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**North Coast Region**  
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Edmund G. Brown Jr.  
Governor

**TO:** Designated Parties

**FROM:** Geoffrey Hales, Regional Water Board Chair and Hearing Officer 

**DATE:** April 27, 2011

**SUBJECT: EVIDENTIARY RULING ON HEARSAY OBJECTIONS TO BIOLOGICAL MONITORING REPORTS, ACL Complaint No. R1-2009-0095, Confusion Hill Bypass Project**

**Introduction**

The Assistant Executive Officer of the North Coast Regional Water Quality Control Board (North Coast Regional Board) issued an Administrative Civil Liability (ACL) Complaint No. R1-2009-0095 pursuant to Water Code section 13323 to the California Department of Transportation (Caltrans), who contracted with MCM Construction, Inc. (MCM), alleging discharges of waste in violation of water quality certification and General Storm Water Permit. The North Coast Regional Board is scheduled to hear this matter during its June 2011, meeting. Parties have exchanged evidence, submitted legal argument, rebuttal, evidentiary objections and responses. This order addresses the evidentiary objections regarding biological monitoring reports (reports) offered as evidence by the Prosecution Team. CalTrans and MCM submit that the reports must be excluded because they are inadmissible hearsay and lack foundation. Prosecution Team responded asserting that the reports qualify under the official records exception to the hearsay rule. Prosecution Team has indicated that the reports make up a significant portion of the evidence supporting its case, and requests a ruling on this issue in advance of the hearing.

**Explanation of Hearsay Evidence**

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally not admissible in court because of its inherent unreliability. There are numerous exceptions to the hearsay rule based on the rationale that even though the statement is made out of court, it is still reliable.

Under the official records exemption, "evidence of a writing made as a record of an act, condition or event is [not hearsay] when offered to prove the act, condition, or event if:

- (a) The writing was made by and within the scope of duty of a public employee;
- (b) The writing was made at or near the time of the act, condition, or event; and
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.)

Under the business records exemption, "evidence of a writing made as a record of an act, condition or event is [not hearsay] when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

A court has broad discretion in determining whether a party has established foundational requirements for the admission of official records. (See *Lee v. Valverde* (2009) 178 Cal.App.4th 1069, 1075.) Similarly, a court has broad discretion in determining whether sufficient evidence is adduced to qualify as business records. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1011.)

### **Water Boards' Rules Governing Admission of Hearsay Evidence**

Adjudicative proceedings conducted by the water boards must be in accordance with the provisions and rules of evidence set forth in Government Code section 11513. (Cal. Code Regs., tit. 23, §648.5.1.) This code section provides that this hearing need not be conducted according to technical rules relating to evidence and witnesses that would apply in a court of law. (Gov. Code, § 11513, subd.(c).) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons rely in conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. (Gov. Code, § 11513.) The Hearing Officer has flexibility to admit evidence and make determinations as to its credibility. Certain basic requirements must be met to constitute substantial evidence upon which the Regional Water Board can rely. Documents and other exhibits must have some foundational support to be properly admitted. (See *e.g. Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 350 [unauthenticated video tapes irrelevant to administrative proceeding].) However, there is no requirement under water board regulations or Chapter 4.5 of the Administrative Procedures Act that a proper trial-like foundation be made for exhibits and evidence.

Government Code section 11513 also states that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (Gov. Code, § 11513, subd. (d).)

### **Biological Monitoring Reports**

The biological monitoring reports were prepared by a consulting firm (URS Corporation) hired by CalTrans to independently monitor and report project activities. This was pursuant to a requirement of the National Marine Fisheries Service (NMFS) permit, which provides: “A biologist shall monitor inchannel activities and performance of sediment control or detention devices for the purpose of identifying and reconciling any condition that could adversely affect salmonids or their habitat. (Prosecution Team Case in Chief, Attachment H to Declaration of Kason Grady at p. 4.) The NMFS permit further provides that CalTrans “shall retain a qualified biologist with expertise in the areas of anadromous salmonid biology....” (*Id.* at p.3.)

Under Task Order No. 34, CalTrans retained a professional biologist, whose tasks included, *inter alia*, the monitoring of “in-channel activities and performance of sediment control or detention devices for the purpose of identifying and reconciling any condition that could adversely affect salmonids or their habitat.” (See Task Order [Attachment to Supplemental Declaration of Terry Davis]) at p. 2.)<sup>1</sup> The contract specifies that the biologist’s duties include monitoring stormwater utilizing Best Management Practices to see that appropriate erosion control measures are adequately placed and maintained. It then lists a number of water quality requirements that need to be met. (*Id.* at pp. 2-3.) The contract specifies that the biologist received copies of the permits from various government agencies, including the water quality certification from the Regional Water Board. (*Id.* at p. 5.) The contract contains a provision for meetings between CalTrans and consultant staff “as often as necessary to ensure they share a common understanding of the Task Order objectives.” (*Id.* at p. 3.)

The contract requires the Caltrans Contract Manager to approve statement of qualifications for key staff and new job classifications assigned to Task Order 34. (*Id.* at p.5.) It lists Carl Page and Bradford Norman as the biological monitors assigned to perform fish monitoring and report preparation (*Id.* at p. 12.).

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<sup>1</sup> URS subcontracted with Ibis Environmental Inc. for the work described in Task Order 34. (See CalTrans Response to Prehearing Instructions, 4<sup>th</sup> Attachment, Work Order No. 050106-001 [URS-IBISreNMFSbiomonitor—34 WORKORDER.pdf].)

### Analysis

Both the official records and business records exemptions to the hearsay rule require that the writing be made near the time of the event and that the source of information and method of preparation indicate trustworthiness. Site conditions were monitored by the biologist, and reports were made at or near the time of the conditions reported as evidenced by the dates of the photographs and reports. The trustworthiness of the reports is not in dispute. In fact, in its Case in Chief CalTrans cites the reports as evidence that project activities did not injure biological resources. (CT Opening Brief at 2 ["It is undisputed that independent biological monitors were on site virtually on a daily basis, monitoring habitat and the river itself; however, their voluminous reports reflect no observations of such injurious impacts"].) The reports were prepared as required by the state and federal endangered species acts and pursuant to the specific terms of a written contract. The biological monitors themselves were required to have certain professional credentials, including expertise in the areas of anadromous salmonid biology. The trustworthiness of the method of preparation of these reports is supported by the presumption that an official duty is regularly performed. (Evid. Code, § 664.) This presumption extends to the duty and exercise of due care of private individuals, particularly those with professional training. (See *Pasadena Research Laboratories v. U. S.* (9th Cir. 1948) 169 F.2d 375, 382 [citing *U. S. Bank v. Dandridge*, 25 U.S. 64, 69 and *Internat. Shoe Co. v. Federal Trade Com.*, 280 U.S. 291, 302 ("There is no reason to doubt that in so doing they exercised a judgment which was both honest and well informed; and if aid be needed to fortify their conclusion, it may be found in the familiar presumption of rightfulness which attaches to human conduct in general")].)

For the official records exemption, the writing must be made by and within the scope of duty of a public employee. Prosecution Team argues that the consultant must be an agent of CalTrans for the purpose of applying the exception. We think if anything, the biological monitor would be an agent for the regulatory agencies: NMFS, DFG and perhaps the Regional Water Board. The purpose of the NMFS permit requirement is to have an independent party verify project conditions. For this reason the reports might be even more reliable than if CalTrans or an agent of CalTrans were reporting.

For the business records exception, the writing must be made in the regular course of business, which is evident based on the NMFS permit requirement and the contract that details the biologist's duties. In a court of law, the business records exemption would also require a custodian or other qualified witness to testify to the record's identity and the mode of its preparation. In this case, even absent a custodian we find sufficient evidence to demonstrate the identity of these records and how they were prepared. The reports were prepared pursuant to the NMFS permit requirement and subsequent contract between CalTrans and the consultant. This provides sufficient foundational support for admission. There is no evidence indicating that they have been forged or

tampered with or could somehow not be what they are purported to be. The reports are evidence of the facts shown in them unless otherwise rebutted or contradicted. (See *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 605-07.)

While CalTrans objected to all the biological monitoring reports as hearsay, MCM submits only a specific and narrow objection that the biological monitor lacks the prerequisite knowledge of heavy equipment to be qualified to make observations. Knowledge of the function of heavy equipment is not necessary to monitor and report fluid leaks. Task Order No. 34 specifically provides that "Consultant Biologist and Resident Engineer will make sure that the contractor is taking necessary action to monitor and prevent fluid leaks in their equipment." (See Task Order No. 34 at 3.) MCM's argument appears to present a rebuttal to the evidence shown rather than a hearsay issue. Parties are allowed to dispute the content of the evidence.

### **Conclusion**

The NMFS permit requirements, specific contract and work order, and the credentials of the hired consultant all corroborate the content of the reports. We find these reports sufficiently reliable and the evidence in the record supports the application of both official records and business records exceptions to the hearsay rule. Accordingly, the hearsay objections to the biological monitoring reports are overruled.

Please note that finding the evidence reliable and not hearsay does not necessarily mean that the evidence proves the violations as alleged in Prosecution Team's case.

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