Pre Hearing Instructions

The Hearing Notice in the above-referenced matter provides for a Tentative Pre-Hearing Conference on March 10, 2011 as necessary and "to be determined" (tbd). A Pre-Hearing Conference is not necessary at this time. Please take note of the following Pre-Hearing Instructions:

A. In preparation for the adjudicatory hearing scheduled for March 24, 2011, we require the Prosecution Team to perform and submit by March 16, 2011 the following tasks for clarification and ease of reference:
   1. a label system for each violation under consideration with a unique identifier;
   2. clearly cite, define and provide for review all evidence used to support each violation (the ACLC appendices, and corresponding attachments and references are difficult to follow);
   3. clearly indicate (using the unique identifier in item 1 above) which violations are no longer being charged;

As soon as possible after March 16, but no later than noon on March 22, Dischargers shall identify each violation where the underlying facts are not disputed (reserving arguments regarding amount of liability) using the unique identifier provided by Prosecution Team under item 1 above.

B. Although not clearly required in the Hearing Procedure, we request that Parties submit 11 hard copies of Rebuttal and Responses to Evidentiary Objections if they have not yet done so.

C. Parties submitted several evidentiary objections, mainly focusing on the hearsay objection to biological monitor reports, and lack of authentication and foundation of numerous photographs relied upon by the Prosecution Team.

This matter is a <u>formal</u> adjudicative hearing that will be conducted in accordance with the procedures set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760. Administrative hearings need not be conducted according to the technical rules relating to evidence and witnesses, and any relevant evidence may be admitted, if it is the sort of evidence on which responsible persons rely in conduct of serious affairs. (Gov. Code,§ 11513.) That said, certain basic requirements must be met to constitute substantial evidence upon which the Regional Water Board can rely. The Regional Water Board cannot make findings of facts supported solely by hearsay evidence; however, it may be used to supplement or explain other evidence. At this time, no evidence will be excluded from the record; however, all objections will be taken into consideration and will inform the Regional Water Board as to the weight to be given to that evidence.

D. In order to determine whether biological monitor reports fall within any exceptions to the hearsay rule, by March 16, 2011, please provide the following (or if already in the record, provide a precise location):
   1. specific contract for biological monitor and official job description of biological monitor;

2. specific process for submittals by the biological monitor of documents and photographs, the purpose of these submittals (i.e. what are the photos intending to document specifically), and whether the submittals were subject to any verification procedure or were subject to challenge by Dischargers.

After a preliminary review of the evidence provided in this case, even if biological monitor reports are not hearsay, it would be useful if these individuals were available to answer questions. Photographs lack titles and it is not always clear when and why they were taken. In some cases it may be proper to make inferences from photographs; however, photographs submitted as direct evidence of violations should be substantiated. Parties may amend witness list by March 16, 2011 to provide for biological monitor testimony if they are available.

On March 4, 2011, the Prosecution Team sent an email in response to evidentiary objections to documents and photos generated by biological monitors. Discharger responded via email on March 7. This correspondence will be included in the administrative record and will be considered by the Regional Board in determining the weight of the biological monitor evidence.

Please note that Advisory Team disagrees with CalTrans' suggestion that Prosecution Team's argument in favor of relying on biological monitor evidence as official records constitutes improper "intermingling of prosecutorial and policymaking roles." Any party may raise policy implications of the issues before the Board, including the policy issues that support legal arguments. The Regional Board will consider the legal, policy and other arguments by all parties in making its decision in this matter.