter had been put to rest. Indeed, a lawyer for the Re-  
5 gional Board’s Prosecution Team has acknowledged that once the CAO against Shell became final,  
6 the Regional Board had what it needed to move forward with clean-up of the Property: “Shell never  
7 petitioned or challenged the original cleanup and abatement order. So they’ll – they’re still responsi-  
8 ble, regardless of who else might be added.” (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional Board  
9 Meeting Tr.] at p. 15.)

10 Notwithstanding, beginning sometime in late 2013, the Regional Board re-opened its investi-  
11 gation of Barclay, illegally charging its staff’s time for that work to Shell. In 2008, the State Board’s  
12 Site Cleanup Program (“SCP”) began invoicing Shell for the Regional Board’s “oversight” work.  
13 (Ex. I [Invoices].) Ostensibly, the invoices were being submitted as part of the State Board’s Cost  
14 Recovery Program for Spills, Leaks, Investigations, and Site Cleanups (“Cost Recovery Program”),  
15 which the State Board instituted pursuant to section 13304(c)(1) of the Water Code. But time entries  
16 and invoices (recently obtained through discovery opposed by the Regional Board in the *Acosta* Liti-  
17 gation) indicate that the Regional Board billed Shell for far more than just cleanup and abatement  
18 costs.

19 The Regional Board billed Shell for the time it spent considering whether to name Barclay as  
20 a discharger, the time it spent building an administrative record to do so, and the time it spent drafting  
21 the necessary documents to do so—including even the Revised CAO. (Ex. G [Site Detail Report] at  
22 pp. 11, 34, 38, 82-83.) Prosecutor Teklewold Ayalew testified that “[w]henever [he] work[s] on the  
23 [*Kast Property Tank Farm*] project,” “*Shell is paying for [it].*” (Ex. F [Ayalew Dep.] at 179:8-21,  
24 italics added.) When asked whether that included the time he spent considering whether to name  
25 Barclay, Ayalew confirmed that time was billed to “*Shell’s account yes.*” (*Id.* at 179:22-180:1, italics  
26 added.) A comparison of the Regional Board’s Prosecution Team’s time entries and the invoices that  
27 the State Board sent to Shell confirm that the Regional Board sought reimbursement from Shell for  
28 the time it spent investigating and naming Barclay as a discharger. (Ex. DDD [Summary Chart].)

1 Indeed, the Regional Board even charged Shell for the time that Ayalew spent discussing the “deposi-  
2 tion subpoenas served by the attorneys for Barclay Hollander Corporation in connection with the  
3 lawsuit *Acosta et al. v. Shell Oil Co., et al.*” with McChesney. (See, e.g., Ex. F [Ayalew Dep.] at Ex.  
4 3 at p. 4 [noting Ayalew’s time discussing the subpoenas with McChesney was billed to Shell].)

5 **F. The Regional Board Issues The Proposed Draft Order.**

6 Disregarding the overwhelming proof that Dr. Dagdigian was correct and the absence of evi-  
7 dence showing that Barclay knowingly moved contaminants around at the Property, the Regional  
8 Board, while being paid illegally by Shell, sent a letter dated October 31, 2013, which attached a No-  
9 tice of Opportunity to Submit Comments on Proposed Draft Order in the Matter of Cleanup and  
10 Abatement Order No. R4-2011-0046, Former Kast Property Tank Farm (SCP No. 1230, Site ID No.  
11 2040330, File No. 11-043). (Ex. J [October 31, 2013 Notice of Opportunity to Submit Comments].)  
12 The Draft CAO added Barclay as an additional responsible party. On January 21, 2014, Gibson  
13 Dunn responded on behalf of Barclay, setting forth the factual and legal reasons why Barclay cannot  
14 be held responsible for Shell’s contamination and should not be added to the CAO. (Ex. TTT  
15 [1/21/14 Ltr.] )

16 **G. The Regional Board Faces Intense Political Pressure To Name Barclay To The Order By**  
17 **Entities Who Have A Financial Stake In The Outcome.**

18 On January 22 2014, Eric Boyd, the Deputy District Director for Congresswoman Janice  
19 Hahn, emailed Sam Unger about an upcoming meeting with Carousel residents. (Ex. E [Unger Dep.]  
20 at Ex. 18.) Bob Bowcock, a consultant hired by Girardi Keese, counsel for the *Acosta* Plaintiffs, was  
21 copied on the email. At the meeting the next day, Congresswoman Hahn said she was going to “call  
22 the ‘head of the Water Board’ [Sam Unger] tomorrow.” (Ex. E [Unger Dep.] at Ex. 19 at PRA-  
23 RWQCB-002633.) At the same meeting, Bowcock told residents that Unger was afraid of Hahn,  
24 afraid of Shell, and that Unger and the Regional Board were “complacent and enabling Shell to be-  
25 have badly.” (*Id.* at PRA-RWQCB-2638.) Notably, counsel for the *Acosta* Plaintiffs is a significant  
26 financial contributor to Congresswoman Hahn. Girardi is also a significant contributor to the Politi-  
27 cal Action Committee of the American Association for Justice, which in turn is one of Congress-  
28 woman Hahn’s largest contributors. (Ex. K; Ex. E [Unger Dep.] at Ex. 21.) Later, when the trial

1 court judge overseeing the *Acosta* Litigation determined that Shell’s \$236 million settlement with the  
2 *Acosta* Plaintiffs was in “good faith” under California law, Congressman Hahn posted a congratulatory  
3 message to the Plaintiffs on her Facebook page, stating that it will “provide[] some compensation  
4 for many residents who have been harmed, while allowing them to pursue their case against Barclay  
5 Hollander Corps. [sic].” (Ex. E [Unger Dep.] at Ex. 21.)

6 **H. The Comment Period On The Draft CAO Closes, Shell Sues Barclay, And Shell And**  
7 **The *Acosta* Plaintiffs Continue To Communicate With The Regional Board.**

8 The comment period on the Draft CAO officially closed on January 21, 2014, with Barclay  
9 being the only entity to provide any comments.<sup>5</sup> Notwithstanding, representatives of Shell and the  
10 *Acosta* Plaintiffs continued to communicate ex parte with the Regional Board after the comment pe-  
11 riod closed, trying to persuade the Prosecution Team to name Barclay. Then, on May 6, 2014, Shell  
12 sued Barclay for contribution and indemnity, seeking its “costs and expenses” in complying with the  
13 CAO, which Shell alleged were “in excess of \$40 million.” (Ex. P [5/6/14 Shell Complaint] at p. 2.)  
14 Days later, on May 9, 2014, Robert Bowcock, the *Acosta* Plaintiffs lawyers’ consultant, emailed  
15 Shell’s complaint to Sam Unger, Executive Officer of the Regional Board and a member of the Pros-  
16 ecution Team. (Ex. E [Unger Dep.] at Ex. 13 at PRA-RWQCB-005513.) And just a few days after  
17 that, on May 14, 2014, there was a meeting attended by members of the Prosecution Team and repre-  
18 sentatives of Shell to discuss “the Dole issue.” (Ex. F [Ayalew Dep.] at 185:24-187:1; *id.* at Ex. 14.)  
19 The evidence suggests that at the meeting, with members of the Prosecution Team having their time  
20 reimbursed by Shell to sit in the meeting with Shell, Shell’s experts tried “to refute the hypothesis”  
21 of Barclay’s expert in order to convince the Prosecution Team to name Barclay on the order. (Ex. F  
22 [Ayalew Dep.] at 189:3-8.)

23  
24  
25 <sup>5</sup> Initially, the comment period was set to close on December 6, 2013. (Ex. J [10/31/13 Draft CAO  
26 Cover Ltr.] at p. 2.) On November 8, 2013, counsel for Barclay asked the Regional Board for an  
27 extension until January 13, 2014. (Ex. L [11/8/13 Ltr.] at p. 1.) On November 15, 2013, the Re-  
28 gional Board approved this extension. (Ex. M [11/15/13 Ltr.] at p. 1.) On January 6, 2014, coun-  
sel for Barclay wrote to the Board again asking for an extension until January 21, in order to  
submit comments after the deposition of Al Vollmer. (Ex. N [1/6/14 Ltr.] at pp. 1-2.) On January  
7, 2014, the Regional Board granted the extension and the comment period officially closed on  
January 21, 2014. (Ex. O [1/7/14 Ltr.] at pp. 1-2.)

1 **I. The Regional Board Reopens The Comment Period For Shell.**

2 On June 3, 2014, two weeks after meeting with Shell, the Regional Board reopened the com-  
3 ment period on the Proposed Draft Order specifically “to provide an opportunity for Shell to submit  
4 comments.” (Ex. S [12/8/14 Memo] at p. 4; Ex. T [6/3/14 Notice of Opportunity for Additional  
5 Comment].) Even the Regional Board staff’s time to draft the re-opening notice for Shell was paid  
6 for by Shell. (Ex. F [Ayalew Dep.] at Ex. 3 at p. 2.) Shell submitted comments on June 16, 2014.  
7 Shell’s comments were the only response to Barclay’s January 21, 2014 submission, and they re-  
8 sponded only to a few, narrow points. On June 30, 2014, Barclay timely responded to Shell’s sub-  
9 mission, refuting the issues raised by Shell and noting that the remaining technical and legal points  
10 made in Barclay’s January 21, 2014 Letter and the associated attachments were uncontested by Shell  
11 and everyone else. (Ex. U [6/30/14 Ltr.] at p. 1.)

12 **J. The Regional Board Continues To Communicate With, And Invites Comments From,**  
13 **The Acosta Plaintiffs.**

14 The second comment period closed on June 30, 2014. Notwithstanding, representatives of the  
15 *Acosta* Plaintiffs continued to communicate ex parte with the Regional Board after that date, urging  
16 them to name Barclay on the order. By way of example, on July 9, 2014, Sam Unger emailed Robert  
17 Bowcock, Mr. Girardi’s consultant, and asked him to “*let us [Unger and Teklewold Ayalew] know if*  
18 *you have any comments*” on Shell’s June 16, 2014 submission. (Ex. E [Unger Dep.] at Ex. 15 at  
19 PRA-RWQCB-007028, italics added.) Later, Unger assured Bowcock that while “there will be an  
20 ‘official’ comment period *we can talk whenever you wish.*” (*Id.* at PRA-RWQCB-007029, italics  
21 added.) Shortly thereafter, Bowcock replied:

22 *Is the Board going to issue a COA to Dole? If so when?*

23 *These documents are embarrassing to the profession . . . can you believe a profession-*  
24 *al like Dr. Dagdigian would actually prostitute himself and spend six (6) pages of a*  
*technical report defending a liar like George Bach. Appendix A . . . makes me ill.*

25 *Bottom line . . . as I have said from the beginning, it doesn’t take a rocket scientist to*  
26 *see they (Shell & Dole) were co-conspirators in the development of the site.*

27 *I’ll get to our comments soon . . . it’s just such a flood of garbage documents.*

28 *Our fear is that Dole causes further delay. How do we prevent that?*

1 (*Id.*, at PRA-RWQCB-007029, italics added.) That same day, Bowcock also sent Unger comments  
2 on Barclay’s submissions, stating that the declaration of Jeffrey Dagdigian is “SHAMEFUL,” that the  
3 declaration of George Bach is “dishonest,” that Barclay has “clearly manipulated and compound[ed]  
4 liar’s lies,” and that Barclay should be “added as a responsible Party to the Cleanup and Abatement  
5 Order.” (*Id.*, Ex. 14 at PRA-RWQCB-004012.)

6 **K. Shell Submits A Revised Remedial Action Plan, And The *Acosta* Plaintiffs And The City  
7 Of Carson Settle With Shell.**

8 On June 30, 2014, after submitting a RAP that was rejected by the Regional Board, Shell  
9 submitted a revised RAP (Ex. V), and on October 15, 2014, Shell submitted an addendum to the re-  
10 vised RAP (Ex. W). The revised RAP requires, among other things, excavation up to 5 feet below  
11 ground surface “at approximately 207 properties,” and excavation up to 5-10 feet below ground sur-  
12 face at approximately 85 homes. (Ex. V at pp. 3-4). In turn, the addendum to the revised RAP pro-  
13 vides that displaced residents will be accommodated and compensated if their homes are sold at less  
14 than fair market value. (Ex. W [10/15/14 Addendum to Revised RAP].) Shell estimates that it will  
15 cost \$146 million to implement the RAP. (*Id.* at p. 3 Table 6-1.)

16 As recently as March 2014, the *Acosta* Plaintiffs’ counsel had described Shell’s proposed  
17 RAP as a “joke,” and called Shell “disgusting” and “despicable” for proposing it. (Ex. X [3/24/14  
18 Daily Breeze Article].) Similarly, when Shell’s revised RAP was first announced, the City of Carson  
19 claimed it was insufficient to secure the “Carousel residents’ health, safety and welfare.” (Ex. Y  
20 [9/7/14 Daily Breeze Article] at p. 2.) Yet, on October 21, 2014, Shell announced to the parties in the  
21 *Acosta* Litigation that it had reached a tentative settlement with the *Acosta* Plaintiffs and the City of  
22 Carson. (Ex. PPP [12/12/14 Decl.].) From that day on, it appears that the *Acosta* Plaintiffs, Girardi  
23 Keese and their consultants like Mr. Bowcock, and the City of Carson no longer criticized Shell’s  
24 RAP to the Regional Board.

25 On or about November 10, 2014, Girardi Keese, on behalf of the *Acosta* Plaintiffs, formally  
26 entered into settlement with Shell. Under the agreement, Shell agreed to pay \$90 million to Girardi  
27 Keese in “full and final settlement of all Claims,” (Ex. Z [*Acosta* Agreement] § 3.2), and to imple-  
28 ment the RAP (*id.* § 4.8). At the same time, the City of Carson, also represented by Girardi Keese

1 LLP, entered into a settlement with Shell. Under the agreement, Shell and the City of Carson agreed  
2 to “Mutual Releases” in which each party released the other from “any and all Claim(s)” related to  
3 the City of Carson’s lawsuit against Shell and the Regional Board proceedings. (Ex. AA [*Carson*  
4 Agreement] § 3.4.) Shell also agreed, as part of the settlement, to remediate the Property. (*Id.* § 4.9.)  
5 Critically, as part of the *Acosta* settlement, the *Acosta* Plaintiffs agreed “to cooperate in good faith in  
6 the ongoing regulatory proceedings overseen by the Water Board” (Ex. Z [*Acosta* Agreement] § 3.6;  
7 see also Ex. GGG [Platt Dep.] at 88:1-12 [testifying that the *Acosta* Plaintiffs “have agreed to coop-  
8 erate relating to the implementation of the RAP”]), and to “waive and release any rights to challenge  
9 any decision of the Water Board in evaluating and approving the RAP for the Carousel Tract.”  
10 (*Ibid.*) Likewise, the City of Carson’s settlement required the City to “cooperate in good faith” in the  
11 Water Board proceedings and “implementation of the RAP.” (Ex. AA [*Carson* Agreement] § 3.5;  
12 see also Ex. GGG [Platt Dep.] at 81:21-82:9 [testifying that the intent of the *Carson* Agreement “is  
13 that Shell perform and implement the remedial action plan and that the City allow that implementa-  
14 tion and cooperate with its implementation”].)

15 News of the settlements, including Shell’s agreement to implement the revised RAP, quickly  
16 spread. In late November and early December 2014, The Los Angeles Business Journal, The Daily  
17 Breeze, and PressTelegram.com all reported that Shell has offered “\$90 million to settle a lawsuit  
18 brought by Girardi & Keese on behalf of the 1,491 current and former residents of the Carousel  
19 Tract.” (Exs. BB-DD [Articles]; Ex. E [Unger Dep.] at Ex. 17.) The Daily Breeze article quoted the  
20 *Acosta* Plaintiffs’ counsel and a Shell spokesperson regarding the settlement, and described “a confi-  
21 dential letter to residents from Girardi & Keese” stating that “the \$90 million would be split between  
22 attorneys and residents, with a court-appointed ‘special master’ to determine how much each plaintiff  
23 will receive based on their personal injury and property damage claims.” (Ex. CC.)

24 **L. The *Acosta* Plaintiffs Designate The Regional Board Prosecutorial Staff As Experts.**

25 On November 14, 2014, the *Acosta* Plaintiffs served their expert disclosures for the Phase II  
26 experts on movement of contaminants, exposure, and dose issues. (Ex. EE [11/14/14 Disclosure].)  
27 In their disclosures, the *Acosta* Plaintiffs identified four members of the Prosecution team as their  
28 “non-retained expert[s]”: Samuel Unger, Paula Rasmussen, Thizar Willians [sic], and Teklewold

1 Ayalew. (*Id.* at pp. 2-3.) Critically, the *Acosta* Plaintiffs designated the Prosecution Team as their  
2 own experts *even though the Draft Revised CAO had not been issued and even though they had no*  
3 *way of knowing based on the public record that Barclay would be recommended by the Prosecution*  
4 *Team for inclusion on the order some three weeks later.*

5 **M. The Prosecutorial Staff Learns Of The Settlement With Shell.**

6 On November 24, 2014, Alfred Robles, the current Mayor of the City of Carson and then a  
7 member of the City Council, emailed Sam Unger a news article about the settlement. (Ex. E [Unger  
8 Dep.] at Ex. 17.) The City of Carson, was then (and still is) an adverse party to Barclay in the *Carson*  
9 *Litigation*, making the communication particularly inappropriate. Robles wrote: “FYI sam. Talk to  
10 you soon.” (*Id.*) Unger then forwarded the email to Teklewold Ayalew, instructing him to “dig up  
11 this article and send to [the prosecutorial] team.” (*Id.*) Minutes later, Ayalew circulated the email to  
12 the entire Prosecution Team. (*Id.*)

13 **N. The Prosecutorial Staff Recommends Approval Of The Revised CAO**

14 Approximately two weeks later, on December 8, 2014, the Regional Board released a Memo-  
15 randum from Sam Unger, Executive Officer of the Regional Board and purported leader of the Prose-  
16 cution Team comprised of selected Site Cleanup Program staff (the “SCP staff”), to Deborah Smith,  
17 Chief Deputy Executive Officer. (Ex. S [12/8/14 Memo].) The Memorandum recommended that  
18 Smith, who reports to Unger, approve and issue the Revised CAO naming Barclay as a responsible  
19 party by January 9, 2014, the very same day that the comment period on Shell’s proposed RAP was  
20 set to close. (*Id.* at pp. 2, 5.) Unger set that aggressive deadline even though he must have known  
21 that Smith was heading out of town on a year-end vacation and would not return until after the holi-  
22 days, giving her effectively about a week to review the extensive file with comments from Barclay  
23 and approve the Revised Draft CAO. (Declaration of Patrick W. Dennis in Support of Petition for  
24 Review of Revised Cleanup and Abatement Order R4-2011-0046; Petition for Stay of Revised  
25 Cleanup and Abatement Order R4-2011-0046; and Petition for (1) Consideration of Evidence, Not  
26 Previously Considered and (2) Hearing on Revised Cleanup and Abatement Order No. R4-2011-0046  
27 (“Dennis Decl.”), ¶ 36.)



1 As part of the recommendation, the Prosecution Team produced a 98-page chart purporting to  
2 respond to the comments submitted by Barclay and others regarding the naming of Barclay as a re-  
3 sponsible party. (Ex. S [12/8/14 Memo] at Attachment 14; see also *id.* at pp. 4-5 [providing summary  
4 of factual conclusions from Prosecution Team staff].) The December 8 Memorandum also identified  
5 for the first time Samuel Unger, Paula Rasmussen, Thizar Tintut-Williams, and Teklewold Ayalew,  
6 among others, as the Regional Board staff who participated in the preparation of the Revised Draft  
7 CAO, and who comprise the Prosecution Team. (*Id.* at p. 1.) Notably, Shell illegally paid for the  
8 Regional Board to prepare the 98-page chart to try to support their decision. (Ex. F [Ayalew Dep.] at  
9 Ex. 3 at p. 2.)

10 **O. Barclay’s Requests To Submit Evidence And For A Hearing Are Denied**

11 On December 24, 2014, Gibson Dunn, on behalf of Barclay, wrote Ms. Smith, asking to  
12 “(1) submit additional critical evidence, that was previously unavailable, and that must be considered  
13 by [the Regional Board] before making any decision on this issue; and 2) schedule a formal hearing  
14 before you in order to give Barclay an opportunity to present the key evidence directly to you and to  
15 explain why Barclay is not a ‘discharger’ under the Water Code.” (Ex. HH [12/24/14 Ltr.] at p. 2.)  
16 On January 6, 2015, Gibson Dunn, on behalf of Barclay, submitted another letter, this time explain-  
17 ing in greater detail the importance of the new evidence, attaching that evidence, and repeating its  
18 request for a hearing. (Ex. N [1/6/15 Ltr.].) On January 15, 2015, McChensey wrote to Smith, stat-  
19 ing that she had no opinion on whether Smith should hold a hearing, but that she opposed the consid-  
20 eration of any additional evidence. [Ex. MM [1/15/15 Ltr.].) Remarkably, McChesney stated that  
21 Barclay should have submitted the new evidence in the fall of 2014, *after* the close of the official  
22 comment period. (*Id.* at p. 2.) On January 16, 2015, Gibson Dunn, on behalf of Barclay, submitted  
23 another letter, clarifying the scope of its request that the Regional Board consider additional evidence  
24 and repeating the request for a hearing. (Ex. NN [1/16/15 Ltr.].)

25 On February 27, 2015, Smith denied all of Barclay’s requests to supplement the record with  
26 one exception, the transcript from the November 2014 deposition of George Bach, which included  
27 testimony refuting a prior unsworn statement that was relied upon by the Prosecution Team as evi-  
28 dence that Barclay was a discharger. (Ex. GG [2/27/15 Ltr.] at pp. 1-2.) Smith also denied Barclay’s

1 requests for an evidentiary hearing. (*Id.*) And despite Barclay’s request that Smith delay any deci-  
2 sion until the completion of depositions of Ayalew and Unger in the *Acosta* Litigation (Ex. XX  
3 [4/22/15 Ltr.]—depositions that Smith previously indicated that she would consider including in the  
4 record (Ex. GG [2/27/15 Ltr.] at p. 3)—Smith issued the Revised CAO just a week before the deposi-  
5 tions of Ayalew and Unger, Smith’s superior, occurred, declining to postpone her decision on the  
6 grounds that “these deposition have not yet occurred, may be further postponed, and substantial addi-  
7 tional time would be necessary” to evaluate the testimony. (Ex. OO [4/30/15 Ltr.]

8 **P. The *Acosta* Plaintiffs File The Revised CAO In The *Acosta* Litigation.**

9 On December 22, 2014, the *Acosta* Plaintiffs submitted a supplemental disclosure of their  
10 Phase II experts. (Ex. FF [12/22/14 Supplemental Disclosure].) As part of this supplemental disclo-  
11 sure, the *Acosta* Plaintiffs submitted rebuttal reports by two of their experts, Lorne Everett and Mark  
12 Kram, which relied on the December 8, 2014 opinions of the SCP staff and their recommendations to  
13 Smith. For example, Dr. Everett used the December 8 memorandum and associated chart from the  
14 SCP staff as evidence that “the professional environmental scientists and engineers at the State of  
15 California (Regional Board Water Quality Control Board) agree with” his opinions concerning Bar-  
16 clay’s liability. (Ex. RR [12/22/14 Everett Rebuttal Report] at p. 2; see also Ex. SS [Kram 12/22/14  
17 Rebuttal Report] at p. 19 [“the RWQCB (2014c) characterizes Mr. Dagdigian’s upward mobility the-  
18 ory as ‘*speculative and incomplete*’ [and] questions the theoretical underpinnings used to support the  
19 theory”].)

20 Since then, the *Acosta* Plaintiffs’ counsel and experts have continued to submit declarations  
21 relying upon the factual conclusions of the SCP staff and their recommendations to Smith. For in-  
22 stance, on January 22, 2015, the *Acosta* Plaintiffs submitted declarations that rely upon the SCP  
23 staff’s factual conclusions as “evidence” purportedly establishing Barclay’s liability. (Ex. TT  
24 [1/22/15 Finnerty Decl.], ¶ 8 [“The Water Board documents contain information that is pertinent to  
25 this case.”]; Ex. UU [1/22/15 Koffman Decl.], ¶¶ 1-10, 13 [“These documents . . . further strongly  
26 support my previous position that Developer Defendants discovered a substantial amount of contami-  
27 nation within the soil of the oil tank farm prior to development.”]; Ex. VV [1/22/15 Cheremisinoff  
28 Decl.], ¶¶ 8-13, 15-23, 26 (“In accordance with comments submitted by the Los Angeles Regional

1 Water Quality Control Board, it is my opinion that the Developer Defendants qualify as a discharger  
2 pursuant to California Water Code Section 13304 and should be treated as such in this litigation.”];  
3 Ex. WW [1/23/15 Suppl. Wallace Decl.] at ¶ 19 [“The Water Board’s conclusion is based on evi-  
4 dence that amply illustrates Barclay Hollander Corporation’s actions and inactions pertaining to the  
5 demolition of the Kast property tank farm and development of the Carousel Housing tract.”].)

6 **Q. Deborah Smith Unilaterally Changes The Draft Revised CAO Before Issuing It.**

7 The Revised CAO was issued on April 30, 2015. (Ex. A [Revised CAO].) While many of the  
8 Revised Draft CAO’s unsupported findings, discussed above, remained unchanged, the Revised CAO  
9 includes a number of changes that were made without any notice to Barclay or an opportunity to  
10 comment. For example, the Draft Revised CAO circulated on December 8, 2014 included this state-  
11 ment: “Available information indicates that by August 15, 1966, all three reservoirs had been fully  
12 cleaned out of liquid residue.” (Ex. D [Draft Revised CAO] at p. 5.) In the Revised CAO, this sen-  
13 tence now states that “all three reservoirs had been emptied of liquid residue.” (Ex. A [Revised  
14 CAO] at p. 4.) Ayalew testified that he wrote in the Draft Revised CAO that all the reservoirs had  
15 been “fully cleaned out.” (Ex. F [Ayalew Dep.] at 141:23-143:22.) He testified that this information  
16 was extracted from the Pacific Soils reports from the time. (*Id.* at 142:25-143:22.) The Revised  
17 CAO issued by Deborah Smith does not explain, or provide a record citation, to support this change.  
18 (See Ex. A [Revised CAO] at p. 4.)

19 The Revised CAO also includes findings that Barclay violated various code provisions that  
20 were never mentioned in the Draft Revised CAO. The Revised CAO states that Barclay’s actions  
21 violated the Fish and Game Code section 5650 and Los Angeles County Code section 20.36.010.  
22 (Ex. A [Revised CAO] at p. 11, fn. 14.) The Revised Draft CAO recommended by the Prosecution  
23 Team did not mention these alleged violations. (Ex. D [Revised Draft CAO].) Both Unger and  
24 Ayalew testified that they had no part in researching or determining whether Barclay violated these  
25 acts or any others. (Ex. F [Ayalew Dep.] at 60:16-61:10, 61:14-21; Ex. E [Unger Dep.] at 56:19-24,  
26 70:7-14.)

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### III. ARGUMENT

**A. Petitioner Will Be Substantially Harmed If The Stay Is Not Granted.**

The extraordinary circumstances of this case—in which Shell, the *Acosta* Plaintiffs, and Carson all pressured, and Shell literally paid for, the Regional Board to name Barclay as a discharger so that it could use the Revised CAO in an attempt to establish Barclay’s liability in collateral litigation for Shell’s financial benefit only—clearly warrant a stay. A stay is necessary to avoid substantial harm to Barclay—in the form of deprivation of property without due process—during the time that its Petition is under review by the State Board and any further appeals to the courts, should they be necessary. (*In the Matter of the Petition of Department of Navy*, 2009 WL 6527514, at \*4 (Cal. St. Wat. Res. Bd. Oct. 19, 2009).)

Unless a stay is granted, the *Acosta* Plaintiffs, Shell, and the City of Carson will continue their attempts to improperly use the Revised CAO as support for their claims against Barclay in separate civil litigation. The potential harm is particularly acute and time sensitive in the *Acosta* Litigation, which is scheduled for trial on November 16, 2015—well before the State Board is likely to decide Barclay’s petition and before subsequent appeals, if any, are exhausted. (See Dennis Decl., ¶ 58.) Moreover, the comment period for the revised RAP closed *before* the Regional Board issued the Revised CAO, meaning that Barclay could potentially be ordered to spend millions on a RAP created by Shell and agreed upon by the *Acosta* Plaintiffs and the City of Carson as part of an omnibus settlement agreement and that Barclay had no reason, nor opportunity, to oppose at the time it was drafted and circulated. (See *id.*, ¶ 72.) Indeed, the Regional Board has confirmed that in their view Barclay is immediately subject to the Revised CAO, notwithstanding the pendency of Barclay’s Petition for Review. (*Id.*, ¶ 55.) Allowing any of these things to happen before Barclay has had a meaningful opportunity to be heard on the merits of the Revised CAO, and exhaust any necessary appeals, would deprive Barclay of the due process to which it is entitled. Such deprivation would cause substantial harm to Barclay, and thus necessitates the granting of a stay.

1           **1.       The *Acosta* Plaintiffs Have Already Misused And Will Continue To Misuse The**  
2           **Revised CAO, Placing Barclay At Risk Of Serious Harm.**

3           If a stay is not granted, the *Acosta* Plaintiffs will attempt to misuse the Revised CAO that they  
4           pressured the Regional Board to issue. Indeed, counsel for the *Acosta* Plaintiffs has already indicated  
5           that the Regional Board’s findings are “critical” to their claims against Barclay. (Ex. CCC [12/15/14  
6           Aumais Decl.]) Specifically, the *Acosta* Plaintiffs will try to introduce and rely upon the Revised  
7           CAO in the *Acosta* Litigation as evidence of Barclay’s purported liability in their impending Novem-  
8           ber 2015 trial. Indeed, as discussed, the *Acosta* Plaintiffs have already misused the Draft Revised  
9           CAO to support their oppositions to dispositive motions. While use the of the Revised CAO for this  
10          purpose (or indeed any collateral litigation purpose) would, of course, be improper, the risk of harm  
11          to Barclay is real, substantial, and immediate. (See Dennis Decl., ¶¶ 62, 63, 64.)

12          Even before the Regional Board issued the Revised CAO, the *Acosta* Plaintiffs attempted to  
13          use, albeit improperly, the Draft Revised CAO as evidence of Barclay’s liability. Prior to the Prose-  
14          cution Team announcing their decision or even making a recommendation to Smith to name Barclay  
15          to the order on December 8, 2014, the four key members of the Prosecution Team, Unger, Ayalew,  
16          Williams and Rasmussen were all identified as “non-retained experts” by the *Acosta* Plaintiffs on  
17          November 14, 2014. (Ex. EE.) Then, just two days after the Prosecution Team’s recommendation to  
18          name Barclay became public and nearly five months before the Revised CAO was actually issued,  
19          the *Acosta* Plaintiffs submitted a declaration arguing that the recommendation was “critical to their  
20          claims against the Developer Defendants.” (Ex. YY [12/10/14 Aumais Decl.], ¶ 11.) And less than  
21          two weeks later, on December 22, 2014, the *Acosta* Plaintiffs submitted a supplemental disclosure of  
22          expert witness information related to the movement of contaminants, exposure and dose issues. As  
23          part of this supplemental disclosure, Plaintiffs submitted rebuttal reports by Lorne G. Everett, PhD,  
24          DSc, and Dr. Mark Kram. In his rebuttal report, Dr. Everett used the Regional Board’s Responses to  
25          Comments as evidence that “the professional environmental scientists and engineers at the State of  
26          California (Regional Board Water Quality Control Board [ ]) agree with” his opinions concerning  
27          Barclay’s liability. (Ex. RR [12/22/14 Everett Rebuttal Report] at p. 2.) Dr. Kram also relied upon  
28          the Revised CAO as evidence of Barclay’s liability. (Ex. SS [Kram Rebuttal Report] at p. 2 [incor-

1 rectly stating that the Regional Board petitioned in December 2014 to name Dole Food Company and  
2 Barclay as dischargers], p. 19.) And during a two day period from January 22 to January 23, 2015,  
3 the *Acosta* Plaintiffs submitted four more separate declarations relying on the Prosecution Team’s  
4 recommendation and related documents in support of their oppositions to three pending motions.  
5 (Ex. TT [1/22/15 Finnerty Decl.]; Ex. UU [1/22/15 Cheremisinoff Decl.]; Ex. VV [1/22/15 Koffman  
6 Decl.]; Ex. WW [1/23/15 Wallace Decl.] )

7 The “critical” importance the *Acosta* Plaintiffs have placed on the Regional Board’s findings  
8 to the *Acosta* Plaintiffs is further demonstrated by the fact that they have designated members of the  
9 Prosecution Team as “non-retained” experts in two separate phases of expert discovery. (Exs. EE,  
10 RRR [Phase II and Phase III designations].) Based on these designations, it is clear that the *Acosta*  
11 Plaintiffs plan to use the opinions of the Regional Board’s staff to support their claims for hundreds  
12 of millions of dollars in damages from Barclay. (See Dennis Decl., ¶ 60.) Indeed, the opinions of  
13 these staff members are so important to the *Acosta* Plaintiffs’ case, they proceeded on April 9, 2015  
14 to designate them to serve as experts on causation and damages despite the fact that the Regional  
15 Board sought to quash their previous designation as “non-retained” experts on movement of contami-  
16 nants at the Property. (Ex. RRR.)

17 Plaintiffs’ attempts to misuse of the Revised Draft CAO should not be surprising. The only  
18 reason the *Acosta* Plaintiffs spent years pressuring the Regional Board to name Barclay as a dis-  
19 charger was because they intended to make the Regional Board’s decision the centerpiece of their  
20 litigation strategy. There is simply no other explanation for the *Acosta* Plaintiffs’ insistence that Bar-  
21 clay be named as a responsible party; as the Regional Board has conceded, Shell was obligated to  
22 implement the RAP and remediate the Property regardless of whether Barclay was named. (See Ex.  
23 E [Unger Dep.] at 191:20-192:6 & Ex. 22 at p. 15.) To that same end, the *Acosta* Plaintiffs’ counsel  
24 has apparently spent thousands in campaign financing trying to exert political pressure on the Re-  
25 gional Board. (See Ex. K; Ex. E [Unger Dep.] at Ex. 21.) And given that the City of Carson is repre-  
26 sented by the same counsel, there is every reason to believe the same tactics will be used in that liti-  
27 gation as well. (Dennis Decl., ¶ 65.)

1           Barclay, of course, is resisting, and will continue to resist, the *Acosta* Plaintiffs’ efforts to im-  
2 properly influence the judge and jury in the *Acosta* Litigation. But until the trial court enters an order  
3 excluding the Revised CAO, and all supporting documents, and precluding the use of the prosecuto-  
4 rial staff at trial, the *Acosta* Plaintiffs’ misuse of the Revised CAO puts Barclay in jeopardy of seri-  
5 ous, and wrongful, loss. (Dennis Decl., ¶¶ 62, 63, 64.) Jury verdicts are difficult to unwind, even if  
6 they are based on a flawed administrative order that is subsequently reversed on appeal. (*Id.*, ¶ 62.)  
7 Plus, there is the wasted time and expenses associated with a jury or bench trial on any issue which is  
8 based upon flawed and improperly procured evidence. (*Ibid.*) And even if the court were to agree  
9 that the Revised CAO and supporting documentation and Prosecution Team witnesses cannot be in-  
10 troduced into the *Acosta* Litigation, it does not change the fact that Barclay has already been forced to  
11 devote resources to defend against the misuse of the Revised Draft CAO and will need to allocate  
12 more resources to these issues in the very near future. (See *id.*, ¶ 62.)

13           The *Acosta* Litigation is set for trial on November 16, 2015—long before Barclay’s Petition to  
14 Review the Revised CAO is likely to be decided, and certainly before any subsequent appeal to the  
15 courts, should that be necessary, will be decided. (Dennis Dec., *Id.*, ¶ 58.) Absent a stay, the Revised  
16 CAO will remain in effect in the interim, erroneously naming Barclay as a discharger. And unless a  
17 stay is granted, the *Acosta* Plaintiffs will continue to try to use the Revised CAO as purported evi-  
18 dence supporting their meritless claims, with the Regional Board staff as their star witnesses. (*Id.*,  
19 ¶ 62.) The jury’s verdict in the *Acosta* Litigation should be based on admissible evidence that Plain-  
20 tiffs put forward at trial, not their improper use of a legally and factually incorrect Regional Board  
21 order, bought and paid for illegally by Shell, and that remains subject to review by the State Board or  
22 the courts. The State Board has no business, and no need with respect to improving water quality,  
23 taking sides in this ongoing civil litigation.

24           **2. After Applying Pressure And Paying For The Revised CAO, Shell Is Likely To**  
25           **Misuse It In Order To Reduce Its Liability For Its Own Oil.**

26           Likewise, absent a stay, the Revised CAO will subject Barclay to harm in Shell’s indemnity  
27 action. In that litigation, Shell is seeking indemnity and contribution from Barclay for Shell’s pur-  
28 ported “costs and expenses” in complying with the CAO—“costs and expenses” that includes com-

1    pensating the Regional Board for its efforts in investigating and naming Barclay at Shell’s insistence.  
2    (Ex. Q at p. 2.) Now, having illegally paid for and pressured the Regional Board to name Barclay as  
3    a discharger, it is a virtual certainty that Shell will seek to get its money’s worth and try to use the  
4    Revised CAO to support its claims for equitable indemnity and contribution. And while the  
5    “[d]iscovery remains stayed until further order by the Court,” Shell can request that the stay be lifted  
6    at any time. (Ex. ZZ.)

7           **3.     Barclay May Be Forced To Pay For A Remedial Action Plan That It Opposes**  
8                   **And That Was Crafted Without Its Involvement.**

9           The current version of the RAP, submitted within days of Shell’s announcement that it had  
10    reached a tentative settlement in the *Acosta* Litigation, appears to have been the result of a negotiated  
11    compromise between Shell and the *Acosta* Plaintiffs, who under the terms of their settlement with  
12    Shell waived their rights to challenge the RAP, and agreed to cooperate with Shell before the Region-  
13    al Board. (Ex. Z at § 3.6.) Notwithstanding, the Regional Board has indicated that it believes it now  
14    has the right to order Barclay to implement the RAP. (Dennis Decl., ¶ 55.) Thus, Barclay may be  
15    held financially responsible for a RAP that reflects a compromise between Shell and the *Acosta*  
16    Plaintiffs—but is not a RAP that is necessary to remediate the Property and certainly not a RAP that  
17    Barclay agrees with. (*Id.*, ¶¶ 72, 74, 75.) It is unconscionable that Barclay would be forced to pay  
18    for Shell’s RAP in which it had no involvement in preparing, to which it is opposed, and to which it  
19    had no reason and no opportunity to respond—and all because the Prosecution Team delayed some  
20    seven years and then timed the naming of Barclay to come after the RAP comments were due. These  
21    costs will rapidly accrue despite the fact that Barclay’s due process rights have been violated and this  
22    appeal is pending—harm that can be easily avoided by the issuance of a stay.

23           **B.     Granting The Stay Will Cause No Harm To The Public Interest Or Interested Parties.**

24           Granting a stay will not harm the public interest or other interested parties. The original CAO  
25    issued in 2011 remains in effect and binding on Shell. (See Ex. B.) Shell is also contractually com-  
26    mitted to implementing the Revised RAP by virtue of its settlements with the *Acosta* Plaintiffs and  
27    the City of Carson. (Ex. Z at § 4.8; Ex. AA at § 3.4.) As such, a stay will have no effect on Shell’s  
28    continued performance of its obligations under the CAO or its contractual promise to implement the



1 Revised RAP—as the Regional Board’s Executive Officer and Counsel for the Prosecution Team  
2 have openly conceded. The Property will be cleaned up on schedule regardless of whether a stay is  
3 issued.

4 In the March 2011, the Regional Board named Shell as the sole responsible party for the  
5 cleanup and abatement of the soil and groundwater contamination underneath the Property. (See Ex.  
6 B.) The original CAO requires Shell to assess, monitor, and cleanup and abate total petroleum hy-  
7 drocarbons and other contaminants of concern discharged to soil and groundwater at the former  
8 Property. (*Ibid.*) Shell never challenged the issuance of the original CAO and remains responsible  
9 for the cleanup, abatement, and other requirements imposed by the original CAO.

10 Since that time, Shell has overseen and paid for the investigation of the underlying contamina-  
11 tion, and the preparation of a RAP, Feasibility Study Report, and Human Health Risk Assessment  
12 Report. After submitting a RAP that was rejected, on June 30, 2014, Shell proposed a Revised RAP.  
13 (Ex. V.) The comments period on the revised RAP closed on January 9, 2015 (Ex. BBB)—the very  
14 same day that Unger urged his Chief Deputy, Deborah Smith, to adopt the Draft Revised CAO (Ex. S  
15 [12/8/14 Memo].) The final adoption of the RAP is currently before the Regional Board. If the RAP  
16 is adopted by the Regional Board, Shell will be responsible under the March 2011 CAO for imple-  
17 menting the remedy agreed-upon by the Regional Board, Shell, the *Acosta* Plaintiffs, and the City of  
18 Carson.

19 Shell is one of the largest and most profitable companies in the world. Undoubtedly, it has  
20 sufficient resources to see the remediation to completion. There is no risk that Shell will not be able  
21 to fulfill the actions required of it under the original CAO. Indeed, the Regional Board’s Chief Exec-  
22 utive Officer and Counsel for the Prosecution Team conceded that, because “Shell never petitioned or  
23 challenged the original cleanup and abatement order[,] they’re still responsible, regardless of who  
24 else might [or might not] be added.” (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional Board Meeting  
25 Tr.] at p. 15; Ex. E [Unger Dep.] at 191:20- 192:6.)

26 By this Petition, Barclay only seeks a stay of the effective date for the Revised CAO as to  
27 Barclay. The requested stay will only suspend the effectiveness of the newly-added provisions that  
28 purport to name Barclay as an additional discharger under section 13304. As such, the stay of the

1 Revised CAO will have no effect on the implementation of the RAP or the actual remediation of the  
2 Property. Because Shell will continue to implement the RAP, a stay of the Revised CAO will not  
3 harm the interests of the Regional Board or the public. As stated, the Property will be cleaned up by  
4 Shell regardless of whether a stay is issued.

5 **C. Substantial Questions Of Fact And Law Exist Regarding The Disputed Action.**

6 Moreover, a stay is warranted here because substantial questions of fact and law exist regard-  
7 ing the propriety of the Revised CAO. Specifically, in issuing the Revised CAO, the Regional Board  
8 denied Barclay due process, and its findings are inconsistent with the facts and the law.

9 **1. The Regional Board Denied Barclay Due Process Of Law**

10 The Revised CAO is the product of a fundamentally flawed and unfair proceeding—illegally  
11 paid for by Shell, an adverse party—that deprived Barclay of due process.

12 **a. The Regional Board Illegally Invoiced Shell, An Adverse Party With A**  
13 **Financial Interest In Naming Barclay, For Its Time Investigating And**  
14 **Naming Barclay.**

15 Under the guise of “cost recovery,” Shell literally paid for the Regional Board to follow its  
16 bidding to investigate and name Barclay as a discharger. Cost recovery is only permitted in connec-  
17 tion with remedial actions, which does not include investigating and naming one’s adversary as a dis-  
18 charger. Paying for the Regional Board staff to investigate Barclay for Shell’s own litigation and fi-  
19 nancial objectives are not costs incurred in “cleaning up the waste, abating the effects of the waste,  
20 supervising cleanup or abatement activities, or taking other remedial action.” (Wat. Code, § 13304,  
21 subd. (c).) Further, Shell’s payments violated Barclay’s due process rights under both the United  
22 States Constitution and the California Constitution. The Supreme Court has long recognized that a  
23 “scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring  
24 irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious  
25 constitutional questions.” (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 249-250.) Likewise, the  
26 California Supreme Court has recognized that “pecuniary conflicts of interests on a judge’s or prose-  
27 cutor’s part pose a constitutionally more significant threat to a fair trial than do personal conflicts of  
28 interest.” (*People v. Vasquez, supra*, 39 Cal.4th at p. 64; see also *County of Santa Clara v. Superior*

1 *Court* (2010) 50 Cal.4th 35, 57 [reaffirming the “bedrock principle that a government attorney prose-  
2 cuting a public action on behalf of the government must not be motivated solely by a desire to win a  
3 case, but instead owes a duty to the public to ensure that justice will be done,” and that “[a] fair pros-  
4 ecution and outcome in a proceeding brought in the name of the public is a matter of vital concern  
5 both for defendants and for the public, whose interests are represented by the government and to  
6 whom a duty is owed to ensure that the judicial process remains fair and untainted by an improper  
7 motivation on the part of attorneys representing the government”].)

8 Here, the Regional Board was billing *Shell* for its own staff’s efforts spent investigating and  
9 naming *Barclay*, at the same time Shell had a substantial financial interest in having Barclay named  
10 on the CAO. Shell had been named in the original CAO; Barclay had not. Shell had demanded that  
11 the Regional Board name Barclay as a discharger, and had even filed suit against Barclay seeking in-  
12 demnification and contribution with respect to its alleged “costs and expenses” in complying with the  
13 CAO and implementing the RAP. Clearly, Shell was seeking to have Barclay named as a discharger  
14 to support its meritless claims for contribution and indemnification. The Regional Board—and spe-  
15 cifically Sam Unger—knew that Shell had filed suit against Barclay for the express purpose of recov-  
16 ering its alleged “costs” in complying with the CAO, but nonetheless sought (and obtained) reim-  
17 bursement from Shell for the time its Prosecution Team spent investigating and naming Barclay at  
18 Shell’s urging. Under the circumstances, Shell surely had the expectation—later proven well-  
19 founded—“that [its] provision of financial assistance would incentivize the [Regional Board] to pur-  
20 sue the [its] desired outcome even if justice demanded a contrary course of action.” (*County of Santa*  
21 *Clara v. Superior Court, supra*, 50 Cal.4th at p. 59, fn. 13.)

22 Indeed, only Shell’s substantial illegal financial inducements can explain why the Regional  
23 Board was willing to devote so many resources from an already “burdened” staff to name a party to  
24 an amended order that, according to the Regional Board’s own counsel, will have no impact going  
25 forward on the cleanup of the Property. (Ex. E [Unger Dep.] at Ex. 22 [6/12/14 Regional Board  
26 Meeting Tr.] at 15:3-9.) Absent Shell’s illegal payments, the Regional Board staff never would have  
27 been able to spend the time (nor have the motivation or need to spend the time) attempting to build a  
28 record to name Barclay. Even though Unger knew that naming Barclay had nothing to do with im-

1 proving water quality (Ex. E [Unger Dep.] at 117:2-13; *id.* at 205:4-9), he diverted valuable staff time  
2 away from the Board’s main mission in order to further Shell’s, the *Acosta* Plaintiffs’, and the City of  
3 Carson’s lawsuits and did so against Barclay using illegal payments from Shell.

4         Simply put, Shell’s illegal payments to the Regional Board created both the appearance and  
5 the probability of outside influence—precisely what due process forbids. (*Nightlife Partners v. City*  
6 *of Beverly Hills* (2003) 108 Cal.App.4th 81, 90 [holding that “an administrative hearing also demands  
7 the *appearance* of fairness and the absence of even a *probability* of outside influence on the adjudica-  
8 tion”], italics in original; see also *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 837 [“One  
9 risk of [private support of government prosecutions is that] the prosecution itself could be used as a  
10 strategic weapon to disrupt and distract a competitor for reasons wholly unrelated to the public ad-  
11 ministration of justice.”].)

12                   **b.         The Composition And Functioning Of The Prosecutorial And Advisory**  
13                   **Teams Violate Barclay’s Due Process Rights.**

14         Constitutional due process requires that a decision be made by a fair tribunal. (*Withrow v.*  
15 *Larkin* (1975) 421 U.S. 35, 46.) Separate and apart from the constitutional requirement of due pro-  
16 cess, the California APA requires that “the prosecutory and, to a lesser extent, investigatory, aspects  
17 of administrative matters must be adequately separated from the adjudicatory function.” (*Nightlife*  
18 *Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91-92. See also *Morongo Band of Mis-*  
19 *sion Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 738; Govt. Code,  
20 § 11425.10, subd. (a)(4) [“During the conduct of administrative proceedings, the adjudicative func-  
21 tion must be separated from the investigative, prosecutorial, and advocacy functions within an agen-  
22 cy.”].)

23         Here, from the start, there was no clear division between the Prosecutorial and Adviso-  
24 ry/Adjudicatory teams, and no formalities were observed in creating the teams. Key members of the  
25 Prosecution Team—Samuel Unger and Teklewold Ayalew—were unable to identify when the teams  
26 were formed or who was on them. (Ex. E [Unger Dep.] at 35:8-9 [“Q. When was the prosecutorial  
27 team established? A. I can’t recall when it was established.”]; Ex. F [Ayalew Dep.] at 26:18-24 [“Q.  
28 Was there some point in time when you were told there’s going to be a prosecutorial team in connec-

1 tion with considering whether to name Barclay on the order? A. That’s correct, yes. . . . That was at a  
2 meeting. I don’t remember the date. Sorry.”.) Surprisingly, Ayalew testified that he thought Debo-  
3 rah Smith, the adjudicator, was actually the prosecutor (Ex. F [Ayalew Dep.] at 15:15-24 [“Q. Do you  
4 know who is part of the prosecutorial team? . . . A. Deborah Smith. Q. And she is part of the prose-  
5 cutorial team; isn’t that right? A. As far as I know, yes.”]), and that he thought Unger was not even a  
6 member of either team (*id.* at 18:19-21; 20:15-18 [“Q. Is Mr. Unger on either the prosecutorial team  
7 or the advisory team? A. No, as far as I know.”].) Unger, in turn, testified that “there was never real-  
8 ly any establishment of the [prosecutorial] team, per se.” (Ex. E [Unger Dep.] at 197:12-19.) Plainly,  
9 when even the team members of the prosecutorial and adjudicatory teams do not even know which  
10 side of the divide they are on, the required separation of functions is missing.

11         Aside from the lack of clarity regarding the formation and composition of the teams, there  
12 was an underlying structural defect in the assignment of responsibilities. The Prosecution Team in-  
13 cluded Unger, the Executive Officer of the entire Regional Board. Unger is effectively the head of  
14 the agency, and every staffer in the agency ultimately answers to him. Obviously, any recommenda-  
15 tion coming from Unger would have carried extraordinary weight with any staff member assigned the  
16 role of adjudicator, “creat[ing] an unacceptable risk of bias.” (*Morongo Band of Mission Indians v.*  
17 *State Water Resources Control Board, supra*, 45 Cal.4th at p. 741.) Here, that “unacceptable risk of  
18 bias” was exacerbated by the selection of Deborah Smith, Unger’s subordinate, as the adjudicator.  
19 Smith reports directly to Unger; he is her immediate superior. (Ex. E [Unger Dep.] at 39:13-20 [“Q.  
20 Between 2011 and today did Ms. Smith report to you in the chain of command at the regional board?  
21 A. Yes. . . . Q. In the organization chart, she reports directly to you in the chart; right? A. Yes.”].)  
22 The APA expressly provides that “[a] person may not serve as presiding officer in an adjudicative  
23 proceeding” if “the person is subject to the authority, direction, or discretion of a person who has  
24 served as an investigator, *prosecutor*, or advocate in the proceeding or its preadjudicative stage.”  
25 (Govt. Code, § 11425.30, subd. (a)(2), italics added.) Notwithstanding, Unger—the prosecutor who  
26 signed the recommendation to Smith that she name Barclay—designated Smith—his direct subordi-  
27 nate—as the presiding officer, a clear and direct violation of section 11425.30, subsection (a)(2) of  
28 the Government Code. (Ex. E [Unger Dep.] at 39:3-12 [“Q. You mentioned that by 2011, when the

1 cleanup and abatement order was issued here, you understood Ms. Smith was in the advisory capaci-  
2 ty; right? A. Yes. Q. My question for you is, do you recall who decided she should be in that capacity  
3 for this matter? A. It was a decision that senior staff and our counsel decided. Q. You're part of sen-  
4 ior staff, are you not? A. Yes, I am."].) Under the circumstances, "the probability of actual bias on  
5 the part of the judge or decisionmaker [was] too high to be constitutionally tolerable." (*Withrow v.*  
6 *Larkin, supra*, 421 U.S. at p. 47.) As the Supreme Court has recognized, "[T]here is a serious risk of  
7 actual bias— based on objective and reasonable perceptions—when a person with a personal stake in  
8 a particular case had a significant and disproportionate influence in placing the judge on the case[.]"  
9 which is precisely what Unger did when he designated his subordinate as the adjudicator. (*Caper-*  
10 *ton v. AT Massey Coal Co., Inc.* (2009) 556 U.S. 868, 884.) Indeed, Smith's inexplicable and ex  
11 parte last-minute editing of the Revised CAO to add purported violations of law, and changes in the  
12 facts, to the Revised CAO—a prosecutorial, not adjudicatory, function—just confirms her lack of  
13 impartiality and independence, her failure to understand or execute the advisory function with which  
14 she was entrusted, and the Regional Board's wholesale failure to adequately separate the adjudicative  
15 and prosecutorial functions.

16 **c. The Regional Board Deliberately Delayed Issuing The Revised CAO Until**  
17 **The Comment Period On The RAP Closed.**

18 Barclay's due process rights also were violated by the Regional Board's decision to delay is-  
19 suing the Revised CAO until after the comment period on the RAP closed. Even though the Regional  
20 Board began its investigation in May 2008, it did not issue the Draft Revised CAO until December  
21 2014—nearly seven years later, and within weeks of learning that Shell had reached a settlement with  
22 the *Acosta* Plaintiffs and the City of Carson that ensured their support for Shell's RAP. (See Ex. E  
23 [Unger Dep.] at Ex. 17.) Then, knowing that Barclay would oppose Shell's RAP once named on the  
24 order, the Regional Board delayed issuing the Revised CAO until after the comment period closed,  
25 depriving Barclay of any opportunity to challenge the RAP after being named on the order, a Revised  
26 RAP that Shell, the *Acosta* Plaintiffs, and the City of Carson agreed upon in closed-door settlement  
27 discussions. Subjecting Barclay to pay for or implement a RAP that it opposes and that it had no rea-  
28

1 son to participate in and therefore no role in crafting would be a profound violation of due process.  
2 (Govt. Code, § 11425.10, subd. (a)(1).)

3 **d. The Administrative Record Is Inadequate.**

4 “To meet the requirement of fairness, the Regional Board . . . must ensure that there is a fac-  
5 tual and legal basis in the record for its decision and must indicate its reasoning and the factual basis  
6 for its decision to the affected parties.” *In the Matter of Project Alpha*, State Board Order No. WQ  
7 74-1, at \*3. The Revised CAO does not satisfy any of these requirements. Both Ayalew and Unger  
8 repeatedly testified that they did not know where the evidence was collected to support key findings.  
9 (Ex. F [Ayalew Dep.] at 73:10-74, 74:18-76:16, 159:6-9, 243:22-244:5, 84:15-22, 229:22-230:5,  
10 109:18-110:3, 166:17-20; Ex. E [Unger Dep.] at 217:14-20, 97:8-14, 232:20-233:15, 234:7-10,  
11 235:5-12.) And the Revised CAO includes numerous changes beyond simply naming Barclay, to  
12 which Barclay has had no opportunity to respond and the factual and legal basis for which is hidden  
13 behind a claimed cloak of privilege. (*E.g.*, Ex. E [Unger Dep.] at 64:5-65:6. [“Q. Okay. As part of  
14 your work on the prosecution side, did you or anybody at your direction attempt to evaluate any of  
15 the laws that were in effect in 1965 and 1966 to determine if Barclay violated those laws? A. My un-  
16 derstanding is that our counsel did that research.”]; *id.* at 55:2-58:18.) Moreover, the Regional Board  
17 appears to rely entirely on an unsworn, hearsay statement that counsel for the *Acosta* Plaintiffs pre-  
18 pared for George Bach in 2011—in direct violation of the APA and the State Board’s own regula-  
19 tions. (Ex. S [12/8/14 Memo] at Attachment 14 at pp. 17, 44; Ex. E [Unger Dep.] at 105:2-105:10,  
20 106:6-21, 108:1-110:1; Govt. Code, § 11425.50, subd. (b) [“If the factual basis for the decision in-  
21 cludes a determination based substantially on the credibility of a witness, the statement shall identify  
22 any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the  
23 determination.”].)

24 **e. The Prosecutorial And Advisory Teams Favored Shell And The *Acosta***  
25 **Plaintiffs And Disfavored Barclay.**

26 Separate and apart from the illegal and unconstitutional payments, Shell’s and the *Acosta*  
27 Plaintiffs’ relationship with the Regional Board is deeply problematic in other important respects.  
28 For example, at Shell’s urging, which did not provide any comments during the initial public com-

1 ment period, the Regional Board re-opened the public comment period specifically to allow Shell to  
2 comment in June 2014. And after that period closed, the Regional Board repeatedly communicated  
3 on an ex parte basis with Robert Bowcock, the *Acosta* Plaintiffs’ lawyers’ consultant. Indeed, Unger  
4 openly invited these ex parte communications by offering Bowcock the opportunity to “talk whenever  
5 you wish.” (Ex. E [Unger Dep.] at Ex. 15.) These improper ex parte, post-comment period com-  
6 munications were never disclosed to Barclay, and Barclay was never given the opportunity to re-  
7 spond. (Ex. E [Unger Dep.] at 22:4-23, 162:5-14; *id.* at Ex. 15.) Additionally, it appears that politi-  
8 cal pressure was applied to the Regional Board and that its decision to name Barclay resulted, in part,  
9 from that pressure, which violates due process. (See, e.g., *Pillsbury Co. v. FTC* (5th Cir. 1966) 354  
10 F.2d 952, 963 [“Common justice to a litigant requires that we invalidate the order entered by a quasi-  
11 judicial tribunal that was importuned by members of the United States Senate, however innocent they  
12 intended their conduct to be, to arrive at the ultimate conclusion which they did reach.”].)

13 In contrast, the Regional Board refused to provide Barclay any opportunity to plead its case  
14 once additional information not previously available came to light. Not only was Barclay not invited  
15 to provide comments outside the official comment period, unlike Bowcock, the *Acosta* Plaintiffs’ rep-  
16 resentative, the Prosecution Team recommended that Barclay’s request to supplement the record with  
17 a 3-D model prepared by Dr. Dagdigian be denied because the information could have been submit-  
18 ted in the fall of 2014—even though the comment period closed months earlier in June. (Ex. MM  
19 [1/15/15 Ltr.].) Smith obligingly agreed with McChesney, and Barclay was unable to submit this ev-  
20 idence, and have it considered, before the Revised CAO was issued.<sup>6</sup> Likewise, the Regional Board  
21 refused to consider various other documents submitted by Barclay to supplement the record. (Ex. GG  
22 [2/27/15 Ltr.].) And despite indicating that she would consider Mr. Bach’s 2014 deposition testimo-  
23 ny and the deposition testimony of Regional Board staff, Smith appears to have ignored the Bach  
24 deposition testimony, and issued the Revised CAO before the Regional Board staff could be deposed.

25  
26  
27  
28 <sup>6</sup> It is impossible to reconcile Smith’s rejection of her consideration of evidence offered by Barclay  
merely because it was generated in “litigation for which the Water Board was not a party” with  
the Prosecution Team’s eagerness to assist Shell, the *Acosta* Plaintiffs, and Carson in the manu-  
facturing of evidence (the Revised CAO) for “litigation for which the Water Board is not a party.”



1                   **f.       Barclay Has Been Denied A Hearing.**

2           Despite Barclay’s repeated requests, and the fact that an informal process may only “be used  
3 where significant facts are not in issue and the proceeding held is to determine only what conse-  
4 quences flow from those facts,” the Regional Board refused to conduct an evidentiary hearing on  
5 whether to name Barclay as a discharger on the Draft Revised CAO. (Ex. HH [12/24/14 Ltr.] at p. 2;  
6 Ex. N [1/6/15 Ltr.]; Ex. NN [1/16/15 Ltr.]; Ex. KK [State Water Resources Control Board, Office of  
7 Chief Counsel, M. A.M. Lauffer Chief Counsel Memorandum (Aug. 2, 2006)] at p. 3; Ex. GG  
8 [2/27/15 Ltr.].) The Board refused to grant a hearing even though the Revised Draft CAO included  
9 new, previously undisclosed alleged “violations” to which Barclay had never had an opportunity to  
10 respond, and even though holding a hearing would not have caused any delay in the cleanup of the  
11 Property. On these facts, due process required a hearing. (See Ex. KK [State Water Resources Con-  
12 trol Board, Office of Chief Counsel, M. A.M. Lauffer Chief Counsel Memorandum (Aug. 2, 2006)]  
13 at p. 3; cf. *Machado v. State Water Resources Control Board* (2001) 90 Cal.App.4th 720, 725.)

14                   **2.       The Regional Board’s Findings Are Not Supported By The Facts**

15           As set forth in Barclay’s Petition for Review, the Regional Board’s finding that Barclay  
16 knowingly engaged in activities that “spread the waste at the site, and contributed to the migration of  
17 the waste through soil and groundwater,” is not supported by the facts. (Ex. A [Revised CAO] at  
18 p. 10.) Indeed, all of the available evidence shows that Barclay spread fill soil that it did not believe  
19 had any petroleum from the upper berms on the Property when it graded the site.

20           In the *Acosta* Litigation, the last four surviving witnesses to Barclay’s placement and compac-  
21 tion of the berm fill soil testified under oath that they saw no oil in the soil. (Ex. TTT [1/21/14 Ltr.],  
22 Tab 7 [Bach Dep.] at 105:8-107:16; 143:23-144:4; *id.* Tab 8 [L. Vollmer Dep.] at 86:2-87:1; *id.* Tab  
23 12 [Anderson Dep.] at 35:9-36:8; *id.* Tab 13 [A. Vollmer Dep.] at 43:25-44:15.) All four men testi-  
24 fied that they had good vantages from which to observe the soil taken from the berms after it had  
25 been spread, and they were in a position to see oil contamination if there had been any. (*Id.* Tab 12  
26 [Anderson Dep.] at 35:24-36:8; *id.* Tab 13 [A. Vollmer Dep.] at 44:7-19.). Those who were asked  
27 about odors testified that there were no petroleum odors in the berm soil. (*Id.* Tab 12 [Anderson  
28 Dep.] at 36:9-12; *id.* Tab 13 [A. Vollmer Dep.] at 60:4-6; 110:19-111:2.) The same is true for obser-

1 vations of soil beneath the reservoir bottoms seen when the concrete floors were being ripped. All of  
2 the eyewitnesses who observed the soil beneath the slabs on the reservoir bottoms observed no petro-  
3 leum hydrocarbons beneath the ripped concrete. (*Id.* Tab 7 [Bach Dep.], at 188:15-189:1; *id.* Tab 8  
4 [L. Vollmer Dep.] at 97:18-98:3; *id.* Tab 12 [Anderson Dep.] at 42:4-12; *id.* Tab 13 [A. Vollmer  
5 Dep.] at 61:18-62:7; 62:19-22; 109:14-110:11.) The testimony of all four witnesses was given in  
6 deposition subject to cross-examination by lawyers for Shell and plaintiffs. These are the only four  
7 known living witnesses who actively participated in the grading and decommissioning of the tanks at  
8 the Property, and their testimony is unanimous on the subject.

9 Moreover, there were soil samples taken from the berm soil as part of the preliminary soils  
10 investigation, and while it was not the purpose of that sampling to look for oil, the cuts taken from the  
11 berms provided yet another opportunity for a trained eye to see oil contamination in the berm soil if it  
12 was there. (Ex. TTT [1/21/14 Ltr.], Tab 66 [CARSON 348-354].) Although there were many soils  
13 reports prepared after those samples were taken, and hundreds of pages of documents placed in the  
14 construction file after that, not one page of those documents says anything about oil in the berm soil.  
15 This corroborates the testimony of the four eye witnesses. (*Id.* Tab 66 [CARSON 348-354]; *id.*  
16 [Shepardson Report] at p. 26.)

17 Ignoring all of this evidence, the Prosecution Team relied instead on the unsworn, hearsay  
18 statement signed by George Bach in 2011 at the direction of counsel for the *Acosta* Plaintiffs. (Ex. S  
19 [12/8/14 Memo] at Attachment 14 at pp. 24, 26); Ex. E [Unger Dep.] at 106:6-21; Ex. F [Ayalew  
20 Dep.] at 71:19-72:6 [“Q Did you read his 2014 deposition? A. Yes, I did. Q. Did you read it before  
21 December 8 of 2014? A. No. Q. So when you made the recommendation and did the response to  
22 comments in this Exhibit 9, you had not read Mr. Bach’s deposition; right? From 2014? A. The 2014  
23 -- yes, I did not read.”].) But in his 2014 deposition, Mr. Bach testified unequivocally that (1) he did  
24 not see or smell oil in the berm soil that was used as fill or in other soils on the Property (Ex. N at  
25 126:16-127:1; 127:19-129:6; 130:4-132:11); (2) he did not observe oil in the soil below reservoir  
26 floors (*id.* at 130:4-132:11), and (3) he saw no ponding of oil on site (*id.* at 135:4-136:10). Mr. Bach  
27 also explained in his November 2014 deposition that the 2011 Statement was written without the  
28 benefit of looking at documents generated at the time the Property was developed (*Id.* at 117:17-21),

1 and was based on speculation (*id.* at 138:9-12 [“These were written because I was asked to speculate  
2 about where [contamination] might be found.”].) Indeed, Mr. Bach’s 2014 testimony makes clear  
3 that the 2011 Statement is not competent or reliable evidence under the Evidence Code, and that the  
4 Regional Board’s reliance on his 2011 unsworn statement is arbitrary and without basis.

5 Moreover, the Revised CAO fails to cite evidence in anything but the most general terms.  
6 Although there are occasional references to “the record,” the Revised CAO nowhere specifies what  
7 evidence was admitted, what documents comprise “the record,” or what evidence supports the  
8 Board’s findings. Indeed, when asked for factual support at their depositions, members of the Re-  
9 gional Board’s Prosecution Team were repeatedly unable to point to any specific documents or wit-  
10 ness testimony to support the Regional Board’s factual assertions. (Ex. F [Ayalew Dep.] at 73:10-74,  
11 74:18-76:16, 159:6-9, 243:22-244:5, 84:15-22, 229:22-230:5, 109:18-110:3, 166:17-20; Ex. E [Unger  
12 Dep.] at 217:14-20, 97:8-14, 232:20-233:15, 234:7-10, 235:5-12.) Such “conclusory findings with-  
13 out reference to the record are inadequate.” (*Envil. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire*  
14 *Prot.* (2008) 44 Cal.4th 459, 517.)

15 The reason for the Regional Board’s failure to properly cite evidence in support of its findings  
16 is clear: there is none. Indeed, all of the available evidence shows that Barclay spread fill soil that it  
17 did not believe had any petroleum from the berms on the Property when it graded the site. Even if  
18 the fill soil used for compaction was already contaminated before Barclay moved it from the berm,  
19 there is no evidence to contradict the overwhelming evidence that Barclay had no knowledge of its  
20 presence.

21 **3. The Regional Board’s Findings Are Not Supported By The Law**

22 Even if there were evidentiary support for the Regional Board’s findings (which there is not),  
23 the Regional Board’s finding that Barclay was a “discharger” is not supported by the law.

24 **a. The Regional Board’s Finding That Barclay “Spread The Waste” And**  
25 **“Contributed To The Migration Of The Waste” Does Not Support Liabil-**  
26 **ity Under Section 13304(a).**

27 As set forth in Barclay’s Petition, even if there were any evidence that Barclay knowingly  
28 “spread the waste” or “contributed to the migration of the waste” (which there is not), “spreading

1 waste” or “contributing to the migration of waste” that has already been discharged by another does  
2 not make one a discharger under section 13304(a). Indeed, no State Board decision has ever held that  
3 “spread[ing] the waste” or “contribut[ing] to the migration of the waste” constitutes a “discharge”  
4 under section 13304(a). And binding Ninth Circuit precedent confirms that redistributing discharge  
5 is not itself a “discharge” under section 13304(a). (*Redev. Agency of the City of Stockton v. BNSF*  
6 *Railway Co.*, *supra*, 643 F.3d at pp. 677-678 [holding that a defendant that had inadvertently moved  
7 petroleum contaminants onto another property was not a discharger under Water Code Section  
8 13304(a)].) The Revised CAO is also consistent with the plain meaning of section 13304(a) and the  
9 legislative history of the 1980 amendments to Porter-Cologne advocated by the State Board, which  
10 indicates that “*transitory discharges are not subject to [enforcement].*” (State Water Resources Con-  
11 trol Board, Request for Approval of Proposed Legislation (Nov. 6, 1979), italics added.)

12 Disregarding this well-established legal background, the Regional Board instead relies on an  
13 interpretation of Section 13304(a) developed by the State Board during the 1980s that expands the  
14 jurisdiction of the state and regional boards well beyond anything permitted by the plain language of  
15 the statute. (*Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal.4th 287, 300 [“[T]he rulemaking  
16 authority of an agency is circumscribed by the substantive provisions of the law governing the agen-  
17 cy. . . . [R]egulations that alter or amend the statute or enlarge or impair its scope are void,” quoting  
18 *Physicians & Surgeons Labs., Inc. v. Dep’t of Health Servs.* (1992) 6 Cal.App.4th 968, 982; see also  
19 *Whitcomb Hotel, Inc. v. Cal. Emp’t Comm’n* (1944) 24 Cal.2d 753, 757 [“An administrative officer  
20 may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.”].) But  
21 the undisputed facts are that Shell contaminated the property before selling it to Barclay. The Re-  
22 gional Board’s definition of “discharge” goes beyond the limits of a Regional Board’s jurisdiction set  
23 by section 13304(a), and will not garner deference from the courts. (*Yamaha Corp. of America v.*  
24 *State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

1           **b.       Barclay Is Exempt From Liability Under Porter-Cologne Because All Of**  
2           **The Acts For Which The Revised CAO Holds It Responsible Occurred**  
3           **Before 1981 And Are Therefore Protected By The Safe Harbor Of Section**  
4           **13304(j).**

5           Even if there was evidence or legal authority to support the Regional Board’s finding that  
6           Barclay knowingly “spread[] the waste” or “contributed to the migration of waste” (and there is not),  
7           Barclay is nonetheless exempt from liability under Porter-Cologne because all of the acts for which  
8           the Revised CAO holds it responsible are protected by the safe harbor of section 13304(j). Section  
9           13304(j) of the Water Code precludes the 1980 amendments to section 13304(a) from creating “any  
10          new liability for acts occurring before January 1, 1981, if the acts were not in violation of existing  
11          laws or regulations at the time they occurred.” (Wat. Code § 13304, subd. (j).)

12                           **(i)       The Regional Board Has Not Met Its Burden To Establish That**  
13                           **Barclay Is Not Protected Under The Safe Harbor Of Section**  
14                           **13304(j).**

15          Because all of Barclay’s activities occurred well before 1981, the burden of proof is on the  
16          Regional Board to establish Barclay’s liability in light of section 13304(j), and the Revised CAO ut-  
17          terly fails to meet that burden. The Revised CAO makes only the conclusory statement that  
18          “[i]ncluding [Barclay] as a responsible party is consistent with Water Code section 13304(j) because  
19          Lomita or [Barclay]’s actions that resulted in creating pollution and nuisance were unlawful since at  
20          least 1949.” (Ex. A [Revised CAO] at p. 11.) In support, the Revised CAO cites in a footnote three  
21          code provisions that Barclay allegedly violated: Health and Safety Code section 5411, Fish and Game  
22          Code section 5650, and Los Angeles County Code section 20.36.010. (*Id.* at p. 11, fn. 14.) The Re-  
23          vised CAO does not cite any specific provisions or elements of those laws, much less any relevant  
24          evidence, to satisfy their burden of proof that Barclay’s acts from 1965-66 were indeed in violation of  
25          any existing laws at the time they occurred. Moreover, the Revised CAO ignores the fact that there  
26          are no published decisions in which section 5411—a provision that applies to disposal of sewage and  
27          similar contaminants, not oil (see *Thompson v. Kraft Cheese Co. of Cal.* (1930) 210 Cal. 171, 173  
28          [enforcing section 5411 against cheese factory for discharge of dirty water that comes from floor

1 cleaning]; *People v. City of L.A.* (1948) 83 Cal.App. 2d 627, 638 [injunction restraining the plaintiff  
2 cities from discharging sewage that is injurious to the public health into the salt waters of the  
3 state)]—was applied to non-dischargers. The Revised CAO similarly disregards the fact that Fish  
4 and Game Code section 5650 does not even apply to groundwater, “where fish would not occur natu-  
5 rally.” (See, e.g., 48 Ops. Atty. Gen. 23, 24, 30 (1966).) Nor does it place any weight on the con-  
6 temporaneous determination by the Los Angeles County Engineer that Barclay complied with the ap-  
7 plicable county laws.<sup>7</sup> (Ex. S [12/8/14 Memo] at Attachment 14 at pp. 13-16; Ex. E [Unger Dep.] at  
8 63:7-15, 64:5-65:6, 66:10-67:23, 70:25-72:8; Ex. F [Ayalew Dep.] at 41:2-22.)

9 Even more troubling is that the purported violations of Fish and Game Code section 5650, and  
10 Los Angeles County Code section 20.36.010 were unilaterally added by Smith—ostensibly a neutral  
11 adjudicator—without notice to Barclay. Moreover, Unger testified that the Prosecution Team’s  
12 counsel, Frances McChesney, added the purported violation of Health and Safety Code section 5411,  
13 and that her reasons for doing so are privileged. (Ex. E [Unger Dep.] at 70:25-72:8.) Thus, Barclay  
14 does not know the Regional Board’s basis (albeit flawed) for adding these purported violations. (See  
15 Ex. TTT [1/21/14 Ltr.], Tabs 55, 114, 116, 117 [County engineer, who pursuant to the U.B.C.  
16 § 7014(c)(1965) was responsible for assuring compliance with all laws, releases grading bonds signi-  
17 fying “[c]ompletion of the job and final approval by the inspector” and that the “project was not be-  
18 ing left in a hazardous condition”].)

19 **c. Public Agencies In A Position To Know Both The Law And The Material**  
20 **Facts At The Time Prove Barclay’s Compliance With Then-Existing Law.**

21 That Barclay complied with then-existing laws is also confirmed by the fact that all relevant  
22 government agencies approved the development. Multiple government agencies—including the Los  
23 Angeles County Engineer, the California State Real Estate Commissioner, and the Los Angeles  
24 County Planning Commission—oversaw the redevelopment of the Property, and all them ultimately  
25 approved it, confirming that there were no “violation[s] of existing laws or regulations at the time”

26 <sup>7</sup> While the Regional Board’s Response to Comments suggests that Barclay violated the Dickey  
27 Act, the Revised CAO alleges no such violation. Nor can it. As such, the alleged violations of  
28 the Dickey Act buried in the Response to Comments cannot justify the naming of Barclay on the  
Revised CAO.

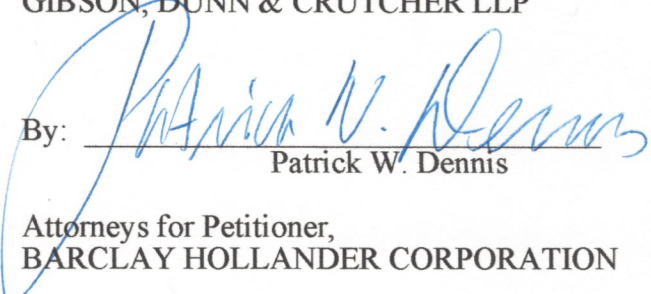
1 Carousel was graded and built in the late 1960s. (See *id.*; U.B.C., § 7014, subd. (c)(1965).) Thus, if  
2 Barclay was a discharger (and it was not), then it was a discharger in compliance with all then-  
3 applicable laws, and is therefore protected by the safe harbor under section 13304(j).

4 **IV. CONCLUSION**

5 For the reasons set forth above, Barclay respectfully requests that the State Board grant this  
6 Petition for Stay, and issue an Order staying the effective date of the Revised CAO until such time as  
7 Barclay's Petition for Review is finally decided or dismissed by the State Board and any appeals are  
8 exhausted.

9 DATED: May 31, 2015

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11  
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13 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

14  
15 In the Matter of Revised Cleanup and  
16 Abatement Order No. R4-2011-0046 Re-  
17 quiring Shell Oil Company and Barclay  
18 Hollander Corporation to Cleanup and  
19 Abate Waste Discharged to Waters of the  
State Pursuant to California Water Code  
Section 13304 at the Former Kast Property  
Tank Farm, Carson, California (File No.  
97-043)

**PETITION FOR (1) CONSIDERATION OF  
EVIDENCE NOT PREVIOUSLY CONSID-  
ERED AND (2) HEARING ON REVISED  
CLEANUP AND ABATEMENT ORDER  
NO. R4-2011-0046 PURSUANT TO TITLE  
23 C.C.R. SECTION 2050.6**



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1 Pursuant to section 2050.6 of title 23 of the California Code of Regulations, Petitioner Bar-  
2 clay Hollander Corporation (“Barclay” or the “Petitioner”) hereby requests that the California State  
3 Water Resources Control Board (the “State Board”) (1) consider evidence not previously considered  
4 by the Los Angeles Regional Water Quality Control Board (the “Regional Board”) and (2) conduct a  
5 hearing to consider testimony, other evidence, and argument In the Matter of Revised Cleanup and  
6 Abatement Order No. R4-2011-0046 Requiring Shell Oil Company and Barclay Hollander Corpora-  
7 tion to Cleanup and Abate Waste Discharged to Waters of the State Pursuant to California Water  
8 Code Section 13304 at the Former Kast Property Tank Farm, Carson, California (File No. 97-043).

### 9 I. INTRODUCTION

10 On April 30, 2015, the Regional Board issued an Amended Cleanup and Abatement Order  
11 (the “Revised CAO”) naming Barclay—which ceased operations decades ago—as a responsible party  
12 for purposes of remediating the Former Kast Property Tank Farm in Carson, California (the “Prop-  
13 erty”). (Ex. A.)<sup>1</sup> The Regional Board issued the decision despite having denied Barclay’s repeated re-  
14 quests to submit additional evidence and to hold an evidentiary hearing. (Ex. HH at p. 2; Ex. N;  
15 Ex. NN; Ex. GG.)

16 The Regional Board’s decision to name Barclay was the result of a fundamentally unfair and  
17 flawed process—paid for by Shell Oil Company (“Shell”), which actually discharged all the contam-  
18 inants at the Property and which is financially motivated and adverse to Barclay, and influenced by  
19 Plaintiffs in parallel civil litigations (the “*Acosta* Plaintiffs” and, separately, the City of Carson)—that  
20 denied Barclay its due process rights under the United States and California Constitutions and its pro-  
21 cedural rights under the California Administrative Procedures Act (“APA”), Govt. Code, §§ 11340 *et*  
22 *seq.* Moreover, the decision to name Barclay is not necessary to protect water quality or ensure a  
23 timely clean-up of the Property, is contrary to existing law, and was done solely to appease Shell and  
24 counsel for the *Acosta* Plaintiffs and the City of Carson. Accordingly, it is not only appropriate, but  
25 necessary, for the State Board to (1) supplement the record with the additional evidence (discussed  
26

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27 <sup>1</sup> Exs. A-D refer to exhibits attached to the Petition for Review, filed concurrently on June 1, 2015.  
28 Exs. E-VVV refer to exhibits attached to the Authenticating Declaration of Patrick W. Dennis,  
filed concurrently on June 1, 2015.

1 below) and (2) conduct a full evidentiary hearing to consider all of the evidence, testimony, and ar-  
2 gument, that the Regional Board ignored.

3 There is no dispute that Shell, not Barclay, discharged all of the petroleum hydrocarbon con-  
4 taminants at the Property. Indeed, the Regional Board rejected Shell’s false claim that Barclay  
5 brought contaminated fill soil onto the Property, finding instead that Barclay was a “discharger” be-  
6 cause it purportedly engaged in activities knowing that those activities “spread [Shell’s] waste” or  
7 “contributed to the migration of [Shell’s] waste.” (Ex. A at p. 10.) That finding, however, is incon-  
8 sistent with the facts, which conclusively establish that nobody involved in the grading of the site  
9 knew that the berms used as fill material contained petroleum. (Ex. TTT at Tab 7, at 188:15-189:1;  
10 Tab 8 at 97:18-98:3; Tab 12 at 42:4-12; Tab 13 at 61:18-62:7; 62:19-22; 109:14-110:11.) The Re-  
11 gional Board’s finding is also inconsistent the plain language of the statute and clearly established  
12 law. (See *Redev. Agency of the City of Stockton v. BNSF Railway Co.* (9th Cir. 2011) 643 F.3d 668  
13 [holding that a defendant that had inadvertently moved petroleum contaminants onto another property  
14 was not a discharger under Water Code Section 13304(a)]; Ex. F at 61:19-62:7.) Further, in an at-  
15 tempt to circumvent the safe harbor under section 13304(j) of the Water Code, the Regional Board  
16 found that Barclay violated certain laws in effect at the time of Barclay’s development of the Proper-  
17 ty—none of which fall within the Regional Board’s purview. Again, this finding is inconsistent with  
18 the facts and the law. (See Wat. Code § 13304(j) [precluding liability for actions taken prior to Janu-  
19 ary 1, 1981 that “were not in violation of existing laws at the time they occurred”].) Indeed, members  
20 of the Prosecution Team testified that they did not know the factual bases for these findings and did  
21 not make them. (Ex. E at 55:2-58:18, 64:5-65:6, 69:20-70:14, 74:5-75:9.)<sup>2</sup>

22 By this Petition, Barclay seeks to submit evidence that the Regional Board declined to consid-  
23 er and/or that has come to light since the Regional Board issued the Revised CAO. While the evi-  
24 dence in the record supports vacating the Revised CAO, Barclay’s supplemental evidence further  
25 confirms that the Regional Board’s findings lack a factual or legal basis. It also clearly shows that  
26 Barclay was denied due process. Evidence obtained since the Revised CAO was issued demonstrates

27  
28 <sup>2</sup> Barclay’s factual and legal arguments are set forth in its Petition for Review of the Revised CAO,  
which is being filed concurrently herewith and which is incorporated herein by reference.

1 that Shell literally paid for the Prosecution Team to conduct the investigation that led to Barclay be-  
2 ing named a discharger. Shell also paid for the Prosecution Team’s time preparing the Revised CAO  
3 and responding to Barclay’s comments. And in meetings and other communications that were not  
4 made part of the public record, the *Acosta* Plaintiffs and the City of Carson, through surrogates, pres-  
5 sured the Regional Board to name Barclay for their own financial gain and their advantage in collat-  
6 eral litigation against Barclay that has nothing to do with water quality. The evidence also demon-  
7 strates that the structure and functioning of the Prosecution and Adjudication Teams were incon-  
8 sistent with due process. While due process requires that two teams remain independent, here that  
9 independence was compromised. Recent testimony shows that Regional Board staff members did not  
10 even know which members were on which teams and that no formalities were followed. And the fact  
11 that the Prosecution Team’s recommendation was made led by Samuel Unger, the Regional Board’s  
12 Executive Officer, who directly supervises Deborah Smith, the leader of the Advisory Team and the  
13 person who issued the Revised CAO, is flatly prohibited by the California Administrative Procedures  
14 Act. (See Govt. Code, § 11425.10, subd. (a)(4) [“During the conduct of administrative proceedings,  
15 the adjudicative function must be separated from the investigative, prosecutorial, and advocacy func-  
16 tions within an agency.”].) Indeed, given her position as Unger’s subordinate, it not remotely surpris-  
17 ing that Smith, in approving the Revised CAO, acted as an additional prosecutor by deleting exculpa-  
18 tory factual findings made by the Prosecution Team and adding new findings of fact and law that the  
19 Prosecution Team did not recommend.

20 Barclay also seeks an evidentiary hearing so that the State Board can hear live testimony from  
21 Barclay’s experts and the Regional Board staff members involved in investigating and issuing the  
22 Revised COA. Even though the State Board recognizes that cleanup and abatement orders are “of an  
23 adjudicative nature” and that full hearing is standard practice (see State Water Resources Control  
24 Board, Office of Chief Counsel, M. A.M. Lauffer Chief Counsel Memorandum (Aug. 2, 2006)), the  
25 Regional Board wrongly denied Barclay’s request for a hearing. The State Board should not make  
26 the same mistake.

27 Accordingly, the State Board should grant Barclay’s petition, consider the supplemental evi-  
28 dence, and conduct a full evidentiary hearing. Anything less would not comport with due process

1 under both the California and United States Constitutions. (*Today's Fresh Start, Inc. v. Los Angeles*  
2 *County Office of Education* (2013) 57 Cal.4th 197, 212, quoting *Armstrong v. Manzo* (1965) 380  
3 U.S. 545, 552; see also *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 546 [“The essen-  
4 tial requirements of due process . . . are notice and an opportunity to respond. The opportunity to  
5 present reasons, either in person or in writing, why proposed action should not be taken is a funda-  
6 mental due process requirement.”]; *Arnett v. Kennedy* (1974) 416 U.S. 134, 178 [“A fundamental re-  
7 quirement of due process is the opportunity to be heard. It is an opportunity which must be granted at  
8 a meaningful time and in a meaningful manner,” internal citations omitted].)

## 9 II. PROCEDURAL BACKGROUND

10 Barclay should not be penalized for having obeyed the rules. By refusing to consider Bar-  
11 clay’s supplemental evidence and to hold a full evidentiary hearing prior to issuing the Revised CAO,  
12 the Regional Board did just that. In her letter denying Barclay’s requests, Smith represented that  
13 Barclay had numerous opportunities to submit evidence. Frances McChesney, counsel for the Prose-  
14 cution Team, made the same representation in a memorandum to Smith. But the record is clear that  
15 Barclay had only two opportunities to provide comments and submit evidence once the Regional  
16 Board circulated a proposed draft CAO naming Barclay in October 2013—one of which was limited  
17 to responding to Shell’s belated comments. In each instance, Barclay timely submitted comments  
18 and evidence, all of which were on the record and publicly available. By contrast, other interested  
19 parties—such the *Acosta* Plaintiffs and Shell—routinely communicated with, and funneled infor-  
20 mation to, the Prosecution Team outside the comment period. In fact, in some instances these finan-  
21 cially-motivated advocates were directly encouraged by Unger to provide comments to him outside  
22 of the formal comment period. Barclay had no notice of, or opportunity to respond to, these non-  
23 public communications. Nor has Barclay ever been given an opportunity to respond to the new find-  
24 ings included for the first time in the Revised CAO that was issued in April 2015.

### 25 A. There Were Only Two Comment Periods, One Of Which Was Limited In Scope.

26 On October 31, 2013, the Regional Board circulated a Notice of Opportunity to Submit  
27 Comments on Proposed Draft Order in the in the Matter of Cleanup and Abatement Order No. R4-  
28 2011-0046, Former Kast Property Tank Farm (SCP No. 1230, Site ID No. 2040330, File No. 11-043)

1 (the “Draft Order”)—the first, and only, public comment period that was not limited in scope.  
2 (Ex. J.) The Draft Order proposed to name Barclay as a party based on the Prosecution Team’s find-  
3 ing that Barclay knowingly spread waste on the Property. (Ex. C at p. 11.) On January 21, 2014,  
4 Gibson Dunn timely submitted comments and evidence on behalf of Barclay, setting forth the factual  
5 and legal reasons why Barclay cannot be held responsible for the contamination at the Property and  
6 should not be added to the CAO—a response specifically directed at the proposed findings in the  
7 Draft CAO. (Ex. TTT.) No other party provided comments while this comment period was open.<sup>3</sup>

8         Nearly four months after the comment period closed and just after Shell had sued Barclay to  
9 recover its cost of complying with the Regional Board’s orders, on May 14, 2014, members of the  
10 Prosecution Team secretly met with representatives of Shell to discuss “the Dole issue.” (Ex. F at  
11 185:24-187:1; *id.* at Ex. 14.) At the off-the-record meeting, Shell’s experts apparently tried “to refute  
12 the [upward migration] hypothesis” of Barclay’s expert, Jeffrey Dagdigian. (*Id.* at 189:3-8.) Two  
13 weeks later, on June 3, 2014, the Regional Board reopened the comment period specifically “to pro-  
14 vide an opportunity for Shell to submit comments.” (Ex. S at p. 4); Ex. T.) The notice specifically  
15 stated that “[c]omments that are outside the scope of this notice or after the deadline *will not be con-*  
16 *sidered or included in the record for this matter.*” (Ex. T, italics added.) The comment period ended  
17 on June 16, 2014, with Barclay having the opportunity to “submit responses to any com-  
18 ments/evidence received by June 16, 2014 to the Regional Board” by June 30, 2014. (*Ibid.*) Thus,  
19 Barclay’s opportunity to comment was limited to only the issues raised by Shell, the only party that  
20 submitted comments prior to June 16, 2014. Consistent with the Regional Board’s direction, Barclay  
21 submitted comments on June 30, 2014, which responded to the narrow issues raised by Shell. (Ex.  
22 U)

23         In contrast to Barclay’s limited opportunities to provide comments, Unger, Executive Officer  
24 of the Regional Board and purported leader of the Prosecution Team comprised of selected Site  
25 Cleanup Program staff (the “SCP staff”), told a consultant hired by counsel for the *Acosta* Plaintiffs  
26 and the City of Carson, after the close of the official comment period on June 30, 2014, that he could

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27 <sup>3</sup> While the Regional Board initially set the comment period to close on December 6, 2013, it was  
28 subsequently extended at Barclay’s request, ultimately closing on January 21, 2014. (Ex. L at p.  
1; Ex. O at pp. 1-2.)

1 “talk [with Unger] whenever [he] wish[ed]” (Ex. E at Ex. 15 at PRA-RWQCB-007029), which the  
2 consultant did. (*Id.*, Ex. E at Exs. 14 & 16.) The secret communications between Unger and the  
3 *Acosta* Plaintiffs’ consultant were never made part of the public record, depriving Barclay of any op-  
4 portunity to respond.

5 **B. The Prosecutorial Staff Recommends Naming Barclay As A Responsible Party, Submit-**  
6 **ting a Revised Draft CAO Containing Findings That Were Not Previously Disclosed.**

7 On December 8, 2014, the Regional Board released a Memorandum from Unger to Deborah  
8 Smith, Chief Deputy Executive Officer. (Ex. S.) The Memorandum recommended that Smith, who  
9 reports to Unger, approve and issue a Draft CAO (the “Revised Draft CAO”), even though it had  
10 been changed from the version submitted for public comment over a year earlier. (*Id.* at pp. 5.) For  
11 example, the Revised Draft CAO included a new finding that Barclay’s “actions that resulted in cre-  
12 ating pollution and nuisance were unlawful since at least 1949” based on section 5411 of the Health  
13 and Safety Code. (Ex. D at p. 11 & fn. 9.) Notwithstanding, Unger recommended that Smith issue  
14 the Revised CAO on January 9, 2015. (Ex. S at p. 5.)

15 **C. Barclay’s Requests To Submit Supplemental Evidence and for a Hearing Are Denied.**

16 On December 24, 2014, Gibson Dunn, on behalf of Barclay, wrote Smith, asking to  
17 “(1) submit additional critical evidence, that was previously unavailable, and that must be considered  
18 by [the Regional Board] before making any decision on this issue; and 2) schedule a formal hearing  
19 before you in order to give Barclay an opportunity to present the key evidence directly to you and to  
20 explain why Barclay is not a “discharger” under the Water Code.” (Ex. HH at p. 2.) On January 6,  
21 2015, Gibson Dunn, on behalf of Barclay, submitted another letter, this time explaining in greater de-  
22 tail the importance of the new evidence, attaching that evidence, and repeating its request for a hear-  
23 ing. (Ex. N.) On January 15, 2015, Frances McChesney wrote to Smith, stating that she had no opin-  
24 ion on whether Smith should hold a hearing, but that she opposed the consideration of any additional  
25 evidence. (Ex. MM.) Remarkably, McChesney stated that Barclay should have submitted the new  
26 evidence in the fall of 2014, *after* the close of the official comment period. (*Id.* at p. 2.) On January  
27 16, 2015, Gibson Dunn, on behalf of Barclay, submitted another letter, clarifying the scope of its re-



1 quest that the Regional Board to consider additional evidence and repeating the request for a hearing.  
2 (Ex. NN.)

3 On February 27, 2015, Smith denied Barclay’s request to supplement the records with one ex-  
4 ception; she granted Barclay’s request that the record be supplemented to include George Bach’s No-  
5 vember 2014 deposition, which included testimony refuting a prior unsworn statement that the Prose-  
6 cution Team improperly relied upon as evidence. (Ex. GG at pp. 1-2.) Smith also denied Barclay’s  
7 requests for a hearing. (*Id.*) These denials were premised on Smith’s conclusion that the new evi-  
8 dence would create “additional delay and burden” and that a hearing would “result in the needless  
9 presentation of cumulative evidence.” (*Id.* at p. 2.) Nevertheless, Smith indicated that she would  
10 consider Barclay’s request to supplement the record with testimony from certain Prosecution Team  
11 members, including Unger, who were scheduled to be deposed in the *Acosta* Litigation. (*Id.* at p. 3.)  
12 But despite Barclay’s request to hold off on issuing a decision until those depositions were completed  
13 (Ex. XX), Smith went ahead and issued the Revised CAO one week *before* those depositions were  
14 scheduled to take place. Without notice to Barclay, the Revised CAO included new findings that  
15 were not contained in either the 2013 Draft CAO or the Revised Draft CAO, including findings that  
16 Barclay violated provisions of the Fish and Game Code and the Los Angeles County Code. (See  
17 Ex. A at p. 11, fn. 14.) Barclay was never given an opportunity to be heard on Smith’s new findings  
18 before she issued the order.

19 **D. New Evidence Is Obtained In Response To Subpoenas Issued To The Regional Board In**  
20 **The *Acosta* Litigation**

21 In the *Acosta* Litigation, the Plaintiffs have designated four members of the Prosecution  
22 Team—Ayalew, Rasmussen, Williams, and Unger—as “non-retained” experts. (Ex. EE; Ex.RRR.)  
23 As a result, on January 8, 2015, Barclay served subpoenas on those individuals, seeking their deposi-  
24 tions and associated documents. Among other things, Barclay sought documents “reflecting, summa-  
25 rizing or recording time [the Regional Board] spent on work related to the REVISED CAO, includ-  
26 ing, but not limited to, electronic or hardcopy entry sheets generated for the purpose of recording  
27 such time.” (Ex. LLL.) Barclay received documents in response to those subpoenas on May 4, 2015,  
28

1 May 8, 2015, May 18, 2015, and May 19, 2015.<sup>4</sup> Barclay also took the depositions of Ayalew on  
2 May 6, 2015 and Unger on May 11, 2015. (Ex. F; Ex. E.)

3 These documents and depositions have uncovered new evidence confirming that the Revised  
4 CAO was the product of a flawed and unfair process. For example, this discovery has revealed that  
5 Shell has reimbursed the Regional Board for the Prosecution Team’s efforts in investigating and  
6 naming Barclay as a responsible party. (See Ex. DDD; see also Ex. G; Ex. H; & Ex. I.) And the  
7 deposition testimony of the Prosecution Team members confirms that the findings made in the Re-  
8 vised CAO lack any factual basis. (Ex. F at 73:10-74, 74:18-76:16, 159:6-9, 243:22-244:5, 84:15-22,  
9 229:22-230:5, 109:18-110:3, 166:17-20; Ex. E at 217:14-20, 97:8-14, 232:20-233:15, 234:7-10,  
10 235:5-12.) Those depositions also confirmed that the Regional Board failed to maintain the constitu-  
11 tionally required separation between the Prosecution and Adjudicative Teams. (Ex. E at 39:13-20.)

12 Barclay anticipates obtaining further exculpatory evidence from the Regional Board. The Re-  
13 gional Board continues to withhold responsive documents and has refused to make the other mem-  
14 bers of the Prosecution Team available for deposition. Those issues will be the subject of additional  
15 motion practice in the near future.

### 16 III. ARGUMENT

#### 17 A. THE STATE BOARD SHOULD CONSIDER THE SUPPLEMENTAL EVIDENCE

18 The State Board should consider the supplemental evidence. A party petitioning the State  
19 Board to review a Regional Board order may request “that the state board consider evidence not pre-  
20 viously provided to the regional board.” (23 Cal. Code of Regs. § 2050.6(b).) The request must be  
21 supported by “a statement that additional evidence is available that was not presented to the regional  
22 board or that evidence was improperly excluded by the regional board.” (*Ibid.*) Here, Barclay is ask-  
23 ing the State Board to consider two categories of evidence: (1) evidence that Barclay asked Smith to  
24 consider, but which she refused to consider in her February 27, 2015 letter; and (2) evidence that

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25  
26 <sup>4</sup> Separately, on December 29, 2014, Barclay made a request pursuant to the Public Records Act  
27 (“PRA”) for various categories of documents related to the Prosecution Team’s recommendation  
28 to name Barclay as a responsible party. (Ex. VVV.) Barclay received documents in response to  
its PRA request on February 11, 2015 and March 6, 2015. (Dennis Decl., ¶ 39.) The Regional  
Board later asked that the documents it produced in response to the PRA request also be consid-  
ered responsive to Barclay’s subpoena, and Barclay agreed.

1 Barclay has obtained since Smith's February 27, 2015 letter. The first category of evidence should  
2 be considered because it is highly probative and directly responsive to Regional Board's erroneous  
3 findings. The second category should be considered because it consists of evidence that the Regional  
4 Board produced and/or made available only *after* Smith refused to receive any more evidence.

5 **1. The State Board Should Consider the Evidence That Was Submitted to the Re-**  
6 **gional Board, But Rejected by Smith.**

7 Following the December 8, 2014 recommendation by the Prosecution Team, Barclay request-  
8 ed that the Regional Board consider "additional critical evidence[] that was previously unavailable."  
9 (Ex. HH; Ex. N.) Specifically, Barclay submitted the following evidence:

- 10 • The November 19, 2014 deposition transcript of George Bach (the "Bach Deposition Tran-  
11 script")—the individual who supervised the dismantling of the reservoirs and grading ef-  
12 forts on the Property;
- 12 • The November 14, 2014 expert report of Jeffrey V. Dagdigian, Ph.D. (the "Dagdigian Re-  
13 port") in *Adelino Acosta, et al. v. Shell Oil Co., et al.*, Case No. NC053643 and related cas-  
14 es (the "*Acosta* Litigation");
- 14 • The December 22, 2014 rebuttal report of Jeffrey Dagdigian, Ph.D. in the *Acosta* Litigation  
15 (the "Dagdigian Rebuttal Report");
- 15 • The November 14, 2014 expert report of Charles R. Faust, Ph.D., P.G. in the *Acosta* Litiga-  
16 tion (the "Faust Report");
- 17 • The July 7, 2014 deposition transcript of F. Edward Reynolds, Jr., RCE (the "Reynolds  
18 Transcript");
- 18 • The March 7, 2014 expert report of Charles R. Faust, Ph.D., P.G. in the *Acosta* Litigation  
19 (the "Faust Rebuttal Conduct Report");
- 20 • The March 7, 2014 rebuttal expert report of Mark Armbruster in the *Acosta* Litigation (the  
21 "Armbruster Report");
- 21 • The March 7, 2014 rebuttal expert report of William R. Brasher in the *Acosta* Litigation  
22 (the "Brasher Report"); and
- 23 • Various documents from the Los Angeles Regional Planning Commission and Los Angeles  
24 County Board of Supervisors that formed the basis for Armbruster's and Brasher's opin-  
25 ions.

25 (Ex. N.) With the exception of the Bach Deposition Transcript, the Regional Board refused to con-  
26 sider this evidence. (Ex. GG.) And even as to the Bach Deposition Transcript, there is no indication  
27 in the Revised CAO that Smith actually considered it.

1 The State Board should consider this evidence because it directly refutes the findings set forth  
2 in the Revised CAO. The expert reports of Dr. Dagdigian and Dr. Faust directly contradict the Re-  
3 gional Board’s theory regarding the dispersal of contamination on the Property, including new infor-  
4 mation that was not available when previous expert declarations were submitted to the Regional  
5 Board in January and June 2014. Likewise, the reports and/or testimony of Faust, Reynolds, Arm-  
6 bruster, and Brasher establish that the activities conducted by Barclay at the Property fell within the  
7 applicable standard of care at the time—refuting the Regional Board’s findings that Barclay violated  
8 the law. These opinions had not been created during the initial comment period. (See Ex. C.) Nor  
9 were they within the subject matter of the second comment period. (See Ex. T.) And public com-  
10 ments were not permitted outside those time periods. (Ex. C at p. 2; Ex. T.) Accordingly, this evi-  
11 dence could not have been submitted prior to the Prosecution Team’s December 8, 2014 recommen-  
12 dation.

13 **2. The State Board Should Consider Evidence Gathered Since Smith’s Letter.**

14 As a result of the subpoenas issued to members of the Prosecution Team in the *Acosta* Litiga-  
15 tion, Barclay has obtained highly probative evidence that was unavailable prior to the February 27,  
16 2015 letter from Smith denying the submission of any new evidence, some of which did not become  
17 available until after issuance of the Revised CAO. Moreover, the Regional Board’s new findings  
18 have cast a new light on previously existing evidence, making it highly relevant to Barclay’s defense.  
19 Thus, Barclay requests that the State Board consider the following evidence:

- 20 • The May 6, 2015 deposition transcript of Prosecution Team member Teklewold Ayalew,  
21 including all exhibits thereto (Ex. F);
- 22 • The May 11, 2015 deposition transcript of Prosecution Team leader Unger, including all  
23 exhibits thereto (Ex. E);
- 24 • All Regional Board time records and all invoices sent to Shell, which show that Shell re-  
25 imbursemented the Regional Board for the time spent investigating and naming Barclay (Exs. G,  
26 H, I, & DDD);
- 27 • The May 14, 2014 sign in sheet for the “Dole” meeting between the Regional Board Pros-  
28 ecution Team and Shell representatives where Shell attempted to refute Dr. Dagdigian’s  
theories (Ex. JJJ);
- Plaintiffs’ Disclosure of Expert Witness Information (Phase II of III – Movement of Con-  
taminants, exposure and dose issue) Pursuant to §2034.260(b), served on November 14,  
2014 (Ex. EE);

- 1 • Plaintiffs’ Supplemental Disclosure of Expert Witness Information (Phase II of III –  
2 Movement of Contaminants, exposure and dose issue) Pursuant to §2034.260(b), served  
on December 22, 2014 (Exs. FF, RR, & SS);
- 3 • Plaintiffs’ Disclosure of Expert Witness Information (Phase III of III – General Medical  
4 Causation, Specific Causation, and Damages Issues) (Ex. RRR);
- 5 • Declarations of Christopher Aumais filed in in support of Plaintiffs Opposition to Devel-  
6 oper Defendants’ Motion for Summary Adjudication on Statute of Repose (Exs. YY,  
CCC);
- 7 • A January 22, 2015 Declaration of Robert Finnerty in support of Plaintiffs Opposition to  
Developer Defendants’ Motion for Summary Adjudication on Statute of Repose (Ex. TT);
- 8 • A January 22, 2015 Declaration of Professor Henry Koffman in Support of Plaintiffs Op-  
9 position to Developer Defendants’ Motion to Exclude Testimony of H. Koffman (Ex.  
UU);
- 10 • A January 22, 2015 Declaration of Nicholas P. Cheremisinoff in Support of Plaintiffs Op-  
11 position to Developer Defendants’ Motion to Exclude Testimony of N. Cheremisinoff  
(Ex. VV);
- 12 • A January 23, 2015 Supplemental Declaration of Alan D. Wallace in Support of Plaintiffs  
13 Opposition to Developer Defendants’ Motion for Summary Adjudication on Statute of  
Repose (Ex. WW);
- 14 • The November 10, 2014 settlement agreement between Girardi Keese and Shell in the  
15 *Acosta* Litigation (Ex. Z);
- 16 • The November 10, 2014 settlement agreement between the City of Carson and Shell in  
*City of Carson v. Shell Oil Co., et al.*, Case No. BC499369 (Ex. AA);
- 17 • The January 16, 2015 deposition transcript of Shell’s corporate designee William Platt,  
18 who testified regarding the relationship between implementation of the RAP and the par-  
ties obligations under the settlement (Ex. GGG);
- 19 • The February 19, 2015 Order Granting Shell Oil Company and Equilon Enterprises LLC’s  
20 Motion for Determination of Good Faith Settlement in the *Acosta* Litigation (Exs. EEE,  
FFF);
- 21 • The initial and amended complaints filed by Shell in *Shell Oil Co. v. Barclay Hollander*  
22 *Corp., et al.*, Case No. BC544786 (the “*Shell* Litigation) (Ex. P);
- 23 • The Notice of Rulings Re: July 2, 2014 Initial Status Conference in the *Shell* Litigation,  
which sets forth the terms of the current discovery stay in that litigation (Ex. ZZ);
- 24 • The concurrently filed herewith declaration of the Jeffrey Dagdigian, which, among other  
25 things, responds to Unger and Ayalew deposition testimony, responds to the Prosecution  
Team’s Responses to Comments, explains his 3-D modeling report (which the Regional  
26 Board excluded), and opines that the requirements of the RAP exceed what is necessary to  
remediate the Property and all exhibits attached thereto or referenced therein (the “Dag-  
27 digian Declaration); and
- 28 • Any other exhibits attached to the Dennis Authenticating Declaration filed contemporane-  
ously herewith that are not specifically addressed above or part of the administrative rec-  
ord so far.

1 This evidence is directly relevant to issues raised in Barclay’s Petition for Review and Peti-  
2 tion for Stay. The deposition testimony of Ayalew and Unger, as well as time logs, invoices, and  
3 payment records, establish that Shell reimbursed the Regional Board for the Prosecution Team’s ef-  
4 forts in investigating and naming Barclay. Indeed, Ayalew testified that “[w]henever [he] work[s] on  
5 the [Kast Property Tank Farm] project,” “Shell is paying for [it].” (Ex. F at 179:8-180:1, italics  
6 added.) Likewise, Ayalew and Unger testified that they are unaware of any factual basis for the new  
7 findings added both in the Draft Revised CAO and the Revised CAO. (See *id.* at 73:10-74, 74:18-  
8 76:16, 159:6-9, 243:22-244:5, 84:15-22, 229:22-230:5, 109:18-110:3, 166:17; Ex. E at 213:2-217:20,  
9 97:8-14, 232:20-233:15, 234:7-10, 235:5-12.) And the exhibits used in the Ayalew and Unger depo-  
10 sitions, along with information regarding Representative Hahn’s funding, demonstrate that outside  
11 parties influenced the decision to name Barclay in the Revised CAO.

12 Other documents relate to the likely misuse of the Revised CAO by the *Acosta* Plaintiffs and  
13 Shell in litigation against Barclay. For example, the *Acosta* Plaintiffs’ expert designations and expert  
14 declarations demonstrate their intent to misuse the Prosecution Team’s findings in the *Acosta* Litiga-  
15 tion, both by designating individual Prosecution Team members as non-retained expert witnesses and  
16 by having their retained experts rely on the Prosecution Team’s findings. And the declarations by  
17 counsel for the *Acosta* Plaintiffs demonstrate that they intend to rely on the Prosecution Team’s find-  
18 ings as substantive evidence in that case. Similarly, the Amended Complaint in Shell’s indemnity  
19 action against Barclay shows that Shell is likely to misuse the Revised CAO in that action as well.  
20 As such, all of this evidence is directly relevant to Barclay’s concurrently filed stay petition.

21 The various settlement agreements, in which the *Acosta* Plaintiffs and the City of Carson  
22 agreed to “cooperate in good faith” with approval and implementation of the RAP (Ex. Z at § 3.6; Ex.  
23 AA at § 3.5), as well as the testimony of Platt, Shell’s corporate designee, that the settlements includ-  
24 ed “claims relating to implementation of the RAP” (Ex. GGG at 91:20-23), demonstrate that the  
25 *Acosta* Plaintiffs and the City of Carson have consented to the RAP as part of a global settlement  
26 with Shell. The relationship between the RAP and these settlement agreements is also confirmed by  
27 the trial court’s good faith order, which found that Shell’s promise to implement the RAP was part of  
28 the *Acosta* Plaintiffs’ consideration. (Ex. EEE; Ex. FFF at p. 1) And the Dagdigian Declaration con-

1 firms that the RAP goes well beyond what is necessary to remediate the Property, at greater cost, than  
2 is necessary. (Dagdigian Decl. at ¶¶ 50-52.)

3 Because this evidence relates to issues that did not fully materialize until the Regional Board  
4 issued the Revised CAO and/or may relate to Barclay's request for a stay, the State Board should al-  
5 low Barclay to supplement the record.<sup>5</sup> The failure to do so would be a violation of Barclay's due  
6 process rights. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Education, supra*, 57  
7 Cal.4th at p. 212; *Arnett v. Kennedy, supra*, 416 U.S. at p. 178.)

8 **B. BARCLAY IS ENTITLED TO A FULL EVIDENTIARY HEARING.**

9 A party petitioning the State Board to review a Regional Board order may request "a hearing  
10 to consider testimony, other evidence and argument." (23 Cal. Code of Regs. § 2050.6(b).) The re-  
11 quest must be "supported by a summary of contentions to be addressed or evidence to be introduced."  
12 (*Ibid.*) Additionally, the party requesting the hearing must make "a showing why the contentions or  
13 evidence have not been previously or adequately presented." (*Ibid.*)

14 A hearing is necessary here for four reasons.<sup>6</sup> First, a hearing is necessary because the State  
15 Board needs to hear from the Regional Board staff members who investigated Barclay, who recom-  
16 mended naming Barclay, and who issued the Revised CAO. This includes Sam Unger, Teklewold  
17 Ayalew, Paula Rasmussen, Frances McChesney and Deborah Smith. As discussed above, since the  
18 Revised CAO was issued, Barclay has obtained evidence in the *Acosta* Litigation demonstrating that,  
19 under the guise of "cost recovery," the Prosecution Team was reimbursed by Shell for investigating

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21 <sup>5</sup> Relatedly, Barclay is continuing to pursue discovery from the Regional Board in the *Acosta* Liti-  
22 gation. To date, the Regional Board has refused to produce hundreds of documents relating to the  
23 investigation and naming of Barclay on the grounds that they are protected from disclosure by the  
24 attorney-client privilege although no privilege log with those documents has been produced. Bar-  
25 clay believes documents have been improperly withheld and intends to file a motion challenging  
26 those privilege claims. Likewise, Barclay is continuing to pursue depositions from other mem-  
27 bers of the Prosecution Team, including Frances McChesney, the Prosecution Team's counsel,  
28 who according to testimony of Unger was the only one responsible for making certain findings  
that Barclay is challenging. (Ex. E at 56:25-57:2; 64:18-65:11.) The Regional Board has also  
yet to produce time entries for 2015. Barclay anticipates that it will obtain this discovery in the  
coming months and requests that the State Board allow it to supplement the record once it is ob-  
tained.

<sup>6</sup> Barclay's contentions are set forth in detail in its concurrently filed Petition for Review, which is  
incorporated herein by reference.

1 and naming Barclay as a discharger. (Exs. G, H, I, & DDD.) Likewise, Barclay has obtained evi-  
2 dence that the Regional Board showed favoritism to Shell and the *Acosta* Plaintiffs—including  
3 through *ex parte* communications with representative of both Shell and the *Acosta* Plaintiffs. (See,  
4 e.g., Ex. E, at 13, 14, 15, 16; Ex. S.) Additionally, the deposition testimony of Ayalew and Unger  
5 indicates the Regional Board failed to properly separate its prosecutorial and investigative functions.  
6 (Ex. E. at 35:22-36:1 [“Q Is there any -- is there anything in writing that established the prosecutorial  
7 team here? A memo, an email, something like that that said we're going to have a prosecutorial team  
8 and here's what it is? A Not that I can recall.”]; 37:21-24 [“Q Was there any written instruction issued  
9 to the de facto prosecution team not to have conversations with Ms. Smith? A Not that I can recall.”];  
10 Ex. F at 35:22-36:1 [“Q. Did you get anything in writing instructing you that there was going to be a  
11 prosecutorial team to consider naming Barclay in this matter? A. Not that I can recall, no.”].)

12 The State Board needs to know why Unger, the lead prosecutor, appointed a direct subordi-  
13 nate as the adjudicator and failed to follow any formalities in creating and separating the Prosecution  
14 and Adjudicative Teams. The State Board needs to know why Unger was secretly soliciting com-  
15 ments critical of Barclay from a consultant for the *Acosta* Plaintiffs. The State Board needs to know  
16 why Unger was communicating with members of Janice Hahn’s staff. The State Board needs to  
17 know from Unger and McChesney why the Prosecution Team, including McChesney herself, be-  
18 lieved it was appropriate to use the cost recovery program to charge Shell for their time investigating  
19 and naming Barclay on the order and at Shell’s request. The State Board needs to why McChesney  
20 added new purported violations of law to the Revised Draft CAO. And the State Board needs to  
21 know why Deborah Smith deleted exculpatory factual findings and added new purported violations of  
22 law to the Revised CAO before issuing it—all without notice to Barclay.

23 Second, a hearing is necessary because the Regional Board refused to consider key exculpatory  
24 evidence, such as evidence that Barclay did not violate existing laws when it redeveloped the  
25 Property and eyewitness and expert testimony demonstrating that Barclay had no knowledge that fill  
26 material was potentially contaminated. Further, the Regional Board refused to consider a 3-D model-  
27 ing report prepared by Jeffrey Dagdigian, Ph.D., which conclusively demonstrates that the current  
28 distribution of oil contaminants on the Property could not have been the result of Barclay’s activities.



1 (Ex. GG at p. 11.) Likewise, the Regional Board refused to consider a report by Dr. Charles Faust, a  
2 highly regarded hydrogeologist with expertise in the movement of chemicals in the vadose zone. (*Id.*  
3 at 13.) In his report, Dr. Faust provides a cogent and compelling explanation for the vertical and lat-  
4 eral movement of petroleum hydrocarbons at the Property. (*Id.*) In addition, the Regional Board re-  
5 fused to consider deposition transcripts from standard of care experts designated by both Barclay and  
6 the *Acosta* Plaintiffs in the *Acosta* Litigation, which demonstrate that Barclay complied with the ap-  
7 plicable standard of care and applicable regulations when it redeveloped the Property—directly refut-  
8 ing the Regional Board’s findings that Barclay violated existing regulations. All of this evidence  
9 needed to be considered, but was not.

10 Third, a hearing is necessary to “meet the requirement of fairness.” (*In the Matter of Project*  
11 *Alpha*, State Board Order No. WQ 74-1, at \*3.) Fairness requires “a factual and legal basis in the  
12 record for [the Regional Board’s] decision,” which “must indicate its reasoning and the factual basis  
13 for its decision to the affected parties.” (*In the Matter of Project Alpha*, State Board Order No. WQ  
14 74-1, at \*3.) The Revised CAO does not satisfy these requirements, and a hearing is therefore neces-  
15 sary to identify the factual and legal basis—if any—for the Revised CAO.

16 Finally, the State Board’s own policies require a formal hearing in adjudicative proceedings.  
17 (Ex. KK). The issuance of a CAO is unquestionably an adjudicative proceeding. (See *ibid.*) The  
18 Regional Board’s refusal to hold a hearing violated the State Board’s own policy, which requires, at a  
19 minimum, the State Board to hold one here.

20 For all of these reasons, a full evidentiary hearing before the State Board is required here, and  
21 it should be structured to allow Barclay to put on all of its evidence, regardless whether it was evi-  
22 dence that was put in front of the Regional Board, or new evidence that the State Board allows into  
23 the record. A failure to conduct a hearing will deprive Barclay of its due process rights under the  
24 California and United States Constitutions. (See *Today’s Fresh Start, Inc. v. Los Angeles County Of-*  
25 *fice of Education, supra*, 57 Cal.4th at p. 212; *Arnett v. Kennedy, supra*, 416 U.S. at p. 178.)

#### 26 IV. CONCLUSION

27 For the foregoing reasons, the State Board should grant Barclay’s petition to (1) consider evi-  
28 dence not previously considered by the Regional Board and (2) conduct a hearing to consider testi-

1 mony, other evidence, and argument In the Matter of Revised Cleanup and Abatement Order No. R4-  
2 2011-0046 Requiring Shell Oil Company and Barclay Hollander Corporation to Cleanup and Abate  
3 Waste Discharged to Waters of the State Pursuant to California Water Code Section 13304 at the  
4 Former Kast Property Tank Farm, Carson, California (File No. 97-043).

5 DATED: May 31, 2015

6 GIBSON, DUNN & CRUTCHER LLP

7  
8 By:   
Patrick W. Dennis

9 Attorneys for Petitioner,  
10 BARCLAY HOLLANDER CORPORATION

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