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7 OF TRANSPORTATION

8 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**

9 **NORTH COAST REGION**

11 IN THE MATTER OF:	DEPARTMENT OF TRANSPORTATION'S
12 ADMINISTRATIVE CIVIL LIABILITY	CASE-IN-CHIEF; LEGAL POINTS,
13 COMPLAINT NO. RI-2009-0095	ARGUMENTS, AND MATRIX OF
	DEFENSES TO CHARGES
	Hearing Date: March 24, 2011
	Location: Weaverville, California

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16 Designated party State of California Department of Transportation ("Department")
17 respectfully submits its Case-In-Chief materials to the North Regional Water Quality Control Board.

18 **I**

19 **OVERVIEW**

20 The subject Administrative Complaint for Liability ("ACL") presents a seemingly great
21 number of violations. However, the Department urges the Board to look carefully beneath the
22 daunting list of charges, to the *evidence* that is cited by Board staff for support. Much of the
23 "evidence" is based on speculation and guesswork, *as admitted by Board staff in sworn deposition*
24 *testimony*. The majority of charges were compiled long after the alleged events occurred, by the
25 staff ACL drafter Kason Grady. Mr. Grady reviewed photographs he did not take, and reports he
26 did not write. He applied his own interpretation to the materials, interpretations which resulted in
27 150+ charges. While the Department does not dispute that some violations did occur on the
28 Confusion Hill job site early in the construction project, the vast number of charges are not

1 substantiated by the supporting evidence identified by the Prosecution Team ("PT") during
2 discovery.

3 In lieu of providing lengthy narrative of its defenses and responses to the charges, the
4 Department has distilled the core defenses into a table ("Defense Matrix") attached hereto. Also
5 provided are citations to deposition testimony and other evidence establishing the existence of each
6 defense. The deposition transcripts will be provided under separate cover, with a few exceptions,
7 evidence cited in the ACL and its appendices (and which are anticipated to be provided to the Board
8 by the PT as part of its case-in-chief) are not replicated by the Department in order to reduce the
9 already-voluminous record in this case.

10 Where the Department's response is an acknowledgement that a violation occurred, that fact
11 is noted in the Matrix, along with additional comments if pertinent. The Department has withheld,
12 at this time, specific comments regarding penalty amounts, and will be in a position to more
13 accurately address the topic at the time evidentiary objections are exchanged. Further, the PT has
14 indicated that it would eliminate certain charges (although it was anticipated any amendment would
15 have occurred prior to the case-in-chief exchange date); if this occurs, the relevance -- or lack
16 thereof -- of disputed penalty amounts will become certain.

17 In terms of factual overview, the project background is set forth in the preamble to the §401
18 Certification, and will be illustrated more fully at the subject hearing. There are few significant
19 "backdrop" factual points that became apparent as the project concluded in 2009. First,
20 notwithstanding the number of alleged violations, neither the written records nor testimony in this
21 case establish any evidence that wildlife, plants, wildlife habitat, or beneficial uses of the river were
22 injured as the result of the project. It is undisputed that independent biological monitors were on
23 site virtually on a daily basis, monitoring habitat and the river itself; however, their voluminous
24 **reports reflect no observations of such injurious impacts.** (See, e.g. deposition testimony of the
25 Board's senior Most Knowledgeable Person David Leland (111:14-112:2), deposition testimony of
26 Board witness Dean Prat (45:5-15).) The Department recognizes that this fact does not serve as a
27 bar from liability, but is a factor to be considered in evaluating the overall case.
28

1 Second, virtually all of the alleged violations occurred between August and November of
2 2006 although the job proceeded well into the second half of 2009. During those first project
3 months, there were challenges in identifying and implementing water quality objectives. However,
4 the Department and Board staff soon improved their communication and achieved a shared
5 understanding as to what was expected under the applicable permits. The Department imparted the
6 information to its contractor. As evidenced by the scarcity of accused violations after November
7 2006, the vast majority of the three-year project stands to demonstrate the Department's
8 understanding of, and compliance with, water quality standards.

9 The remainder of this brief addresses significant legal points that are vital to assessing
10 liability in this case.

11 II

12 APPLICABLE LAW RE BURDEN OF PROOF

13 "As in court proceedings, the burden of proof, including both the initial burden of going
14 forward and the burden of persuasion by a preponderance of the evidence, is on the party asserting
15 the affirmative of an issue before an administrative agency." (2 Cal Jur 3d *Administrative Law*,
16 §535.) In administrative proceedings involving the Water Code, the Board prosecutors must prove
17 the elements of the offenses charged; the burden of proving affirmative defenses then shifts to the
18 alleged discharger. (*City of Brentwood v. Central Valley Reg'l Water Quality Control Bd.* (2004)
19 123 Cal.App.4th 714, 720).

20 The California Supreme Court follows our nation's high court in recognizing that while
21 administrative hearings are less formalized than court proceedings, the actual evidence must be real
22 and probative: "On this point, the United States Supreme Court has noted that the "assurance of a
23 desirable flexibility in administrative procedure does not go so far as to justify orders without a
24 basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not
25 constitute substantial evidence." (*Edison Co. v. Labor Board* (1938) 305 U.S. 197, 230 . . . ""
26 (*Daniels v. Department of Motor Vehicles* (1983) 123 Cal.App.4th 714].)

27 As noted in the attached Defense Matrix, the PT simply does not meet its burden of proof on
28 many of the charges. The Department anticipates that the PT will, as much as feasible, "lump"

1 many charges in groups in order to fend off scrutiny of individual charges that cannot be proved.
2 **However, whether an ACL alleges 150+ charges, or a mere handful, the accused parties are**
3 **entitled to due process and a full and fair hearing on each and every charge that carries a**
4 **penalty.** The Department urges the Board to review the attached Matrix to get a full view of the
5 charges and defenses. The charges that have not been proved must be dismissed.

6 III

7 LAW AGAINST DOUBLE AND TRIPLE-COUNTING OF CHARGES

8 As noted in the Defense Matrix, the PT has in several instances inappropriately exceeded the
9 maximum \$10,000 per day, per violation, provisions of Water Code §13385(c)(1). Up front, it is
10 noted the Department does not dispute that *one event* can result in multiple penalties for a single day
11 for violations of multiple pollutant limitations. (See, *Atlantic States Legal Foundation, Inc. v.*
12 *Tyson Foods, Inc.* (1990) 897 F.2d 1128.) However, the Department asserts that legally, where
13 several permit conditions¹ are being interpreted by the PT *as prohibiting substantively identical*
14 *acts*, multiple daily \$10,000 charges cannot be enforced.

15 For instance, Condition 9 provides that -- amongst other substances -- oil and petroleum
16 products shall not be "allowed to enter into or be placed where it may be washed by rainfall into
17 waters of the State." Condition 13 prohibits the use of, "any vehicle or equipment, which leaks any
18 substance that may impact water quality." For every single "leaky equipment" charge set forth in
19 Appendix A_B of the ACL, the PT has asserted violations of Conditions 9 and 13. However, the
20 nature of the conditions, as charged, **are not distinct**. That is not to say that under certain factual
21 situations, the two conditions *could* apply to two substantively different prohibitions; however, in
22 this case they amount to the *same prohibition*, albeit stated in two different paragraphs.

23 Stated another way, creative ACL drafting could result in innumerable duplicative and
24 overlapping permit conditions, leading to improper multiple \$10,000 daily charges for what would
25 constitute, in essence, the same violation of the same permit prohibition. Penalty calculations

26 _____
27 ¹ In order to avoid confusion and misinterpretation of the §401 permit conditions herein, it is noted that page 7 of ACL
28 materially misstates/misidentifies several portions of the permit. Specifically, the ACL wholly errs in its quotation of
Conditions 11, 12, and 13. The Department requests that the Board not rely in any manner on the permit conditions set
forth in the ACL, and refer instead to the actual permit, including amendments, to ensure accuracy. The mistakes in the
ACL were made known to the PT, but for reasons unknown were not remedied.

1 should be based on actual violations of substantively distinct limitations, and should not hinge on a
2 "form over substance" approach to interpreting and applying permits.

3 Furthermore, in a number of instances the ACL relies on permit Condition 17 as a separate
4 basis of liability. Condition 17 provides, "All activities, BMPs, and associated mitigation will be
5 conducted as described in this Permit and the application submitted by the applicant for this
6 project." Literally, every violation of other sections of the permit **would also constitute a violation**
7 **of Condition 17**. The provision provides a means to automatically double a penalty, without the PT
8 meeting its burden of proving that a substantively distinct violation has occurred. Where the PT has
9 so applied Condition 17, an improper excessive penalty assessment has occurred in violation of
10 Water Code §13385(c)(1).

11 IV

12 APPLICATION OF CONDITION 9'S "MAY BE WASHED BY RAINFALL . . . "

13 Due to frequency of its invocation in the ACL, and the Department's disagreement with the
14 PT's interpretation of it, a brief discussion of Condition 9 is set forth here. The Department
15 specifically takes issue with the PT's interpretation of the last portion of the last sentence of the
16 provision. The section provides in relevant parts that, "No debris, soil, [etc.], or other organic or
17 earthen material from any construction or associated activity of whatever nature, other than that
18 authorized by this permit, shall be allowed to enter into or be placed where it may be washed by
19 rainfall into waters of the State." It was confirmed in Board staff depositions that this section has
20 been interpreted as warranting a fine where there exists the mere *possibility, no matter how remote,*
21 *of rainfall.* That is, if a substance was accidentally dropped or spilled on the job site in the vicinity of
22 the river, did not enter the river, was picked up promptly, and there was no rain forecast for days or
23 weeks, a violation would nonetheless be deemed to have occurred under Condition 9.

24 Such an interpretation ignores, not only the practicalities of a job site, but the very risk
25 sought to be avoided by the condition. If there is no reasonable possibility of rainfall, a "placement"
26 violation should not occur under this section as there is no danger of pollution. If the object has
27 been placed when there *is* a reasonable possibility of rainfall in the near future, a penalty could be
28

1 warranted, depending of course on the other facts involved. In this regard, reference is made to
2 Department of Fish and Game permits which tie a permittee's rainfall-sensitive responsibilities to
3 actual forecasted rainfall per National Weather Service seventy-two hour rain forecasts.

4 Furthermore, the PT's interpretation of Condition 9 renders Condition 11 a total nullity.
5 That is, no "excess material" or "debris" could ever be left at the work area if Board staff's
6 interpretation of Condition 9 were valid. It is unreasonable to assume that Condition 11 was
7 meaningless or wholly superfluous. General principles of interpretation are illustrative: "The
8 whole of a contract is to be taken together, so as to give effect to every part, if reasonably
9 practicable, each clause helping to interpret the other." (Civil Code §1641.) "[W]here there are
10 several provisions or particulars, such a construction is, if possible, to be adopted as will give effect
11 to all." (Code of Civil Procedure §1858.) Condition 9 should not be read to wholly outlaw
12 placement -- including fleeting placement -- of construction materials without any reference to the
13 possibility of rainfall.

14 V

15 **THE ACL DOES NOT STATE A VALID BASIS FOR VIOLATIONS UNDER THE STORM**
16 **WATER PERMIT**

17 Pages 17-18 of the ACL prescribe a large monetary penalty for alleged violations of the
18 "Storm Water Permit". Allegedly the Permit was violated for "141 days", although nowhere in the
19 ACL does there exist substantiation of daily violations for such a period. The ACL does not
20 identify Permit or the section(s) of the Permit sections purportedly violated. Thus, the ACL's non-
21 specificity constitutes a violation of Water Code §13323(a). That section requires, in pertinent
22 parts, that an ACL "**shall allege the act or failure to act that constitutes the violation of law, [and]**
23 **the provision of law authorizing civil liability** to be imposed pursuant to this article". [Bold
24 emphasis added.]

25 The unspecified "Storm Water Permit" violations should be dismissed as fatally vague, and
26 incapable of substantiation on their face.

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VI

CONCLUSION

The Department respectfully requests that the Board consider *all* the evidence submitted herein, including the Matrix (Exhibit A), and not be influenced in judgment by the sheer volume of alleged violations. As indicated above, and in the attached Matrix, the PT has included many charges that are wholly speculative in nature, "without a basis in evidence having rational probative force." (*Edison Co. v. Labor Board, supra.*)

Respectfully submitted,

DATED: 2-14-11

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11 **IN THE MATTER OF:**

12 **ADMINISTRATIVE CIVIL LIABILITY**
13 **COMPLAINT NO. R1-2009-0095**

LIST OF WITNESSES AND SUMMARY
OF ANTICIPATED LIVE TESTIMONY

Hearing Date: March 24, 2011
Location: Weaverville, California

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15 In addition to deposition testimony submitted concurrently with this document, the
16 Department of Transportation may call the following witnesses to testify to the matters described
17 herein:

18 Mr. Sebastian Cohen: Mr. Cohen has professional experience and specialized knowledge
19 regarding equipment used in construction and will testify regarding repair and maintenance issues
20 pertaining to such items. Mr. Cohen also has knowledge about the construction site and will testify
21 regarding placement of Isolated Pool B. Mr. Cohen has knowledge regarding the Department's
22 assertions that certain claimed releases were cleaned up, as set forth in the Department's Defense
23 Matrix. Mr. Cohen will also testify regarding project background, staging, his communications
24 with Board employees regarding permit compliance, communications with the contractor, expenses
25 of water pollution control measures, turbidity monitoring, and nature of and changes to Best
26 Management Practices throughout the project.

27 Mr. David Melendrez: Mr. Melendrez has professional experience and specialized
28 knowledge regarding water quality protection standards and compliance, as well as transportation

1 project planning, construction and permitting, including that for the Confusion Hill Bypass project.
2 Mr. Melendrez will testify regarding the subject permit application and process, Departmental
3 interpretation of relevant permits, communications with Regional Board staff regarding the project,
4 Departmental efforts, including costs, to comply with water quality objectives, turbidity monitoring,
5 placement and use of Isolated Pool B, specialized water quality terminology, storm-water and non-
6 storm-water issues arising from Confusion Hill (to extent Prosecution Team pursues those issues),
7 opinions regarding Best Management Practices, and Departmental policies and practices regarding
8 water pollution control and water quality objectives.

9 Respectfully submitted,

10 DATED: 2-14-11

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