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8 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
9 **CENTRAL VALLEY REGION**
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13 In the Matter of Malaga County Water
14 District, Wastewater Treatment Facility
(WTTF))
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Administrative Civil Liability Complaint
No. R5-2013-0527

DATE: July 25 and 26, 2013
TIME: 8:30 A.M.
PLACE: 11020 Sunsetter Dr., Suite
200, Rancho Cordova CA

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF APPLICATION OR MOTION FOR SEPARATE PRIOR HEARING
ON (1) LATCHES DEFENSE; AND (2) OBJECTIONS TO EVIDENCE;
(3) DECLARATION OF INVALIDITY OF HEARING PROCEDURE FOR
ADMINISTRATIVE LIABILITY COMPLAINT R5-2013-0527 ISSUED TO
MALAGA BY "PROSECUTION TEAM" AND ESTABLISHMENT OF
A HEARING PROCEDURES CONSISTENT WITH STATUTE AND DUE
PROCESS OF LAW AND PRE-HEARING BRIEF IN RESPONSE TO
ADMINISTRATIVE LIABILITY COMPLAINT (ALC) SUBMITTED
SUBJECT TO THE FOREGOING MOTION AND OBJECTIONS**

1 Malaga County Water District, a county water district, organized and existing under
2 Water Code §31000 et seq submits the following Memorandum of Points and Authorities
3 in Support of its application and motion for the above specified orders and in response to
4 the ACL, subject to the application and motion and objections submitted herewith providing
5 the legal and factual basis for the aforesaid application and motion and response to the
6 ALC.

7 I. INTRODUCTION

8 This is a proceeding commenced by a complaint issued by Pamela C. Creedon
9 (Creedon) Executive Officer of the Central Valley Regional Water Quality Control Board
10 (Regional Board) on May 1, 2013. The complaint alleges that on July 8, 2010,
11 unidentified Regional Board "staff" issued a Notice of Violation (NOV) and Draft Record
12 of Violations (ROV) for 20 effluent limitation violations allegedly occurring between
13 March 14, 2008 and January 31, 2010. The NOV was responded to, according to the
14 complaint, by Malaga's "legal counsel" on January 22, 2010. (Complaint p. 2, ¶¶8 and
15 9). It alleges that on November 5, 2010, a "revised NOV and ROV identifying 15
16 effluent limitation violations occurring between the same dates (March 14, 2008 to
17 January 31, 2010) and that legal counsel responded to this NOV/ROV on January 6,
18 2011. The complaint alleges that on December 9, 2011 staff issued a NOV with an
19 updated draft ROV for alleged effluent violations occurring between March 14, 2008
20 and October 30, 2011. This NOV was again responded to by legal counsel on January
21 3, 2012. (Complaint p. 2, ¶¶10-13).

22 The complaint alleges Malaga's "self monitoring reports covering the period
23 from" February 1, 2004 through March 13, 2008 show eight violations of limitations,
24 three of which are allegedly subject to mandatory minimum penalties (MMP's) pursuant
25 to, presumably, the provisions of Water Code (WC) 13385 and alleges that "Attachment
26 A" "summarizes these violations". Attachment A specifies purported violations the
27 Executive Officer claims are subject to MMP's beginning not in 2004 but on August 9,
28 2007 three of which are specified as "exempt" and continuing to March 31, 2008, the

1 remaining four of which are specified as "chronic" in the Attachment A. The complaint
2 further alleges that according to Malaga's "self-monitoring reports covering the period
3 from" March 14, 2008 through December 31, 2012 there were "25 violations of effluent
4 limitations" 21 of which are allegedly subject to "MMP's". Attachment A to the complaint
5 purportedly summarizes these violations. The attachment lists 24 dates and purported
6 descriptions of violations, occurring on those dates, four of which are characterized in
7 the attachment as "exempt". Contrary to the allegation made by Creedon that these
8 violations occur "through" December 31, 2012, the violation dates listed begin with April
9 18, 2008 and conclude on March 30, 2011. There is no violation alleged to have
10 occurred on any date after March 30, 2011 and the allegation in the complaint, is
11 according to the attachment, demonstrably false.

12 ¶31 of the complaint alleges that under WC §13385(l), the "Executive Officer"
13 Creedon, "proposes assessment" of a "administrative civil liability in the amount of
14 \$72,000" as "MMP's that occurred from 1 February 2004 through 31 December 2012"
15 and ostensibly identified an Attachment A to the complaint. As noted, however, the
16 attachment identifies purported violations occurring between August 9, 2007 and March
17 30, 2011, only.

18 The responses by "legal counsel" to each and all of the NOV/ROV's referred to
19 in the complaint are dated July 21, 2010 (in response to the July 8, 2010 NOV),
20 January 5, 2011, (in response to the November 5, 2010 NOV), and December 30,
21 2011, (in response to the December 9, 2011 NOV) (staff exhibits 7 through 12
22 inclusive). Each and every one of the NOV's states that following submission of the
23 requested response by the date specified, and on which the response was made, the
24 Regional Board "plan(s) to incorporate the referenced violations", all of which appear on
25 an Attachment A into a complaint. Never once was any of legal counsel's responses
26 ever responded to by Regional Board Staff. (See Declaration of Neal E. Costanzo).
27 Nor did any administrative liability complaint issue following Regional Board's receipt of
28 these responses. (Id).

1 Curiously, although the complaint refers to and apparently relies upon the
2 notices of violation issued between July 8, 2010 and December 9, 2011, no mention is
3 made in the complaint, and no evidence submitted by the Prosecution Team refers to
4 the more recent notices of violation issued by Regional Board Staff and responded to
5 by legal counsel on April 12, 2012 and May 10, 2012, respectively. The response to
6 that NOV dated May 10, 2012 (Costanzo Decl. Exhibit B) was responded to, not by the
7 staff that issued it but by a staff counsel of the State Water Resources Control Board
8 (State Board) on May 17, 2012. The impertinent and meaningless response by Staff
9 Counsel was responded to on May 23, 2012. (Costanzo Decl. Exhibit C and D). Less
10 curiously, but even more deceptively, not mentioned in the complaint is Creedon's July
11 7, 2010 letter demanding payment for the 'outstanding balance' of administrative civil
12 liability order R5-2006-003 and Malaga's August 9, 2010, response to that demand
13 (which was never responded to by the Regional Board). (Costanzo Decl. Exhibits E
14 and F). Also not included are two separate submissions dated April 28, 2011, and
15 never responded to by the Regional Board, which are submissions by Malaga relating
16 to satisfaction of the requirements of ACL order R5-2006-0003 and R5-2008-0033 and
17 Cease and Deist Order R5-2008-0032 either showing completion of or progress toward
18 completion or requests for extensions for completion of compliance projects the
19 Regional Board agreed in Order No. R5-2006-0032 and Order No. R5-2008-003 could
20 be completed in lieu of any penalty for many of the violations that are listed on the
21 NOV's. Violations purportedly occurring between 2008 and after 2010 were, if they
22 occurred at all, violations that resulted from the performance of the compliance projects
23 so they are not subject to any penalty assessment (§13385(2)(3)).

24 II. GOVERNING LAW AND PROCEDURE

25 The complaint is expressly issued on the authority of WC 13323 and 13385 and
26 "is based on findings that the discharger violated effluent limitations of waste discharge
27 requirements" for Rescinded Order 99-100 and the aforementioned order R5-2008-003
28 as to which Malaga's evidence shows compliance projects in lieu of penalties were

1 A. THE HEARING PROCEDURES SET BY THE PROSECUTION TEAM
2 ARE NOT VALID.

3 Subsequent to service of the complaint, the individual who mailed the complaint
4 with a cover letter directing Malaga on when and how to respond (Lonnie Wass), a
5 person designated by the "Prosecution Team" as a witness", issued a letter which
6 included a document entitled "Hearing Procedures" specifically applicable to the ACL
7 issued to Malaga. (Costanzo Declaration Exhibit G). It states the required evidentiary
8 hearing will be conducted in accordance with the hearing procedure document which
9 states that it has been approved by the "Board Chair"; and then inconsistently states
10 the hearing will be conducted pursuant to the State Board's Regulations, beginning at
11 §648. It states in accordance with §648 of the regulations "any procedure not provided
12 by" the document is "deemed waived". As directed by Wass in the letter that
13 transmitted the complaint, Malaga sent a letter informing Wass Malaga would not be
14 paying any purported penalty, waiving a hearing or agreeing to settlement negotiations
15 and would contest the complaint at the required evidentiary hearing. The letter
16 comments on the invalidity of the hearing procedure document, in particular, the
17 deemed waiver referred to above of any procedure not provided for by the document,
18 and the manner in which it purports to require the submission of evidence (which as
19 noted below is apparently not even to this Board but to an "advisory team" comprised of
20 the Assistant Executive Director and a vaguely identified lawyer employed by a different
21 Regional Board). (See Hearing Procedure at p. 2-3). Although unclear, the Hearing
22 Procedure document apparently, according to the Prosecution Team, specifies this
23 "Advisory Team" as the persons to whom submissions required in advance of the
24 hearing are to be made. (See Costanzo Declaration).

25 The Prosecution Team purportedly filed with that "Advisory Team" a "Response"
26 to Malaga's letter. There is no procedure which allows a party in this proceeding to
27 submit a response to a letter served on that party to the Board which is to hear and
28 determine the administrative civil liability complaint. The response identifies and

1 misstates objections and assertions that appear in the May 23, 2013 letter, most of
2 which relate to the Hearing Procedure document that was sent to Malaga and had
3 presumably been prepared by the same individuals who issued the administrative
4 liability complaint. The Prosecution Team applies for several orders. There are no
5 regulatory or statutory provisions allowing the making of those applications for those
6 orders. The Prosecution Team's response was emailed to the Advisory Team on May
7 28, 2013. The attorney member of the Advisory Team purportedly issued a ruling on
8 the multiple the applications made in the Prosecution Team's response and purportedly
9 overruling Malaga's objections to the Hearing Procedure document, either as set forth
10 in the May 23 letter or the Prosecution Team's response. (Costanzo Decl. Ex. I).

11 The "response" filed following the Prosecution Team's receipt of the May 23
12 letter states:

13 "The hearing procedures issued . . . follow the Central Valley Water
14 Board's pre-approved hearing procedure format. . . . Adoption of the
15 hearing procedures by the Board's Chairman satisfies the requirements of
16 Section 648(d) as the "presiding officer", the Board Chair has the ability to
waive any additional procedural requirement not specifically provided
within the hearing procedures, including Chapter 5 of the Administrative
Procedure Act."

17 No declaration or evidence of these facts is provided with the "response".
18 Assuming the truth of this assertion, however, it is clear that the hearing procedure
19 notice that was issued to Malaga is indeed a document that was simply generated by
20 the Prosecution Team and that specific language included in the notice, that is not
21 specific to Malaga or this complaint has been taken from some unknown form or format
22 adopted by the Chairman of the Board in some unknown context, presumably in a
23 different adjudication. Certainly, the Board Chairman never adopted the "important
24 deadlines" that are a part of the notice. These were presumably selected unilaterally by
25 the Prosecution Team. If these deadlines were set by the Chair, they were set without
26 notice or an opportunity to be heard being given to Malaga. Either way, the deadlines
27 are invalid as they have not been set according to law.

28 Government Code §11425.10 reads in pertinent part as follows:

1 (a) The governing procedure by which an agency conducts an
2 adjudicative proceeding is subject to all of the following requirements:

3 (1) The agency shall give the person to which the agency action is
4 directed notice and an opportunity to be heard, including the opportunity
5 to present and rebut evidence.

6 (2) The agency shall make available to the person to which the agency
7 action is directed a copy of the governing procedure, including a
8 statement whether Chapter 5 (commencing with §11500) is applicable to
9 the proceeding. . . .

10 (4) The adjudicative function shall be separated from the
11 investigative, prosecutorial, and advocas functions within the agency as
12 provided in §11425.30."

13 The governing procedure adopted by an agency may include provisions
14 equivalent to, or more protective of the rights of the person to which the agency action
15 is directed, than the requirements of §11425.10, but that section prescribes the
16 minimum requirements. Malaga is plainly entitled to notice and an opportunity to be
17 heard on the suitability of various procedures purportedly mandated by notice in this
18 proceeding and it has received no such notice or opportunity to be heard. Further, as
19 the Prosecution Team acknowledges in its "response" the notice of procedures
20 supplied to Malaga is simply and only a creation of the Prosecution Team which
21 purports to regulate the manner in which Malaga may present its evidence and defense.
22 This violates the above quoted requirement for separation of the prosecutorial and
23 adjudicative functions. The advising lawyer has no authority or ability to rule on the
24 Prosecution Team's Response or Malaga's objections to the Hearing Procedures.
25 Those objections are requested to be addressed by this Board.

26 The Prosecution Team is dictating what form Malaga's evidence is to take, when
27 Malaga is to produce that evidence, how Malaga is to provide that evidence, and the
28 amount of time during which Malaga will be allowed to present evidence. Subdivision
29 (d) of §648, of Title 23 in the California Code of Regulations, the provision relied upon
30 in the notice of hearing procedures for setting these bizarre requirements for the
31 conduct of an adjudicative proceeding that is required to be conducted as an
32 "evidentiary hearing for determination of facts" (Government Code §11410.10) does not

1 authorize these Hearing Procedures. Subdivision (d) of §648 of the regulations
2 provides "the presiding officer may waive any requirements in these regulations
3 pertaining to the conduct of adjudicative proceedings including but not limited to the
4 introduction of evidence, the order of proceeding, the examination or cross examination
5 of witnesses, and the presentation of argument, so long as those requirements are not
6 mandated by state or federal statute or by the state or federal constitutions."

7 The subdivision speaks in terms of waiving requirements of the regulations. It
8 does not provide authorization for establishment of a set procedure including time
9 limitations on the presentation of evidence, requirements that all evidentiary
10 presentations be made in writing or numerous other requirements that are purportedly
11 set by the notice of hearing procedures served on Malaga and prepared by the
12 Prosecution Team. Indeed, the hearing procedures conflict with the provisions of
13 §11425.10 and Government Code §11513 which is expressly incorporated into the
14 regulations as the applicable procedure in allowing for each party to have the right to
15 call and cross examine witnesses, introduce exhibits on any matter relevant even
16 though not covered by direct examination to impeach witnesses, regardless of which
17 party called the witnesses, and to rebut evidence. Most significantly, the notice of
18 hearing procedures served on Malaga contains "hearing time limits limiting the time
19 available" to Malaga to examine, cross examine, rebut witnesses provide opening and
20 closing statements to 30 minutes total. There is no provision in the regulations that
21 allows the imposition of such a limit and the imposition of that limit is directly contrary to
22 Government Code §11425.10 and 11513.

23 Also included is a requirement that "all evidence other than witness testimony to
24 be presented orally at the hearing be submitted in advance of the hearing". Of course,
25 given the 30 minute limitation on the presentation of evidence and argument at the
26 hearing, this amounts to a requirement that all evidence be presented in writing
27 because 30 minutes is an insufficient amount of time within which to even provide an
28 opening statement on the facts of this case which spans the course of many years.

1 The notice also purports to require that all legal and technical arguments or analysis
2 and the name of all witnesses intended to be called at the hearing be provided. The
3 right of Malaga to present evidence or a defense cannot be so restricted in accordance
4 with statute or consistent with the due process clause of the state and federal
5 Constitutions. §648.4 of the regulations specifies what is required to be provided in
6 advance of the hearing and the Prosecution Team is not authorized to impose
7 additional requirements on the evidentiary submission to be made by Malaga.

8 The lawyer may serve as an advisor to assist and advise the decision maker -
9 this Board - but he is prohibited from furnishing argument, diminishing or modifying the
10 evidence in the record. He cannot act as the decision maker. (Government Code
11 §11430.30(a)). The Assistant Executive Officer is presumably subject to the authority,
12 discretion or direction of the Executive Officer, who issued this complaint so that he is
13 plainly prohibited from taking any role whatsoever in this proceeding, particularly in
14 advising the decision maker on a decision. (Government Code §11425.30(a)(1) and
15 (2)).

16 The agency is required to give Malaga notice and a meaningful opportunity to be
17 heard, including the opportunity to present and rebut evidence. (§11425.10(a)(1)).
18 Under §11415.10, the agency must either conduct its hearing according to the
19 procedures set by its regulations, or if it fails to set those procedures by regulations,
20 then the provisions of the APA apply, and they apply despite any conflicting provisions
21 in this agency's regulations. (§11425.10(b)). The procedures set by the Hearing
22 Document do not conform either to the APA or this Board's regulations and they are
23 invalid. (See *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 789-
24 790). The limitations set by the Hearing Procedure document are not appropriate to the
25 character of this particular proceeding and there has been no separate consideration by
26 this Board of what procedure is required to conform with the APA and with the
27 requirements of procedural due process. (See *Petrillo v. Bay Area Rapid Transit*
28 *District* (1988) 197 Cal.App.3d 798, 807-808; *Smith v. Organizations of Foster Families*

1 *Etc.* (1977) 431 US 816; *Shaket v. Osteopakic Medical Board* (1996) 51 Cal.App.4th
2 223, 230). The statute, regulations, and requirements of due process are required to
3 be adhered to. The Hearing Procedure requirements set by Regional Board Staff or the
4 Prosecution Team do not conform to those requirements and this Board is requested to
5 declare those Hearing Procedures inadequate and invalid and establish the appropriate
6 procedure by which this matter will be heard.

7 B. THE PROCEEDING IS BARRED BY LATCHES. THE ANALOGOUS
8 STATUTE OF LIMITATIONS IS THE ONE YEAR PROVISION OF CCP §340(1) AND
9 (2) AND THE EXISTENCE OF THIS ANALOGOUS STATUTE OF LIMITATIONS
10 MAKES THE AGENCY'S DELAY INEXCUSABLE AS A MATTER OF LAW AND
11 SHIFTS TO THE AGENCY THE BURDEN OF SHOWING MALAGA HAS NOT BEEN
12 PREJUDICED BY THE DELAY. THE LATCHES ISSUE IS REQUIRED TO BE TRIED
13 BEFORE CONSIDERATION OF THE MERITS.

14 Statutes of limitations found in the Code of Civil Procedure do not literally apply
15 to administrative proceeding because those statutes apply to civil actions and special
16 proceedings of a civil nature and administrative proceedings are neither. (See *City of*
17 *Oakland v. PERS* (2002) 95 Cal.App.4th 29; *Bernard v. Fong Eu* (1979) 100 Cal.App.3d
18 511, 515; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal.App.4th 325, 329).

19 Under appropriate circumstances, the defense of latches, however, operates in
20 the same manner to bar a claim by a public administrative agency such as this Board if
21 the requirements of unreasonable delay and resulting prejudice are met. (*Fountain*
22 *Valley Regional Hospital and Medical Center v. Bonta* (1999) 75 Cal.App.4th 316, 323-
23 324). Latches is designed to promote justice by preventing surprises through the
24 revival of claims that have been allowed to slumber until evidence has been lost,
25 memories have faded and witnesses have disappeared. It is unjust not to put the
26 advisory on notice to defend even a just claim within the period of limitations and the
27 right to be free of stale claims in time comes to prevail over the right to prosecute them.
28 (*Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1521).

It is well established that the elements of latches, unreasonable delay and
resulting prejudice may be met in one of two ways. First, they may be demonstrated by
the evidence, with the person arguing in favor of latches presenting proof of

1 unreasonable delay and resulting prejudice. Second, the element of prejudice may be
2 "presumed" whenever there exists a statute of limitations that is sufficiently analogous
3 to the facts of the case and the period of that statute of limitations has been exceeded
4 by the public administrative agency in making its claim. (See *Robert J.*, *supra*, at p.
5 1522; *Fountain Valley*, *supra*, at p. 324; *Brown v. State Personnel Board* (1985) 166
6 Cal.App.3d 1151, 1158-1161; *Stevedoring Services v. Prudential Lines Inc* (1986) 181
7 Cal.App.3d 154, 158; *Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d
8 921).

9 In this second situation, the limitations is "borrowed" from the analogous statute
10 and the burden of proof shifts to the administrative agency. To defeat the finding of
11 laches, the agency, here this Regional Board, must show that the delay involved in the
12 case was excusable and rebut the presumption that such delay resulted in prejudice to
13 the opposing party, Malaga. (Id). In cases where there is no directly applicable statute
14 of limitations such as administrative proceedings but a statute of limitations governs an
15 analogous action of law, the statute of limitations time period is borrowed as the
16 measure of the outer limit of reasonable delay in determining laches. (See *Brown*,
17 *supra*, 166 Cal.App.3d at p. 1159-1160). Whether such borrowing occurs and whether
18 there is a consequent transfer of the burden of proof on the claim of laches to the
19 administrative agency depends upon the strength of the analogy. (*Fountain Valley*,
20 *supra*, at p. 325). The effect of the violation of an analogous statute of limitations is to
21 shift the burden of proof to the plaintiff to establish that the delay was excusable and
22 that the defendant was not prejudiced thereby. (Id; *Robert J.*, *supra*, at p. 1522). This
23 is because the statute of limitations reflects a "legislative policy judgment that a delay"
24 exceeding the time limit is "inherently unreasonable in the prosecution" of an
25 administrative proceeding. (*Brown*, *supra*, at p. 1160).

26 It is established law that where, as here, an administrative agency pursues a civil
27 penalty, there is a directly analogous statute of limitations which is CCP §340. It
28 provides that an action "upon a statute for penalty or forfeiture, when the action is given

1 to an individual, or to an individual and the state, is one year. Subdivision (2) of that
2 section provides that an action upon a statute for a forfeiture or penalties to the people
3 of this state must be commenced within one year. (See *Myers v. Eastwood Care*
4 *Center Inc* (1981) 124 Cal.App.3d 491).

5 Each and all of the alleged violations claimed to give rise to the right to pursue
6 and recover MMP's occurred far longer than a year prior to May 1, 2013 when this
7 frivolous complaint was ultimately issued, with the latest alleged violation occurring
8 March 30, 2011, two years and two months before the complaint was issued. There is
9 only one other violation allegedly occurring during the entirety of 2011 and the vast
10 majority of the alleged violations are claimed to have occurred between 2007 and 2010.
11 This is unreasonable delay as a matter of law, and without regard to the agency's
12 previous acknowledgment that not these violations never actually occurred. There is no
13 excuse for this extreme delay, and the evidence submitted by the Prosecution Team
14 offers no such excuse. Prejudice is presumed, even if it were not, given the agency's
15 failure to even respond to responses to its purported Notices of Violation detailing why
16 none of the violations ever even occurred, establishes clearly that the agency cannot
17 possibly overcome the presumption of prejudice and that prejudice is apparent from the
18 evidence that the Prosecution Team has submitted.

19 Most importantly, in these circumstances where the existence of a defense to a
20 claim which depends upon a determination of facts has been raised, that defense must
21 be tried before the agency proceeds to any hearing on the merits. A hearing on the
22 merits is patently premature and the agency has ministerial obligation to address the
23 latches claim first, before proceeding to consideration of any other matter. (See
24 *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1045-1049 ("factual
25 underpinnings of a latches claim should initially be considered at an administrative
26 hearing").

27 Given the presence of a directly analogous statute of limitations, without any
28 evidence by the Prosecution Team that the extreme delay involved here is any sense

1 excusable or that it can overcome the presumption of prejudice that clearly applies
2 here, this agency's obligation is to rule on the matter based on the undisputed facts
3 shown above and dismiss this claim. If the agency takes any action other than
4 dismissing this claim because it is barred by latches, Malaga is entitled to and hereby
5 gives this agency notice of its intent to initiate a proceeding under Water Code §13320
6 based on the action or failure to act by this Regional Board and have a court order it to
7 dismiss this proceeding. There is no justification for requiring Malaga to address the
8 merits of the claim that the Prosecution Team has not even undertaken to provide
9 evidence of.

10 In the analogous civil context, Malaga would be entitled to and in this context
11 Malaga is entitled to a separate prior trial on the latches question. (See CCP § 597;
12 *Sahadi v. Soheaffer* (2007) 155 Cal.App.3d 709, 721). Further, in the analogous civil
13 context, and in this administrative proceeding, Malaga is entitled to and does object to
14 all of the Prosecution Team's evidence on the ground that none of it is relevant
15 because the claim is completely barred by latches. (*Mize v. Reserve Life Insurance*
16 (1975) 48 Cal.App.3d 487, 491). Malaga requests a ruling on these objections to
17 evidence and a determination on the latches claim at the threshold of this proceeding.

18 C. BASED ON THE PROSECUTION'S OWN EVIDENCE, IT IS CLEAR
19 THAT THE REGIONAL BOARD HAS ALREADY CONCEDED THAT NO VIOLATION
OF §13385 HAS OCCURRED.

20 Where one party to dispute makes an assertion or declaration of a fact and
21 conveys that to the other party in circumstances that would normally call for a response
22 or an answer or other reaction by the other party, that party's silence or equivocal
23 response amounts to an implied admission and provides affirmative evidence of the
24 truth of the declaration or assertion not responded to. (See Evidence Code §1221; *Los*
25 *Robols Motor Lodge v. Department of Alcoholic Beverages* (1966) 246 Cal.App.2d 198,
26 205; 3 Witkin, California Evidence (5th Ed. 2012) at Sections 104, 105 and 340). As
27 noted, Malaga objects to all of the Prosecution Team's evidence, because the alleged
28 violations are all barred by latches, but subject to that objection Malaga notes that the

1 Prosecution Team's own evidence establishes its implied admission of the truth of
2 various declarations and assertions made by Malaga in response to the series of NOV's
3 issued that no violation has occurred.

4 Here, the Prosecution Team's evidence shows a series of NOV's all of which
5 were responded to in detail and in writing. In response to the July 10, 2010, NOV,
6 listing the same violations that are listed in Attachment A to the Complaint, occurring
7 between 3/30/08 and 12/7/09 Malaga responded by pointing out that the NOV was for
8 multiple reasons inaccurate and that literally none of the violations occurred or qualified
9 as serious or chronic. (See Exhibit 7 and 8). The agency staff responded with a new
10 NOV - that deleted five of the purported violations in the prior NOV on November 5,
11 2010. (Exhibit 9). Malaga responded to this NOV on January 5, 2011, noting the
12 purported violations were "not established by the data or are not violations" and further
13 that even if the violations had occurred, they could not be pursued and were not subject
14 to penalties under subdivision (i) of §13385 because they occurred while Malaga was in
15 the process of implementing and/or completing various phases of a compliance project
16 or projects and/or a pollution prevention plan and/or a time schedule related to a
17 previous complaint, administrative civil liability order and/or cease and desist order
18 issued by the Board and as to which Malaga had made regular progress and
19 compliance reports. Malaga points out that having agreed to the installation of those
20 improvements in lieu of the imposition of fines and to the District's use of grant funding
21 to implement those improvements, the Board is legally estopped from taking action to
22 fine Malaga for purported discharge violations occurring before the necessary
23 improvements had been completed.

24 This is the effect of subdivision (i) of §13385 and it is clear that under standard
25 principles of estoppel, this Regional Board cannot agree to implementation of
26 compliance projects or pollution control prevention plans or similar measures to correct
27 past asserted violations and then claim that these violations are nevertheless violations.
28 (See Evidence Code §623 (estoppel arises whenever a party has by its own statement

1 or conduct intentionally and deliberately led another to believe a particular thing to be
2 true and to act upon that belief so that the party is not permitted to contradict it); *Niles*
3 *Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 793 (reciting elements of
4 estoppel); *Jones v. Noble* (1934) 3 Cal.App.2d 316, 322 (agreement to settle and
5 discharge claims in pending action remains in force until performed or rescinded and if
6 not rescinded, the agreement is a bar to a further action); *Lusardi Construction*
7 *Company v. Aubry* (1992) 1 Cal.4th 976, 996-997 (Labor Commission estopped from
8 imposing penalty against contractor acting in good faith in reliance on assertion that
9 project was not a public works requiring payment of prevailing wages). Here, based on
10 its agreement to allow compliance projects in lieu of penalties, its acknowledgment of
11 the truth of assertions made in Malaga's serial responses to the multiple NOV's the
12 agency is precluded by basic principles of estoppel and law governing the effect of its
13 agreement to allow compliance projects in lieu of penalties from pursuing these same
14 alleged violations as a basis for the imposition of penalties.

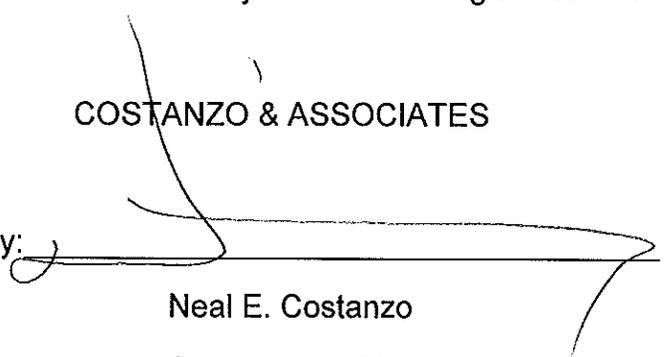
15 Malaga submits the information concerning the exhibits and witnesses it intends
16 to present subject to all of the foregoing objections to the agency even proceeding with
17 this complaint given the fact that it is plainly barred by laches and by principles of
18 estoppel.

19 **CONCLUSION**

20 For the foregoing reasons, this Board should exclude all evidence offered by the
21 Prosecution Team, find that the doctrine of laches applies to bar this claim and dismiss
22 the complaint and award Malaga its cost and attorneys fees for having to deal with this
23 frivolous filing.

24 COSTANZO & ASSOCIATES

25
26 Dated: June 21, 2013

27 By: 

28 Neal E. Costanzo

Attorneys for Plaintiff