CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

Administrative Civil Liability Complaint
No. R5-2006-0501

COMMENTS (CORRECTED)

In The Matter Of:

Tehama Market Associates, LLC,
Linkside Place Subdivision,
Butte County

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I. INTRODUCTION

Tehama Market Associates, LLC ("TMA") owned the Linkside Place Subdivision ("Linkside Place"), a residential subdivision in Oroville, California, where single-family residences are currently under construction, in February of 2004. After two inspections in February 2004, each following a major rainstorm, the Central Valley Regional Water Quality Control Board ("Regional Board") issued a Notice of Violation ("NOV") of the National Pollutant Discharge and Elimination System ("NPDES") General Permit For Storm Water Discharges Associated With Construction Activity ("General Permit") No. CAS000002 (Order No. 99-08-DWQ). On January 25, 2006, the Regional Board filed an amended complaint for Administrative Civil Liability ("ACL"), ACL Complaint No. R5-2006-0501, drafted by Mr. Scott Zaitz, for violations of §301 of the Federal Clean Water Act, §13376 of the California Water Code, and the General Permit, naming Tehama, LLC as the party.

II. FACTS

Linkside Place is a parcel of real property located on the south side of Highway 162, in Butte County, Assessor Parcel Number 303-260-021. Highway 99 is west Of Linkside Place, Highway 70 is east, and the city of Oroville is four miles east northeast. The Table Mountain Golf Course ("Golf Course") is east of Linkside Place, with the NEXRAD Radar facility access road ("NEXRAD Road") separating the two properties. (Site Inspection Report, Picture 17; Site Inspection Report, Attachment A, "Linkside Place aerial taken 21 November 2003 by Loafer Creek LLC.") The Oroville Municipal Airport ("Airport") is east of the Golf Course, with Larkin Road, and then the Clay Pit State Vehicular Recreation Area, east of the Airport. There are two cul-de-sacs on the

eastern side of Linkside Place - Logan Court, the northeastern cul-de-sac, and Zachary Court, the southeastern cul-de-sac. Phase I, where 65 single-family residences are planned, constitutes the northern 18.6 acres of Linkside Place.

TMA obtained a General Permit on October 23, 2003. (ACL, p13.) Pursuant to the General Permit, Linkside prepared a Stormwater Pollution Prevention Plan ("SWPPP"). It hired Sean O'Neill, of Genesis Engineering, to prepare the plan. (SWPPP, p3.)

Phase I drains in two directions – north and east. Water draining from the north side of Linkside Place flows through two culverts running under Highway 162. Pastureland lies north of Highway 162. (Site Inspection Report, Pictures 29-30.) The Thermalito Powerhouse Tail Channel, a canal connecting the Thermalito Forebay and Thermalito Afterbay, lies to the north of the pastureland and runs from west to east.

Water draining from the east of Linkside Place drains into a low depression between the eastern border of Linkside Place and NEXRAD Road. (Site Inspection Report, Pictures 17-19, 45-48.) Water draining into the low depression from the northern portion of Linkside Place, which includes Phase I, moves south, and water draining from the southern portions of Linkside Place, which were not graded in February 2004, flows north into the low depression. (Site Inspection Report, Picture #45.) When sufficiently high, water in the low depression then flows east through a dual culvert running under NEXRAD Road. (Site Inspection Report, Picture #46.)

Based on his observations, further research, and instructions from management, Mr. Zaitz drafted a NOV for Linkside. The discharge volumes cited in the Staff Report

and ACL were ultimately calculated by a Regional Board Engineer. (Zaitz Depo., p31-33, 58-59.) The NOV was issued on April 7, 2004.

III. CONFLICTED MEMBERS OF THE ENFORCEMENT TEAM MUST BE DISQUALIFIED.

An attorney acting as prosecutor cannot simultaneously act as counsel to an administrative body, even in unrelated matters. (Quintero v. City of Sanfa Ana (2003) 114 Cal.App.4th 810, 817.) Due process requires freedom from actual bias and an appearance of fairness, without any probability of outside influence on the adjudication. (Id. at 814.) Consequently, no attorney may occupy more than one position at one time. (Id. at 817.) However, when this bright-line rule is not triggered, the test for an impermissible "probability of actual bias" is based on the "totality of the circumstances." (Id.) In Quintero, an impermissible probability of actual bias occurred when the prosecuting attorney provided legal advice to the administrative body while the matter she prosecuted was pending. (Id. at 815.)

Ms. Francis McChesney currently acts as a member of the prosecutorial team. However, Ms. McChesney also advises the Regional Board on almost all matters. The inspections at Linkside Place were conducted in February of 2004, over two years ago, and have since been pending. Thus, based on the standard established in Quintero, Ms. McChesney must be disqualified from the prosecutorial team if she has provided legal advice to the Regional Board at any time since February 2004.

IV. ARGUMENT

A. Pollutants Did Not "Discharge" From Linkside Place.

The Regional Board derives its authority to issue civil penalties for water quality violations from California Water Code §13385(c). Under §13385, the Regional Board

may impose civil penalties for violations of certain specified sections of the Water Code and Federal Clean Water Act and of orders and permits, such the General Permit, that regulate compliance with the Federal Water Pollution Control Act.

Under Water Code §13373, "discharge", "navigable waters", and "pollutant" have the same meaning as in the Federal Water Pollution Control Act. The Federal Water Pollution Control Act defines a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source". (33 USCA §1362(12).) "Navigable waters" are waters of the United States. (33 USCA §1362(7).) Waters of the United States are intrastate lakes, rivers, and streams, including intermittent streams, used in interstate or foreign commerce, as well as the tributaries of such waters. (Headwaters, Inc., *supra,* 243 F.3d at 533.)

Consequently, the Regional Board can only impose civil penalties for violations of the General Permit if the violation constitutes a discharge of pollutants and if the pollutant enters a water of the United States or a tributary to a water of the United States.

B. The Regional Board Has the Burden to Prove A Discharge of Pollutants Occurred.

Evidence Code §500, which applies to the Regional Board, charges a party with "the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting", unless otherwise provided by law. Consequently, the Regional Board has the burden to prove every element of every allegation it makes. It must prove a discharge of a pollutant occurred by proving pollutant left Linkside Place and reached either a navigable body of water or a tributary to a navigable body of water. (Headwaters, Inc. v. Talent Irrigation District (2001) 243 F.3d 526, 5343.) If the Regional Board proves a discharge occurred, it may then seek per

gallon penalties, but must prove how much pollutant was discharged. (Water Code §13385(c)(2).) The State Water Resources Control Board recognizes that it and the regional boards have the burden of proof in all enforcement actions by acknowledging in its enforcement policy that "Formal enforcement orders should contain findings of facts that establish all the statutory requirements of the specific statutory provision being utilized." (State Water Resources Control Board, Water Quality Enforcement Policy, p16 (February 19, 2002).) In the current action, Linkside has to prove or disprove nothing. The burden of proof is on the Regional Board. Any allegation lacking relevant, supporting evidence must be dismissed.

C. An Order Imposing Civil Liability Must Be Based on Substantial Evidence.

Any civil liability for violations of Water Code §13385(c) is imposed pursuant to Water Code §13323. Judicial review of proceedings under Water Code §13323 are governed by Civil Code §1094.5. (Water Code §13330.) The inquiry by the reviewing court extends to whether the agency proceeded without, or in excess of, jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. (Civil Code §1094.5(b).) Abuse of discretion is established if the agency failed to proceed in a manner required by law, if the findings are unsupported by the evidence, or if the order or decision is unsupported by the findings. (Id.) If the issue is whether the findings are supported by sufficient evidence, in all cases other than those in which the reviewing court is authorized to exercise its independent judgment, abuse of discretion is established if, in light of the whole record, the findings are unsupported by substantial evidence. (Civil Code §1094.5(d).) Since the independent judgment test does not apply to

orders issued pursuant to Water Code §13323, such orders are reviewed for, and consequently, must be supported by, substantial evidence. (Water Code §13330.)

"Substantial evidence" is evidence of "ponderable legal significance", which is "reasonable in nature, credible and of solid value." (Mohilef v. Janivici (1996) 51 Cal.App.4th 267, 305 n28; Newman v State Personnel Bd. (1992) 10 Cal.App.4th 41, 47; Pennel v. Pond Union High School Dist. (1973) 29 Cal.App.3d 832, 837 n2.) Consequently, an order imposing administrative civil liability cannot be based on unreliable evidence or evidence that is not credible, such as unsworn statements or hearsay, or on evidence that is inaccurate and misleading, such as calculations based on faulty assumptions and inaccurate measurements.

D. Anything Not Relevant to the Discharge of Pollutants into Waters of the United States Should Be Dismissed and Stricken from the Record.

In an administrative proceeding, "any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Government Code §11513(b).) "Relevant evidence" is evidence with any tendency in reason to prove or disprove any disputed fact of consequence in determining the action. (Evidence Code §210.) While relevant evidence shall be admitted, the chairperson of the Regional Board, in its discretion, can exclude evidence if its probative value is substantially outweighed by the probability that admitting the evidence will necessitate an undue consumption of time, create a substantial issue of undue prejudice, or confuse the issues. (Government Code §11513; Evidence Code §352.)

The only issues before this body are whether Linkside discharged "material other than storm water" into "waters of the nation" and, if so, how much. No other issues are

relevant. Any facts regarding the adequacy of the SWPPP, the condition of the property, and the implementation of erosion and sediment controls are irrelevant and without probative value. Paragraph 17(d) of the ACL should be excluded and its allegations dismissed, because it is unrelated to the occurrence of a discharge.

Any and all allegations in the Staff Report and Notice of Violation related to the dewatering pump, the condition of the property, and Best Management Practices ("BMP's") should also be excluded, because they have no relevance to the sole issue, whether Linkside discharged pollutants into waters of the United States. (ACL, p3.) Specifically, Paragraph 14, bullet point one of the ACL, and the first sentence of Specifically, Paragraph 14, bullet point one of the ACL, and the first sentence of Paragraph 17 should be excluded, because they relate solely to the dewatering pump and are unrelated to whether a discharge from the property actually occurred.

Evidence regarding any change in ownership of Linkside Place without the filing of a Change in Information Form or termination of coverage under the General Permit should similarly be excluded. Specifically, Paragraph 3 and all but the last sentence of Paragraph 4 of the ACL should be excluded, because they relate solely to changes in ownership of Linkside Place and are unrelated to any allegations of discharges from the property. It serves no purpose other than to unnecessarily consume time, confuse issues, and prejudice TMA and should therefore be excluded.

E. The Regional Board Has No Evidence a Discharge Occurred.

1. The Regional Board Does Not Allege That Any Release of Pollutants Entered Waters of the United States.

Evidence Code §500 requires the Regional Board to plead and prove every element of allegation it makes. Furthermore, its claim for relief is limited by the scope of

its complaint. Paragraph 17(b) of the ACL only refers to "ephemeral drainages and wetlands adjacent to the site." There are no references to "waters of the United States." The ACL not only fails to include any facts supporting the element of a discharge into waters of the United States, it fails to even allege such an event occurred. Without a complete claim for relief, the ACL must be dismissed.

2. The Regional Board Has No Evidence Proving Water From Linkside Place Can Drain into the Thermalito Powerhouse Tail Channel.

Mr. Zaitz never actually saw any water flowing across the pasture land north of Highway 162. He never walked the pasture, and never reviewed any topographic maps or other documents to determine whether the pastureland was tributary to Thermalito Afterbay. Mr. Zaitz gathered absolutely no evidence remotely indicating the pastureland drained in to Thermalito Afterbay. He also only examined the north side of Linkside Place on February 25, 2004, because on February 18, he was "totally focused" on the east side of the development. (Depo., p69.)

Mr. Zaitz did nothing, except contact Mr. David E. Bird, the General Manager of the Thermalito Irrigation District, who found "little evidence of the waters course." (See Attachment 8, Letter from David E. Bird to Mr. Zaitz, April 2, 2004.) At the request of Mr. Zaitz, Mr. Bird walked the main drainage conduit for the pastureland and examined the culverts that drain water from the north side of Linkside Place to the pastureland, but found no evidence of petroleum or foreign object decay pollution, and concluded the area, "all in all", was in "good condition." (Id.)

The Regional Board must prove every assertion it makes, but there is no evidence the pastureland is tributary to Thermalito Afterbay or any other waters of the United

States. The only evidence Mr. Zaitz has is a statement from the only person who has personally inspected the pastureland, who found "little evidence" of anything.

3. The Regional Board has No Evidence Supporting the Allegation that the East Side of Linkside Place Discharged Pollutants into Waters of the United States.

Mr. Zaitz walked to the NEXRAD facility. (Depo., p55.) Since the Airport is on the east side of the Golf Course, Mr. Zaitz could not see where any of the water flowing onto the Golf Course finally went. (Staff Report, Pictures 25, 26, 49, and 50.) He did not follow the flow across the Golf Course, examine the culverts running through the Golf Course, consult with the Golf Course to confirm the water's course, study any Golf Course drainage plans, or contact the City of Oroville for drainage studies of the Airport. (Id.)

Choosing to forego any onsite investigation of the Golf Course and Airport drainage, Mr. Zaitz turned to low-quality aerial photographs and satellite images, but none of the maps or photographs reviewed included topographic or drainage information, flow data, or anything else relevant. (Depo., p37.)

Never having personally observed water from Linkside Place draining into waters of the United States, failing to find anything through aerial photography or GIS maps, and realizing he could not prove a discharge into the Feather River occurred, Mr. Zaitz turned to Mr. Kelley of the United States Army Corps of Engineers (Id., p38.) However, a statement by a person who is not testifying that is offered to prove the truth of the matter asserted constitutes hearsay. (California Evidence Code §1200.) Mr. Kelley has not submitted any testimony, written or otherwise, and cannot be cross-examined. The basis for Mr. Kelley's answer, his background with Linkside Place, and the background

facts Mr. Zaitz provided Mr. Kelley are all unknown. (Depo., p38:5-14.) Neither could Mr. Zaitz, during his deposition, recall when he discussed the Linkside Place matter with Mr. Kelley, how long they discussed it, exactly what was said, or whether the conversation was in-person or over the telephone. (Depo., p38-39.) Furthermore, Mr. Zaitz lacks any record of correspondence with Mr. Kelley or any other material documenting their conversations regarding Linkside Place. (Depo., p38-39.)

Before the Regional Board, "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Daniels v. Department of Motor Vehicles (1993) 33 Cal.3d 532, 538.; see also Government Code §11513(d) and Evidence Code §1200..) The purpose of this provision is to free administrative boards from the "compulsion" of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. (Consolidated Edison Co. of New York v. National Labor Relations Board (1938) 305 U.S. 197, 339.) However, this assurance of a desirable flexibility in administrative procedure does not justify baseless orders lacking "rational probative force." (Id.) Hearsay statements are not made under oath, the adverse party cannot cross-examine the declarant, and the fact-finder cannot observe the declarant's demeanor while making the statement. (People v. Duarte (2000) 24 Cal.4th 603, 610.)

Even when hearsay evidence is admissible, it is not necessarily sufficient to support a finding. "Admissibility is not the equivalent of evaluation; the former makes certain concessions in the interest of full and complete discovery while the latter, in the

interest of fairness, withholds legal sanction to evidence found not to be trustworthy." (Daniels, *supra*, 33 Cal.3d at 538 fn3.) "[T]here must be substantial evidence to support such a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end." (Furman v. Department of Motor Vehicles (2002) 100 Cal.App.4th 416, 421.)

Mr. Kelley's unsworn, uncorroborated statement is offered for the truth of the matter asserted and does not fall within an exception. Without corroborating or supporting evidence, statements by Mr. Kelley only confuse issues, unnecessarily consume time, and unduly prejudice TMA. Any evidence of statements by Mr. Kelley should therefore be excluded and stricken from the record pursuant to Evidence Code §352.

The Regional Board has the burden to prove every element in its cause of action. It must not only prove pollutants left Linkside Place, it must also prove the pollutants entered the Feather River, as asserted or claimed by Staff, but none of the Regional Board's documents allege any facts supporting such an assertion. The Regional Board has no evidence, because Mr. Zaitz never gathered any "evidence" on this issue. Mr. Zaitz did nothing and now has nothing to support this claim except an undocumented hearsay statement. The Regional Board has no evidence to support finding a discharge of pollutants into the Feather River occurred and must dismiss the ACL.

V. The Regional Board Incorrectly Calculated the Civil Penalties.

The method of calculating civil penalties is contained in §13385(c) of the Water Code, which provides that

> Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in

> an amount not to exceed the sum of both of... (1) Ten thousand dollars ($10,000) for each day in which the violation occurs...; and (2) additional liability not to exceed ten dollars ($10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

Based on Water Code §13385(c), the Regional Board calculated Linkside's maximum civil liability at $310,400. (ACL, p5.) The Regional Board erred in calculating this sum, both in the number of violations and in the quantity discharged.

A. The Regional Board Erred in Calculating Daily Penalties.

The only California court case addressing the issue of penalty calculation under Water Code §13385(c) is State of California v. City and County of San Francisco (1979) 156 Cal.Rptr. 522, 529-530. In City and County of San Francisco, the Attorney General argued that the discharge of raw sewage from five point sources over ten days required a penalty of $500,000, because each point source constituted a separate violation. (Id.) The black, reeking, turbid discharge discolored the bay, left a large floating sheen, seriously harmed marine life, frightened consumers from buying fish and, as a result, caused fish sales to plummet, sickened several surfers, and led to quarantines and warning signs at numerous beaches. (Id. at 526.)

In interpreting Water Code §13385(c)(1), the court reviewed the Federal Water Pollution Control Act. (Id.) Water Code §13385 implements and is similar to the Federal Water Pollution Control Act. (Id.) Numerous statements made during the legislative history of the Federal Water Pollution Control Act declared that the maximum penalty would be $10,000 per day. (Id.) Thus, the court held that the maximum daily penalty allowed under §13385(c)(1), similar to the Federal Water Pollution Control Act, was "$10,000 per day of violation." (Id.)

The ACL uses the General Permit's structure to make up multiple violations and fine Linkside up to $80,000 per day, even though the magnitude of any violation at Linkside Place was inconsequential compared to the discharge in City and County of San Francisco that led to a multitude of serious impacts throughout the Bay Area. The ACL complains of violations occurring on two days. Therefore, the maximum civil penalty permitted pursuant to §13385(c)(1) is $20,000.

B. No Relevant Evidence Supports Any Determination of the Quantity of Pollutant Possibly Discharged From Linkside Place.

1. The Dewatering Pipe Is Irrelevant And Should Be Excluded From the Record.

The General Permit prohibits dewatering operations that discharge pollutants. (General Permit, Section A: Storm Water Pollution Prevention Plan 9, Non-Storm Water Management.) Dewatering operations that do not discharge pollutants and do not violate water quality objective are permitted. (General Permit, Finding 10.) Therefore, it is the discharge resulting from a dewatering operation, rather than the dewatering operation itself, that constitutes a violation of the General Permit.[1]

The pump, the pipe, and the dewatering pond were all on the Linkside Place property. (Staff Report, Attachment B, Picture #15.) No discharge would have occurred until water from Linkside Place entered a navigable water or tributary. However, since the observations, calculations, and estimates of discharge by Mr. Zaitz and the Regional Board's engineer were all based on measurements made at the end of the dewatering pipe, none of their data represents a discharge. The data, observations, and calculations

[1] "Discharging sediment-laden water which will cause or contribute to an exceedance of the applicable RWQCB's Basin Plan from a dewatering site or sediment basin into any receiving water or storm drain without filtration or equivalent treatment is prohibited." (General Permit, Section A: Stormwater Pollution Prevention Plan, 9. Non-Storm Water Management (emphasis added).)

regarding the dewatering pump are not representative of the water draining from Linkside Place, irrelevant to the discharge of pollutants, should be excluded from the record.

2. Evidence Supporting the Amount of Water Expelled By the Dewatering Pipe is Inconsistent and Incomplete.

After Mr. Zaitz drafted his Site Inspection Report, a Regional Board Engineer calculated the flow rate of the dewater pump using the Manning Equation. (Zaitz Depo., p31-33, 58-59.) Variables used in Manning's Equation include pipe diameter, pipe slope, the surface material in the pipe, and depth of the water in the pipe. (Id.) Mr. Zaitz did not measure these items. (Id., p24-25.) The size of the dewater pipe, the depth of the water in the pipe, the slope of the pipe, and the size of the pipe are not documented. There is no description of the type of pipe. Not even Mr. Zaitz had any idea how the Regional Board Engineer determined the surface water elevations in the pipe and culverts. (Id.) The Regional Board has the burden to prove every element of every allegation it makes, and since there it has no documentation of how any of the information used to calculate flow with the Manning Equation was obtained, if it was obtained at all, the Regional Board cannot prove how much water the dewater pipe expelled. The only field data was collected by Mr. Zaitz. The information he collected is "insufficient" to make such a calculation.

3. The Regional Board Has No Evidence Supporting Any Determination of the Quantity of Pollutant Possibly Discharged From Linkside Place.

The volume of pollutant discharged through the dual culverts under NEXRAD Road was estimated by the Regional Board engineer using the Manning Equation, but the Manning Equation requires variables such as the size of the pipe, the slope of the pipe, the head, and the depth of the water in the pipe. No measurement of the surface water

dual culverts was ever made. (Depo., p24.) Neither do any of the photographs taken by Mr. Zaitz have sufficient detail to make any determination of the surface water elevation in the culverts, much less accurate to one-tenth of an inch. (Staff Report, Attachment B, Pictures #17, 18, 19, 20; Staff Report, Attachment D, Pictures #46, 47, 48,49.) None of the other Regional Board documents indicate how its engineer determined the depth of the water in the dual culverts. Even Mr. Zaitz had no idea how the Regional Board Engineer determined surface water elevation in the dual culverts. (Id.)

There is no indication on how the "water depth" values were determined. The depth has a significant effect on discharge. If the depth of flow in the South culvert was 1.2 inches instead of the reported 1.5 inches, the discharge would have been calculated at 0.05 cfs, rather than less than 0.04 cfs, increasing the discharge rate, and resulting volume, by 25%.

Neither is there any indication on how the "Pipe Slope" values were determined. Discharge is proportional to the square root of the slope. The reported slope of the North culvert was 0.0078 feet/foot. Over a 20 foot culvert this would be a change in elevation of 3.5 inches. Based on the photos, it is impossible to tell whether these slope values are accurate, but if the South culvert was the same slope as the North culvert, the calculated discharge would have been significantly less.

Finally, the Regional Board used a Mannings roughness coefficient (n-value) of 0.022. However, Butte County Improvement Standards require a Mannings roughness coefficient of 0.025 be used for a plain unlined corrugated metal pipe such as the culvert. The discharge of a pipe or culvert is inversely proportional to this constant, so a 14% increase in the n-value would also result in a 14% decrease in the discharge. An n-value

of 0.22 versus Manning's coefficient of 0.25 represents a decrease of approximately 12% and, consequently, a 12% increase in the calculated discharge. Merely by using a different Manning's coefficient, the Regional Board distorted and increased TMA's alleged violation and penalty by 12%.

The Regional Board has the burden to prove how much pollutant was discharged through the dual culverts, but without any documentation of any measurement of the water in the culverts, it can prove nothing and no discharge calculation is possible.

4. The ACL's Discharge Volume Improperly Imposes a Penalty for the Dewatering Operation Separate From, and in Addition to, the Penalty for Pollutants Flowing Through the Dual Culverts Under NEXRAD Road.

The General Permit and Federal Pollution Control Act only prohibit dewatering operations that are discharges. (General Permit, Section A: Storm Water Pollution Prevention Plan 9, Non-Storm Water Management; 33 USCA §1362(12).) The flow through the dual culverts physically limited the total combined volume that may have been discharged by the dewatering pump and runoff on the east side of Linkside Place. Therefore, the maximum volume of pollutant subject to per-gallon penalties is limited to the volume of pollutant the ACL alleges passed through the dual culverts. Any additional amount is physically impossible, unsupported by law, and must be dismissed.

V. CONCLUSION

The only issue is whether a discharge from Linkside Place occurred and, if so, how much volume was discharged. Many of the allegations in the ACL are not relevant and prejudicial and must be excluded. The Regional Board has the burden to prove a discharge of a pollutant occurred and how much pollutant was discharged. The "sole" fact supporting the existence of a hydrologic link to waters of the United States is a

hearsay statement by a staff person at the Army Corps of Engineers. Furthermore, the only support for the quantity of pollutant discharged is a calculation by Regional Board engineer that could not have been made, because data necessary for the calculation was never obtained. The Regional Board has no evidence that proves a discharge of pollutants occurred or, even assuming a discharge did occur, how much pollutant was discharged. TMA accordingly requests that the charges contained in the ACL be dismissed in their entirety.

Respectfully submitted,

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Date: March 8, 2006

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