that peak flow can be more than double the average on any given day, thus allowing the City to have an effective release that would be 70% of the actual average flow of the Russian River.(Exhibit 16) This would be equivalent to a motorist defending a speeding ticket by stating that despite exceeding the posted limit his average speed from the point of departure to the point where he was pulled-over averaged under the speed limit. What a boon for commuters who under the Defendants theory would be able to avoid violations by averaging their entire week.

Although the City has never discharged at a rate of 35%, on numerous occasions they have released at rates above 10% of the flow of the Russian River.(Exhibit 16) Clearly this could have never been contemplated from the language of the Permit, "In no case shall effluent discharges exceed 5% of the flow of the River."

Given the obvious, unequivocal language of the Permit and the lack of basis for Defendant's interpretation, the Plaintiffs contend that the City has violated its NPDES permit, for this limitation, on 74 separate occasions.

4. Discharges greater than 1% in violation of B(3).

The Permit is specific in that the City cannot discharge at rates above 1% unless the current storage is above the operations curve, the City has requested and the Regional Board has authorized increased discharges . Therefore, Plaintiffs contend that the City violated its Permit by releasing at greater than 1% on at least 242 occasions in violation of Effluent Limitation B(3).

The 1990 NPDES permit states, " Prior to discharges at rates exceeding one percent of the flow of the Russian River, or at river flows less than 1000 cfs, the permittee shall obtain authorization from the Regional Board or the Executive Officer. Such Authorization shall be based on evidence that justifies the necessity for the discharge....."(Exhibit 2, 1990 NPDES Permit pg. 8).

The language on its face say "discharges" indicating that their might be more than one in a season and for each discharge the City must submit a report that "justifies the necessity for the discharge". The language is clear on its face.

Prior to receiving authorization to release above 1% of the flow of the Russian River the City must submit documentary evidence to the Regional Board consisting of, among other criteria, the following:

" The variance of the current storage above the operations curve and the time required to reapproach the curve at various dilution rates given the current Russian River flow at Hacienda Bridge and the most recent inflow rates to the system." (Exhibit 2, 1990 NPDES Permit pg. 8)

On page 2 of Executive Officer's Summary report for January 30, 1986, item 2 states "**Discharges** exceeding one percent would have to be made only when the accumulation of stored effluent exceeded planned operational levels." *(emphasis added)* (Exhibit 7). On page 3 of the same report the Executive Officer goes on to say, " **In those cases** the City would have to document the need to discharge at higher rates."

Under Order No. 86-190 the findings of the Regional Board were that: "The amendments to the Basin Plan adopted by the Regional Board in June 1986, as approved by the State Board, authorized the discharge of advanced treated effluent from the Laguna wastewater treatment and disposal facilities at rates up to five percent of the flow of the Russian River under limited and specific circumstances. Such circumstances are broadly defined as those occasions when weather and river conditions cause the effluent storage level to increase at critical times above that indicated by the dischargers operational curve (a plot of total volume v. time). **At such times**, discharges may increase above one percent of the flow of the Russian River **to return storage back below** the operational storage curve."(*emphasis added*) (Exhibit 11, 1986 NPDES Permit pg 4; Exhibit 25).

In a letter from Bruce Burton, District Engineer for Department of Health Services to Ben Kor the Department "requests that **each authorization** for the City to discharge above one percent be limited....".*(emphasis added)*(Exhibit 19).

When the storage plot line is above the operational plot line and the other factors support an increase in discharge, the City would be allowed an increase above 1%, not to exceed 5% of the flow of the Russian River, until the storage returns below the operational curve, at which time the City would be required to return to their 1% limit (Exhibit 26). The findings of the

Regional Board continue to state," These operational procedures shall be designed to minimize the number of occasions of discharge above one percent....". Accordingly this restriction was placed in the 1986 , 1990, and 1995 Permits. (Exhibit 11, 1986 NPDES Permit pg. 5; Exhibit 2, 1990 NPDES Permit pg. 5; Exhibit 13, 1995 NPDES Permit, pg. 9)

In two letters from Miles Ferris, Director of Utilities for the City of Santa Rosa to Regional Board Executive Director, Ben Kor, the City acknowledges the understanding of the Board members that this increased allowance above the previous 1% limit was for emergency circumstances (to avoid another Big Spill) and to act as an Interim Contingency Plan until the City had developed and implemented its long range plan (Exhibit 27). After reviewing the Board's comments Mr. Ferris makes the following proposal, "When the storage level meets the operational curve, the City will continue to discharge at the rate necessary to maintain the operations curve. When weather conditions permit the City to discharge effluent at one percent of the Russian River flow, and drop below the operations curve, the City will discharge at one percent until storage levels once again exceed the operations curve....". In the follow up letter from Mr. Ferris to Mr. Kor, Mr. Ferris indicates that even if the storage levels are above the operations curve the City would not necessarily need to release above 1% to meet their storage goals.

It should be noted that the Operations Curve was designed for two purposes; 1) to prevent an overflow or uncontrolled release of effluent and, 2) to meet irrigation contracts for the next year. An examination of the Operations Curve will show that the City is allowed to release above 1% when storage is only 15% of capacity, In other words according to the Operations Curve the City can release above 1% when storage is only 0.23 billion gallons despite a storage capacity of more than 1.5 billion gallons. Even at the highest ratio of Actual to Operational the storage system is only 75% full with more the 0.5 billion gallons of capacity remaining (Exhibit 25).

The evidence will show that the City has been requesting release authorization prior to the Storage Curve exceeding Operational Curve levels and the Regional Board Executive Officer has been granting the City's request. (Exhibit 40, 41) The City only makes one request per

season. After the first request for increased discharges, the City then releases above 1% when ever it deems necessary.

It is Plaintiffs' contention that the City is allowed to discharge above 1% of the flow of the Russian River only when its Storage Curve exceeds its Operational Curve and the other criteria of effluent limit B(3) are met. That each discharge above 1% requires the same documentation specified in the Permit section B(3). To imply that the City only needs to exceed the Operational Curve, once, then may be given carte blanche to discharge above 1% for the remainder of the season, flies in the face of reason as well as all documentary evidence to the contrary. Under the City's interpretation and looking at the Operations curve for 1996 (Exhibit 25) they would be able to begin its releases above 1% as soon as the discharge season starts, despite the fact that the storage ponds are 85% empty. The City's interpretation renders the B(3) discharge limitation, in the Permit, virtually meaningless. Plaintiffs' interpretation conforms to the evidence and is logical and consistent with the intent of the Clean Water Act itself. Further clarification comes from Supplement to the Executive Officer's Summary Report 9:00 a.m., January 30, 1986 which states "Discharges exceeding one percent would have to be made only when the accumulation of stored effluent exceeds planned operational levels." (Exhibit 7)

In light of the plain language of the Permit, its clear intent, and the City's prior history, it is Plaintiffs' contention that the City's discharges which exceed 1% when current storage is below the operations curve constitutes 242 violations of the City's permit in regard to this one limitation.

5. Defendant Failed to Monitor Final Effluent for Chlorine and Coliform Organisms

The Permit requires the Defendant to sample the final effluent and measure for chlorine residual and coliform organisms. Evidence will show that the City only measured one of the three effluent lines on any given day. Plaintiffs were able to find only two examples where Defendant sampled more than one of its three effluent flows on any particular day. Therefore, Plaintiffs allege that Defendant violated it NPDES Permit on 2280 occasions for chlorine residual in that the City has no data which it can present which meets the requirement of the

Permit. Plaintiffs allege that Defendant violated it NPDES Permit on 2280 occasions for daily maximum coliform organisms and 2280 occasions for coliform monthly median in that it has no data which Defendant can present which meets the requirements of the Permit.

The facts will show that effluent flows from the treatment plant and is split into three streams which then go into three contact chambers (Exhibit 14, Stinebaugh dec 145:8-17; 148:1-4). The function of these contact chambers is to allow sufficient surface contact and contact time of the effluent with the disinfectant to oxidize organics and well as kill bacteria and virus. Time, temperature, flow rate, pressure and other factors effect the function of the contact chambers.(Exhibit 28) The Defendant can point to no evidence that the flows coming out of each chamber are identical. In fact, in the two instances where Plaintiffs could find that more than one of the chambers was sampled, the results were different (Exhibit 29).

It is Plaintiffs position that the Permit requires the City to sample its final effluent. Specifically the Permit states, "Monitoring Discharge to the Laguna Effluent Disposal System Samples to be taken after disinfection. These monitoring requirements apply to discharge point 015." (Exhibit 2, 1990 NPDES Permit, Monitoring pg. 1) Discharge point 015 is defined as the Laguna Treatment Plant outfall to Laguna de Santa Rosa or Reclamation System. (Exhibit 2, 1990 NPDES Permit pg. 5) All of the effluent limitations in B(1) are specified in that section. Not only is the Permit explicit in that regard, but it is the combined impressions of William Stinebaugh, Deputy Director of Utilities and Manager of the City's wastewater treatment plant, Tuck Vath, lead Regional Board Staff member responsible for permitting and inspecting Defendant's operation, and David Richardson, CH2M Hill engineer and Defendant's expert, that the samples are taken after the streams are commingled. (Exhibit 14, Stinebaugh depo 146:8-12; Vath depo 31:21-26, 32:1-6; Richardson depo 89:16-26; 90:1-8).

Plaintiffs could find no pattern to the City's sampling of the contact chambers. On several occasions the same chamber was sampled on successive days. Over a typical month the sampling was neither random nor balanced. (Exhibit 47)

Accordingly Plaintiffs have determined that the Defendant has violated its NPDES Permit a total of 6840 times with respect to chlorine residue and coliform measurements in that it has no data it can present which satisfies the requirement of its permit.

6. City Has Numerous Hydrogen Ion (pH) Violations.

The Defendant's 1990 NPDES Permit states that representative samples of effluent from the final effluent should have a pH not less than 6.5 nor greater than 8.5. The City takes samples on a daily basis and places those results on data sheets which are later transferred to the Defendant's self monitoring reports. Plaintiffs have examined Defendant's own raw monitoring data and have determined that Defendant has violated its Permit on 75 occasions with respect to pH (Exhibit 30).

The City generally takes two pH samples on a daily basis. Both samples are measured and the results recorded in City's data log book entitled "Analyzer Daily Check Sheets". (Exhibit 30) From those two actual measurements, the City extrapolates the number used for their self monitoring reports. This number recorded in the official self monitoring report is often rounded off and rounded up. What is actually measured as a pH value of below 6.5 is often reported as a value of 6.5. The City is required to report all measurement of final effulent which are violation of their permit. The raw data was obtained from the City's own records. The device used to measure the pH is either a Beckman or an Orion with an accuracy of 0.001 pH units.(Exhibit 45) An examination of the raw data shows 75 actual readings which violate the terms of the City's permit.

7. The City has Numerous Other Numeric Effluent Violations including BOD, Turbidity, and Toxicity

Plaintiffs allege 1350 violations of the City's 30-day average turbidity limit, 92 violations of the turbidity daily maximum, 90 violations of the 30-day average BOD limits, 14 BOD 7-day average violations, 15 BOD daily maximum violations and 84 21-day B(4) fish toxicity violations. All of these violations occurred in the treatment ponds. Plaintiffs maintain

that the ponds are part of the plant for purposes of compliance with the terms of the NPDES Permit.

Defendant will contend that the ponds are not the point of compliance for purposes of the NPDES Permit and will refer the Court to a Regional Board Meeting which took place in Eureka and a reference document the City contends was made part of the record of that meeting. This note is entitled "Issues related to the draft NPDES Permit prepared for the City of Santa Rosa".(Exhibit 31) That note discuses the belief of Regional Board staff that "AWT standards can only be properly determined immediately following the treatment plant and prior to the storage of treat effluent in the storage ponds. For that reason, effluent limitations were written to apply at the terminus of the Laguna treatment facilities and not at all possible discharge points of the holding ponds. Staff believes that this is appropriate even though it may be argued that additional treatment occurs in the holding ponds." It should be noted that this critical meeting took place in Eureka more than 200 miles and five hours drive from Santa Rosa. Furthermore, Plaintiffs have not been able to determine if this note was ever made part of the public record during public proceedings and if the public had an opportunity to comment as required by law. To the extent that the public was not allowed to comment on this major change from previous Permits, to the extent that this change in the Permit represents backsliding as defined by 33 U.S.C § 1342(o) of the Clean Water Act, and to the extent that this interpretation contradicts the language of the Permit, Plaintiffs believe that the ponds are part of the plant and the City is required to both monitor and maintain numeric effluent limitations in those ponds as per section B(1) of the permit.

The holding ponds were constructed specifically to store effluent. Further treatment does occur in the ponds. Under the permit these holding ponds are not defined as receiving waters for the treatment plant. Finally, these ponds are identified as part of the wastewater treatment system in the permit. Consequently Plaintiffs have sufficient basis for alleging that the holding ponds should be considered part of the facility.

In a communication from Miles Ferris, Director of City Utilities, to Ben Kor, Executive Director of Regional Board Staff, he states "The existing treatment system at the Laguna

Regional Wastewater Treatment Plant ("Laguna") consists of the following steps: .....Pond storage and transmission facility that produce, as a minimum, an additional 7.5 days of chlorine contact." (Exhibit 32)

Treated effluent is released from the ponds into the receiving waters. By definition the final effluent is this release. By measuring effluent before the ponds the City is not measuring the actual final effluent nor adequately assessing the effect of its discharges on the receiving waters.

G. Regional Board's Staff "Interpretations" of the NPDES Permit are De facto Modifications

There was a improper delegation of authority to the Regional Board staff when they either modified the Permit after it was approved by the Board, or made impermissible interpretations amounting to a modification, all in violation of the Clean Water Act, Porter-Cologne Act and California Water Code. CWC §13223, Cal. Code Regs. Title 23 §2235, 40 CFR §122.62 (see also *Ackels v. U.S.E.P.A.*, 7 F3d. 862, 864 (9th Cir. (1993).

The interpretation of the Permit by the staff of the Regional Board is impermissible and unreasonable given the history previously discussed and basic intent of the Clean Water Act. The objective of the Clean Water Act 33 U.S.C. §§ 1251-1376 is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Id. §1251(a). The Clean Water Act, as amended in 1972, provides that in order to achieve this objective, "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." Id.

Staff's "interpretation" of the discharge requirements would allow the City discharges as much as 70% of the flow of the Russian River. Although such flows have not been observed, several releases of greater than 10% of the flow of the River have been reported. In all those cases of exceedences of 10%, the Staff does not consider the City to be in violation of its permit despite the specific language in the Permit which states that in no case shall any discharge of wastewater exceed five percent of the flow of the Russian River. Therefore, it is Plaintiffs'

conclusion that Staff's "interpretation" amounts to a de facto modification of the specific and unambiguous language of the Permit and the clear legislative intent of the Clean Water Act. In addition to being impermissible for the reasons stated above such modifications would likely run afoul of the substantive constraint on the ability of regulators to modify permits found in 33 U.S.C. §1346(o), the anti-backsliding provisions of the Clean Water Act.

As stated in a Ninth Circuit Court of Appeals recent decision in *CBE v. UNOCAL*, 96 CDOS 3359, 3362. "state and federal regulations govern the modification of NPDES permits.....These regulations, both procedural and substantive, ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities."

Any attempt to modify an NPDES permit's existing compliance schedule must be accomplished through a formal permit modification. Public Interest Research Group v. Yates Industries, 757 F. Supp. 438, 445 (D.N.J. 1991). United States v. Ohio Edison Co., 725 F. Supp. 928, 930-932 (N.D. Ohio 1989), *CBE v. UNOCAL*, 861 F. Supp. 889, 899.

The procedures for NPDES permit modification are governed by federal regulations and are mandatory. Cal. Code Regs. Title 23, §2235.2; 40 C.F.R. §123.25(22); Ackels v. U.S. E.P.A., 7 F.3d 862, 864 (9th Cir. 1993); United States v. Metropolitan Dist, 16 Envtl. L. Rep. 20621, 20624 (D. Mass. 1985). Unless properly modified in accordance with those procedures, the permit as originally issued remains in effect, and violations of the permit may be subject to a citizens' enforcement suit. 40 C.F.R. §§122.41(f), 122.62, 122.63; Public Interest Research Group v. Yates, 757 F. Supp. at 445; United States v. Metropolitan, 16 E.L.R. at 20624.

Had the Board intended to modify the City's permit, it would have been required by applicable regulations to find that cause for the modification exists under either 40 C.F.R. §122.62 or §122.63 and follow other procedures in part 124 (or procedures of an approved State program). Yet it did none of these things.

First, the Board made no finding of cause appropriate for modifying the City's permit. Second, the Board did not prepare a draft permit, issue a fact sheet setting forth the significant factual, legal, methodological and policy questions considered in preparing the draft permit, or

take other mandatory steps to ensure careful assessment of alternatives. 40 CFR §§124.6, 124.8(a), 124.10, 124-11, 124.12, 124.56.

We recognize that the Regional Board has the right to exercise prosecutorial discretion and they may interpret the Permit with that goal in mind; however, the Staff of the Regional Board without Board approval and public comment, cannot, on its own, carry out actions that are de facto modifications. *CBE v. UNOCAL*, 861 F. Supp. 889 at 903; *CPIRG v. Shell*, 840 F. Supp. 712, 716-717. Allowing an impermissible modification to be termed a permissible interpretation creates an enormous loophole, thereby allowing dischargers to achieve, in effect, modifications that would be illegal under the Clean Water Act. *CBE v. UNOCAL*, supra. Defendant contends that the permit specifies effluent and flow limitations but not means of compliance. The City absurdly asserts that taking the peak hourly flow multiplied by 24 averaged over 7 days from Friday to Thursday is simply a means of compliance, despite they fact that this "means of compliance" leads to greater discharges. Accepting the City's assertion would allow dischargers to avoid obvious requirements of their permits by merely redefining compliance. The City's interpretation of law is a poorly disguised attempt to manipulate the system and would render any regulation or law, to which this principle was applied, virtually meaningless and unenforceable.

H. Interpretation of the NPDES Permit Presents a Question of Law

The parties' dispute over the meaning of the NPDES permit presents a question of law for the court to decide. *PIRG of New Jersey v. American Cyanamid Co.*, 23 ERC (BNA) 2044, *CPIRG v. Shell*, 840 F. Supp. 712 (N.D. Calif. 1993), An NPDES permit is not a contract; rather it is a legally enforceable rule drafted by a regulatory agency. As such, it is akin to an agency regulation or rule, which the court would normally interpret.

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I. Interpretation Must Be Reasonable and Consistent with Underlying Purpose of the Law

Staff interpretation must be consistent with the language of the Permit and its underlying purpose. *CPIRG v. Shell*, supra at 716. In construing NPDES permits, courts may defer to the agency drafting the permit provided the agency interpretations are reasonable and do not conflict with both the language and purpose of the Permit. *PIRG of New Jersey v. Yates* 790 F. Supp. 511, 514 (D.N.J. 1991), *CPIRG v. Shell*, supra at 716. *Skidmore v. Swift & Co.* 323 U.S. 134

Tuck Vath, lead Regional Board staff person responsible for permitting and inspection of the City of Santa Rosa's treatment facility and author of the 1990 permit (Exhibit 14, Vath depo, 17:24-26, 18:1-17), agreed with Plaintiffs in his deposition that the average flow was a more precise measurement than the peak flow (Exhibit 14, Vath depo, 69:1-26) and the peak flow leads to greater discharges than average flow (Exhibit 14, Vath depo, 129:1-9)

The State Water Resources Control Board Administrative Procedures Manual governing NPDES permits, which Mr. Vath states is followed when drafting Permits, and was followed when drafting this Permit, states, "Effluent limitations shall be specified in a technically correct and precise manner." (Exhibit 18)

Even if the Board was not required to complied with the procedural requirements for permit modifications under 40 C.F.R. §123.25 , their "interpretations" of the Permit would violate the Act's "anti-backsliding" provision:

> [i]n the case of effluent limitations established on the basis of section 1311(b)(1)(C) of this title or section 1313(d) or (e) of this title [all concerning water quality standards], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit ....

33 U.S.C. §1342(o)(1)3; Public Int. Research v.N.J. Expressway Authority, 822 F. Supp. 174, 185.

Courts have explained the rationale for the anti-backsliding provision of the Clean Water Act was as follows: "Congress clearly did not view modification as a vehicle which dischargers could freely use to relax or eliminate effluent limitations." Texas Municipal Power Agency v.

Administrator of United States Environmental Protection Agency, 836 F 2d 1482, 1486 (5th Cir. 1988).

As discussed the Staff's "interpretations" lead to absurd results, potential for abuse, and rendered the actual language of the permit nearly meaningless. For all the reasons presented the Staff's "interpretation" of the provisions of the Permit are inconsistent with the language of the permit, its underlying purpose, and have no reasonable basis.

J. Public Was Not Informed Nor Given Opportunity To Comment

The public was not informed nor given an opportunity to comment on the Permit in regard to how the insists flows should be calculated, nor where compliance was measured, in violation of 40 CFR §125.10 and 33 U.S.C. §1342(a)(1). According to the State Water Resources Control Board Administrative Procedures Manual governing NPDES permits, "All significant activities conducted in the development of a permit must be documented and placed in the dischargers file." (Exhibit 33, SWRCB AP Manual pg 11) "Calculations and other explanation of the derivation of effluent limitations and special conditions" are required to be part of the fact sheets for the NPDES Permit (Exhibit 33, SWRCB AP Manual pg 12). In the permit itself, "Effluent limitations shall be specified in a technically correct and precise manner" (Exhibit 33, SWRCB AP Manual pg 14). The Administrative Procedures Manual requires that the Board hold public hearings (Exhibit 33, SWRCB AP Manual pg 18) in accordance with 40 CFR §125.10 and 33 U.S.C. §1342(a)(1). All pertinent material relating to the discharge shall be available to the public for inspection (Exhibit 33, SWRCB AP Manual pg 19). It is clear from the testimonies of Executive Director Ben Kor, lead staff person Tuch Vath and Senior Water Resources Control Engineer, Robert Tancredo, that these procedures were not followed in either the Staff's method for "interpreting" discharges nor the point of compliance for numeric effluent limits.

In fact we can find no place where the compliance criteria was ever written or memorialized. We only know of oral discussions between the Board Staff and the City.

Reliance on oral assurances for interpretations of complex statutes is inappropriate, especially where those statements run counter to the express written provisions of a permit. *Public Interest Research Group v. Yates Industries*, 757 F. Supp 438, 449 (D.N.J. 1991), Heckler v. Community Health Services, 467 U.S. 51 (1984)

K. Defendant Is Strictly Liable for Any and All Violations

The statutory scheme makes Defendant, City of Santa Rosa strictly liable for any violations of its NPDES permit. *CBE v. UNOCAL*, 861 F. Supp. 889. Reliance on advice or suggestions of the Regional Board staff will not relieve Defendant from actual violations. *United States v. Earth Sciences, Inc.*, 599 F. 2d 368, *Sierra Club v. Union Oil*, 813 F. 2d 1480. *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 205 (D. Mont. 1990); *United States v. City of Hoboken*, 675 F. Supp. 189, 198 (D.N.J. 1987). Thus, neither good faith, impossibility, nor data reporting errors, are accepted as valid defenses to liability, Sierra Club, at 1491-92; *Hoboken*, at 198; *Student Public Interest Research Group ("PIRG") v. AT & T Bell Laboratories*, 617 F. Supp. 1190, 1203 (D. N.J. 1985) In short, "excuses are irrelevant; under the [Clean Water] Act the party must either achieve the discharge levels it has been allowed, or pay the consequences of its discharge, or stop discharging." *Hoboken*, at 198.

The language of the permit itself states, "The permittee must comply with all of the conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act" (Exhibit 2, 1990 NPDES Permit pg. 14) See also: 40 CFR § 122.41(a).

Reliance on oral assurances for interpretations of complex statutes is inappropriate, especially where those statements run counter to the express written provisions of a permit. *Public Interest Research Group v. Yates Industries*, 757 F. Supp 438, 449 (D.N.J. 1991); *Heckler v. Community Health Services*, 467 U.S. 51 (1984)

Each sample taken which is in excess of the Defendant's effluent limit constitutes a violation. *PIRG of New Jersey v. Powell Duffryn Terminals Inc.*, 913 F. 2d 64 (1990). Each violation of a 30-day, 21-day or 7-day average limit counts for 30, 21 or 7 violations.. *Atlantic*

States Legal Foundation v. Tyson Foods, Inc. 897 F. 2d 1128, at 1139-1140 (1990), Gwaltney, 484 U.S. 49. The City's treatment facility operates 365 days a year, therefore they receive no offset for those days when the plant in not in operation. NRDC v. Texaco, 2 F. 3d 493, 507-508. As with pH the City cannot pick and choose which results it wishes to report. In addition, it cannot round up, round off and average out obvious violations.

L. The North Coast Regional Board is Captive of the City of Santa Rosa

Judge Henderson in his decision in CBE v. UNOCAL (861 F. Supp. 889, 906) observed, "The Court can easily imagine that Congress, realizing that state enforcement agencies can be susceptible to regulatory "capture" by the industries they regulate, might have feared that state agencies might consent to inappropriately lax compliance agreements." Nothing could be truer then in this case.

In the past when the RRWPC, its affiliated members, other citizens and citizen groups have sought to make public presentations at meetings before the Regional Board, they have been blocked, abused, interrupted, and provided with limited time, most of which has been taken up with arguments from members of the Regional Board. On one occasion Plaintiff Brenda Adelman was so rudely treated by a member of the Regional Board that after the meeting another Regional Board member called Ms. Adelman to apologize. (Exhibit 43) The Chairman of the Board, Mr. Ross Liscum is a real estate broker who stands to benefit by continued development in Sonoma County, in addition Mr. Liscum is Chairman of the City of Santa Rosa's Board of Public Utilities, a body charged with the responsibility of overseeing the wastewater management facility which is the subject of the current action. Mr. Liscum is in essence the boss of both the Board's executive director Ben Kor, as well as the City's Director of Public Utilities, Miles Ferris. Mr. Liscum was the selling agent when Mr. Ferris bought his house.(Exhibit 14, Ferris depo. 87:22-26, 88:1).

Mr. Liscum has recently become a member of the City's "Rapid response media team" with a mandate to "set the record straight" regarding news stories and public criticism of the

City's wastewater problems. Mr. Liscum has been quoted as saying "...we need to be proactive on this, not to be defensive, but to set the record straight." (Exhibit 34) The "rapid response team" was also subject to public criticism for trying to present wastewater as clean and free from pollution.(Exhibit 35) Mr. Liscum has appeared on behalf of the City of Santa Rosa at another Regional Board meeting allegedly wearing his "other hat" and in violation of CWC § 13207. (Exhibit 36). Mr. Liscum, wearing his hat as a regional board member, has voted on issues directly effecting the City of Santa Rosa. (Exhibit 37). In one Regional Board meeting Mr. Liscum, Chairman of the Public Utilities, engaged in discussion concerning the City of Santa Rosa's Long Range Plan while Mr. Liscum, Chairman of the Regional Board, abstained from participation. (Exhibit 44)

The Regional Board is located in the City of Santa Rosa. A majority of the Regional Board's employees live in the county or the City itself. Santa Rosa is the largest single discharger in the entire Region 1. On critical issues involving the City of Santa Rosa, the Board has limited or suspended discussion, failed to address comments, and has moved meetings to Eureka (more than 200 miles and 5 hours by car north) where few but the very dedicated citizens could take the time to attend. The captive nature of the Regional Board and its Staff has created a body insensitive to the citizenry they are sworn to serve and protect. The duty of being part of the Regional Board carries with it the duty to demonstrate to an apprehensive citizenry that they are protecting the environment. *County of Inyo v. Yorty*, 32 Cal. App. 3d 795; *People ex. rel. Department of Public Works v. Bosio*, 47 Cal. App. 3d 495.

VI. CONCLUSION

The "central purpose" of the Clean Water Act's citizens' suit provisions is to permit citizens "to abate pollution when the government cannot or will not command compliance." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 62 (1987).

The Plaintiffs request that the Court reject the "interpretations" of Staff as impermissible modifications of the NPDES Permit; as unreasonable and inconsistent with the procedural

history; as unreasonable and inconsistent with the underlying intent of the Clean Water Act; and because these interpretations were never disclosed to the public prior to implementation as required by law. The Plaintiffs request the Court find that the Defendant, City of Santa Rosa, in violation of both the flow and numeric effluent limits detailed in this brief. The Plaintiffs further request that the court find that Defendant's violations were wilful and neither negligent nor accidental.

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. State and federal regulations govern the modification of NPDES permits. These regulations, both procedural and substantive, ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities. The Court should not allow state enforcement agencies that have become "captive", to consent to inappropriately lax compliance interpretations. This Court should not allow polluters to excuse their violations based upon lack of action and compliant attitudes of regulatory agencies.

Plaintiffs understand that the City relied upon the advice of the Staff of the Regional Board; however, the best that can be said is that the City was given bad advice and followed it.

DATED: June 28, 1996

SILVER & SILVER

Jack Silver, Esquire
Attorney for Plaintiffs
Russian River Watershed Protection
Committee and Brenda Adelman

PROOF OF SERVICE

Code of Civil Procedure Section 1013a(3), 2015.5

I declare that:

I am over the age of eighteen years and not a party to this action. My business address is 902 Stevenson Street, Santa Rosa, CA 95404, which is located in the County where this mailing described below took place.

I am readily familiar with the business practice at my place of business, for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 28, 1996 at 902 Stevenson Street, Santa Rosa, CA 95404, the within legal document(s) where placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, addressed to the parties indicated below, and the envelope was placed for collection and mailing on that date following ordinary business practices.

DOCUMENT: Plaintiff's Trial Brief

ADDRESSED TO:

Rene' Auguste Chouteau, Esquire
100 Santa Rosa Avenue
P. O. Box 1678
Santa Rosa, CA 95402

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 28th day of June, 1996, at Santa Rosa, California.

Lisa H. Mador

ATTACHMENT #19

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUSSIAN RIVER WATERSHED PROTECTION COMMITTEE and BRENDA ADELMAN,

Plaintiffs,

vs.

CITY OF SANTA ROSA, and DOES 1 TO 10, inclusive,

Defendants.
_____/

CASE NO: C-95-1550-SC

PLAINTIFFS' CLOSING ARGUMENT

Summary

1. It is a violation of Section A-1 of Defendant's 1986 NPDES Permit[1] (Permit), Section A-7 of Defendant's 1990 Permit, and Section A-6 of Defendant's 1995 Permit for Defendant to discharge treated wastewater after October 1st and before the Russian River reaches 1,000 cubic feet per second, or before being given consent by the Regional Board or its Executive Officer.

2. It is a violation of Section A-2 of Defendant's 1986 Permit, Section A-8 of Defendant's 1990 Permit, and Section A-7 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 1% of the flow of the Russian River as measured at Guerneville USGS Gauge No. 11-4670.00 prior to being given consent to do so as provided in those Permits.

3. It is a violation of Section A-4 of Defendant's 1986 Permit, Section A-9 of Defendant's 1990 Permit, and Section A-8 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 5% of the flow of the Russian River as measured at Guerneville USGS Gauge No. 11-4670.00 **at any time.**

4. It is a violation of Sections A-2 and B-5 of Defendant's 1986 Permit, Sections A-8, and B-3 of Defendant's 1990 Permit, and Sections A-7, and B-3 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 1% at any time in which Defendant's actual storage of treated wastewater is **below** the Defendant's operations curve.

5. It is a violation of Section B-1 of Defendant's 1990 Permit, and Section B-1 of Defendant's 1995 Permit for Defendant to sample for chlorine from only one of its three chlorine contact chambers on a daily basis.

6. It is a violation of Section B-1 of Defendant's 1990 Permit, and Section B-1 of Defendant's 1995 Permit for Defendant to fail to sample for coliform at the location described as

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[1] Plaintiffs served its 60 day letter on Defendant on February 21, 1995. In accordance with 28 USC 2462, SIERRA CLUB v. CHEVRON (1987) (9th Circuit) 834834 F.2d 1517, 1520-21. Plaintiffs are entitled to claim violations for a period five years prior to the date of service of the 60 days letter. Therefore, Plaintiffs claim violations for the period commencing February 21, 1990 through the present. Defendant's 1990 Permits was not issued to Defendant until August 16, of 1990. Defendants prior NPDES Permit was issued on December 4, 1986, was the permit in effect on February 21, 1990 and is therefore relevant to these proceedings.

015 in its Permits.

Argument

Section 1. It is a violation of Section A-1 of Defendant's 1986 Permit, (Exhibit P-11) Section A-7 of Defendant's 1990 Permit, (Exhibit P-2) and Section A-6 of Defendant's 1995 Permit (Exhibit P-13) for Defendant to discharge treated wastewater after October 1st and before the Russian River reaches 1,000 cubic feet per second, or before being given consent by the Regional Board or its Executive Officer.

For this phase of the case Plaintiffs request a finding only that it is a violation of Defendant's Permit for Defendant to discharge treated wastewater prior to the Russian River reaching 1000 cfs or prior to being given consent. All of Defendant's Permits state this requirement clearly and unequivocally. Defendant's defense is that the Permits do not require consent to be given in writing and it therefore may be given orally. Defendant alleges it was given oral consent to commence discharge in each of the discharge seasons at issue in this case[2].

Plaintiffs do not dispute that Defendant may be given oral permission to commence discharge in any season. However, the purpose of this phase of the case is not to determine whether they have been given permission, but to determine what is a violation. It will remain for the next phase of the case for Defendants to show by competent evidence, if and when they were actually given consent as required by their Permits.[3]

Section 2. It is a violation of Section A-2 of Defendant's 1986 Permit, Section A-8 of Defendant's 1990 Permit, and Section A-7 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 1% prior to being given consent to do so as provided

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[2] The discharge seasons at issue in this case are from October of 1990 through May of 1996. The discharge season commences October 1 and ends May 14.

[3] It should be noted at this stage that the evidence on this point given in the first phase of the trial is potentially in conflict. Regional Board Staff engineer Mr. Tuck Vath, who has been primarily responsible for the Defendant's NPDES Permit requirements from 1990 through the present, testified that he had given oral consent. Mr. Ben Kor, Executive Director of the Regional Board Staff testified that he recalls giving these consents and believes that he may have written memoranda to that effect.

in those Permits.

Plaintiffs submit that on this point the Permits are clear and unequivocal on their face: Defendant is not to discharge treated wastewater in excess of 1% unless it has been given special consent to do so and only after satisfying the provisions set forth in Section B-5, of the 1986 Permit, Section B-3 of the 1990 Permit, and Section B-3 of the 1995 Permit.

Defendants defense to this provision, as well as the 5% limitation discussed below, is to assert that the enforcement criteria or method of compliance for the 1% and 5% limitations developed by the Defendant City and the Regional Board Staff, and referred to throughout the trial as the "7 Day Averaging/Peak Flow Method" and its use of peak rather than average flow, are legitimate and lawful methods of determining compliance with the flow limitations in Defendant's Permit. Plaintiffs submit that while the 7 day averaging/peak flow method may be legitimate enforcement criteria for the Regional Board Staff to use in order to determine whether it will take any action against the Defendant, this method is not a legitimate or lawful means of measuring compliance with the actual Permits. Further, the use of peak flow rather than actual flow as measured at Guerneville USGS Gauge No. 11-4670.00 has no reasonable basis even as an enforcement criteria.

The testimony in this case makes it clear that the 7 day averaging/peak flow method was developed by the Regional Board Staff in 1985 or 1986 by Regional Board Staff engineer Mr. Luis Rivera under the direction of Regional Board Staff engineer Mr. Bob Tancreto. The 7 day averaging/peak flow method was never made a part of the 1986, 1990 or 1995 Permits. The evidence shows that no one outside of the Regional Board Staff and the Defendant City knew of the existence of this means of compliance until March 15, 1994 when the Regional Board Staff's Executive Officer, Mr. Ben Kor, **partially** revealed this method in a letter to Plaintiff which has been admitted as **Exhibit "P-17"** in this case.[4]

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[4] Plaintiffs submit that the 7 day averaging/peak flow method was only partially revealed in this letter because the information provided did not indicate that compliance was measured only on Thursdays for the 7 day period commencing from the preceding Friday, nor did it reveal that the

The 7 day averaging/peak flow method was mentioned in a public meeting for the first time on May 25, 1995 as memorialized in the minutes of a meeting before the Regional Board Staff held on that date. **(Exhibit "D-512")**. At that time the 7 day averaging/peak flow method was **not** an agenda item. It was mentioned to illustrate how the Regional Board Staff had previously measured flow compliance as part of a discussion regarding a proposal in the 1995 draft Permit in which the Regional Board Staff urged the Board to adopt a means of flow compliance using a 30 day averaging period and the prior day's average flow at the Russian River, rather than the peak flow of the previous day and averaging over 7 days.

The next, and only other mention in public of this method was at the Regional Board's meeting of December 7, 1995 **(Exhibit "P-39")**, at which time Board Member Flournoy (who had been a member of the Board since prior to 1990, according to the testimony of Mr. Kor), asked Mr. Kor how the Regional Board Staff was measuring flow compliance for Defendant's Permit. Once again, at the December meeting the 7 day averaging/peak flow method was **not** an agenda item.

At neither of these meetings was the Regional Board required to take action on the 7 day averaging/peak flow method. Despite this, Defendant asserts that the Regional Board's failure to take any action when the use of this method was partially revealed (see footnote 4) constitutes a ratification of the prior use of this method, and an intention to support its future use, even though the method was not incorporated into any Permit.

Plaintiffs submit that in order for the 7 day averaging/peak flow means of compliance to be valid and lawful it must be subjected to public hearing in accordance with Section 1342(a), and (b) 2 (B) of the Clean Water Act (CWA) and Section 13244 of the California Water Code which is known as the Porter-Cologne Water Quality Control Act (Porter-Cologne)[5]. Public hearing of NPDES Permit issuance or modification is an absolute requirement under both the CWA and the

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averaging was done on a "static" as opposed to a "rolling" average.

[5] "The regional boards shall not adopt any water quality control plan unless a public hearing is first held, after the giving of notice of such hearing by publication in the affected county or counties pursuant to Section 6061 of the Government Code." California Water Code Section 13244.

Porter-Cologne.

Defendant argues that the means of compliance developed by the Regional Board Staff need not be incorporated into the Permits and therefore need not be subjected to public comment. Before addressing this argument directly it should be noted that there are only two kinds of limitations set forth in the Defendant's NPDES Permits: those involving limitations of flow, and those which address numeric effluent limits. The means of compliance for numeric effluent limits are clearly set for the in the Permits themselves in Section D.12(d) (1986) Permit, Section F.10(d) (1990) Permit, and Section G.10(d) (1995) Permit. Quite simply, these sections state that unless specifically set forth in the Permit itself, all numeric measurements are to be determined using the standard laboratory text "Standard Methods For the Examination Of Water And Wastewater", and/or the methods set forth in 40 CFR Part 136.

If the means of compliance for numeric effluent limitations are set forth in the Permit there is no reason why corresponding means of compliance for flow limitations should not also be set forth in the Permit and should not correspondingly be subject to public hearing as required by law.

Addressing directly the Defendant's contention that the means of compliance need not be set forth in the Permit, Plaintiffs have submitted in evidence the State Water Resources Control Board Administrative Procedures Manual, Water Quality, Chapter I, NPDES Permits **(Exhibit "P-33")** which mandates at page 11, under the subject heading Administrative Record, that with respect to the preparation of Permits:

> All significant activities conducted in the development of a permit must be documented and placed in the discharger file. Telephone calls, compliance inspections, monitoring report reviews, and correspondence should be documented routinely on standard forms.
>
> When developing the draft permit, the application, all formal notes, calculations, meetings reports, and literature references shall be entered into the file. The name of the writer and the date shall be included on all materials. The file is a public record and will be maintained in a neat, orderly, complete, and retrievable format in such a manner that the permit development history can be reconstructed.

Curiously, in fact strikingly, and somewhat disturbingly, there is no mention whatsoever of

this 7 day averaging/peak flow method in the Board's file. The complete details of this method, including the use of a Friday to Thursday seven day period, the use of a static as opposed to a rolling seven day average, and any rationale for use of the previous days peak flow as a benchmark for the subsequent day's dilution ratio, are never discussed or explained in any memorandum to the Regional Board, any internal memorandum of the Board Staff, any memorandum of the Defendant, or any correspondence between the Regional Board Staff and the Defendant's staff. This is all the more surprising, (or perhaps not surprising at all) given the testimony from Plaintiff BRENDA ADELMAN that there is immense public interest in the Defendant CITY's discharges of treated wastewater to the Russian River, and her additional testimony that had she known about this 7 day averaging/peak flow method when it was first put in use she would have vigorously and publicly opposed it in every way possible.

In support of the Regional Board Staff's right to develop a means of compliance for the flow limitations in Defendant's NPDES Permits, Defendant points to Section 3223(a) of the Porter-Cologne Act which allows the Regional Board to delegate certain responsibilities to its Staff, and the delegation pursuant to this section by the North Coast Regional Water Quality Control Board to its Executive Officer, Mr. Ben Kor, on December 5, 1985 of all powers except those specifically delineated as set forth in **Exhibit "D-505"**. Among the powers not so delegated, and <u>therefore reserved to the Regional Board as a whole</u>, is the power to modify any water quality control plan, water quality objective, or waste discharge requirement.

Defendant contends that the 7 day averaging/peak flow method does not constitute a modification of Defendant's NPDES Permits. Plaintiffs submit that the use of this method constitutes a **de-facto** modification of the Permit in the manner, and for the same reasons set forth in **<u>CITIZENS FOR A BETTER ENVIRONMENT v. UNION OIL COMPANY, et al</u>** (1994) (ND Cal.) 861 F. Supp.899, affirmed (1996) 96 C.D.O.S. 3359 (hereinafter cited as CBE v. UNOCAL). In that case, which arose in this District, the Regional Board for San Francisco Bay region sought to grant an extension to Defendant's Unocal regarding the limitations on the discharge of selenium

which had been set forth in Defendant's NPDES Permits. The trial court, per Judge Thelton Henderson held this extension to be invalid, which holding was affirmed on appeal.

In this case flow limitations have been specifically set forth in the Permit. The Regional Board Staff (not the Board) has sought to make an interpretation of those limitations which amount to a de-facto modification, because the limitations allow greater discharges than the limitations clearly specified in the Permit, additionally running afoul of the anti-backsliding provisions of the CWA, Section 1342(o).

The testimony of Mr. Ben Kor on his view of the extent of his authority is eloquent and revealing on this point. Mr. Kor, the Staff's Executive Director made it clear that his authority to interpret the Permit clearly allows him to ignore any provision which he elects to ignore. The most revealing testimony on this point was with respect to the limitations set forth in Section A-9 of the 1990 Permit (identical provisions were in the 1986 and 1995 Permits), which state that in no case is the Defendant to discharge more than 5%. Both Mr. Kor and Mr. Vath (as well as Mr. Tancreto and the Defendant's Director of Public Utilities, Mr. Miles Ferris) agree that the words "in no case" means under no circumstances. But Mr. Kor insisted he has the right to define the words "in no case" to mean whatever case he chooses, thereby creating a "case" where none exists. The words "in no case", according to Mr. Kor and Mr. Vath, contain an exception which allows the Regional Board Staff to essentially define the Permit in any way they saw fit, at any time. Following the logic of this testimony, the Regional Board Staff can define compliance as a 7 day average today, a 30 day average next month, and a seasonal average next year, all without any administrative record, public notice, or Regional Board approval.

Plaintiffs concede that the Regional Board Staff has the right to **interpret** any NPDES Permit. Plaintiffs submit, however, that no NPDES Permit may be interpreted so as to allow greater discharge limitations than those set forth in the Permit itself. Yet this is precisely what has been done.

Even assuming for the sake or argument that the Regional Board Staff has the right to make

interpretations on the flow limitations, Plaintiffs submit that those interpretations must be reasonable. In this case they are not. Specifically, Plaintiffs refer to the use of the previous day's peak flow as the benchmark for the subsequent day's dilution ratio. There is nothing in the any of the Permits which would lend itself to this interpretation. In fact there is no rationale whatsoever for the use of this provision. Even Mr. Tancreto, the supervisor responsible for the development of the 7 day averaging/peak flow method, testified twice that the use of the previous day's peak flow was an arbitrarily selected term. The testimony from Dr. John Rosenblum in behalf of Plaintiffs clearly indicates the use of the previous day's peak flow not only results in a fictitious volume of water for the Russian River, but can result in allowing the Defendant a flow discharge which in some cases is much as 2.3 times the actual flow of the Russian River.

The flow of the Russian River results in a real number which can be computed by taking the 24 one hour readings from USGS Gauge No. 11-4670.00, which is designated in Defendant's 1986, 1990, and 1995 Permits. On the other hand, multiplying the highest hourly peak flow by 24 does not render a correspondingly accurate measurement of the flow. Conveniently for the Defendant, the peak will, in all cases, result in a higher number for purposes of the dilution ratio than the average flow, thereby allowing a correspondingly higher discharge of treated wastewater.

While Mr. Tancreto testified that the use of the peak flow was arbitrary, Mr. Ferris testified at great length that the rationale for using the peak flow had to do with the "scouring" effect of heavy flows in the Russian River which would arguably distort the accuracy of the USGS Gauge. However, this was Mr. Ferris "expert opinion"[6] with no supporting evidence or real data of any kind. Both Mr. Ferris and Mr. Tancreto testified that the discharges from the Defendant's discharge points would often not arrive at the Russian River for indeterminate periods, depending upon tidal flow, weather, and the amount of discharge.

Plaintiffs submit that all of this testimony is unnecessary and irrelevant because none of it is

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[6] Mr. Ferris was not declared an expert in this case in accordance with FRCP26(a)(2), but was nevertheless allowed, over objection, to offer expert testimony and opinions.

called for in order to determine the allowable discharge for purposes of the Permit. In order to determine the allowable discharge, all that the Permit requires is a reading from the USGS Gauge to ascertain the flow of the Russian River and a computation of the allowed rate, whether that be 1% or 5%. Moreover, the hours spent in taking testimony on this point show how very important it was for the Defendant's support of their 7 day averaging/peak flow method, and correspondingly illustrate how important it would have been for such subjects to be exposed to public hearing and the opportunity for the public (and the Regional Board itself) to object to these criteria, or support them, or reject them entirely, or participate in shaping them in some meaningful way. Instead, this 7 day/peak flow method represented, in effect, a secret between the Regional Board Staff and the Defendant which was not revealed to any member of the public until March of 1994 (Exhibit P-17) and not even mentioned (and then only partially), to the Regional Board itself, until May and December of 1995, nearly ten years (and perhaps billions of gallons of treated wastewater) after the 7 day averaging/peak flow method had been put into effect.

Defendants further argue that the 1% limitation is reasonably subject to averaging over 7 days because nothing in the Permit indicates that it is a daily limitation. Plaintiffs, on the other hand, have clearly shown that the Defendants are required by the monitoring provision of their Permit to maintain data regarding the dilution ratio on a daily basis.[7]

Correspondingly, Defendants can point to nothing in the Permit which indicates that the 1% limitation is to be seasonal from October 1 (or the commencement of discharge after October 1) through May 14 of the following year (the end of the discharge season). Plaintiffs' interpretation, on the other hand, is consistent with the language of the Permit requiring daily monitoring and the submittal of daily statistics for the flow of the Russian River and the amount of discharge. Plaintiffs' interpretation is also consistent with the testimony of Mr. Kor that it is the intention of the

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[7] "The monitoring and Reporting Program No. 90-79 page 2 (Exhibit 2) states under the section Monitoring Discharge To Receiving Waters that flow is to be measured continuously and sampled daily. The only way to give meaning to this provision is to recognize an intention to require compliance with the limitations on a daily basis.

Regional Board and its Staff to minimize discharges from the Defendant's plant to the Russian River.

Defendants' "interpretation" is arbitrary, and can lead to clearly absurd results in which the Defendant can literally "save up" its discharges and thereafter discharge 30%, or 50%, or even 100% of the flow of the Russian River over a series of days, and not be in violation of its Permit (according to their interpretation) so long as the seasonal discharge rate is met for the 1% limitation. The Defendants' interpretation becomes even more confusing when, according to the evidence set forth in Exhibits P-40 and P-41, the Defendant sought and received authority to increase discharges to 5% in several of the discharge seasons at issue in this case.

In summary, the 7 day averaging/peak flow method is neither valid nor lawful: it was never subjected to public hearing as required by law, it was never submitted to the Regional Board for its approval, and it was never subject of modification proceedings. It represents a de-facto modification of the Permits at issue, it results in plainly ignoring Permit limitations, and it allows for discharges greater than those provided in the Permits. The use of the previous day's peak flow is an arbitrary measurement resulting in a fictitious volume of water which allows greater discharge than using the actual flow of the Russian River, and a correspondingly higher dilution ratio. Lastly, it was never made a part of any of Defendant's Permits at issue, despite the fact that the corresponding numeric effluent limit compliance means are all set forth in those Permits.

Section 3. It is a violation of Section A-4 of Defendant's 1986 Permit, Section A-9 of Defendant's 1990 Permit, and Section A-8 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 5% at any time.

If there is any uncertainty as to the time limitation regarding an allowed discharge limit of 1%, there is no such uncertainty with respect to the 5% limitation. The 5% limitation states **"in no case"** shall any discharge of wastewater exceed 5%. Nothing could be clearer on its face. No case exceptions are identified in this section or in any other section of the Permit which applies to this section. Indeed, Section F-16 of the 1990 Permit located at Pg. 14 (**Exhibit "P-2"**) specifically

indicates that **all** provisions of the Permit must be complied with to prevent violations of the CWA. **There were no deliberations regarding the 5% limitation in the public records concerning the** Defendant's 1990 Permit. There were regarding the 1986 Permit and the relevance of those deliberations to this provision are discussed in Plaintiffs' Motion To Reconsider Admission Of Documentary Evidence submitted herewith.

Once again, Defendant asserts that any exceedences of the 5% limitation on any occasion are allowable based upon the Regional Board Staff's 7 day averaging/peak flow criterion. In that regard, Plaintiffs wish to make clear that Plaintiffs do not dispute the Regional Board Staff's right to prepare and use enforcement criteria to determine whether or not the Regional Board Staff itself will take action against the Defendant for exceedences of its Permit limitations. However, it is clear that if the Defendant follows the enforcement criteria instead of the limitations set forth in the Permit, and thereby exceeds the Permit limitations, it will be in violation of its Permit. See **CALIFORNIA PUBLIC INTEREST RESEARCH GROUP v. SHELL OIL CO.**, 840 F. Supp 712 (N.D. Cal. 1993) at 716-17 (construing language in NPDES permit as an assurance as to how the Regional Board intended to exercise its prosecutorial discretion, and not as a term modifying and weakening the permit's effluent limit).

What the Board Staff chooses to do, and what the Permit requires, are, in this particular case, two entirely different things. The Defendant is required to meet the limitations in its Permit, not the opinions, recommendations, guidelines, or enforcement criteria developed by the Regional Board Staff for its own use.

It should also be borne in mind that the Defendant is not denying it has exceeded the 1% and 5% limitations in its Permits on a daily basis; it is **defending** on the grounds that it has met other limitations outside of the Permit which excuse its failure to meet the Permit limitations.

Plaintiffs respectfully request that the Court consider the ramifications of allowing this kind of conduct to continue, not only with respect to this case, but as precedent in other cases as well. If the Defendant's defense that it was following guidelines outside of the Permit which allow it to

exceed its Permit limitations, is allowed, then the Permit itself, and the entire Permit process, becomes at best advisory, and the real power for compliance becomes concentrated in the hands of the Executive Officer of the Regional Board Staff who is free to ignore limitations and ignore the plain language of the Permit, develop other, secret Permit limitations, in conjunction with the discharger, never disclose these new limitations to the public, never disclose them to the Regional Board itself and reduce the entire NPDES Permit process and the purpose of the CWA to a second class status and an authority inferior to the Executive Officer and his Regional Board Staff. Plainly, this was not the intent of the law. Not only would Citizen Suits under the Clean Water Act be rendered a potential nullity, but even the Court's power to enforce the act on its own would be imperilled because compliant Regional Board Staff members need only testify in any hearings that they had developed undocumented, extra-permit criterion which the discharger was following and thereby render the Permit limitations a nullity. No records need be kept. The public need not be informed. Even the Regional Board, State Board, nor EPA need be informed.

By way of example, as mentioned above, even with language as unequivocal as "in no case", cases are still being invented by the Regional Board Staff in order to excuse and ratify the conduct of the Defendant. The evils of this practice were observed and commented on by Judge Henderson in **CBE v. UNOCAL** supra, when he stated: "Construing the statute to require enforcement provision comparability would not, as the Scituate court contended, be inconsistent with sensible policy or with the goals of the Clean Water Act. The Court can easily imagine that Congress, realizing that state enforcement agencies can be susceptible to regulatory "capture" by the industries they regulate, might have feared that state agencies might consent to inappropriately lax compliance agreements." **CBE v. UNOCAL**, supra 906. (Emphasis added.)

A Permit is akin to a regulation and it is a settled rule that it must be construed in such a fashion that every word has some operative effect. Interpreting one word so as to render another superfluous is anathema to elementary principles of regulatory construction. **CPIRG v. SHELL OIL**, supra, 716. Discharge prohibition A(9) of the 1990 Permit (Exhibit 2, page 6) reads, "In no

case shall and discharge of wastewater exceed five percent of the flow of the Russian River." Section 12(d)(i) (Exhibit 2) states, " 'Daily Discharge' means the discharge of a pollutant measured during a calender day or any 24-hour period that reasonably represents the calender day for purposes of sampling". It is impossible to see how this plain language can be construed such that daily discharge means: "Single hourly peak flow multiplied by 24 and averaged over a static 7-day period starting on a Friday and ending on a Thursday".

Section 4. It is a violation of Sections A-2 and B-5 of Defendant's 1986 Permit, Sections A-8, and A-9, and B-3 of Defendant's 1990 Permit, and Sections A-7, and B-3 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 1% at any time Defendant's actual storage of treated wastewater is below the Defendant's Operations Curve.

Plaintiffs submit that the provisions of Section B-3, Exhibit P-2, (with identical provisions in the 1986 and 1995 Permits), are equally clear in their requirements. If the Defendant wishes to discharge treated wastewater in excess of 1% it must apply for, in writing, and receive from the Regional Board or its Executive Officer written consent to discharge in excess of 1%.

The first criterion listed in B-3 is the "variance of the current storage **above** the operations curve and the time required to **reapproach** the curve....." Even Mr. Ferris during cross-examination admitted that "above" meant "above" and not below. Yet the Defendant continuously applied for, and received consent to discharge in excess of 1% and up to 5% when storage of treated wastewater was well below the operations curve, based upon projections that it would soon meet or exceed the curve.

Substantial testimony was offered by Defendant's regarding the rationale and reasonableness of using this approach, yet no effort was made to introduce any change in the 1990 or 1995 Permit allowing Defendant to discharge in excess of 1% as it's storage approached the curve, rather than exceeded it. Why? The answer is simple: with a compliant Regional Board Staff willing and ready to agree to de-facto modifications of the Permit why should the Defendant risk public hearing?

As a case in point, the Regional Board Staff sought to amend the Permit in 1995 to include a

30 day averaging provision for flow compliance and met with opposition from Plaintiffs herein on the grounds that it was backsliding. The Staff, per the testimony of Mr. Vath, conferred with the Defendant and the 30 day averaging provision was withdrawn.

Defendants have argued that the storage of treated wastewater relative to the operations curve is but one factor to be considered in allowing a grant of authority to discharge in excess of 1%. Defendants contend that it should be given equal weight with the other factors, and not more. In response, Plaintiffs submit that such analysis misses the point entirely: it is not important whether the operations curve is one of 8 factors, 10 factors, 25 factors, or 100 factors. What is important is that the provision simply not be ignored or modified by allowing the Defendants to commence discharges in excess of 1% when its storage of treated wastewater is below the operations curve, particularly in light of the stated testimony on the part of Mr. Kor and Mr. Vath regarding their intentions to limit Defendant's discharges of treated wastewater to the Russian River.

If Defendant thought it was sufficiently important to modify B-1 and allow for discharges when the Defendant's storage approached the curve, but did not exceed it, the Defendant should have sought a modification of the 1990 or the 1995 Permits. Given the testimony of Mr. Kor this recommendation would have undoubtedly received the Staff's support. But it would also have been necessary to place this on the Board's agenda, disclose it to the public, and offer the reasons, and rationale for public scrutiny. Plaintiffs submit that in all likelihood this provision would have been opposed as backsliding under Section 1342(o) of the CWA and would probably have met a fate similar to the 30 day averaging provision: opposition and withdrawal.

The purpose of the Clean Water Act as stated in its preamble is to eliminate the discharge of pollutants to the navigable waters of the United States. NPDES Permits are intended to limit those discharges before their eventual elimination. We once again observe that if there is one permit for public consumption, and another, private permit reinvented between the Regional Board Staff and the discharger outside of the public's hearing and sight, and this private permit allows for enlarged limitations, then mischief, deception and advantage-taking will be substituted for the Congressional

intent in enacting the CWA.

As with the pervious example concerning the 5% limitation in flow, the permit language must be construed in such a fashion that every word has some operative effect. Interpreting one word so as to render another superfluous is anathema to elementary principles of regulatory construction. Effulent limitation B(3) states that, " Evidence shall consist of documentation related to the following factors:

- The variance of the current storage above the operations curve and the time required to reapproch the curve....."

Plaintiffs submit it is impossible to have documentary evidence of the **current** storage **above** the operations curve, unless the current storage is indeed above the curve. The Permits are clear in showing that the Regional Board approved, and the public believed, that above meant above and not below, and authorization for releases above 1% could not be made unless this factor was met.

Section 5. It is a violation of Section B-1 of Defendant's 1990 Permit and Section B-1 of Defendant's 1995 Permit for Defendant to sample for chlorine from only one of its three chlorine contact chambers.

The testimony indicates that two chlorine samples are taken at the Laguna Wastewater Treatment Plant near the end of the treatment process: the first sample is taken from one of three chlorine contact chambers and is a "grab" sample taken to comply with the Permit, which requires a grab sample. The second sample is taken by a device which tests a combined sample from the three chlorine contact chambers. The second sample is taken to as part of a feed back control loop for chlorine addition to the system.

Plaintiffs' expert agrees that a sample from the combined streams would be a more accurate sample, however, this is not in the Permit. Once again, Plaintiffs' point regarding this issue is simple: the Defendant is required to comply with the terms of the Permit. If there is a more accurate way of determining the effectiveness of the chlorinating process and that method is not in the Permit, then it should be placed in the Permit. In the meantime, the grab sample used from only one

of the three chambers is not accurate: it samples only one-third of the water being chlorinated. The evidence presented by Plaintiffs indicates that chlorine samples from adjacent tanks taken five minutes apart can, and do significantly differ (**Exhibit "P-29"**). As long as the Permit requirement for a grab sample exists, that grab sample should be representative of the final effluent, not one-third of the final effluent. Plaintiffs submit that Defendant has no sampling to meet its Permit requirements for chlorine. Plaintiffs request that not only should Defendants be found in violation of Section B-1, but Defendants should also be required to conform to its present Permit or seek its change to reflect the more accurate way of measuring chlorine compliance.

Moreover, Defendant presented no documentary evidence to show that the three contact chambers are in fact identical. Even though the Defendant offered testimony through Mr. Adam Russell that it had records of continuous chlorine measurements of the combined flow, Defendant did not offer that evidence to refute Plaintiff's documentary evidence and testimony that chlorine reading in the chambers could differ. In fact, under cross examination Mr. William Stinebaugh, the director of operations at the plant, admitted that Defendant tries to sample a different contact chamber each day. The obvious inference is that Defendant knows differences potentially exist.

Section 6. It is a violation of Section B-1 of Defendant's 1990 Permit, and Section B-1 of Defendants' 1995 Permit for Defendant to fail to sample for coliform at the location described as 015 in its Permits.

Defendants test for coliform at the end of the chlorine contact chamber to determine whether its efforts at disinfecting the final effluent have been effective. Plaintiffs find no fault with this. The Defendant can conduct any tests it deems necessary to ensure that the plant is operating efficiently. However, the Permit requires that final effluent be tested for coliform at point 015 which point was identified during the course of testimony and in the Permit as the outfall to Laguna de Santa Rosa or Laguna Subregional Reclamation System and specifically admitted by the Defendant as a location other than at the end of the chlorine contact chamber. Defendant attempted to minimize the distinction between these two points as separated by perhaps 20 feet, however evidence suggests that

the distance is much greater. In any event, this analysis once again misses the point: the Permit has requirements which the Defendant is expected to meet. Those Permit requirements are plain and unambiguous. If the Defendant wishes to change them, then Defendant should seek change and not rely on the Regional Board Staff to make de-facto modifications in the Permit, or ignore its requirements to suit the Defendant's convenience.

In regard to this last point, Plaintiff wishes to note that at the outset Defendant attempted to make a motion before this Court to dismiss the case on the grounds that Plaintiff was seeking administrative remedies with respect to the 1995 Permit. Defendant's Motion was denied as untimely. The inference behind Defendant's line of thought is that the Plaintiffs' quarrel is with the Regional Board, not Defendant. Plaintiffs' response is that Plaintiffs have no dissatisfaction with the Regional Board itself with respect to the Permit. Plaintiffs' position is that the Defendant is responsible to meet the Permit requirements, and cannot excuse its failure to meet those requirements by pointing to arrangements it has made off the record with the Regional Board Staff. In the recent case of **CBE v. UNOCAL**, supra, the court held that the Regional Board Staff's enforcement criteria are statements of prosecutorial intent and not law.[8]

Conclusions

It is a violation of the Defendant's Permit for the Defendant to discharge treated wastewater after October 1st and prior to the Russian River reaching 1000 cfs unless the Defendant obtains specific consent. In accordance with American Petroleum Institute, et al. v. EPA, (need date and district) 661 F 2d 340, 16 ERC 1694, Defendant has the burden of proof on this issue once raised and that burden must be met in the next phase of this case, not this one, particularly in light of potentially conflicting testimony on this point from Mr. Vath and Mr. Kor.

The seven day averaging/peak flow method may be appropriate enforcement or prosecutorial criteria for the Regional Board Staff's use regarding when, and under what circumstances it will take

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[8] "Such an extension, unless it satisfies the requirements to qualify as a "modification", is simply a statement by the agency as to how it plans to exercise its prosecutorial discretion." **CBE v. UNOCAL**, Supra 903.

action against the Defendant for violations of its flow limitations, but they cannot be used to determine compliance with the Permit itself. They cannot be used because they were never a part of any Permit, never disclosed to the public or available for public comment, never disclosed to the Regional Board itself, allow substantial enlargements on the flow limitations set forth in the Permit, and constitute a de-facto modification.

It is a violation of Defendant's Permit for the Defendant to discharge treated wastewater in excess of 1% when that is the allowable limit and in excess of 5% under any circumstances.

The provision of Section B-3 which requires the Defendant to demonstrate its storage above the operations curve is a valid provision of the Permit enacted by the Regional Board after public comment and disclosure. It cannot be ignored for the Defendant's convenience. The reasonableness or unreasonableness of this provision, and the rationales which are suggested as the basis for permitting discharges when the actual storage is below the operations curve, should be the subject of a public hearing and not simply made de-facto modifications of the Permit. When requesting authorization for daily discharge in excess of 1% of the flow of the Russian River, the Defendant should be required to submit documentary evidence of the variance of the current storage curve above the operations curve which would require the Defendant's storage to actually be above the operational curve at the time of the request..

The Defendant is not properly measuring for chlorine and coliform. Chlorine should be measured according to the Permits at issue by the use of a grab sample from the combined chlorine contact chambers, or a sample from each on a daily basis. Coliform should be measured at point 015 as specified in the Permit.

Plaintiffs' Proposed Findings and Proposed Intentions With Respect To The Next Phase of This Case

Plaintiffs make the following proposed findings in this case:

1. It is a violation of Section A-1 of Defendant's 1986 NPDES Permit (Permit), Section

A-7 of Defendant's 1990 Permit, and Section A-6 of Defendant's 1995 Permit for Defendant to discharge treated wastewater after October 1st and before the Russian River reaches 1,000 cubic feet per second, or before being given consent by the Regional Board or its Executive Officer.

2. It is a violation of Section A-2 of Defendant's 1986 Permit, Section A-8 of Defendant's 1990 Permit, and Section A-7 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 1% prior to being given consent to do so as provided in those Permits.

3. It is a violation of Section A-4 of Defendant's 1986 Permit, Section A-9 of Defendant's 1990 Permit, and Section A-8 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 5% at any time.

4. It is a violation of Sections A-2 and B-5 of Defendant's 1986 Permit, Sections A-8, and B-3 of Defendant's 1990 Permit, and Sections A-7, and B-3 of Defendant's 1995 Permit for Defendant to discharge treated wastewater in excess of 1% at any time in which Defendant's actual storage of treated wastewater is below the Defendant's operations curve.

5. It is a violation of Section B-1 of Defendant's 1990 Permit , and Section B-1 of Defendant's 1995 Permit for Defendant to sample for chlorine from only one of its three chlorine contact chambers daily.

6. It is a violation of Section B-1 of Defendant's 1990 Permit, and Section B-1 of Defendant's 1995 Permit for Defendant to fail to sample for coliform at the location described as 015 in its Permits.

7. The 7-day averaging/peak flow method used by the Defendant is invalid for purposes of complying with the flow effluent limitations specified in the Permit. Defendant is required to use daily average flow of the Russian River as measured at Guerneville USGS Gauge No. 11-4670.00 for its dilution ratio.

8. Plaintiffs are the prevailing party and are entitled to reasonable costs, including expert witness fees, and attorney's fees.

Future Of The Litigation

Addressing the future of this litigation, assuming that the Court agrees with any or all of the categories of alleged violations set forth by Plaintiffs in this litigation, then the next phase of the case should address the numbers of violations in each alleged category. That phase would be brief (presently estimated at perhaps no more than two days). Plaintiffs' only witness for phase two of the case would be Dr. John Rosenblum. Defendant has retained two experts, either, or both of whom will be offered for that phase.

Once the Court determines the number of violations, Plaintiffs will require a period of discovery in order to retain experts to testify on the issues related to penalties. This is because when this case was originally bifurcated Plaintiffs discontinued any efforts to locate and prepare witnesses for a phase of the trial which potentially might not have taken place.

Plaintiff is proposing that the trial be, in effect, trifurcated. The first phase focused on: What is a violation? The second phase would be limited to the number of violations in each category found by the Court. The second phase could probably be set sometime in the next 30 to 60 days, in Plaintiffs' view. A final phase would take place after the Court has decided the number of violations in order to determine what penalties will be assessed and what injunctive relief ordered. Plaintiffs submit that a discovery period of 120 days should be allowed from the date of the Court's Order determining the number of violations, with experts to be declared in 60 days from that date and deposed not later than 30 days prior to the date of trial.

Dated: 9/6, 1996

PAUL S. SILVER
Attorney for Plaintiffs

PROOF OF SERVICE
Code of Civil Procedure Section 1013a(3), 2015.5

I declare that:

I am over the age of eighteen years, and am not a party to this action. My business address is 902 Stevenson Street, Santa Rosa, CA 95404, which is located in the county where this mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 7, 1996 at 902 Stevenson Street, Santa Rosa CA 95404, the within legal document(s) were placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, addressed to the parties indicated below, and the envelope was placed for collection and mailing on that date following ordinary business practices.

DOCUMENT: PLAINTIFFS' CLOSING ARGUMENT

ADDRESSED TO:

Rene' Auguste Chouteau, Esq.
100 Santa Rosa Avenue
P. O. Box 1678
Santa Rosa, CA 95402

I declare under penalty of perjury under the laws of the State of California, and that the foregoing is true and correct.

Executed on September 7, 1996.

Sheila M. Reilly

Sheila M. Reilly