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Edmund G. Brown Jr.
Governor

TO: Designated Parties

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

DATE: June 3, 2011

SUBJECT: **EVIDENTIARY RULING ON OBJECTIONS TO CALTRANS AND
MCM CORRESPONDENCE ON WATER QUALITY COMPLIANCE,
ACL Complaint No. R1-2009-0095, Confusion Hill Bypass Project**

Introduction

The Assistant Executive Officer of the North Coast Regional Water Quality Control Board (North Coast Regional Board) issued an Administrative Civil Liability (ACL) Complaint No. R1-2009-0095 pursuant to Water Code section 13323 to the California Department of Transportation (Caltrans), who contracted with MCM Construction, Inc. (MCM), alleging discharges of waste in violation of water quality certification and General Storm Water Permit. The North Coast Regional Board is scheduled to hear this matter on June 23, 2011. This order addresses evidentiary objections to exhibits containing correspondence between Caltrans and MCM on the subject of water quality compliance.

"New Evidence" Objections

MCM objects to a series of exhibits attached to the Declaration of Julie Macedo in the Prosecution Team's Case in Chief, specifically, Exhibits A through P, and R through Y. (MCM Evidentiary Objections, p.1, lines 20-23.) MCM's objection appears to be based in part on the premise that the deadline to submit evidence passed prior to the submittal date for Case in Chief. MCM cites to no statute, regulation, or agreement between the parties regarding close of discovery to support the position that Prosecution Team is barred from introducing additional evidence after the Complaint is issued or after the deposition of a person most knowledgeable. The issuance of a Complaint does not close the library of evidence and argument that can be submitted to support a claim. Parties are allowed time to engage in discovery after a Complaint issues, and may compile additional evidence up until the time a Case in Chief is submitted. Further, Parties are generally given additional time and ability to submit responsive evidence and argument within the scope of rebuttal. MCM's objection to "new" evidence submitted with the Prosecution Team's Case in Chief submittal is overruled.

Other objections to information submitted after the Case in Chief submittal were already addressed by the Advisory Team in a note dated March 31, 2011 [excluding Prosecution Team's "chart of similar conduct" from the record; overruling objections to new specific citations to materials already reference in the record¹]. Caltrans and MCM complained about inadequate time to evaluate new material before the hearing, (Caltrans Objections to New Evidence and New Bases for Violations at page 3); however, because the hearing was delayed, Parties have had ample time to review any additional specific citations.

Additional Hearsay Objections

MCM also objects to various declarations from Caltrans employees not listed as witnesses as inadmissible hearsay, referring again to statements, letters, events and quotes attached to the Declaration of Julie Macedo. (MCM Rebuttal, p.2, lines 3-4.) "The new letters and emails are rife with inadmissible hearsay, which a court would normally reject." (*Id.* at lines 20-21.) These exhibits contain various letters, emails and other documents between Caltrans and MCM and MCM's subcontractors regarding water quality compliance. Similarly, it appears that Caltrans objects to the introduction of declarations from MCM employees not listed as witnesses as inadmissible hearsay.² (Caltrans Response and Rebuttal, p.4, lines 19-27.) "Hearsay statements of contractor MCM cannot be used as the basis for charges against the Department." (*Id.*)

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally not admissible in court because of its inherent unreliability. If the declarant is not made available as a witness, a party will not have an opportunity to cross-examine them. There are numerous exceptions to the hearsay rule based on the rationale that even though the statement is

¹ California Code of Regulations, title 23, section 648.3 provides that referencing exhibits is allowed so long as they are in the possession of the Board and "the specific file folder or other exact location where it can be found is identified." (Cal. Code Regs., tit. 23, §648.3.)

² On May 2, 2011, Advisory Team sent a request for information as follows:

"MCM objects to various declarations from Caltrans employees not listed as witnesses as inadmissible hearsay. Similarly, Caltrans objects to the introduction of declarations from MCM employees not listed as witnesses as inadmissible hearsay. Advisory Team requests that, in no more than five (5) pages, Parties brief the issue of whether or not these statements substantially meet the party, adoptive and/or authorized admission exemptions to the hearsay rule."

This request relates to any remaining hearsay objections to Caltrans and MCM declarations, including the documents attached to the Declaration of Julie Macedo. It is not intended to address or revisit my previous ruling dated April 27, 2011, regarding Biological Monitoring Reports and other records.

made out of court, it is still reliable. For example, under the party admissions exception, “[e]vidence of a statement is not [hearsay] when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.” (Evid. Code, § 1220.) The rationale for the party admission exception is that a party is not denied an opportunity to cross-examine when they can readily make themselves available to explain or deny their own statements.

Statements by Caltrans employees fall within the party admission exemption of the hearsay rule. Caltrans is the named Permittee and the named Discharger in the ACLC and is therefore a party to the action. If Caltrans wished to explain or deny purported admissions, it was free to add its own witnesses to testify at the hearing. However, statements by MCM are not party admissions because, while MCM is a designated party to this hearing, it is not named in the ACLC and therefore cannot really be considered a “party to the action” for purposes of the hearsay rule. MCM is, however, significantly associated with the “party to the action” as evidenced by its participation in the hearing and its contract provisions with Caltrans.

Section 5-1.21 of the contract between Caltrans and MCM provides: “The location of the project is within an area controlled by the Regional Water Quality Control Board. 401 Certification has been issued covering work to be performed under this contract. The Contractor shall be fully informed of rules, regulations, and conditions that may govern the Contractor’s operations in the areas and shall conduct the work accordingly.” Citing Caltrans’ stormwater permits, Section 10-1.02 provides that “[t]he Contractor shall know and fully comply with applicable provisions of the Permits and all modifications thereto....” In addition, Section 7-1.12 (Indemnification and Insurance) of Caltrans Standard Specifications requires the Contractor to “observe and comply with all laws, ordinances, regulations, orders and decrees of bodies or tribunals having any jurisdiction or authority over the work.” The Contractor must indemnify Caltrans against any claim or liability arising from or based on the violation of any law, ordinance, regulation, order or decree. (*Id.*)

Under the declarant liability exception to the hearsay rule, “[w]hen the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant,...evidence of a statement made by the declarant is admissible against the party as it would be offered against the declarant in an action involving that liability, obligation, duty or breach of duty.” (Evid. Code, § 1224.) Evidence Code section 1224 recodified former Code of Civil Procedure section 1851, which allowed admission of a declarant’s statements in an action where the liability of the party against whom the statements are offered is based on the declarant’s breach of duty. The California Supreme Court found that “the statute contemplated those situations in which such an obligation or duty was an essential operative fact in establishing the cause of action or defense involved. Such situations may arise when

the declarant and the party have a privity of interest in the property involved or the party is one who has assumed responsibility for the obligations of the declarant....” (*Markley v. Beagle* (1967) 66 Cal.2d 951, 960 [internal citations omitted].)

Caltrans’ liability in this matter hinges in whole or part on the liability, obligation, and duty of MCM. MCM had a contractual obligation to Caltrans to implement stormwater controls and other permit conditions for the project, which is a duty and obligation. MCM must indemnify Caltrans for any permit violations, which is a liability for MCM. Accordingly, declarations by MCM fall within the hearsay exception provided under Evidence Code section 1224.

In addition, there is nothing inherently unreliable about the documents at issue. These documents were produced by the Parties themselves, often on formal letterhead. There is no evidence that they have been forged or tampered with.³ These communications occurred contemporaneously while events were occurring and not in preparation for this hearing. There is no evidence that Caltrans disputed the substantive content of MCM’s communications, which would also support the application of the authorized admission exception to the hearsay rule. Under the authorized admissions exception, “[e]vidence of a statement offered against a party is [not hearsay] if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.” (Evid. Code, § 1221.)

Finally, it is not clear whether these declarations are offered to actually prove a violation, or rather, to inform the Regional Water Board about the Dischargers’ general attitude toward permit compliance. If introduced for the latter purpose, the declarations are not hearsay because they are not introduced to prove the truth of the matters stated. Either way, they are not hearsay.

Government Code section 11513 provides that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (Gov. Code, § 11513, subd. (d).) Even if the Regional Water Board rests any finding solely on one of these documents, they are not hearsay because Caltrans statements qualify as party admissions and MCM statements fall within declarant liability exception to the hearsay rule.

The objection is overruled. The weight to give these items is for Board deliberation, and is not addressed in this ruling.

110603_Evidentiary Ruling on Objections to Caltrans and MCM Correspondence on Water Quality Compliance

³ Prosecution Team has noted that it added highlighter to certain documents.