Item 18

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June 28, 2005

Mr. Roger Briggs
Executive Director
Regional Water Quality Control Board
Central Coast Regional
895 Aerovista Place, Ste. 101
San Luis Obispo, CA 93401

Re: Goldie Lane Property - David Pierson; Administrative Civil Liability Order No. R3-2005-0024

Dear Mr. Briggs:

This letter is submitted on behalf of Mr. David Pierson in response to Administrative Civil Liability Complaint Order No. R3-2005-0024 ("Complaint"), for which a hearing is currently scheduled for July 8, 2005. Mr. Pierson will appear at the hearing and can affirm that the factual statements in this letter are true and correct as his written testimony.

Mr. Pierson has entered into discussions with Regional Water Quality Control Board, Central Coast Region ("RWQCB") staff and certain non-profit organizations regarding resolution of this matter through the possibility of payment of a fixed sum representing reimbursement of staff time and funding for certain Supplemental Environmental Projects ("SEP"s). While the preparation of the SEPs continues to progress, representatives for Mr. Pierson informed Chairman Young, the Executive Director, RWQCB'S legal counsel and staff that it would be unlikely that Mr. Pierson would have sufficient time to prepare adequate SEP proposals for consideration at the July 8th meeting. Mr. Pierson requested a continuance of this matter for the sole purpose of working with RWQCB staff on the SEP proposals. This courtesy was denied by the RWQCB.

Because the RWQCB has decided to go forward with a formal evidentiary hearing on this matter on July 8, 2005, Mr. Pierson submits this letter to preserve significant legal and factual defenses. While Mr. Pierson is negotiating with RWQCB staff to settle this Complaint by funding certain SEPs, Mr. Pierson is in no way waiving any of his legal rights, including legal arguments previously raised by counsel for Mr. Pierson. This includes Mr. Pierson's assertion that the RWQCB was without authority to rescind Administrative Civil Liability Complaint Order No. R3-2204-0110 ("2004 Complaint") in the amount of $25,500 at its December 2004 meeting. Accordingly, the RWQCB did not have the authority to issue the current Complaint that seeks higher penalties in the amount of $125,000.

Furthermore, and perhaps most importantly, Mr. Pierson believes that the RWQCB has a misguided impression of him and the actions allegedly taken on his behalf. It is believed that this impression has adversely affected the RWQCB and its staff and brought them to conclusions that are not merited by the actual facts presented here.

I. SUMMARY OF EVIDENCE

Mr. Pierson invested for his family in the Goldie Lane property in 1999. His plan for the property included its possible use for agriculture and also to split the parcel into separate parcels to allow him to pass his investment in the community to his children for estate planning purposes. Under the existing rural land zoning and other County of San Luis Obispo ("County") ordinances, the maximum number of parcels that the property could be divided into was three.

It was never Mr. Pierson's plan to build on any of the property. Further, there were never any permits sought for grading or construction, no development plans submitted to any governmental agency and certainly no work was done on the property in preparation for construction.

Mr. Pierson retained eda-design professionals ("eda") to do the necessary work for splitting the parcel and relied upon eda to determine what forms and permits were necessary to accomplish his plans.

While there were allegations leveled at Mr. Pierson that the property was "graded," this is not case. There was only a clearing of brush. Mr. Pierson thought that the clearing would make the property look better and provide some opportunity for limited agricultural use. He had no intentions of creating an erosion concern. However, once advised by the RWQCB of a possible problem, Mr. Pierson immediately authorized eda to address this concern by whatever means were required. Mr. Jeff Emrick, a highly experienced California registered civil engineer, performed what, in his opinion, were all the appropriate steps to address the concern. Mr. Emrick designed an appropriate Storm Water Pollution Prevent Plan ("SWPPP") for the subject property. The necessary items for the SWPPP were purchased and installed. As the season wore on, maintenance of the various employed devices occurred. Mr. Emrick maintained, as necessary, a detailed set of reports of the events affecting the property and what needed maintenance etc. Mr. Emrick is the only professional who has worked on this situation continuously from the start to the finish and has the best overall picture of the events on site.

Mr. Emrick's professional opinion is that, while there was some erosion on the property itself, no sediment entered the Huerhuero Creek or any of the blue lined creeks from the subject property. In other words, the Best Management Practices ("BMPs") were performed as expected at the property.

Importantly, a review of the evidence proves that there was never any time that eda or Mr. Pierson failed to respond to the requests made by the RWQCB or its staff.

Notwithstanding the foregoing facts, the RWQCB Executive Officer issued an administrative civil liability complaint against Mr. Pierson, fining him $25,500 on the recommendation of staff. Mr. Pierson tendered the fine and waived hearing. This act of submission denied the RWQCB the legal authority to hold a hearing and certainly did not permit it to increase the fine amount. However, a hearing did take place, depriving Mr. Pierson of his basic rights. Mr. Pierson contends that the hearing was improper and not permitted by the California Water Code.[1]

II. ANALYSIS OF EVIDENCE

A. Mr. David Pierson

Mr. Pierson currently lives in the northern San Diego area with his wife. Some years ago he decided he wanted to relocate to the central coast area and purchased a piece of property north of Cayucos to be on the beach. He also purchased additional property in the Creston area and built a home there. He has engaged and continues to be engaged in agricultural pursuits on this property. He has purchased equipment and has planted and maintains considerable acreage of dry crops.

The only development application pending on any of his properties in the County is the one pertaining to the property near Cayucos. Further, another one of his parcels near Creston that received subdivision approval is under construction. None of these properties are the subject of the Complaint.

Mr. Pierson is an estate planning attorney by trade; however, he has not practiced for some years. Because of this profession, he recognizes that the best planning is to give his children individual parcels, rather than to leave one entire parcel to divide among them.

In his earlier years, Mr. Pierson served on the Inglewood City Council for several years. In addition, he served in the California State Legislature at the time the Coastal Act was enacted and the Coastal Commission was created. He was active and committed to the passage of this legislation. Notwithstanding this history, he does not have a

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[1] It is clear from the transcripts of the hearing that the RWQCB was provided with misleading and inflammatory information about the situation without input from Mr. Pierson, who believed the matter concluded. Mr. Pierson believes that the RWQCB became prejudiced against him during the course of this one-sided hearing. Mr. Pierson reserves all his rights relating to such prejudice. As an example, it is contended that parties that would have the RWQCB unfairly penalize Mr. Pierson showed photographs to the RWQCB that created the erroneous impression that Mr. Pierson was responsible for the barren hillsides shown. *See* Audio Recording of December 2004 Hearing ("Audio Recording"). In fact, some of the areas had been cleared by California Department of Forestry ("CDF") as a result of the Highway 58 fire.

background in rules and regulations involving RWQCB issues.

Mr. Pierson has a deep concern and respect for the environment. He believes in being a good steward of the land. This shows through with his now "under construction" subdivision project where he created a wildlife corridor. He has restricted a portion of the property so that the wildlife can continue through an area where they traditionally have traveled. He wishes this property, once he has built his house, to remain natural, pristine and in agricultural operation where feasible. He has also given strict orders to prevent the unnecessary cutting of trees.

B. Purchase of the Subject Property

The subject property was specifically purchased solely as part of his estate planning. Mr. Pierson's desire was merely to split the lot so that each resulting parcel could be transferred later to his sons and daughters. There never were any plans to develop and build on this property. When purchased, he also entertained some idea that certain areas of the property could be cultivated for dry crops.

Mr. Pierson retained the services of eda to assist him in splitting the lot. He never told eda that the properties should be split for development. eda applied for a subdivision. Mr. Pierson signed the July, 26, 2002 Developer's Statement for David Pierson Tentative Parcel Map because eda informed him that this was required to split the property into smaller parcels. Mr. Pierson was not familiar with the requirements to perform such tasks in the County. Mr. Pierson now acknowledges that the August 23, 2002 Mitigated Negative Declaration & Notice of Determination states "[a] request to subdivide an approximate 635 acre parcel into three parcels consisting of 2 parcels of approximately 160 acres each and 1 parcel of approximately 155 acres for the sale and/or development of each proposed parcel." However, as indicated above, it was never Mr. Pierson's intent to "sell" and "develop" the subject property.

C. Mr. Dave Williams

Mr. Williams performed some tasks for Mr. Pierson with reference to the subject property. But while Mr. Williams may have referred to the subject property as "our property" (meaning Mr. Pierson and himself) he never had any ownership interest in the property, he is not a partner in any way in the property, nor did he sign any loans for the property.

It now appears that Mr. Williams took certain actions and positions with the RWQCB, its staff, and others that were inconsistent with Mr. Pierson's instructions and desires. Some actions and positions were even done without Mr. Pierson's input or knowledge.

As an example, after the subject property was cleared of brush, Mr. Pierson asked Mr. Williams to assess whether something could be grown on the property. In response, Mr. Williams offered the idea of olive trees to Mr. Pierson. However, Mr. Pierson was

not interested in this idea because a well would have to be drilled on the property in order to irrigate the olive trees. Mr. Pierson was interested in the possibility of dry farming. At no time did he authorize Mr. Williams to pursue olive tree planting, and, as will be discussed further below, he had no knowledge of Mr. Williams' contact with Allegre Consultants.

In sum, the controversy over whether an olive grove for the subject property was contemplated by Mr. Williams is simply irrelevant and a red herring which only served to create a bad impression about Mr. Pierson.

Further, while it is true that Mr. Pierson has listed this property for sale, this decision was reached after the RWQCB's commencement of action against Mr. Pierson. Mr. Pierson had by then given up his original plans for the property. However, at no time was the text of the listing by Mr. Williams even shown to Mr. Pierson. In fact, it was not until 2005 that Mr. Pierson aware of what was being advertised by Mr. Williams.

D. The "Grubbing"

Shortly after Mr. Pierson purchased the property, he received a call from Mr. Williams. Mr. Williams told Mr. Pierson that he had equipment working on the neighbor's property (Haig Kelegian) and that it would be cost-effective to take advantage of the presence of the equipment to clear some brush from Mr. Pierson's property. Mr. Pierson told Mr. Williams to go ahead with the clearing of the brush. He felt it would not only make the property look nicer but would permit the growth of some dry crops. However, Mr. Pierson did not believe that this work was in violation of any law, rule or regulation and he certainly did not think that this simple act would have the consequences it did. Specifically, there was no plan or plot to clear the property for construction.

E. Subsequent Events

1. Mr. Ryan Lodge (former RWQCB staff member) visited the property on September 20, 2002 and discussed various issues with Mr. Williams. Mr. Williams informed Mr. Lodge that the property would be seeded by plane. Mr. Lodge insisted that aerial seeding was not sufficient. However, Mr. Lodge's opinion on this point was incorrect and contradicted a recommendation of the Upper Salinas-Las Tablas Resource Conservation District relating to the restoration of areas of Mr. Pierson's property (as well as surrounding properties) destroyed by the Highway 58 fire.[2] An Upper Salinas-Las Tablas Resource Conservation District Report, dated August 14, 2002, recommended that aerial reseeding be employed to restore the areas destroyed by the Highway 58 fire.

[2] During the fire, the cleared portion of Mr. Pierson's property that is the subject of the Complaint served as a major firebreak that aided in the CDF's ability to bring the fire under control. When the fire occurred, CDF brought heavy equipment to the affected area and did some further clearing on Mr. Pierson's property in order to stop the fire.

(Exhibit A) Mr. Lodge may not have been aware of this report.[3] Nonetheless, seeding was done by Mr. Pierson of not only the property in question, but on a large portion of the property that was deforested by the fire.[4]

2. When Mr. Pierson received an October 10, 2002 letter (Exhibit B) from the RWQCB raising issues as to the subject property, he immediately called eda and gave them a very simple instruction. His instruction was to do whatever was necessary to address the matter and take care of the problem. At no time did Mr. Pierson ever countermand or amend that simple instruction. His retention of eda, a respected, responsible and competent firm appropriately experienced to deal with the situation, demonstrates his intent not to violate any rules, regulations or laws, but rather to deal with the situation appropriately and effectively.

3. On October 22, 2002, eda submitted a letter to State Water Resources Control Board Division of Water Quality with a Notice of Intent, SWPPP Narrative and Monitoring Report, Erosion Control Plan and a check for the required payment. (Exhibit C) The submitted plan called for installing silt barriers and other erosion and sediment controls and preparation for final planting and seeding. More specifically, it stated that the following would be accomplished:

a. Install straw waffles as shown on plan
b. Install EnviroBerm porous sediment control as shown on plan
c. Stabilize denuded areas within 14 days of last clearing activity
d. Remove accumulated sediment from berms and other sediment control devices.
e. Aerial seed after clearing activity done - references seeding of disturbed and burned areas.
f. Maintenance procedures to be taken over time.

4. Mr. Jeff Emrick of eda designed this plan. Mr. Emrick is a very experienced Civil Engineer registered in the State of California and other states as well and would testify[5] that in his professional opinion, the design he outlined was appropriate for the property.

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[3] In mid November, 2002, this seeding took place. No one required Mr. Pierson to reseed the fire ravaged area, he just did it.

[4] When one observes the current condition of the property, it is clear that the seeding has transformed the fire ravaged areas into a vibrant living carpet of green.

[5] It is Mr. Pierson's current understanding that Mr. Emrick will not be available to testify at the July 8, 2005 hearing, but has been or will be subpoenaed by the RWQCB to give his deposition testimony after the July 8th hearing. (Exhibit X) Mr. Pierson objects to the RWQCB's attempt to blatantly disregard the requirements of the Administrative Procedures Act and its own regulations. *See* Section IV.E, *infra*.

5. The November 25, 2002 RWQCB letter authored by Mr. Lodge (Exhibit D) noted numerous concerns. In response to these concerns, Mr. Emrick would testify that, in his professional opinion, the concerns raised were not appropriate in light of the conditions and the plan that was being put in place. What is disturbing is that Mr. Lodge states in his letter that there had been no SWPPP devices installed as of the date of the letter. This was not true and never corrected in the record. The truth was that dikes had already been installed. (Exhibit E)

6 Further, although Mr. Williams, not a professional civil engineer, may have said that the devices would all be installed before the first rain, he was not aware of the lag time in obtaining some of the devices in the quantities needed.

7. By December 13, 2002 it was reported by eda that the dikes were in good shape and the wattles were installed in critical areas. (Exhibit F) After a three-inch rainfall, eda's reports indicated that some repair was necessary at certain points but that these repairs were subsequently done. (Exhibit G)

8. On January 23, 2003 the RWQCB issued Cleanup and Abatement Order ("CAO") No. R3-2003-0021 (Exhibit H) for alleged failure to implement effective erosion and sedimentation controls and alleged discharging of pollutants to state waters. Prior to this issuance, there was no attempt by the RWQCB staff to discuss with eda or Mr. Pierson any issues of concern leading to this CAO. In fact, the speed of the issuance of this CAO was, frankly, astonishing given that the SWPPP was being employed and updated as required. The motivation for the issuance of the CAO is highly questionable.

9. Nonetheless, to address certain concerns relating to one of the roads[6] on site that existed prior to the purchase of the property by Mr. Pierson, eda revised the SWPPP on February 7, 2003 (Exhibit I). While the seeding complained of by Mr. Lodge had long since germinated over the vast range of the area seeded, the SWPPP revisions included further hand seeding in specific areas where germination had apparently been delayed. The revised SWPPP also called for the spreading of straw where appropriate, a significant regrade of the existing access road to 2% slope, and the installation of straw bundle chevrons at the road's flow line. Further, the silt fencing in the blueline stream near conveyances with Huerhuero Creek was to be removed, and removal of sediment from berms and behind other devices was to be done. All this work was completed.

10. Continuing maintenance and upgrades of the BMPs occurred at the property. According to eda's February 18, 2003 "Inspection and Maintenance Report" (Exhibit J):

> "On 32 acres, minor rivulets. Access road good. Intersection of roads slow erosion on upper road. Hand dug berms repaired. Road

[6] There was a grading violation related to this road, which Mr. Pierson learned about after he purchased the subject property.

> intersection – pack rivulets with straw and brush and clean silt. To be done by February 25, 2003."

11. As the foregoing shows, the only reasonable conclusion that can be reached by the RWQCB is that appropriate and satisfactory attention was given by Mr. Pierson to the issues raised by the RWQCB and its staff at all times—any contrary conclusion is wholly unsupported by the evidence.

12. Further substantiating the diligent and appropriate work completed by Mr. Pierson in response to the RWQCB's concerns is a February 20, 2003 letter written by the San Luis Obispo County Planning and Building Department to eda (Exhibit K). In that letter it is apparent that the County did a site inspection. The letter states:

> "...it is clear that sedimentation and erosion control methods installed after the first seasonal rains are now effectively limiting situation into swales and water ways."

At no time did the RWQCB acknowledge or take this determination by the County into account.

13. It should be further noted that RWQCB staff had visited the property on February 3, 2003 and based their subsequent February 21, 2003 letter (Exhibit L) on the three-week-old and then irrelevant February 3, 2003 review. The RWQCB staff failed to take into account any work done over the interceding 18 days. That interceding work is discussed in the February 18, 2003 eda report (Exhibit J). Again, this factual error was never taken into account or corrected in the RWQCB's record.

14. In response to the letter of February 21, 2003, Mr. Emrick spoke with Mr. Lodge and followed up with a letter on February 25, 2003 wherein he took issue with Mr. Lodge's findings. (Exhibit M) Mr. Emrick stated in part:

> "There is no evidence of erosion from the hillsides entering a creek or a blueline stream. The erosion control measures in place and the cleared brush at the bottom of the slopes is acting as an effective BMP."

Mr. Emrick further advised that eda had submitted to the County for review as a BMP the elimination of the road that Mr. Lodge seemed focused on, reminding him that this action required permits.

15. However, it unfortunately became quite obvious that Mr. Lodge seemed bent on taking Mr. Pierson to task with no attempt to be technically correct. Very early in March, 2003, Mr. Lodge and Ms. Bitting joined Mr. Emrick for a site visit. Mr. Emrick wrote to Mr. Lodge on March 3, 2003 (Exhibit N) thanking them for viewing the erosion control and for suggestions on improvement. He further discussed in this letter that straw

wattles needed to be installed on the upper access way, silt fences located at the lower end of the site needed to be removed as shown on the SWPPP, and that the existing site access road did not need to be included in the activities because no work had been done on the road for years and was not for construction.[7]

16. Four days later Mr. Lodge asserted what amounts to calling Mr. Emrick a liar. He stated the he had "no concurrence" with Mr. Emrick's letter and further stated: there is evidence that erosion from the hillsides and entering roadway is entering area surface waters; and that eda's statement that erosion control measures are effective was incorrect. Mr. Lodge also took issue with Mr. Emrick's comments that the road does not have to be on SWPPP because it is not in the construction areas and has been there for years. (Exhibit O) Staff's version, without any reference to Mr. Emrick's comments, becomes "the record" and position of the RWQCB and again, never has been corrected.

17. Mr. Emrick, rightly so, responded to what he saw as a twisting of the record by Mr. Lodge. He wrote on March 12, 2003 (Exhibit P) to Mr. Lodge and stated that that Mr. Lodge was confusing many issues. Mr. Emrick stated again that:

> "...there is no evidence of erosion from hillsides entering a creek or blueline stream"

Further Mr. Emrick stated that Mr. Lodge:

> "has confused this statement saying erosion from the hillsides and roadway have entered surface waters".

Mr. Emrick also noted in this letter that the currently submitted SWPPP showed that neither the County nor the RWQCB had approved the access road erosion control measures and thus they could not yet be put into effect.

Mr. Emrick concluded:

> "Ryan, we are confused as to why erosion of the access road leading to the site is not an issue while on site it has become the major thrust of your erosion concerns. We are continuing to try to stabilize this agricultural road even though it is not included in the current SWPPP."

18. Clarification was sought, but never delivered by Mr. Lodge, nor anyone else from the RWQCB. Again, it appears that the die was already cast. Facts and reason appear to have been superfluous.

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[7] Another old road on the subject property was abandoned at the County's request. This old road was packed with straw and allowed to re-vegetate.

19. Mr. Pierson received the August 12, 2003 letter transmitting yet another CAO from the RWQCB. (Exhibit Q) That letter stated: "Despite submitting a Notice of Intent to comply with the General Storm Water Permit for construction activities, you have now indicated that the project is an agricultural project. Agricultural projects are exempt from National Pollutant Discharge Elimination System permitting requirements." Mr. Pierson was shocked that the RWQCB was saying that he was not complying. Notwithstanding this, Mr. Pierson again instructed Mr. Emrick to do what was necessary to address the RWQCB concerns. In that spirit Mr. Emrick met with Mr. Lodge at the property on August 19, 2003. As confirmed in a letter by Mr. Emrick to Mr. Lodge dated August 20, 2003 (Exhibit R), eda proposed revising the SWPPP to include further reseeding of some bare areas, the packing of rivulets and hand dug berms with straw where necessary, and to include a road management plan. Again, there is absolutely nothing shown here but outright cooperation by Mr. Pierson.

20. The RWQCB record reveals that Ms. Sarah Christie became officially involved in this matter in August 2003, when she wrote a letter dated August 27, 2003 to the RWQCB. (Exhibit S) It was not until 2005 that Mr. Pierson saw this letter and learned of its contents. Unfortunately, it contains many misstatements and is laced with innuendo. Nonetheless, this letter seems to have become "fact" as far as the RWQCB is concerned, again raising the specter of a misguided prosecution. Its basic themes appear to be reiterated again and again in RWQCB staff reports.

For instance, Ms. Christie stated in her letter:

> Essentially, you are saying that you are choosing to believe the assertions of the land owner that he cleared the site to plant olives, even though he has no background in agriculture, has planted no olives in the last year, has hired a real estate broker, not an olive farmer to manage the site.

There can be no dispute that these comments are highly inflammatory and as indicated above, Mr. Pierson had no intent to plant olive trees and Mr. Williams was not "managing" the property. What the RWQCB has allowed Ms. Christie to do is to manufacture a major controversy over whether Mr. Pierson was going to plant olive trees, when he had no such intent.

Another false accusation Ms. Christie has repeatedly made against Mr. Pierson is that he plans to subdivide the subject property for residential development. Again, as stated above, Mr. Pierson never sought to develop the subject property; he only wanted to subdivide it for his children and possibly use some of the property for dry farming. Further, despite Ms. Christie's baseless accusations to this effect, he has never testified before the County Subdivision Review Board that he plans to develop the site for residential uses. Also, Ms. Christie contends that Mr. Pierson has been cited for grading violations by the County for roads that do not meet the test for county agriculture roads—this is untrue, no citations were ever issued. Yet again, the RWQCB appears to have accepted and indeed endorsed these accusations.

Finally, Ms. Christie contends:

> As noted previously, the property owner has purchased approximately 3,000 acres in the area which he is currently in the process of rezoning and subdividing to increase its development potential.

This latter statement apparently refers to other properties owned by Mr. Pierson that have either been previously rezoned or have underlying legal parcels. His intent is for these parcels also to go to his family and also some close friends—there is no intention to sell these parcels to the general public. What Ms. Christie fails to explain is that one of the parcels in question when purchased by Mr. Pierson had already been zoned for two golf courses. Mr. Pierson filed a request to change the zoning back to rural land. As a result of his request and requests of other landowners in the area, the County changed its Master Plan and his property was zoned agricultural.

Notwithstanding the above, these other properties have no relevance to the matter now before the RWQCB, and clearly Ms. Christie's misplaced comments on this point were meant to impugn Mr. Pierson's character. Mr. Pierson does not wish to engage in a prolonged discussion of what she said and did. She is entitled to her position and belief, but her juxtaposition of one property with another and her use of misleading evidence is improper and should not now or ever have an impact on the RWQCB's decision in this matter. But it did. When one compares the thrust of Ms. Christie's accusations and the comments in various RWQCB staff reports, or the comments on the record by RWQCB Board members at the last hearing, it is clear that the RWQCB accepted her "spin." Consideration of these false accusations, even if they had been true (which they were and are not), would be improper considerations by the RWQCB and constitute an abuse of discretion by the RWQCB.

21. Notwithstanding Ms. Christie's campaign against Mr. Pierson, the RWQCB's own chronology (Exhibit T, Attachment 2) reports that on September 19, 2003 the site was:

> [W]ell vegetated, with only small area as requiring additional seeding. The site does not appear to be have a potential erosion threat.

22. On February 4, 2004, Mr. Emrick wrote another letter to Mr. Briggs (Exhibit U) in an attempt to correct conclusions drawn by RWQCB staff members in their staff report prepared on January 15, 2004. Mr. Emrick's letter points out:

> 1. No sediment has been deposited into the Huer Huero Creek as a result of the clearing of the property. "The entire cleared area drains to a tributary of the Huer Huero Creek that is entirely contained on the project site." While there is surface flow, the flow goes subsurface 100-200 yards upstream from the confluence

> with the Huer Huero Creek. "There is no evidence that the confluence has had surface flows in the past two years. eda believes that "sediment deposition into the Huer Huero Creek cannot occur without surface flows in the tributary of the confluence."
>
> 2. Clearing of the property was in conformance with USDA Natural Resource Conservation Service guidelines and not "grading" as claimed by the RWQCB. He also notes that in fact the CDF staff on the "scene of the HWY 58 fire have reported that the clearing on this site was instrumental in arresting the progress of the fire in this area towards Creston."

23. Notwithstanding these attempts to correct the record, the subsequent February 6, 2004 RWQCB Staff Report for Regular Meeting of February 6, 2004 (Exhibit T) quoted below took no note of any of the corrections:[8]

> The evidence points strongly toward the conclusion that the Pierson site was, at all times, intended to be subdivided and cleared for home sites and future construction. **[Comment: As indicated above, not only is this statement blatantly untrue, no one ever attempted to ascertain its accuracy by contacting Mr. Pierson, nor was there any proof that the any clearing was done for home sites and/or future construction.]** Pierson obtained a Storm Water General Construction Permit after the initial land disturbance, yet later claimed that the site was intended for agricultural purposes." **[It is Mr. Pierson's understanding that Mr. Emrick requested this type of permit as Mr. Emrick was used to using it and felt that it offered the best avenue to deal with the then existing concern by the RWQCB. Mr. Pierson relied on his expertise in this area. Further, the fact that the general permit was sought does not in any way mean that there was going to be construction—as repeatedly stated previously, there was never any intention to do construction on the subject property any never any permits sought to do so.]**
>
> A representative of Pierson...contacted an olive grower and requested a proposal for purchase and installation of a low density of olive tress **[Mr. Williams was not Mr. Pierson's representative in this regard and sought that proposal without authority, and certainly contrary to prior discussions with Mr. Pierson]**; The grower stated that the low density, and 'huge spaces between the trees' was desirable because the trees were intend for aesthetics, rather than olive oil production. . . . The

[8] Mr. Pierson's comments in response to this RWQCB staff report are indicated in bold text.

> landowner did not, and still does not, know an existing groundwater well's safe yield, therefore an irrigation system was never designed. **[There was no such work because no such use was intended as stated herein. Further, it becomes clear at this point that the RWQCB is not differentiating Mr. Pierson's property from that of Mr. Kelegian. Mr. Kelegian's property has a well, Mr. Pierson's never has.]** The site representative stated that they did not pursue growing olive trees with the grower, or any other consultant." **[One of the reasons Mr. Pierson rejected the idea of growing olive trees because there was no existing well on the property.]**
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> . . . RWQCB staff summarized that it was highly reasonable to expect there would have been 'one to two orders of magnitude of increased soil loss' given the land clearing, as 'compared to the native setting.'" **[There has never been any verification of this claim and, indeed, the comments from Mr. Emrick to the RWQCB in his letters are in stark contradiction to this allegation.]**
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> . . . The current condition....does not threaten water quality. Staff believes that further enforcement for past violations could be merited. ... Staff concurs with the comments at the October board meeting that the agricultural exemption from permit requirements cannot be used as a shield for construction activities. **[See comments above regarding agriculture and alleged construction activities.]** However, staff time is limited due to the current budget status, so the Board should consider whether these sites warrant allocation of additional staff resources to pursue further enforcement. ...The extensive 'informal' and 'formal' enforcement actions already taken have prompted the additional work necessary to protect water quality. Staff believes this outcome is an adequate conclusion to these cases." (Emphasis added).

24. On April 1, 2004, Mr. Mark Angelo authored an internal memo to Chris Adair of the RWQCB. (Attachment 14 to RWQCB Staff Report for Regular Meeting of July 7-8, 2005 (2005 RWQCB Staff Report), Item 18.) He had visited both Mr. Pierson's and Mr. Kelegian's properties. According to the 2004 Complaint, the property was stable as of September 19, 2003 (2004 Complaint, at p. 2, ¶ 3.). His visit then was almost 8 months after that declaration of stability. His findings are curious. He claims to have found some "freshly deposited" sediment deposits in the lower reach of an unnamed tributary to the Middle Branch of the Huerhuero Creek. The initial question is how can he make such a finding and connect it to any other event or circumstance after the passage of 8 months? He does not demonstrate any scientific evaluation, discovery of weather events in the ensuing months, impact of the deforested areas due to the Highway 58 fire, nor does he associate any of the designated soil types to this sediment. Further, while he makes the statement contending a connection between what he observed and the "grubbing" operation, he makes the following observations in his "General Findings":

1. "Impacts to the beneficial uses in Huerhuero Creek down stream of the two properties [Pierson/Kelegian] were not assessed because no sediment deposits attributable to the grubbing operations were observed..."

2. "The area where these properties are located is subject to extremely high natural sediment inputs, especially after fires."

3. "I did not observe any sediment deposits in the Middle Branch of the Huerhuero Creek that I could directly attribute to the grubbing operations."

25. The 2004 Complaint was issued by the RWQCB on July 16, 2004. Mr. Pierson, wishing to put these events behind him, and notwithstanding the errors, mistakes and improper judgments made and demonstrated by members of the RWQCB, sent a check to the Board in the amount specified in the Complaint. He thus waived hearing. Obviously, because he waived hearing neither he nor counsel attended nor offered any evidence or comments at the hearing.

26. In the December 2004 hearing, the RWQCB took up the issue of the fine levied according to 2004 Complaint. While there are claims that this was not a "hearing," it was, as will be more fully discussed below. There were two relevant items on the agenda, Item nos. 4 and 5. (Exhibit T). The first was related to Mr. Kelegian's Creston property and the second to Mr. Pierson's Creston property. However, the audio recording of the hearing shows that there was a great deal of intermingling of evidence shown to the RWQCB regarding both items. *See,* Audio Recording.

According to the audio recording of the December 2004 meeting, the RWQCB did the following:[9]

A. It summarized and accepted a letter from Ms. Christie arguing against the level of the fine based on what she complains of as "environmental devastation that is put on the property in terms of water quality impairment, habitat destruction, on-going erosion". **[Note: This is in stark contrast to the RWQCB's own analysis that at this time there was no water quality impairment, the seeding had taken hold and was flourishing and there was no ongoing erosion.]**

B. It read into the record a letter by Mr. James Patterson. In pertinent part it stated: "It is unfortunate that the responsible party did not effectively implement the recommended control measures or adequately respond to communications from your

[9] Mr. Pierson's comments in response to this RWQCB's actions are indicated in bold text.

staff." **[Note: How Mr. Patterson knew this is not stated, yet it appears that the RWQCB accepted this factual summation without any foundational evidence.]**

C. Ms. Heatherington showed photos. She stated: "And I just wanted them to be vivid images in your mind as we discuss what the fines are for these egregious actions of moonscaping up in the Northeast county areas." **[Note: There was no foundational information offered for these photos and there is no proof that they are actually the property at issue regarding Mr. Pierson.]** Further, she shows pictures of a creek that is approximately 1200 feet or so from either Mr. Pierson's or Mr. Kelegian's property and claims that the silt there came from either of those properties. **[Note: There is nothing in the record substantiating this at all. Further, later in the transcript Ms. Heatherington admits she didn't take the pictures.]** Later, this same witness states:

> Heatherington: Eva just informed me that on January 3, before the Dept. of Planning and Building, that Mr. Pierson is going for a tentative parcel map to allow division of the 626 acres site ... this year, or next year, I mean.
> Chairman: He is going through a ... ?
> Heatherington: He is going for a tentative parcel map to allow division of the 626 acres site into three parcels. **[Note: This is simply not true.]**

D. Mr. Christie stated: "The property owners still have not implemented the best management practices of seeding, erosion controls, and monitoring outlined in the restoration plan." **[Note: Again this is contrary to the RWQCB's own conclusions in their staff report supporting the $25,500 fine.]**

E. Ms. Everhart: Identified herself as a neighbor of Mr. Pierson. During the course of the conversation, a RWQCB member took evidence when they asked:

> Daniel (Board member): "We saw some pretty, I think, scary pictures of _____, what was the stream like before they started doing this? Was it having any of those problems?
> Everhart: No.
> Daniel: Was it clear running?
> Everhart: Yes, it was."

III. COST OF RESPONSE ACTION

The cost of the response actions taken by Mr. Pierson was far from insignificant. These costs were reported to the RWQCB on October 22, 2004 by Mr. Pierson's former counsel. Sadly, there is no record in the RWQCB's file of any consideration given to these costs.

To add to the record, attached are true and correct copies of the various bills and other paid expenses incurred by Mr. Pierson in response to the RWQCB's requests. (Exhibit V). Mr. Pierson has spent a total of $ 82,616.94.

California Water Code Section 13327 requires that assessing the amount of a fine the RWQCB consider the voluntary cleanup efforts undertaken.[10] Despite having been informed by Mr. Walters of the amount spent by Mr. Pierson, there is nothing in the record indicating that the RWQCB took these expenditures into account. Ignoring this requirement is certainly an abuse of discretion.

Nonetheless, these invoices are being submitted by way of an attachment hereto, and therefore, prior to the hearing Mr. Pierson requests the RWQCB to perform this calculation as they performed in the matter relating to Mr. Kelegian. (*See*, 2005 RWQCB Staff Report, Item 19.) Notwithstanding its failure to perform this calculation, the RWQCB claimed that it believes Mr. Pierson benefited a substantial amount by not taking appropriate action.

IV. LEGAL ISSUES

A. There Is No Evidence Of A Violation And, Thus, The RWQCB Cannot Assess Civil Liability In This Case

The RWQCB's assessment of a penalty under California Water Code section 13350 must be supported by clear evidence that a violation occurred. Section 13350(a) provides that any person who is in violation of an order issued by the RWQCB because he "discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state..." shall be civilly liable in accordance with section 13350(e). Thus, such liability may only be imposed when an actual discharge occurred.

Here, the Complaint alleges violation of the RWQCB's Basin Plan which prohibits "[t]he discharge or threatened discharge of soil, silt, bark, slash, sawdust, or other organic and earthen materials into any stream in the basin in violation of best management practice for ... soil disturbance activities..." Complaint at p. 2. The Complaint then alleges that Mr. Pierson did, in fact, violate these Basin Plan provisions by discharging or threatening to discharge "soil, silt, and other organs and earthen materials into the blue line stream and Huerhuero Creek in violation of best management practice for soil disturbance activities..." Complaint at pp. 2-3.

As an initial matter, under section 13350, a "threatened discharge" alone is not sufficient basis for assessing civil liability. Thus, any evidence which supports a threatened discharge in this case is irrelevant and cannot support the assessment of civil liability against Mr. Pierson.

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[10] All statutory references are to the California Water Code unless otherwise indicated.

As for evidence of an actual discharge, the RWQCB Staff Report fails to provide clear evidence of an actual discharge. Mr. Pierson, on the other hand, has provided a declaration of his consultant Mr. Emrick showing that it is highly unlikely that a discharge occurred to the blue line stream and Huerhuero Creek.

As discussed above, despite RWQCB Staff's attempt to misconstrue the facts of this case, Mr. Pierson took reasonable efforts to implement BMPs at the site that would mitigate the effects of erosion. *See*, Section II.E, *supra*, ¶ 2-19. Mr. Pierson hired eda who assigned Mr. Emrick, a civil engineer with over 20 years experience in the preparation of SWPPPs and the design and implementation of erosion BMPs. *Id.* On behalf of Mr. Pierson, Mr. Emrick prepared a SWPPP Narrative and Monitoring Report and Erosion Control Plan for the site. *Id.* at ¶ 3. The BMPs proposed by Mr. Emrick were appropriate based on his visits to the site and his experience at other properties in the area. *Id.* at ¶ 3-4.

Emrick continued to work at the site to address any problems concerning erosion at the site. Mr. Emrick received and reviewed copies of letters prepared by RWQCB Staff concerning the site. *Id.* at ¶ 5, 7, 12-19. Several of these letters contained obvious misstatements of fact that Mr. Emrick corrected in his correspondence to the RWQCB. *Id.* Mr. Emrick also monitored the site to ensure that the BMPs were in working order and that repairs were made if necessary. *Id.* at ¶ 7, 9-11. Mr. Emrick further modified the BMPs at the site as appropriate to ensure that erosion issues were adequately addressed. *Id.* Based on Mr. Emrick's professional opinion, sufficient BMPs were installed at the site to control erosion.

On the other hand, the RWQCB Staff Report contains several letters prepared by RWQCB Staff that contain no affirmative findings that an actual discharge occurred. *Id.* at ¶ 5, 8, 13, 15-19. Unlike Mr. Emrick's opinion which is supported by significant evidence, including first hand observations, the RWQCB's Staff's opinions are not supportable. Thus, the RWQCB Staff's own letters do not support a finding that a discharge actually occurred at the site.

The RWQCB may not adopt a complaint that is not supported by the findings or is based on findings that are not supported by the evidence. *See Harris v. Civil Service Commission* (1998) 65 Cal.App.4th 1356, 1364; *Mihilef v. Janovici* (1996) 51 Cal.App. 4th 267, 305. Here, all the RWQCB has is allegations of a *threatened discharge*, there is no evidence that an actual discharge occurred. Thus, the RWQCB has no authority to assess liability pursuant to section 13350.

B. The RWQCB Was Without Authority To Take Action On The Complaint At The December 2004 Board Meeting

At its December 2004 meeting, the RWQCB rejected the settlement of the previous administrative civil liability complaint that was issued to Mr. Pierson and directed the RWQCB staff to reassess the amount of the penalty levied against Mr.

Pierson. This action was taken in direct contradiction to the provisions of the California Water Code that governs administrative civil liability complaints.

The 2004 Complaint was issued by the Executive Office on July 16, 2004. Section 13323(d) clearly states that the orders imposing administrative civil liability shall become effective and final upon issuance thereof. Mr. Pierson duly paid the fine assessed in the 2004 Complaint and waived hearing. Thus, the settlement of the 2004 Complaint was accepted and the matter completed when Mr. Pierson tendered payment. Because this matter was concluded, Mr. Pierson and his representatives did not attend the RWQCB's December 2004 meeting.

There is no statutory authority permitting the RWQCB to rescind a final complaint nunc pro tunc. Clearly, without authority to act, and acting contrary to the law of this state, the RWQCB's "rescission" of the 2004 Complaint is arbitrary and capricious and beyond the scope of its authority.

In fact at the December 2004 meeting, the RWQCB itself questioned whether or not the fact that Mr. Pierson paid the assessed fine and waived a hearing, prohibited it from making the determination not to accept the fine set forth in the Complaint and issue another Complaint with higher fines. The audio recording of the December 2004 meeting indicates that in response to these inquiries, Ms. Okun, counsel for the RWQCB, stated:

> If I could just make a suggestion on procedure. There is nothing in the statute that says that if the discharger waives the hearing and submits a check, that it has to be accepted as a settlement or that you can't go forward with a hearing. In this case, the discharger was told that they had a right to waive the hearing and pay and that what would be on the agenda today was the board's consideration of whether or not to accept the settlement. So, as long as the complaint and all that accompanying documentation with the reissued complaint, says here is the amount staff is proposing, you can pay it but the board is intending to hold a hearing and they can show up or not at their own peril, then we won't have to go through this again.

Ms. Okun cites no support, legal or otherwise, for these proposition because she cannot. There are none, and her opinion is incorrect.

Section 13323(b) permits the person who has been issued a complaint the right to waive hearing. In other words, there is no hearing if the person subject to the complaint accepts the findings in the complaint and pays the fine. There is no legal authority supporting the manner in which the RWQCB operated in regard to Mr. Pierson.

Mr. Pierson contends, and the law comports with that contention, that before the Executive Officer issues an complaint with a fixed damage demand, that demand should already have been approved by the RWQCB if there was any issue to be considered. It

cannot be decided after the fact. As stated above, the intent of the waiver under the Water Code is clear, once the fines are paid, the demand has been satisfied and the matter is closed. "[The] primary aim in construing any law is to determine the legislative intent. *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 187, 185. In doing so, [the court looks] first to the words of the statute, giving them their usual and ordinary meaning. *Young v. Haines* (1986) 41 Cal.3d 883, 897; *People ex rel Younger v. Superior Court* (1976) 16 Cal.3d 30; *Committee of Seven Thousand v. Superior Court*, (1988) 45 Cal.3d 491, 501.

The dictionary[11] says "final" means:

1. Forming or occurring at the end; last: *the final scene of a film.*
2. Of or constituting the end result of a succession or process; ultimate: an act with both an immediate and a final purpose.
3. Not to be changed or reconsidered; unalterable: *The judge's decision is final.*

A legal dictionary[12] defines "final" as:

1 : ending a court action or proceeding leaving nothing further to be determined by the court or to be done except execution of the judgment but not precluding appeal —used of an order, decision, judgment, decree, determination, or sentence;
2 : being a decision that precludes the right to appeal or to continue a case in any other court upon the merits: as a: being a decision for which availability of appeal has been exhausted and concerning which a writ of certiorari has been denied or the time to petition for certiorari has expired: being a decision of the Supreme Court of the U.S. that terminates the litigation between parties on the merits and leaves nothing for the lower court to do in case of an affirmance except to execute the judgment
3 : being the last in a series, process, or progress: *a final payment.*

Final means final!

Further, there are issues of fundamental due process that the RWQCB has violated. Without an appearance by Mr. Pierson, the RWQCB took it upon itself to overturn the RWQCB's Executive Officer's considered and final decision in face of members of the public seeking to make an "example" of this circumstance. The RWQCB went forward without hearing any evidence from Mr. Pierson and without concern for the fact that Mr. Pierson was not even present at the December 2004 meeting. The argument

[11] Source: The American Heritage® Dictionary of the English Language, Fourth Edition, © 2000 by Houghton Mifflin Company, Published by Houghton Mifflin Company.
[12] Merriam-Webster's Dictionary of Law, © 1996 Merriam-Webster, Inc.

that Mr. Pierson has the ability at the July 8, 2005 hearing to respond is insufficient now that that it is clear the RWQCB has already made up its mind as to culpability and liability. "You can't unring a bell." *See, e.g., People v. Wein* (1950) 50 Cal.2d 383; *People v. MacIntosh* (1968) 264 Cal.App.2d 701; *People v. Hill* (1998) 17 Cal.4th 800.

The RWQCB seems to believe it has the ability to act on its own, unrestrained by the law that binds it. Section 13001 sets forth the legislative intent of the Porter-Cologne Water Quality Control Act (Act). It states in pertinent part:

> The state board and RWQCBs in exercising any power granted in this division shall conform to and implement the policies of this chapter and shall, at all times, coordinate their respective activities so as to achieve a unified and effective water quality control program in this state." (Emphasis added.)

Simply put, there is no indication that the Legislature has given any power to the RWQCB to make up rules of its own that are contrary to the dictates of statute. Here, the RWQCB has disregarded the requirements of the Act which provide that this matter became final when Mr. Pierson paid the penalty assessed in the 2004 Complaint and waived hearing.

Clearly, while an agency can "fill in the details" regarding its enabling legislation *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, an agency cannot make up its own laws. "An administrative agency has only that authority conferred upon it by statute and any action not authorized is void." *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337. Nor can an agency "enlarge or exceed the scope of authority that has been statutorily delegated to it." *Western States Petroleum Ass'n v. Department of Health Services* (2002) 99 Cal.App.4th 999.

In *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, a case involving a landlord's claim for damages for alleged due process violations during rent control adjustment hearings held by the City of Clovis, the California Supreme Court addressed the issue: "Is there a standard that can identify more precisely [than the shock the conscience standard] when the actions of an administrative body charged with implementing the law are arbitrary and conscience-shocking in a constitutional sense?" *Id.* at 1034. The California Supreme Court held that arbitrary and capricious conduct that constitutes a substantive due process violation must consist of a "deliberate flouting of the law." *Id.* at 1036. A "deliberate flouting of the law" will be found where a government agency's actions "substantially and unreasonably diverged from clear legal rules." *Id.* "Deliberate flouting of the law" appears to be what the RWQCB has done.

The Act clearly does not authorize the actions taken by the RWQCB at the December 2004 meeting. The matter became final when Mr. Pierson tendered his check for $25,500 in payment of the 2004 Complaint. Thus, any subsequent acts of the

RWQCB and its staff related to this matter, including the issuance of the recent Complaint, are without legal authority. The RWQCB does not now have the authority to impose a greater penalty, let alone any penalty against Mr. Pierson at this time.

C. The RWQCB Acted Beyond The Scope Of Its Authority At Its December 2004 Hearing By Admitting Factual Evidence

As discussed above, Mr. Pierson maintains that the RWQCB did not have authority to rescind the 2004 Complaint at its December 2004 meeting. *See*, Section IV.B, *supra*. Without waiving that argument, Mr. Pierson now addresses the RWQCB's argument that its hearing on the 2004 Complaint was appropriate. Even assuming that the RWQCB was permitted to have a hearing on the settlement of the 2004 Complaint, the RWQCB acted beyond the scope of its authority when it transformed a simple settlement hearing into an evidentiary hearing.

The RWQCB Executive Office proposed a fine of $25,500 for alleged violations at the site and presented Mr. Pierson with a settlement offer for that amount and a waiver of hearing on the fine. Mr. Pierson accepted this settlement offer by tendering a check to the RWQCB in the amount of $25,500 and signing the waiver form. Because he signed this form, Mr. Pierson had no reason to believe he should attend the December 2004 hearing, nor would anyone else in his position. Mr. Pierson agreed to the settlement then at issue and was not disputing the allegations of the 2004 Complaint for the sole purpose of resolution of the matter.

The RWQCB at its December hearing heard evidence, including certain and conditions, both purportedly historical and present, of the property. To compound this problem and saw photographs[13]. It was unfathomable that the RWQCB would base its decision on such evidence *knowing that Mr. Pierson was not even present to comment on the evidence.*

The RWQCB is required to comply with the requirements of the Administrative Procedures Act (APA) when it conducts an evidentiary hearing. Such a hearing is required when an agency, in this case, the RWQCB take an action that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Gvt. Code §§ 11410.10, 11410.20(a), 11405.50.

To have an evidentiary hearing (even one where the RWQCB pretends it is "not a hearing") the RWQCB must of necessity have informed Mr. Pierson of his rights to be heard and to present both written and oral testimony at the hearing. Mr. Pierson also had the right to review and comment on any written or oral testimony presented by the

[13] As to the photographs, they are an example of hearsay at its worst. The presenter of the photographs, who did not in fact take the photographs, could not be sure where or when these photographs were taken. *See*, Section II.E., *supra*,¶ 25.

RWQCB or the public on this matter at that time, not later when evidence, which was unchallenged, already influenced the RWQCB.

The RWQCB cannot ignore the requirements of the APA, its own regulations, or basic due process. It cannot simply decide to hold an evidentiary hearing without complying. These statutes and regulations are in place not only to ensure the due process rights of the discharger but to make sure that the agency is making informed decision based on the best available evidence. In fact, it is the RWQCB's explicit policy to discourage the introduction of surprise testimony and exhibits. 22 C.C.R. § 648.4 Admitting evidence and testimony without allow the discharger to address that evidence clearly violates both of these principles. Thus, there is no support for the RWQCB's actions in December 2004 and all of the subsequent actions taken by RWQCB Staff based on the RWQCB's December 2004 action are in violation of the APA and the RWQCB's own regulations.

D. Mr. Pierson's Purported "Waiver" Was Against Public Policy And Was Not Knowing And Voluntary, Thus, It Is Void

"Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." *Vikco Ins. Services, Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55. However, in order for such a waiver to be valid, the waiver must be intentional and requires sufficient awareness of relevant circumstances and likely consequences. *Bank v. Lee* (1993) 14 Cal.App.4th 1533. Here, the language of the waiver presented to Mr. Pierson indicated that the RWQCB would hold a hearing to determine whether or not to accept the settlement offer contained in the 2004 Complaint.

Section 13323(b) permits the person who has been issued a complaint the right to waive hearing. In other words, there is no hearing if the person subject to the complaint accepts the findings in the complaint and pays the fine. The fact that the RWQCB has, on its own, developed a process that contradicts the law cannot affect Mr. Pierson's rights.

As discussed above, the RWQCB went beyond it authority at the December 2004 meeting by conducting an evidentiary hearing without Mr. Pierson's knowledge. *See* Section IV.C, *supra*. It is clear from the language of the waiver that Mr. Pierson had no understanding that the RWQCB would conduct an evidentiary hearing in December 2004.

Mr. Pierson in no way waived his rights to address factual evidence and evidence at a hearing. Accordingly, the RWQCB was without authority to consider the evidence at the December 20004 meeting which was the basis for its actions and all subsequent actions of the RWQCB and its staff regarding this matter are without authority.

E. RWQCB Staff Continues To Ignore Mr. Pierson's Due Process Rights

The RWQCB Staff issued the current Complaint to be considered at the RWQCB's July 8th meeting and was accompanied by the 2005 RWQCB Staff Report dated June 14, 2005. For the last six weeks, the RWQCB staff and Mr. Pierson have been working towards an amicable resolution of this matter without need for legal action, include possible funding of certain SEPs. *See* Section V, *infra*.

However, despite Mr. Pierson's willingness to work with the RWQCB staff and despite the impropriety of the fines and actions taken against him, RWQCB staff to date are still attempting to gather evidence regarding the Complaint without notification to Mr. Pierson or his counsel. Counsel for Mr. Pierson understands that the RWQCB Staff have subpoenaed Jeff Emrick and Dave Williams to attend the July 8th hearing. However, neither Mr. Pierson nor his counsel ever received an notice of this or copies of the subpoenas.

Additionally, as of the submission of these comments, just a week before the hearing, RWQCB Staff is attempting to depose Mr. Emrick. Counsel for Mr. Pierson became aware of this from comments by Mr. Emrick himself. Recent correspondence from RWQCB counsel indicates that this deposition may actually occur after the July 8th hearing. (Exhibit X).

The APA provides that certain requirements for taking of a deposition, including compliance the requirements for taking a deposition in a civil action and a petition containing the nature of the proceeding, the name and address of the witness and a showing of the materiality of the testimony. *See* Gvt. Code § 11151. This also includes notice to all parties subject to the action. *Id.* These requirements obviously have not been met here. Further, it is appalling that the RWQCB Staff is attempting to garner evidence at this late date without offering Mr. Pierson an opportunity to review and comment on that evidence prior to the July 8th hearing. This simply demonstrates an ongoing disregard by the RWQCB and its staff for Mr. Pierson's rights under the APA and the RWQCB's own statutes and regulations.

F. The Evidence Does Not Support The Penalty Amount of $125,000

Mr. Pierson maintains that assessment of civil liability is not appropriate because there is no evidence of a discharge. However, even if civil liability were appropriate in this case, the RWQCB staff has not presented evidence sufficient to support the penalty amount of $125,000. Section 13327 provides that the RWQCB shall consider certain factors in determining the amount of civil liability to be assessed against an alleged violator. Specifically, these factors are:

1. The nature, circumstance, extent, and gravity of the violations;
2. Whether the discharge is susceptible to cleanup or abatement;

3. The degree of toxicity of the discharge;
4. The violator's ability to pay, including the effect on ability to continue in business;
5. Any voluntary cleanup efforts undertaken;
6. Any prior history of violations;
7. Degree of culpability;
8. Economic benefit or savings conferred on the violator, if any, resulting from the violation;
9. Other matters as justice may require.

Wat. Code § 13327.

The Complaint evaluates each of these facts. However, the findings under certain of the factors are not supported by the evidence. For example, under the discussion of whether the discharge was susceptible to cleanup or abatement, the Complaint states that actual cleanup of the sediment was probably not prudent but concludes that "consideration of this factor justifies assessment of civil liability that is *significant*..." (Complaint at p. 6 (emphasis added)). There is absolutely no consideration under this factor of any abatement measures taken by Mr. Pierson at the site. However, as discussed above, Mr. Pierson hired qualified consultants that took necessary and reasonable steps to implement BMPs at the site that mitigated erosion at the site. Thus, full consideration of this factor would warrant an assessment that is not significant and is "less than the maximum."

The Complaint also ignores voluntary cleanup efforts undertaken by Mr. Pierson. The Complaint takes a highly restrictive and improper interpretation of voluntary cleanup efforts. Complaint at p. 6. Specifically, in its discussion of this factor, the Complaint states:

> The discharger [Mr. Pierson] never proposed or initiated any efforts to remove the discharged sediments from waters of the state. However, Central Coast Water Board staff would probably have discouraged such efforts as being impractical because efforts to remove the sediments in this case could have been more damaging than if they were left in place.

Id. As noted above, the Complaint then concludes that "consideration of this factor justifies assessment of civil liability that is *significant*..." *Id.* (emphasis added).

Based on the arbitrary and capricious and inexplicably narrow interpretation of this factor, the RWQCB clearly excludes consideration of any voluntary efforts made by the Mr. Pierson to abate and prevent future discharge. Rather, as with the cleanup and abatement factor, the consideration of this factor in the Complaint is limited to efforts made to actually remove any discharged material from the water source. Such a position is untenable.

The interpretation given of "cleanup efforts" only makes sense in circumstances involving discharge of toxic materials, where removal of the toxic material is a common and necessary remedy. In circumstances such as this one where the discharge consisted of non-toxic sediment, "cleanup" in the sense of removal of the discharged material would rarely be an appropriate remedy. The RWQCB acknowledged so much when it stated "Board staff would probably have discouraged such efforts as being impractical because efforts to remove the sediments in this case could have been more damaging than if they were left in place." In plain language, the RWQCB's nonsensical analysis can be summarized as follows: "If you had asked us to remove the sediment, we would have told you no. But, the fact that you didn't even ask is grounds in and of itself for penalizing you." Thus, full consideration of this factor would warrant an assessment that is not significant and is "less than the maximum."

Additionally, there are two factors that the Complaint states justify "assessment of a significant portion of the maximum liability." Complaint at p. 7 (emphasis omitted). These factors are economic benefit received and degree of culpability. *Id.* There is no evidence supporting such a finding under these factors.

The Complaint and accompanying RWQCB Staff Report provide absolutely no support for the economic benefit factor. The Complaint simply asserts that Mr. Pierson must have realized an economic savings because he did not incorporate a specific BMP at the site. Complaint at p. 7. Further, this assertion is simply supported by a vague statement that use of the "erosion mats would have substantially increased the Discharger's BMP expenditures." Id. There is no calculation as to what this substantial increase would be. However, as discussed above, Mr. Pierson has invested significant monies, over $80,000, into placing and maintaining effective BMPs on the site. These BMPs were reasonable and effective as noted by Mr. Emrick. *See* Section II.E, *supra*. It is hard to see what economic benefit Mr. Pierson has received in this case. Thus, the economic benefit factor clearly does not support an assessment of a significant portion of the maximum liability and, instead, justifies a penalty that is "less than the maximum."

As for the degree of culpability factor, the determination that this factor "justifies assessment of a significant portion of the maximum liability" appears to be entirely based on the assertion that the discharger did not nurture the seed into vegetation and did nothing to prevent the seed from being washed away. Complaint at p. 7 (emphasis omitted). However, there is no evidence to support these simple conclusory statements by RWQCB Staff. Contrary to these assertions, there is evidence attached hereto and found in the RWQCB's records that necessary and effective BMPs were implemented at the site that mitigated erosion. *See* Section II.E, *supra* Thus, there is no support for the finding that "[c]onsideration of this factor justifies assessment of a significant portion of the maximum liability. In fact, the evidence before the RWQCB warrants a penalty that is "less than the maximum."

Therefore, Mr. Pierson respectfully requests that the proposed $125,000 penalty be reduced accordingly.

V. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Mr. Pierson has been working with certain non-profit organizations, particularly the Upper Salinas-Las Tablas Resource Conservation District ("RCD"), to develop SEPs that Mr. Pierson would fund in lieu of penalty in this matter.[14] The funding of the SEPs would allow these monies to stay in the area and fund projects for the benefit of the watershed. While the details of these SEPs continue to be worked out, Mr. Pierson has worked with RCD to develop a four-pronged approach to reduce erosion and improve water quality within the RWQCB's jurisdictional area. The first element of the project is an erosion control project along the Salinas River, downstream of the Pierson property, within urban and agricultural areas near the community of San Miguel. The second element is an erosion control project within East-West Ranch in Cambria.[15] The third element is the reinitiation of landowner working groups in San Luis Obispo and southeastern Monterey Counties. The fourth element is a television outreach program identifying the need of the public to be good stewards of the land. Mr. Pierson submits that attached summary of the SEPs for the RWQCB's consideration. (Exhibit W). The estimated cost of funding for these four programs is approximately $108,000.

The RCD is an appropriate non-profit to administer these SEPs. The California Public Resources Code created the resource conservation districts as non regulatory special districts charged with assisting public agencies and individuals with resource management. There are currently 108 resource conservation districts serving 80% of California's land area. The RCD provides technical conservation assistance to other agencies and landowners, including assistance on erosion and water quality issues, in San Luis Obispo and Monterey counties. The RCD works to help land users and communities approach conservation planning and application of conservation programs with an understanding of how natural resources relate to each other and to the area's residents and how human activities affect those resources.

As per the requirements for a SEP, the proposed SEPs are not projects that Mr. Pierson is otherwise required to undertake by any rule or regulation of any entity or proposed as mitigation to offset the impacts of Mr. Pierson's actions at his property.

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[14] While Mr. Pierson is negotiating with RWQCB staff to settle this Complaint by funding certain SEPs, Mr. Pierson is in no way waiving any of his legal rights, including legal arguments previously raised by counsel for Mr. Pierson and those contained in this letter.

[15] Mr. Pierson recognizes that the Cambria project is outside the relevant watershed (but still within the RWQCB's jurisdictional area). In looking for potential SEPs to fund, representatives for Mr. Pierson met with Sarah Christie and others to determine if there were more local projects that could use funding. Ms. Christie and the others did not provide Mr. Pierson with any information regarding potential SEPs that they would be interested in seeing funded.

Additionally, these SEPs do not directly benefit the State Water Resources Control Board or RWQCB function or staff.

VI. CONCLUSION

Mr. Pierson has done his best to deal with the situation presented to him. However, it is clear from the facts, not the incorrect and misleading record that the RWQCB has cobbled together, that Mr. Pierson should not be fined at all. Further, it should be obvious to even the neutral observer, that the RWQCB did its very best to ignore any fact that got in its way. On this basis alone, the RWQCB should rescind or reduce its fines.

Further, the RWQCB has acted outside of its legislative grant. By acting as it did, it not only violated the law, but ignored basic due process.

Notwithstanding these legal and factual issues, Mr. Pierson seeks a conclusion to this horrible tale. He sees the SEPs as a way to do this.

Very truly yours,

Steve Hoch (SM)

Steven L. Hoch
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cc: Mr. David Pierson
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