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STATE WATER RESOURCES CONTROL BOARD

OF THE STATE OF CALIFORNIA

IN THE MATTER OF PETITION OF MEDICAL DEVICE BUSINESS SERVICES, INC. FOR REVIEW OF ACTION BY LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD CLEANUP AND ABATEMENT ORDER NO. R4-2023-0009 (AND ORDERS RELATED THERETO)	**PETITION FOR REVIEW BY MEDICAL DEVICE BUSINESS SERVICES, INC. OF LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD'S IMPROPERLY ISSUED JUNE 4, 2026 CONDITIONALLY APPROVED INTERIM REMDIAL ACTION PLAN ISSUED PURSUANT TO THE REGIONAL BOARD'S IMPROPERLY ISSUED CLEANUP AND ABATEMENT ORDER NO. R4-2023-0009, AND FAILURE TO ISSUE A STAY OF SUCH ORDER AS TO PETITIONER** **[REQUEST FOR STAY 23 CCR § 2053]**

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I. INTRODUCTION AND OVERVIEW

The Los Angeles Regional Water Quality Control Board ("Regional Board") did not follow controlling decisions and statutes—and ignored its own knowledge of the relevant facts—to improperly issue Cleanup and Abatement Order No. R4-2023-0009 (the "Order"), and the June 4, 2026 Conditionally Approved Interim Remedial Action Plan (the "IRAP") which was issued pursuant to, and amends, the Order, to Petitioner.[1] The Order and the IRAP are referred to herein collectively as "the Orders."[2] Concurrently with this filing, Petitioner shall request the Regional Board to rectify its improper actions by requesting: (a) to be delisted as a Discharger under the Order and the IRAP and (b) in the alternative, for a stay of the Order and the IRAP as to Petitioner. Petitioner petitions the State Water Resources Control Board ("State Board") pursuant to California Water Code section 13320 and Title 23 of the California Code of Regulations §§ 2050 *et seq*. for review of the Order and the IRAP, and for a stay of enforcement of the Order and IRAP pending resolution of the issues raised in this Petition pursuant to 23 CCR § 2053 so Petitioner does not suffer further immediate and substantial irreparable injury, including violations of Constitutional rights, as a result of the Order and the IRAP. As shown herein, the Regional Board's improper issuance of the Order and IRAP as to Petitioner is inappropriate, improper, an abuse of discretion, arbitrary, and capricious. Petitioner submits the Declaration of Steven R. Tekosky, Esq. ("Tekosky Decl.") and the Declaration of Steven Beadle Submitted in Support of MDBSI's Petition ("Beadle Decl.") concurrently in support of the request for stay of enforcement of the Orders. Both Declarations are attached hereto, following the Exhibits.

To be clear, the relief Petitioner seeks will not cause an imminent environmental emergency endangering human health or the environment. It will not endanger human health or the environment at all. And it will not exacerbate conditions at the Property at issue. The State

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[1] Petitioner is Medical Device Business Services, Inc. ("MDBSI"), corporate successor to Ace Medical Co. ("Ace"). Petitioner and Ace are hereafter collectively referred to as Petitioner.

[2] The Order and the IRAP are attached hereto, respectively, as Exhibit A and Exhibit GG.

has been aware of the conditions at the Property for over 30 years and never took action on its own to investigate or remediate those conditions. Instead, decades later, the State undertook its improper initiative to make Petitioner investigate and remediate environmental conditions that Petitioner did not cause. As explained below, no one and nothing—not the State, human health, or the environment—will be endangered by the interim relief (a stay) and ultimate relief Petitioner seeks. This is especially the case as the substances of concern in the perched groundwater at the Property are stable and/or declining (attenuating).[3] Moreover, the Orders are also directed to, and name as a discharger, the current owner of the Property, Ms. In Ok Song. Unlike the purported responsibility of Petitioner, which is challenged herein, Ms. Ok Song's responsibility is unquestioned. Accordingly, granting the relief as to Petitioner will not affect the obligations of the current owner of the Property to undertake the actions required by the Orders. But without that relief, Petitioner will suffer immediate, substantial, and irreparable harm.

Ultimately, the Regional Board has the burden of proving by the preponderance of admissible, relevant evidence that Petitioner is liable under the statute. The Regional Board has not even established by substantial admissible and relevant evidence any basis for the Order and the IRAP. Under the California Evidence Code and case law, "speculation" is not evidence, much less "substantial evidence." As to Petitioner, the issuance of the Order and IRAP is based on speculation, nothing more.

At its core, the Regional Board misapplied the law in three fundamental ways, as follows:

1. First, the Regional Board breached its statutory duty to carry its evidentiary burden of proof with respect to the Order and the IRAP. Rather than meet its burden, the Regional Board resorts to speculation in an effort to shift to Petitioner the burden of proving a negative. That is not the way the law works. The Regional Board's evidentiary burden requires initially, and

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[3] There is no immediate or imminent human health or environmental threat that necessitates action while the merits of the challenge are decided as to soil or soil vapor as to date no substances detected in soil samples taken at the Property exceed human health-based screening levels, and the Property Owner's modifications to the Property's buildings addressed soil vapor intrusion (indoor air) concerns. (*See* Exh. D, 1996 Assessment; Beadle Decl at p. 5-8; , Exh J, April 29, 2024 Regional Board Review of Indoor Air Vapor Intrusion Testing and Subsurface Shallow Soil Gas Investigation at p. 4. at Bates nos. MDBSI 001167.

foremost, that the material allegedly comprising the "evidence" be both relevant and admissible. Speculation, the absence of evidence rebutting speculation, or the inability of a party opposed to that speculation to prove a negative, is not "evidence" at all. And axiomatically, those things cannot and do not comprise even "substantial evidence." Moreover, a reviewing court ultimately will conduct a *de novo* review, which means, for example, the evidence must not only be admissible and relevant, it must also be sufficient to meet the Regional Board's burden of proving the key components of its claim under the statute pursuant to which the Order and IRAP were purportedly issued. Those components—such as the Regional Board's claim that Petitioner is liable for a nuisance under the Water Code—must be proven by a preponderance of the evidence. Merely having "substantial evidence" will not be enough to stop a superior or appellate court from voiding the Order and IRAP. But even if this Board or a reviewing court requires nothing more than "substantial evidence," the Order and IRAP do not pass muster.

2. Second, the Order is based on the novel—and unfounded—proposition that *any former owner* of a property on which a nuisance may *currently* exist is liable for that nuisance, regardless of facts that (a) there is no evidence that the former owner *caused* the nuisance or groundwater pollution that may now exist, and (b) the former owner did not transfer a property with a known nuisance which the former owner unreasonably failed to abate. This is also a fundamental misunderstanding of the law of nuisance.

3. Any hypothetical, speculative discharge of 1,4-Dioxane by Petitioner is not a basis for including Petitioner in the Order or the IRAP.

The Regional Board issued the Order to Petitioner on January 24, 2023, and the IRAP on June 4, 2026, in connection with property located at 14131 and 14133 South Avalon Blvd., Los Angeles, California (the "Property"). The Regional Board did so even though it is and was aware:

1. That Petitioner played no part whatsoever in the creation of the current contamination at the Property, as principally addressed by the Order and the IRAP,

2. That when Petitioner ceased to operate on and sold the Property, it did not know or have reason to know of a groundwater nuisance on the Property which it "unreasonably" failed

to abate. ***The knowledge and conduct of the State (acting through the Department of Toxic Substances Control ("DTSC")—which was the lead State environmental agency for the Property)—affirms this fact,***

3. Petitioner has not physically occupied the Property for the last 30 years, and

4. The Regional Board has made not even a desultory effort to carry its burden of proving that its stale claim is not barred by the doctrine of laches, as required by California law.

As a result, the Order and IRAP were issued improperly to Petitioner. To date, the Regional Board has not acted on its own to rectify its improper action as it has not withdrawn the Order and IRAP as to Petitioner, nor has it to removed Petitioner from them, or stayed them as to Petitioner.

Petitioner did not create the contamination at the Property, and Petitioner was not a previous owner of the Property who transferred a known groundwater nuisance after unreasonably failing to abate it, as the administrative record clearly reflects.[4]

A. The allegations in the Order do not sustain the Regional Board's burden of proving Petitioner is liable as a party causing a nuisance, or as a former owner who transferred a known nuisance but unreasonably failed to abate it.[5]

The speculative (and wholly unfounded) premise of the Order is that MDBSI, as successor of a prior owner of the Property, "permitted wastes of [substances of concern] to be discharged or deposited where the wastes are, or probably will be discharged into the waters of the State which creates a condition of pollution or nuisance" and "permitted [substances of concern] to be discharged or deposited where the wastes are or probably will pose a potential

[4] To assure the State Board that the Regional Board had an opportunity to correct its error, the Declaration of Steven R. Tekosky attaches as an exhibit Petitioner's Demand Letter (without exhibits) to the Regional Board requesting the Regional Board to delist (or withdraw) Petitioner from the Orders, and, in the alternative, to stay the Orders as to Petitioner. The Demand Letter, as submitted to the Regional Board, includes this full petition to the State Board as well as the exhibits.

[5] The Orders do not explicitly rely on the latter theory of liability for a former owner, nor could they, for the reasons explained herein. Since Petitioner may not have an opportunity to supplement this submission, it therefore anticipatorily explains why any effort by the Regional Board to buttress the Orders by switching to a new theory would be futile.

human health threat to occupants of the Property through direct contact exposure to contaminated soil, soil vapor or through vapor intrusion into indoor air or through other exposure pathways." (Exh. A, Order, ¶¶ 23, 24, at p.12).

The Order, however, omits key information in its charging language. Specifically, the Order opaquely purports to be based on an investigation Ace voluntarily performed in connection with a potential sale transaction (and not in response to a known or suspected release) while it owned the Property, but ignores the key facts that this investigation was done in 1996 and:

- The investigation was planned with and overseen by the DTSC, the lead State agency for soil and water at the Property.
- The investigation, which included assessment of groundwater, was conducted by a well-known and reputable consulting firm whose project manager was a Professional Engineer licensed by the California Board of Professional Engineers, Land Surveyors and Geologists.
- DTSC had unfettered access to the investigation and all related results and conclusions.
- Based on numerous sources, the investigation concluded that Ace did not use TCE at the Property, and found no evidence that Ace used TCE, PCE, or 1,4-Dioxane.
- DTSC did not question or contest the conclusions of the investigation that any groundwater under the Property was perched, had no beneficial use and was not a threat to human health or the environment.
- At no time did DTSC request that Ace further investigate or address groundwater. Although Ace voluntarily initiated the 1996 investigation, if DTSC determined from the resulting 1996 Preliminary Endangerment Assessment Report ("1996 ") a groundwater nuisance or threat was known or suspected on the Property, DTSC had the statutory duty and right to conduct further investigations/remediation and/or require Ace to do so. But DTSC did none of those things with respect to

groundwater.

These material facts were omitted in the Order. Yet, if the facts were included, it would be clear that there is no basis to support the Order's allegation that: "As a result of investigations performed during ACE Medical Company's ownership and operations, MDBSI knew or should have known that activities on the [Property] created a reasonable possibility of discharge into waters of the state of wastes that could create or threaten to create a condition of pollution or nuisance, and had ability to control those discharges." (Exh. A, Order at ¶ 22, pp.11–12).

The above passage is a legal conclusion, not supported by the facts, and inconsistent with the law. That is, it is comprised of a double *ipse dixit*: the first is the "qualifiers on qualifiers" (which are speculation, not evidence); the second is the wholesale rewrite of the correct and controlling legal standard of liability. That correct legal standard firmly places on the Regional Board the burden of proving its Order is based on the preponderance of actual (not speculative, inadmissible) evidence. Put simply, the Regional Board (without fessing up to what it is doing) relies on sheer speculation in an attempt to shift to Petitioner the burden of proving a negative.

This allegation in the Order quoted above is also internally inconsistent. The first part of the sentence is framed in terms of there being a "reasonable possibility of discharge." (Exh. A, Order at ¶ 22, pp.11–12). Yet, the Order does not explain how Petitioner could "control those discharges" that were purely speculative. (*Id.*). The Order's hollow recitation of the "caused or permitted" language in paragraphs 23 and 24, tracking the language in Section 13304(a) of the California Water Code, does not salvage it. That section requires an *actual or probable* discharge to the waters of the State, not a "reasonable possibility," before liability may be imposed on:

> [a]ny person ... who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance....

Cal. Water Code § 13304(a). When the Legislature intended the standard to be "reasonable possibility" (as the Order states) rather than "probability" (as the statute requires), it knew exactly how to say that. The Legislature did not abdicate to the Regional Board the right to re-write the statute. *See*, *e.g.*, Cal. Civ. Proc. Code §§ 128, 1029.5, 1029.6; Cal. Corp. Code §§ 834; Cal. Penal

Code § 287.

As discussed below, California Water Code section 13304(a) is grounded in nuisance law. When this provision and the allegations in the Order are viewed through that lens, it becomes clear that the Regional Board did not have the required actual evidence. Instead, through speculative allegations, the Regional Board attempts to shift to Petitioner the burden to prove a negative.

B. Petitioner did not use the substances of concern at the Property and Petitioner did not transfer a groundwater nuisance at the Property which it unreasonably failed to abate.

To properly name Petitioner in the Orders, the Regional Board would have to prove one of two things by a preponderance of relevant admissible evidence: (1) that Petitioner actively discharged substances of concern causing a groundwater nuisance or groundwater pollution, or (2) that in 1998, Petitioner transferred a groundwater nuisance which Petitioner "unreasonably" failed to abate. The Regional Board cannot sustain its burden to prove either proposition.

Tetrachloroethene ("PCE") and trichloroethene ("TCE") and their degradation compounds are the primary substances of concern both on and off the Property (including the upgradient and cross-gradient directions). No investigation found any evidence of Petitioner's use, storage, handling, or release of any of these substances of concern whatsoever during Petitioner's brief (seven-year) operational tenure at the Property. The Regional Board's administrative record contains no such evidence either.

The Orders are devoid of any—much less a preponderance of—evidence that Petitioner, at any time, ever used, handled, stored, or discharged PCE or TCE at the Property. The Orders cite no expert evidence of such usage or discharge, do not provide the credentials or identity of any staff member qualified to give an opinion on that issue, and do not provide an adequate foundation for such an opinion as is required by the California Evidence Code. Instead, the Orders' "evidence" is comprised of nothing more than a perfunctory and conclusory, "oh, we see this kind of thing all the time."

Instead of basing the Orders on speculation, the Regional Board could and should have relied on actual evidence the State has had since 1996, which debunks that speculation. That is, in 1996, a Preliminary Endangerment Assessment Report (the "1996 Assessment" or "PEA") was prepared for and under the supervision of DTSC, the Regional Board's sister agency.[6] The 1996 Assessment was conducted contemporaneously with Petitioner's ownership and operation at the Property.[7] The Orders ignore the key content of the 1996 Assessment which, with regard to the Property (1) affirmatively states that Petitioner never used TCE;[8] (2) notes there was no record of Petitioner's use of TCE or PCE;[9] (3) lists all the substances Petitioner used at the Property, which list does not include TCE or PCE;[10] (4) states that the depth, concentration, and presence of TCE, PCE and their breakdown products indicate these substances were not discharged during Petitioner's ownership of the Property;[11] and (5) concludes—and DTSC did not contest—that the perched groundwater under the Property was "of no beneficial use" and that there was no significant health or environmental threat posed by the presence of chemicals in soil or groundwater (*i.e.*, there was no reasonable cause for concern that such presence would create a nuisance).[12] Records contemporaneous with Petitioner's ownership and operation at the

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[6] Like the State Board and the Regional Board, the Department of Toxic Substances Control, is a sub-agency of the California Environmental Protection Agency ("CalEPA") with the statutory authority and responsibility to enforce environmental protection laws, including those affecting groundwater. In 1996, DTSC was designated at the "lead agency" for the State in enforcing environmental protection laws at the Property.

[7] Moreover, "the 1996 Assessment and the conclusions stated therein meet the "standard of practice" at that time. *See* Declaration of Steven Beadle submitted herewith ("Beadle Declaration") ¶ 3.

[8] *See* Exh. D, 1996 Assessment at 3-3 (Bates no. MDBS 00085); at 6-7 (Bates no. MDBSI 00104); 10-1 to 10-2 (Bates no. MDBS 00116-00117). The 1996 Assessment is Exh. VIII to the Chemical Use Questionnaire, which was produced and submitted to the Regional Board pursuant to an information request by the Regional Board, and is a document that was in the administrative record prior to the issuance of the Orders. As noted above, it was cited in the Order, albeit without explicitly providing identifying information.

[9] *See* Exh. D, 1996 Assessment at 3-3 (Bates no. MDBSI 00085); *id.* at 6-7 (Bates no. MDBSI 00104); *id.* at 10-1 to 10-2 (Bates no. MDBS 00116-00117).

[10] *See* Exh. D, 1996 Assessment at 3-3 (Bates no. MDBS 00085).

[11] *See* Exh. D, 1996 Assessment at 3-3 (Bates no. MDBS 00085); *id.* at 6-7 (Bates no. MDBSI 00104).

[12] *See* Exh. D, 1996 Assessment at 10-1 to 10-2 (Bates no. MDBS 00116-00117).

Property do not show any use, handling, storage, or discharge of TCE or PCE by Petitioner at the Property. Neither does the administrative record.[13] At all times since 1996, the Regional Board has had access to—and is charged with knowledge of—information that Ace did not use, dispose, or release any substances of concern. Thus, the Orders do not satisfy the first prong set forth above.

Moreover, as discussed in more detail below, since at least 1996, the Regional Board has been aware that there was not a groundwater nuisance at the Property during Ace's occupancy that Petitioner transferred after "unreasonably" failing to abate it. That means the Orders also cannot meet the second prong set forth above. Further, at all times since 1996, the Regional Board has had access to—and is charged with knowledge of—information that Ace did not use, dispose, or release any TCE or PCE.

There is yet another reason why the Orders, issued solely to Petitioner and the current property owner, must be reviewed: since at least October 2025, the Regional Board has been aware of evidence that properties located upgradient and side-gradient to the Property contain independent sources of PCE, TCE, and other contaminants. As of the date of this Petition, it does not appear that the Regional Board has taken any action whatsoever with respect to the owners/operators of these adjacent and nearby properties.[14]

C. Any hypothetical discharge of 1,4-Dioxane by Petitioner is not a basis for including Petitioner in the Orders.

The Orders speculate that Petitioner discharged 1,1,1-TCA. The Orders further speculate the 1,1,1-TCA contained 1,4-Dioxane, which has been detected now in perched groundwater in a limited area under the Property. From that, the Orders erroneously assert the 1,4-Dioxane is or

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[13] The Order merely asserts that "[a]ctivities at the" Property resulted in the discharge of PCE and TCE (and other wastes) to the environment (Exh. A, Order ¶ 3 at p.2), but does not state, and offers no evidence, that activities *of Petitioner*—as opposed to those of any of the numerous (at least 18) other owners and operators at the Property—resulted in the discharge of PCE or TCE. (*See id.*).

[14] Per the Order, Petitioner has expended considerable sums and time in attempting to obtain, obtaining access agreements for, and environmental media sampling at, the adjacent/neighboring "offsite" properties. (*See* Tekosky Decl. at p.3).

"threatens" to cause "pollution" or "nuisance" under the statute on which the Orders are based. For multiple reasons, discussed below in more detail, the Orders are completely wrong in this speculation and the conclusion based on that speculation.

D. Although Petitioner is not liable, Petitioner has exclusively borne all costs under the Orders and will incur substantial costs in the next months and year if a stay is not granted.

Although the Orders require both Petitioner and the current Property owner to assess, cleanup, and abate chemicals that *Petitioner never handled, used, stored, or discharged at the Property*, the work pursuant to the Orders has been undertaken, and its costs have been borne, exclusively by Petitioner. To date, this work has already cost Petitioner in excess of $950,000.00, which Petitioner has no clear path to recoup.

Petitioner's environmental consultant, Arcadis, estimates that through 2034, performance of the specified non-remedial work (*i.e.*, "reports and investigations"), coupled with the Regional Board's interim remedial measures required by the improper Orders, will cost Petitioner an additional $3,300,000.00 to more than $7,000,000.00, with a significant projected expenditure of between $1,139,950.00 to more than $2,400,000.00 over the next 12 months. (Exh. A, hereto, Beadle Decl. at ¶¶ 6, 9).[15] That expenditure would be costly and difficult or impossible to recoup. Costs for any yet-to-be-determined remediation (which the Orders purport to require, apparently in the sole discretion of the Regional Board) and "additional" (but not specified) reports and investigations referenced in the Orders, will increase those expenditures even further, in an unquantified amount. (*Id.*).

The costs related to the projects specifically required by the Orders may, however, only be the tip of the iceberg, as the Orders also require Petitioner to conduct unspecified "cleanup" for an unspecified period of time, and also pay Regional Board oversight costs for the reports, investigations, interim cleanup, and any final cleanup. The Orders further provide that the Regional Board may unilaterally expand the scope of the required reports, investigations, and

[15] The Order (Exh. A) at p.9, paragraph 13, specifies "reports and investigations" Petitioner is required to undertake. Although the Order estimates the cost of conducting these non-remedial projects will be $2–5 million, Petitioner's environmental consultant estimates the costs will be significantly higher.

cleanup. At this point, it is not possible to estimate what that "cleanup" would entail, how much it would cost, and how long it would be operational. It is also not possible to speculate what additional "reports and investigations" the Regional Board may impose (and related costs), or the Regional Board's oversight costs.[16]

If a stay is not granted while the State Board conducts its review pursuant to this Petition, Petitioner faces an untenable choice of continuing to incur substantial costs or being subjected to fines and penalties of $1,000.00 to $15,000.00 per day per the Orders. (Order (Exh. A) at ¶ 21, p.9). Thus, if Petitioner fails to comply with the Orders pending its prosecution of this petition, it faces irreparable injury by subjecting itself to significant penalties in an amount of between $1,000.00 to $15,000.00 per day.

In order to meet the deadlines in the Orders (and thereby avoid fines and penalties), Petitioner will have to incur a substantial portion of the 2026 costs while this review is undertaken. Subjecting Petitioner to having to comply with the improper Orders will effectively deprive Petitioner of its administrative right to appeal and seek redress for the wrongfully imposed Orders because if Petitioner's prayer for this limited stay is not granted, and if Petitioner must adhere to its current obligations under the Orders' calendar, it will have to incur the substantial cost for building a remedial system for the Property. Undertaking those things will effectively moot Petitioner's administrative and legal remedies and rights to appeal the Orders.

The stay and review requested by Petitioner will not affect the ability of the Regional Board to enforce the Orders against the Property's decade-long current owner, In Ok Song, who, as the current owner, is unquestionably responsible, and who is also financially capable.

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[16] Specifically, Petitioner's consultant does not have an estimate for the cost of the following, the scope and extent of which are currently unknown, even though they are identified as obligations under the Orders: preparation of any "additional reports or investigations" the Regional Board may require under the Orders; the implementation and operation any additional remediation/cleanup the Regional Board may require under the Orders; regulatory oversight fees associated with any such additional tasks; operation and maintenance of the AS/SVE after 2034, if required by the Regional Board under the Orders; regulatory oversight fees after 2034; and conduct of quarterly groundwater monitoring and reporting and semi-annual vapor intrusion monitoring after 2034, if required by the Regional Board under the Orders. (*See* Beadle Decl. at ¶ 11).

E. The State acknowledges that conditions that existed during Petitioner's tenancy do not meet the statutory definitions of "pollution" or "nuisance."

Petitioner is not a liable former, non-discharging owner of the Property. Only former owners who knew or should have known of a nuisance but unreasonably failed to abate it before selling a property can be liable. Relevant case law establishing that rule is cited and discussed below. When Petitioner transferred the Property in 1998, it (and the State) had no reason to believe there was any groundwater contamination needing remediation, *i.e.*, there was no extant groundwater nuisance that Petitioner "unreasonably" failed to abate before the transfer.

Specifically, the State had exactly the same knowledge as Petitioner regarding conditions at the Property in 1996 and 1998 when Petitioner sold the Property. Yet, the State did not find there was a groundwater nuisance, a discharge by Petitioner to groundwater, or even the "reasonable possibility" of one (per the proposed statutory re-write recited in the Order), much less a "probable" one (as the statute requires). Instead, with all that knowledge—and its status as lead State agency for the Property with the authority and statutory duty to enforce the Water Code notwithstanding—DTSC did not request abatement or even request further investigation of anything related to groundwater.

Of course, DTSC was correct in not acting: the conditions that existed during Petitioner's ownership of the Property do not meet the statutory definition of "pollution" or "nuisance" under Water Code section 13050(l) and (m). Liability for "pollution" under Section 13050 is not triggered unless the "contamination" "unreasonably affects the waters for beneficial uses." The 1996 Assessment prepared for DTSC concluded—and DTSC did not contest—that the perched groundwater under the Property was "of no beneficial use." Nor did DSTC contest the recommendations in the 1996 Assessment that no further action be required at the Property because, among other things, (1) there was no significant health or environmental threat posed by the presence of chemicals in soil or groundwater (*i.e.*, there was no reasonable cause for concern that such presence would create a nuisance), and (2) the groundwater beneath the Property is perched and not of any known beneficial use. All of the evidence available to

Petitioner and the State from the time period during which Petitioner owned or occupied the Property supports the conclusion, and the State's acknowledgement, that chemicals did not pose an "unreasonable risk of nuisance" at that time. That is not surprising since the 1996 Assessment also states affirmatively that Ace had not used TCE at the Property.

F. Petitioner will suffer further substantial and irreparable harm if the relief sought herein is not granted, in violation of State and Federal Due Process protections.

Because there is no legal basis for naming Petitioner a responsible party in the Orders, if the Orders are not stayed (and Petitioner is not ultimately removed as a party to the Orders), Petitioner will suffer further irreparable harm, and any administrative remedy is illusory. Petitioner, accordingly, petitions the State Board requesting that it both rescind the Orders as to Petitioner and stay enforcement of the Orders as to Petitioner during its review. As of the date of this submission, one thing is certain: if Petitioner does not immediately begin incurring costs and preparations to perform obligations under the Orders, Petitioner will be in the crosshairs for massive daily fines and penalties when it cannot perform.

Petitioner would suffer further substantial and irreparable harm if the relief it seeks herein is not granted, as follows:

1. The Orders violate the Due Process Clause of the United States and California Constitutions. Violations of constitutional rights are a well-established substantial and irreparable harm. Specifically, the Orders violate Due Process insofar as mandates further steps and expenditures to address TCE and PCE, the primary substances of concern at the Property. Recovering those expenditures, if possible at all, would be costly and very difficult. BUT, TCE and PCE are substances which Petitioner never used, handled, or released at the Property—and which Petitioner did not unreasonably fail to abate during its brief tenure at the Property.

2. The Orders further violate Due Process insofar as they were issued after the Regional Board fundamentally changed the theories of liability against Petitioner between the Draft Order and the Order, without providing Petitioner an opportunity to be heard.

3. "Due process" requires that the "process" provide a meaningful path to a

resolution. Forcing a party to endure significant (and irremediable) hardship in order to invoke that process—which hardships will moot the benefits of any ultimate result—is the *sina qua non* of a violation of Due Process rights. But that is exactly what the Orders purport to do. Compliance with the schedule dictated by the Orders is necessary for Petitioner to avoid hefty fines and penalties. That is, to achieve compliance with the schedule in the Orders requires Petitioner currently to incur significant costs for consultants and other professionals, who must design the mandated systems and arrange for the needed technology and resources. That is a process that will take months and require significant current and ongoing expenditures. Because of these realities, Petitioner is, for all intents and purposes, being forced to make a Hobson's choice: either incur those expenses (effectively foregoing any practical relief that could come from this appeal to the State Board or a court), or risk not preparing to comply and becoming subject to the "imposition of civil liabilities, imposed either administratively by the Regional Board or judicially by the Superior Court in accordance with Water Code sections 13268, 13304, 13308, and/or 13350, and/or referral to the Attorney General of the State of California." (Order (Exh. A) at p.19, ¶ 21).

4. If the State Board will not remove Petitioner from the Orders, Petitioner will be denied Due Process as a result of being inappropriately assigned responsibility for the remediation measures mandated by the Orders, which have already cost Petitioner in excess of $950,000.00 and which Petitioner would have a difficult (if not impossible) time recouping from the State. The Orders specify certain non-remedial work (*i.e.*, "reports and investigations") and interim remedial measures. Together those projects specified in the Orders are estimated to cost between $3,300,000.00 to more than $7,000,000.00, with a projected cost of between $1,139,950.00 to more than $2,400,000.00 over the next 12 months. (Beadle Decl. ¶¶ 6, 9). However, the Orders also require Petitioner to conduct unspecified "cleanup" for an unspecified period of time, and further provides that the Regional Board may unilaterally expand the scope of the required reports, investigations and cleanup, all portending further significant—but currently unquantified—

expenditures. The Orders also obligate Petitioner to pay unquantified "oversight" costs of the Regional Board. At this point, it is not possible to guess what "cleanup" the Regional Board might require, how much it would cost, and how long it would be operational. It is also not possible to speculate what additional "reports and investigations" the Regional Board may impose (and related costs), or the amount of any oversight costs. Given that Petitioner is not legally or factually responsible for conditions at the Property, it is inappropriate for Petitioner to be included in the Orders which have an unquantified temporal and monetary tail.

5. Petitioner will be denied Due Process and be required to bear the costs of groundwater monitoring directed toward concerns beyond those that exist at the Property, and for which other, unrelated parties are responsible.

There is no risk of immediate or substantial harm to any public interest as a consequence of staying Petitioner's obligation to plan and conduct measures mandated by the Orders until its merits are decided by this Board. (Beadle Decl. ¶¶ 11–12). That is because: (a) there is no immediate or imminent human health or environmental threat that necessitates action while the merits of this challenge are decided; (b) the substances of concern in the groundwater at the Property are stable or declining; (c) the substances of concern in the soil at the Property do not exceed human health-based screening levels; and (d) there is another Responsible Party named in the Orders who is available to effectuate such measures, *i.e.*, the current and decade-long owner of the Property, Ms. In Ok Song. (*Id.*). As the current owner, Ms. In Ok Song has no basis for refusing to comply with the Orders.

II. Petition for Review

A. Name, Address, Telephone Number, and Email Address of Petitioner

The Petitioner is Medical Device Business Services, Inc. ("MDBSI"), corporate successor to Ace Medical Co. ("Ace").

Petitioner can be contacted through its legal counsel as follows:

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B. Specific Regional Board Action/Failure to Act for Which Review is Sought

Petitioner seeks review of the Regional Board's actions in improperly and unlawfully issuing the IRAP pursuant to its improper and unlawful issuance of the Order to Petitioner. The Regional Board's actions were unlawful, inappropriate, improper, an abuse of discretion, arbitrary, and capricious.

As noted above, the Order and IRAP are attached hereto, respectively, as Exhibits A and GG.

The Regional Board has not fulfilled its burden of proving by the preponderance of admissible, relevant evidence that Petitioner is liable as a "Discharger" under governing statute statutes or caselaw. The Regional Board has not even established by substantial admissible and relevant evidence any basis for the Orders. The Orders are based on speculation, nothing more. "Speculation" is not evidence, much less "substantial evidence." Petitioner therefore makes these requests on the following grounds, each of which provides an independent and sufficient basis for rescinding the Orders as issued to Petitioner or removing Petitioner from the Orders, and for staying enforcement of the Orders as to Petitioner:

1. The Regional Board based its Orders on a putative legal standard not found in the enabling statute.

2. The Regional Board based the Orders on the novel—and unfounded—proposition that any former owner of a property on which a nuisance may currently exist is liable for that nuisance, regardless of facts that

   a. there is no evidence that the former owner caused any nuisance groundwater pollution that may now exist, or even played any part whatsoever in the creation of the contamination now at the Property that requires active remediation, and

b. the former owner did not transfer a nuisance about which it knew or should have known while also "unreasonably" failing to abate it.[17]

3. The Regional Board's failure to carry its burden of proving—through relevant, admissible, and non-speculative evidence—that Petitioner is liable under the statute.

4. The Regional Board unreasonably delayed its investigation of the Property that led to the issuance of the Orders, in which the Regional Board has named Petitioner as one of only two dischargers. The Regional Board has the burden of proving by a preponderance of the evidence that the Orders and any related enforcement efforts are not barred by the doctrine of laches.

5. There is substantial inequity caused by the Regional Board's failure, before issuing the Orders, to conduct a timely and reasonable investigation of the numerous other potentially responsible parties, including, but not limited to, parties other than Petitioner (and the current Property owner) who have owned and/or conducted operations at the Property, as well as parties who own or have owned, or operate or have conducted operations at, properties in the vicinity of the Property which recent evidence demonstrates could be a source or sources of the substances of concern at the Property.

Depending on how (if at all) the Regional Board responds to this Petition, Petitioner also requests that the State Board allow oral argument and hold an evidentiary hearing on the Petition to allow Petitioner (at Petitioner's discretion) to provide additional testimony, argument, and evidence that Petitioner does not qualify as a discharger and/or regarding the Regional Board's failure to timely investigate the contamination of the Property.

In addition, Petitioner requests a stay of enforcement of the Orders as to Petitioner pending resolution of this Petition pursuant to 23 CCR § 2053, based upon the facts set forth in

[17] As noted above, a former property owner is only liable (1) for a nuisance it created or (2) if the owner sold a property on which there was a nuisance the owner knew (or should have known) about but unreasonably failed to abate.

the Tekosky Declaration and the Beadle Declaration submitted herewith, which establish the requisite elements for the stay requested, *i.e.*: (1) there will be substantial harm to Petitioner if a stay is not granted because Petitioner necessarily will incur substantial costs to comply with the Orders under the deadlines set forth therein; (2) there is no harm (substantial or otherwise) to other interested persons and to the public interest if a stay is granted, as evidenced by the facts that (a) the Regional Board waited more than 25 years to act, which delay demonstrates that no urgency exists, (b) detections of the substances of concern in the Property's perched groundwater are declining or stable, which also demonstrates no urgency exists (as noted *supra*), and (c) the Orders are also directed to the current Property owner, who can take all actions required by the Orders, (3) substantial questions of fact or law regarding the disputed action of the Regional Board, and (4) Petitioner has a high likelihood of prevailing on this Petition and/or at any subsequent review by a court.

C. Date on Which the Regional Board Acted

The Regional Board acted and or failed to act on June 4, 2026, when it improperly and unlawfully issued the IRAP pursuant to its improperly and unlawfully issued Order to Petitioner.

D. Reasons Why the Action was Inappropriate or Improper

The Regional Board's actions were unlawful, inappropriate, and improper for the reasons set forth in Petitioner's Statement of Points and Authorities, below.

PETITIONER'S STATEMENT OF POINTS AND AUTHORITIES

BACKGROUND FACTS

1. Petitioner is the only previous owner/operator of the Property named in the Orders.

Petitioner occupied the Property for about seven years, from 1988 to 1995, first as a tenant and then, beginning in 1993, as an owner, where it manufactured orthopedic devices. Petitioner sold the Property 28 years ago, in 1998. Petitioner is named as a responsible party in the Orders.

The Order documents a long operational history of the Property by at least 19 individuals and entities as owners/lessees/operators at the Property from 1926 to the present. Only the current Property owner and Petitioner are named as responsible parties in the Orders. Of the numerous entities and individuals that owned/operated at the Property over the last 70+ years, Petitioner is the only one which has voluntarily cooperated—at significant expense—with environmental regulatory agencies.

2. The 1996 Assessment on which the Orders purport to be based.

To understand how far the Orders miss the mark requires contextualizing them with the 1996 Assessment (Exh. D) on which they purport to be based.

The sum of the 1996 Assessment is as follows: the 1996 Assessment was the culmination of a voluntary undertaking, in cooperation with DTSC, the lead State environmental agency for the Property, to prepare an evaluation of the Property which met the approval of DTSC. The 1996 Assessment, Petitioner, and the DTSC —all operating with the exact same information—did not conclude there was any significant health or environmental threat at the Property.

The 1996 Assessment, as provided to DTSC, stated:

> [T]hat no further action be required of ACE at this time … based on the following:
>
> 1. ACE did not use substances of concern at the Property.
>
> 2. The risk assessment results indicate that no significant health or environmental threat is posed by the presence of VOCs in soil up to 15 feet deep.
>
> 3. Groundwater beneath the Property is perched, is not of any known or of any beneficial use.
>
> 4. Off-site sources may be contributing to the concentration of VOCs found in groundwater and soil beneath the Property.

(Exh. D at 10-1 to 10-2 (MDBSI 00116-00117).

a. Petitioner did not use, handle, store, or discharge PCE or TCE at the Property.

As set forth above, there is no evidence, and the Orders do not provide any, that Petitioner at any time ever used, handled, or stored—much less discharged—PCE or TCE at the Property.

As the administrative record in this matter shows, Petitioner's operations at the Property were pervasively regulated and inspected. Petitioner operated pursuant to appropriate environmental permits, registrations, and authorizations issued by, among others, the South Coast Air Quality Management District, the Regional Board, the Los Angeles County Sanitations Districts, the Los Angeles City Fire Department, the Los Angeles County Fire Department, the DTSC, and the United States Environmental Protection Agency. Contemporaneous sworn reports and filings with these agencies do not evidence any usage or disposal of PCE or TCE, or any substances of concern by Petitioner, at the Property.

Petitioner's yearly hazardous materials inventories filed under oath with the Los Angeles County Fire Department, Health Hazardous Materials Division in accordance with the California Hazardous Materials Release, Response Plans and Inventory Act, California Health and Safety Code sections 25500 *et seq.*, and the Los Angeles County Code do not list TCE or PCE as being used at the Property by Petitioner. *See* Exh. D at MDBSI 0001 *et seq.* [18]

Similarly, Petitioner's Sanitation Districts of Los Angeles County Industrial Self-Monitoring Reports filed under oath in accordance with Petitioner's Industrial Wastewater Permit did not require testing for TCE or PCE and do not evidence any such use by Petitioner at the Property. Additionally, as set forth above, environmental assessments prepared contemporaneously with Petitioner's operations on the Property state affirmatively that Petitioner did not use TCE at the Property. For instance, the 1996 Assessment submitted to the lead agency on the Property, DTSC, proximate in time to Petitioner's termination of operations at the Property states, "trichloroethylene (TCE), the primary constituent of concern, was not used by [Petitioner] at the site." (Exh. D, 1996 Assessment at 3-3 at Bates nos. MDBSI 00085).

The 1996 Assessment further establishes that, from 1988 (Petitioner's first presence on the Property) to the early 1990s, Petitioner only degreased parts in self-contained tanks using

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[18] *See* Exh. D at MDBSI 0001 *et seq*. The Chemical Use Questionnaire, which was produced and submitted to the Regional Board pursuant to an information request by the Regional Board, and is a document that was in the administrative record prior to the issuance of the Orders.

small amounts of a different chemical, 1,1,1-tricholorethane ("1,1,1-TCA"), as well as a soap/water solution. (Exh. D, 1996 Assessment at 3-3 at Bates nos. MDBSI 00085). In the early 1990s, Petitioner replaced the 1,1,1-TCA with biodegradable solutions. (*Id.* at 3-3 at Bates nos. MDBSI 00085). 1,1,1-TCA is chemically different from TCE and PCE. 1,1,1-TCA is not a substance of concern at the Property. Moreover, as discussed below, there is no credible evidence that 1,1,1-TCA was released at the Property.

In its Orders, the Regional Board does not offer any evidence that Petitioner used TCE or PCE at the Property, nor does it offer evidence contradicting the evidence described above. Instead, the Regional Board relies solely on speculation that Petitioner may have used PCE or TCE because in general industrial operations, these chemicals frequently had been associated with degreasing, metal cleaning, and use of a clarifier in the past. As the 1996 Assessment and Petitioner's expert explain, however, 1,1,1-TCA was the preferred metal degreasing solvent during the time period of Petitioner's operation at the Property because it was considered less toxic than PCE and TCE. *See* Exh. D, 1996 Assessment at 3-3 at Bates no. MDBSI 00085,); Exh. I, Supplemental Expert Report of Stephen Emsbo-Mattingly, M.S. ("Supp. Mattingly Report") at 4 at Bates no. 01097. The Orders do not and cannot tether past general industrial practices to Petitioner or Petitioner's operations at the Property. The Regional Board's speculation is not admissible evidence of actual use at the Property by Petitioner. Moreover, the Regional Board's speculation is contradicted by actual admissible evidence in records contemporaneous with the time of Petitioner's ownership and operation at the Property (including those described above), which records do not show any use, handling, storage, or discharge of TCE or PCE by Petitioner at the Property, and in fact indicate that Petitioner did not use these chemicals. Entities unrelated to Petitioner which operated on, adjacent to, or upgradient from the Property, including prior owners and operators of the Property as well as off-Property sources, likely released substances of concern.

Petitioner is informed and believes, and thereon alleges, that the concentrations of the substances of concern at the Property that are the subject of the Orders result from discharges that did not take place during Petitioner's ownership and use of the Property. The 1996

Assessment states that the depth, concentration, and presence of TCE, PCE, and their breakdown products indicate the source of these contaminants was not during Petitioner's ownership of the Property. *See* Exh. D, 1996 Assessment at 6-7 at Bates no. MDBSI 00104.

Petitioner did not use at the Property the substances of concern addressed in the steps required by the Orders, *i.e.*, TCE, PCE and their breakdown products. However, the Order identifies entities unrelated to Petitioner which operated on, adjacent to, or upgradient from the Property (collectively, "Other Entities"). Petitioner is informed and believes, and thereon alleges—based on current knowledge regarding the Property, which is consistent with the 1996 Assessment—that it is likely some of those Other Entities used TCE and/or PCE.

According to the Order, several Other Entities were engaged in manufacturing or other operations that pre-dated Petitioner's operations at the Property, and likely pre-dated many environmental permit requirements. In the decades prior to Petitioner's presence at the Property, the reporting and tracking of chemical usage was less rigorous than during Petitioner's tenure. As a result, those sworn reports to regulatory agencies made during Petitioner's time on the Property, coupled with the known time when TCE was phased out, are consistent and unassailable proof that Petitioner is not the source of the substances of concern. The same cannot be said with respect to the Other Entities. In contrast to the two consistent bodies of evidence that absolve Petitioner and rebut any speculative "inference" about use by Petitioner, to the extent any reports of chemical usage by those Other Entities ever existed, they are now apparently lost to time. Prior to Petitioner's presence on the Property (but not during or after that time) TCE was known to be used as a degreaser in many industrial spheres and applications—including in oil drilling, processing and maintenance activities. [19]

According to the Order, Other Entities include prior owners and operators such as

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[19] For example, one "Other Entity" was The Superior Oil Company now merged into Exxon Mobil. To be clear, Petitioner is not here arguing that the Regional Board had sufficient evidence to name any of these Other Entities in the Orders. However, Petitioner *is* saying that the Regional Board (1) had an obligation to fully and timely investigate these Other Entities, (2) failed to do so and (3) ignored evidence that is less speculative than that used to name Petitioner and which is not contradicted by known facts (as is the case for Petitioner). It is not Petitioner's burden at this point to prove any of these Other Entities are liable.

Superior Oil (which has since merged into, and became a part of Exxon-Mobil), which owned and operated the Property from 1948 to 1954; a printing business, Biltmore Press (a business type now known to use solvents), which owned the Property from 1961 to 1970; the Bruckners, who operated a woodworking shop and machine shop (business types now known to use solvents) and owned the Property from 1970 to 1978; and G&A Furniture, which apparently constructed some of the first substantial buildings on the Property as it operated as a furniture manufacturer (a business type now known to use solvents) at the Property from approximately 1978 to 1988, immediately preceding Petitioner's occupancy.[20]

Petitioner is informed and believes, and thereon alleges, based on current knowledge regarding the Property, that G&A Furniture was a likely discharger of the substances of concern at the Property. Petitioner is informed and believes, and thereon alleges, that TCE was a commonly used solvent in furniture manufacturing/finishing in the decade between 1978 and 1988. This is significant because, according to Petitioner's expert, the constellation of substances detected at the Property is not consistent with the substances reported to have been used by Petitioner at the Property, but is consistent with furniture manufacturing and finishing, *i.e.*, with the precise business of G&A Furniture. As Petitioner's expert opines, the mixture of substances now detected on the Property "is consistent with furniture manufacturing which employ a wide range of paints, stains, varnishes, removers, and adhesives. This mixture of solvents is not consistent with the Ace Medical procedures or product inventories, which only used" 1,1,1-TCA at the Property. (Exh. G, Bates no. MDBSI 01049).

In addition, Petitioner is informed and believes, and thereon alleges, TCE is known to be an ingredient in, or associated with, printer's ink and printing operations. The Order describes operation of the Biltmore Press (a former owner of the from 1961-1970) as "printing."

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[20] *See, e.g.*, 1996 Assessment at p.3-5 documenting entities "in the vicinity of the property" with known releases; p.10-2 ("The information available suggests that the groundwater may be impacted by one or more off-site sources."); p.10-1 (based on several factors, "it is believed that the original source of contamination predates" Petitioner's presence on the Property).

b. Petitioner's voluntary cooperation with environmental agencies, which led to the collaborative planning and execution of the 1996 Assessment.

In the 1990s, while Ace owned the Property, DTSC, the lead California agency for the Property, proceeded under the Voluntary Site Cleanup Program to oversee a site investigation and remedial activities. A Preliminary Endangerment Assessment Agreement with DTSC was signed by DTSC on December 23, 1994 (the "Assessment Agreement"). As the lead state agency at the Property at that time, DTSC had access to all environmental data and also had the authority and statutory duty to enforce the Water Code.

Pursuant to that Assessment Agreement, Woodward-Clyde—a highly qualified and respected national and international environmental consulting company—prepared the 1996 Assessment (Exh. D) dated February 23, 1996. (Beadle Decl. ¶3). The 1996 Assessment was submitted to DTSC in accordance with the Assessment Agreement and the Guidance Manual prepared by the State of California Environmental Protection Agency. (*See* Exh. D, 1996 Assessment at 1-1 at Bates nos. MDBSI 00079).

As discussed above, drawing on multiple sources of evidence, the 1996 Assessment confirms that Petitioner has no history of use of TCE or PCE, the primary substances of concern in the Orders. (*See* Exh. D, 1996 Assessment at 3-3 (Bates no. MDBS 00085); at 6-7 (Bates no. MDBSI 00104); 10-1 to 10-2 (Bates no. MDBS 00116-00117). The 1996 Assessment also concludes that, while such chemicals were detected in the soil and non-beneficial groundwater, they posed no imminent threat. The 1996 Assessment states that "the concentration of VOCs [volatile organic compounds, here TCE and PCE or their degradation products] in the groundwater *does not pose an imminent threat* to on-site receptors because the groundwater at 62 feet bgs is not used at the site as a drinking water source. The groundwater is believed to be perched and of *no beneficial use*, including as domestic supply…." (*See* Exh. D, 1996 Assessment at 10-1 to 10-2 (Bates no. MDBS 00116-00117) (emphasis added)).

The conclusions in the 1996 Assessment submitted to DTSC over 30 years ago that there was no "imminent threat" or "significant health or environmental threat" were not gratuitous "consultant speak." Instead, they were based on a professional and "very conservative" risk analysis. That analysis employed "exposure assumptions" higher than and "not necessarily reflective of actual exposures." (Exh. D, 1996 Assessment at 7-8 (Bates no. MDBSI 00113); *id.* at 10-1 (Bates no. MDBSI 00116); *id.* at 10-2 (Bates no. MDBSI 00117)).

DTSC did not challenge these conclusions of the 1996 Assessment. DTSC did not order or require any further action with regard to groundwater pursuant to the Water Code or any other statute or regulation. Nor did DTSC give any indication that anything in the groundwater under the Property was an extant nuisance or comprised a threat of a nuisance. The evidence does not stop with what was affirmatively in the 1996 Assessment. Actions also provide evidence, and in this instance, actions speak louder than words: after DTSC reviewed the 1996 Assessment, it directed some limited soil remediation and once that was complete, thereafter issued on August 15, 1996, a No Further Action Letter ("NFAL"). *See* Order (Exh. A) at p. 4; a copy of the NFAL is at Exh. D, Bates no. MDBSI 00908-09. DTSC did not then—or ever—exercise its jurisdiction to require that Petitioner remove or abate any groundwater contamination. DTSC's actions literally shout, "there is no nuisance, no threat, nothing that needs remediation, and nothing further for Petitioner to 'know' with respect to abatement." If things had been otherwise, DTSC had a statutory obligation to act. But it did not. The 1996 Assessment's and DTSC's determinations were reasonable when made.

c. The Regional Board is charged with DTSC's knowledge and decision, which confirms Petitioner did not transfer a known nuisance that it unreasonably failed to abate.

DTSC's decision not to pursue any further investigation or remediation of groundwater is dispositive of a key issue: when Petitioner sold the Property in 1998, it was not selling a property on which there was a known nuisance which it had unreasonably failed to abate. Although DTSC, the lead State agency, had authority to do so, it never issued an order requiring such groundwater cleanup, and at no time did DTSC itself commence any such cleanup. Nor did DTSC ever request or order Petitioner or its predecessors to conduct any further investigation regarding the presence of any chemicals in the groundwater at the Property. Nor is there any evidence that DTSC or any other State entity ever engaged in any such investigation in the approximately quarter of a century that elapsed from the time DTSC received the 1996 Assessment and issued the NFAL until the

Regional Board issued an "Investigation Directive" in 2018 and then the subsequent 2023 Order.

If the information contained in the 1996 Assessment evidenced a nuisance or a reasonable threat of a nuisance that Petitioner knew or should have known of, the State Board's Resolutions that existed as of 1996 *required* that an enforcement action "be initiated as soon as possible." *See, e.g.,* State Water Resources Control Board Resolution No. 96-030, *Water Quality Enforcement Policy,* ¶ 4 at p.3 (Eff. Nov. 7, 2024) ("Enforcement actions should be initiated as soon as possible after discovery of the violation.").

As noted above, DTSC and Regional Boards share responsibilities. *See* https://www.waterboards.ca.gov/losangeles/about_us/ The State Board's Resolutions that existed as of 1996 indicate that DTSC and Regional Board shared responsibility at that time for preparing or approving remedial action plans for sites where hazardous substances were released to the environment *See, e.g.,* State Water Resources Control Board Resolution No. 92-49 (As Amended on April 21, 1994 and October 2, 1996), *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304* at p.11.

Importantly, DTSC and the Regional Board did not merely share enforcement responsibility; each is *charged* with the knowledge of the other. In other words, the Regional Board had the same knowledge about the Property as DTSC in 1996, but, like DTSC, took no action, and did not allege there was a nuisance on the Property. *See, e.g., In re Brown*, 17 Cal. 4th 873, 879 (1998); *In re Jensen*, 995 F.2d 925, 931 (9th Cir. 1993) (imputing knowledge of California Water Board to California DHS); *c.f., Griffin & Griffin Exploration, LLC v. United States of America*, 116 Fed. Cl. 163, 175 (Ct. Fed. Cl. 2014); State Water Resources Control Board, Resolution No. 92-49. *Policies and Procedures for Investigation and Cleanup of Discharges Under Water Code Section 13304,* ¶ 11 at p. 2 ("California Health and Safety Code (HSC) Section 25356.1 requires the Department of Toxic Substances Control (DTSC) or, if appropriate, the Regional Water Board to prepare or approve remedial action plans for sites where hazardous substances were released to the environment …."); *id.*, ¶ 12 at p.2.

The rules and regulations also expressly establish that the Regional Board had access to, and was *required* to review, "[o]ther agencies' records of possible or known discharge." *Id.,* ¶ I.A(9) at pp.3–4; *see also* State Water Resources Control Board Resolution No. 96-30, *Water Quality Enforcement Policy*, ¶ V at pp.3–4 (Eff. Nov. 7, 2024) ("The State and Regional Water Board staff shall cooperate with other environmental regulatory agencies, where appropriate, to ensure that enforcement actions are coordinated. The aggregate enforcement authority of the Boards and Departments of the California Environmental Protection Agency (Cal/EPA) should be coordinated to eliminate inconsistent, overlapping, and redundant efforts. The following steps should be taken by Regional Water Board staff to assist in integrated enforcement efforts: …. "B. Share enforcement information …."); *id.* at ¶ VI. at p.4 ("For spills of hazardous materials: A. The Regional Water Board staff shall coordinate enforcement actions with the Department of Toxic Substances Control and/or any local or county hazardous material program ….").

d. DTSC was required to act if there was a nuisance or threat to groundwater with a beneficial use; the fact that DTSC did not do so debunks the assertions in the Order.

The 1996 Assessment employed accepted methodologies for such analyses at the time and is consistent with DTSC's Imminent and/or Substantial Endangerment Policy, Procedure and Guidelines dated July 14, 1993 ("Policy, Procedure and Guidelines"), which references Health & Safety Code Section 25355.5(a)(2)(b)(3), which was in effect when the NFALs were issued. This Policy, Procedures and Guidelines, and the definitions it contains, strongly corroborates the conclusions in the 1996 Assessment, because had the Property met the criteria for further action as defined in the Policy, Procedures and Guidelines, DTSC's statutory obligations did not allow it to stand down on the Property. DTSC's decision not to pursue further action, in concert with its issuance of the NFALs after all remedial action required to address environmental conditions on the Property were completed, confirms that Petitioner's remedial and abatement actions were reasonable under the circumstances and information known at that time.

The term "beneficial use," as it appears in the 1996 Assessment, is also important in evaluating what DTSC did—or did not do. Since September 29, 1996, Section 13050(f) has defined "beneficial uses" very broadly. That broad definition notwithstanding, DTSC did not challenge the conclusion in the 1996 Assessment that the groundwater did not have a "beneficial use," which DTSC would have been duty bound to do if that conclusion was incorrect. In fact, the Order does not assert that the 1996 Assessment was incorrect about the conclusions on "beneficial use," and the Regional Board has never asserted that the groundwater at the Property had any beneficial use in 1996.

Parsing the knowledge and actions of DTSC under principles of nuisance law inexorably leads to the conclusion that Petitioner is improperly named in the Orders. As a former owner who did not discharge the substances of concern, Petitioner could only be liable under the Orders if it (a) knew or (b) should have known of the nuisance *and* (c) acted unreasonably in failing to abate it. Unless one believes the environmental consultants who conducted the 1996 Assessments were time-travelers from the future—but that the DTSC personnel were not—the Regional Board has no evidence of either of those required elements.

Obviously, "knowledge" of environmental conditions, and the "reasonableness" of any related actions, can only be judged by the "state of the art" and regulatory guidance available contemporaneously. In 1996, both Petitioner and DTSC, the Regional Board's sister agency, which was "lead" on the Property for CalEPA and which also had jurisdiction over groundwater threats, had the exact same information about groundwater conditions.

The Regional Board attempts to sidestep those facts—and the *telling* decision of DTSC not to order work on groundwater—by relying on "updated science" that is contrary to the "state of the art" and regulatory guidance available when Petitioner owned the Property and when the 1996 Assessment was submitted to DTSC. (*See* Exh. A, Order, Response to Comments on Draft Order, Comment A.3.1 at pp.8-9). Like Marty McFly and Doc Brown in *Back to the Future*, in 1998, Petitioner was purportedly supposed to foresee what DTSC did not: environmental conditions at the Property in 2023, as well as environmental enforcement policies. There is no evidence that Petitioner (or DTSC) had knowledge of science that did not exist during Petitioner's tenure as owner of the Property. Marty McFly and Doc Brown were fiction, as is the fiction that Petitioner was somehow more clairvoyant in 1996 than the Regional Board or DTSC.

Put simply, the Regional Board cannot meet its burden of proof by purporting to impute knowledge to Petitioner, but not to its sister agency (*i.e.*, DTSC) lead for the State on the Property, an agency with jurisdiction and enforcement rights over groundwater parallel to the Regional

Board's.

The legal effect of these facts is clear, as is discussed below in the Legal Argument section: Petitioner is not a liable former, non-discharging owner of the Property because Petitioner had no reason to believe there was any contamination of groundwater with a beneficial use that required remediation prior to Petitioner's sale of the property in 1998, and because Petitioner's abatement efforts undertaken at the Property, which resulted in the NFALs, were reasonable based on the information and science then known.

e. There is no evidence that 1,4-Dioxane is a proper basis for the Order and IRAP.

There is a dearth of evidence for basing the Order or IRAP on Petitioner's supposed responsibility for 1,4-Dioxane in the limited perched groundwater at the Property. That includes the following:

- There is no evidence that Petitioner discharged 1,1,1-TCA (the purported source of the 1,4-Dioxane in the perched groundwater);
- There is no evidence that there is any feasible or anticipated beneficial use of that perched groundwater;
- There is no evidence of 1,4-Dioxane in the soil or soil gas being addressed by the Order and IRAP;
- There is no evidence that the steps required by the Order and IRAP are "fit for purpose" if 1,4-Dioxane in the perched groundwater needed to be addressed; and
- There is no evidence that 1,4-Dioxane is, or threatens to cause, pollution or a nuisance at the Property.

f. The Orders will inevitably chill voluntary cooperation, which has an overall deleterious effect on voluntary environmental compliance and remediation.

Despite the long operational history of the Property by many individuals and entities, the 1996 Assessment is the only instance where anyone (including the current owner of the Property or any other former owners or operators) voluntarily cooperated with environmental regulatory agencies—at significant expense—to assess environmental conditions at the Property. In this regard, the Orders implement a policy detrimental to the objective of *encouraging* voluntary and cooperative environmental investigations and responses. If the Regional Board then issues an order to a volunteer exculpated by the investigation (as happened here), that will disincentive voluntary cooperation.

3. Respondents did not act for 27 years and thereby prejudiced Petitioner; Petitioner acted reasonably in relying on the State's Decision not to request or require abatement of any groundwater condition.

Because the Regional Board and DTSC are part of the same state agency (CalEPA), the State, including the Regional Board, thus was aware, in 1996, of any potential risks to groundwater from the prior owner/operators' or neighbors' discharges at and near the Property and could have acted on that information, even if DTSC chose not to do so.

However, rather than act on information available to it in 1996—while evidence of activities at the Property a mere decade before would have been more readily accessible—Petitioner has seen no evidence that the Regional Board made sufficient attempts to locate or request information from the Other Entities.

LEGAL ANALYSIS

1. The State Board must independently review this Petition and the record below to determine if the Regional Board has sufficient admissible evidence to satisfy its ultimate burden of proving by a preponderance of the evidence that Petitioner is a responsible discharger or former owner.

The State Board is authorized to review Regional Board actions and, where it finds such actions are "inappropriate or improper," direct that the appropriate action be taken, take the appropriate action itself, or do both. Cal. Wat. Code § 13320. The State Board's standard of review for factual findings under Water Code Section 13320 is akin to the "independent judgment" standard of judicial review for evaluating whether an agency has abused its discretion, which "permits the reviewing court to take a fresh look at the facts to see if the weight of the evidence supports the decision," and does not require the court to "defer to the agency if the court disagree[s] with the conclusion." *In re Exxon Company, U.S.A., et al.*, Order No. WQ 85–7, 1985 WL 20026, at **5-6 (Cal. St. Wat. Res. Bd. Aug. 22, 1985) ("*In re EXXON*"). Section 13320 provides that the State Board shall consider both the Regional Board record and "any other relevant evidence" it wishes in reviewing the order. Cal. Wat. Code § 13320(b).

Petitioner acknowledges that the State Board can, if it chooses, use a lesser standard of proof than any reviewing Superior Court or Court of Appeals will use. Those courts will independently review the evidence and, without deference to the administrative agency, determine if the "weight" or preponderance of the admissible and relevant evidence proves Petitioner is properly named in the Orders. In the interest of efficiency and avoidance of duplication, Petitioner therefore urges the State Board to apply the same standard of proof as a reviewing court, but shows herein that the Orders are not based on "substantial evidence," nor do they have the elements necessary to hold Petitioner liable been established by a preponderance of the evidence.

"Substantial evidence" is a threshold issue that must be met before it makes sense to ask if that evidence comprises a preponderance. Here, even if the State Board only reviews the Orders using the lesser, "substantial evidence" standard, the Orders fall short. The simple reasons are that speculation and a sleight of hand attempt to shift to an accused party the obligation to prove a negative are not "evidence" at all, substantial or otherwise. If, as Petitioner now urges the State Board to do, the Orders are reviewed from a preponderance of relevant, admissible evidence perspective (as a reviewing court will do), the Orders simply never get out of the starting blocks.

Because the minimal standard for sustaining the Orders requires that "any findings made by an administrative agency in support of an action must be based on substantial evidence in the record …," Petitioner first assesses the Orders under that standard. *Id.* (citing *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506 (1974)). As this Board recognized in *In re Las Virgenes Municipal Water Dist.*, Order No. WQ 2001-03, 2001 WL 36247986 (Cal.St.Wat.Res.Bd. Feb. 15, 2001), "'the agency which renders the challenged decision must set forth findings to bridge the analytic gap between raw evidence and ultimate decision or order." [Footnote.] In other words, findings must explain the reasoning of the agency. They must explain how the law and facts justify the decision or order." *Id.* at *2 (Footnote omitted; quoting *Topanga Assn. For a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974)).

Any discussion of whether or not an order is based on "substantial evidence" must start with an understanding of what comprises "evidence." The California Evidence Code provides the rule of law on what comprises admissible evidence. It is axiomatic that before evidence can be "substantial," it must first be admissible, *i.e.*, a reviewer (be it the State Board or a court) applying the standard of "substantial evidence" must consider only the admissible evidence. It is improper to consider anything that is inadmissible, because that is not "evidence." That is a key principle which must guide the review of the Orders, since many of the purportedly factual assertions and conclusions on which the Orders are premised are inadmissible under the Evidence Code. When those assertions and conclusions are extirpated from the Orders, as they must be, the Orders fail for lack of substantial evidence.

2. The Regional Board exceeded its statutory authority by invoking Section 13304 as a basis for liability: the legal framework.

As noted above, there are only two ways Petitioner can legally be subjected to the Orders, as follows: either (1) the Regional Board must prove Petitioner actively caused or permitted the discharge, or (2) the Regional Board must prove that Petitioner transferred the Property when it unreasonably failed to abate a nuisance of which it knew or should have known. The Regional Board cannot do either of those things. To prevail before a reviewing court, the Regional Board will have to prove those elements by a preponderance of the evidence. *Orange Cnty. Water District v. Alcoa Glob. Fasteners, Inc.*, 12 Cal. App. 5th 252, 342–43 (2017), *as modified on denial of reh'g* (June 22, 2017).

a. The confluence of the Water Code and California nuisance law.

Nuisance law defines the parameters of liability under Water Code section 13304. The California Court of Appeal reasoned in *City of Modesto Redevelopment Agency v. Superior Ct.*, 119 Cal. App. 4th 28 (2004), *as modified on denial of reh'g* (June 28, 2004), that "[t]he Porter–Cologne Act … appears to be harmonious with the common law of nuisance" and "it appears that the Legislature not only did not intend to depart from the law of nuisance, but also explicitly relied on it in the Porter–Cologne Act." *Id.* at 37–38. Accordingly, the court concluded that Section 13304 "must be construed 'in light of the common law principles bearing upon the same subject' [citation]—here the subject of public nuisance…" *Id.* at 38 (citation omitted). Stated differently, "Water Code section 13304 must be construed as incorporating law of public nuisance in identifying responsible parties." *Atl. Richfield Co. v. Cent. Valley Reg'l Water Quality Control Bd.*, 41 Cal. App. 5th 91, 97 n.3 (2019), *as modified* (Oct. 15, 2019). In California, Civil Code Section 3483 and related decisions provide the relevant rule of law on nuisance.[21]

As the courts recognize, "section 13304 should be construed harmoniously with the law of nuisance." *Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 676 (9th Cir. 2011) (*citing Modesto*, 119 Cal. App. 4th at 37-38). *See also Wells Fargo Bank, N.A. v. Renz*, 795 F. Supp. 2d 898, 918 (N.D. Cal. 2011) ("The Act derives from the common law of nuisance."), *citing Modesto*, 119 Cal. App. 4th at 37. "Thus, the relevant question for purposes of liability is whether the defendant created or assisted in the creation of the nuisance." *Id.* (internal quotations and citation omitted). *Accord City of W. Sacramento, California v. R & L Bus. Mgmt.*, 2018 WL 3198118, at *6 (E.D. Cal. June 27, 2018).

b. Proof of direct causation as a basis for liability.

Under Water Code section 13304, a prior owner of property may be required to participate in the cleanup of wastes discharged from its property that resulted in groundwater contamination if the prior owner "caused or permitted" the discharge. Cal. Water Code § 13304(a); *United Artists Theatre Cir., Inc. v. California Reg'l Water Quality Control Bd.*, 42 Cal. App. 5th 851, 857 (2019), *as modified on denial of reh'g* (Dec. 18, 2019).

The words "caused or permitted" as used in Section 13304 are interpreted consistently with the federal statute, CERCLA, in the context of whether or not a former owner can be liable

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[21] *Accord Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 676 (9th Cir. 2011) ("section 13304 should be construed harmoniously with the law of nuisance."), *citing Modesto*, 119 Cal. App. 4th at 37-38. *See also Wells Fargo Bank, N.A. v. Renz*, 795 F. Supp. 2d 898, 918 (N.D. Cal. 2011) ("The Act derives from the common law of nuisance."), *citing Modesto*, 119 Cal. App. 4th at 37; *id.* ("Thus, the relevant question for purposes of liability is whether the defendant created or assisted in the creation of the nuisance.") (internal quotations and citation omitted); *City of W. Sacramento, California v. R & L Bus. Mgmt.*, 2018 WL 3198118, at *6 (E.D. Cal. June 27, 2018).

for a discharge. The California Court of Appeal has concluded that the words "causes or permits" in Section 13304 are not intended "to encompass those whose involvement with a spill was remote and passive." *City of Modesto Redevelopment Agency v. Superior Ct.*, 119 Cal. App. 4th 28, 44 (2004), *as modified on denial of reh'g* (June 28, 2004); *see also id.* at 43 ("[T]hose who took affirmative steps directed toward the improper discharge of [hazardous] wastes … may be liable under [section 13304]…."). As the U.S. District Court for the Eastern District of California explained in *Redevelopment Agency of City of Stockton v. Burlington N.*, 2006 WL 931059, at *3 (E.D. Cal. Apr. 11, 2006), "the 'cause or permit' language [in Section 13304(a)] requires either an affirmative act or actual knowledge of the discharge." *Lewis v. Russell*, 2012 WL 4747172, at *10 (E.D. Cal. Oct. 3, 2012) ("Although the Code does not include the same detailed description of what counts as a contribution, the common meanings of the words 'contributes,' 'causes,' and 'permits' also plainly 'require[ ] a more active role with a more direct connection to the waste,' such as handling or actually disposing of the waste.").

c. Proof of a former owner who is not a direct discharger as a basis for liability.

Under some limited circumstances, a former owner who transfers a property on which a nuisance exists at the time of transfer may be liable for injuries caused by the nuisance, if the later owners do not abate it. *Longfellow v. Cnty. of San Luis Obispo*, 144 Cal. App. 3d 379, 384 (1983). The parameters of those circumstances are narrowly drawn so the exception does not swallow the general rule that former owner status alone does not create nuisance liability.[22]

First, "one who was not the creator of a nuisance must have notice or knowledge of it before he can be held" liable. *Reinhard v. Lawrence Warehouse Co.*, 41 Cal. App. 2d 741, 746 (1940) ("It is a prerequisite to impose liability against a person who merely passively continues a nuisance created by another that he should have notice of the fact that he is maintaining a nuisance and be requested to remove or abate it, or at least that he should have knowledge of the existence of the nuisance.") (Citation omitted). This is longstanding principle. *Edwards v. Atchison, T. & S.F.R. Co.*,

[22] 144 Cal. App. 3d at 384 ("The general rule is that former owners of land are not liable for injury sustained by persons while on the land after the property has been transferred."), *citing Copfer v. Golden,* 135 Cal. App. 2d 623, 631 (1955).

15 F.2d 37 (1926) ("[A] party, not the original creator of a nuisance, must have notice of it and a request to remove it before any action can be brought against him, and that the mere occurrence of injury to the plaintiff's land without any finding of such knowledge or notice of the existence of the nuisance as to charge the defendant with fault for its continuance is insufficient to create a right of action."); *accord City of Los Angeles v. San Pedro Boat Works*, 2008 WL 11334051, at *11 (C.D. Cal. Apr. 28, 2008); *see also Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 674 (9th Cir.2011) ("Under California law, conduct cannot be said to 'create' a nuisance unless it more actively or knowingly generates or permits the specific nuisance condition."). As the State Board's own decisions recognize, "section 13304 requires some meaningful showing of awareness of the risk of discharge to justify naming a prior owner in a cleanup order." *United Artists Theatre Circuit, Inc. v. Regional Water Quality Control Board*, 42 Cal. App. 5th 851, 821 (2019).

Second, even a former owner who knew or should have known of a nuisance is not liable unless the failure to abate was "unreasonable." As the Ninth Circuit aptly summarized—applying and in accordance with California law—a party that "did not create or assist in the creation of the nuisance, can only be held liable if [it] acted unreasonably as possessors of the property in failing to discover and abate the nuisance." *Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 673 (9th Cir. 2011).

Under those rules, as applied to former owners of property such as Petitioner, "a possessor of land is liable for a nuisance that is caused 'by an abatable artificial condition on the land' and (1) the possessor knew or should have known of the condition and nuisance or an unreasonable risk of nuisance, (2) the possessor knew or should have known it existed without the consent of those affected by it, and (3) the possessor failed to take reasonable steps to abate the condition or protect those affected by it. [Citation]." *City of Banning v. Dureau*, 2013 WL 12114827, at *5 (C.D. Cal. July 11, 2013); *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.*, 153 Cal. App. 3d 605, 619 (1984) (same; citing section 839 of the Restatement Second of Torts). *See also Redevelopment Agency of City of Stockton,* 643 F.3d at 676 ("California nuisance law conforms to the Restatement."), citing *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 452 (9th Cir. 2011). Those who "did not create or assist in the creation of the nuisance, can only be held liable if [they] acted unreasonably as possessors of the property in failing to discover and abate the nuisance." *Redevelopment Agency of City of Stockton,* 643 F.3d at 673.

3. Evidence does not support a conclusion or inference that Petitioner caused pollution or nuisance.

The Regional Board has no evidence—much less evidence sufficient to carry its burden of proof—of any of these elements, much less all of them, applicable to Petitioner. To the contrary, as the State Board's own decisions recognize, "section 13304 requires some meaningful showing of awareness of the risk of discharge to justify naming a prior owner in a cleanup order." *United Artists Theatre Circuit, Inc. v. Regional Water Quality Control Board*, 42 Cal. App. 5th 851, 821 (2019). Here, the 1996 Assessment and the NFALs dispel any speculation that, circa 1996, there was any "meaningful showing of awareness of the risk of discharge," or "an unreasonable risk of nuisance" or that any remaining risk remained on the Property that Petitioner "unreasonably" failed to remediate.

There is no evidence—much less substantial evidence—of an affirmative act by Petitioner that caused or permitted the discharge of any of the substances of concern, so Petitioner cannot be liable as a discharger. As noted above, a former owner who actually affirmatively acted to cause or create a nuisance may be liable. But there is no evidence of that here. There is no evidence whatsoever—much less substantial evidence—of an "affirmative act" by Petitioner that caused or permitted the discharge of the substances of concern at the Property.

a. The Regional Board has no actual, admissible evidence that Petitioner engaged in any activity that resulted in the discharge of any substance of concern.

Proof of causation is a cornerstone of liability. Even in strict liability or "no fault" liability schemes, there must be an unbroken chain of causation culminating in the harm on which liability is premised.

The Regional Board has not established, and cannot establish, such an unbroken chain of causation as to Petitioner. To the contrary, as discussed in the Statement of Facts, above, there is no evidence that Petitioner, at any time during its operations at the Property from 1988 to 1995 or ownership until 1998, ever handled, used, or stored—much less disposed or discharged—the primary substances of concern (*i.e.*, PCE, TCE, and the TCE breakdown products).[23] Neither Petitioner's records, nor the Order, document any use, handling, storage, or discharge of the substances of concern by Petitioner at the Property. Contemporaneous reports and filings with the relevant regulatory agencies, moreover, do not evidence usage or disposal by Petitioner of PCE or TCE or any substances of concern at the Property. In addition, environmental assessments prepared contemporaneously with Petitioner's Property operations, including the 1996 Assessment, state affirmatively that Petitioner did not use TCE at the Property. Therefore, there is no basis for a finding that Petitioner "created" any condition of pollution or nuisance at the Property. Put otherwise, the fundamental element of causation is missing.

The State Board has also recognized the key role of causation in reviewing regional board orders. In *In re Wenwest, Inc.,* Order No. WQ 92-13, 1992 WL 12622783 (Cal.St.Wat.Res.Bd. Oct. 22, 1992), the State Board considered whether it was proper for a number of parties that had some connection to the site of a former gasoline service station to be named in a cleanup order, including the owner of the site during the period of operation of the station (Phillips Petroleum Co.), the current owners of the site, and a past owner who did not own the property while it was a service station (Wendy's International). *Id.* at *2. The State Board concluded it was proper to name the current owners, who had "the obligation to prevent an ongoing discharge caused by the movement of the pollutants on their property, even if they had nothing whatever to do with putting it there." *Id.* On the other hand, it was not proper to name Wendy's International because the corporation—like Petitioner here—was "a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place." *Id.* As the Board expressly recognized, "[n]o order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. Considering those facts and the

[23] As discussed above, Petitioner did use a limited amount of 1,1,1-TCA, but there is no evidence of a discharge. The reasons why the Order and IRAP are wrong in their attempt to use 1,1,1-TCA and/or 1,4-Dioxane as a basis are discussed complete detail below in Section 5 beginning at p.53.

existence of other fully responsible parties, we see no reason to establish that precedent in this case." *Id.*

Here, just as in *Wenwest*, the Regional Board has no actual, admissible evidence that Petitioner engaged in any activity which resulted in the discharge of any of the substances of concern. Nor is there any evidence that any discharge of any substances of concern took place during Petitioner's ownership. Under *Wenwest*, Petitioner is not properly named in the Orders.

b. In lieu of actual, admissible evidence, the Regional Board improperly relies on inadmissible speculation.

In response to Petitioner's comments on the Draft Order, the Regional Board in the Order purports to distinguish *Wenwest* on the ground that, "[m]ost critically, in that case, Wendy's made no contribution to the contamination, unlike Ace in this case." (Order, Response to Comments on Draft Order, Comment A.1.1 at p.2). As discussed earlier, as well as below, the Regional Board's comment, "unlike Ace in this case"—even if it was part of the Order (which it is not)—is inadmissible speculation. Speculation is not "credible and reasonable evidence which indicates the named party has responsibility." *In re EXXON,* 1985 WL 20026, at *6.[24] There is no evidence—and unquestionably no substantial evidence much less a preponderance of evidence—that Petitioner made any contribution to the contamination that is the subject of the Order or the IRAP, because there is no evidence that Petitioner ever handled, used, stored, or disposed of the substances of concern.

This brings us back to the California Evidence Code and the cases interpreting it. The Regional Board's "evidence" boils down to an assertion that "we see this kind of thing all the time" so "we infer that it happened here as well." There are numerous evidentiary issues precluding the admissibility of this litany, or reliance on its conclusions.

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[24] Numerous decisions are in accord. *Estate of Teed*, 112 Cal. App. 2d 638, 644 (1952) (evidence "must be reasonable…, credible, and of solid value"); *Kuhn v. Dep't of Gen. Servs.*, 22 Cal. App. 4th 1627, 1633 (1994) ("inferences that are the result of mere speculation or conjecture cannot support a finding [citation]."); *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984) (excluding "an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or a possibility.").

The Evidence Code is quite precise as to when opinion testimony, "character evidence," and inferences are admissible. The admissibility of opinion testimony is addressed in Evidence Code Sections 800–805. The Order purports to be based on opinion testimony (*e.g.*, "Los Angeles Water Board staff know from experience"). This "opinion" is not provided by a knowledgeable, qualified witness. This kind of unsubstantiated, untested assertion, which is not supported by any expert report or any documentation whatsoever, would never see the light of day in a courtroom. It would not be "evidence." Nor would it be "substantial evidence," or a preponderance of evidence. To the contrary, California courts have become increasingly rigorous about excluding expert opinion testimony for which a proper basis has not been provided. Ascertaining whether expert opinions should be considered is a "substantial 'gatekeeping' responsibility" that ensures that an expert's opinion is based on both reliable material and sound reasoning. *Sargon Enters., Inc. v. Univ. of S. California*, 55 Cal. 4th 747, 753 (2012). "'[T]he matter relied [by the expert] on must provide a reasonable basis for the particular opinion offered, and … an expert opinion based on speculation or conjecture is inadmissible.'" *Id.* at 770 (quoting *Lockheed Litigation Cases*, 115 Cal. App. 4th 558, 564 (2004)).

Dee v. PCS Prop. Mgmt., Inc., 174 Cal. App. 4th 390, 396 (2009), *as modified* (May 28, 2009), provides an excellent example of how these principles result in the exclusion of expert testimony regarding causation. In *Dee*, as here, the putative expert testified to a causal connection because "'I know it when I see it,' and 'I know it based on my experience.'" *Id.* The testimony was excluded by the trial court because the expert "has no sufficient evidence of a causal connection." *Id.* The expert's causation conclusion was "speculation" and based on "'I know it when I see it,' and 'I know it based on my experience'; and we don't know what that experience was." *Dee*, 174 Cal. App. 4th at 396. This is precisely the nature of the boilerplate "we see it all the time" opinion with absolutely no foundation that the Regional Board touts as its "evidence" of causation as to Petitioner. It simply is not evidence of anything, and it does not support issuance of the Orders.

c. The actual evidence does not support the Regional Board's "inference."

The Regional Board has similar problems with respect to its "inference" argument. The

Regional Board argues that it is "entitled to rely on any relevant evidence, including circumstantial evidence of the kind present in this case, which includes the presence of a type of industry or activity (degreasing operations/use of a clarifier/chemical storage area) known to use particular chemicals of concern, as well as evidence of those chemicals of concern in the subsurface." (Exh. A, Order at Response to Comments on Draft Order, Comment A.1.1 at p.2). The Regional Board continues: "PCE and TCE are frequently associated with the types of activities (degreasing; metal cleaning; use of a clarifier) at the [Property]. Los Angeles Water Board staff know from experience and Board files contain significant documentation of the known association of PCE and TCE with degreasing operations and/or use of clarifiers, and frequent association of those operations with discharges to the subsurface," all of which, the Regional Board improperly claims, "support the determination that discharges of PCE and TCE occurred at the [Property], particularly in proximity to the drum storage area." (*Id.*, Order, Response to Comments on Draft Order, Comment A.2 at pp.4-5).

California Evidence Code Section 600(b) defines "inference" as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." Cal. Evid. Code § 600(b). Consistent with this definition, it is well-stablished that "[a]n inference … is not a mere conjecture or an arbitrary dixit without reason and without factual support." *Sweeney v. Metro. Life Ins. Co.*, 30 Cal. App. 2d Supp. 767, 772 (1937). *See also Brautigam v. Brooks*, 227 Cal. App. 2d 547, 556 (1964); *Bardin v. Case*, 99 Cal. App. 2d 137, 142 (1950) ("[a]n inference of fact must be based upon substantial evidence, not conjecture."); *Farmer v. Fairbanks*, 71 Cal. App. 2d 70, 80 (1945) ("inferences cannot be based upon speculation or conjectures, but must be based upon 'a fact legally proved'"). Under these general principles, "a finding of causation may not be based on mere speculation or conjecture …." *City of Modesto v. Dow Chemical Co.,* 19 Cal. App. 5th 130, 153 (2018). *See also People v. Ramon*, 175 Cal. App. 4th 843, 851 (2009) ("Speculation is not substantial evidence.").

Here, there are known facts (as opposed to the "we see it all the time" assertions), and the known facts, do not support the Regional Board's proposed inferences. In the face of all the evidence to the contrary, it is not reasonable to infer that, because Petitioner was in the business of manufacturing orthopedic devices, it used PCE and TCE at the Property. Even if the Regional Board produced evidence – which it has not - of Petitioner's conduct generally regarding the use of PCE and TCE "evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion." Cal. Evid. Code § 1104. So it is improper to infer that on the operation at the Property, Petitioner actually used TCE or PCE. Any such proposed inference also runs afoul of Evidence Code section 1105, which provides, "[a]ny otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." Cal. Evid. Code § 1105. Obviously, the Regional Board has not provided any evidence whatsoever of Petitioner's "habit or custom." Nonetheless, the Regional Board apparently hypothesizes and then relies on the purported "habit or custom" of some unspecified (and unsubstantiated) industry (or industries?) to impute that to Petitioner. Section 1105, however, has never been applied to allow the habit or custom of an industry to prove conduct by a specific company within that industry. *See also Clark v. Optical Coating Laboratory, Inc.*, 165 Cal. App. 4th 150, 174-75 (2008) ("Plaintiffs had no evidence whatsoever of OCLI's chemical waste disposal practices at its Santa Rosa facility. They sought to use evidence of contamination as evidence that OCLI's practices, whatever they were, must have been careless. From this, plaintiffs wanted the jury to infer that OCLI must have also been careless in the manner in which it disposed of its drums containing hazardous wastes at the Frances Street site. This is not habit or custom evidence, but propensity evidence of just the type condemned in [other cases].").

Nor can the Regional Board postulate that simply because these kinds of discharges can or do happen in some places in some industries, that Petitioner caused such a discharge at the Property. There is no direct or circumstantial evidence to support such a conclusion. Such reasoning would be tantamount to using a police officer's testimony that it is common for people to speed at a particular location as sufficient proof, without more, that a specific individual was speeding at that location. The law does not support this kind of unreasonable inference as a basis for a finding. *Cf. Farmer v. Fairbanks*, 71 Cal. App. 2d 70, 79–80 (1945) (Affirming judgment in favor of defendant in negligence action based on a motor vehicle accident, finding "[t]here was nothing in the proved physical facts which would have justified an inference that the speed of the truck at this open intersection … was a negligent one or that the driver was inattentive to his duties as he approached the intersection…. To draw from plaintiffs' evidence the inferences which they would have us draw would be to decide a question upon mere speculation and not upon facts 'legally proved.'").

Likewise, it is not reasonable to infer that, because Petitioner degreased parts and had a chemical storage area, it therefore used PCE or TCE for its degreasing and stored PCE and TCE in its storage area at the Property. The Regional Board's speculations are particularly inappropriate where the known facts are contrary to the Regional Board's speculations: Petitioner's contemporaneous records, including the 1996 Assessment, explain that Petitioner cleaned parts in self-contained tanks using 1,1,1-TCA and a soap/water solution at the Property, not PCE or TCE. (*See* Exh. D, 1996 Assessment at 3-2 (Bates no. MDBSI 0084); *see also* Exh. I, Supp. Mattingly Report at p.4 (Bates no. MDBSI 01097)). In light of this evidence, the Regional Board's speculation that Petitioner used and stored PCE and/or TCE at the Property is not of solid value; it is not a product of logic and reason, does not rest on evidence, and is nothing more than mere conjecture without reason or factual support. It therefore does not meet the required evidentiary standard and cannot support a determination that Petitioner is a "discharger" in the Orders.

4. The Regional Board does not have evidence that Petitioner is liable as a former owner.

The Regional Board has no evidence—much less evidence sufficient to carry its burden of proof—of any (much less all) of the elements necessary to name Petitioner in the Orders as a former owner. As noted above, the exception to the general rule that mere former owners are not liable for nuisance is narrowly drawn. State and federal courts applying California nuisance law limit liability of former owners to those (1) who "knew or should have known of the condition and nuisance or an unreasonable risk of nuisance, (2) [who] knew or should have known it existed without the consent of those affected by it, and (3) [who] failed to take reasonable steps to abate the condition or protect those affected by it. [Citation.]" *City of Banning v. Dureau*, 2013 WL 12114827, at *5 (C.D. Cal. July 11, 2013) (citation omitted). The State Board's own decisions recognize that "section 13304 requires some meaningful showing of awareness of the risk of discharge to justify naming a prior owner in a cleanup order." *United Artists Theatre Circuit, Inc. v. Regional Water Quality Control Board*, 42 Cal. App. 5th 851, 821 (2019).

Here, the 1996 Assessment and DTSC's decision not to take any further action in regard to groundwater at the Property (and to issue the NFAL after the limited soil remediation was completed) dispel any speculation that, circa 1996, there was any "meaningful showing of awareness of the risk of discharge," or "an unreasonable risk of nuisance" or that any remaining risk remained on the Property that Petitioner "unreasonably" failed to remediate.

a. The Regional Board has not met and cannot meet its burden of proving the conditions that existed during Petitioner's ownership meet the statutory definition of "pollution" or "nuisance."

The Regional Board cannot meet its burden of proving, as a threshold matter, that the conditions that existed during Petitioner's ownership, as reflected in the 1996 Assessment, met the statutory definition of either "pollution" or "nuisance" under Water Code section 13050(l) and (m) about which Petitioner knew or should have known:

> (l)(1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree *which unreasonably affects either of the following*:
>
> (A) The waters for beneficial uses.
>
> (B) Facilities which serve these beneficial uses.
>
> (2) "Pollution" may include "contamination."
>
> (m) "Nuisance" means anything *which meets all of the following requirements*:
>
> (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
>
> (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
>
> (3) Occurs during, or as a result of, the treatment or disposal of wastes.

Cal. Water Code §§ 13050(l), (m) (emphases added).

Liability for "pollution" is therefore not triggered unless the "contamination" "unreasonably affects the waters for beneficial uses." The 1996 Assessment concluded—and

DTSC did not contest—that the groundwater under the Property was "of no beneficial use." Ergo, it was definitionally unnecessary to conduct an analysis of whether or not any effect was "unreasonable." (Exh. D, 1996 Assessment at 10-1, Bates no. MDBSI 00116).

Liability for nuisance is not triggered unless all the elements required by section 13050(m), above, are met. Failure to meet any one of these elements precludes a finding of nuisance. It is unnecessary to go through all the elements because the first one is absent, which concludes the analysis. That is, the Regional Board has not met its burden of proving that the condition of the groundwater in 1996 or 1998 was injurious to anyone's health or interfered with anyone's "comfortable enjoyment of life or property."

However, even if the first element was satisfied (it is not), the other two were not met in 1996 or 1998. The Regional Board does not make even a perfunctory effort to carry its burden of proving that anything in the groundwater at that time affected "an entire community or neighborhood, or any considerable number of persons." Nor did DTSC or the highly qualified consultant who prepared the 1996 Assessment flag any evidence that the conditions also met the third mandatory element, *i.e.*, that they resulted from Petitioner's "treatment or disposal of wastes."

Section 13050(m) requires the Regional Board to carry its burden of proving all three elements in that section in order to establish that a nuisance existed at the time Petitioner owned the Property. But the Regional Board cannot even do that for a single element. As the express provisions and case law applying Section 3483 confirm, for liability to be imposed on a former owner under Section 3483, it is essential that the owner knew or should have known of the nuisance.

b. There was no nuisance about which Petitioner knew or should have known, so Petitioner cannot be liable for unreasonably failing to abate it.

Under some circumstances, a former owner who transfers a property on which a nuisance exists at the time of transfer may be liable for injuries caused by the nuisance, if the later owners do not abate it. *Longfellow*, 144 Cal. App. at 384.

A key inquiry is whether the Regional Board can prove a "nuisance" existed on the

Property at the time it was transferred in 1998. If not, then Petitioner—legally—is not a "former owner" of a nuisance, and the analysis ends there. Without an extant nuisance, there is nothing for Petitioner to "know or should have known." While the burden of proof is the Regional Board's (*i.e.*, it is not Petitioner's burden to prove a negative), the 1996 Assessment and DTSC's actions make it clear that the Regional Board cannot meet that burden.

However, even if the Regional Board could prove there was an extant nuisance at the Property in 1998 at the time of the transfer, the Orders still fail. State and federal courts applying California nuisance law limit liability of former owners to those (1) who "knew or should have known of the condition and nuisance or an unreasonable risk of nuisance, (2) [who] knew or should have known it existed without the consent of those affected by it, and (3) [who] failed to take reasonable steps to abate the condition or protect those affected by it. [Citation.]" *City of Banning v. Dureau*, 2013 WL 12114827, at *5 (C.D. Cal. July 11, 2013) (citation omitted).

i. There is no evidence—much less sufficient evidence on which to base the Orders—that Petitioner knew or should have known that conditions on the Property were a nuisance or an unreasonable risk of nuisance.

There is no evidence to indicate that Petitioner "knew or should have known" that conditions on the Property constituted a "nuisance or an unreasonable risk of nuisance." *City of Banning,* 2013 WL 12114827, at *5. DTSC, after all, who had more knowledge than Petitioner about what constituted a nuisance or unreasonable risk of one, did not know it either.

There is overlap between the evidence that establishes there was no nuisance during Petitioner's ownership and the evidence that shows there was no reason Petitioner "knew or should have known" of a "nuisance or an unreasonable risk of nuisance." The totality of the evidence Petitioner had (leaving aside any internal deliberations at DTSC) is embodied in the 1996 Assessment coupled with DTSC's reaction to that evidence. That evidence unambiguously shows there was no known nuisance at the time of the 1998 transfer.

The evidence does not stop with what was affirmatively in the 1996 Assessment. Actions also provide evidence, and in this instance, actions speak louder than words: after DTSC reviewed the 1996 Assessment, it directed some limited soil remediation and once that was complete, thereafter issued the August 15, 1996, NFAL. (*See* Exh. D at Bates no. MDBSI 00908-09). DTSC did not then—or ever—exercise its jurisdiction to require that Petitioner remove or abate any groundwater contamination. DTSC's actions literally shout, "there is no nuisance, no threat, nothing that needs remediation, and nothing further for Petitioner to 'know' with respect to abatement." If things had been otherwise, DTSC had a statutory obligation to act. But it did not.

It is difficult, if not impossible, to over-emphasize the evidentiary significance of DTSC's decision to forego any request for further investigation or abatement with respect to the groundwater.[25] The inexorable conclusion is that, based on the 1996 Assessment, DTSC believed there was no nuisance or unreasonable risk of nuisance that triggered a need for further action. DTSC's conduct thereby necessarily negated any speculation about knowledge Petitioner allegedly had (or should have had) regarding the existence of a nuisance or an unreasonable risk of nuisance (element 1 of former possessor liability for nuisance). DTSC's conduct also supports the conclusion that Petitioner did not fail to take reasonable steps to abate the condition (element 3). *City of Banning*, 2013 WL 12114827, at *5; *Leslie Salt Co.*, 153 Cal. App. 3d at 619. These arguments are further buttressed by the fact that, as explained below, the State is the owner of all groundwater, and is in charge of supervising and regulating it.

It is also impossible to square these facts with the Regional Board's conclusion in the Order that "[a]s a result of investigations performed during ACE Medical Company's ownership and operations, Petitioner knew or should have known that *activities on the Property* created a nuisance or an unreasonable risk of nuisance, and had ability to control those discharges." (Exh. A, Order, ¶ 11 at p.11). The only "investigations performed" during that tenure were planned in collaboration with DTSC, conducted by reputable environmental consultants, shared with DTSC, and resulted in the 1996 Assessment. Put simply, the only evidence of "investigations performed"

[25] A good analogy to DTSC's silence in the face of the 1996 Assessment exists in the doctrine of "adoptive admissions." That is, if a party with knowledge of the content of a statement has, by silence, manifested his adoption or his belief in its truth, then it becomes an "admission" of that party. *See In re Gaines' Est.*, 15 Cal. 2d 255, 262 (1940) (declarations of third person made in presence of party become "admissions" of party by silence of party). Of course, DTSC's silence is not merely an "adoptive admission." DTSC was duty bound by regulation and statute to take action if it disagreed with the 1996 Assessment.

during the period referenced by the Order refutes any such assertion. Petitioner reasonably relied on the conclusions in the 1996 Assessment by reputable environmental consultants and the inaction of DTSC. Petitioner did not know or have any reason to believe that activities on the Property created a nuisance or an unreasonable risk of nuisance. Neither the Order nor the IRAP provide any such reason.

ii. Petitioner did not act unreasonably under the circumstances.

The Regional Board has not proved that Petitioner acted unreasonably under the circumstances in not pursuing any action to clean up the chemicals that were identified in the 1996 Assessment as being present in the groundwater.

As noted above, DTSC did not contest the conclusion in the 1996 Assessment that, while substances Petitioner never used were detected in the soil and groundwater, they posed no imminent threat of any harm given that the perched groundwater below the Property was not of any beneficial use. Had DTSC contested that conclusion, that might be relevant to the "unreasonableness" of Petitioner relying on it. But that did not happen. In addition, DTSC did not contest the recommendations in the 1996 Assessment that no further action be required with respect to groundwater because, among other things, there was no significant health or environmental threat posed by the presence of chemicals in soil and groundwater (*i.e.,* there was no reasonable cause for concern that such presence would create a nuisance), and the groundwater beneath the Property is perched and not of any known beneficial use. Moreover, DTSC did not challenge the conclusion in the 1996 Assessment that "the information available suggests that the groundwater may be impacted from one or more off-site sources [and it] is not clear that the contaminants found in the groundwater beneath the property may be attributed to past activities on the site." Instead, the only condition at the Property DTSC determined needed to be addressed was some soil contamination. Once that work was completed, DTSC required nothing further.

The environmental consultant's conclusion and recommendations in the 1996 Assessment—along with DTSC's failure to contest or challenge them—preclude Regional Board from now attempting to prove that the substances posed an "unreasonable risk of nuisance" *at* *that time.*

DTSC went a step further than simply not questioning the 1996 Assessment and underlying data. After completion of the soil remediation DTSC determined was needed, DTSC issued the NFAL discussed above on August 15, 1996 which specifically signs off on soil and does not require or order any work with respect to groundwater. That is noteworthy because DTSC, the lead agency on the Property, had authority over groundwater. DTSC had determined the need for some limited soil remediation, so it gave a formal "all clear" when that was done. But because DTSC did not order that anything needed to be done on groundwater, a formal "all clear" on groundwater was not needed to be obtained.

A further fact also explains why the Regional Board cannot sustain its burden of proving Petitioner purportedly acted unreasonably in failing to abate a putative nuisance. In the approximately quarter of a century from the time DTSC received the 1996 Assessment and issued the NFAL until the Regional Board issued the 2018 Investigation Direction and then the subsequent 2023 Order, *no State entity, including DTSC, ever engaged in any such groundwater investigation with respect to the Property* If the information contained in the 1996 Assessment was sufficient to establish a nuisance or a reasonable threat of a nuisance, the State Board's Resolutions that existed as of 1996 *required* that an enforcement action "be initiated as soon as possible." *See, e.g.,* State Water Resources Control Board Resolution No. 96-030, *Water Quality Enforcement Policy,* ¶ 4 at p.3 (Eff. Nov. 7, 2024) ("Enforcement actions should be initiated as soon as possible after discovery of the violation.").

DTSC's Policy, Procedure and Guidelines provides further support for this conclusion. The document "establishes policy and procedure and provides guidance to [DTSC] staff on utilizing [its] Imminent and/or Substantial Endangerment (I/SE) Determination and Order and Remedial Action Order (RAO) and Consent Order (CO) authority. It also … identifies DTSC organizational roles and responsibilities." (Policy, Procedure and Guidelines, ¶ 1 at p.1).

As the Policy, Procedure and Guidelines state:

> If the site information shows that a *possible* I/SE [imminent and/or substantial endangerment] condition exists, but the information is inadequate to plan the full remedial action, the Removal Actions and Operable Units sections in the order

> should include specific interim removal actions, as well as the more general Remedial Investigation/Feasibility Study (RI/FS) and Remedial Action Plan (RAP) requirements for the development of the full remedial action.

Id. ¶ 5 at p.4 (emphasis added).

> The Policy, Procedure and Guidelines define "imminent" to refer to:
>
> the imminence of risk of harm, and not actual harm, and may be proven by showing that a chain of events that may result in harm has been set in motion. For example, a release has resulted in a contaminated plume which may be moving toward an as yet uncontaminated drinking water aquifer ***and*** the contaminants may eventually cause health damage….

Id. ¶ 6.1 a. at p.5 (emphasis added).

In addition, the Policy, Procedure and Guidelines define "substantial" as requiring "a showing that there is a *reasonable cause for concern* that the public or the environment *may be exposed to a risk of harm* by a release or threatened release of a hazardous substance." *Id.* ¶ 6.1 b. at p.5 (emphasis added).

"Environment," in turn, "is broadly defined in CERCLA section 108(a) to include … groundwater …." *Id.* ¶ 6.1 f. at p.6.

Taken together, the language in the Policy, Procedure and Guidelines establishes that DTSC's own internal practice is to conduct further investigation where there is even a "possible" imminent and/or substantial endangerment, even though the evidence to say for sure is insufficient. Here, DTSC's decision not to conduct any further investigation regarding the chemicals reported in the 1996 Assessment to be present at the groundwater under the Property is irrefutable evidence that DTSC did not believe there was even a "possible" imminent and/or substantial endangerment at that time, or at any time during Petitioner's ownership of the Property.

Likewise, the Determination Guidance attached as Appendix IID to the Policy, Procedure and Guidelines (*see id.* at p.52) *requires* DTSC to make an imminent and/or substantial endangerment "Determination" if it doesn't have enough evidence to issue an imminent and/or substantial endangerment order, but it nonetheless wants to compel more remediation because conditions at the site indicate that an imminent and/or substantial endangerment *may* exist:

> **Option #1. Imminent and Substantial Endangerment Determination**
> **(H&SC Sections 25358.3 (a) and 25355.5 (b)(3))**
>
> *The Department will make an Imminent and Substantial Endangerment Determination when an I/SE Order is not appropriate and (a) the Department determines that it is necessary to spend state funds at the site; and/or (b) the Department wants to pursue civil action to obtain an injunctive order requiring the RP(s) to conduct a response action or other court-ordered relief. (Use of this option requires that conditions at the site indicate that an imminent and substantial endangerment may exist).*
>
> **Option #2. Imminent or Substantial Endangerment Determination**
> **(H&SC Section 25358.3 (a))**
>
> *The Department will make an Imminent or Substantial Endangerment Determination when site conditions indicate that only an imminent or substantial endangerment may exist (and an I/SE Order is not appropriate), and the Department wants to pursue civil action to obtain an injunctive order requiring the RP(s) to conduct a response action or other court ordered relief. (Use of this option requires that conditions at the site indicate that an imminent or substantial endangerment may exist).*

Id.

Again, the fact that DTSC did not make any such Determination here is conclusive evidence that DTSC determined conditions at the Property did not indicate that an imminent or substantial endangerment existed or even "may exist." In light of the definition of those terms, DTSC's actions also necessarily indicate that the conditions at the Property reported in the 1996 Assessment did not constitute a nuisance or an unreasonable risk of one. Accordingly, there is no basis for naming Petitioner as a Discharger in the Orders.

These facts all demonstrate that the complete lack of an evidentiary basis for the Regional Board's conclusion in the Order that "[a]s a result of investigations performed during ACE Medical Company's ownership and operations, MDBSI knew or should have known that activities on the [Property] created a reasonable possibility of discharge into waters of the state of wastes that could create or threaten to create a condition of pollution or nuisance, and had ability to control those discharges" (Exh. A, Order, ¶ 11 at p.11). That statement is, in fact, refuted by such evidence.

Petitioner, accordingly, has no liability in nuisance.

iii. The Regional Board's misguided attempt to use "updated science" to prove there was a nuisance on the Property in 1998 that Petitioner "knew or should have known" about and unreasonably failed to abate.

The Regional Board's responses to Petitioner's comments to the Draft Order expose the Regional Board's inappropriate attempt to base Petitioner's putative liability in the Orders as a former owner on "updated science" that is contrary to the "state-of-the-art" and regulatory guidance available when Petitioner owned the Property. (*See* Order, Response to Comments to Draft Order, Comment A.3.1 at pp.7-8 ("The guidance concerning threat to indoor air and groundwater has changed based on updated science since the NFA letter was issued on August 15, 1996. Region IX PRGs were used to determine Site risk in the Preliminary Endangerment Assessment Report (Woodward-Clyde, 1995), which was cited in the NFA. However, PRGs are no longer used, and the Los Angeles Water Board assesses threats to human health and the environment using criteria such as MCLs (revised October 2018) for groundwater and HERO Note 3 (Revised June 2020) for indoor air and soil vapor.")).

The Regional Board cannot use current (2026) science or conditions to prove a circa 1996 extant nuisance about which Petitioner (or DTSC) either knew or should have known. Even assuming that then Regional Board's recitation of the "updated science" is accurate, it is axiomatic that there is no substantial evidence that Petitioner (or DTSC) had the requisite knowledge of science that did not exist during Petitioner's brief tenure thirty years ago as owner of the Property.

The Regional Board's assertion that Petitioner had "knowledge" is based on the hypothesis—really, speculation—that Petitioner had a better crystal ball than the State regulators about how science and regulations would evolve. There is not even evidence that Petitioner's "crystal ball" on those issues was as good as the State regulators who, at the time of Petitioner's ownership, did not predict those changes and direct Petitioner accordingly. Speculations about how science and regulations may change are inherently unreliable. In 2000, it was common to dismiss the prediction of a certain entrepreneur that by 2021, 95% of Americans would own a cell phone. Mobile Fact Sheet, Pew Research Center (Nov. 10, 2022, 9:52 AM), https://www.pewresearch.org/internet/factsheet/mobile/. That prediction turned out to be correct, and the naysayers were wrong. For over a century, there have been optimistic predictions about a cure for cancer. Although treatments now exist for some cancers, there still is no cure. Science and industry is littered with such predictions, and charging Petitioner with responsibility for correctly making a prediction not even the State regulators made based on the data available borders on the absurd.

The unsound logic of what the Orders purport to do also has legal consequences: it violates due process. The Regional Board's attempt to name Petitioner as a former, non-discharging owner of the Property despite the fact that Petitioner had no reason to believe that there was any contamination needing remediation prior to Petitioner's sale of the Property in 1998, and based on "updated science" which was unavailable at the time Petitioner owned the Property, is an obvious violation of Petitioner's right to due process.

5. Any hypothetical discharge of 1,4-Dioxane by Petitioner is not a basis for including Petitioner in the Orders.

There are multiple reasons why—consistent with the controlling legal standards and statute—1,4-Dioxane detections in perched groundwater at the Property do not make MDBSI subject to the Orders. Those reasons include the following:

- There is no evidence that Petitioner ever released 1,1,1-TCA at the Property, and the Regional Board's speculation that Petitioner did so is not a sufficient basis to include Petitioner in the Orders.
- There is no evidence that any 1,1,1-TCA used (or, speculatively, released) at the Property contained 1,4-Dioxane as a stabilizer.
- There is no 1,4-Dioxane or 1,1,1-TCA in the soil or soil vapor at the Property.
- The SVE/air sparging interim remediation measures Petitioner is ordered to perform are designed to address and reduce the high TCE concentrations in the soil vapor and perched groundwater at the Property.
- The SVE/air sparging interim remediation measures Petitioner is ordered to perform are not designed to address (and will not address) the attenuating and/or stable 1,4-Dioxane in the perched groundwater at the Property.

- Any 1,4-Dioxane in the perched groundwater at the Property—regardless of its source —is not a "nuisance" or "pollution" as required by the Water Code before the Regional Board can order a cleanup.
- Assuming (contrary to the evidence) that Petitioner has some responsibility for 1,4-Dioxane, and further assuming (also contrary to the evidence) that 1,4-Dioxane is "pollution" or a "nuisance" under the statute, Petitioner cannot be responsible for investigations or interim remedial measures addressing TCE/PCE.

a. There is no evidence Petitioner is responsible for any 1,4-Dioxane in a limited area of perched groundwater at the Property.

Because Petitioner acknowledges that some small quantity of 1,1,1-TCA was used at the Property in "self-contained tanks" owned and serviced by Safety Clean, the Order speculates—and the Orders rest on the speculation—that Petitioner must have released it, that the speculative release migrated through 60' of soil without leaving a current trace, and that 1,4-Dioxane detections now found in some perched groundwater under the Property is somehow related to the **non-existent 1,1,1-TCA detections** in the Property's environmental media. As discussed below, that perched groundwater is not being used and no one has plans to use it.[26]

No 1,1,1-TCA storage tanks (whether above or below ground) are listed as being used at any time by Petitioner. Exh. D, 1996 Assessment at 3-4 (Bates no.MDBSI 00086). According to the 1996 Assessment, "No waste was disposed of on-site by Ace." and "No wastes from off-site sources were brought on site by Ace for treatment, disposal or storage." *Id.* There are no historical or current detections of 1,1,1-TCA in the groundwater, let alone any snail trail of detections from surface to groundwater. In 1994–1996, comprehensive soil and groundwater investigations were conducted at the Property, including 128 samples for 1,1,1-TCA. The results of that sampling do

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[26] There is no record, including in the 1996 Assessment, of any 1,1,1-TCA being manifested for offsite disposal as hazardous waste. Exh. D, 1996 Assessment at p. 3-3 (Bates no. MDBSI 00085). That makes sense because Safety Kleen provides a "closed loop" service with its parts cleaners, whereby Safety Kleen picks up any spent solvent and refreshed the parts washer with new solvent. https://www.safety-kleen.com/about-us

not support the speculation that Petitioner discharged any amount of 1,1,1-TCA at any time to the ground at the Property.

The 128 soil and water samples collected for the 1996 Assessment resulted in a total of five detections of 1,1,1-TCA—all in soil nearly 40 or more feet below ground surface—at levels slightly above the reporting limit (2 ug/kg), and in all instances were accompanied by TCE readings that were 180 to 1560 times the reported 1,1,1-TCA detections. The five detections are as follows:

B-12 3.7 ug/kg @ 37' and 41' BGS TCE: 670-680 ug/kg

B-12 2.5 ug/kg @ 52' BGS TCE: 3900 ug/kg

B-13 2.2 ug/kg @ 52' BGS TCE: 420 ug/kg

B-15 2.6 ug/kg @ 55' BGS TCE: 3200 ug/kg

The reporting limit in the affected samples for 1,1,1-TCA was 2 ug/kg. All sampling was evaluated by EPA Method 8010, which relies on Gas Chromatography paired with a Halogen-Specific Detector (such as an Electrolytic Conductivity Detector or Hall HECD). It is well-known to the EPA and environmental engineers (and, presumably, Regional Board staff) that Method 8010 (as used in 1996) was notorious for generating false positives for 1,1,1-TCA when TCE is present at high concentrations, especially when the 1,1,1-TCA signal was near the detection limit.

Notably, Method 8010 has since been superseded by methods which do not have that flaw.

The false positives under those circumstances (such as those presented in the 1996 Assessment) were due to a combination of chromatographic co-elution and detector saturation. The former occurs because in gas chromatography, separation relies on chemical interactions with the column's stationary phase. On the packed or wide-bore capillary columns historically utilized in Method 8010, the retention times of 1,1,1-TCA and TCE are known to overlap or exist incredibly close to one another, which can be incorrectly interpreted as a 1,1,1-TCA signal. The latter occurs because Method 8010 utilized a halogen-specific detector designed to measure electronegative compounds like chlorine. When amounts of TCE such as those present in the above samples enter the detector, it experiences electronic saturation, yielding false positives for

1,1,1-TCA.

In lay terms, the large volume of TCE is injected into the gas chromatogram and makes its way onto the column. Because the column cannot perfectly resolve such a large TCE concentration from a trace or non-existent amount of 1,1,1-TCA, the tail end of the massive TCE peak is swept into the detector exactly when the 1,1,1-TCA *would* have eluted. Because both compounds are highly chlorinated, the detector triggers on this combined signal, incorrectly registering it as 1,1,1-TCA.

Put simply, the large discrepancy between TCE and 1,1,1-TCA means that the very low 1,1,1-TCA signal in 5 out of 128 samples was a false positive, making the Regional Board's assertion that Petitioner released 1,1,1-TCA even more speculative.

Petitioner acknowledges that that the Regional Board is entitled to make *reasonable* inferences from the evidence. There is, however, a difference between a reasonable inference and speculation. Here, the Regional Board is speculating, not reasonably inferring, and the Regional Board's assertion in the Order that Petitioner's admitted 1,1,1-TCA usage and the presence of 1,4-Dioxane in a limited area of the perched groundwater "connects the dots" is pure speculation. It is also wrong, and is not a proper basis on which to include Petitioner in the Orders.

In fact, the scientific data provide evidence that Petitioner did *not* release 1,1,1-TCA. Of all the environmental samples collected in and since 1996, the five 1,1,1-TCA detections in soil occurred infrequently, at low concentrations barely above detection levels, and in deep soil (*i.e.*, 37 to 55 ft BGS). 1,1,1-TCA was not detected in 1995 in shallow soil samples where detections of it should have appeared, if released during the seven previous years of Petitioner's operation. Rather, the shallow soil detections were exclusively limited to TCE/PCE, substances Petitioner did not use at the Property. As the Mattingly Report explains, if the Order's speculation regarding 1,1,1-TCA was correct, then the 1,1,1-TCA residues should extend from the area of release to the level below ground surface where they were detected. But that is not the case. *See* Exh. I, Supp. Mattingly Report at 4 at Bates no. 01097.

The Regional Board attempts to leapfrog over this data gap by asserting that 1,1,1-TCA might not be found in shallow soil because it is thought to degrade more rapidly than TCE and

PCE. Even if true, the complete disappearance of 1,1,1-TCA in the soil column is inexplicable. If 1,1,1-TCA passed through the shallow soil during Petitioner's operations, vestiges of its migration pathway would be evident. There are none. The more scientifically correct conclusion is that any migration pathway of 1,1,1-TCA from alleged Petitioner releases should exhibit shallow soil detections, especially proximal to the point of release. The absence of surficial soil detections indicates Petitioner was not the source of subsurface 1,1,1-TCA detections, which is consistent with the propensity of the testing methodology used to show false positives for vanishingly low levels of 1,1,1-TCA in the presence of high levels of TCE. As Petitioner's expert succinctly put it, site samples contain no evidence of historical 1,1,1-TCA releases from Ace's operations at the Property. *See* Exh. I, Supp. Mattingly Report at 4 at Bates no. 01097; Exh. G, Expert Report of Stephen Emsbo-Mattingly, M.S. ("Mattingly Report") at 4 at Bates no. MDBSI 01050

Moreover, while it may be true that some 1,1,1-TCA contained 1,4-Dioxane as a stabilizer, the Regional Board provides no reasonable scientific basis for speculating that the 1,1,1-TCA used by Petitioner at the Property did in fact contain 1,4-Dioxane.[27]

b. Any 1,4-Dioxane in the shallow perched groundwater at the Property is not "pollution" under the controlling statute.

The Orders purport to be issued under Water Code Section 13304. That section limits the Regional Board's ability to issue cleanup orders to situations of actual or threatened "pollution" or "nuisance." There is no 1,4-Dioxane or 1,1,1-TCA in the soil or soil vapor at the Property. Therefore, any "pollution" or "nuisance" related to those substances must be founded on their presence in a limited area of the perched groundwater.[28]

[27] This is not a situation where the Regional Board can analogize to the "market share liability" exception the California Supreme Court developed in 1981 in *Sindell v. Abbot Lab'ys.,* 26 Cal. 3d 588, 612 (1980). Among other things, since some 1,1,1-TCA may have been stabilized with 1,4-Dioxane while other 1,1,1-TCA was not, these were not fungible products where all manufacturers produced the identical 1,1,1-TCA products from the same formula. *See also,* Exh. G, Mattingly Report at 4 at Bates no. MDBSI 01050.

[28] As the State Water Board has recognized, perched groundwater is not connected to actual aquifers.

1,4-Dioxane in the perched, shallow groundwater at the Property is not "pollution." The Orders do not specifically call out 1,4-Dioxane as being or threatening "pollution" under Water Code Section 13304. Nor could they.

Under that Code section, "pollution" is defined as follows:

> (l)(1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree *which unreasonably affects* …:
>
> (A) The waters for *beneficial uses*….

Cal. Water Code § 13304(l)(1).

Because there is not (a) a relevant "beneficial use" which the 1,1,1-TCA/1,4-Dioxane (b) unreasonably affects, MDBSI cannot be liable under the Orders.

In 1996, multiple investigations were conducted at the Property and reported to the State. Regarding the perched groundwater which now contains 1,4-Dioxane, the State was informed—accurately—that "Groundwater beneath the Property is perched, is not of any known or of any beneficial use." The State did not demurrer to that statement, the existence of Resolution 88-63 and its successors notwithstanding.[29] And, the State was correct not to do so.

The perched groundwater at the Property has not been, and is not currently, used for any purpose, including municipal, industrial or agricultural purposes. The Regional Board's Public Information Fact Sheet regarding the proposed IRAP for this property notes that "groundwater beneath the Site is not a source of drinking water for the area; potable water is provided by the California Water Service." The Regional Board Fact sheet refers to California Water Services' drinking water quality reports, which show that the closest operating production wells are thousands of feet away, and that California Water Service's water is non-detect for 1,4-Dioxane.

[29] That verbiage of that Resolution and its successors is key. The Resolution states: "All surface and ground waters of the state are *considered* to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards…." In other words, the Resolution does not actually determine as a factual matter that all groundwaters of the state *are* suitable or potentially suitable for such uses. Instead, it simply says they should be "considered" so suitable, and so designated. There is no usual sense in which the word "considered" means "is" or "are." Nor could there be, as that would be a matter the Legislature would have to declare. This language does not appear in the statute or Constitution, and so is an administrative gloss, not a law.

There is not an actual, established "beneficial use" of the perched groundwater at the Property. Nor is one "probable," "anticipated," "likely," or "foreseeable." Therefore, the Orders do not and cannot establish that any putative interference by any 1,4-Dioxane is "unreasonable."

The lithography at the Property as described in the most recent Conceptual Site Model is consistent with the 1996 Assessment that the shallower groundwater is "perched."[30] Nor is it "probable," "anticipated," "likely," or "foreseeable" that the groundwater will ever (or in the foreseeable future) be used for one of those purposes.

Petitioner acknowledges that some written non-legislative materials from the State Water Board and the Regional Board (including the Basin Plan)[31] refer to "potential" beneficial uses. However, the four words quoted above appear with great frequency in the actual Water Code and other writings by the State Water Board in the context of "beneficial uses" to be protected.[32] All of those words appear to set standards for "beneficial use" that the perched groundwater at the Property does not meet. In all events, the Orders do not establish that the perched groundwater at the Property has even the "potential" for a beneficial use.

This is inferentially confirmed by the overarching State Water Board Resolution 92-49 which controls orders under Section 13304. Resolution 92-19 speaks, alternatively, about protecting against anything that "unreasonably affect[s] present and anticipated beneficial use of such water" and "the present and probable future uses of ground water." State Water Board Resolution 2012-0016 quotes Resolution 92-49 ("not unreasonably affect current and anticipated beneficial use of affected water"), and considers "(3) the likelihood that the impacted groundwater will be used in the foreseeable future; …." Likewise, the State Water Board "Low Threat UST Closure Policy" focuses on the level of threat to human health and environment, the

[30] While the Los Angeles Regional Basin Plan does not define "perched," the State Water Board has approved basin plans in other regions which define groundwater as "[a]ny subsurface body of water which is beneficially used or is usable. It includes perched water if such water is used or usable, or is hydraulically continuous with used or usable water." There is no evidence that the perched groundwater at the Property satisfies any of these conditions.

[31] *E.g.*, Cal. Code Regs., tit. 23, §§ 2720-2728, and State Board Resolutions 88-63 and Resolution No. 89-03.

[32] *E.g.*, the State Water Board's FAQ regarding Resolution 68-16 focuses in one place on protecting "anticipated" beneficial uses and "past, present or *probable* beneficial uses."

likelihood that new wells will be installed in the future, any "unreasonabl[e]affect [on] current and anticipated beneficial use of affected water," and "current and near term reasonably anticipated future scenarios."

The Article X, Section 2 of the California Constitution—the enabling provision for Section 13304—likewise speaks to "feasible," not hypothetical, "beneficial uses":

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

To the extent the Los Angeles Region Basin Plan ("the Plan") purports to designate the perched groundwater at the Property as an "existing" beneficial use, it is mistaken. No actual beneficial use for the perched groundwater at the Property has ever been attained (much less, after November 28, 1975, as required) so, at most, it could be designated as "potential." However, that designation is for implementation of the State Board's policy entitled "Sources of Drinking Water Policy" (State Board Resolution No. 88-63, described in Chapter 5 of the Plan), and applies to "plans to put the water to such future use, potential to put the water to such future use, designation of a use by the Regional Board as a regional water quality goal, or public desire to put the water to such future use." Again, none of those things has been done with respect to the perched groundwater at the Property.

In terms of assessing the "reasonableness" of any interference with a beneficial use, the following are the guidelines provided in the Plan, none of which are implicated in the "potential" use of the perched groundwater at the Property:

- "The principal issues involving municipal water supply quality are (1) protection of public health; (2) aesthetic acceptability of the water; and (3) the economic impacts associated with treatment- or quality-related damages."
- "The health aspects broadly relate to: direct disease transmission, such as the possibility of contracting typhoid fever or cholera from contaminated water; toxic effects, such as links between nitrate and methemoglobinemia (blue babies); and increased susceptibility to disease, such as links between halogenated organic compounds and cancer."
- "Aesthetic acceptance varies widely depending on the nature of the supply source to which people have become accustomed. However, the parameters of general concern are excessive hardness, unpleasant odor or taste, turbidity, and color. In each case, treatment can improve acceptability although its cost may not be economically justified when alternative water supply sources of suitable quality are available."
- "Published water quality objectives give limits for known health-related constituents and most properties affecting public acceptance. These objectives for drinking water include the U.S. Environmental Protection Agency Drinking Water Standards and the California State Department of Health Services criteria."

Water Code Section 13241 is consistent with the fact that in assessing the "reasonableness" of a putative interference, the focus should be on existing or probable future beneficial uses:

> Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional

> board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: (a) Past, present, and probable future beneficial uses of water.

Cal. Water Code § 13241.

At most, the State Water Board declaration that all groundwater should be "considered" to be suitable or potentially suitable for a beneficial use is, yet again, a mere administrative gloss. This language does not appear in the statute or Constitution. It is not a law. Even if the gloss rises to the level of creating a "rebuttable presumption," the presumption would be rebutted by the facts regarding this perched groundwater at the Property.

But regardless of the outcome on any such presumption, the "unreasonably affect" of the 1,4-Dioxane on a beneficial use element is not satisfied.[33] Given the statutory definition of "threaten," no condition of pollution (impairment of a beneficial use) is "threatened."

Logically, it is an oxymoron to say that an "existing" beneficial use—which doesn't really exist at all—is being unreasonably impaired (especially when the odds of that hypothetical beneficial use becoming a reality are vanishingly small, and may be as low as zero). But regardless, when the following three passages in paragraphs 15–17 of the Order are parsed against the Plan, the facts and the Water Code—as they must be—it is clear that any putative interference by 1,4-Dioxane is not "unreasonable."

> 15. [T]he concentrations of TCE, PCE, *cis*-1,2-DCE, and 1,1-DCE in groundwater at and downgradient of the Site exceed the water quality objectives applicable to the wastes.
>
> 16. The exceedance of applicable narrative or numeric water quality objectives in the Basin Plan constitutes contamination, pollution, and nuisance as defined in Water Code section 13050.

[33] The appropriate focus is an extant "unreasonable affect" on a beneficial use, because the use of the word "threatened" in the Orders in connection with "pollution" is an emperor with no clothes. That is, the statute defines: "'[t]hreaten,' for purposes of this section, means a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." Cal. Water Code § 13304(e). There is no evidence anywhere that the 1,4-Dioxane creates a "substantial probability of harm" such that the "probability and potential extent of harm make it reasonably necessary to take immediate action…." *Id.* The Order and IRAP certainly do not allude to any such evidence or determination.

17. The wastes detected in the soil matrix and soil vapor at the Site have caused and threaten to continue to cause nuisance, as defined in Water Code section 13050.

These passages are noteworthy insofar as they (1) do not say 1,4-Dioxane "exceeds" any water quality objective (it does not), (2) do not identify any narrative or numeric water quality objective applicable to 1,4-Dioxane (there are none), and (3) reference only "wastes detected in the soil matrix and soil vapor" as the cause of nuisance—in which environmental media 1,4-Dioxane is not present.

Put simply, the Regional Board cannot show that the 1,4-Dioxane is a condition of pollution that "unreasonably" affects a beneficial use.

c. There are no narrative or numeric water quality objectives for 1,4-Dioxane to exceed.

The reference to "narrative" and "numeric" water quality objectives is particularly revealing, because that is the objective standard by which "unreasonable" effect on a beneficial use is measured (*e.g.*, Paragraph 16 of the Order: "The exceedance of applicable narrative or numeric water quality objectives in the Basin Plan constitutes contamination, pollution, and nuisance as defined in Water Code section 13050.")

The Plan does not have any numeric or "narrative" water quality objectives for 1,4-Dioxane, and the Orders do not cite or recite any. In the absence of a numeric objective, the only basis for the statement in Paragraph 16 of the Order must be a "narrative" objective. But the Plan does not have one applicable to 1,4-Dioxane.

Chapter One of the Plan alludes to a variety of things, including "narrative" water quality objectives. Notably, the Plan promises to "*include*[] the narrative and numerical water quality objectives that must be attained or maintained to protect the designated beneficial uses and conform to the State's anti-degradation policy":

> The Regional Water Board's Basin Plan contains the Region's water quality regulations and programs to implement the regulations. The Basin Plan is designed to preserve and enhance water quality and protect the beneficial uses of all regional waters. **Specifically, the Basin Plan**: (i) identifies beneficial uses for surface and ground waters, **(ii) includes the narrative and numerical water quality objectives that must be attained or maintained to protect**

> **the designated beneficial uses and conform to the State's anti-degradation policy,** and (iii) describes implementation programs and other actions that are necessary to achieve the water quality objectives established in the Basin Plan. In combination, beneficial uses and their corresponding water quality objectives are called Water Quality Standards.

Thereafter, to find those objectives, the reader is pointed to Chapter 3 of the Plan: "[t]he following chapters identify the designated beneficial uses of the Region's waters (Chapter 2), include the narrative and numeric water quality objectives that must be attained or maintained to protect these beneficial uses and conform to the State's anti-degradation policy (Chapter 3),…"

But when the word "narrative" is searched in Chapter 3 of the Plan, it only shows up in four places: the table of contents ("Regional Narrative Objectives for Wetlands"); the section entitled "Regional Narrative Objectives for Wetlands ("In addition to the regional objectives for inland surface waters (including wetlands), the following narrative objectives apply for the protection of wetlands in the Region"); the section on Surface Waters and Wetlands ("Regional Objectives for Inland Surface Waters Narrative or numerical water quality objectives have been developed for the following parameters (listed alphabetically) and apply to all inland surface waters and enclosed bays and estuaries (including wetlands) in the Region."); and a footnote about certain streams in the region.

In other words, the promise of Chapter One of the Plan notwithstanding, it does not create a narrative objective for 1,4-Dioxane.[34]

[34] Obviously, the general verbiage of State Water Board Resolution 92-49 does not provide a "narrative water quality *objectives*" because construing it as such would create a circularity: they are only triggered when a "threatened" discharge is made where it does get or "probably" will get to the waters of the State and then "creates, or threatens to create, a condition of pollution or nuisance," which of course leads right back to the definition of "beneficial use." In practical terms, there is no logical sense behind an argument that the verbiage of Resolution 92-49 or similar resolutions creates a "narrative" standard. The Plan has a number of very specific (and identified) narrative standards. It does not have one for 1,4-Dioxane. Moreover, if that verbiage was in fact a "narrative" standard, it would moot the need for any numeric standards, as it authorizes the Regional Board to require cleanup to background in all circumstances.

d. Petitioner cannot be saddled with responsibility for the TCE/PCE investigation and remediation on the basis of any 1,4-Dioxane discharge.

Even if Petitioner discharged 1,4-Dioxane and caused a condition of "pollution" (for which there is no factual or legal foundation), legally and equitably, Petitioner should not be jointly and severally liable for the TCE/PCE investigation and remedy.

This conclusion is based on three decisions by the State Water Board.

Each of these decisions establishes (or acknowledges) exceptions to the putative general proposition that in a commingled condition, all those who had a discharge that found its way into the condition are jointly and severally liable for it.

In the Matter of the Petition of Mehdi Mohammadian, Order WQ 2002-0021, 2002 WL 31694368 (Cal.St.Wat.Res.Bd., Nov. 19, 2002) ("*Mohammadian*"), the State Water Board considered (and denied but remanded) the site owner's (Mohammadian) challenge to Alameda County's decision to relieve Texaco and two individuals from responsibility at a UST site for a release for which the State Water Board determined Texaco was responsible commingled with a subsequent release by the site owner. The State Water Board determined that it was appropriate to name Texaco based on the credible and reasonable evidence that Texaco was responsible, *but* remanded on the question of whether Texaco should be "removed" based on the tests articulated by the State Water Board. There were three separate UST periods of operation, one of which was Texaco's.

In this "case of first impression," the State Water Board found "that it is not appropriate for an LOP agency to remove a person who has been properly named as a responsible party for cleanup of an unauthorized release unless it finds, by a preponderance of the evidence, that constituents from that party's release, when taken in conjunction with commingled constituents from another release(s) that have similar effects on beneficial uses, do not contribute to the need for cleanup at the site."

The State Water Board added:

> Moreover, a balancing of the equities dictates that, whenever possible, a responsible party should not be left to clean up constituents attributable to a

> different release for which that party is *not* responsible. The burden of producing evidence to support removal as a responsible party rests with the discharger." (emphasis supplied).

Mohammadian, 2002 WL 31694368 at *6.

In a conclusion that clearly applies to any relationship Petitioner has to 1,4-Dioxane at the Property, the State Water Board stated,

> According to the test set forth in this order, Texaco and the Calleris may be removed as responsible parties only if the constituents from the first release that occurred for which they are responsible, when taken in conjunction with constituents from the second release or releases for which Petitioner is responsible, do not currently contribute to the need for cleanup at the site.

Id. at *7.

The State Water Board remanded because,

> What the County did not consider, and what must be determined by the County on remand, is whether the constituents attributable to the release that occurred during or prior to the Calleris' ownership and which persisted at the site while Texaco owned the property, taken in conjunction with the other constituents at the site having similar effects on beneficial uses, are contributing to the current need for corrective action. If the County determines that the constituents from the first release do not contribute to the need for cleanup at the site, it may remove Texaco and the Calleris' designation as responsible parties. For example, if the County decides: (1) that the site would be closed but for the MTBE from the second release(s), and (2) that the BTEX constituents remaining from the first release do not have similar effects as MTBE on beneficial uses, it may remove Texaco and the Calleris as responsible parties.

Id. at *8.

The exception provided in *Mohammadian*, even standing alone, would exculpate 1,4-Dioxane and Petitioner (to the extent Petitioner has any responsibility for 1,4-Dioxane). A subsequent decision, *In Matter of Petition of James Salvatore*, Order WQ 2013-0109, 2013 WL 6234175 (Cal.St.Wat.Res.Bd., Nov. 5, 2013) ("*Salvatore*"), expanded the exception even further and underscored why MDBSI is not properly included in the Orders.

Like *Mohammadian*, in *Salvatore,* the Regional Board denied closure for the discharger of an unauthorized release. The State Water Board reversed, both endorsing and expanding the *Mohammadian* rule.

In *Salvatore*, the State Water Board focused on protecting against degradation which "unreasonably affect[s] current and anticipated beneficial use of affected water

The State Water Board characterized site conditions as follows:

> The affected shallow groundwater (9 feet below ground surface (bgs)) in the vicinity of the former UST system is not used as a source of water supply nor is it likely to be used as a source of water supply in the foreseeable future.
>
> The Site is located in an area of Santee that is zoned for mixed use (commercial and residential) and is covered with concrete and asphalt; this in turn puts a control on the quantity of surface water, i.e. precipitation, available for infiltration. The annual average precipitation in the area is approximately 13 inches. The residual petroleum constituents in soil will continue to attenuate over time and result in future mass reduction. With the exception of methyl tert-butyl ether (MTBE), concentrations of petroleum constituents in groundwater are decreasing in all Site wells and are estimated to reach water quality objectives (WQOs) in a few decades.

In Matter of Petition of James Salvatore, Order WQ 2013-0109, 2013 WL 6234175 at *3.

San Diego County objected to the closure because of residual contamination in the groundwater and soil. But the State Water Board was not persuaded, because what San Diego County wanted done would "be little benefit to current or anticipated actual uses":

> Excavation of approximately 1,100 cubic yards of soil would eliminate most if not all of the residual petroleum constituents at the Site. However, there would be little benefit to current or anticipated actual uses of groundwater that is not meeting WQOs for benzene and MTBE. In addition, if complete removal of detectable traces of petroleum constituents becomes the standard for UST corrective actions, the statewide technical and economic implications will be enormous. For example, disposal of soils from comparable areas of excavation throughout the state would greatly impact already limited landfill space. In light of the minimal benefit of attaining further reductions in concentrations of benzene and MTBE at this Site, the precedent that would be set by requiring additional excavation and the fact that affected groundwater is unlikely to be used during the period of impairment, additional excavation at Petitioner's Site is neither reasonable nor necessary.

Id. at *5.

The State Water Board also observed, "the Site… in its current condition is highly unlikely to pose a risk to human health, safety or the environment" and "pose[s] a low risk to human health, safety and the environment" (*id.* at *6) because

> The affected groundwater is not currently being used as a source of drinking water or for any other designated beneficial use, and it is highly unlikely that the affected groundwater will be used as a source of drinking water or for any other

> beneficial use in the foreseeable future. Remaining petroleum constituents are limited, stable and declining. Corrective actions have been implemented and additional assessment/monitoring will not likely change the conceptual model. Any remaining petroleum constituents attributable to Petitioner's release do not pose significant risk to human health, safety or the environment."

Id.; *see also id.* at *12.

Analogous to the 1,4-Dioxane in the perched groundwater at the Property, the State Water Board continued on "the fact that it [Salvatore's discharge] has commingled with the release from the upgradient Border Patrol property presents a complication." *Id.* at *7.

After reciting the "general rule" of joint and several liability for dischargers to a commingled plume, the State Water Board quoted the *Mohammadian* "rule," and added the following gloss:

> The test under *Mohammadian* is whether constituents from one release are contributing to the need for cleanup of the commingled plume as a whole, considering the constituents of each release and their relative impacts on beneficial uses.

Id.

As context, the State Water Board explained *Mohammadian* in these terms, specifically observing how inequitable it is to require one responsible party to clean up the release of another:

> Before the *Mohammadian* Order, a responsible party who contributed to a commingled release could only be relieved of liability when no further cleanup or corrective action was required. The test in *Mohammadian* was designed to provide relief to responsible parties in limited situations. The State Water Board recognized the importance of naming multiple responsible parties to promote cleanup of water quality problems. Limiting the number of responsible parties increases the likelihood that public funds will have to be used to ensure site cleanup. The State Water Board also considered the inequitable aspect of requiring one responsible party to clean up the release of another. The State Water Board addressed these competing policy concerns in *Mohammadian* and the result was a test that was intended to provide relief to certain responsible parties in limited scenarios.

Id. at *8.

But because the *Mohammadian* rule "will result in the removal of responsible parties in an overly limited number of cases," it needed to be expanded to provide relief in more commingled release situations. *Id.*

Thus, some new rules are warranted, by which a discharger into a commingled plume—whose discharge is not driving the remediation or being remediated—can be relieved of responsibility.[35] "Under the test established in *Mohammadian*, Petitioner could not be removed as a responsible party because remaining petroleum constituents from Petitioner's release are contributing to the need for cleanup of the commingled release." *Id.* at *7, fn.3.[36] *I.e.*, even under the more limited *Mohammadian* rule, Petitioner would not properly be included in the Orders because 1,4-Dioxane is not "contributing to the need for cleanup of the commingled release." *Id.*

The third relevant decision of the State Water Board is the 1990 Union Oil Order WQ 90-2, 1990 WL 272134 (Cal.St.Wat.Res.Bd. Apr. 19, 1990). There, the State Board noted, "[t]here may, of course, be tasks which are appropriately required only by the dischargers to an individual site. An example would be cleanup of contaminated soil below the site." *Id.* at fn.6. That order recognizes the propriety of distinguishing a 1,4-Dioxane "remedy" from the TCE/PCE remedy, as discussed in the next section.

e. An overarching equitable issue.

The Regional Board has not demonstrated that the Order or the IRAP require Petitioner to undertake work "fit for purpose" regarding 1,4-Dioxane. Consistent with the discussion above, and especially with the three decisions of the State Water Board, it is not equitable to force Petitioner to clean up someone else's mess.

Put simply, the IRAP requirements are tailored to reduce high TCE concentrations in the

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[35] That *Salvatore* involved a "relatively minor" release which commingled with a release into "groundwater that has already been significantly impacted by another release" is a case-specific fact that does not make the principle underlying the decision inapplicable to Petitioner and 1,4-Dioxane, *i.e.*, Petitioner is not being ordered to clean up 1,4-Dioxane, and any such order would be completely unreasonable under the circumstances. In this case, the 1,4-Dioxane is not subject to any corrective action, which fits four-square with the "new test" in *Salvatore*: "This new test acknowledges the relative contributions of the responsible parties and provides relief to the party whose release is not significant enough on its own to require corrective action." *Id.* at *8.

[36] Neither of the limitations to the *Salvatore* rule are relevant to Petitioner or the 1,4-Dioxane in the perched groundwater at the Property. Removing Petitioner will not create an "orphan site" as the Ok Songs are financially capable. Nor is this a situation where multiple minor releases—of which 1,4-Dioxane is one—combine to make corrective action necessary. As discussed *passim*, all corrective action at the Property is driven by and focused on TCE/PCE.

Property's soil vapor and groundwater, and do not remediate 1,4-Dioxane in the perched groundwater. Accordingly, there is no colorable argument that Petitioner should pay for any TCE/PCE remediation in media where 1,4-Dioxane does not exist (soil, soil gas) or in groundwater where 1,4-Dioxane is not the principal constituent driving any remediation.

f. 1,4-Dioxane is not a nuisance for which Petitioner is legally responsible.

For many of the same reasons that mean 1,4-Dioxane is not "pollution" and for which Petitioner is improperly named in the Orders under Section 13304, Petitioner is not legally responsible for a 1,4-Dioxane "nuisance." Under the statute (as the State Water Board has acknowledged in its decisions), *all* the following elements of "nuisance" must be met:

> "Nuisance" means anything which meets all of the following requirements:
>
> (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
>
> (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
>
> (3) Occurs during, or as a result of, the treatment or disposal of wastes.

Cal. Water Code § 13304.

The presence of 1,4-Dioxane in the perched groundwater at the Property[37] clearly does not meet the first two elements. Unlike the presence of TCE/PCE in the soil vapor (which can plausibly interfere with the "comfortable" or "healthful" occupancy of the building on the Property), the 1,4-Dioxane, which is attenuating or stable, is not migrating upward into the soil column or soil vapor, and it is not migrating downward into drinking water resources.

There are no extant pathways for human or environmental/ecological exposure to any 1,4-Dioxane in the perched groundwater. Thus, axiomatically there is nothing in the present tense—as the statute requires—which "is" injurious to health, any more than, to take extreme examples, the sulfuric acid cloud shrouding Venus or the ammonia surrounding Jupiter "is"

[37] The 1,4-Dioxane detections at issue are principally confined to a portion of the footprint of the Property.

injurious to health. Nor do the Orders provide any basis for finding a present "obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" caused by 1,4-Dioxane. Obviously, Ms. Ok Song and every previous owner of the Property has used it for whatever desired purpose they chose (and Ms. Ok Song continues to do so).

In fact, the Order makes it clear that there are no extant pathways for any 1,4-Dioxane exposures:

> Dischargers have caused or permitted COCs to be discharged or deposited where the wastes are or probably will pose a potential human health threat to occupants of the Site through direct contact exposure to contaminated soil, soil vapor or through vapor intrusion into indoor air or through other exposure pathways.

The ambiguous (and unexplained and unfounded) reference to "other exposure pathways" notwithstanding, focusing on the operative verbs—"are [posing] or probably will pose"—there is no basis in the Order or in fact to speculate that anyone will ever be exposed to 1,4-Dioxane via the perched groundwater, much less that such exposure is "probable."

The Order's reference to a "threatened" nuisance is also misplaced with respect to 1,4-Dioxane.

Section 13304 defines "threaten" as follows:

> (e) "Threaten," for purposes of this section, means a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

Any actual use of the perched groundwater is not probable, foreseeable, anticipated, planned, etc. Any such use is purely hypothetical; the Order does not provide any basis to assume it is even feasible.

As there is no soil/soil vapor pathway for any exposure to 1,4-Dioxane at the Property, any hypothetical "harm" can only be via the perched groundwater. But, as explained above, there is not currently a "substantial probability" the perched groundwater will ever be a pathway. The Orders certainly do not provide any basis for any other conclusion. Moreover, given the speculative nature of any such pathway ever becoming actuality, the Orders do not (and cannot) establish that the "probability and potential extent of harm make it reasonably necessary to take immediate action…."

It is also well established that any "interfere[nce] with the comfortable enjoyment of life or property" must be "unreasonable" before the conditions become a "nuisance." Even if the Orders specified (and they do not) the putative "interference" 1,4-Dioxane in the perched groundwater allegedly (or even hypothetically) causes, unless and until there is evidence that the 1,4-Dioxane creates such an interference, it is not relevant to consider whether or not it is "unreasonable." As noted above, 1,4-Dioxane has not and will not constrain the use of the Property, so there is no question as to "reasonableness." And if the perched groundwater is the issue, it would be illogical to assert that it is "unreasonable" to interfere with a usage that may not be feasible, and is not planned, anticipated, foreseen or probable.

Nor do the Orders establish the second statutory element of nuisance with respect to 1,4-Dioxane. That is, the Orders provide no basis whatsoever for claiming that 1,4-Dioxane "[a]ffects at the same time an entire community or neighborhood, or any considerable number of persons…." Cal. Water Code §§ 13050(m). Again, any such claim would fly in the face of the facts: 1,4-Dioxane in a spatially confined,[38] unused, possibly unusable perched groundwater is not affecting *anyone,* much less a "considerable number of people" as the statute requires.

Even if the TCE/PCE in the perched groundwater is a "nuisance" or "threatened nuisance," *and* even if Petitioner was in some way responsible for discharging 1,4-Dioxane, and even if the 1,4-Dioxane is commingled with the TCE/PCE in the perched groundwater, MDBSI would is not properly subject to the Order or IRAP.

The logic and principles of the three State Water Board decisions discussed above in connection with "pollution," *i.e.*, *Mohammadian, Salvatore,* and *Union Oil*, support the conclusion that Petitioner is not properly subject to the Order or IRAP. In summary:

- There is no evidence that Petitioner ever released 1,1,1-TCA at the Property, and the Regional Board's speculation that Petitioner did so is not a sufficient basis to include Petitioner in the Orders.

[25] As noted above, the 1,4-Dioxane detections at issue are principally confined to a portion of the footprint of the Property.

- There is no evidence that any 1,1,1-TCA used (or, speculatively, released) at the Property contained 1,4-Dioxane as a stabilizer.
- The SVE/air sparging interim remediation measures are not designed to address (and will not address) any 1,4-Dioxane in the perched groundwater at the Property.
- Assuming (contrary to the evidence) that Petitioner has some responsibility for 1,4-Dioxane, and further assuming (also contrary to the evidence) that 1,4-Dioxane is a "nuisance" under the statute, Petitioner cannot be responsible for investigations or interim remedial measures addressing TCE/PCE.

Water Code Section 13304 and the case law recognize "causation" as the cornerstone of any liability analysis regarding nuisance.

The State Water Board's attempt to avoid the necessary element of causation by creating out of whole cloth a "commingling" rule creating joint and several liability materially (and improperly) expands the reach of the statute. That is, Section 13304 is quite clear that all a discharger can be ordered to clean up is "the waste" the discharger discharged.

Here is the relevant language of 13304 with some key phrases highlighted:

> (a) A person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall, upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

Cal. Water Code § 13304 (highlights added).

Put simply, those three highlighted references limit the Regional Board to ordering cleanup of abatement of "the waste" the "person" discharged.[39] If "the waste" the "person" "discharged" "creates, or threatens to create, a condition of pollution or nuisance," then—and only then—does the literal language of the statute authorize the Regional Board to issue an order to that discharger for "the waste."

This is consistent with the general law of causation in nuisance, which, as discussed above, defines the reach of Section 13304. In other words, liability under 13304 is no broader than it would be for a common law nuisance claim. In that context, liability for nuisance only follows where the purportedly liable party is a "substantial factor" or "independent concurrent cause" of the nuisance. Within that context, even if the "nuisance" is defined here as the "commingled" contamination at the site, then Petitioner's alleged 1,1,1-TCA/1,4-Dioxane "contribution" is not going to be either a "substantial factor" ("but for") or "independent concurrent cause," so the question of joint and several liability for the nuisance – never become relevant because MDBSI is not liable at all.

The State Water Board cannot administratively create a "general exception" to the statutory language, whereby if "the waste" which is discharged *also* commingles with "other waste" which also is or threatens to create, a condition of pollution or nuisance, *then*—according to the State Board, the person who discharged "the waste" will "*generally*" be "*considered*" to be jointly and severally liable for the "combined condition." *See e.g.*, *Mohammadian*.[40]

Importantly, even the decisions which seem to acknowledge the State Water Board's "considered" approach as creating in fact a "general exception" to the statutory language cannot avoid the fundamental role of causation under nuisance law. While the courts under this line of cases purport to break the statute into two parts, distinguishing between causation of the "release" or "discharge" and causation of the nuisance, in the end, they fall back onto the principle that the

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[39] If, as here, the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal.4th 733, 737 (2004).

[40] As discussed above, an administrative expedient of "considering" something to be a particular way is no substitute for facts, or the law.

discharge must be a cause of the nuisance. The key passage in such cases is as follows:

> In each of the above cases [*1800's cases*], the defendant's acts were subject to abatement based on its causal connection to an actual or potential *discharge of waste* into state waters, where *the discharged waste created, assisted in creating, or threatened to create, a nuisance.*

San Diego Gas & Electric Co. v. San Diego Regional Water Quality Control Bd., 36 Cal. App. 5th 427, 438 (2019) (emphasis added).

In other words, the effort to expand the statute and dispense with the requirement of a causal nexus between the discharge and the nuisance notwithstanding, there still must be a determination that the "waste created, assisted in creating, or threatened to create, a nuisance." "Created" is a "causal" notion. "Assisted in creating" is also a "causal" notion. "Threatened" is also a "causal" notion in the sense that for something to "threaten to create," it must "cause" a threat. Without such a causal requirement, as the *Modesto* line of cases illustrate, any principled application of Section 13304 evaporates into unfettered Regional Board discretion.

6. The Orders should be directed to individuals and entities other than Petitioner.

This is not a case in which the Regional Board relied on substantial evidence in the record to show that substances of concern resulted—much less could only have resulted—from Petitioner's activity at the Property, or during Petitioner's ownership of the Property, because there was no other source for those substances. Here, as Petitioner informed the Regional Board in its comments submitted in connection with the Draft Order, there are other former owners of the Property, as well as adjacent property owners, who engaged in activities that are known to involve the use of TCE and/or PCE. When naming potential dischargers in an order, equity demands that the Regional Board include all appropriate individuals and entities. Although the Orders name the current owner of the Property, numerous previous owners have held property interests in and/or operated at the Property during the time periods referenced in the Orders. Likewise, new evidence points to sources adjacent to the Property.

a. The Orders should be directed to Other Entities that are more likely the source of the substances of concern than Petitioner.

The Regional Board paid lip service[41] to Petitioner's comments on the Draft Order directing the Regional Board to investigate other parties. Although the Regional Board ultimately eschewed action, the Regional Board placated that it "may add dischargers in future amendments to the Order" (Order, Response to Comments to Draft Order, Comment A.7.2 at p.11 and Comment A.18 at p.22), and is "willing to consider any evidence of other dischargers who contributed to the discharge, including those listed" in the Order, but that "it is not necessary to identify all dischargers for the Regional Water Board to proceed with requirements for a discharger to investigate and clean up." (Order, Response to Comments to Draft Order, Comment A.7.2 at p.11, citing State Water Board Resolution 92-49).

However, as discussed above, Resolution No. 92-49 imposes on the Regional Board the obligation (not option) to use reasonable efforts to identify responsible parties under Water Code Section 13304. *See* Resolution No. 92-49 (as Amended on April 21, 1994 and October 2, 1996) (the Regional Board "*shall* … [m]ake a reasonable effort to identify the dischargers associated with the discharge....") (Emphasis added).

Here, as set forth in the Mattingly Report, TCE and the other substances of concern detected at the Property were commonly used solvents in, and associated with, furniture manufacturing in the 1970s and 1980s—especially with respect to adhesives and painting and coatings. (Exh. G, Mattingly Report at p 4 at Bates no. MDBSI 01050). Yet, the Regional Board made (at most) a perfunctory effort to "investigate" G&A Furniture, and apparently thereafter made no further efforts after G&A Furniture stonewalled.

The known facts on G&A Furniture, Petitioner's immediate predecessor at the Property, required more, much more, of the Regional Board than just giving up after being stonewalled. G&A Furniture operated on the Property as a furniture manufacturer for ten years, from the time the building at 14131 South Avalon Boulevard was constructed in 1978, until 1988. The Mattingly

[41] "Lip service" is "an avowal of advocacy, adherence, or allegiance expressed in words but not backed by deeds." https://www.merriam-webster.com/dictionary/lip%20service

Report provides evidence that G&A Furniture's operations—and not Petitioner's—were responsible for the discharge of the substances of concern at the Property, as reported in Petitioner's comments on the Draft Order. (*See* Exh. G, Mattingly Report, Section 1.4, Opinions at Bates no. MDBSI 01047-90). Belatedly, on December 27, 2023, based on information provided by Petitioner, the Regional Board issued a request for information and a chemical use questionnaire to the former owner/operator of G&A Furniture. On May 31, 2024, the former owner/operator returned the chemical use questionnaire to the Regional Board with apparently rote answers of "no," "don't know," or "unknown" to virtually every question in a nine- page questionnaire. G&A Furniture's response to the chemical use questionnaire included the seemingly incredulous answer of "no" with respect to whether it ever used any chemicals at all in its furniture manufacturing business or operations at the Property. Even more incredible is that the Regional Board does not appear to have followed up on G&A Furniture's responses to the request for information and the chemical use questionnaire, and has seemingly accepted G&A Furniture's notionally preposterous assertion that in nine years of furniture manufacturing at the Property (1978 to 1987) it did not use a single chemical at the Property or in its operations.

The ownership of the Property was transferred at least seven times during G&A Furniture's decade-long operation at the Property, including to Richard G. Schwecke and Robin L. Schwecke. (*See* Exh. D hereto, Chemical Storage and Use Questionnaire, Bates no. MDBSI 0001 *et. seq.*). Among the historic owners of the Property, the Schweckes seem to remain viable recipients of a Regional Board information request, or even as "dischargers" with respect to the Orders.

In addition, as reflected in the Order, from 1961 to 1970, Biltmore Press (a printer) owned the Property, or operated at it. (Exh. A, Order, ¶ 3, Table 1, at p.3). As Petitioner noted in its comments to the Draft Order, TCE is known to be an ingredient in, or associated with, printer's ink and printing operations.[42] (Exh. A, Order, at Comments to Draft Order p.19). The

[42] With the passage of 50 years since Biltmore Press's ownership of the Property, it is now uncertain as to what use or uses Biltmore Press made of the Property. Moreover, the magnitude of that uncertainty has undoubtedly increased during the 27 years that elapsed while the Regional

(footnote continued...)

Order describes operation of the Biltmore Press (a former owner of the from 1961-1970) as "printing." The Regional Board gave no indication that it has ever made any effort to investigate whether, and to what extent, TCE was discharged by the Biltmore Press's use of the Property.

From 1970 to 1978, the Property was owned by the Bruckners, who operated a woodworking shop and machine shop—business types now known to use solvents. (Exh. A, Order, at p.4; Exh. I, Supp. Mattingly Report at 3 at Bates no. MDBSI 01096).

The Regional Board gave no indication that it has ever made any effort to investigate whether, and to what extent, the substances of concern were discharged by the Bruckners' use of the Property.

Likewise, in the decades prior to Petitioner's presence at the Property, the reporting and tracking of chemical usage was less rigorous than during Petitioner's tenure. As a result, those sworn reports to regulatory agencies made during Petitioner's time on the Property, coupled with the known time when TCE was phased out, are consistent and unassailable proof that Petitioner is not the source of the substances of concern at the Property. The same cannot be said with respect to the Other Entities. In contrast to the two consistent bodies of evidence that absolve Petitioner and rebut any speculative "inference" about use by Petitioner: to the extent any reports of chemical usage by those Other Entities ever existed, they are now apparently lost to time. The Order notes that The Superior Oil Company was an owner/operator of the Property from 1948 to 1954. (*See* Exh. A, Order, ¶ 3, Table 1 at p3.) The Order states that The Superior Oil Company's "Current Successor" is "Unknown." (*Id.*). In contrast to the effort devoted to building the house of cards on which the putative liability of Petitioner is founded, it takes only a single query to Wikipedia to find that The Superior Oil Company was purchased by, and merged into, Mobil Oil, which then merged with Exxon to become Exxon Mobil. Based on Wikipedia, The Superior Oil Company's successor is both known, and is one of the largest extant corporations in the world, Exxon Mobil. While it is unclear from the Order to what use The Superior Oil Company put the Property, considering that the time period in which The Superior Oil Company owned the

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Board sat idle without investigating or taking affirmative steps to preserve evidence regarding Biltmore Press.

Property was a period when TCE was known to be used in oil operations, which period coincided with lax-to-no environmental regulations, The Superior Oil Company (Exxon-Mobil) would have been (and is) an appropriate recipient of an information (or technical report) request from the Regional Board regarding the nature and extent of, and the chemical usage involved in, that company's activities at the Property.[43]

In addition, as set forth in the 1996 Assessment that Petitioner submitted with its comments to the Draft Order, in 1996, "adjacent properties include[d] industrial and commercial establishments, including[:] …Falcon Insulation and Packaging Company is located north and west of the site. Three businesses (Air Mechanical, Inc., Industrial Door, and VIRCO, Inc.) also bound the west side of the site. Service stations are located south of the site, on the northwest, northeast, and southeast corners of the intersection of Avalon Boulevard and Rosecrans Avenue." (Exh. D, 1996 Assessment at p.3-2, MDBSI 00084). As the 1996 Assessment notes, "[t]he information available suggests that the groundwater may be impacted from one or several off-site sources…. It is not clear that the contaminants found in the groundwater beneath the property can be attributed to past activities at the [Property]." (*Id.* at p.6-8, MDBSI 00105).

However, even if there was substantial evidence establishing that Petitioner discharged a different substance (*i.e.,* not one of the substances of concern) causing an imminent threat of a nuisance (there is none), it would be inequitable to require Petitioner to bear the brunt of the cleanup for other chemicals it never used and did not discharge. The Regional Board's targeting of Petitioner is particularly unfair, given the voluntary cooperation with environmental agencies concerning the Property, which culminated in the 1996 Assessment. Rather than investigate more likely actual dischargers responsible for the substances of concern in the groundwater at the Property, the Regional Board picked a convenient target in Petitioner, and ordered, in effect, that

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[43] To be clear, Petitioner is not here arguing that the Regional Board had sufficient evidence to name any of these Other Entities in the Orders. However, Petitioner *is* saying that the Regional Board (1) had an obligation to fully and timely investigate these Other Entities, (2) failed to do so, and (3) ignored evidence that is less speculative than that used to name Petitioner and which is not contradicted by known facts (as is the case for Petitioner). It is not Petitioner's burden at this point to prove any of these Other Entities are liable.

Petitioner prove it is not responsible. Where, as here, the record indicates that one party has been "unfairly singled out" to address discharges "which must have resulted from numerous dischargers," and those "other potential dischargers have not been ordered to perform cleanup," this Board has intervened. For example, in *In re Union Oil Company of California,* Order No. WQ 90-2, 1990 WL 10589600 (Cal.St.Wat.Res.Bd. April 19, 1990), it was "apparent that there were at least several potential sources for the hydrocarbon plume…[that] may have contributed to the contamination." The State Board therefore initially directed the Regional Board back to the drawing board, "to augment the record in this matter to show what steps it had taken to obtain reports and cleanup from other potentially responsible persons." *Id.* at **2-3.

Based on the augmented record with additional information regarding other potentially responsible persons, the Board remanded the matter back to the Regional Board, stating:

> From our review of the record, it appears that the Regional Board has much more information now on potential sources of pollution, characterization of the plume, and necessary remedial actions than it did when it issued the Cleanup and Abatement Order. It is obvious that at some point *all responsible persons* will have to work in concert to complete study of the plume and to perform remediation activities: while there are several sources, all lead to the same plume (or a number of plumes in the same area) and cleanup *must be performed in a coordinated fashion*. Since a wealth of new information has been provided since adoption of the Order … we do not believe that it is a reasonable use of our resources to address all of Union's legal and factual contentions at this point. Rather, it is appropriate at this time for the Regional Board to compile all of its various actions on the downtown plume and to issue either one order, or several orders with coordinated tasks and time schedules, to all persons it finds are legally responsible, requiring any further investigation and cleanup which is necessary.

Id. at *3 (emphasis added).

Similarly, in *In re San Diego Unified Port District,* Order No. WQ 89-12, 1989 WL 118194 (Cal.St.Wat.Res.Bd. Aug. 17, 1989), another matter involving numerous responsible parties, the State Board noted that "it may be appropriate for the Regional Board to direct the parties to submit a plan specifying the roles of each party in implementing the cleanup and abatement order." *Id.* at *5 n.6.

The record here warrants the same equity be afforded Petitioner in requiring the Regional

Board to conduct an investigation regarding the numerous Other Entities and to include those parties so that a coordinated and effective cleanup effort can be made, and so that all responsible parties can assist in the cleanup.

b. New evidence provides further support for the conclusion that some of the substances at issue in groundwater originated from off-Property sources.

To date, the investigations conducted by Petitioner per the Order have included assessment on offsite properties to the west, north, and south of the Property. This assessment evidences, and Petitioner reported to the Regional Board the assessment and all related data evidencing, offsite adjacent sources of TCE and PCE originating with Other Entities to the west and north (cross-gradient and up-gradient, respectively).

Pursuant to the Order, as noted above, Petitioner has submitted Conceptual Site Models and all related soil, soil vapor, and groundwater data to the Regional Board. The Conceptual Site Models identify PCE and TCE and their degradation compounds as the primary substances of concern both on and off the Property (including the upgradient and cross-gradient directions).

As also noted above, neither previous Property investigation, nor the Regional Board's administrative record, evidence Ace's use, storage, handling, or release of any TCE or PCE during its brief tenure at the Property. Ace, which was present at the Property for approximately seven years and has not been at the Property for approximately the last 30 years, did not release PCE or TCE.

Since the submittal of an updated Conceptual Site Model in January 2026, groundwater monitoring results conducted pursuant to the Order have been consistent with the findings of the updated Conceptual Site Model. Therefore, there are no further updates to the Conceptual Site Models.

7. The Regional Board has not and cannot carry its burden of rebutting the presumption that laches bars the Orders.

In addition to, and independent of, the lack of evidence and other inequities and shortcomings implicated by the Orders, the doctrine of laches bars the Orders as against Petitioner. As explained below, the Regional Board, not Petitioner, has the burden of proving the

Regional Board's claim is not barred by laches; the presumption is that the bar of laches applies here.

"Laches is an equitable defense based on the principle that those who neglect their rights may be barred from obtaining relief in equity." *Feduniak v. Cal. Coastal Comm'n*, 148 Cal. App. 4th 1346, 1381 (2007) (internal citations and quotation marks omitted). "[L]aches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." *Id.*; *accord Johnson v. City of Loma Linda*, 24 Cal.4th 61, 68 (2000). "Laches … exists to assure defendants are not confronted with stale claims." *Transwestern Pipeline Co. v. Monsanto Co.*, 46 Cal. App. 4th 502, 520 (1996).

The facts and consequences related to the Regional Board's delays are summarized above. Under the circumstances here, the Regional Board has the burden of establishing its delay in acting was not unreasonable and not prejudicial to Petitioner. The defense of laches applies to orders, such as the Orders here, issued under the Water Quality Control Act. As California courts recognize, "the defense of laches may operate as a bar to a claim by a public administrative agency … if the requirements of unreasonable delay and resulting prejudice are met." *Robert F. Kennedy Medical Center v. Belshe*, 13 Cal.4th 748, 760, n.9 (1996); *accord Krolikowski v. San Diego City Employees' Retirement System*, 24 Cal. App. 5th 537, 568 (2018); *Cedars-Sinai Medical Center v. Shewry*, 137 Cal. App. 4th 964, 985–86 (2006). Laches specifically applies in actions involving decisions by Regional Boards pursuant to the Water Quality Control Act and Water Code section 13304. *Malaga County Water District v. State Water Resources Control Board*, 58 Cal. App. 5th 447, 466 (2020) ("[L]aches should typically be available as a defense in administrative proceedings run by the state."). As the *Malaga* court explained, "[i]n the context of judicial proceedings, the need to limit prosecution of stale claims has been clearly stated in Code of Civil Procedure section 338, subdivision (i), where a three-year statute of limitations has been imposed on any 'action commenced under the [Water Quality Control Act],' of which Section 13304 is a part. *Malaga*, 58 Cal. App. 5th at 467. "Nothing in the statutory scheme or the case law suggests that the Legislature intended to limit potentially stale actions brought in court but permit those same actions to proceed through administrative hearings." *Id.* Rather, the legislative history of the provisions of the Water Quality Control Act suggests the opposite. *See id.* at 468 ("[T]he overall framework of California's enforcement scheme is designed to quickly stop and remedy polluting discharges.").

Under the *Malaga* decision, the Regional Board, not Petitioner, has the burden of proving the Regional Board's claim is not barred by laches. The presumption is that the bar applies under these circumstances. In *Malaga*, the Court of Appeal reversed the trial court determination that laches could not be a defense to a Regional Board order. The Court was reviewing an administrative order, to which the three-year statute of limitations for a civil lawsuit under the statute would not apply. However, because that statute would have barred a civil claim by the Regional Board, it was appropriate to "shift to the agency [the burden] to demonstrate any delay in enforcement was reasonable and without prejudice." *Id.* at 471. In so concluding, the Court of Appeal expressly rejected the argument that applying laches to an order issued under the Water Quality Control Act would impermissibly nullify an important policy adopted for the public's benefit, and concluded that "[t]he application of laches furthers a policy of quick and timely enforcement and, ultimately, of ensuring the state's waters are clean." *Id.* at 468. As the *Malaga* court explained:

> While the State Regional Board suggests that laches will hinder effective enforcement of polluting dischargers, this seems unlikely. Indeed, it was a history of delays in administrative prosecution that led to the statutes the State Regional Board now wants to use to support delays in prosecution. Allowing the government to store endless years of prior violations for prosecution in administrative proceedings rather than requiring immediate correction and cleanup … where those same violations cannot be adjudicated in court, would provide an impermissible end-run around the goals of effective and speedy enforcement embodied in the statutory scheme, and could potentially lead to long-standing uncorrected pollution of the state's waters. Permitting the doctrine of laches to preclude stale violations thus furthers the goals of constant monitoring, effective and speedy enforcement, and immediate cleanup of the state's waters.

Id. at 468–69.

The necessity of moving with dispatch that will avoid the loss of evidence is actually codified in State Water Resources Control Board Resolution No. 96-030, *Water Quality Enforcement Policy,* ¶ 4 at p.3 (Eff. Nov. 7, 2024) ("Enforcement actions should be initiated as soon as possible after discovery of the violation.”).

The doctrine of laches thus is applicable to the Orders to Petitioner which, like the order addressed in *Malaga*, was issued pursuant to the Water Quality Control Act well after the three-year statute of limitations would have run if it were applicable in an administrative proceeding.[44] But the Regional Board does not carry its burden of rebutting the presumption of the laches bar.

a. The State’s 27-year delay is *per se* unreasonable.

Notably absent from the Orders is any effort to explain—much less justify as “reasonable”—the Regional Board’s 27-year delay in acting when the State and the Regional Board’s sister agency, DTSC, had the data on which it now wants to act sitting in the files. Silence is not “evidence” that the delay was reasonable.

b. Petitioner has been prejudiced by the Regional Board’s delay.

Regarding proof of prejudice, in a holding the *Malaga* court endorsed, the California Court of Appeal explained in *Fountain Valley Reg’l Hosp. & Med. Ctr. v. Bonta*, 75 Cal. App. 4th 316 (1999), as follows:

> [T]he elements of unreasonable delay and resulting prejudice may be “met” in two ways. First, they may be demonstrated by the evidence in the case…. Second, the element of prejudice may be “presumed” if there exists a statute of limitations which is sufficiently analogous to the facts of the case, and the period of such statute of limitations has been exceeded by the public administrative agency in making its claim.… To defeat a finding of laches the agency, here the [administrative agency], must then (1) show that the delay involved in the case … was excusable, and (2) rebut the presumption that such delay resulted in prejudice to the opposing party.

Id. at 323–24.

Although the statutes of limitations set forth in the Code of Civil Procedure do not apply to administrative proceedings (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal.4th 1072 (2005)), they may be used in such proceedings to

[44] Although the order at issue in *Malaga* imposed penalties for violating water discharge requirements of a permit pursuant to under Water Code Section 13385 (*see* 58 Cal. App. 5th at 457, 458), the same interests were implicated in *Malaga* as are implicated here in enforcing the provisions of the Water Quality Control Act to protect the quality of the State’s water.

ascertain whether prejudice may be presumed under the doctrine of laches. *Malaga*, 58 Cal. App. 5th at 469. As the *Malaga* court explained:

> The need to quickly and effectively remedy pollution of the state's waters, and the dual nature of the enforcement actions embodied in the statute, demonstrate that delays in administrative prosecutions beyond those applicable to enforcement actions in the court system should be viewed as potentially stale…. [T]he proper period to employ under such a conclusion is the three-year period contained in Code of Civil Procedure section 338, subdivision (i).

Id. at 469.

Accordingly, the *Malaga* court held that "any claims where the Water Quality Board could be said to have known of the violation more than three years before the enforcement action was initiated are subject to the burden shifting presumption that the delay in initiating an action was unreasonable and prejudicial." *Id.* at 471. Thus, the three-year statute of limitations set forth in Section 338(i) of the Code of Civil Procedure should be employed to determine whether Petitioner is entitled to a presumption that the Regional Board's delay in issuing the Orders was unreasonable and that this unreasonable delay prejudiced Petitioner.

One of the key principles underlying the laches doctrine is to avoid the prejudice that can result when, through the passage of time, memories fade, relevant documents are discarded, witnesses move or die, site conditions change, scientific knowledge and standards evolve so objectively applying existing standards at the time of the event becomes more challenging, etc. In 27 years, a whole new generation of environmental scientists—who didn't "live" in the 1980's and 1990's—came online. As the Regional Board actually confessed in its responses to Petitioner's comments to the Draft Order (as quoted above), this new generation will be advocating the application of "today's standards" to decisions made nearly 30 years ago.

Here, the State waited 27 years to act after first becoming aware of the contamination at the Property. To overcome the presumption of prejudice, the Regional Board will have to show that evidence did not become stale, that it is not more difficult (if not impossible) to find evidence and witnesses and responsible parties, and that the costs of investigation and remediation have not shot up. The Regional Board has not done the first two things and cannot do the third. The

Regional Board estimates the cost of the "reports and investigations" required by the Orders would now cost $2 million to $5 million, which costs Petitioner's environmental consultant estimates is actually $3,300,000.00 to more than $7,000,000.00. (*See* Exh. A, Order at p.9; Beadle Decl. ¶¶ 6, 9). That is in addition to the $950,000.00 Petitioner has already spent, and these costs are also subject to further increase caused by any "additional" reports, investigations, cleanup, and oversight costs the Regional Board requires. However, the cost to perform the work required under the Orders would have been significantly less in 1996, *i.e.,* in the approximate range of $1 million to $2.5 million. (Beadle Decl., ¶ 6).

The Regional Board will also have to rebut the presumption that relevant—and exculpatory—evidence was lost (to Petitioner's prejudice) during the Regional Board's more-than-quarter-century failure to rigorously investigate other potentially responsible parties who likely actually used TCE or PCE, the primary substances of concern, at or around the Property. Relying on the State's conduct, Petitioner had no incentive or reason to undertake such investigations and preserve evidence that is now lost to time as a consequence of the Regional Board's inaction.

Another obstacle the Regional Board will face in attempting to rebut the presumption exists in the Legislative goals of quickly and effectively remedying pollution of the State's waters as set forth in the Water Quality Act. "Quickly" is the antipode of a facially unreasonable 27-year delay. Nor does the delay evidence an "orderly" or "efficient" administration of water resources, as required by Water Code Section 174(a) in defining the very purpose of the State Board: "[t]he Legislature hereby finds and declares that in order to provide for the orderly and *efficient* administration of the water resources of the state, it is necessary to establish a control board that shall exercise the adjudicatory and regulatory functions of the state in the field of water resources." Cal. Water Code § 174(a) (emphasis added).

In addition, State Board Resolution No. 92-49 (as Amended on April 21, 1994, and October 2, 1996), Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304, expressly provides that:

> The Regional Board *shall* apply the following procedures in determining whether

> a person shall be required to investigate a discharge under WC Section 13267, or to clean up waste and abate the effects of a discharge or a threat of a discharge under WC Section 13304. The Regional Board shall: … B. Make *a reasonable effort to identify the dischargers associated with the discharge*....

(Emphasis added). *See also* Section 13304(d) (recognizing that Regional Boards are to use "reasonable efforts" "to identify the person responsible for the discharge …."). As these governing statutes and Resolution make clear, it is the obligation (not the option) of the Regional Board to use reasonable efforts to identify responsible parties under Water Code Section 13304. To be "reasonable," efforts must be somewhat rigorous (not perfunctory) and conducted before evidence disappears or becomes stale. In light of the goals of the Water Quality Control Act, the Regional Board's delay of 27 years in this case was *per se* unreasonable.

Nor can the Regional Board rebut the presumption of prejudice that resulted from the self-inflicted impairment of its ability to comply with its statutory and regulatory duties to identify and pursue the third parties whose activities most likely caused any on-site or off-site contamination. That prejudice is even more pernicious as the Regional Board now seeks to pursue an innocent party, Petitioner, which had nothing to do with discharging the substances of concern, while letting those who caused the problem become inaccessible because the Regional Board did not timely and vigorously investigate them. Had the Regional Board fulfilled its obligation to timely "make a reasonable effort to identify the dischargers associated with the discharge" (State Board Resolution No. 92-49), it (or Petitioner, if it knew the State's determination was unreliable) would have, in a timely manner, investigated: (a) the Other Entities, including a printer (Biltmore Press) and a furniture manufacturer (G&A Furniture) (Exh. A, Order, ¶ 3, Table 1 at p. 3)—both of which were likely to have used the substances of concern in connection with their operations (*see* Exh. G, Mattingly Report at p.3 (Bates no. Petitioner 01049)), and (b) the Other Entities which are adjacent and nearby property owners and operators, whose properties or operations are now known to be a potential source of the substances of concern at the Property. As a practical—but prejudicial to Petitioner—matter, by its delay, the State has significantly hampered its ability to add, with evidence, financially capable individuals and entities to the Orders, leaving Petitioner and Ms. Song holding the proverbial bag.

By operation of law, the Regional Board is aware of the legal principles as articulated in *Malaga, et al.* establishing a presumption that laches applies and requiring the Regional Board to rebut the presumption. *E.g., Chester v. State of California*, 21 Cal. App. 4th 1002, 1007–08 (1994) ("The Legislature is presumed to act with knowledge of existing law, including the opinions of the Attorney General affecting the subject matter of the proposed legislation."); *In re W.B.,* 55 Cal.4th 30, 57 (2012) ("[T]he Legislature is presumed to know about existing case law when it enacts or amends a statute ...."); *see also Katsura v. City of San Buenaventura*, 155 Cal. App. 4th 104, 109 (2007); *State Air Res. Bd. v. Superior Ct.*, 93 Cal. App. 3d 803, 810 (1979); *Benson v. California Coastal Com.*, 139 Cal. App. 4th 348, 355 (2006), *as modified on denial of reh'g* (June 6, 2006); *Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 106 Cal. App. 5th 982, 997 n.5 (2024). That presumption and the related evidentiary burdens it places on the Regional Board notwithstanding, the Regional Board should be prohibited from coming in nearly three years after the Order was issued with putative evidence to rebut the presumption. But even if the Regional Board is allowed to put on any such evidence now, the question is, what evidence does the Regional Board have? *I.e.,* does the Regional Board have evidence sufficient to rebut the presumption of prejudice by proving it ever made a timely, much less *any*, effort whatsoever to investigate whether, and to what extent, any of the substances of concern were discharged by any of these parties? If it has done so, the Regional Board has kept that secret (which, in and of itself, is prejudicial to Petitioner). Under these circumstances, it is inequitable to name Petitioner as a Discharger. Barring the enforcement of the Orders as to Petitioner under the doctrine of laches will not mean that the discharges of the substances of concern identified in the Orders will not or cannot be abated—it would instead result in the appropriate, culpable parties responsible for the discharges being required to perform the abatement.

8. The proposed burden on Petitioner is not reasonable.

Information that is required to be provided under Water Code Section 13267 is subject to the requirement that "[t]he burden, including costs of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." Cal.

Water Code § 13627(b)(1). This is not the case here.

The Orders' burdens on Petitioner do not bear a reasonable relationship to the need for the reports or the benefits potentially gained from the reports; the financial burden to be imposed on Petitioner is unwarranted both in light of the utter lack of evidence that Petitioner used, handled, stored, or discharged the substances of concern, and in light of the cost of doing the anticipated work.

The Order at p.9, Paragraph 13 specifies "reports and investigations" MDBSI is required to undertake and estimates that the cost of conducting those non-remedial projects will be \$2–5 million. Through 2034, Petitioner's environmental consultant, Arcadis, estimates those two projects, coupled with the Regional Board's interim remedial measures, will cost Petitioner an additional \$3,300,000.00 to more than \$7,000,000.00, with a projected expenditure of between \$1,139,950.00 to more than \$2,400,000.00 over the next 12 months. (*See* Order at p.9; *see also* Exh. H hereto, Beadle Declaration at ¶¶ 6, 9).

Those two tasks may, however, only be the tip of the iceberg, as the Orders also require Petitioner to conduct unspecified "cleanup" for an unspecified period of time, and pay Regional Board oversight costs for the reports, investigations, interim cleanup, and any final cleanup. The Orders further provide that the Regional Board may unilaterally expand the scope of the required reports, investigations and cleanup. At this point, it is not possible to estimate what that "cleanup" would entail, how much it would cost, and how long it would be operational. It also is not possible to speculate what additional "reports and investigations" the Regional Board may impose (and related costs), or the Regional Board's oversight costs.

This is a significant burden to impose on any entity, and especially significant to impose on an entity that is not a discharger within the meaning of Water Code sections 13267 and 13304 and had nothing to do with the substances of concern that are driving the Orders. This is particularly the case in the context of a Property that Petitioner has not owned or operated in more than a quarter century. This inequity is further underscored by the fact that among the 19 parties listed in Table 1 of the Order that have owned or operated at the Property since 1926, only one has taken *any* action to investigate or remediate the Property, and voluntarily remediated others' contamination sufficiently to obtain from DTSC a no further action letter. Given that Petitioner is not legally or factually responsible for conditions at the Property, it is inappropriate for Petitioner to be included in the Orders which have an unquantified temporal and monetary tail.

The record does not support the conclusion that there is any basis for requiring Petitioner to incur the estimated additional $3,300,000.00 to more than $7,000,000.00 for non-remedial "reports and investigations," with a projected expenditure of between $1,139,950.00 to more than $2,400,000.00 over the next 12 months, to say nothing of the as-yet undetermined costs for further reports, investigations, interim or final remediation measures, and Regional Board oversight costs. To the contrary, the evidence indicates that there is no discharge for which Petitioner is liable that would warrant the exorbitant costs necessitated by the provisions of the Orders.

9. The Orders' stated basis for naming Petitioner as a discharger is different than that asserted in the Draft Order and changing the scope of the Orders to include different theories of liability deprived Petitioner of an opportunity to comment on those theories prior to the issuance of the final Order.

"Due process is the opportunity to be heard at a meaningful time and in a meaningful manner. [Citation.]" *Southern Cal. Underground Contractors, Inc. v. City of San Diego*, 108 Cal. App. 4th 533, 543 (2003). Petitioner was robbed of this fundamental right when—without notice to Petitioner or providing Petitioner an opportunity to be heard or even comment—the Regional Board transitioned the Draft Order to the Order by materially modifying both the scope and theory of its action. After receiving Petitioner's comments pointing out the dearth of evidence that Petitioner is responsible for any of the substances of concern, the Regional Board re-wrote the Order to include new, never-before-raised theories on which it purports to name Petitioner as a "discharger." For example, confronted with evidence that Petitioner had nothing to do with the 1,4-Dioxane at the Property addressed by the Draft Order, the Regional Board conjured a whole new hypothesis for such a connection. *I.e.*, the Regional Board hypothesizes in the Order for the first time that because Petitioner used 1,1,1-TCA (albeit in small quantities), it (i) must have released 1,1,1-TCA and (ii) that 1,1,1-TCA must have contained 1,4-Dioxane, which the

Regional Board claims (again, for the first time in the Order) "is a stabilizer commonly used with 1,1,1-TCA." (*See* Exh. A, Order, ¶ 7(c) at p.6; Order ¶ 22 at p.11; Exh. A, Response to Comment A.2 at p.4).

In apparent recognition of the lack of evidence that Petitioner used, handled, stored, or released PCE or TCE at the Site, the Regional Board also added to the Order, for the first time, an assertion that "[i]nadequate investigation of metals has occurred to date." (Exh. A, Order ¶ 5(a) at p.4).

Similarly—but apparently without reading the 1996 Assessment—the Regional Board added to the Order, for the first time, a citation to the 1996 Assessment (Exh. A, Order ¶ 6(a) at p.5). The Order inexplicably purports to rely on the 1996 Assessment for the proposition that "investigations performed during ACE Medical Company's ownership and operations," imbued Petitioner with knowledge, during its occupancy, of a putative groundwater threat/nuisance. (Order ¶ 22 at p.11). But, for the reasons explained at length above, the 1996 Assessment actually yields the exact opposite conclusion: (1) the 1996 Assessment affirmatively noted that Petitioner did not use TCE; (2) Petitioner's contemporaneous inventories and government filings did not evidence any use of TCE or PCE by Petitioner; and (3) the 1996 Assessment affirmatively noted there was no threat to groundwater.

Here, the new (albeit baseless) theories of liability alleged against Petitioner necessarily implicate Petitioner's rights with respect to the Orders *Cf. International Brotherhood of Electrical Workers Local 1245, Charging Party, v. City of Roseville, Respondent*, 41 PERC ¶ 97; 2016 WL 7664440 (Cal.Pub.Empl.Rel.Bd., Nov. 30, 2016) ("[A]n additional theory of liability necessarily affects the scope of any Board-ordered remedy and substantially affects the rights of the parties."). Nonetheless, Petitioner was precluded from submitting any comments to contest or refute these new theories of liability prior to the Regional Board's entry of the final Order, and was thereby denied due process with respect to the Orders.

E. Manner in Which Petitioner is Aggrieved

Petitioner—which has not been in possession of the Property for more than a quarter of a century—has been aggrieved by the Regional Board's actions because Petitioner will be subjected to provisions of the arbitrary and capricious and unenforceable Orders unsupported by sufficient admissible evidence. As a result of being named a discharger in connection with the Property, Petitioner—which has already spent in excess of $950,000.00—will be forced to inequitably shoulder more (and likely much more) than $3,300,000.00 to $7,000,000.00 costs of complying with the "reports and investigation" requirements of the Orders, ***in addition to the increased costs of:*** any "additional reports and investigations" the Regional Board requires, Regional Board "oversight costs," attaining Property access, and costs associated with implementing any workplan subsequently approved by the Regional Board. (Beadle Decl. ¶¶ 6, 9). Further, by failing to name other former operators and owners of the Property, and failing also to take enforcement actions against the current owner, the Regional Board unreasonably has increased what should have been a zero share of responsibility to be borne by Petitioner to 100%.

F. Specific Action by the State Board Which Petitioner Requests

As further discussed in this Petition, Petitioner requests that the State Board rescind the Orders as to Petitioner (or require that the Regional Board amend the Orders to delete Petitioner from the Orders, and to add as many responsible Other Entities as is appropriate to the Orders). Petitioner further requests that the State Board stay enforcement of the Orders pending resolution of the issues raised in this Petition, as requested in the next section.

G. Request for Stay.

Petitioner requests a stay of enforcement of the Orders pending resolution of the issues raised in this Petition pursuant to 23 CCR § 2053, which provides:

> (a) A stay of the effect of an action of a regional board shall be granted only if petitioner alleges facts and produces proof of all of the following:
>
> (1) substantial harm to petitioner or to the public interest if a stay is not granted,
>
> (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and

> (3) substantial questions of fact or law regarding the disputed action.
>
> A petition for a stay shall be supported by a declaration under penalty of perjury of a person or persons having knowledge of the facts alleged….

23 CCR § 2053.

The facts set forth in the accompanying Tekosky Declaration and Beadle Declaration establish that Petitioner has satisfied each of the three requirements in Section 2053.

1. Substantial Harm to Petitioner if a Stay is not Granted.

If the stay is not granted, Petitioner (who is erroneously named as a discharger in the Order) will continue to be one of only two parties solely responsible for compliance with the Orders, and Petitioner will continue to incur additional consultants' costs and additional attorneys' fees. Petitioner will be substantially prejudiced by having to expend an estimated between $1,139,950.00 to more than $2,400,000.00 over the next 12 months to, among other tasks, submit quarterly groundwater monitoring reports, conduct semi-annual vapor intrusion testing, install an onsite air sparge and soil vapor extraction system, and more, while the State Board is considering the Petition which may render the issue moot. (Beadle Decl., ¶¶ 7-9).

As the State Board recognized in *In re Ocean Mist Farms and RC Farms, et al.*, Order WQ 2012-0012, 2012 WL 5494091, at *3 (Cal.St.Wat.Res.Bd. Sept. 19, 2012) ("*Ocean Mist*"), "[a] substantial cost alone may meet the first prong of a stay determination if the requesting party shows that it constitutes substantial harm. Such a conclusion is consistent with the language of our regulations, and the purposes of extraordinary, interim relief." Even before *Ocean Mist,* the State Board has granted stays where the Petitioner would be prejudiced by the cost and difficulty of complying with an order pending review by the State Board. *See, e.g., In re International Business Machines*, Order No. WQ 88–15, 1988 WL 157324, at *3 (Cal.St.Wat.Res.Bd. Dec. 15, 1988) (granting stay of order and holding, "[w]e agree that IBM could be substantially prejudiced by preparing the extensive technical report and groundwater reuse plan adequate to meet the Regional Board's order by December 15, 1988."); *In re Fairchild Semiconductor Corporation and Schlumberger Technology Corporation,* Order No. WQ 89-5, 1989 WL 66565, at *2 (Cal.St.Wat.Res.Bd.

April 20, 1989) ("We find that Fairchild could incur additional costs to comply with the tasks if a stay is not issued. Further, Fairchild has shown that there will be no substantial harm to the public in allowing the status quo to exist while we review the petition. Finally, testimony at the hearing and written submittals indicate there are questions of fact and law as to whether these technical reports are needed.").

The costs of remediation should be borne by, and shared among, the responsible parties that actually discharged the substances that are being remediated (which does not include Petitioner), as described in detail above. Staying the Orders pending the State Board's resolution of the issues raised in the Petition will allow that to happen.

2. Lack of Substantial Harm to Other Interested Persons and or the Public Interest if a Stay is Granted.

In contrast to the prejudice that Petitioner would suffer if a stay is not granted, in this case there will be "no immediate impact on water quality" if the required actions set forth in the Orders are suspended pending the State Board's review of the Petition; nor is there any imminent threat to public health or environment. (Beadle Decl., ¶¶ 13, 17, and 18.

As set forth in the Quarterly Groundwater Monitoring Reports and the most recent site data , the detections of the substances of concern in the Property's perched groundwater have been declining and/or stable. (*See* Beadle Decl., ¶¶ 12and 13 ("A review of the most recent groundwater monitoring results as well as the historical groundwater monitoring data, as set out in in the First Quarter 2026 Groundwater Monitoring Report, shows that for the last nineteen groundwater monitoring/sampling events (November 24, 2021 through April 2026) the detectable levels of TCE, PCE and 1,4–Dioxane in the Property's groundwater wells have been declining or remaining generally stable.")). *Id.* ¶ 13. A stay of the Orders pending State Board review of this Petition will not exacerbate known Property conditions. (*Id.* ¶ 18 . In addition, as the Regional Board's delay of over 25 years highlights, the Regional Board cannot now be heard to claim there is great (or any) urgency to the Orders.

This Petition, moreover, is brought only on behalf of Petitioner, while the Orders are (properly) directed to the current owner of the Property. (*See* Exh. A, Order, ¶ 1 at p.1.

Accordingly, a stay as to Petitioner will not affect the obligations of the Property's current owner to undertake the actions required by the Orders while the State Board decides this Petition. (Tekosky Decl. ¶ 5).

Any Other Entities that actually discharged the substances of concern should be named as responsible parties. They will not be harmed if the stay is granted as they are not currently bound by the Orders. There will be no substantial harm to the public interest if the stay is granted as there is no imminent threat to public health or the environment and the current owner remains subject to the Orders.

3. Substantial Questions of Law or Fact Regarding the Disputed Action.

In terms of there being substantial "disputes" about the law and facts, there really are none. But that does not mean the questions of law and fact teed up by this petition are unimportant, or "insubstantial." They are programmatically important to the just administration of the Water Code, and very important to Petitioner's fisc. Those questions include: whether the Orders as to Petitioner are barred by the doctrine of laches, whether Regional Board has fulfilled the evidentiary requirements for naming Petitioner as a responsible party, whether the Regional Board denied Petitioner due process by changing the theories of liability for Petitioner as a purported discharger, and whether additional individuals or entities should be named as parties responsible for complying with, and sharing the costs necessitated by, the terms of the Orders. (Tekosky Decl., ¶ 4).

If a stay is not granted, the Petitioner will continue to incur costs necessary to comply with the Orders while this Petition asserting these substantial questions of law and fact is pending. (*See* Beadle Decl., ¶¶ 6-10).

H. Statement that the Petition has been Sent to the Appropriate Regional Board and to the Discharger.

Petitioner certifies that a true and correct copy of this Petition was emailed on the date listed in the signature block below to the following addresses:

Regional Board:
Ms. Renee Purdy
Executive Officer
Los Angeles Regional Water Quality Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013
Renee.Purdy@waterboards.ca.gov

Current property owner:
Ms. In Ok Song
c/o Mr. Chad Biggins
Biggins Law Group
3701 Wilshire Blvd. Suite 410
Los Angeles, CA 90010
chadbiggins@gmail.com

I. Statement that Substantive Issues or Objections Raised in the Petition were Raised Before the Regional Board.

Petitioner previously requested the relief sought in this Petition when it submitted, on May 9, 2022, written comments on Draft Cleanup and Abatement Order No. R4-2022-XXXX from the California Regional Water Quality Control Board, Los Angeles Region.

The substantive issues and objections raised in this Petition were also raised before the Regional Board, including in each of Petitioner's Conceptual Site Models submitted to the Regional Board, and raised again in the demand letter which has been, or shortly will be, filed with the Regional Board in substantially the form filed herewith as Exhibit LL, at Bates no. MDBSI 006562–006450.

In sum, all substantive issues and objections raised in the Petition have been raised before the Regional Board.

Dated: July 1, 2026

TATRO TEKOSKY SADWICK LLP

By:____________________________
Steven R. Tekosky, Esq.
Attorneys for Petitioner Medical Device Business Service Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1800 N. Vine Street, Suite 234, Los Angeles, CA 90028.

On July 1, 2026, I served the foregoing documents(s) described as:

on the interested parties in this action as follows:

___ by placing ___ the original __x__ a true copy thereof enclosed in sealed envelopes addressed as stated on

State Water Board
waterqualitypetitions@waterboards.ca.gov

BY ELECTRONI SERVICE via Email

_x__ A true copy of the above-referenced documents was served to the recipient(s) noted via the Email listed above.

Executed on July 1, 2026 at Los Angeles, California.

_X_ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Steven R. Tekosky
Steven R. Tekosky