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February 29, 2012

File: Confusion Hill
Bypass - ACL

Transmitted via First-Class and Electronic Mail

Advisory Team, c/o Lisa Bernard

Sanitary Engineering Associate

Regional Water Quality Control Board

5550 Skylane Blvd., Suite A

Santa Rosa, CA 95043

In re: *Administrative Civil Liability draft Order No. R1-2012-0034, Confusion Hill Bypass Project*

Dear Ms. Bernard:

Designated Party the California Department of Transportation (Department) hereby submits its comments to the draft order regarding administrative civil liability (ACL) arising from the Confusion Hill Bypass Project (Mendocino County). Per the Regional Board's directives of February 15 (reiterated on February 16 and 21), 2012, the Department's comments are limited to the general acceptability of the order or possible technical corrections.

General Comment: Other than liability for charges that were accepted (indicated on the Department's itemized list of accepted charges), and the Regional Board's decision to not impose multiple per-day penalty amounts for a substantively single event, the Department generally disputes the liability findings and penalty amounts set forth in the draft order. Further, the Department does not concede any of the evidentiary objections it made during the course of the proceeding; this statement includes those objections which received rulings and those which did not. Because the record already contains the Department's testimony, briefs, and arguments on liability, penalties, and objections, they will not be repeated here. To the extent the draft order contains new matter, the Department comments as follows:

A. A Basis For an Award of "Staff Costs" Has Not Been Identified; Imposition of "Staff Costs" Constitutes an Attempt to Enforce an Invalid Regulation. Over Department's objections, the draft order requires the Responding Parties to pay "staff costs" as an element of liability. Prior to the hearing the Advisory Team requested that the Prosecution Team (PT) articulate legal authority for recovering costs and/or fees, but the PT did not produce any legal grounds either prior to or at the hearing. Concomitantly, the draft order does not specify the legal basis for the "staff costs" award. The Department articulated its objections to any possible award of costs or fees in its Supplemental Brief by Department of Transportation: Recovery Of Staff and Attorneys Fees Not Authorized By Law; Objections (which will not be reiterated here).

The Department further comments:

1. To the extent the draft order relies on the 2002 Enforcement Policy handbook, while that manual does refer to recovery of "staff costs" (although the term is not defined--see below) in the context of an ACL, such recovery has not been embodied in a regulation promulgated under the Administrative Procedures Act (Gov. Code §11340, et seq.) (APA). Further, Government Code § 11425.50, applicable to Water Board proceedings, provides, "A penalty may **not** be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section [Gov. Code section] 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340)." (Emphasis added.) Thus, the Regional Board lacks power to enforce rules regarding "staff costs" since they constitute improper "underground" regulations. A regulation that is adopted inconsistent with the APA is an "underground regulation" (Cal.Code Regs., tit. 1, § 250) and may be declared invalid by a court (Gov. Code §11350; *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333.) (Also see, *State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 705 (APA requirements apply to California regulatory agencies, including the Board)).

A rule imposing costs and fees in ACL proceedings falls within the definition of a "regulation" under the APA: "A regulation subject to the APA thus has two principal identifying characteristics. (Citations.) First, the agency must intend its rule to apply generally, rather than in a specific case . . . Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.'" (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) The 2002 enforcement policy, under the Regional Board's interpretation, extends beyond the mere establishment of policies and guidelines internal to the Board; it directly and substantially affects the rights of all parties sued by the Board. The significance of the stakes is evidenced in this case, where exposure to "staff costs" amounted to hundreds of thousands of dollars with a proposed imposition of over \$70,000. A rule providing for PT "staff costs" constitutes a regulation that is subject to the APA.

As further indicated by the California Supreme Court in *Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal.4th at pp. 568-69,

"One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation (*Armistead v. State 569 Personnel Board* (1978) 22 Cal.3d 198, 204-205 . . . , as well as notice of the law's requirements so that they can conform their conduct accordingly (*Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583, 588 . . .). The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. (See *San Diego Nursery Co. v. Agricultural Labor Relations Bd.* (1979) 100 Cal.App.3d.)"

In comparison, certain agencies do have legal authority, by statute or regulation, to include recovery of investigation and prosecution costs as part of their decision (see, e.g., Bus & P C §125.3, permitting costs to agencies within the Department of Consumer Affairs); and, 16 Cal Code Regs §317.5 (relating to chiropractors), but the Board is not one of those agencies.

In sum, the 2002 policy handbook does not constitute or contain statutory or regulatory authority under which "staff cost" payments can be compelled. The Board must comply with the rulemaking provisions of the APA in order to validly create an enforceable rule regarding costs and/or fees.

2. Moreover, even the language of the 2002 policy does not support a recovery of *fees*. The policy refers to "staff costs" which are not defined. In general civil law, recoverable "costs" do not include fees (Code of Civil Procedure §1033). Moreover, typical "costs" are only recoverable by the prevailing party (Code Civ. Proc. 1032), which clearly the PT in this case is not.

The Department respectfully requests that based on the foregoing, the Regional Board wholly eliminate from the final order any requirement that "staff costs" be paid. Should the final order ultimately contain a "staff costs" payment provision, the Department requests, for purposes of clarifying the record and for review purposes, that in the final order the Regional Board articulate the basis for allowing staff costs as well as a description of what the "staff costs" entail. (Gov. Code §11425.50).

In the event that a reviewing administrative or judicial body determines that costs and/or fees are recoverable in this proceeding, the Department reserves the right to submit its cost and fee bill in this case for payment.

B. The PT's Withdrawal of Charges is Binding on the Regional Board Based on Principles of Agency; The Regional Board is Estopped From Reinstating the Conceded Charges; The Draft Order's Surprise Reinstatement of Withdrawn Charges Acts to Deprive the Responding Parties of Due Process Guarantees Such as a Full and Fair Hearing. It is undisputed that the PT expressly "conceded" a number of charges several months before the hearing, in written briefs. The Department relied on the PT's representation of withdrawal and ceased preparing any defense to those charges. The Regional Board had actual knowledge of the conceded charges prior to the hearing; however, at no time prior to publication of the draft order did the Regional Board or PT notify the Responding Parties that the heretofore-conceded charges remained candidates for assignment of liability and penalties. The imposition of liability for approximately five previously-withdrawn charges constituted a surprise to the Responding Parties. The final order should not include any conceded charges based upon the following:

1. The ACL is brought by the Regional Board, and the prosecution thereof was assigned to the PT, including its attorneys. It is further noted that the complaint was executed by the Regional Board's Assistant Executive Director, who is also named as a member of the PT. Thus, the PT acted as the express agent of the Regional Board (Civ. Code §2295), "and, as such agent, [it] has

authority to bind [its] client in all matters pertaining to the conduct and management of the suit. ... ". (1 *Witkin, Cal. Proc. 5th* (2008) Attys, § 255, p. 330, citing *Knowlton v. Mackenzie* (1895) 110 C. 183, 188.) Thus, when the PT expressly withdrew certain charges from further prosecution, the action bound the Regional Board. Its surprise reinstatement of five of the conceded charges, to the detriment of the Responding Parties, is legally prohibited.

2. In addition or in the alternative, because the requisite elements of equitable estoppel exist in this case, the Regional Board should be estopped from assigning administrative liability for the approximately five withdrawn charges.

"A valid claim of equitable estoppel consists of the following elements: (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it. (13 *Witkin, Summary 10th* (2005) Equity, § 191, p. 527.) The estoppel doctrine can be applied against the state, its subdivisions, and other governmental agencies. (13 *Witkin, supra*, Equity, § 199, p. 540.)

A valid claim of equitable estoppel exists on the facts of this case: (a) The Board knew that the PT had conceded charges and that the Responding Parties had received actual notice of the withdrawals. The Board did not reveal that it would treat the charges as existing and viable; (b) The Board knew that when issuing its order it would not treat the charges as having been effectively withdrawn; (c) The Responding Parties were ignorant of the fact that the Regional Board would not consider the charges to have been withdrawn; (d) When the PT (the Board's agent) in good faith conceded the charges it intended the Responding Parties to rely on that act; and, at the time of the hearing the Regional Board knew by way of the briefing and hearing presentations that the Responding Parties had acted on the withdrawal of charges, in that they had ceased to actively defend against them; and, (e) The Responding Parties were induced to act upon the PT's withdrawal and the Board's silence, and did in fact cease to present evidence and testimony (exculpatory and explanatory) regarding the conceded charges in the context of further briefing and at the hearing .

3. The guarantee of a fair hearing is embedded in the statutes governing hearings before Water Boards (e.g., Gov. Code §§11425.10, 11425.20). All hearing notices in the case echoed the principles and rules discouraging surprise at Water Board proceedings, in accordance with 23 Cal. Code Regs. §648.4. However, the surprise reinstatement of the withdrawn charges acted to deprive the Responding Parties of a fair hearing, and essentially resulted in the exposure of the Responding Parties to charges against which they were led to believe did not require preparation of a defense.

The Department respectfully requests that the Board eliminate all liability for charges conceded by the PT, based on the foregoing legal authority.

C. No Rulings Were Made Regarding the Foundational Objections. The Department notes that although the Department asserted specific objections to the lack of foundation for all photographs proffered by the PT (AR, G-3, Department's Objections to Evidence, p.1), no overt rulings were made. It is axiomatic in the rules of evidence that foundational matters directly

inform relevancy. It is apparent from the draft order that the photographs were all admitted. The Department respectfully requests that the grounds for dismissing the objections be identified in the final order (Gov. Code §11425.50(a)).

D. Citation of Materials in the Draft Order That Were Not Identified In Support of Charges. The Department notes that the draft order contains references to reports and other documents which were not identified by the complaint or PT as forming the bases of charges. For instance, page 8 contains a quotation from AR, exhibit M-Tab 28. The relevance of the quote in the context of the order is not clear. Also, since the report was *not* cited as a basis for liability by the PT prior to the hearing, Responding Parties had no reason or opportunity to muster testimony and other evidence to explain or deny the report's contents. However, given the serious implications of the cited report, the Responding Parties would have undertaken pointed investigations into the report's meaning, veracity, accuracy, and context, and done so prior to settlement discussions and briefing.

It is undisputed that the AR consists of a large amount of documents, most of which have no relevance to the ACL. The Responding Parties conducted discovery in order to ascertain which of the numerous writings and photographs in the AR would be used by the PT to establish its burden of proof for the 150+ charges. The Department objects to the reference to and reliance upon materials that were not identified as evidence of violations on the basis they are incompatible with Water Code §13323(a) (indicating that it is at the commencement of an ACL proceeding that the enforcing authority must spell out all acts -- or failures to act -- that are alleged to constitute a violation). The Department further objects on the grounds that the materials lack foundation, are not relevant to charges properly alleged, are prejudicial, inflammatory, and their use violates due process.

E. No Waiver of Contentions re Acceptability or Technical Errors: Given the sizable volume of adjudicatory materials associated with this proceeding, the correspondingly and necessarily lengthy 31-page draft order, and the number of business days allowed the parties and their attorneys for review of the draft order, the absence of any comments that could have been included herein should not be construed as a waiver or admission of any kind on behalf of the Department, in either the context of further proceedings before the Regional Board, the State Board or a State court.

Respectfully submitted,



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