Paul A. Beck (CSBN 079760)
Law Offices of Paul A. Beck
A Professional Corporation
13701 Riverside Drive, Suite 701
Sherman Oaks, California 91423
Tel: (818) 501-1141; Fax: (818) 501-1241
Email: pab@pablaw.org

Mark Kester Brown (CSB#89467)
11150 W. Olympic Blvd., Suite 1020
Los Angeles, CA. 90064
Telephone: (310) 739-3900
Facsimile: (775) 542-4938
E-mail: mkesterbrown@attglobal.net

Attorneys for Petitioner/Respondent Balcom Ranch

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of: Balcom Ranch 21099 South Mountain Road Santa Paula, CA 93060	Complaint No. R4-2010-0023 PETITION FOR REVIEW OF REGIONAL WATER QUALITY CONTROL BOARD – LOS ANGELES REGION ORDER ON ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R4-2010-0023 (Issued July 14, 2011)

Petitioner Balcom Ranch ("Petitioner") (Respondent below) respectfully submits this Petition seeking review of the Order of the Regional Water Quality Control Board – Los Angeles Region ("RWQCB" or the "Regional Board") re Administrative Civil Liability Complaint No. R4-2010-0023, issued July 14, 2011, pursuant to California Water Code Section 13320(a). By this Petition, Petitioner seeks relief from the State Water Resources Control Board ("SWRCB" or the "Board") in accordance with Title 23, California Code of Regulations, Sections 2050 *et seq*.

(1) Petitioner's Information:

Balcom Ranch
21099 S. Mountain Road
Santa Paula, CA 90360
310-826-7776

(2) Petitioner seeks review of the July 14, 2011 Order of the Regional Water Quality Control Board – Los Angeles Region with respect to the Administrative Civil Liability Complaint No. R4-2010-0023 (the "Order"). Attached hereto as **Exhibit 1** is a true and correct copy of the Order. Attached hereto as **Exhibit 2** is a true and correct copy of Proposed Findings of Fact with which Petitioner was served.[1]

(3) The action of the Regional Board with respect to which this Petition pertains occurred on July 14, 2011.

---

[1]The Prosecution Team contended that it could amend the Findings of Fact up until the day of the July 14, 2011 Hearing. Although the Prosecution Team provided Petitioner with a copy of their proposed draft Findings, Petitioner was never served with a copy of any finalized or adopted Findings. Accordingly, Petitioner attaches a copy of the final version of the draft Findings with which Petitioner was provided.

(4) As set forth more fully herein, the action was inappropriate for the reasons set forth in the accompanying Memorandum of Points and Authorities, and, in particular, the following:

1. The penalty is unconstitutionally excessive, being wholly out of proportion to the quantifiable harm incurred.
2. Under the Regional Board's Prosecution Team's own template, they found damages of a little over $3,000.
3. Petitioner had a right to challenge the perceived unconstitutional infirmities in the 2005 Conditional Waiver without incurring a penalty disproportionate to any harm resulting from its constitutional challenge. *See People ex rel. Younger v. Superior Court* (1976) 16 Cal. 3d 30.
4. The Regional Board did not take these constitutional issues into account in applying the matrix factors.
5. In warrantless administrative searches, if the search is unconstitutional, the entire proceeding or prosecution is nullified. *See Camara v. Municipal Court of the City and County of San Francisco* 387 U.S. 523 (1967) (criminal prosecution for not allowing warrantless search set aside).
6. Unlike adversarial litigation, under the governing statute – CWC § 13327 – the Regional Board had an independent obligation to gather evidence and determine an equitable and appropriate fine, if any, in light of the factors set out in the statute, including the obligation to propose a fine early on proportional to the approximately $3,000 in damages its own Prosecution Team calculated. The Prosecution Team admitted that it made no effort to obtain such financial information.
7. Section 13327's structure and language leads to the conclusion that each of the various factors does not result only in the possibility of an upwards adjustment; rather individual factors can result in a reduction of

the fine; and one factor – the "Ability to Continue in Business" factor – should serve as a *de facto* ceiling for fines against entities whose ability to continue in business would be threatened by a fine that might otherwise have been appropriate.

8. Even if this were a quasi-punitive damages calculation – which it is not – the Regional Board would constitutionally have had to give the "Ability to Pay" factor preeminence in calculating any fine.

9. There is no requirement of a "Potential for Harm" factor in the non-discharge situation. The Regional Board's attempt to salvage the "Potential for Harm" factor by inserting language suggesting that Petitioner's not joining a Discharger Group "impact[s] the Regional Board's ability to oversee and regulate the site or determine whether the Discharger's management practices were adequate...." is:

   i. Without support based on evidence presented;

   ii. Becomes irrelevant as the Regional Board has acknowledged that Petitioner could have complied via joining VCAILG and avoiding inspections. Therefore the Prosecution Team's insertion of the concept of not "submit[ting] a report of waste discharge" (p. 7, ¶ 18.a) is an artificial basis for allegedly increasing the harm; and

   iii. Underscores the constitutional concerns – as the only way the quoted "ability to oversee and regulate the site" could have been done under the 2005 Conditional Waiver was to conduct constitutionally questionable inspections.

10. The new language of Paragraph 29 of the Findings alleges that "the penalty was calculated **as required by** the Enforcement Policy" (emphasis added). This underscores that there is no discretion – but it is Petitioner's contention that the manner in which the Regional Board is

being advised to apply the Matrix Factors under the Enforcement Policy is not merely arbitrary and capricious, but unreasonably arbitrary and capricious.

(5) Petitioner is aggrieved in that the penalty assessed against it by the Regional Board is both unwarranted and constitutionally infirm for the reasons set forth herein.

(6) Petitioner requests that the Board rescind and/or modify the Order and eliminate or reduce the penalty assessed by the Regional Board so that it is not unconstitutionally punitive. In addition, Petitioner requests that the Board include in its administrative record the entire record below in order to these constitutional and other important issues be afforded full and fair judicial review should that become necessary.

(7) The relevant Points and Authorities and transcript citations are set forth hereafter. Attached hereto as **Exhibit 3** is a true and correct copy of the Transcript of Proceedings – March 17, 2011.

(8) The Petition has been sent via e-mail to the Los Angeles Regional Board c/o Rebecca Nascimento (rveiga@waterboards.ca.gov) and Jennifer Fordyce (jfordyce@waterboards.ca.gov).

(9) The substantive issues and objections delineated in this Petition were raised before the Regional Board to the extent that Petitioner was afforded sufficient time and written submissions were allowed and/or accepted for filing. Petitioner contends that the Regional Board's overly-restrictive limitations of oral presentation time and written submissions, as well as the refusal to allow hearing subpoenas, deprived Petitioner of its constitutionally-protected due process rights.

MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF CONTENTS

I. Introduction 1

II. From the Outset, Balcom Ranch Acted in Good Faith 2

III. The Regional Board Should Have Abstained from Ruling on the ACL Complaint Because of the Constitutional Issues 3

IV. The Trespassing Search That Was the Cornerstone of the ACL Complaint Violated Petitioner's Constitutional Rights and Therefore Fatally Infected the Complaint 3

V. The Issuance of the Replacement Conditional Waiver in 2010 Acknowledged the Unconstitutionality of the Methods of Enforcement of the Statute Under Which the 2005 Conditional Waiver Arose 7

VI. The Conditional Waiver Program as Applied, Including the Imposition and Assessment of Fees and Costs, Constitutes an Improper and Unconstitutional Delegation of Governmental Powers 9

VII. Petitioner Had the Right to Subpoena Witnesses and Documents within the Control of the Regional Board to the March 17, 2011 Hearing 12

VIII. Under the Circumstances, Any Penalty Should Have Been Nominal and Predicated on Petitioner's Ability to Pay and on Petitioner's Ability to Remain in Business 16

IX. The Amended Fine Was and Is Excessive Because the 2005 Conditional Waiver Was Unconstitutionally Infirm, and Balcom Ranch Challenged that Conditional Waiver in Good Faith 17

X. Other Reasons Why the Proposed Fine Is Excessive or Unsupported by the Evidence 20

1. The Prosecution Team Did Not Follow the Board's Own Statutorily-Required Guidelines in Calculating the Penalty 20

2. Excess Acreage in the Penalty Calculation 25

XI. Erroneous Findings by the Regional Board 27

XII. Conclusion 28

Table of Exhibits

Exhibit 1: July 14, 2011 Order of the Regional Water Quality Control Board – Los Angeles Region with respect to the Administrative Civil Liability Complaint No. R4-2010-0023.

Exhibit 2: Proposed Findings of Fact with which Petitioner was served.

Exhibit 3: Transcript of Proceedings – March 17, 2011.

Exhibit 4: Site Visit Report authored November 18, 2009 (Tab 4.12 before Hearing Panel of the Regional Board ("Hearing Panel")).

Exhibit 5: Notice of Violation dated November 15, 2007 (Tab 4.11 before Hearing Panel).

Exhibit 6: Documents related to proposed solicitation letter drafted by Petitioner to other dischargers re forming alternate discharger group, as edited by Regional Board staff (dated August 31, 2010; Tab 4.23 before Hearing Panel).

Exhibit 7: Balcom Ranch's Objections and Responses to Revised Notice of Public Hearing and Administrative Proceedings, dated February 16, 2011 (Tab 4.19 before Hearing Panel).

Exhibit 8: March 8, 2010 letter from Petitioner's counsel re refusal to allow subpoenaed documents.

Exhibit 9: March 10, 2011 letter of Lori Okun, Assistant Chief Counsel of the Regional Board, issuing various rulings with respect to the Pre-Hearing Conference conducted on March 9, 2011.

Exhibit 10: Prosecution Team's Reply to Respondent's Objections and Responses, dated March 4, 2011 (Tab 4.20 before Hearing Panel).

Exhibit 11: Revised Notice of Public Hearing and Hearing Procedures, dated December 17, 2010 (Tab 4.4 before Hearing Panel).

Exhibit 12: February 10, 2011 letter of Jennifer Fordyce, Staff Counsel, Office of Chief Counsel, SWRCB and Legal Advisor to the Prosecution Team (Tab 4.26 before Hearing Panel).

Exhibit 13: Consideration of ACL Complaint to Assess a Penalty in the amount of $193,850 against Balcom Ranch for violation of Water Code section 13260. (Item 11-3 before Regional Board).

Exhibit 14: Ms. Nascimento's memorandum to file dated January 28, 2010 in which she calculated the economic benefit or savings resulting from the violation (Tab 4.14 before Hearing Panel).

I. Introduction

As Petitioner learned about the 2005 Conditional Waiver (the "Waiver"), it came to understand that its participation in the Waiver would not result in any further testing or otherwise affect the scope or implementation of the Waiver in any way other than spreading its cost, and that it would not directly render the water quality at Balcom Ranch or the Santa Clara River environs any cleaner. However, it concluded that the significant constitutional issues and perceived defects in the law and related regulations, as well as their enforcement, warranted a judicial test.

Pursuant to the California Supreme Court case of *Shively v. Stewart* (1966) 65 Cal. 2d 475, the Regional Board had a duty to see that constitutional issues were fully aired and addressed in a judicial or quasi-judicial proceeding – and therefore only a nominal or modest penalty was warranted if it concluded that any award was appropriate after full consideration of all of the evidence and argument of the parties. A party should not be penalized for attempting to assert constitutional rights.

Moreover, while these constitutional issues remained unresolved, the Regional Board's Prosecution Team sought penalties of nearly $200,000. These penalties were primarily based upon a daily rate assessment while this proceeding was pending – even though there was (and is) no discharge violation, and even though, had Petitioner joined the Ventura County Agricultural Irrigated Lands Group ("VCAILG"), no greater testing would have resulted. Thus, the proposed penalty was grossly out of proportion to any harm suffered by anyone.

Finally, the Regional Board's rulings ought to be viewed from the larger perspective: These issues necessarily affect public perceptions, and present the possible perception that a State agency will be viewed as running roughshod over small farmers and businesspersons without accountability for the economic disruption created. For all of these reasons, Petitioner requests that this proceeding be dismissed or abated, or that only a nominal penalty be ordered.

II. From the Outset, Balcom Ranch Acted in Good Faith

Balcom Ranch noted constitutional infirmities in the 2005 Conditional Waiver when it became aware of that document. Among other problems, the 2005 Conditional Waiver authorized warrantless searches of private lands.

Following its initial meeting with Regional Board staff in July 2010, Balcom Ranch demonstrated its good faith by attempting to create a competing discharger group, but as a result of specific language changes urged by the Regional Board's Prosecution Team with respect to the draft letter Balcom Ranch was proposing to send to prospective dischargers, the letter (and Balcom Ranch's effort) was effectively gutted because the Prosecution Team stated that Balcom Ranch could make no representation that any enforcement action against any other proposed discharger/violator was then contemplated or likely.[2]

After October 2010, in the course of these proceedings, Balcom Ranch discovered the new Conditional Waiver (and then joined VCAILG as of March 21, 2011).[3]

---

[2]*See* discussion at page 5, *infra*.

[3]The Prosecution Team mischaracterizes the discovery by Balcom Ranch of the effect of the new Conditional Waiver – suggesting that Balcom Ranch discovered the saving correction of the Waiver's constitutional infirmities in October 2010. *See* Hearing Panel's Proposed Findings of Fact ("FOF") No. 24. Rather, in October 2010, Balcom Ranch was led to believe (by the Ventura County Farm Bureau ("VCFB"), the controlling and administering entity under which VCAILG operates), that the new Conditional Waiver was merely an extension of the 2005 Conditional Waiver and no material changes had been made to it. *See* VCFB's October 2010 newsletter (http://www.farmbureauvc.com/pdf_forms/newsletters/FB_News_October10.pdf) at 1. It was not until its preparation for the March 2011 hearing that Balcom Ranch learned of the change to the Conditional Waiver that rectified the prior Waiver's constitutional infirmities.

III. The Regional Board Should Have Abstained from Ruling on the ACL Complaint Because of the Constitutional Issues

In this administrative proceeding, the Regional Board's Prosecution Team sought enormous monetary penalties for Petitioner's alleged non-compliance with the Conditional Waiver program. In light of the absence of significant evidentiary and due process safeguards (*e.g.*, (1) the lack of guarantied and full cross-examination, (2) the restricted time allowed for the hearing, (3) the rejection of Petitioner's efforts to obtain testimony from Regional Board personnel (whom Petitioner could not identify without the Prosecution Team's disclosure thereof), and (4) the classification of this proceeding as a quasi-judicial hearing initiated by a complaint while at every turn, the Prosecution Team argued that all testimony to be adduced by Petitioner, and Petitioner's analysis, needed to be disclosed and set in stone a month before the hearing or else Petitioner's position could not be maintained,[4] this proceeding was not structured to permit the proper weighing and consideration of federal and state constitutional issues – and, indeed, is subject to constitutional challenges itself.

IV. The Trespassing Search That Was the Cornerstone of the ACL Complaint Violated Petitioner's Constitutional Rights and Therefore Fatally Infected the Complaint

The Prosecution Team argued that it had a right to trespass on private property. Although the Prosecution Team misleadingly stated that Ms. Nascimento made her observations from a public road, the Site Visit Report[5] irrefutably confirmed that the Regional Board and its agents in fact deeply trespassed onto Petitioner's private

---

[4]The Regional Board's and its Prosecution Team's changing of its own Findings of Fact up until the day before the July 14, 2011 Hearing has already been noted. *See* text accompanying n. 1, *supra*.

[5]Tab 4.12. Attached hereto as **Exhibit 4** is a true and correct copy of Tab 4.12.

property and residential curtilage – with no urgent reason to do so. This search was unconstitutional, and fatally infected this enforcement action.

The Prosecution Team cited *Oliver v United States* (1984) 466 U.S. 160, a case that involved a marijuana search and seizure, in support of its right to have conducted a warrantless search. However, *Oliver* is distinguishable because the instant search involved traveling down a marked private road that was posted with "No Trespassing" signs, with respect to which Petitioner had a privacy interest because its private road constituted the only access to the residence of its principals; and (2) because the curtilage of the residence of Petitioner's principals was necessarily involved in the search. *See United States v. Dunn* (1987) 480 U.S. 294 (multi-faceted test for whether "open fields" search conducted was constitutional or unconstitutional).

But more importantly, the actions of the Regional Board and its agents violated the California Constitution. The California Constitution affords greater protection against warrantless search than does the United States Constitution. *Compare California v. Ciraolo* (1986) 476 U.S. 207 (aircraft overflight/inspection not barred by Fourth Amendment) with *People v. Cook* (1985) 41 Cal.3d 373 (warrantless aircraft search violates California Constitution).

Indeed, the California Supreme Court case of *People v. Mayoff* (1986) 42 Cal.3d 1302, extensively discussed several factors that confirm that the Regional Board and its agents violated Petitioner's state constitutional rights here.[6] Mayoff was a marijuana cultivation case, involving aerial surveillance. In that case, the Court upheld the search, but only because it was a generalized high-altitude aerial search that was merely for purposes of information gathering and had not targeted any particular citizen. *Id.* at 1308-09 ("Fundamental to the scheme is a random pattern of warrantless flights over the entire county, focusing on rural areas....The areas surveyed

[6]Petitioner asked the Regional Board to abstain from deciding these issues because of its own involvement in these constitutional issues. While *arguendo* the Regional Board may be able to determine some constitutional issues that arise before it, the conflicts of interest inherent in these circumstances warranted abstention here.

during a particular flight are selected almost entirely at random."); *see also Mayoff* at 1313-14.

The *Mayoff* Court pointedly noted that the California Constitution's warrantless search protections were the cornerstone of individual liberty for California citizens: "The warrant clause is the Constitution's most important safeguard against overzealous government intrusions on legitimate privacy." *Id.* at 1318, n.8.

The *Mayoff* Court began its "open fields"/curtilage analysis by noting the higher California constitutional protections:

> Our state charter is a "document of independent force" (*People v. Brisendine* (1975) 13 Cal.3d 528, 549-550), and its guarantees "are not dependent on those [provided] by the United States Constitution" unless a contrary intent appears. (Cal. Const., art. I, § 24.) **We grant "respectful consideration" to constitutional interpretations of the United States Supreme Court, but they are to be followed in California "only where they provide no less individual protection than is guaranteed by California law."** (*People v. Longwill* (1975) 14 Cal.3d 943, 951, fn. 4). On many occasions, we have concluded that the California Constitution accords greater protection to individual rights within our borders than federal law guarantees throughout the nation. (E.g., *People v. Bustamante* (1981) 30 Cal.3d 88, 102; *People v. Pettingill* (1978) 21 Cal.3d 231, 246-252; *People v. Disbrow* (1976) 16 Cal.3d 101, 113.)

Id. at 1312 (emphasis added; brackets original; parallel citations omitted).

After reaffirming *People v. Cook*, *supra*, 41 Cal.3d 373, and noting the intervening contrary United States Supreme Court decision in *California v. Ciraolo, supra*, 476 U.S. 207, the *Mayoff* Court held that *Ciraolo* did not alter *Cook*'s continuing validity. *Id.* at 1312.

The *Mayoff* Court cited and extensively discussed *Oliver*, *supra*, and concluded that *Oliver* did **not** circumscribe the governmental limitations in the open fields

warrantless search context in California – rather those outer limitations are set by the California Constitution. *Id.* at 1310-15. In particular, the *Mayoff* Court noted that the California Constitution allowed normal-altitude aerial searches precisely because they were not trespasses – but that ground searches of the same open fields would be constitutionally suspect:

> [W]e do not necessarily accept, for purposes of the California Constitution, *Oliver's* ruling that law enforcement agents may constitutionally conduct warrantless *ground* searches of open fields even where they physically trespass upon private land. *Aerial* surveillance of crops in fields, **from the visual distances we suggest, is not a trespass, and it is substantially less likely than a ground search to infringe on legitimate private activities taking place within open fields.**

Id. at 1315, n.5 (bolded emphasis added; italics original). Thus, the California Supreme Court has confirmed that landowners have legitimate privacy interests **in their open fields.**

Moreover, the reasoning of the *Mayoff* Court further buttresses the conclusion that an on-the-ground search of the type conducted by the Regional Board's enforcement personnel were indeed violative of the California Constitution. The *Mayoff* Court allowed the high-level aerial search precisely because there was no type of camera magnification utilized that allowed the police to view anything other than what would have been normally visible to the naked eye. The Court reasoned, "If that is so, the details of human activity could scarcely have been discernible from the aircraft." *Id.* at 1316. Concurrently, the Court set an important standard: "We establish the principle that the aircraft must maintain a visual distance sufficient to obscure the details of human activity below." *Id.* at n.6. Further, the Court made clear that it was the potential for intense and focused observation – which is part and parcel of a ground-based search – that rendered the search in that case constitutionally prohibited:

> Moreover, in the *Cook* situation, the intensity and focused nature of the observation, even if it occurs from substantial altitudes, enhances the danger that innocent activities occurring within a legitimate zone of protected privacy will be unreasonably infringed.

Id. at 1317. The government bears the burden of proof of establishing that the search must be of a type whereby the "possibility of intrusion on private activities below is remote." *Id.* at 1316.

In contrast, Ms. Nascimento's driving and/or walking through and on numerous portions of the Property readily and impermissibly disclosed to governmental authorities extensive details of private human activity, thereby invading Petitioner's zone of privacy, as recognized by *Mayoff*.

In further distinguishing the facts before it – which involved an aerial search, not a ground search – the *Mayoff* Court stated that "[t]here was no physical indication, such as a common enclosure, that the trailers and gardens were considered a common zone of private residential activity." *Id.* at 1315. Here, by contrast, there is considerable evidence that Petitioner's residential grounds extended into the groves – and governmental agents inspected various residential grounds.

Accordingly, the Regional Board's enforcement action should not have proceeded because it was predicated on an unconstitutional search.

V. The Issuance of the Replacement Conditional Waiver in 2010 Acknowledged the Unconstitutionality of the Methods of Enforcement of the Statute Under Which the 2005 Conditional Waiver Arose

The 2005 Conditional Waiver, under which this enforcement action was initiated, authorized governmental officials to conduct unconstitutional or potentially unconstitutional administrative searches by permitting warrantless searches of private

land. This encouraged governmental violations of the United States and California Constitutions.

The original Conditional Waiver upon which the original ACL Complaint was founded was promulgated on November 3, 2005. It was superseded by a new Conditional Waiver on November 19, 2010, long after this administrative action was initiated. The new Conditional Waiver attempted to rectify this constitutional deficiency by requiring that the Regional Board and its "authorized officials" (except in emergency situations) engage in no warrantless searches, but instead obtain a warrant issued pursuant to Civil Code section 1822.50.[7] However, a legislative or administrative body cannot re-interpret a prior version of a law in order to render it constitutional. *See County of Sacramento v. State* (1982) 134 Cal. App. 3d 428 (interpretation of earlier version of statute is judicial function). Accordingly, the prior Conditional Waiver statute under which this enforcement action was brought cannot be rectified by the corrective 2010 Conditional Waiver.

After noting that certain warrantless searches were being enjoined, the California Supreme Court in *Mayoff, supra*, encouraged the Legislature to "participate in establishing standards which will balance the needs of law enforcement against the legitimate privacy expectations of affected citizens." *Id.* at 1308. In addition, the *Mayoff* Court urged the governmental agencies to enact appropriate administrative

---

[7]*See* http://www.waterboards.ca.gov/losangeles/water_issues/programs/tmdl/waivers/11_22_10/Order%20R4-2010-0186_signed.pdf. Paragraph D.4.a. reads:

> To the extent authorized by, and in accordance with, Water Code section 13267, the Regional Board is authorized to inspect upon reasonable notice private property owned or occupied by any Discharger for the purpose of determining compliance with the provisions of this Order. Except in emergency situations that pose a threat to public health, safety and property, no authorized official of the Regional Board may enter private property owned or occupied by a Discharger **except upon consent of the owner or possessor of the facilities or, if consent is withheld, with a warrant issued pursuant to Civil Code section 1822.50.**

(Emphasis added.)

regulations limiting warrantless searches – and suggested that the presence of such administrative regulations would limit the relief they could legitimately seek in judicial proceedings.

Due to its failure to promulgate appropriate administrative regulations despite the established guidance of *Mayoff*, it was appropriate for the Regional Board to issue (at most) a nominal penalty under these circumstances.

VI. The Conditional Waiver Program as Applied, Including the Imposition and Assessment of Fees and Costs, Constitutes an Improper and Unconstitutional Delegation of Governmental Powers

Petitioner was provided with two "options" to comply with the terms of the Conditional Waiver.[8] One option required Petitioner to comply with the waiver individually. This would have required Petitioner to pay an annual waiver fee to the Board of approximately $2,270. (23 CCR § 2200.6.) In addition, Petitioner would have been required, individually, to incur (and pay annually) all costs involved in monitoring, testing, reporting and otherwise complying with the terms of the Conditional Waiver. These annual costs have been estimated to range between $50,000 and $80,000.[9]

The second and only other option available to Petitioner required it to become a member of the VCAILG. According to the current version of the VCFB Website:

> The Farm Bureau of Ventura County administers the program, providing staff support, maintaining records, overseeing the work of the primary program consultant, and handling correspondence with group members and

---

[8] *See* Notice of Violation (Tab 4.11) at 1, last paragraph. Attached hereto as **Exhibit 5** is a true and correct copy of Tab 4.11.

[9] *See* estimates by the VCAILG and VCFB. (http://www.farmbureauvc.com/pdf_forms/VCAILG_costbenefit.pdf (p.3)).

> the Regional Board. A seven-member VCAILG Executive Committee **develops the proposed program budget each year and recommends policy. Budget and policy recommendations are reviewed and approved by a 20-member Steering Committee consisting primarily of growers. Final approval of program expenditures and assessments rests with the Farm Bureau Board of Directors.**

http://www.farmbureauvc.com/pdf_forms/FAQ_About_VCAILG.pdf (answer to fourth question) (bolded emphasis added). As a member of the VCAILG discharger group, Petitioner would be required to pay only an annual assessment to the group. The estimated annual assessment for 2010-2011 is $23 per acre, which would equate to approximately $2,500 for Petitioner annually.

Thus, Petitioner's options to comply with the Conditional Waiver are to incur an annual expenditure of either (i) $52,270 to $82,270 or (ii) approximately $2,500.[10] These facts compel the conclusion that the option to comply individually via the Conditional Waiver is not a viable economic alternative, but rather compels individual landowners to sign up with VCAILG. Thus, Petitioner and the other Ventura County affected landowners are effectively being forced to join the VCAILG discharger group or risk enforcement action.

The Regional Board's approval of VCAILG and its administration by the VCFB under these circumstances constitutes a delegation of the Regional Board's

---

[10]Further, the difference in the cost of Petitioner to comply individually versus joining VCAILG reveals the absurdity of the regulatory scheme. The Tier III individual compliance fee specified by 23 CCR § 2200.6 computes to approximately $21 per acre, with the individual still required to bear the extraordinarily high monitoring, testing and reporting costs. By comparison, the VCAILG/VCFB assessment computes to approximately $23 per acre, which **includes** all monitoring, testing and reporting costs. On these facts, rational government policy would and should require the Regional Board simply to raise its Tier III fee by $2 per acre, eliminate the discharger group option with the Tier I and II fees, and perform the monitoring, testing and administration work itself. If the VCFB can perform all of these tasks for $23 per acre, why cannot or should not the state do so?

powers to those private organizations. The breadth of such powers includes the development of policy and approval of expenditures and assessments in respect of the Conditional Waiver. Under this application of the Conditional Waiver statutes, the decisions taken by VCAILG (and the VCFB) clearly affect and regulate how its members use their land.

In *Eubank v. City of Richmond* (1912) 226 U.S. 137, the Supreme Court struck down a statute that allowed two-thirds of property owners on a street to determine a building line restriction on another owner's property. Since that decision, numerous cases have held that the delegation of power to private individuals to decide what others may do with their land was "repugnant to the due process clause" of the Fourteenth Amendment and equal protection of the law. *See Young v. City of Simi Valley* (2000) 216 F.3d 807, 820 (quoting from *Seattle Title Trust Co. v. Roberge* (1928) 278 U.S. 116).

Such delegation is particularly suspect where, as here, constitutional rights are implicated. Not only is the government utilizing VCAILG (and the VCFB) as a proxy to conduct warrantless searches and inspections, but it is violating Petitioner's constitutional rights of association by effectively compelling it, under threat of enforcement and the imposition of an excessive penalty that bears no relationship to any harm caused to the environment, to join VCAILG.

Moreover, the Regional Board has adversely impacted Petitioner's ability to form an alternate discharger group by gutting the letter Petitioner proposed to send to other potential non-compliers, which the Prosecution Team edited to such an extent that any interest in forming an all the discharger group was effectively undermined. *See* Tab 4.23.[11]

Under these circumstances, where Petitioner has no practical alternative to comply with the Conditional Waiver other than membership in VCAILG and

---

[11]Attached hereto as **Exhibit 6** is a true and correct copy of Tab 4.23.

submission to its policies and assessments, and because VCAILG is forming and effectuating policy, this statutory structure as applied is an improper and unconstitutional delegation of governmental powers.

VII. Petitioner Had the Right to Subpoena Witnesses and Documents within the Control of the Regional Board to the March 17, 2011 Hearing

The Office of Chief Counsel of the Regional Board, via Lori Okun's[12] March 10, 2011 letter, issued various rulings with respect to the Pre-Hearing Conference conducted on March 9, 2011. Ms. Okun's letter was largely accurate as to the evidence it cited as having been presented. However, with respect to Categories 5 and 6 of the documents that Petitioner gave notice that it wished to subpoena and present, Petitioner cited the following evidence as to the Prosecution Team's bias (and potentially the inherent bias of the Regional Board)[13] in terms of setting an appropriate penalty: the alleged bias reflected by the Regional Board's insistence on clearing Petitioner's proposed letter to other landowners who had not responded or registered with the Conditional Waiver program, and strongly suggesting alternative language that nullified the impact of Petitioner's proposed letter to other landowners. (*See* Exhibit 6 herein.)

A copy of Petitioner's categories of documents that it wished to subpoena is set forth in **Exhibit 7**. Petitioner's correspondence related thereto is set forth as **Exhibit 8**, and Ms. Okun's rejection of Petitioner's right to subpoena documents is **Exhibit 9**.

The California Supreme Court case of *Shively v. Stewart*, *supra* (1966) 65 Cal.

---

[12]Ms. Okun is an attorney with the Office of Chief Counsel of the Regional Board.

[13]In light of the possibility that other Regional Board personnel may also be biased – a fact that Petitioner was precluded from discovering because of the refusal to issue subpoenas and obtain relevant documents – the Regional Board may not be qualified to pass on this issue (and the underlying subpoena issue) because of the potential conflicts of interest.

2d 475, establishes that Petitioner was entitled to subpoena Regional Board-related witnesses to the March 17th Hearing. *Id.* at 479. The goal is to augment administrative procedures with common law rules whenever it appears necessary to promote fair hearings and effective judicial review. *Id.*

> In supporting the use of subpoenas at trial, the Supreme Court reasoned: **Since the agency is the accuser [and] a party to the proceeding, and ultimately makes a decision on the record, its concentration of functions calls for procedural safeguards.** .... Section 11510[14] of the Government Code provides that on proper application before the hearing subpoenas "shall issue" and **whether subpoenas are sought for the production of evidence at the hearing** or to secure prehearing discovery, their issuance is a ministerial act with respect to which the agency or the hearing officer has **no discretion**.

Id. at 480 (emphasis added; citations omitted). Moreover, because the "concentration of functions calls for procedural safeguards," the Supreme Court held that the issuance of the subpoena is mandatory – and any motion to quash should be ruled on by the superior court and not within the administrative proceeding. *Id.* at 481.

A similar result was reached in *Boal v. Price Waterhouse & Co.* (1985) 165 Cal. App. 3d 806. There, defendant argued that the discovery cutoff (30 days before trial per rule of court) precluded a party from issuing a trial subpoena if the documents had not been subpoenaed or produced prior to the cutoff. The *Boal* Court quickly dismissed this argument, holding that a party always has a right to issue a trial subpoena, and that once the documents are produced, the trier-of-fact can review them and deal with any privilege or other objections. *Id.* at 810.

Accordingly, Petitioner submits that the Regional Board erred in barring the issuance of the requested subpoenas duces tecum and refusing to continue the March

---

[14]Now Government Code Section 11450.20(a), with a slight change of language.

17th Hearing to allow for the requested documents to be produced and/or for the Prosecution Team to move the Superior Court to quash the requested subpoenas.

As recognized in the *Shively* case, *supra*, the potential conflicts of interest inherent in the Regional Board's serving concurrently as judge and jury, and as administrator – conflicts the case law makes clear require particular efforts to assure due process – are brought into high relief here.

Furthermore, the Prosecution Team attempted to limit Petitioner's access to relevant evidence, and to bar it from adducing additional relevant evidence at the March 17th Hearing.[15] (*See* Prosecution Team's Reply[16] at 12 (refusal to identify persons most knowledgeable) and at 14-15 (refusal to stipulate or produce any documents as requested by Petitioner; no obligation to identify documents; will bring motion to quash). Moreover, at that juncture, Petitioner requested a continuance to permit briefing with respect to the subpoenas and to allow a reasonable opportunity for production at the March 17th Hearing. Nowhere in the Prosecution Team's notices had it suggested that trial subpoenas were not permitted or that any discovery cut-off was in place. However, the Hearing Officer denied this request.

This denial was inconsistent with due process – and particularly inconsistent with the requirements set forth by the California Supreme Court in *Shively* that the Regional Board, its agents and employees, including the Prosecution Team, must make particular efforts to assure due process to other parties. Given this mandate, Petitioner should have been permitted to adduce further evidence and to submit a hearing brief. This particularly applied to evidence that was not in existence on the

---

[15]The Prosecution Team also reserved the right to have the last word, and even reserved the right to adduce additional evidence. *See* Notice of Public Hearing at ¶ VI.A. ("The Prosecution Team shall have the right to present additional evidence in rebuttal of matters submitted by any other party."), thus not even limiting itself to rebuttal argument. Attached hereto as **Exhibit 10** is a true and correct copy of such Notice of Public Hearing.

[16]Attached hereto as **Exhibit 11** is a true and correct copy of such Reply.

prior exchange date (February 16, 2011) or that was to be utilized for purposes of impeachment, for the following reasons:

(1) The Prosecution Team's Notice of Hearing was silent as to Petitioner's right to submit a hearing brief; accordingly, Petitioner's hearing brief should have been accepted and considered and made part of the record;[17] and

(2) The Notice of Hearing states that Petitioner was required to submit by the cutoff date "any additional documents or evidence the Party/ies want(s) the Hearing Panel to consider." *Id.* at ¶ VI.A. Thus, this procedure was akin to an exchange of exhibits prior to a trial.

There is no authority for the proposition that a document exchange order bars a party from subpoenaing or producing documents not then in its possession, custody or control. The Notice of Hearing did not indicate to the contrary or provide any notice that Petitioner would be barred from adducing any such subpoenaed or later-obtained evidence.[18]

Due to these inherent conflicts of interest, the Regional Board's refusal to allow the person-most-knowledgeable subpoenas and related document production requests to be issued, or to authorize Petitioner's use of later-obtained evidence at the March 17th hearing on the ACL Complaint, was reversible error.

---

[17]This was particularly true if these same arguments could have been made orally – their submission in written form would have saved time and rendered the Regional Board's performance of its obligation to review the evidence and consider the parties' argument more effective and efficient. *See also* Jennifer Fordyce's February 10, 2011 letter (Tab 4.26) stating only that Petitioner was required to submit a "summary" or arguments to be presented at the Hearing – obviously inferring that further briefing would be permissible. Attached hereto as **Exhibit 12** is a true and correct copy of Ms. Fordyce's February 10, 2011 letter.

[18]Since the Prosecution Team based its calculation of potential penalties on an analysis of the Regional Board's overhead incurred in these proceedings, Petitioner had a particular disincentive to engage in preliminary adversarial discovery.

VIII. Under the Circumstances, Any Penalty Should Have Been Nominal and Predicated on Petitioner's Ability to Pay and on Petitioner's Ability to Remain in Business

The Prosecution Team's submission contained no evidence whatsoever with respect to Petitioner's ability to pay or to continue in business. Its sole foundational showing related to the Ventura County Assessor's records. The record as presented by the Prosecution Team did not reveal that the Prosecution Team ever inquired or conducted discovery as to Petitioner's operating expenses, or its property liens and encumbrances (which are a matter of public record).

Petitioner sought to adduce appropriate and unquestionably relevant testimonial evidence which would have demonstrated that in the entire history of its ownership and operation of the subject property, from 1992 to date, it has never generated a profit. In fact, it has realized operating losses annually in its efforts to operate in an environmentally conscious manner.[19]

Moreover, purely as a practical matter, the assessed penalty bears no relationship to the Prosecution Team's announced objectives, because the Prosecution Team disclosed during these proceedings that whether or not Petitioner joined the Discharger Group (VCAILG), no further testing (or water remediation) would in fact be conducted.

Therefore, Petitioner submits that, particularly in these circumstances in which constitutional rights are implicated, the penalty should have been nominal and predicated on competent evidence of Petitioner's ability to pay and to continue in business.

---

[19]Ms. Thomas testified that money was always tight. *See* Transcript, at 64, and 68.

IX. The Amended Fine Was and Is Excessive Because the 2005 Conditional Waiver Was Unconstitutionally Infirm, and Balcom Ranch Challenged that Conditional Waiver in Good Faith

The record contains no competent evidence that Balcom Ranch actually discharged any amounts greater than it would have been permitted to discharge had it joined a discharger group in 2010 or earlier. Balcom Ranch clearly had the right to challenge the perceived unconstitutional infirmities in the 2005 Conditional Waiver, without incurring a penalty that is disproportionate to any harm resulting from its constitutional challenge. *See People ex rel. Younger v. Superior Court* (1976) 16 Cal. 3d 30.

The assessed penalty ($193,850) is excessive, particularly in light of the circumstances under which it was imposed and in view of the testimony at the March 17, 2011 hearing regarding the financial condition of Balcom Ranch and its ability to pay, and therefore it is unconstitutional as an excessive fine. The size of the proposed fine certainly suggests that citizens' attempts to protect their constitutional rights can be penalized significantly, out of all proportion to any ultimate harm. This anomaly was implicitly acknowledged by the Prosecution Team in its formulaic application of its generic methodology to calculate the proposed penalty – an application devoid of foundational evidence of harm.[20]

The constitutional infirmity of the 2005 Conditional Waiver – tacitly recognized by the Regional Board – is the fact that the 2010 Conditional Waiver was modified to include a warrant requirement for governmental inspectors, thereby validating Balcom Ranch's prior constitutional objections.

Furthermore, the actual inspection of the Balcom Ranch property did not need to be illegal for Balcom Ranch's constitutional concerns to be legitimate. For at the time Balcom Ranch noted its objections, no search or inspection had yet occurred.

---

[20]Attached hereto as **Exhibit 13** is a true and correct copy of the penalty calculation prepared by Samuel Unger, Assistant Executive Officer of the Regional Board, and submitted to the Regional Board at the most recent hearing.

From a legal perspective, it is sufficient that future searches hold the potential for unconstitutional intrusion. Balcom Ranch, as a potentially affected landowner, had the right to challenge the constitutionality of the Conditional Waiver, rather than implicitly waiving its constitutional rights by joining a Discharge Group and thereby acquiescing to future potentially unconstitutional searches.

Balcom Ranch extensively briefed these constitutional issues in its Trial Brief, which the Hearing Panel (the "Panel") below considered in a limited fashion but only as part of Balcom Ranch's oral presentation, but the Regional Board specifically declined to permit Balcom Ranch's Brief to be filed as part of the record.[21] Constitutional violations were apparent not just in this particular instance, but also in the general application of the policies and procedures of the Regional Board. Ms. Rebecca Nascimento testified that it was her practice while conducting a search to look for owners and property managers of the property in question – which she admitted logically included attempting to find such individuals at any residences on the property.[22] Accordingly, the "open fields" doctrine upon which the Prosecution

---

[21]Balcom Ranch's counsel, Paul Beck, was able to read only a portion of the Trial Brief into the record after the Panel refused to allow its filing. *See* Transcript of Proceedings – March 17, 2011 ("Transcript" or "TR") at 69-83.

[22]Transcript, at 90:

> Q. So you were attune [sic] to looking for housing or office space or anything like that, correct?
>
> A. I was not particularly attune [sic] to looking for housing. I was verifying the land use and looking for a property owner or a property manager. I visited this property more than one year ago and I do not particularly remember seeing a home.
>
> Q. But you would have looked – a home would have been a logical place to look for an owner, wouldn't it?
>
> A. It is a logical place to look for an owner.

See also FOF No. 8 ("Staff testified that the purpose of the visit was...to find a contact person for the Discharger....").

The inevitability of Ms. Nascimento's having searched the curtilage areas of the property is established by her admission – drawn out by her own counsel – that as part of her inspection she viewed the silver barn immediately adjacent to the residences:

(continued...)

Team places such great weight cannot validate such an intrusive and unconstitutional search – both as authorized by the 2005 Conditional Waiver generally and in this specific instance.

The imposition of an excessive fine is viewed as a constitutional violation. *See* U.S. Const., 8th Amend.; Cal. Const., Art. I, § 17; ; *see also Hale v. Morgan* (1978) 22 Cal. 3d 388 ($17,300 fine, accrued at $100 per day, imposed on landlord for shutting off tenant utilities, found to be constitutionally excessive and violative of due process).

Accordingly, Balcom Ranch respectfully requests that if the Board ultimately elects to affirm the penalty assessment against Petitioner, despite Balcom Ranch's good faith and its efforts to protect private growers' constitutional rights, any such assessment should be limited to the minimal injury incurred (reflected by the Regional Board's own evidence[23]) – and not calculated based upon a daily accrual (*cf. Hale, supra*) or any other unreasonably arbitrary and capricious template.

---

[22](...continued)

MS. OKUN: – and then [you] went to the end of that road to the north and turned around and came back?

MS. NASCIMENTO: I did not travel all the way to the end of the road. I traveled approximately to the midpoint of the road and then turned around.

MS. OKUN: Okay. And you said that there was a barn on the road that runs from South Mountain Road to the north part of the parcel that was –

MS. NASCIMENTO: Yes.

MS. OKUN: – at the intersection about halfway up that road?

MS. NASCIMENTO: Yes, ma'am. It was approximately at the midpoint of that road.

Transcript, at 33:22-34:9.

[23]*See* the "Economic Benefit" factor, discussed below.

X. Other Reasons Why the Proposed Fine Is Excessive or Unsupported by the Evidence

1. The Prosecution Team Did Not Follow the Board's Own Statutorily-Required Guidelines in Calculating the Penalty

In its proposed Finding of Fact ("FOF") No. 18, the Prosecution Team acknowledged that the Regional Board had established a methodology for assessing administrative civil liability, as required by CWC § 13327, but it had ignored the methodology and argued for an illogical application of this methodology to the facts.

For example, it applied a Per Day Factor for Non-Discharge Violations at .4 based upon the Potential for Harm. However, Section 13327 does not require that non-discharge violations automatically have a Potential for Harm factor. Section 13327 does not mention "harm" but speaks generally about the "nature, circumstances, extent and gravity" of violations. While certain non-discharge violations may still create harm, no presumption of harm factor should automatically be applied where there is no actual discharge. Moreover, there could be no harm here (in the environmental sense, which is the clear focus of Section 13327)[24] because, as discussed below, there was no evidence that Balcom Ranch's joining the VCAILG discharger group (which it did) would have resulted in any lesser discharge from Balcom Ranch lands or even in any enhanced monitoring.[25] Anything more than a minimal Harm Factor was not appropriate, particularly given the multiplier effect of the penalty calculation.

Similarly, the Deviation from Requirement should also have been circumscribed because Balcom Ranch was in good faith pursuing a legitimate

---

[24]Section 13327 is geared to and speaks primarily of harmful environmental discharge violations: "...whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge,...any voluntary cleanup efforts undertaken,[and] any prior history of violations...."

[25]Indeed, VCAILG reports that the water quality in the Santa Clara River near the Balcom Ranch property does not exceed the limits of the law. *See* April 2011 VCFB newsletter (http://www.farmbureauvc.com/pdf_forms/newsletters/FB_News_April11.pdf).

public/constitutional interest in seeking to fine tune the Conditional Waiver. Indeed, the matrix itself was deficient if it provided that .4 was the "lowest-range" possible.

With regard to FOF No. 18.b.i., the Culpability Factor should not have been greater than 1.00. This was not a simple compliance issue, as Balcom Ranch perceived issues of constitutional and public policy significance (as discussed above). Even if Balcom Ranch's constitutional analysis were flawed, Balcom Ranch nevertheless maintained a good faith belief as to the alleged constitutional infirmities in the Conditional Waiver, and therefore a factor of no more than 1.00 should have been applied because Balcom Ranch had no improper motive.

With regard to FOF No. 18.b.ii., the Cleanup and Cooperation factor, similar good faith considerations should have applied. Moreover, if the Cleanup aspect was admittedly irrelevant,[26] then the Culpability factor and the Cooperation factor (stripped of its Cleanup component) were mere mirror images of the same inquiry. In neither instance should the factor have been more than 1.00, nor should it have been compounded because they were in actuality the same inquiry. Finally, the Cooperation factor should also have been revised downward because, since the date of the March 17th Hearing, Balcom Ranch had joined the VCAILG discharger group (having realized that the constitutional infirmities in the prior Conditional Waiver had been rectified). Moreover, in 2010, after its initial meeting with Regional Board staff, Balcom Ranch undertook significant good faith efforts to come into compliance, while not ignoring its constitutional concerns.

As noted above, Balcom Ranch initially sought to proceed with these good faith efforts by initiating the formation of an additional discharger group, particularly from those agriculture dischargers who had not yet come into compliance pursuant to

[26] *See* Statement of Samuel Unger, Executive Officer of Regional Board, Transcript, at 15-16 ("[T]his really concerns the failure to submit a report of waste discharge.")

information provided by Ms. Nascimento.[27] If Balcom Ranch formed a new discharger group, it could ensure that appropriate constitutional protections could be achieved for those participating property owners.[28]

Balcom Ranch drafted a letter to the non-compliant agriculture users. However, Regional Board staff insisted that they review a copy of the letter prior to its mailing. *Id.* Balcom Ranch furnished the draft letter to staff, as requested, but the letter was substantially edited, resulting in the elimination of any sense of urgency for non-compliers to join, *i.e.*, that all non-compliers were "immediately subject to pending enforcement action."[29] These corrections were made with the express intent as to "how Mark Brown's proposed letter should be revised before it goes out."[30] Without the urgency to act, why would any other non-compliers join?

With regard to FOF No. 18.b.iii (the History of Violations factor), where the Prosecution Team was aware of no prior violations yet still applied a factor of 1.00, this application was inequitable. Section 13327 expressly states that factors are to be applied "as justice may require." The factors are to be weighed individually – some factors may warrant a greater than neutral weight, while others may warrant a less than neutral weight. It was, however, an abuse of discretion to assume that each factor is solely additive or cumulative (*i.e.*, that no factor can act in a mitigating fashion).[31] Accordingly, the History of Violations factor should have been less than 1.00.

Section 13327 is mandatory – it states that in assessing a penalty, the Regional Board "shall" take into account the enumerated factors. Thus, it was incumbent upon

---

[27]Transcript, at 23.
[28]Transcript, at 140:12-17.
[29]Transcript, at 24:13-18.
[30]Transcript, at 24:21-24.
[31]Indeed, the "Ability to Pay" factor – given short shrift by the Prosecution Team – was clearly such a mitigating or ameliorating factor.

the Regional Board affirmatively to explore these factors (and to not impede Balcom Ranch's efforts to obtain discovery relevant to these factors).

In particular, with respect to the "Ability to Pay" factor (and the "Ability to Continue in Business" factor), Balcom Ranch adduced *prima facie* evidence of its twelve (12) years of annual operating losses averaging $236,000 per year, and its current long-term indebtedness of approximately $2,359,000 in bank loans.[32] Mr. David Park, Balcom Ranch's accountant for over 20 years, testified specifically that Balcom Ranch had suffered losses in each of those years. This testimony alone should have been more than sufficient under Section 13327 to shift the burden of proof to the Prosecution Team, which did not meet that burden. Indeed, Ms. Nascimento admits that the Prosecution Team made no effort to obtain financial information from Balcom Ranch. Transcript, at 99-100.

Under Section 13327, the "Ability to Pay" and "Ability to Continue in Business" are separate factors and need to be addressed separately. In this case, Balcom Ranch's perennial losses, together with the excessive amount of a fine grossly disproportionate to the "Economic Benefit" or avoided cost, demonstrated that the Panel failed to apply a standard (or fair) economic or accounting analysis.

Moreover, the "Ability to Continue in Business" factor by itself is sufficient to negate other factors. It is obviously part of the public policy behind Section 13327, that absent some egregious quasi-criminal conduct or exceptional circumstances not present here, the purpose of the statutory construct is not to run legitimate small enterprises out of business. Once again, the Regional Board and its Prosecution Team cannot unthinkingly or mechanistically apply these factors in strict additive fashion.

The "Economic Benefit" test (*i.e.*, the avoided cost of non-compliance) was also central to the calculation of a just penalty. By the Prosecution Team's own

---

[32]In addition, Mark Brown, one of the principals of Balcom Ranch, offered to testify as to his lack of assets in response to an inquiry from Charles Stringer (one of the Panel members) regarding evidence of Balcom Ranch's inability to pay, but Mr. Brown's offer was not taken up by the Panel. Transcript at 135.

analysis of the "Ability to Pay" element of the template, the economic benefit or avoided cost of Balcom Ranch's non-compliance – a mere $3257[33] – was clearly wholly disproportionate to the almost $200,000 proposed penalty. Instead of proceeding "as justice may require" and weighing each factor, including those that should equitably result in a diminution of the penalty (by reason of applying a factor of less than 1.0 where appropriate), the Prosecution Team instead disregarded the importance of this factor and dismissed its application. This factor was supposedly irrelevant because the "Adjusted Total Base Liability Amount of $35,700 is at least 10% higher than the economic benefit amount as required in the Enforcement Policy."[34]

In short, virtually every factor enumerated in Section 13327 either warranted only a modest fine based on these facts, or it was inapplicable, leading to the conclusion that any fine should have been modest. The factors are: (1) "nature, circumstance, extent, and gravity of the violation or violations" (a generalized factor that was applicable); (2) "whether the discharge is susceptible to cleanup or abatement" (an inapplicable factor because the issue of discharge was irrelevant, particularly where compliance could have been attained merely by joining VCAILG); (3) "the degree of toxicity of the discharge" (again a specific but irrelevant factor because of the absence of discharge); (4) "with respect to the violator, the ability to pay" (a specific factor that militated in favor of reducing the fine); (5) "the effect on ability to continue in business" (a second economic factor that militated in favor of reducing the fine); (6) "any voluntary cleanup efforts undertaken" (a specific,

---

[33]Attached hereto as **Exhibit 14** is a true and correct copy of the Ms. Nascimento's memorandum to file dated January 28, 2010 in which she calculated the economic benefit or savings resulting from the violation.

[34]As to FOF No. 18.a.ii., it remains unclear why there could be no calculation of the "economic benefit...that can be measured on a daily basis," since throughout all relevant time periods, the economic benefit was the avoided cost of not joining VCAILG.

admittedly irrelevant factor because of the absence of discharge[35]); (7) "any prior history of violations" (again a specific but mitigating factor); (8) "the degree of culpability" (a relevant, potentially non-mitigating factor); and (9) "economic benefit or savings, if any, resulting from the violation" (a factor that, given the limited benefit the Prosecution Team itself calculated (a mere $3,233), strongly militated in favor of a significantly reduced penalty).

Thus, out of the 9 factors, other than the generalized introductory factor, there was only one factor arguably militating in favor of a greater fine (factor 8), while there were 4 factors that militated in favor of a reduced fine (factors 4, 5, 7, and 9) and 3 factors (factors 2, 3, and 6) that were largely irrelevant (other than to reinforce the notion that the failure to enroll is not the type of intentional discharge or contamination that is the focal point of the statutory construct).[36] Accordingly, the proposed penalty should, in equity, have been significantly reduced.

2. Excess Acreage in the Penalty Calculation

The Prosecution Team based its proposed penalty calculation on the raw boundaries of the parcels derived from the County Assessor's boundary data. *See* FOF No. 3. The penalty must bear some relationship to lands actually irrigated and utilized for agriculture. However, approximately 5 acres are devoted to non-irrigated purposes (*e.g.*, roads, buildings, support structures such as barns, etc.), and the Parcel

---

[35]And also because of Balcom Ranch's established adoption of best management practices ("BMPs"). Transcript, at 89:1-15.

[36]Note further that Section 13327 contains a catch-all factor (to consider "other matters as justice may require"). Balcom Ranch requested that its environmental contributions in keeping its lands in groves, at considerable extra cost, be considered in calculating any penalty – a far superior usage (compared to, for example, row cropping or cattle ranching) that reduces erosion, dust and other environmental contaminants. The Prosecution Team appeared to disregard this evidence and relevant authorities, as it proposed a finding of fact (FOF No. 25) that suggested (contrary to Section 13327) that there was no legal authority for Balcom Ranch's position, and that no distinction could be drawn between varying agricultural uses.

No. 046-0-150-320 (the "320 Parcel") contains in excess of 10 acres of non-irrigated, non-cultivated "wild" lands. Thus, it was neither a logical assumption nor could it have been judicially noticed that all lands within a parcel boundary are irrigated. Ms. Nascimento stated that she inspected the property to establish that the parcels involved irrigated lands. It was therefore incumbent upon her (or the Regional Board) to determine the extent of the irrigated lands.[37]

Finally, approximately 35 acres of the 320 Parcel is leased by a tenant farmer unaffiliated with Balcom Ranch.[38] For purposes of establishing the penalty, land that Balcom Ranch does not irrigate and has not irrigated since the initial Conditional Waiver should not have been included in any penalty calculation.[39]

---

[37]*See* Ms. Nascimento's testimony at the Hearing:

Q. From your site visit, did you include roads or buildings?

A. As I stated just a moment ago, I included the assessed acreage by the Ventura County Assessor's Office, so it is possible that 108 acres is a slight overestimation of the actual irrigated acreage, but that was all the information available to me.

Transcript, at 101:8-14. Despite the quasi-criminal nature of the penalty assessment, Ms. Nascimento attempted to shift the evidentiary burden to the responding party:

Q. **So you have to determine accurately how many irrigated acres there are on each parcel, correct?**

A. **Yes**, but that responsibility is incumbent upon the enrolling Discharger.

Id. at lines 1-4 (emphasis added).

[38]FOF No. 8.b.ii.

[39]The Prosecution Team appeared to disregard Ms. Nascimento's inspection, site visit report and testimony. FOF No. 8.c and d. Without her testimony, it could proffer only a generalized statement of agriculture usage for an unspecified portion of the lands in question. *Id.* at 8.c. ("Even without considering Ms. Nascimento's inspection report or her testimony about the site visit, the evidence is undisputed that the Site is used for commercial irrigated agriculture....") Unfortunately, without Ms. Nascimento's testimony (and in some cases even with it), the Prosecution Team could not establish the amount of acreage devoted to irrigated agriculture – a cornerstone of any constitutionally defensible penalty calculation. *See* the Prosecution Team's admission in the following Finding of Fact (No. 8.d): "For the sake of simplicity, the evidence regarding the site visit was not considered for purposes of establishing the violations **or determining the amount of liability.**" (Emphasis added.) Moreover, particularly where there is a constitutionally

(continued...)

In short, the Prosecution Team did not establish – and the record does not reflect – that there are 108 acres of irrigated lands subject to regulation and potential fine.[40]

XI. Erroneous Findings by the Regional Board

Petitioner has not been served with a final version of the Findings that it believes were adopted by the Regional Board. However, assuming that the last version of the Findings that it received (Exhibit 2) are the final Findings, Petitioner believes such Findings to be erroneous and defective in the following respects (in addition to the defects set forth above).

Finding of Fact No. 9 is erroneous. There was no competent evidence that Petitioner engaged in any improper discharge, as admitted in the proposed finding itself, and no evidence that Petitioner engaged in any discharge greater than that permitted any neighboring agricultural user or landowner. More importantly, had Petitioner joined an approved Discharger Group such as VCAILG – which the Prosecution Team acknowledged was an acceptable method of compliance (and, indeed, the most common method[41]) (*see* FOF Nos. 6 and 14) – not a single additional water sample would have been taken or water testing done. The Prosecution Team did not adduce any evidence to the contrary.[42]

---

[39](...continued)
questionable search, the Hearing Panel could not simply pick and choose what portions of the Prosecution Team's proffered testimony it could consider. *See* FOF No. 8.d.

[40]*See* FOF No. 8 ("A significant portion of the Site is used to grow commercial citrus crops."); FOF No. 8.b.ii. ("Parcel 046-0-150-140 is mostly...comprised of orchards").

[41]*See* FOF No. 18.e (Prosecution Team "assumed that the Discharger would select the most cost-effective option for compliance with the Conditional Waiver, which is enrollment in the Discharger Group [VCAILG]").

[42]The Prosecution Team's statement that "There is no evidence whether the
(continued...)

With regard to FOF No. 19, Petitioner fulfilled its burden as to affirmative defenses and appropriate grounds to stop the accrual of penalties by challenging the same constitutionally questionable provisions that the new Conditional Waiver rectified.

Finally, with respect to FOF No. 8.a., there is clear evidence that "No Trespassing" signs were posted not only on the access gate but all down the road. *See* Transcript, at 59-62.

XII. Conclusion

Petitioner has acted in good faith in raising issues of constitutional magnitude that infected the 2005 Conditional Waiver and this enforcement action in particular. The Board has acknowledged the timeliness and importance of those constitutional issues by amending the 2010 Conditional Waiver to correct those defects. For those

[42](...continued)
Discharger degraded water quality or impaired beneficial uses **because no monitoring was conducted**" (emphasis added) ignores the effect of Petitioner's being able to come into compliance by joining VCAILG (*see* FOF No. 6), and ignores the Team's burden of proof on this issue.

resets and all of the reasons set forth above, Petitioner respectfully requests that the Board rescind and/or modify the Order and eliminate or reduce the penalty assessed by the Regional Board so that it is not unconstitutionally punitive.

Respectfully submitted,

DATED: August 15, 2011

LAW OFFICES OF PAUL A. BECK
LAW OFFICES OF MARK KESTER BROWN

By MARK KESTER BROWN
Attorneys for Petitioner

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:	**Order on Complaint No. R4-2010-0023**
Balcom Ranch	**Administrative Civil Liability**
	Pursuant to California Water Code § 13261
	For Violations of
	California Water Code § 13260

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The Regional Water Quality Control Board, Los Angeles Region (Regional Board) has found and determined that Balcom Ranch (Discharger) violated California Water Code (CWC) section 13260 by failing to submit a report of waste discharge or a Notice of Intent, individually or as a member of a Discharger Group, to comply with the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands within the Los Angeles Region, Order No. R4-2005-0080 (Conditional Waiver), despite at least two notices by the Regional Board.

2. The Discharger owns the property located at 21099 South Mountain Road in the City of Santa Paula, Ventura County, with Assessor Parcel Numbers (APN) 046-0-150-140 and 046-0-150-320. According to Ventura County Assessor records, the Discharger owns approximately 108 acres. A commercial irrigated farming operation is operated on the Discharger's property. By owning irrigated land, the Discharger is subject to the Conditional Waiver.

3. On January 23, 2007, the Regional Board's Executive Officer sent an official notice to the Dischager entitled "Notice to Comply with the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands within the Los Angeles Region" (Notice to Comply). This Notice to Comply directed the Discharger to comply with the terms of the Conditional Waiver by first submitting a Notice of Intent, MRP Plan, and a QAPP, individually or as a member of a Discharger Group. Alternatively, if the Discharger did not enroll in the Conditional Waiver, the Discharger was required to submit a report of waste discharge in order to apply for an individual waste discharge permit. Finally, if the property was not commercially irrigated agriculture, and therefore not subject to the Conditional Waiver, the Discharger was asked to provide such information to the Regional Board. This Notice to Comply was sent to Balcom Ranch's mailing address located at 943 South Burnside Avenue, Los Angeles, California 90036. The Discharger failed to respond to the January 23, 2007 Notice to Comply.

4. On November 15, 2007, the Executive Officer issued the Discharger a Notice of Violation (NOV) for failure to enroll under the Conditional Waiver pursuant to California Water Code section 13269. This Notice of Violation once again directed the Discharger to immediately

Exhibit 1

comply with the terms of the Conditional Waiver and to submit a Notice of Intent, MRP Plan, and QAPP or to join a Discharger Group. Regional Board staff mailed the November 15, 2007 Notice of Violation by certified mail, and received a return receipt confirming delivery to the Discharger at the same mailing address as the January 23, 2007 Notice to Comply . The Discharger failed to respond to this NOV.

5. On February 18, 2010, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R4-2010-0023 against the Discharger in the amount of $35,700. In addition to seeking civil liability, the intent of the Complaint was to encourage compliance with the Conditional Waiver. Accordingly, the Complaint sought higher penalties in the amount of $400 per day if the Discharger did not enroll under the Conditional Waiver within 30 days from the date of the Complaint. The Discharger had the burden of submitting the required documentation in order to stop the accrual of penalties. For the Discharger's convenience, a copy of the Notice of Intent form, MRP Plan, and QAPP, as well as a list of the Discharger Groups that are currently on record with the Regional Board as submitting Notices of Intent and other required information, accompanied the Complaint.

6. On March 17, 2011, this matter was heard in Los Angeles, California before a Regional Board Hearing Panel (Panel) consisting of Regional Board Members Francine Diamond (Panel Chair), Charles Stringer, Steve Blois, and Maria Mehranian. Deborah Smith and Lori Okun were Panel advisors. Paul Beck, Mark Brown, Pat Thomas and David Park appeared on behalf of the Discharger. Samuel Unger, Jenny Newman, Rebecca Veiga Nascimento, and Jennifer Fordyce appeared for the Prosecution Team. The Panel subsequently submitted to the Regional Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended administrative civil liability.

7. Based on the written record and evidence presented at the hearing, the Panel determined that the Discharger violated CWC section 13260 by failing to submit a report of waste discharge or a Notice of Intent, either individually or as a member of a Discharger Group, to comply with the Conditional Waiver. As of the date of the hearing, the Discharger had still not submitted the required documentation. Therefore, pursuant to CWC section 13261, the Panel recommended that the Regional Board impose administrative civil liability in the amount of $193,850 on the Discharger for the pre- and post-Complaint violations. The administrative liability calculation is shown in Exhibit A and incorporated by this reference.

8. Upon considering the Panel's report and making an independent review of the record, the Regional Board during its meeting on July 14, 2011 adopted the findings of the Hearing Panel Report, with modifications, as the findings of the Board and upheld the imposition of the Panel's proposed administrative civil liability on the Discharger. The Board's findings are attached as Exhibit B and incorporated by this reference.

9. This Order on Complaint is effective and final upon issuance by the Regional Board. Payment must be received by the Regional Board no later than thirty days from the date on which this Order is issued.

10. In the event that the Permittee fails to comply with the requirements of this Order, the Executive Officer or his delegee is authorized to refer this matter to the Office of Attorney General for enforcement.

11. Any person aggrieved by this action of the Regional Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with Water

Exhibit 1

Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must *receive* the petition by 5:00 p.m., 30 days after the Regional Board action, except that if the thirtieth day following the action falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at the link below or will be provided upon request.

http://www.waterboards.ca.gov/public_notices/petitions/water_quality

IT IS HEREBY ORDERED that, pursuant to CWC section 13323 of the CWC, Balcom Ranch shall make a payment of $193,850 (check payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days from the date of issuance of this Order.

In the event that the Discharger fails to comply with the requirements of this Order on Complaint No. R4-2010-0023, the Executive Officer or his delegee is authorized to refer this matter to the Office of Attorney General for enforcement.

I, Deborah J. Smith, Chief Deputy Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the California Regional Water Quality Control Board, Los Angeles Region, and that such action occurred on July 14, 2011.

Deborah J. Smith
Chief Deputy Executive Officer

Exhibit 1

~~HEARING PANEL REPORT AND PROPOSED ORDER~~FINDINGS

This matter was heard on March 17, 2011 in Los Angeles, California before a panel consisting of Regional Board Members Francine Diamond (Panel Chair), Steve Blois, Charles Stringer and Maria Mehranian. Deborah Smith and Lori Okun were Panel advisors. David Park, Patricia Thomas, Paul Beck and Mark Brown appeared on behalf of Balcom Ranch (Discharger). Samuel Unger, Jenny Newman, Rebecca Veiga Nascimento, and Jennifer Fordyce appeared for the Prosecution Team.

The ~~Panel recommends the following~~Board finds as follows:

FINDINGS ~~OF FACT~~

1. The Regional Board adopted the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands within the Los Angeles Region, Order No. R4-2005-0080 (Conditional Waiver) on November 3, 2005. The Regional Board renewed the Conditional Waiver in Order No. R4-2010-0186 on October 7, 2010. The Conditional Waiver applies to wastewater (irrigation and stormwater runoff) discharged to groundwater and surface waters from irrigated agricultural operations in the Los Angeles Region, which includes the coastal watersheds of Los Angeles and Ventura Counties.

2. The Conditional Waiver requires all commercial irrigated farming operations in the Los Angeles Region to submit a Notice of Intent, Monitoring and Reporting Program (MRP) Plan, and Quality Assurance Project Plan (QAPP), individually or as a member of a Discharger Group, to comply with the Conditional Waiver by August 3, 2006, pursuant to California Water Code (CWC) section 13260. Public notification regarding the adoption of this program included a Notice of Public Hearing on August 30, 2005, a September 27, 2005 newspaper notice published in the Ventura County Star, Thousand Oaks Star, Oxnard Star, Simi Valley Star, Moorpark Star, and Camarillo Star, as well as a letter mailed to agriculture stakeholders (addressed to interested parties) on April 17, 2006.

3. The Discharger owns the property located at 21099 South Mountain Road in the City of Santa Paula, Ventura County, with Assessor Parcel Numbers (APN) 046-0-150-140 and 046-0-150-320. According to Ventura County Assessor records, the Discharger owns approximately 108 acres. A commercial irrigated farming operation is operated on the Discharger's property. Some of the acreage is operated by a tenant and some is utilized for non-irrigated purposes (e.g., roads, buildings, and support structures). By owning and/or operating irrigated land, the Discharger is subject to the Conditional Waiver.

4. On January 23, 2007, the Regional Board's Executive Officer sent an official notice to the Discharger entitled "Notice to Comply with the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands within the Los Angeles Region" (Notice to Comply). This Notice to Comply directed the

Discharger to comply with the terms of the Conditional Waiver by first submitting a Notice of Intent, MRP Plan, and a QAPP, individually or as a member of a Discharger Group. Alternatively, if the Discharger did not enroll in the Conditional Waiver, the Discharger was required to submit a report of waste discharge in order to apply for an individual waste discharge permit. Finally, if the property was not commercially irrigated agriculture, and therefore not subject to the Conditional Waiver, the Discharger was asked to provide such information to the Regional Board. This Notice to Comply was sent to Balcom Ranch's mailing address located at 943 South Burnside Avenue, Los Angeles, California 90036. Although Ms. Thomas denied that she had previously seen the letter, the Discharger signed for subsequent correspondence sent to this address (see below) and Ms. Thomas acknowledged that is was one of the mailing addresses the Discharger uses.

5. The Discharger failed to respond to the January 23, 2007 Notice to Comply, either by: a) submitting a Notice of Intent, MRP Plan, and QAPP to comply with the Conditional Waiver individually, b) providing proof of Discharger Group membership, c) submitting a report of waste discharge, or d) by providing information showing that the operation was not a commercial irrigated farming operation.

6. On November 15, 2007, the Executive Officer issued the Discharger a Notice of Violation (NOV) for failure to enroll under the Conditional Waiver pursuant to California Water Code section 13269. This NOV once again directed the Discharger to immediately comply with the terms of the Conditional Waiver and to submit a Notice of Intent, MRP Plan, and QAPP or to join a Discharger Group. Regional Board staff mailed the November 15, 2007 NOV by certified mail, and received a return receipt confirming delivery to the Discharger at the same mailing address as the January 23, 2007 Notice to Comply.

7. The Discharger failed to respond to the November 15, 2007 NOV either by submitting a Notice of Intent, MRP Plan, and QAPP to comply with the Conditional Waiver, providing proof of Discharger Group membership or submitting a report of waste discharge.

8. A significant portion of the Site is used to grow commercial citrus crops. The Discharger uses furrow irrigation to irrigate its citrus orchards.

    a. Site visit and character of property

        i. On November 17, 2009, Regional Board staff conducted a site visit of APNs 046-0-150-140 and 046-0-150-320. The Discharger asserted that the Complaint was predicated upon this search, and that the search violated the Fourth Amendment due to an invasion of the curtilage of the residence of the principals of Balcom Ranch. Staff testified that the purpose of the visit was two-fold: to find a

contact person for the Discharger, who had not responded to staff's prior contacts; and to verify that the property had not been converted to a non-agricultural use. Staff drove the southern boundary of parcel 046-0-150-140 (South Mountain Road), the eastern boundary of parcel 046-0-150-140 ("north-south dirt road") and the southern boundary of parcel 046-0-150-320 ("east-west dirt road"). South Mountain Road is a public street. From South Mountain Road, Ms. ~~Nacimiento~~Nascimento could see that at least some portion of the property was used for citrus groves. The Discharger does not own the property to the east of the north-south dirt road or to the south of the east-west dirt road.

ii. Ms. Thomas provided testimony and photographs that there is a posted gate at the intersection of South Mountain Road and the east-west dirt road. However, the gate was open on the date of Ms. ~~Nacimiento~~Nascimento's site visit and on other occasions when she drove along South Mountain Road.

iii. Ms. Thomas' private residence is on the west side of the north-south dirt road. Ms. ~~Nacimiento~~Nascimento did not recall seeing the residence, did not enter or approach the residence and did not inspect or visit any homes. The front of the residence is enclosed by a wooden fence, ornamental shrubbery and several tall trees. Ms. Thomas testified that there exist "naturalized patios that are mingled and interwoven over a large area among the existing Valencia trees, as well as one of fruit trees. This space creates a significantly larger homestead of outdoor rooms and other personal uses." The Discharger did not describe the "naturalized patios," indicate where the "outdoor rooms and other personal uses" occur, or offer any evidence regarding whether they are enclosed, what steps are taken to protect those areas from people who use the dirt road or who are present in the commercial groves or areas leased to tenants, or whether they are intimately tied to the home itself. There is no evidence that staff inspected such areas.

iv. Ms. ~~Nacimiento~~Nascimento stopped at a barn/work area in an attempt to locate Discharger personnel. No one was present. She did not otherwise leave the dirt road.

b. Other evidence of irrigated agricultural activities on the property

i. Prior to the November 17 site visit, staff already had documentation from the County Assessor that the current land use of both parcels was commercial orchards.

ii. Staff introduced an aerial photograph of the Site that shows Parcel 046-0-150-140 is mostly or entirely comprised of orchards. Parcel 046-0-150-320 appears to be comprised of row crops. Ms. Thomas testified that the Discharger does not grow row crops, and what was observed was likely weeds. However, Mr. Brown testified that the "tenant farmer" grows row crops.

iii. Two water supply wells are located on the property.

iv. Ms. Thomas testified that the Site is used for commercial citrus crops; there are two wells on site; furrow irrigation is used; and the Discharger applies nutrients to soil. Although the Discharger implements practices to reduce the amount of irrigation water it applies, the Discharger's representative admitted that the Discharger is engaged in commercial irrigated agriculture.

v. Ms. Thomas introduced photographs at the hearing depicting commercial orchards at the property.

c. The Complaint was not predicated on the site visit, nor was the site visit the "cornerstone" of the administrative civil liability (see Transcript, p. 76). The purpose of the site visit was to verify that the land used had not changed and to locate a contact person. Ms. ~~Nacimiento~~Nascimento took photographs during the site visit for purposes of illustration, but did not collect any other evidence. Even without considering Ms. ~~Nacimiento~~Nascimento's inspection report or her testimony about the site visit, the evidence is undisputed that the Site is used for commercial irrigated agriculture, and that it is in close proximity to the Santa Clara River.

d. For the sake of simplicity, the evidence regarding the site visit was not considered for purposes of establishing the violations or determining the amount of liability. The Board has considered the evidence regarding the site visit for the sole purpose of responding to the Discharger's allegation that it was an unconstitutional search. Specifically, the November 18, 2009 Memo to File (Hearing Panel Binder #4.12) other than the attachment (aerial photograph dated Sep. 2007) has been disregarded in determining liability in this matter. The ~~Hearing Panel~~Board has considered Ms. ~~Nacimiento~~Nascimento's testimony regarding her observations from South Mountain Road, but has disregarded the remainder of her testimony regarding observations from the site visit, specifically Transcript, p. 19 line 19 through page 20, line 17; page 21, lines 2 through 11; and page 31 line 21 through page 34, line 10. The ~~Hearing Panel~~Board declines to find that the site visit violated the Fourth Amendment. Even if it had, the appropriate remedy would be to exclude

the evidence described in this paragraph and not to dismiss the Complaint.

9. Agricultural activities can generate pollutants such as sediment, pesticides, and nutrients. Unregulated discharges of water containing these pollutants from irrigated lands to receiving water bodies can degrade water quality and impair beneficial uses. There is no evidence whether the Discharger degraded water quality or impaired beneficial uses because no monitoring was conducted. However, based on staff's professional judgment, the Discharger's irrigated agricultural practices discharged waste to groundwater and possibly to surface water. Runoff through the Discharger's agricultural lands discharged into the Santa Clara River during flood conditions in the aftermath of the fires, rains and freezes in 2003-2005. (Transcript, p. 64.) The Discharger did not provide evidence that it contained its irrigation water on-site.

10. The Discharger violated CWC section 13260 by failing to submit a report of waste discharge for an individual waste discharge permit or a Notice of Intent to enroll under the Conditional Waiver by August 3, 2006, despite at least two subsequent notices by the Regional Board, and is therefore subject to civil liability pursuant to CWC section 13261.

11. CWC section 13261(a) states that "Any person failing to furnish a report or pay a fee under Section 13260 when so requested by a regional board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."

12. CWC section 13261(b)(1) states that "Civil liability may be administratively imposed by a regional board or the state board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount that may not exceed one thousand dollars ($1,000) for each day in which the violation occurs."

13. On February 18, 2010, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R4-2010-0023 (Complaint) against the Discharger for failing to submit a report of waste discharge or Notice of Intent after being so requested by the Regional Board. While the Regional Board can assess penalties starting from the January 23, 2007 Notice to Comply, the Prosecution Team recommended that penalties be calculated starting from the November 15, 2007 NOV. The November 15, 2007 NOV was selected as the date from which penalties would be calculated because there is documentation (a certified mail return receipt) that the NOV was received by the Discharger at its mailing address. The Panel ~~agrees~~ agreed with the Prosecution Team's recommendation regarding the commencement of the penalty calculation.

14. In addition to seeking civil liability, the intent of the Complaint was to encourage compliance with the Conditional Waiver. The Prosecution Team recommended that the Regional Board assess the Discharger $35,700, provided that the

Discharger submitted the required documentation to come into compliance within 30 days of the date of the Complaint. The Complaint sought higher penalties in the amount of $400 per day if the Discharger did not enroll under the Conditional Waiver within 30 days from the date of the Complaint. The Discharger had the burden of submitting the required documentation in order to stop the accrual of penalties. For the Discharger's convenience, a copy of the Notice of Intent form, MRP Plan, and QAPP, as well as a list of the Discharger Groups that are currently on record with the Regional Board as submitting Notices of Intent and other required information, accompanied the Complaint.

15. In response to the Complaint, the Discharger waived its right to a hearing within 90 days in order to engage in settlement discussions with the Prosecution Team. Those discussions were unsuccessful and this matter was scheduled for a hearing. On December 17, 2010, a revised Notice of Public Hearing and Hearing Procedures was issued, requiring that all additional documents or evidence must be received by February 16, 2011.

16. As of the date of the hearing before the Panel, the Discharger had still not submitted a report of waste discharge or enrolled under the Conditional Waiver, either individually or as a member of a Discharger Group. Accordingly, the Discharger has been continually violating CWC section 13260 since at least November 15, 2007, which constitutes 1,218 days of violation.

17. The maximum civil liability authorized by CWC section 13261(b)(1) for violations of CWC section 13260 is $1,000 per day for each day in which the Discharger failed to submit a report of waste discharge, Notice of Intent, MRP Plan, and QAPP, or proof of Discharger Group membership, after requested so by the Regional Board. Thus, the total potential maximum civil liability, calculated from the November 15, 2007 NOV through March 17, 2011 (the date of the hearing) is $1,218,000.

18. The State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing discretionary administrative civil liability. Use of the methodology addresses the factors in CWC section 13327. A spreadsheet demonstrating the penalty calculation is in Exhibit A, which is attached hereto and incorporated herein by reference. The recommended administrative civil liability, for the time period up to the date of the Complaint, was derived from the use of the penalty methodology in the Enforcement Policy as follows.

    a. Initial Liability Determination:

        i. The Per Day Factor for Non-Discharge Violations is 0.4. This factor was determined by a matrix analysis using the Potential for Harm and the Deviation from Requirement. The Enforcement Policy states, "Most incidents would be considered to present a moderate

potential for harm." (Enforcement Policy, p. 16.) The Potential for Harm is determined to be Moderate since agricultural operations often use pesticides, fertilizers, and/or other chemicals that are known to cause aquatic toxicity. Monitoring data collected under the Conditional Waiver program has reported toxic discharges in other locations that receive discharges from agriculture operations. In this case, there is no evidence of the Discharger's tenant's practices. The Discharger applies nutrients (fertilizers) but not pesticides. Delayed enrollment in the Conditional Waiver, and the resulting ~~delayed water quality monitoring~~impact on the Regional Board's ability to oversee and regulate the site or determine whether the Discharger's management practices were adequate, presents a substantial ~~threat to beneficial uses and a~~ potential for harm. The Deviation from Requirement was Major since the Discharger completely disregarded the requirement to submit a report of waste discharge or enroll in the Conditional Waiver, thus constituting a complete deviation from the requirement, even as of the date of the hearing. From the range given in the matrix, the ~~Panel~~ Board finds ~~determined~~ that the lowest-range of 0.4 was reasonable based on the evidence.

ii. As of the date of the Complaint, there were 826 days of violation, calculated from the November 15, 2007 NOV through February 18, 2010. The ~~Panel determined~~Board finds that the Enforcement Policy's alternative approach to penalty calculation is appropriate for the time period up to the date of the Complaint. A multiple-day approach is appropriate since the violations that occurred prior to the Complaint's issuance resulted in no economic benefit from the illegal conduct that can be measured on a daily basis. The economic benefit is the cost savings associated with the Discharger's non-compliance.

iii. Following the Enforcement Policy, for violations that last more than 30 days, the liability shall not be less than an amount that is calculated based on an assessment of the initial liability amount for the first day of violation, plus an assessment for each five day period of violations until the 30th day, plus an assessment for each 30 days of violation thereafter. As of the date of the Complaint, the Discharger was in violation for 826 days. Thus, during that time, only 33 days worth of violations accrued based on a per day assessment for days 1, 5, 10, 15, 20, 25, 30, 60, 90, etc.

iv. Applying the Per Day Factor to the number of days of violation yields an initial liability of $13,200. This is the number of days of

violation (33) multiplied by the Per Day Factor (0.4), multiplied by the statutory maximum penalty per day ($1,000).

b. Adjustments to Initial Liability Determination: Based on the following adjustments, the initial liability was revised to $29,700.

   i. The Discharger's Culpability factor is 1.5 based on the Discharger's intentional failure to submit a report of waste discharge or Notice of Intent to enroll in the Conditional Waiver. The Discharger was given sufficient notice (at least two official notices, as well as the Complaint) to submit the required documentation to come into compliance. The Discharger therefore knew about the requirement and failed to comply. Upon receiving the first notice, a reasonable and prudent person would have submitted a report of waste discharge or enrolled in the Conditional Waiver to come into compliance.

   ii. The Discharger's Cleanup and Cooperation factor is 1.5. Cleanup is not a factor in this matter because the violation is failure to enroll in the Conditional Waiver or submit a report of waste discharge. However, the Discharger did not cooperate in returning to compliance. As of the date of the Complaint, and still as of the date of ~~this~~ the hearing, the Discharger ~~has~~ had yet to come into compliance with submitting the required documentation, despite two official notices by the Regional Board.

   iii. The Discharger's History of Violations factor is 1, which is a neutral multiplier. Neither enforcement staff nor the ~~Panel~~ Board is aware of any prior violations by this Discharger.

   iv. Based on these adjustments, the Total Base Liability Amount is calculated as $29,700. This is the initial liability ($13,200) multiplied by the Culpability factor (1.5), multiplied by the Cleanup and Cooperation factor (1.5), multiplied by the History of Violations factor (1).

c. Ability to Pay and to Continue in Business: For the reasons discussed below, the Total Base Liability Amount was not adjusted based on an inability to pay or continue in business.

d. Other Factors as Justice May Require: As of the date of the Complaint, the Prosecution Team incurred costs of investigation and enforcement in the amount of $6,000. This represented approximately 40 hours of staff time devoted to investigating the violations and preparing the Complaint at

$150 per hour. This amount is added to the Total Base Liability Amount, which calculates to $35,700.

e. Economic Benefit or Savings: The Discharger realized cost savings by failing to pay fees or perform required individual water quality monitoring or participate in the Discharger Group option established under the Conditional Waiver. The Discharger realized additional cost savings by failing to attend required education courses. In the Complaint, the Prosecution Team conservatively assumed that the Discharger would select the most cost-effective option for compliance with the Conditional Waiver, which is enrollment in the Discharger Group, Ventura County Agriculture Irrigated Lands Group (VCAILG). According to Ventura County Assessor records, the Discharger owns approximately 108 acres in Ventura County. Therefore, the ~~Panel~~ Board concurs with the Prosecution Team's assessment and estimates the cost savings for non-compliance as of the date of the Complaint to be ~~approximately~~ at most $3,233 (including administration and monitoring costs, State Water Resources Control Board waiver fees (currently ~~zero~~$0.12/acre) and education costs). The Adjusted Total Base Liability Amount of $35,700 is at least 10% higher than the economic benefit amount as required in the Enforcement Policy. Therefore, the Adjusted Total Base Liability Amount was not adjusted for this factor.

f. Maximum and Minimum Liability Amount: The statutory minimum liability is zero. As of the date of the Complaint, the statutory maximum liability amount for 826 days was $826,000. The Enforcement Policy requires that the discretionary administrative civil liability must not exceed the maximum liability amount nor be less than the minimum liability amount. Accordingly, there is no need to adjust the proposed liability amount since it is less than the statutory maximum amount.

g. Final Liability Amount as of Date of Complaint: Based on the foregoing analysis, and consistent with the Enforcement Policy, the proposed calculated administrative civil liability, up to the date of the Complaint, is $35,700.

19. As of the date of the hearing, the Discharger had not submitted a report of waste discharge or a Notice of Intent to enroll in the Conditional Waiver. As stated above, the Prosecution Team's intent of the Complaint was to encourage compliance with the Conditional Waiver. Accordingly, the Prosecution Team sought an additional $400 per day for each day past 30 days from the date of the Complaint up to the date that the Discharger submits the required documentation. The Discharger had the burden of submitting the required documentation to stop the accrual of penalties and the burden of proving any affirmative defenses. The Discharger did not fulfill that burden.

20. Since the Discharger had not complied by March 17, 2011, the Discharger was in violation for an additional 362 days, calculated from March 20, 2010 (30 days from the date of the Complaint) through March 17, 2011 (the date of the hearing). An additional $400 per day should be imposed on the Discharger for this continuing violation. The $400 per day amount is based on the same factors discussed above and the ability to pay factor discussed below, except that this amount does not include multipliers to increase the per day amount for Culpability or Cleanup and Cooperation. No additional economic benefit or savings were included in this calculation beyond those described above as of the date of the Complaint. Accordingly, an additional $144,800 (362 days x $400/day) should be imposed on the Discharger for these post-Complaint violations.

21. Staff incurred an additional $13,350 in staff costs (89 hours) between issuance of the Complaint and the date of hearing. The total amount of recommended liability is thus $193,850 ($35,700 + $144,800 + $13,350).

22. Ability to Pay and to Continue in Business. The Regional Board lacks adequate financial information to assess the Discharger's ability to pay the recommended $193,850 liability amount, or to assess the effect of this amount on the Discharger's ability to continue in business. The Prosecution Team presented information from the Ventura County Assessor that the 2010-2011 tax assessment value of APN 046-0-150-140 is $986,754 and the 2010-2011 tax assessment value of APN 046-0-150-320 is $1,004,655. The Discharger provided testimony of David Park, a certified public accountant who has served as the Discharger's accountant since 1992. Mr. Park is also the accountant of Mark Brown, one of the Discharger's general partners. Mr. Park testified that the Discharger averaged approximately $236,000 of loss over the last 12 years and is subject to loan balances as of the end of 2009 of $2,359,000. Mr. Park did not know whether the Discharger received rental income, did not know how many real estate parcels or other assets the Discharger owns, was unclear about the source of the Discharger's income and could not answer questions about the income or assets of Mark Brown or the individual general partner (identified as "Mel"). He did testify that general partner Zonal, a corporation, had no income. Although the Discharger's counsel stated that Mr. Park was offered as an expert witness, Mr. Park did not offer an opinion about the Discharger's ability to pay or continue in business and did not appear to possess sufficient factual information to do so. The Discharger chose not to introduce any other evidence of its inability to pay or continue in business, either before or at the hearing. The evidence of inability to pay or continue in business is inconclusive and incomplete. The Ability to Pay and to Continue in Business factor is therefore 1, so the liability amount was not adjusted based on this factor.

23. The Discharger contends that the Regional Board has delegated its regulatory authority to the Farm Bureau and that monitoring costs should be borne by the government. The record does not support this contention. Agricultural dischargers may join Ventura County Agriculture Irrigated Lands Group (VCAILG) as a cost-effective way to comply with waiver requirements. The Regional Board's regulatory program relies on discharger self-monitoring. The Board has determined that the VCAILG's monitoring program meets the Conditional Waiver's requirements but does not require membership. VCAILG, and not the board, charges a fee to provide this service to VCAILG members.

24. Selective and Discriminatory Enforcement

a. Legal Standard

The Discharger contends that it is being singled out for asserting constitutional claims. In order to establish a claim of discriminatory enforcement, the Discharger must demonstrate that it has been deliberately singled out for prosecution on the basis of some invidious criterion, such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 298; *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, 348.) Respondent bears the burden of establishing the discriminatory prosecution defense. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 305; *City of Brentwood v. Central Valley Regional Water Quality Control Board* (2004) 123 Cal.App.4th 714, 726 [discharger has burden of proof of affirmative defenses]). The fact that there may be other persons who are also in violation but have not yet been subject to formal enforcement action does not give rise to a claim of discriminatory prosecution. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832.)

b. Application

The Prosecution Staff generally prioritizes enforcement actions based on the size of the property, the proximity to a water body, the potential risk to that water body, and things of that nature. Because there is 95 percent enrollment of all the irrigated acreage in Ventura County, there are relatively few parcels remaining to which staff must apply the criteria. Balcom Ranch was selected based on its proximity to the Santa Clara River. Staff issued ~~two~~ a Notice to Comply, a N~~n~~otice~~s~~ of V~~v~~iolation and the C~~c~~omplaint before the D~~d~~ischarger asserted any constitutional defenses or responded at all. Prosecution Staff was unaware that the Discharger was asserting constitutional claims until the Discharger filed its objections on February 16, 2011. ~~The Discharger~~Ms. Thomas stated at the hearing that ~~these issues were discussed~~she expressed concern at a meeting in July 2010 that the Conditional Waiver provided broad authority for property inspections (Transcript, pp. 130-131), but staff's testimony made clear that staff did not understand that the Discharger was

asserting constitutional claims nor did staff make any prosecutorial decisions in response to such claims.

The Discharger admitted that the Conditional Waiver, as renewed in 2010, alleviated its privacy concern about unannounced property inspections. However, ~~in the four months between issuance of the 2010 waiver and the Panel Hearing,~~ the Discharger made no attempt to enroll in the revised Conditional Waiver before the hearing, or apply at any time for ~~-~~waste discharge requirements or an individual waiver that addressed the Discharger's privacy concerns.~~-~~ The Discharger notified Regional Board staff on March 21, 2011 that it intended to join the Ventura County Agriculture Irrigated Lands Group and enroll in the Conditional Waiver. Staff confirmed that the Discharger completed its enrollment.

25. The Discharger requested an offset for the environmental benefits of its operation. (~~Panel~~ Hearing Panel Binder, p. 4-348.) The Discharger cites no legal authority for this request or any reason why these factors distinguish the Discharger from other agricultural operations. The Discharger also requests an offset for its "considerable financial sacrifice." (*Ibid.*) The ~~Hearing Panel~~Board considered all financial evidence under "Ability to Pay and to Continue in Business."

26. The Discharger contends that the Regional Board is estopped from asserting that the Discharger must comply with the Conditional Waiver or enroll in the Ventura County Farm Bureau compliance group. (Hearing Panel Binder, p. 4-349.) Staff did not require the Discharger to join a compliance group. The Discharger did not demonstrate any of the elements of equitable estoppel. (*City of Goleta v. Super. Ct.* (2006) 40 Cal~~.~~ 4th 270, 279.) Moreover, estoppel may not be asserted against a government body except in unusual instances, when necessary to avoid grave injustice, and when the result will not defeat a strong public policy. (*Ibid.*)

27. Hugh Marley and Paula Rasumussen were present at the hearing as required by the Chair's March 10, 2011 ruling.

28. On considering the written record and evidence presented at the hearing, the Panel determined that $193,850 ($35,700 + $144,800) should be imposed on the Discharger pursuant to CWC section 13261 for the pre- and post-Complaint violations of CWC section 13260. The Board concurs.

29. The Discharger asserts, in its comments on the Hearing Panel's proposed Order, that the liability amount is excessive. The penalty was calculated as required by the Enforcement Policy, and is appropriate in light of the agricultural program's importance in protecting water quality and the goal expressed in the Enforcement Policy to address, correct and deter water quality violations. In support of its excessive-penalty claim, the Discharger asserts the calculation was erroneously

based on a conclusion that the Discharger operates 108 acres of commercial irrigated agriculture. The Discharger claims that only approximately 93 acres of the property are used for commercial agriculture, including approximately 35 acres operated by the Discharger's tenant(s). The Discharger does not state whether the tenant's row crops are irrigated, but admits to owning and operating approximately 58 acres of commercial irrigated agriculture. The liability amount is based on the failure to submit a report of waste discharge or a notice of intent. The liability amount is not based on acreage.

30. The Discharger also asserts that its discharges were no greater than those that would have been authorized under the Conditional Waiver and no greater than discharges from any neighboring properties. Even if true, neither of these factors is a defense to compliance with Water Code section 13260.

CONCLUSIONS ~~OF LAW~~

1. The failure to submit a report of waste discharge or a Notice of Intent, individually or as a member of a Discharger Group, to comply with the Conditional Waiver, despite at least two notices by the Regional Board, as well as a Complaint, constitutes a violation of CWC section 13260.

2. Pursuant to CWC section 13261, the Regional Board may impose civil liability up to $1,000 for each day of violation.

3. The total maximum amount of administrative civil liability assessable for the pre- and post-Complaint violations found herein pursuant to CWC section 13261 is $1,218,000 through March 17, 2011.

RECOMMENDED ADMINISTRATIVE CIVIL LIABILITY

The Panel recommended~~s~~ that the Regional Board impose administrative civil liability in the amount of $193,850 on the Discharger for the violations found herein to have been committed by the Discharger. ~~A proposed Order on Complaint No. R4-2010-0023 is attached.~~ The Board concurs, for the reasons set forth above.

~~Francine Diamond~~ ~~Date~~
~~Panel Chair~~

~~Attachments:~~

~~Exhibit A: Liability Methodology Spreadsheet~~
~~Proposed Order on Complaint No. R4-2010-0023~~

1 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
2 LOS ANGELES REGION
3 FRANCINE DIAMOND, PANEL CHAIR
4
5
6
7 In the Matter of the)
Regional Board Public)
8 Meeting/26th Panel Hearing)
_____)
9
10
11
12
13 TRANSCRIPT OF PROCEEDINGS
14 Los Angeles, California
15 Thursday, March 17, 2011
16
17
18
19
20
21
22 Reported by:
23 MARCENA M. MUNGUIA,
CSR No. 10420
24
Job No.:
25 B6698WQLA

Exhibit 3

1 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
2 LOS ANGELES REGIONAL
3 FRANCINE DIAMOND, PANEL CHAIR
4
5
6
7 In the Matter of the)
Regional Board Public)
8 Meeting/26th Panel Hearing)
)
9
10
11
12
13
14
15 Transcript of Proceedings, taken at
16 700 North Alameda Street, Board Room, Los Angeles,
17 California, commencing at 9:00 a.m., on Thursday,
18 March 17, 2011, heard before the LOS ANGELES
19 REGIONAL WATER QUALITY CONTROL BOARD, reported
20 by Marcena M. Munguia, CSR No. 10420, a Certified
21 Shorthand Reporter in and for the State of
22 California.
23
24
25

Exhibit 3

1 APPEARANCES:

PANEL CHAIR:	Francine Diamond
BOARD MEMBERS:	Steve Blois Maria Mehranian Charles Stringer
EXECUTIVE OFFICER:	Samuel Unger
ASSISTANT EXECUTIVE OFFICER:	Deborah Smith
ASSISTANT CHIEF COUNSEL:	Lori Okun
STAFF COUNSEL:	Jennifer Fordyce
For the Prosecution Team, BALCOM RANCH:	Jennifer Fordyce Rebecca Veiga Nascimento Sam Unger
For the Respondent BALCOM RANCH:	Paul Beck Mark Brown Patricia Thomas David Park
For the Prosecution Team, PORT OF LOS ANGELES:	Ann K. B. Carroll Hugh Marley Cassandra Owens
For the Permittee PORT OF LOS ANGELES:	Kenneth Mattfeld Christopher Foley
For the Prosecution Team, CASDEN PROPERTIES, LLC:	Julie Macedo Kristie Kao Augustine Anijielo
For the Permittee CASDEN PROPERTIES, LLC:	Peter R. Duchesneau Dana Palmer Kay Swikart Robert Lofy Charles Buckley
For the Prosecution Team, CRESCENTA VALLEY WATER DISTRICT:	Mayumi Okamoto Pansy Yuen Hugh Marley Paula Rasmussen

Exhibit 3

1 APPEARANCES (continued):

2 For the Permittee CRESCENTA VALLEY WATER DISTRICT: James D. Ciampa
3 James Bodnar

4 ALSO PRESENT: Ronji Moffett
5 Alex Carlos

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Exhibit 3

1 I N D E X

2 ITEM NUMBER: PAGE

3 4 - Enforcement Issue 8
Complaint No. R4-2010-0023 to assess
4 Administrative Civil Liability against
Balcom Ranch
5
Prosecution Team presentation
6 Mr. Samuel Unger 10
Ms. Rebecca Veiga Nascimento 16
7 Cross-Examination by Mr. Brown 87
Cross-Examination by Mr. Beck 97
8 Redirect Examination by Ms. Fordyce 110
Ms. Jennifer Fordyce 34
9
Balcom Ranch presentation
10 Mr. David Park 38
Cross-Examination by Ms. Fordyce 39
11 Ms. Patricia Thomas 55
Cross-Examination by Ms. Fordyce 117
12 Mr. Paul Beck 69
104
13
Prosecution Team rebuttal 124
14
Questions by the Board members 128
15 Panel's recommendation to the Board 157

16 5 - Enforcement Issue 158
Complaint No. R4-2010-0169-M to assess
17 Mandatory Minimum Penalties again
Port of Angeles (New Dock Pump Station)
18
Prosecution Team presentation
19 Ms. Ann Carroll 162
Mr. Hugh Marley 164
20
Permittee presentation
21 Mr. Kenneth Mattfeld 171

22 Prosecution Team rebuttal 177
Mr. Samuel Unger 178
23
Permittee rebuttal 182
24
Questions by the Board members 183
25 Panel's recommendation to the Board 201

Exhibit 3

1 I N D E X (continued)

2 ITEM NUMBER: PAGE

3 6 - Enforcement Issue 213
Complaint No. R4-2008-0199-M to assess
4 Mandatory Minimum Penalties against
Casden Properties, LLC
5
Joint opening presentation, Items 6 and 7 202
6
Prosecution Team presentation
7 Ms. Kristie Kao 218
Mr. Augustine Anijielo 224
8 Cross-Examination by Mr. Duchesneau 289
Redirect Examination by Ms. Macedo 293
9 Ms. Julie Macedo 227
10 Permittee presentation
Mr. Peter Duchesneau 243
11 Ms. Kay Swikart
Direct Examination by Mr. Duchesneau 263
12 Cross-Examination by Ms. Macedo 295
Mr. Robert Lofy
13 Direct Examination by Mr. Duchesneau 277
Cross-Examination by Ms. Macedo 297
14 Mr. Charles Buckley
Direct Examination by Mr. Duchesneau 283
15
Prosecution Team rebuttal 293
16 Mr. Hugh Marley
Direct Examination by Ms. Macedo 296
17
Permittee rebuttal 301
18
Questions by the Board members 302
19 Panel's recommendation to the Board 334

20

21

22

23

24

25

Exhibit 3

1 I N D E X (continued)

2 ITEM NUMBER: PAGE

3 7 - Enforcement Issue 336
Complaint No. R4-2009-0010-M to assess
4 Mandatory Minimum Penalties against
Crescenta Valley Water District
5
Joint opening presentation, Items 6 and 7 202
6
Prosecution Team presentation
7 Ms. Mayumi Okamoto 339
Ms. Pansy Yuen 341
8
Permittee presentation
9 Mr. James Ciampa 348

10 Prosecution Team rebuttal 357

11 Permittee rebuttal 360

12 Questions by the Board members 361
Panel's recommendation to the Board 366
13

14

15

16

17

18

19

20

21

22

23

24

25

Exhibit 3

1 Los Angeles, California, Thursday, March 17, 2011
2 9:00 a.m.
3
4
5 MS. DIAMOND: Good morning, everybody. We are going
6 to begin our proceedings today.
7 My name is Fran Diamond. I'm the chair. We
8 have our three Board members with me here today who will
9 be on the Hearing Panel. To my left is Board Member
10 Charlie Stringer, Maria Mehranian, and Steve Blois.
11 So we're going to begin with the opening
12 statement for the first panel hearing, which is
13 Balcom Ranch.
14 This is the date, time, and place set for
15 Item 4, which is a hearing in the matter of
16 Administrative Civil Liability Complaint Number
17 R4-2010-0023, issued to Balcom Ranch for failure to
18 either obtain Waste Discharge Requirements or enroll in
19 the Conditional Waiver of Waste Discharge Requirements
20 for Discharges from irrigated lands.
21 This hearing is taking place at 700 North
22 Alameda Street, Los Angeles, California. The hearing is
23 being held before a duly authorized panel of members of
24 the Los Angeles Regional Water Quality Control Board of
25 whom I've already introduced you to.

Exhibit 3

1 The panel is being advised by Deborah Smith,
2 Assistant Executive Officer, and Lori Okun, Assistant
3 Chief Counsel. Jennifer Fordyce, Staff Counsel, is
4 assisting the Prosecution staff, but neither she nor the
5 Prosecution staff are advising the Regional Board in this
6 matter. The Prosecution staff is a party for the
7 purposes of this proceeding.
8 The official record of the testimony at this
9 hearing will be created by our court reporter. We are
10 also using a tape recorder today, but the tape recording
11 will not be an official record of the hearing.
12 At the end of this hearing, we will close the
13 record in this matter and this panel will discuss and
14 arrive at a proposed report of findings of fact,
15 conclusions of law, and recommend a decision for
16 consideration by the full Board.
17 Our recommendation will be presented to the
18 Regional Board at a future meeting. You will be notified
19 of the date and location of that hearing. At that time,
20 the Board may adopt, reject, or modify the recommendation
21 of this panel. Absent unusual circumstances, you will
22 not have another opportunity to provide argument or
23 evidence to the full Board; thus, you are encouraged to
24 present today all the evidence that you would like this
25 panel or the full Board to consider.

Exhibit 3

1 If anyone in the audience wishes to address the
2 panel today, please fill out a speaker card and hand it
3 to the clerk. I have received speaker cards for
4 Sam Unger, Rebecca Veiga Nascimento, and Jennifer
5 Fordyce, representing the Prosecution Team; John Krist,
6 who is, I believe, from the Ventura County Agriculture
7 Irrigated Lands Group; Paul Beck and Mark Brown, counsel,
8 Pat Thomas and David Park, witnesses representing
9 Balcom Ranch.
10 So we'll begin with the Prosecution Team.
11 MS. OKUN: Before we do that, Ms. Diamond, I would
12 just like to say for the record there were some
13 procedural and evidentiary objections before the hearing
14 in this matter and so I've added to the record the
15 documentation of those issues. There was a letter from
16 Paul Beck dated March 8th, 2011. Ms. Diamond did hold a
17 prehearing conference to address those issues and I
18 issued an e-mail on March 10th with her ruling, and that
19 e-mail will also be added to the record.
20 You can go ahead, Sam.
21 MR. UNGER: We're ready?
22 MS. DIAMOND: Yes. Please go ahead.
23 MR. UNGER: Good morning, Chair Diamond and members
24 of the Hearing Panel. I am Sam Unger, Executive Officer
25 of the Regional Board, and I would like to provide just a

Exhibit 3

1 few brief comments as an introduction to Item 4, the
2 complaint against Balcom Ranch.
3 Item 4 concerns one of the fundamental
4 principles of water quality management; namely, that
5 unregulated discharge of wastes into waters impairs its
6 uses.
7 Centuries of science have shown that discharges
8 of waste containing harmful pollutants, make water unfit
9 for human consumption and unable to sustain healthy
10 habitats.
11 That is why both State and Federal water quality
12 laws and regulations are premised on the principle that
13 all waste discharge into waters are subject to Waste
14 Discharge Requirements unless such requirements are
15 specifically waived.
16 The California Water Code requires any person
17 discharging waste that could affect the quality of the
18 waters of the state to file a Report of Waste Discharge.
19 MS. OKUN: Excuse me, Sam. I'm sorry to interrupt,
20 but the Chair has an administrative issue.
21 MS. DIAMOND: I think I need to continue to page two
22 which requires me, before we begin this, to have the
23 administration of an oath, and I just want to go
24 through -- once again, I'm sorry to do this -- because I
25 think I would like to indicate exactly what the process

Exhibit 3

1 will be today, which I neglected to do.
2 MR. UNGER: Certainly.
3 MS. DIAMOND: This is the way we will proceed.
4 First, we will hear from the Prosecution Team, then the
5 representatives of Balcom Ranch may cross-examine the
6 Prosecution staff and present their case, and then any
7 interested persons will have an opportunity to address
8 the panel. The Prosecution Team may then provide
9 rebuttal and a closing statement, and Balcom Ranch may
10 provide a closing statement if they so choose.
11 Both the Prosecution Team and Balcom Ranch each
12 have one hour total allotted for their presentations.
13 The time limits include the combined time for
14 presentations and any Cross-Examination or closing
15 statements. The panel members may ask questions of the
16 parties at any time, but will generally wait until the
17 end of the presentation. Interruptions for Board
18 questions do not count towards time limits.
19 So now I'm going to administer the oath. So if
20 you intend to speak or provide testimony on any of these
21 matters, please stand, raise your right hand, and repeat.
22 I will first say the oath and then you can answer.
23 (Whereupon all prospective witnesses were
24 collectively sworn)
25 MS. DIAMOND: Okay. The deadlines for submitting

Exhibit 3

1 written comments and documentary evidence were
2 January 26th for interested persons and February 16th for
3 Balcom Ranch. The items that were received by the
4 deadlines are hereby made a part of the record. If you
5 use any visual aids illustrating previously submitted
6 evidence with your presentation, you must leave a copy
7 with the panel so that the material can be made part of
8 the record. No other documentary evidence will be
9 accepted into the record unless I make a specific ruling
10 to allow it.
11 Okay. Sorry. Would you start over.
12 MR. UNGER: Yes, I will.
13 Good morning, Chair Diamond and members of the
14 Hearing Panel. I am Sam Unger, the Executive Officer of
15 the Regional Board, and I just wanted to provide a few
16 brief introductory comments to Item 4 for you this
17 morning.
18 I want to make clear that Item 4 concerns one of
19 the fundamental principles of water quality management;
20 namely, that the unregulated discharges of waste into
21 waters impairs those waters' uses.
22 Centuries of science have shown that such
23 discharges of waste contain harmful pollutants, make
24 waters unfit for human consumption and unable to sustain
25 healthy habitats, and that is why both the State and

Exhibit 3

1 Federal water quality laws and regulations are premised
2 on a simple principle that all wastes discharged into
3 waters are subject to Waste Discharge Requirements unless
4 these requirements are specifically waived.
5 The California Water Code requires any person
6 discharging wastes that could affect the quality of the
7 waters of the state to file a Report of Waste Discharge
8 with the Water Board so that the Water Board can
9 determine the appropriate requirements for that
10 discharge.
11 Item 4 is a complaint by the Water Board
12 Prosecution Team about an agricultural Discharger in
13 Ventura County who has failed to file a Report of Waste
14 Discharge, in violation of Water Code Section 13260 or,
15 alternatively, has failed to enroll under the Regional
16 Board's Conditional Waiver Program.
17 As you know, the Board adopted over five years
18 ago a Conditional Waiver under which Dischargers of
19 agricultural wastes from irrigated lands can operate. It
20 is well-established that agricultural wastes typically
21 contain pesticides, herbicides, excessive nutrients, and
22 harmful sediments. 90 percent of our irrigated
23 agricultural is enrolled in the waiver in Ventura County,
24 making it one of the most successful programs in the
25 entire state. The waiver has been so successful, in

Exhibit 3

1 fact, that the Board renewed the waiver for another five
2 years late last year.
3 The agricultural communities in the region have
4 largely complained with -- excuse me -- complied with the
5 waiver by forming Discharger Groups. In Ventura County,
6 that group is the Ventura County Agricultural Irrigated
7 Lands Group and as you may recall, several
8 representatives from that group have come before the
9 Board during the past public forums to comment that
10 participation in the Discharger Group or discharging
11 under individual permits is essential for the protection
12 of water quality and the success and integrity of the
13 Board's irrigated lands program.
14 As with all our programs, compliance with the
15 Board's requirements is essential for protection of water
16 quality and, as such, noncompliance by some agricultural
17 landowners jeopardizes the long-term success and
18 integrity of the Board's agricultural program, as well as
19 the beneficial uses of the Board's -- of the State's
20 waters.
21 So as we proceed, I would just like you to keep
22 in mind that while this complaint is focused on
23 Balcom Ranch and specifically irrigated lands, the
24 recommendation you take will have broader far-reaching
25 impacts on all our programs because essentially this

Exhibit 3

1 really concerns the failure to submit a Report of Waste
2 Discharge.
3 So at this time, I'd like to turn it over to
4 Rebecca Veiga Nascimento to provide you the specifics.
5 Thank you.
6 MS. NASCIMENTO: Good morning, Madam Chair and Panel
7 members. My name is Rebecca Veiga Nascimento. I am a
8 Staff Environmental Scientist with the Regional Programs
9 program -- with the Regional Program Section and I'm
10 going to present the case for the Prosecution Team.
11 Today I'm presenting for your consideration an
12 Administrative Civil Liability against Balcom Ranch for
13 violation of Water Code Section 13260, specifically for
14 failure to enroll under the Los Angeles Region
15 Conditional Waiver Program or submit a Report of Waste
16 Discharge.
17 The Regional Board adopted the Conditional
18 Waiver Program on November 3rd, 2005. The Regional Board
19 renewed the Conditional Waiver Order on October 7th of
20 2010. This order was renewed in accordance with the
21 California Water Code because all waivers are required to
22 be renewed every five years. The Conditional Waiver
23 applies to all irrigated agriculture within Ventura and
24 Los Angeles Counties and regulates the discharge of both
25 stormwater and irrigation water runoff.

Exhibit 3

1 The waiver provides growers two options to
2 enroll in the program: as a member of a Discharger
3 Group, which our Regional Board approved or as an
4 individual Discharger. Both the individual enrollment
5 option and the group enrollment option require three
6 enrollment documents: the Notice of Intent, a Monitoring
7 and Reporting Plan, and a Quality Assurance Project Plan.
8 The deadline for enrollment in the 2005 waiver was
9 August 3rd, 2006.
10 Additionally, I would like to point out that
11 even though the 2010 waiver that you adopted last October
12 replaced the 2005 Conditional Waiver, the 2005 waiver is
13 still effective for the purposes of enforcement and this
14 enforcement action was initiated under the 2005 waiver.
15 Balcom Ranch owns two irrigated agricultural
16 parcels located near the intersection of South Mountain
17 Road and Balcom Canyon Road in Ventura County.
18 On January 23rd, 2007, the Executive Officer
19 sent Balcom Ranch a Notice to Comply. This notice was
20 sent to the address on record with the Ventura County
21 assessor's office. This notice directed Balcom Ranch to
22 enroll under the Conditional Waiver or, alternatively,
23 submit a Report of Waste Discharge and apply for an
24 individual discharge permit. The Notice to Comply also
25 directed Balcom Ranch to contact Regional Board staff if

Exhibit 3

1 they had any questions; or if they felt that this notice
2 had been received in error, they should contact Regional
3 Board staff to resolve that issue.
4 On November 15th -- sorry. Balcom Ranch did not
5 respond to the Notice to Comply.
6 On November 15th, 2007, the Executive Officer
7 issued Balcom Ranch a Notice of Violation for failure to
8 enroll under the Conditional Waiver. Once again, this
9 notice directed Balcom Ranch to immediately comply with
10 the Water Code and/or contact Regional Board staff with
11 questions or concerns. The Notice of Violation was sent
12 by certified mail to the address on record with the
13 Ventura County assessor and Regional Board staff did
14 receive a return receipt to confirm that the Notice of
15 Violation was delivered and Balcom Ranch did not respond
16 to the Notice of Violation.
17 On November 17th, 2009, I conducted a site visit
18 of the Discharger's property. My site visit memo is
19 Exhibit 12 in your binder.
20 The parcels outlined on this photograph are the
21 parcels owned by Balcom Ranch. As you can see, we have
22 one parcel here and another parcel here (indicating).
23 The combined acreage of these two parcels is 108 acres.
24 The objective of my site visit was to verify that, in
25 fact, the land use was irrigated agriculture and, if

Exhibit 3

1 possible, identify the property owner or farm manager and
2 alert them to their compliance requirements. As I
3 described in my site visit memo, I did verify that the
4 land use was irrigated agriculture.
5 I arrived at the site at approximately 3:30 in
6 the afternoon on South Mountain Road, which is right here
7 (indicating). From -- right there (indicating). This is
8 South Mountain.
9 From South Mountain Road, I was able to view the
10 southern portion of Parcel 140. So I'm using these short
11 numbers here (indicating), 140, and I was able to see
12 that it was, in fact, a citrus orchard and I generally
13 assessed that the entire parcel appeared to be planted in
14 citrus orchard.
15 I parked right about there (indicating) on the
16 edge of South Mountain. I got out. I walked along the
17 edge of the property on South Mountain and took some
18 photographs.
19 I then returned to my car and turned north and
20 drove along a dirt road that runs right here (indicating)
21 along Parcel 140. As I was driving down that road, I
22 noticed that, in fact, the entire parcel appeared to be
23 planted with a citrus orchard.
24 About halfway down that road, there was a barn
25 or a building structure right here (indicating). There

Exhibit 3

1 were several trucks and cars parked around that barn. I
2 stopped and looked for somebody to make a point of
3 contact to discuss with them why I was there that day and
4 their compliance requirements. I did not find anybody at
5 that point.
6 I continued down this dirt road and then turned
7 east so I could come over and view Parcel 320, using that
8 short number there (indicating), 320. I viewed that
9 Parcel 320 appeared to have some orchard and row crops
10 planted. I observed several people -- a field crew
11 working in the row crop area and I also stopped there and
12 looked for anyone who appeared to be the property owner
13 or farm manager. I didn't obviously identify somebody in
14 charge and no one approached me.
15 I took some photographs to verify the land use
16 and then I returned back to South Mountain Road and
17 exited the property.
18 Now, you can also see from this aerial
19 photograph (indicating) that both of these parcels are
20 very close to the Santa Clara River. So this is the
21 Santa Clara River over here and, you know, it goes up off
22 the photograph in those directions.
23 So you can see that they are in close proximity
24 to the river and they both discharge to the Santa Clara
25 River, and the Santa Clara River is a water of the

Exhibit 3

1 United States.
2 These (indicating) are two of the photographs I
3 took on the site. So this first photograph is of the row
4 crop area. You can note that there's broadhead
5 sprinklers placed here in the fields, ready for
6 irrigation activities, and you can see there is a field
7 crew working in the background.
8 This second photograph (indicating) is a portion
9 of the orchard that I observed. You can see that the
10 trees appear to be well-tended and that there is cover
11 crop planted between the orchard rows.
12 This Discharger has violated California Water
13 Code Section 13260 by failing to submit a Report of Waste
14 Discharge or a Notice of Intent despite notices by the
15 Regional Board. Therefore, this Discharger is subject to
16 a Civil Liability, pursuant to Water Code Section 13261.
17 Water Code Section 13261(a) states that:
18 "Any person failing to furnish a report
19 or pay a fee under Section 13260 when so
20 requested by a Regional Board is guilty of a
21 misdemeanor and may be liable civilly in
22 accordance with subdivision (b)."
23 Subdivision (b)(1) states the following:
24 "The civil liability may be
25 administratively imposed by a Regional Board

Exhibit 3

1 for a violation of subdivision (a) up to
2 $1,000 per day of violation."
3 On February 18th, 2010, the Executive Officer,
4 Sam Unger, issued an Administrative Civil Liability
5 complaint against Balcom Ranch for failing to submit a
6 Report of Waste Discharge or a Notice of Intent after so
7 requested by the Regional Board.
8 In addition to seeking civil liabilities, the
9 intent of this ACL was to encourage compliance with the
10 Conditional Waiver. Therefore, the complaint sought
11 additional penalties if the Discharger did not comply
12 within 30 days.
13 The Discharger had the burden of submitting the
14 required documentation to stop the accrual of the
15 penalties. To date, Balcom Ranch has not complied with
16 the Water Code and has not submitted an ROWD or enrolled
17 under the Waiver. As a result, they have been accruing
18 additional penalties for approximately one year.
19 We would also like to share with the panel that
20 when Balcom Ranch first received the ACL, they waived
21 their right to a hearing within 90 days and agreed to
22 settlement discussions with Regional Board staff. We
23 engaged in settlement discussions for approximately six
24 months and ultimately those settlement discussions were
25 not successful.

Exhibit 3

1 One aspect of the settlement discussion that we
2 would like to present to you is that on July 15th, 2010,
3 the Prosecution Team met with representatives of
4 Balcom Ranch, Mr. Paul Beck, Mr. Mark Brown, and
5 Ms. Pat Thomas.
6 At that meeting, staff told Balcom Ranch that
7 they were not in compliance with the Water Code and that
8 they needed to either enroll under the Conditional Waiver
9 individually or as a member of a group; or if they chose
10 not to enroll in a waiver, they needed to submit a Report
11 of Waste Discharge.
12 At that meeting, Balcom Ranch notified Regional
13 Board staff that they were interested in the possibility
14 of forming their own Discharger Group. They stated they
15 would like to send a letter to other nonenrolled
16 landowners in Ventura County to gauge the interest of the
17 establishing a second Discharger Group in the county.
18 Balcom requested the names and addresses of other
19 nonenrolled growers from the Regional Board and I
20 provided them that information.
21 At the meeting, Regional Board staff requested
22 that we see a copy of the letter that they were planning
23 to send out, but we did not insist upon seeing this
24 letter.
25 On September 8th, 2010, Paul Beck provided me

Exhibit 3

1 with a draft of this letter via e-mail. On
2 September 21st, 2010, I returned to Mr. Paul Beck
3 Regional Board staff comments on the draft letter. These
4 comments are included on page 4-391 and 4-392 of your
5 binder.
6 As I stated in my e-mail, our comments were
7 solely to provide correction to factual misstatements we
8 found in the letter.
9 The Regional Board staff and its Conditional
10 Waiver Program needs to be presented to all agricultural
11 landowners in a correct format and in the correct light.
12 Some of the factual misstatements that were corrected
13 were things that all landowners were immediately subject
14 to pending enforcement action. It was reasonable and
15 appropriate for the Prosecution Team to request to review
16 this letter and correct factual errors because we do not
17 want to provide incorrect information to irrigated
18 agricultural landowners.
19 On October 3rd, 2010, I received a reply from
20 Paul Beck concerning our comments. In his e-mail reply,
21 which is on page 4-393 of your binder, Paul Beck stated
22 he understood the suggestions that you and your team have
23 made about how Mark Brown's proposed letter should be
24 revised before it goes out.
25 Up until Balcom Ranch submitted their documents

Exhibit 3

1 on February 16th, 2011, this was the last communication
2 we had regarding this letter and we were not aware that
3 Balcom Ranch chose never to mail the letter.
4 Now I'm going to move into talking about how we
5 calculated the recommended penalty. The State Water
6 Resources Control Board has a Water Quality Enforcement
7 Policy and this policy establishes a method for assessing
8 penalties. This method addresses all of the factors in
9 Water Code Section 13327 and as a reference, this slide
10 includes all of those factors. Also, there's a
11 discussion of each one of these factors in the complaint
12 on page 4-10 in your binder. So we followed the
13 enforcement policy method for calculating the penalty.
14 In the next couple of slides, I'm going to go
15 over in detail how the penalty was calculated. The first
16 thing you do when calculating the penalty is quickly
17 determine what is the potential maximum penalty, and
18 that's a very easy calculation because the Water Code
19 stipulates that the maximum amount is $1,000 per day.
20 Balcom Ranch has been out of compliance for 826
21 days between when the NOV was mailed and between when the
22 ACL was issued, so 1,000 times 826 is a maximum penalty
23 of $826,000.
24 This maximum penalty was adjusted using the
25 calculation method. The first step is to identify the

Exhibit 3

1 per-day factor. So this table here is actually a table
2 taken out of the Enforcement Policy and you can see that
3 it is used to calculate the per-day factor. This per-day
4 factor is used to reduce the maximum penalty.
5 So in this first column here (indicating), we
6 have "Deviation from Requirement." Staff selected that
7 the deviation from requirement was major because
8 Balcom Ranch completely disregarded our notices and did
9 not comply with the Water Code, even after we had given
10 them notices and asked them to come into compliance.
11 Under "Potential for Harm," staff selected
12 moderate. We selected moderate because agricultural
13 operations are known to use pesticides, fertilizers, and
14 other chemicals which can cause water quality
15 impairments. So when we select major and we select
16 moderate, it puts us in this box here (indicating). So
17 among these factors, we selected 0.4, which is the most
18 conservative factor in that range.
19 Also, when we issued this ACL, as I said, Balcom
20 had been out of compliance for 826 days. So following
21 the Enforcement Policy, we were able to use an
22 alternative multiple-day approach to help us calculate
23 the final recommended penalty.
24 The Prosecution Team determined that the
25 violations prior to this ACL did not result in an

Exhibit 3

1 economic benefit that could be quantified on a per-day
2 basis. So based on that conclusion, the Enforcement
3 Policy allows us to reduce the number of violation days
4 to 33 days. So that's how we got to 33 days here
5 (indicating) when we started with an original 826.
6 So this per-day factor and the multiple days are
7 then inserted into a spreadsheet to make the final
8 calculation. So this (indicating) is the image of the
9 spreadsheet that's used, and this spreadsheet is also in
10 your binder on page 4-17.
11 Because this is a nondischarge violation, we
12 automatically skip to step three. So you can see there's
13 step one, step two, and we start at step three because
14 this is a nondischarge violation.
15 So the first thing we do is we drop in the
16 per-day factor we established, which is 0.4. Next we
17 drop in our reduced number of violation days, which is
18 33. And then we put in the statutory maximum per day
19 penalty, which is $1,000 per day.
20 So you multiply those three things together and
21 it gives you the initial ACL of 13,200. This initial ACL
22 penalty can then be adjusted up or down based on
23 additional factors. The first factor is culpability,
24 which is in step four. So under "Culpability," the
25 Enforcement Policy requires staff to choose a factor

Exhibit 3

1 between 0.5 and 1.5. Because Balcom Ranch was provided
2 two notices regarding their need to come into compliance
3 and they still did not comply, we considered Balcom Ranch
4 to have a high degree of culpability and assigned a
5 factor of 1.5. You can see how the associated penalty
6 has gone up.
7 The next step is "Cleanup and Cooperation."
8 Similarly, the Enforcement Policy requires staff to
9 choose a factor between 0.75 and 1.5. Staff considered
10 Balcom Ranch's cooperation to be insufficient,
11 particularly because they have not come into compliance.
12 And because they're still not in compliance with the
13 program, we selected a factor of 1.5 for cleanup and
14 cooperation and you can see again that the penalty is
15 going up accordingly.
16 Under "History of Violations," we applied the
17 neutral multiplying factor of 1 because we are unaware of
18 any prior violations by Balcom Ranch.
19 So that gives us the Total Base Liability and
20 then we can adjust on a couple more factors here.
21 The next factor that can be used for adjustment
22 is the "Ability to Pay and Continue in Business."
23 Regional Board staff finds that Balcom Ranch does have
24 the ability to pay and continue in business because the
25 Discharger owns these two parcels and the assessed value

Exhibit 3

1 of these two parcels is approximately 2 million dollars.
2 Also, these parcels are planted with valuable crops and
3 they are leased to tenants, which provides income to
4 Balcom Ranch. However, even though based on that
5 conclusion, we applied the neutral multiplier of 1,
6 meaning we did not increase or decrease the penalty based
7 on ability to pay.
8 The next factor is "Other Factors as Justice May
9 Require" and this is where staff costs comes into the
10 penalty. The Regional Board staff has incurred costs in
11 evaluating the violations and preparing this complaint.
12 At the time the complaint was issued, we had incurred
13 costs of $6,000. This represents approximately 40 hours
14 of staff time at a rate of $150 per hour. So the staff
15 costs of $6,000 is added to the Total Base Liability
16 amount.
17 The final thing to consider in the penalty
18 calculator is "Economic Benefit." The economic benefit
19 is the monetary savings from not complying with Regional
20 Board requirements, and the economic benefit cannot be
21 higher than the final penalty amount. In this case, we
22 estimated the economic benefit to Balcom Ranch to be
23 $3,233. This is what we considered to be the costs saved
24 from not participating in a Discharger Group.
25 Participation in a Discharger Group is by far

Exhibit 3

1 the most economic means of compliance with the
2 Conditional Waiver Program and so staff assumed that
3 Balcom Ranch would choose the most economic means of
4 compliance.
5 So by following all of these steps for our ACL
6 on February 18th, we came up with a final liability of
7 $35,700.
8 However, as I had previously stated, the purpose
9 of this complaint was also to encourage compliance with
10 the Conditional Waiver and, as such, the complaint sought
11 additional penalties if the Discharger did not come into
12 compliance within 30 days.
13 To date, Balcom Ranch is still not in
14 compliance. They have not enrolled under the waiver, nor
15 have they submitted a Report of Waste Discharge for an
16 individual permit; and despite several reminders from
17 Regional Board staff, they have been accruing penalties
18 at the rate of $400 a day for 362 days.
19 Also, since issuing this complaint, Regional
20 Board staff has incurred additional costs in the amount
21 of $13,350. This represents approximately 89 hours of
22 staff time and we ask the panel to consider these
23 additional costs when you make your final penalty
24 decision.
25 So the final penalty for this case is the

Exhibit 3

1 addition of all these things. We have the initial
2 penalty of 35,700, the additional penalty that's been
3 accrued for approximately one year of continued
4 noncompliance, and the additional staff costs for the
5 final penalty of $193,850.
6 So I'm now going to turn the presentation over
7 to our counsel, Jennifer Fordyce, for final conclusions.
8 MS. OKUN: Ms. Nascimento, before you do that --
9 MS. NASCIMENTO: Yes.
10 MS. OKUN: -- could you go back to your slide of the
11 aerial overview. And the timer should be stopped for
12 this. I just want to make sure that the record is clear
13 because you were pointing to various roads and that's not
14 going to show up on the transcript.
15 MS. NASCIMENTO: Okay.
16 MS. OKUN: So when you said you first traveled along
17 South Mountain Road, is that the road -- the southernmost
18 road on this map that runs east and west?
19 MS. NASCIMENTO: Yes. That is this (indicating)
20 southernmost road that is running east and west.
21 MS. OKUN: And when you turned left, that is on the
22 second road?
23 MS. NASCIMENTO: It's this road right here which is a
24 dirt road which leads you onto these parcels here
25 (indicating).

Exhibit 3

1 MS. OKUN: Right. I understand and I can see what
2 you're pointing to; but on the transcript --
3 MS. NASCIMENTO: Oh, sorry.
4 MS. OKUN: -- we won't be able to see it. I need you
5 to describe it in words.
6 MS. NASCIMENTO: Okay. I apologize.
7 So I was traveling east on South Mountain Road.
8 I made a left, turning north onto a dirt road. To my
9 knowledge, that dirt road does not have a specific name.
10 MS. OKUN: Is that the second road to the east on
11 this map? So starting from the west side of the map,
12 there's a road that runs north-south.
13 MS. NASCIMENTO: Yeah. This is not a road
14 (indicating), so I would say it's the first road to the
15 east on this map.
16 MS. OKUN: The road to the east of the thumbtack?
17 MS. NASCIMENTO: Yes, ma'am.
18 MS. OKUN: And where did you turn right?
19 MS. NASCIMENTO: I turned left right here at that
20 intersection (indicating).
21 MS. OKUN: Right. And then you traveled to the
22 north?
23 MS. NASCIMENTO: Then I traveled to the north and
24 then there's also like a little dirt road. So it kind of
25 dead ends right here as you're approaching the river in

Exhibit 3

1 this riparian area. So then I turned back right and
2 traveled east along the river until I came to Parcel 320.
3 MS. OKUN: Stop. And the road you're talking about
4 right now is the northernmost road shown on this map --
5 MS. NASCIMENTO: Yes, ma'am.
6 MS. OKUN: -- that runs east to west?
7 MS. NASCIMENTO: Yes, ma'am. So then I continued
8 along this northernmost road, following the edge of
9 Parcel 320, until I came to this juncture here which is
10 the distinction between the orchard area and the row crop
11 area on this visual.
12 At that point, I turned back north and followed
13 this road directly adjacent to the yellow thumbtack on
14 the image and took some photographs, and then I turned
15 around and retraced all of these directions to exit the
16 property.
17 MS. OKUN: So on the road that you took going to the
18 east, you didn't turn left on the first road. You turned
19 left on the first road that's past the thumbtack on this
20 depiction --
21 MS. NASCIMENTO: Yes, ma'am.
22 MS. OKUN: -- and then went to the end of that road
23 to the north and turned around and came back?
24 MS. NASCIMENTO: I did not travel all the way to the
25 end of the road. I traveled approximately to the

Exhibit 3

1 midpoint of the road and then turned around.
2 MS. OKUN: Okay. And you said that there was a barn
3 on the road that runs from South Mountain Road to the
4 north part of the parcel that was --
5 MS. NASCIMENTO: Yes.
6 MS. OKUN: -- at the intersection about halfway up
7 that road?
8 MS. NASCIMENTO: Yes, ma'am. It was approximately at
9 the midpoint of that road.
10 MS. OKUN: Okay. Thank you.
11 MS. FORDYCE: Good morning, Panel members.
12 In its February 16th response to the complaint,
13 Balcom Ranch raised several civil so-called affirmative
14 defenses to this action. The Prosecution Team's reply
15 brief responding to these defenses is contained in
16 Exhibit 20 of your binder.
17 I would like to take this opportunity to briefly
18 address just a few of these defenses. First, Balcom
19 Ranch alleges that Ms. Nascimento's site visit
20 constituted a search under the Fourth Amendment.
21 As you just heard, Ms. Nascimento testified to
22 the facts surrounding her visit. She also testified to
23 her visual observation of Balcom Ranch's property, which
24 are also documented in her memo in Exhibit 12. Clearly,
25 what Ms. Nascimento observed from a lawful vantage

Exhibit 3

1 point -- specifically, the roads outside of Balcom
2 Ranch's property boundaries such as South Mountain
3 Road -- is not a search under the Fourth Amendment
4 because a person cannot maintain a reasonable expectation
5 of privacy regarding anything visible to the naked eye
6 from that position.
7 It is also well-established under Fourth
8 Amendment search and seizure law that a search conducted
9 without the consent of the owner or warrant violates
10 constitutional rights only if there exists a reasonable
11 expectation of privacy in the area searched. It is
12 equally well-established that while reasonable
13 expectation of privacy exists in residences, other closed
14 structures, and their curtilage -- meaning the areas
15 immediately surrounding these residences -- no such
16 expectation of privacy exists in open fields. Balcom
17 Ranch's agricultural land consisting of approximately 108
18 acres of orchards and row crops constitute open fields.
19 Accordingly, even if Ms. Nascimento unknowingly
20 entered Balcom Ranch's property, such entry did not
21 amount to a search within the meaning of the Fourth
22 Amendment.
23 Second, Balcom Ranch raises various challenges
24 to the Conditional Waiver itself. These challenges are
25 not only irrelevant, but they're inappropriate at this

Exhibit 3

1 proceeding. Under the doctrine of collateral estoppel,
2 Balcom Ranch is precluded from contesting the validity of
3 any requirements of the Conditional Waiver in this
4 proceeding. The Regional Board adopted Conditional
5 Waivers in 2005 and 2010. No petitions were filed with
6 the State Water Resources Control Board challenging
7 either waiver and thus both waivers are final actions of
8 this Board. Accordingly, neither waiver can be
9 challenged now.
10 Before I conclude, I would like to point out
11 that the Prosecution Team was extremely conservative in
12 calculating its recommended penalty in the complaint. As
13 explained by Ms. Nascimento, the Prosecution Team
14 selected the lowest factor in the range for the per-day
15 factor. Regarding the number of days of violation, not
16 only was a start date for the number of days of violation
17 based on the date of a second notice, not the first
18 notice as allowed by the Water Code, the Prosecution Team
19 also recommended the use of a multi-day approach for the
20 pre-complaint violations. The Prosecution Team's
21 estimation of the cost savings achieved by Balcom Ranch
22 was also conservatively assumed.
23 Had the Prosecution Team chosen to use the cost
24 savings associated with individual enrollment with
25 Conditional Waiver, which is approximately $50,000, the

Exhibit 3

1 recommended penalty in the complaint would have been much
2 higher.
3 The Prosecution Team's recommended penalty
4 before you today, which includes pre-complaint and
5 post-complaint violations and additional staff costs from
6 the last year, is the direct result of Balcom Ranch's
7 utter failure to comply with the Water Code despite
8 several notices urging compliance. Accordingly, the
9 Prosecution Team recommends that the panel make findings
10 of fact and conclusions of law upholding the pre- and
11 post-complaint violations and recommend assessment of
12 Administrative Civil Liability in the 1,903 -- I'm
13 sorry -- $193,853 or such other amount the panel deems
14 appropriate, including the additional staff time spent
15 over the last year.
16 A proposed Hearing Panel Report and Order is
17 included in Tab 4.7 in your binder. At this time, I
18 would like to move Exhibits 1 to 27 into the
19 administrative record and submit into evidence Exhibits 2
20 to 5, 8 to 19, and 21 to 27.
21 This concludes our case-in-chief and we reserve
22 the remainder of the time for rebuttal and
23 Cross-Examination and closing, which I note is
24 approximately 28 minutes, I believe, according to the
25 clock.

Exhibit 3

1 MS. DIAMOND: So that concludes the Prosecution Team?
2 MS. FORDYCE: Yes.
3 MS. DIAMOND: Next we have the members from
4 Balcom Ranch, Paul Beck, Mark Brown; Pat Thomas and
5 David Park as witnesses. And however you choose to do
6 that, we can begin. Would you like to come up to the --
7 MR. BROWN: Just a point of order, would you like
8 Cross-Examination now or would you like our case-in --
9 our case-in-chief now?
10 MS. DIAMOND: I believe we normally have the
11 case-in-chief.
12 MR. BROWN: Very well.
13 MS. DIAMOND: Well, actually, we can -- you can
14 decide however you'd like to do it.
15 MR. BROWN: That's fine. We'll do it that way.
16 MS. DIAMOND: Is that your preference? 'Cause we can
17 do it either way.
18 MR. BROWN: Yeah.
19 MR. PARK: Good morning. My name is David Park. I
20 am a Certified Public Accountant in the state of
21 California. I've been licensed since 1982. I hold a
22 master's degree in accounting and I have served as
23 Balcom's accountant since their inception in 1992.
24 I was requested to present some financial
25 information regarding the operation and financial

Exhibit 3

1 condition of Balcom to this hearing. In order to do so,
2 I reviewed the last 12 years of records of their income
3 and expenses, including expenses such as vehicle and
4 equipment expenses, supplies, materials, property taxes,
5 wages, utilities, things of that nature; and my
6 conclusions are that over the last 12 years, they've
7 averaged approximately $236,000 of loss over that period
8 of time.
9 In addition, I put together loan balances that
10 Balcom was subject to as of the end of 2009 and that
11 figure is $2,359,000.
12 MR. BECK: Madam Chair, Mr. Park came from out of
13 town, San Diego; and if it's convenient for the
14 Prosecution Team, we would ask that Mr. Park be subject
15 to Cross-Examination now so that he doesn't have to wait
16 until the end of our case-in-chief. Otherwise, we'll ask
17 him to remain until they have an opportunity to
18 cross-examine, if they choose to do so.
19 MS. DIAMOND: That's fine.
20 MS. FORDYCE: I have just a few questions.
21
22 CROSS-EXAMINATION
23 BY MS. FORDYCE:
24 Q Is Balcom Ranch a general partnership?
25 A Yes, it is.

Exhibit 3

1 Q And how many partners are there?
2 A Three partners.
3 Q Can you name each of the partners?
4 A Mark Brown, Mel -- well, that's a good question.
5 I'm drawing a blank on his last name.
6 Q The first name is Mel?
7 A Yes.
8 Q Okay.
9 A And --
10 MR. BROWN: We're going to object to this on the
11 basis that's private information here in a public
12 hearing, not relevant to these proceedings.
13 MS. DIAMOND: All right.
14 MS. OKUN: Why do you need to know that? How is that
15 relevant?
16 MS. FORDYCE: I think it's relevant to the
17 proceeding, as it's common knowledge that in general
18 partnerships, each individual partner is liable for the
19 debts and obligations of the partnership and to the
20 extent that Balcom Ranch is attempting to introduce
21 evidence of its financial condition, it's important to
22 know what the financial condition of each partner is
23 also.
24 MS. OKUN: I agree with that. I recommend that you
25 overrule the objection.

Exhibit 3

1 MS. DIAMOND: Okay. Overruled.
2 BY MS. FORDYCE:
3 Q I'm sorry. You said Mark Brown is one partner?
4 A Yes.
5 Q And you said another person by the name of Mel,
6 but no last name?
7 A I don't recall his last name.
8 Q And then a third partner?
9 A There's a fractional owner as well.
10 Q It's an individual?
11 A It's a corporation.
12 Q And do you know the name of the corporation?
13 A It's called Zonal.
14 Q Can you spell that?
15 A Z-o-n-a-l.
16 Q Are the two properties at issue that have
17 previously been identified as 140 and 320 the sole assets
18 of Balcom Ranch?
19 A I'm not actually familiar with the different
20 parcels and where -- you know, I've -- I don't know what
21 all is included. All I know is the results of the
22 farming activities.
23 Q All right. Let me ask it -- I think we have --
24 A I'm not really qualified to speak to --
25 Q How many parcels does the partnership own?

Exhibit 3

1 A I don't know.
2 Q Does Balcom Ranch -- don't they have to file tax
3 returns with the State of California?
4 A They do.
5 Q And does the information on the individual
6 parcels have to be included in those tax returns?
7 MR. BROWN: I'm going to object to that. All
8 information regarding tax returns filed are privileged.
9 MS. FORDYCE: Mr. -- Mr. Park just testified of
10 reviewing the last 12 years of financial information,
11 which I assume includes tax return information. They've
12 introduced this information into evidence and I have the
13 right to request additional information.
14 MR. BROWN: He hasn't testified to that at all. He
15 testified that he reviewed certain work papers and other
16 documents. There's a clear protection for tax returns.
17 MS. OKUN: Could you -- with respect to the tax
18 returns, it's Balcom Ranch that's putting this issue
19 before the Board in its defense, so if Balcom Ranch wants
20 to assert that it has an inability to pay, it needs to
21 provide documentation to support that claim.
22 Before we rule on that, could you describe the
23 work papers and documents that you did review.
24 THE WITNESS: Yes. Bank statements, canceled checks,
25 and books of account.

Exhibit 3

1 MS. OKUN: Did you review any tax returns?
2 THE WITNESS: No. I acquired some of this
3 information from the books and records.
4 MS. OKUN: Do you prepare the tax returns for
5 Balcom Ranch?
6 MS. THOMAS: I do.
7 MS. DIAMOND: We find that the questions are valid
8 and that it will be helpful to the decision before us
9 today.
10 MR. BROWN: May I address that, because there's clear
11 legal authority that plenty of litigants put into issue
12 financial condition, financial issues, and that privilege
13 protecting tax returns is always maintained, even in
14 those conditions, and we're happy to brief that if you'd
15 like.
16 MS. OKUN: We can decide later whether we need
17 briefing on that. If you instruct your witness not to
18 answer, I think it's going to impair the Board's ability
19 to be able to find that Balcom Ranch has any inability to
20 pay, but you can continue on putting on your case if you
21 like.
22 MR. BECK: May we have one moment to confer?
23 MS. OKUN: Yes.
24 (Pause in the proceedings)
25 MR. BROWN: If the Prosecution is prepared to

Exhibit 3

1 stipulate that any testimony here does not waive the tax
2 return privilege and does not require production of the
3 returns, we're willing to allow him to testify on a
4 conditional basis about what knowledge he has gathered in
5 reviewing work papers related thereto.
6 MS. FORDYCE: We're not willing to stipulate to that.
7 Balcom Ranch has provided this witness to
8 provide testimony about the financial condition of
9 Balcom Ranch. If they're not willing to actually provide
10 this information to the Board, then we would ask that all
11 the testimony concerning its current financial
12 conditional be struck from the record.
13 MR. BECK: With respect, that's not, I think, what we
14 are saying and that's not what Mr. Brown said a moment
15 ago.
16 We're making the distinction between producing
17 the tax return which is privileged and having the witness
18 testify from his knowledge, based on his performance of
19 his duties as the accountant, and I think that he can
20 clearly testify he has the knowledge, but we don't want
21 to waive the right to withhold tax returns. They have
22 not been requested. They're not part and parcel of this
23 proceeding. Financial condition is. Ability to pay and
24 continue in business is. But the production -- that does
25 not implicate or require the production of tax returns

Exhibit 3

1 and it's customary in many legal proceedings in all of
2 the courts of the state that information derived from
3 financial condition and statements can be produced, but
4 that does not constitute a waiver of the right not to
5 produce tax returns or other similar kinds of filings
6 that are privileged.
7 MS. OKUN: I don't know that we need to belabor the
8 issue of whether or not you need to produce the tax
9 returns because it's too late to submit additional
10 documents into the record anyway. So if he wants to
11 provide basically hearsay testimony about any aspects of
12 Balcom's financial condition, I don't have a problem with
13 that.
14 In terms of stipulating -- regarding waiver of
15 the privilege, I think the fact that it's too late to
16 submit those documents anyway makes that issue moot
17 unless anyone's seeking to introduce these documents into
18 the record, and at this point nobody is.
19 MR. BROWN: Just so we're clear, we had offered him
20 as an expert. You raised the issue of hearsay. So
21 experts can adduce -- can rely on their opinions on
22 hearsay. I just want to make that clear.
23 MS. FORDYCE: We object to Mr. Park being labeled as
24 an expert witness. He was not -- we were not notified
25 that he was being provided as an expert witness and he

Exhibit 3

1 certainly has not been qualified by the Board to speak as
2 an expert witness.
3 MS. OKUN: Do the hearing procedures require
4 specification if witnesses will be testifying as experts,
5 as opposed to percipient?
6 MS. FORDYCE: No. Hearing procedures do say that you
7 need to notify the Prosecution Team of the witnesses. We
8 still contend that if he's speaking as an expert witness,
9 we should have been notified of that fact.
10 MS. OKUN: At this point, the Board would like to
11 hear the testimony and they'll take it into account in
12 their deliberations. I don't think it's necessary at
13 this point to resolve the issue of whether he's an expert
14 or not. He testified that he's a CPA and he's competent
15 to testify about his review of the documents; and with
16 respect to if anyone wants to interpose a hearsay
17 objection, if the Prosecution Team wants to do that, if
18 they want to seek to add the tax returns to the record,
19 then we'll address that later if it's necessary.
20 MS. DIAMOND: So you can continue. We'll hear it and
21 take your testimony into account during our
22 deliberations.
23 BY MS. FORDYCE:
24 Q How many parcels does the partner- -- how many
25 parcels of property does the partnership own?

Exhibit 3

1 MR. BROWN: Asked and answered.
2 MS. FORDYCE: He didn't answer the question.
3 MR. BROWN: He said he didn't know.
4 BY MS. FORDYCE:
5 Q Are you aware that they own at least three
6 parcels?
7 A No, I'm not.
8 Q So when I was -- regarding the question of
9 income, this is information that you have to report to
10 the State of California in the tax returns; is that
11 correct?
12 A Yes. They report their income to the State.
13 Q And that income -- what income does Balcom Ranch
14 receive?
15 A Crop income.
16 Q And when you say "crop income," is that their --
17 they are selling the crops and getting the profits from
18 selling the crops?
19 A Yes.
20 Q They also receive rent?
21 A I don't know that they do receive rent. I
22 looked on the books of operation from the farm itself, so
23 that's not something that I reviewed.
24 Q So if they had received rent, wouldn't --
25 wouldn't this be income that would have to be reported to

Exhibit 3

1 the State of California?
2 A Yes. If Balcom received the rent, yes.
3 Q Okay. And so you don't know if Balcom actually
4 received rent?
5 A No.
6 Q Do they lease the properties, the parcels?
7 A They own the property.
8 Q And do they also lease it to tenants?
9 A I don't know.
10 MR. BROWN: I'm sorry. Point of clarification: Are
11 you talking about rent from the residences or rent from
12 tenant farmers?
13 MS. FORDYCE: We understood from you from a previous
14 meeting that you had leased portions of your parcels to
15 tenants to grow crops.
16 MR. BROWN: To speed this up, that's true. We do
17 report the income.
18 MS. FORDYCE: Okay. That's why I'm trying to find
19 out how much rent does Balcom Ranch receive from these
20 tenants.
21 MR. BROWN: Over 12 years?
22 MS. FORDYCE: Per year.
23 MR. BROWN: About $25,000.
24 MS. FORDYCE: Is that per parcel?
25 MR. BROWN: No.

Exhibit 3

1 MS. FORDYCE: Is that the total of the two parcels --
2 MR. BROWN: Total.
3 MS. FORDYCE: -- described in this complaint? I'm
4 sorry. So that includes the third parcel that you own?
5 MR. BROWN: There is a total of approximately $25,000
6 of income from tenant farmers, on average, over the 12
7 years.
8 BY MS. FORDYCE:
9 Q And you also testified -- again, Mr. Park, you
10 testified that there was crop income. On a yearly basis,
11 what is that value, approximate?
12 A Well, I didn't see a breakdown between the crop
13 income and the rental income, but I averaged over the 12
14 years that it was about 150,000 average, 156,000.
15 Q So you said that you didn't know -- you didn't
16 know the separate values, but a combined value with the
17 25,000 and you said the approximately 156-, are we
18 talking about approximately $200,000 a year in income?
19 Am I correct?
20 MR. BROWN: Objection. That's vague and ambiguous,
21 would you restate it.
22 MS. FORDYCE: You testified, actually, the
23 approximate crop value of 25,000 per year.
24 MR. BROWN: Not crop value. Tenant rental income.
25 MS. FORDYCE: I'm sorry. Yes, tenant rental income,

Exhibit 3

1 and then there's approximately $156,000 from crops.
2 MR. BROWN: No. That's not what he testified to.
3 That's the average income over the 12 years.
4 MS. FORDYCE: Okay. The 156-. Okay. Thank you.
5 BY MS. FORDYCE:
6 Q Are you aware of Mark Brown's individual assets?
7 A No, I'm not.
8 Q Do you -- are you his personal accountant?
9 A I am.
10 MS. OKUN: Ms. Fordyce, can I interrupt for a minute.
11 Mr. Brown, did you take the oath?
12 MR. BROWN: I did.
13 MS. DIAMOND: It would be helpful to the Board
14 members, I think -- and I heard from one Board member and
15 I agree. If there was -- if you were speaking only to
16 the person at the podium, if, in fact, you also,
17 Mr. Brown, want to be part of it, I think you should both
18 be at the podium. It's -- the cross-talk is very -- it's
19 not really normally the way we handle it and it would be
20 easier for us if we had both of you or whoever's
21 testifying at the podium in front of us.
22 MR. BROWN: Is this good?
23 MS. DIAMOND: Yeah. Thanks.
24 BY MS. FORDYCE:
25 Q What crops does Balcom Ranch receive income on?

Exhibit 3

1 A Lemons and grapefruits, as far as I know.
2 MR. BROWN: And oranges.
3 BY MS. FORDYCE:
4 Q You heard Ms. Nascimento testify that there was
5 also row crops. Does Balcom Ranch receive income from
6 those row crops?
7 MR. BROWN: That's the tenant farmer.
8 MS. FORDYCE: Am I allowed to ask questions of
9 Mr. Brown also since he's standing up there?
10 MS. OKUN: It's not uncommon for the Boards to have a
11 panel testifying together and the questions be directed
12 at the panel and if the Discharger can choose the most
13 competent witness to answer the question, we're taking
14 Cross-Examination a little bit out of order to
15 accommodate Mr. Park. So if the Board would rather have
16 the Discharger finish the testimony and then go back to
17 Cross-Examination, we can do this, or Ms. Fordyce can ask
18 the questions and leave it to the Discharger to decide
19 who should answer.
20 MR. BROWN: Well, let me just interject.
21 I have stepped forward to speed this process
22 along on a couple of key points. We have had a pretrial
23 conference where the Prosecution Team has been insisting
24 that no further witnesses and no further documents are
25 allowed. So since they haven't identified me as a

Exhibit 3

1 witness and since we haven't identified me as a witness,
2 I'm happy to step forward and clarify anything to help
3 the Board that this witness is testifying to, but I'm not
4 agreeing to automatically be a witness here to be subject
5 to broad examination.
6 MS. DIAMOND: Given the issue that Mr. Park needs to
7 leave and it's getting a little bit confusing with what
8 you've just said as well, I think it would be best if
9 Ms. Fordyce finished her Cross-Examination, and then you
10 can sit down and if there's more information that needs
11 to be asked and if you choose to become a witness or not,
12 we can deal with that later.
13 MR. BROWN: And do you want me to stand up if we're
14 objecting on something or is objecting from the chair
15 fine?
16 MS. DIAMOND: You can object from there, but it's
17 better not to have a lot of conversation objections and
18 then we can deal with the objections afterwards.
19 MR. BROWN: Thank you.
20 MS. OKUN: And, Mr. Park, if you don't know the
21 answer to a question, if you'd just say you don't know.
22 BY MS. FORDYCE:
23 Q So, Mr. Park, you just testified that you
24 were -- also served as Mark Brown's personal accountant?
25 A Yes.

Exhibit 3

1 Q Do you know how many properties Mark Brown has a
2 personal property interest in?
3 A I don't.
4 Q Do you know how many business -- other business
5 entities aside from Balcom Ranch that Mark Brown has an
6 interest in?
7 A I don't.
8 Q You also testified that there was a loan balance
9 of approximately 2.5 --
10 A 2.359 --
11 Q 2.359 --
12 A -- million.
13 Q -- million. Is Balcom Ranch paying down this
14 loan?
15 A That loan balance for the last few years has
16 remained approximately constant.
17 Q And how much loan payments do -- does
18 Balcom Ranch pay per year on the loan?
19 A I don't know what the total principal and
20 interest payments are, but the interest alone amounts to
21 about 185,000.
22 Q Do you file -- I'm not going to ask you.
23 MS. FORDYCE: Just to preface this, I'm not going to
24 ask him what's in the contents from tax returns for
25 Mark Brown, to avoid any objections.

Exhibit 3

1 BY MS. FORDYCE:
2 Q But do you file tax returns for and on behalf of
3 Mark Brown?
4 A No. CPA's don't file tax returns on behalf of
5 their clients.
6 Q I'm sorry. Thank you.
7 Do you prepare tax returns for Mark Brown?
8 A I do.
9 Q What is Mark Brown's -- in 2010, do you know
10 what Mark Brown's income was?
11 A No.
12 Q How about the other -- how about this other
13 partner, Mel?
14 A No.
15 Q And the other one corporation, Zonal?
16 A Zonal makes no income.
17 MS. FORDYCE: We have no further questions for this
18 witness.
19 MS. DIAMOND: Yes. Board members' questions.
20 Mr. Blois has a question.
21 MR. BLOIS: Do you know in the preparation of the tax
22 return for Balcom Ranch whether or not the two parcels in
23 question were included in the Williamson Act?
24 THE WITNESS: No. I'm not familiar with the
25 Williamson Act.

Exhibit 3

1 MR. BLOIS: Thanks.
2 MS. DIAMOND: Any other questions? Thank you.
3 Do we have -- does anybody else need to ask any
4 more questions, or will there be any further need for
5 Mr. Park?
6 MS. FORDYCE: From the Prosecution Team, we have no
7 further questions.
8 MS. DIAMOND: Okay. No further questions for you.
9 MR. BECK: So with the Chair's permission, we'll
10 excuse Mr. Park.
11 MS. DIAMOND: Yes.
12 MR. PARK: Thank you.
13 MR. BECK: Thank you very much, Mr. Park.
14 Madam Chair, we'll next present the testimony of
15 our second witness, Pat Thomas.
16 MS. DIAMOND: Okay. Ms. Thomas, will you please go
17 to the podium as soon as you're ready.
18 MS. THOMAS: Good morning. My name is Pat Bowers
19 Thomas.
20 I have a couple of quick things that I'd like
21 off the time, please. Is there a way to get that aerial
22 view that you have back up there and can somebody show me
23 how to use this pointer real quick.
24 So I'm also going to hand you something, let you
25 decide, but I think it'll help us go through this much

Exhibit 3

1 more quickly and --
2 MS. FORDYCE: We object to the introduction of late
3 evidence at this point.
4 MS. THOMAS: It's a picture to help you with the
5 words. That's all it is.
6 MS. FORDYCE: We object. We understand that, but --
7 MS. DIAMOND: Hand it to our counsel. She'll be --
8 MS. THOMAS: I'd be happy to.
9 MS. FORDYCE: Would you like me to state my objection
10 now or after you've had a chance to look at it?
11 MS. DIAMOND: She's looking at it.
12 We'll let it in. It's not our normal practice,
13 but I think that it might help the Board. So at this
14 time, we're going to accept it.
15 MS. THOMAS: Thank you.
16 Again, my name is Patricia Bowers Thomas, Pat,
17 and I'm speaking on behalf of Balcom Ranch.
18 I will cover information regarding three main
19 areas for you this morning with respect to Balcom Ranch.
20 Those areas are its environment, the financial aspects of
21 its operations, privacy of the property.
22 Let me paint you a picture of the ranch. We're
23 a small to midsize citrus ranch acquired from the Balcom
24 family in the 1990s whose historical family ownership was
25 dying out. We are a partnership of families coming here

Exhibit 3

1 for location, open space, and preserving a way of life.
2 We support the philosophy that the United States must
3 grow food in this country for its citizens in order to
4 maintain its greatness and its actual survival. This is
5 our homestead, residence and business.
6 This ranch was already planted with citrus trees
7 at the time of purchase, the southernmost portion with
8 older trees, while the northernmost was significantly
9 younger trees. Today, these areas remain planted as they
10 were upon purchase, with the exception of the loss of
11 some of the older trees. No new blocks have been
12 planted. There are five homes and three barns on the
13 property. The crops help to pay the mortgage on the
14 land.
15 Now, if you look on this aerial photograph up
16 here (indicating) starting right along at this
17 southernmost boundary here, that's where the ranch begins
18 along -- approximately two-tenths of a mile of South
19 Mountain Road. Here, there are three homes and a barn
20 that are interwoven at the front of the ranch with under
21 50 acres of citrus trees.
22 Along that road, there are "No Trespassing"
23 signs and other such warnings posted in addition to
24 various gates and barriers. From this point in the map,
25 you can see a very narrow stretch of trees moving from

Exhibit 3

1 the bottom of your page toward the top; again, south to
2 north.
3 At the point that Ms. Nascimento turned into the
4 ranch right here (indicating), if you will look at your
5 photograph number one, you will see that there is a white
6 gate, there are "No Trespassing" signs, and it is clear
7 from that point on that there are signs, photographs
8 numbers one through five.
9 MS. OKUN: Ms. Thomas --
10 MS. THOMAS: Uh-huh?
11 MS. OKUN: -- we don't have photograph numbers on
12 these handouts, so could you --
13 MS. THOMAS: I'm sorry, and I do also have to
14 apologize. They are in numerical order and I think the
15 word "trespass" is misspelled on them as well.
16 MS. OKUN: There are some numbers on the bottom of
17 each photo. If you could, refer to the numbers.
18 MS. THOMAS: Okay. The first -- you can see "com
19 edge" on it and a white gate. That is number 1. The
20 next one you can see --
21 MR. BROWN: Hold on. You're asking that she refer to
22 each photo by the last three numbers on the bottom?
23 MS. OKUN: I think that would be easier, if we can
24 just go through and number these.
25 MS. THOMAS: I'm sorry, but I don't have those

Exhibit 3

1 numbers. Hold on.
2 Okay. I'm going to use the last numbers. I
3 think they will work. Number 005 is the first one
4 located right here at this juncture (indicating) where
5 she talked about -- where Ms. Nascimento talked about
6 entering the ranch and turning left. A close-up of that
7 fence, so that you can see, is photo number 006, "No
8 Trespassing."
9 The next photograph, number 584, that gate is
10 open. The next photograph, number 002, displays a
11 telephone pole that is slightly down the road and it
12 says, "Private Road: Keep out." And the next
13 photograph, which is also listed 002, distinguished by
14 the word "lemon" before the numerals, says "No
15 Trespassing. Keep out." And that is approximately --
16 sorry -- that is approximately at this point in the road
17 (indicating).
18 MS. OKUN: So what you're pointing to is the first
19 intersection on the road that runs from south to north?
20 MS. THOMAS: The first intersection, then further
21 down the road, then further down the road again, and then
22 further down the road. And these are just a few of them.
23 I didn't want to give you all the different signs and
24 take up too much time, but the point is that it is posted
25 as a private road.

Exhibit 3

1 Along the way this road is bisected by these
2 telephone poles for approximately four-tenths of a mile.
3 Access to this road is gated, as are other perpendicular
4 cross dirt roads, using gates and chain barriers.
5 So, again, I've shown you a number of clearly
6 marked signs identifying "Private Property," "No
7 Trespassing," and generally indicating people need
8 specific clearance to enter the property.
9 After traveling approximately four-tenths of a
10 mile down this private road, you will arrive at our home,
11 and that is the picture that says "Bungalow 599." As you
12 can see by this photograph from the outside, our home is
13 modest and its entrance is easily identified by stone
14 walls, posts, and newels, fencing, fountains and such.
15 There are organic flower, antique rose and heirloom
16 vegetable gardens, as well as naturalized patios that are
17 mingled and interwoven over a large area among the
18 existing Valencia trees, as well as one of fruit trees.
19 This space creates a significantly larger homestead of
20 outdoor rooms and other personal uses.
21 So on this map, from the point of entry down to
22 the lighter area, traveling north to the lighter area of
23 green, past that lighter area of green, this area here
24 (indicating), just beyond that, just north of it -- it's
25 about, as I said, four-tenths of a mile -- is the area

Exhibit 3

1 that I'm speaking of and that is where our homestead and
2 our residence is located, as well as another home and the
3 barn that Ms. Nascimento spoke of.
4 From the bungalow picture that we were just
5 talking about, number 599, the next photograph is number
6 024. That is immediately in front of the property here.
7 I've turned around and have taken a picture looking back
8 south down the road that we have just traversed. Okay?
9 It provides a perspective looking back south from this
10 bungalow area toward South Mountain Road and the white
11 gate we saw in photo number 1 that I talked about. That
12 photo, again, is 005. It's far enough away that it's
13 hard to know where the white gate is and South
14 Mountain Road. It's really quite a visual distance.
15 The next photo, number 023, I turned around from
16 the same position and took a picture looking further
17 north down this road, and there you see some of the
18 trucks. They're work trucks, as opposed to the prior
19 picture where you can see there's a truck that's probably
20 a truck that I drive, that black truck.
21 And you can see the edge of a barn jutting out
22 into the road, and this photo provides the perspective in
23 the other direction looking forth further into the ranch.
24 Now, also in that picture, if you will note,
25 there is a dark red line in the road up ahead. So the

Exhibit 3

1 next picture I've provided you with is number 022 and
2 that's a close-up of that dark red line, which is another
3 gate; and alongside of the gate, it is posted with a
4 warning "Keep Out" sign.
5 And so now to take you on the rest of the little
6 tour of this area, we are going to travel from that red
7 gate north to the point right at the tip here that is the
8 northern edge of the Valencia trees where our well is
9 located behind a chain-link fence. The bulk of Balcom
10 Ranch is planted with Valencia trees.
11 At the point that we are at the well, we are
12 approximately three-quarters of a mile into the ranch.
13 In order to get to our smaller, younger trees from this
14 point at the well, you have to turn right, which goes
15 eastward along the southern dirt road, and this dirt road
16 is like a little chute. You don't really see a lot of
17 anything and when you come out at the other end, you come
18 to citrus acreage, and it's approximately -- that
19 distance from here to here is approximately two-tenths of
20 a mile and that's when you start to open into citrus
21 acreage at that little point right there and -- I'm
22 sorry, I don't know a better way to describe that. And
23 that's all dirt road and very dusty and so forth.
24 From approximately that beginning point there of
25 the citrus ranch, the western tip of this eastern area

Exhibit 3

1 here, you can go further into the trees traveling along
2 the dirt roads and eventually you will come to an area up
3 where that -- the yellow poker point is; and up in there,
4 there is a large barn. These are all tangential roads.
5 This area is planted with citrus and only citrus. I'm
6 not quite sure what Rebecca meant about "cover crops,"
7 but I think when she took our picture, that was -- those
8 are weeds.
9 I participate in the management of the ranch. I
10 try to identify needs and issues, adjust and manage
11 expectations due to such things as unpredictable mother
12 nature; and including in that, I want to underline the
13 unprecedented 2003 to '05 fires, freeze, and floods.
14 I look for solutions and alternatives to
15 shrinking crop prices and consumer demands. I deal with
16 increasing regulations and paperwork from governmental
17 agencies; and of tremendous importance, I prepare for and
18 deal with the implications, expenses, and destruction
19 brought about by the threat of pests entering our state
20 and our county, our most threatening being the Asian
21 citrus psyllid, the ACP, and the Huanglongbing, HLB,
22 which in its ghostly presence has destroyed more than 60
23 percent of Florida citrus crops and trees, decimated the
24 acreage and the values, and it's caused economic disaster
25 for State and County revenues. Moreover, we have no cure

Exhibit 3

1 for this pest, but each citrus farmer contributes money
2 to Boards to the cure for each bin of fruit that it
3 produces and we have been doing so for many years. It's
4 necessary for the survival and hopefully a cure for the
5 citrus industry will be found. Meanwhile, these costs
6 continue to multiply rapidly.
7 This ranch has to work and I make it a labor of
8 love. I receive no payment for my services except the
9 benefit of this beautiful space. I am no hero, but there
10 simply isn't enough money to go around, although I hope
11 my efforts will get us there.
12 There is some additional exceptional
13 circumstances that have made it more economically
14 challenging and more difficult than you might realize,
15 even before our country's current economic depression.
16 An example, well, the result of those
17 devastating fires, rains, and freezes beginning in 2003
18 going through sometime in 2005: the burnout debris-laden
19 hillsides above Balcom Canyon flooded through our ag
20 lands, all the way into the Santa Clara River and beyond,
21 causing significant destruction in their path, as well as
22 the onset of the Santa Clara River east of us going down
23 to the sea and cutting into ag lands with destructive
24 force; the extreme freezes well publicized during this
25 period of time for its citrus crop destruction. Frozen

Exhibit 3

1 fruit cannot be sold as fresh and is not viable for even
2 juice.
3 Pruning, cleanup, repair, they become a
4 greater-than-normal requirement under these
5 circumstances. The destruction has long-lasting
6 repercussions, and all of this was happening within the
7 environment and time frame that I believe the Conditional
8 Waiver was evolving.
9 Let me tell you about a citrus crop site.
10 Valencia trees are just about to come into bloom now. By
11 this time right now, those little blooms hopefully should
12 form into hard tennis-ball-sized fruit that color up for
13 the next three to seven months. So right now, you'll be
14 able to see flowers and hard fruit on the trees
15 simultaneously side by side.
16 Depending upon luck and treatment, demand,
17 prices, quality and weather, the fruit pick should occur
18 sometime between July and January. After that, we see no
19 money until at earliest late December. So today's bloom
20 can hopefully produce dollars, but what this means is
21 March 2011 you have a flower and hopefully you see money
22 by January of 2013. Expenses are paid out over long
23 periods that are hopefully recouped, however, much later.
24 One of my focuses has been green agriculture. I
25 reduce irrigated water usage, sometimes in an

Exhibit 3

1 old-fashioned way by just timing and trying to watch the
2 Farmer's Almanac and watch when the rains are going to
3 come down; and the few nutrients that I add to the soil
4 are put in at that point. It saves water. It saves
5 irrigated water.
6 I recycle plant matter into the soil. We do a
7 lot of wood pruning on the ranch and that wood pruning is
8 made into wood chips. It's no matter, not the
9 introduction of mystery green and compost coming from
10 other counties, and this has tremendous implications on
11 these pests that I've been talking to you about. Wood
12 chips balance and naturally feed the soil while cutting
13 down on the weeds. It reduces the need to do anything,
14 and that's why you saw weeds down in that area. I don't
15 use pesticides. And it helps maintain the soil's
16 moisture so that irrigation is needed less frequently
17 during the summer months.
18 I use minimal additives to the soil. We have
19 not used wind machines in years. It's a cost-benefit
20 analysis, and we live in tandom with respect for the
21 wildlife and we do have some grand species there.
22 The ranch is a private space. Visitors are
23 preapproved and met at specific locations at the south
24 entry to the ranch. It provides control so that
25 identifiable people with approved purpose at specific

Exhibit 3

1 time and place can be given access. It's a necessary
2 protection given the destruction that can be caused when
3 people disregard privacy, and it's a common courtesy that
4 we respect from anyone.
5 Several reasons that I questioned the
6 information about and within the Conditional Waiver: I'm
7 not a lawyer. I'm a layperson. However, after reading
8 and rereading the Conditional Waiver and the pages of
9 accompanying and related information -- and yes, there
10 are many pages and I did a lot of reading -- I found it a
11 morass of confusing and opaque papers in several
12 disturbing ways. Let me give you a couple of examples.
13 I've had a fair amount of experience in
14 benchmarking; and the benchmarking in this, how it's
15 being done, whether it's current, past and so forth, you
16 know, it's just very hard to decipher. I'm concerned
17 about the excessive cost placed on citrus owners when
18 they clearly are only part of the impact of Dischargers
19 and we need a level playing field.
20 The language also appeared to waive privacy and
21 trespass issues. Attempting to understand the
22 Conditional Waiver is a cumbersome process that is
23 difficult to follow. It requires commitment to annual
24 cost structure increases and we struggled with all of
25 this and we were not prepared to give up our rights,

Exhibit 3

1 given the many known and unknown consequences.
2 Evidently our concerns regarding the
3 constitutional flaws were reasonable given the recent
4 enactment and those changes dealing with Constitutions,
5 the recent enactment of the new Conditional Waiver.
6 MS. DIAMOND: I don't mean to interrupt your
7 testimony. I just want to give you and everybody kind of
8 a time update. You have 24 minutes left in the total
9 hour that you've been given for your presentation. I
10 just wanted you to know that.
11 MS. THOMAS: Okay. I'm watching this (indicating).
12 Thank you.
13 In light of this, I request this panel does not
14 assess penalties for Balcom Ranch for we are a smaller,
15 financially strapped ranch that wants to do the right
16 thing without bankrupting ourselves and giving away our
17 rights.
18 If you must fine us, then may I recommend that
19 it not exceed the modest but still costly to us penalty
20 mentioned in your 2009 Board meeting minutes.
21 I'd like to thank you for your time. We
22 appreciate that you and your predecessors have devoted
23 much energy to the Conditional Waiver, including
24 envisioning an environment where resolutions may be
25 worked out in the spirit of cooperation.

Exhibit 3

1 Balcom Ranch hopes and plans to remain part of
2 this important community and continue to participate
3 solving future problems for ag and our county.
4 MS. DIAMOND: Thank you.
5 Do you wish to use your time now?
6 MR. BROWN: Is she going to be cross-examined?
7 MS. DIAMOND: Yeah, when you finish.
8 MR. BROWN: Oh, when we finish?
9 MS. DIAMOND: Are you finished with your case yet?
10 MR. BROWN: No.
11 MR. BECK: No.
12 MS. DIAMOND: Okay. Then why don't we finish with
13 your case.
14 MR. BECK: Madam Chair, members of the panel, this is
15 not in the nature of testimony. This is in the nature of
16 argument, but I wanted to tell you that in response to
17 the --
18 MS. DIAMOND: Would you identify yourself for the
19 record, please.
20 MR. BECK: I'm sorry. I'm Paul Beck, B-e-c-k,
21 counsel for Balcom Ranch.
22 MS. DIAMOND: Thank you.
23 MR. BECK: In response to the Prosecution Team's
24 reply and in the aftermath of the prehearing conference,
25 we have prepared a trial brief. I am prepared to present

Exhibit 3

1 the trial brief. I think it would save a great deal of
2 time if I was permitted to offer it to the panel and a
3 copy to the Prosecution Team and certainly if they feel
4 that they have the need to respond, we can work out a
5 procedure where they would get an opportunity to respond
6 and we could both reply. But we have briefed a number of
7 these issues, including the serious constitutional issues
8 that we have perceived and I don't know that that's the
9 best use of the panel's time.
10 I am prepared to present it; but as I say, it's
11 something I can submit. It's in writing. I have copies.
12 MS. OKUN: Submitting written documents that are that
13 extensive this late in the process is a pretty egregious
14 violation of our hearing procedures. The Board can
15 accept that document, but I would recommend that you give
16 the Prosecution Team an opportunity to respond and the
17 Board of course would need an opportunity to review it,
18 as would I.
19 So if you are inclined to accept the trial
20 brief, we won't be able to make a preliminary decision
21 today because we'll have to read that first.
22 MS. DIAMOND: Well, I'm inclined not to accept it
23 today. We don't take that kind of information on the day
24 of the hearing. That's just more than our Board can --
25 our Board can deal with today. I mean, you've had ample

Exhibit 3

1 opportunity to provide this to us in advance of the
2 hearing.
3 MR. BECK: Actually, Madam Chair, this is customary
4 in civil litigation for parties to submit trial briefs at
5 the time of a proceeding and we are -- as I mentioned, we
6 are proceeding in the face of the rulings made at the --
7 in the aftermath of the March 9 prehearing conference.
8 We certainly have no objection whatsoever to the
9 Prosecution Team having an opportunity to respond on
10 these issues, but we really don't think that they were
11 ripe for determination until after the prehearing
12 conference when our objections procedurally were aired
13 and we got a number of rulings from the Hearing Panel.
14 MS. OKUN: I disagree. Our hearing procedures were
15 clear and there's no right in an administrative hearing
16 to provide a trial brief.
17 MR. BROWN: If I may, I don't believe that the --
18 MS. DIAMOND: Would you identify yourself for the
19 record.
20 MR. BROWN: I'm sorry. Mark Brown.
21 I don't believe that the notices we received
22 that talked about the documents we were obligated to
23 exchange and identify said anything about further trial
24 briefs being barred. It was talking about evidentiary
25 documents.

Exhibit 3

1 And I would also note that in that notice, the
2 Prosecution Team expressly reserved the right to produce
3 written evidence and briefing.
4 MS. OKUN: The Prosecution Team -- well, the
5 Prosecution Team doesn't reserve any rights because it's
6 the Board that issued the hearing procedures. It's a
7 template that the Board adopted and it does allow the
8 Prosecution Team to submit rebuttal evidence consistent
9 with the State Board's procedural regulations. The
10 hearing procedures did clearly require the Discharger to
11 submit all written materials that it wanted the Board to
12 consider before February 16th.
13 MR. BECK: It would -- I understand your comment,
14 Ms. Okun. My point is that until we had the prehearing
15 conference, some of the issues that are discussed in our
16 trial brief were not even determined. They hadn't been
17 fully aired and decided, so we were hardly in a position
18 to address the Board about these issues until we had the
19 prehearing conference and there has been, at least on our
20 end, substantial confusion about the manner in which this
21 was going to proceed.
22 MS. DIAMOND: I think what we will do is you can
23 proceed with your presentation and Ms. Okun can look at
24 the brief during the break and let us know whether -- if
25 her advice is different than just given.

Exhibit 3

1 So would you provide her with the brief and then
2 you can go ahead with your presentation --
3 MR. BECK: Yes, absolutely. If I may approach, I'll
4 do it right now.
5 MS. DIAMOND: -- or --
6 MR. BECK: I'll ask Mr. Brown to do it.
7 MS. DIAMOND: Mr. Brown can do it and you can
8 continue. I will remind you that the clock is running.
9 MR. BECK: I don't know if Ms. Okun would prefer to
10 take a brief recess to read the brief in advance or
11 whether I should just read it into the record. It is
12 my -- certainly it is a critical part of our argument.
13 MS. DIAMOND: No. I think you should give it to her,
14 we're not going to take a break now, and continue with
15 your presentation. You can hand it to her now.
16 MR. BROWN: Well, if we're allowed only -- this is
17 Mark Brown. If we're allowed only 20 some-odd minutes,
18 you wouldn't allow us to read the brief in.
19 MS. DIAMOND: Please, we'd like to hear from him.
20 This isn't an appropriate time for you to be speaking to
21 us.
22 MR. BECK: Madam Chair, I'm also going to provide a
23 copy of the brief to Ms. Fordyce, in the interest of
24 fairness.
25 MS. DIAMOND: Okay.

Exhibit 3

1 MR. BECK: In order to assist the Board in its
2 understanding and determination of the issues presented,
3 and to respond to certain points raised in the
4 Prosecution Team's reply to respond to Respondent's
5 objections and responses, I'd like to make a number of
6 points.
7 As Balcom Ranch learned more about the
8 Conditional Waiver program, it came to understand that
9 its participation in this program would not result in any
10 further testing or otherwise affect the scope or
11 implementation of the program in any way other than
12 spreading its costs and that it would not directly render
13 the groundwater at the Ranch or anywhere else any
14 cleaner. However, it concluded that the significant
15 constitutional issues and perceived defects in the law
16 and related regulations, as well as their enforcement,
17 warranted a judicial test.
18 Pursuant to the California Supreme Court case of
19 Shively versus Stewart, 1966, 65 Cal. 2d 475, the Board
20 has a duty to see that constitutional issues are fully
21 aired and addressed in a judicial proceeding and,
22 therefore, only a nominal or modest penalty, if it
23 concludes that any award is warranted after full
24 consideration of all of the evidence and argument of the
25 parties. A party like Balcom Ranch should not be

Exhibit 3

1 penalized for attempting to assert its constitutional
2 rights.
3 While these constitutional issues remain
4 unresolved, the Prosecution Team is seeking penalties of
5 approximately $193,000. These penalties are primarily
6 based upon the daily rate assessment while this
7 proceeding has been pending, even though there has been
8 no discharge violation and even though if Respondent had
9 joined VCAILG, no greater testing would have resulted.
10 Thus, the proposed penalty appears to be grossly out of
11 proportion to any harm suffered by anyone.
12 We also believe the panel's rulings ought to be
13 reviewed from a larger perspective. These issues
14 necessarily affect public perceptions and present the
15 possible perception that a State agency will be viewed as
16 running roughshod over small farmers and businesspersons
17 without accountability for the economic disruption that's
18 been created. We respectfully request that the
19 proceeding be dismissed or abated, or that only a nominal
20 penalty be ordered.
21 With respect to our substantive arguments on
22 constitutional issues, the Prosecution Team in this
23 proceeding is seeking enormous monetary penalties for
24 Balcom Ranch's alleged noncompliance with the Conditional
25 Waiver Program. In light of the absence of significant

Exhibit 3

1 evidentiary and due process safeguards -- for example,
2 lack of an opportunity for full Cross-Examination,
3 limited -- very limited time allotted for the hearing,
4 the rejection of Balcom Ranch's efforts to obtain
5 testimony from Board-related personnel whom Respondent
6 Balcom Ranch could not identify without the Prosecution
7 Team's disclosure, and the classification of this
8 proceeding as a quasi-judicial hearing initiated by a
9 complaint while at the same time, the Prosecution Team is
10 urged that all testimony to be adduced by Balcom Ranch
11 and its analysis thereof needed to be disclosed and
12 established a month before the hearing or else
13 Balcom Ranch's position could not be maintained -- this
14 proceeding does not appear structured in a manner that
15 permits it to serve as a proper forum for the weighing
16 and consideration of Federal and State constitutional
17 issues and exposes this proceeding to constitutional
18 challenges.
19 I'd like to focus on the search for a moment,
20 Ms. Nascimento's inspection of the property in November
21 of 2009. That is clearly the cornerstone of the ACL. We
22 believe it violated our constitutional rights and,
23 therefore, fatally infects the ACL.
24 The Prosecution Team has taken the position in
25 its reply that it has a right to trespass on private

Exhibit 3

1 property. Although the Prosecution Team states
2 misleadingly that Ms. Nascimento made her observations
3 from a public road, the site visit report, which is
4 Exhibit 4.12, irrefutably confirms that the Board and its
5 agents, in fact, deeply trespassed onto Balcom Ranch
6 private property and residential curtilage, with no
7 urgent reason to do so. We believe that search -- that
8 is a search that is unconstitutional and that it fatally
9 infects this enforcement action.
10 The Prosecution Team has cited Oliver versus
11 United States, a case that involved a marijuana search
12 and seizure, in support of its right to have conducted a
13 warrantless search. Oliver is distinguishable because
14 this search involved traveling down a marked private road
15 that was posted with many "No Trespassing" signs, with
16 respect to which Balcom Ranch had a privacy interest
17 because its private road constituted the only access to
18 the residence of its principals, and because the
19 curtilage of the residence of the principals of
20 Balcom Ranch was necessarily involved in the search.
21 You can refer to United States versus Dunn, 480
22 U.S. 294, which refers to -- describes a multi-faceted
23 test regarding whether open fields searches are
24 constitutional or not constitutional.
25 More importantly, the actions of the Board and

Exhibit 3

1 its agents violated the California Constitution. That
2 constitution affords greater protection against
3 warrantless searches than does the Federal Constitution.
4 You can compare California versus Ciraolo, 476 U.S. 207,
5 which involved an aircraft overflight inspection not
6 barred by the Fourth Amendment, with the 1985 case of
7 People versus Cook, 41 Cal. 3d 373, which involved a
8 warrantless aircraft search that did violate the
9 California Constitution.
10 The California Supreme Court case of People
11 versus Mayoff, 1986, 42 Cal. 3d 1302, discusses several
12 factors that confirm that the Board and its agents
13 violated Balcom Ranch's state constitutional rights here.
14 Mayoff was involved in marijuana cultivation problem with
15 aerial surveillance. In that case, the Court upheld the
16 search but only because it was a generalized
17 high-altitude aerial search that was mainly for purposes
18 of gathering information and not targeting any particular
19 citizen. The Mayoff Court noted that the California
20 Constitution's warrantless search protections were the
21 cornerstone of individual liberty for California
22 citizens. It said:
23 "The warrant clause is the
24 Constitution's most important safeguard
25 against overzealous government intrusions on

Exhibit 3

1 legitimate privacy."
2 The Mayoff Court talks about the open fields and
3 curtilage analysis, which is germane here, by noting the
4 higher California Constitutional protections and said the
5 following:
6 "Our State charter is a document of
7 independent force and its guarantees are not
8 dependent on those provided by the U.S.
9 Constitution unless a contrary intent
10 appears. We grant respectful consideration
11 to constitutional interpretations of the
12 U.S. Supreme Court, but they are to be
13 followed in California only where they
14 provide no less individual protection than
15 is guaranteed by California law. On many
16 occasions, we have concluded that the
17 California Constitution accords greater
18 protection to individual rights within our
19 borders than Federal law guarantees
20 throughout the nation."
21 After reaffirming People versus Cook and noting
22 the intervening contrary U.S. Supreme Court decision in
23 California versus Ciraolo, the Mayoff Court held that
24 Ciraolo did not alter Cook's continuing validity. The
25 Mayoff Court cited and extensively discussed the Oliver

Exhibit 3

1 case and concluded that Oliver did not circumscribe the
2 general governmental limitations in open fields
3 warrantless searches in California. Those outer
4 limitations are set by the California Constitution. That
5 Court noted that the California Constitution allows
6 normal-altitude aerial searches precisely because they
7 are not trespasses, but that ground searches of the same
8 open fields would be constitutionally suspect. I quote:
9 "We do not necessarily accept, for
10 purposes of the California Constitution,
11 Oliver's ruling that law enforcement agents
12 may constitutionally conduct warrantless
13 ground searches of open fields even where
14 they physically trespass upon private land.
15 Aerial surveillance of crops in the fields
16 from the visual distances we suggest is not
17 a trespass, and it is substantially less
18 likely than a ground search to infringe upon
19 legitimate private activities taking place
20 within open fields."
21 The California Supreme Court, therefore, has
22 confirmed that landowners have legitimate privacy
23 interests in their open fields.
24 The Mayoff Court's reasoning buttresses the
25 conclusion that an on-the-ground search of the type

Exhibit 3

1 conducted by the Board's enforcement personnel is indeed
2 violative of the California Constitution. The Mayoff
3 Court allowed the high-level aerial search precisely
4 because there was no type of camera magnification
5 utilized that allowed the police to view anything other
6 than what would have been normally visible to the naked
7 eye. The Court reasoned:
8 "If that is so, the details of human
9 activity could scarcely have been
10 discernible from the aircraft."
11 The Court set an important standard.
12 "We establish the principle that the
13 aircraft must maintain a visual distance
14 sufficient to obscure the details of human
15 activity below."
16 The Court made clear that it was the potential
17 for intense and focused observation, which is part and
18 parcel of a ground-based search that rendered the search
19 in that case constitutionally prohibited.
20 The government bears the burden of proof
21 establishing that the search must be a type whereby the
22 possibility of intrusion on private activities below is
23 remote.
24 In contrast here, Ms. Nascimento's driving
25 and/or walking through on numerous portions of the

Exhibit 3

1 property readily and impermissibly disclosed to
2 governmental authorities extensive details of private
3 human activity, thus invading the Respondent's zone of
4 privacy as recognized by Mayoff.
5 In further distinguishing the facts before it,
6 which involved an aerial search and not a ground search,
7 the Mayoff Court concluded that:
8 "There was no physical indication, such
9 as a common enclosure, that the trailers and
10 gardens were considered a common zone of
11 private residential activity."
12 By contrast here, at Balcom Ranch, there's
13 considerable evidence that Respondent's residential
14 grounds extended into the groves and governmental agents
15 that are inspecting residential grounds.
16 The next constitutional issue is the issuance of
17 the replacement Conditional Waiver, which we believe
18 acknowledges the unconstitutionality of the method of
19 enforcement under the original Conditional Waiver of
20 2005.
21 The original Conditional Waiver permitted
22 warrantless intrusions into private land. The original
23 waiver promulgated on November 3, 2005 was superseded by
24 the new waiver on November 19, 2010, long after this
25 administrative action was initiated. The new waiver

Exhibit 3

1 attempts to rectify the constitutional deficiency by
2 requiring that the Regional Board and its authorized
3 officials, except in emergency situations, engage in no
4 warrantless searches but instead obtain a warrant issued
5 pursuant to Civil Code Section 1822.50. The new
6 Conditional Warrant (sic) contains the following
7 language:
8 "No authorized official of the Regional
9 Board may enter private property owned or
10 occupied by a Discharger except upon consent
11 of the owner or possessor of the facilities
12 or, if consent is withheld, with a warrant
13 issued pursuant to Civil Code Section
14 1822.50."
15 MS. DIAMOND: Excuse me. I just wanted to tell you
16 that you have about five minutes left and I don't know if
17 that's -- if this is how you want to continue to use the
18 balance of your time. There's Cross-Examination left.
19 MR. BECK: Let me take one moment.
20 (Pause in the proceedings)
21 MR. BECK: Thank you for your comment, Madam Chair.
22 MS. OKUN: Before you continue, Mr. Beck, how much
23 time do you anticipate you'll need to cross-examine
24 staff? You had indicated that there was a lack of
25 Cross-Examination; but as we decided at the prehearing

Exhibit 3

1 conference, staff's witnesses and the two additional
2 staff members they agreed to make present at the hearing
3 were responsive to all your categories of questions that
4 you had for staff, and you've got I think five minutes
5 left. I'm trying to figure out where you're going with
6 the hearing.
7 MR. BECK: Thank you. Ms. Okun, I would think that
8 we could get the Cross-Examination completed if we had 30
9 minutes.
10 MS. DIAMOND: 30 additional minutes?
11 MR. BECK: 30 additional minutes beyond the five that
12 we've got.
13 MS. OKUN: And what testimony are you -- or what
14 evidence are you hoping to adduce from that
15 Cross-Examination?
16 MR. BECK: Our Cross-Examination would be of, I
17 believe, Ms. Nascimento because she has testified about
18 both the inspection and she's also testified regarding
19 the penalty, and I would think that the Cross-Examination
20 with respect to the penalty could be done in a little
21 more than five minutes perhaps, but I think we need the
22 additional time to go into the more substantive aspects
23 of her testimony.
24 MS. OKUN: And are those the issues on the staff
25 person that you would have Cross-Examination for?

Exhibit 3

1 MR. BECK: I think that's correct.
2 MS. DIAMOND: For Cross-Examination, we will give you
3 20 all together, including the five minutes that you have
4 left. So 20 more minutes is what is left. We agreed
5 during prehearing conference that each side would get an
6 hour. You have -- you've used 55 minutes. Now you're
7 asking for more time and I think 20 minutes all together
8 more should be sufficient to present the rest of your
9 case and Cross-Examination.
10 MR. BECK: Thank you. We'd also just want to point
11 out to the Chair, I believe the Chair of the Panel may be
12 including in the calculation of our time the time that
13 was used to cross-examine Mr. Park. I understood
14 Mr. Park's testimony -- affirmative testimony, Direct,
15 was only about five minutes and I believe Ms. Thomas's
16 testimony was about 20 minutes, based on what I clocked.
17 So I just wanted to raise that in case there was
18 any possibility that the Panel included the
19 Cross-Examination part as our time. My understanding was
20 the Cross-Examination by us would be included in our
21 time, but Cross-Examination of our witnesses would be
22 Prosecution Team's time.
23 MS. OKUN: That's correct.
24 Did you stop the clock, Ronji, during
25 Cross-Examination?

Exhibit 3

1 MS. MOFFETT: Yes. Mr. Carlos indicated that they
2 have 15 minutes left.
3 MS. OKUN: 15?
4 MS. MOFFETT: According to the clock.
5 MS. OKUN: Thank you.
6 MS. DIAMOND: Yes. You have 15 minutes left and the
7 Prosecution's Cross-Examination was not included in your
8 time.
9 MR. BECK: I understood that you had said we'd have
10 20 minutes to --
11 MS. OKUN: They have 15 minutes left of the original
12 hour?
13 MS. MOFFETT: Yes.
14 MS. DIAMOND: Okay, and five minutes. So are you
15 saying that we should -- so let's go with the 30, but
16 it's all -- it's moving now.
17 MR. BECK: Just to clarify, we have 15 minutes left
18 of our originally allotted time and you're --
19 MS. DIAMOND: You have 30 minutes left total to
20 finish whatever else you need to.
21 MR. BECK: Thank you. Thank you.
22 MS. DIAMOND: I just want to check with the court
23 reporter, are you okay?
24 MR. BECK: I'm going to change the order slightly, in
25 light of the Panel's comments, and proceed immediately

Exhibit 3

1 with the rest of our Cross-Examination. I'll resume with
2 the argument after that.
3 I think Mr. Brown is going to start with the
4 Cross-Examination.
5 MR. STRINGER: Excuse me. This won't count in your
6 time. Are you going to get back to the Fourth Amendment
7 issue later? Is that what you're saying?
8 MR. BECK: Yes.
9 MR. STRINGER: Okay. I'll hold my questions.
10 MR. BECK: Thank you.
11 Do you want Mr. Brown or whoever's doing the
12 Cross-Examination to address the witness from here?
13 MS. DIAMOND: Yes, please.
14 MR. BECK: Thank you.
15
16 REBECCA NASCIMENTO,
17 called as a Witness, and having been previously duly
18 sworn by the Panel Chair, was examined and testified as
19 follows:
20
21 CROSS-EXAMINATION
22 BY MR. BROWN:
23 Q Good morning, Ms. Nascimento.
24 You heard Ms. Fordyce say that you unknowingly
25 entered the property perhaps. Is that true?

Exhibit 3

1 A I did not unknowingly enter the property.
2 Q How do you know that Balcom Ranch is a
3 Discharger?
4 A Well, the Balcom Ranch is the owner and operator
5 of the irrigated agricultural land. All irrigated
6 agricultural lands are subject to either the Conditional
7 Waiver or required to submit a Report of Waste Discharge,
8 and our authorities extend to both surface water and
9 groundwater discharges. So the fact of irrigation would
10 result in potential pollutants being transported to
11 groundwater and that is a discharge under our authority.
12 Q So because it's irrigated, it's by definition a
13 Discharger?
14 A Yes.
15 Q Okay. Why does noncompliance by Balcom Ranch --
16 once the VCAILG program is in full force and testing, why
17 does that hurt your program? I understand why VCAILG
18 might have some interest in it, in spreading its costs,
19 but why does it hurt your program?
20 A I think continued noncompliance by not only
21 Balcom Ranch but all other noncompliant irrigated
22 agricultural landowners throughout our region continue to
23 cause water quality impairments. The water quality
24 impairments that are -- that are suffered by surface
25 water are from comprehensive watershed-wide Dischargers

Exhibit 3

1 of many different types of land use, including irrigated
2 agricultural, and it has been well documented by several
3 studies the importance of the role of BMPs in a
4 comprehensive manner to thoroughly protect and improve
5 water quality.
6 So the fact that Balcom Ranch is not
7 participating and it is closely adjacent to the
8 Santa Clara River does put that water body at risk.
9 In addition, the groundwater discharges and our
10 protection of groundwater is of equal importance, and the
11 Conditional Waiver Program does have specific
12 requirements for the protection of groundwater, and the
13 fact that Balcom Ranch is not participating and not
14 meeting those requirements directly on their parcels does
15 represent a threat to groundwater.
16 Q Now, you heard Ms. Thomas's testimony about the
17 layout of the ranch. Does that comport with your
18 recollection?
19 A Not exactly. A particular part of Ms. Thomas's
20 testimony that does not comport with my recollection is
21 two things. One, all gates were open when I visited the
22 ranch. I did not open a single gate, I do not recall
23 seeing any signage and I do not recall seeing any homes,
24 nor did I closely, you know, inspect or visit any homes.
25 I only stayed on roads and viewed the general property.

Exhibit 3

1 Q Were you looking for signage?
2 A Upon coming to the gate, I looked around to
3 determine that the gate was open, but I wasn't
4 specifically inspecting for signage. I was inspecting
5 the land use and looking for a property owner or farm
6 manager to speak to them about their compliance issues
7 for the property because we had mailed previous notices
8 and not received any response.
9 Q So one of your two goals I believe you stated
10 was to locate the property owner; correct?
11 A Yes.
12 Q So you were attune to looking for housing or
13 office space or anything like that; correct?
14 A I was not particularly attune to looking for
15 housing. I was verifying the land use and looking for a
16 property owner or a property manager. I visited this
17 property more than one year ago and I do not particularly
18 remember seeing a home.
19 Q But you would have looked -- a home would have
20 been a logical place to look for an owner, wouldn't it?
21 A It is a logical place to look for an owner. I
22 don't remember seeing a home on my visit to the property.
23 Q Either on South Mountain Road or down the
24 private road?
25 A No.

Exhibit 3

1 Q Okay. You don't have any reason to believe that
2 home was recently built, do you?
3 A No.
4 Q Thank you. Have you ever or has the Board ever
5 penalized other growers on a daily basis for time spent
6 in settlement negotiations?
7 A Yes. Penalties do accrue -- in other cases,
8 penalties have accrued during settlement negotiations.
9 In the Board's final recommended penalties that were
10 approved by the full Board, they did not actually assess
11 those penalties, but they were recommended by the
12 Prosecution Team.
13 Q So in other words, the Prosecution Team was
14 recommending that a Discharger be penalized for engaging
15 in settlement negotiations that would prove unsuccessful?
16 A I'm sorry. I think -- I was a little confused.
17 Let me back up and start by saying the first thing.
18 All other cases, all other enforcement cases
19 that have been brought by this Prosecution Team for
20 failure to enroll or submit a Report of Waste Discharge
21 under 13260, all other cases, those Dischargers
22 immediately enrolled in the Conditional Waiver Program
23 and thereby stopped the accrual of additional penalties.
24 Q I'm not limiting my question just to the
25 Conditional Waiver. In your enforcement actions --

Exhibit 3

1 A I can only speak to the Conditional Waiver. I'm
2 not involved with any other Regional Board enforcement
3 actions.
4 Q Okay. Let me ask it again.
5 In your enforcement actions, do you believe it's
6 fair to encourage people to engage in settlement
7 discussions and that if those prove unsuccessful that
8 they are penalized for every day in those settlement
9 negotiations?
10 MS. FORDYCE: Objection. That question calls for
11 speculation.
12 BY MR. BROWN:
13 Q You may answer.
14 MS. FORDYCE: Ms. Nascimento can only speak to her
15 own personal opinion and not whether this is fair.
16 MS. DIAMOND: We'll advise her whether she can answer
17 or not.
18 It's just your opinion. If you want to give
19 your opinion, the Board will take it as an opinion.
20 THE WITNESS: One of the objectives of this ACL was
21 to encourage compliance with the Conditional Waiver or
22 the Water Code by submitting an ROWD, Report of Waste
23 Discharge, so I do think it is fair to encourage
24 compliance with water quality regulations, and Balcom
25 Ranch had ample opportunity to come into compliance

Exhibit 3

1 immediately and was repeatedly asked to do so and
2 encouraged by the Prosecution Team; and when Balcom Ranch
3 chose not to take actions to come into compliance, I do
4 think it's fair that they put themselves at risk to
5 additional penalties.
6 BY MR. BROWN:
7 Q Do you understand that Balcom Ranch was raising
8 constitutional issues during that meeting?
9 A During our settlement meeting?
10 Q Or during the course of this proceeding, before
11 today.
12 A I did not understand at the July 15th, 2010
13 meeting that Balcom Ranch was raising constitutional
14 issues and I don't think I can speak to the
15 constitutional concerns you've been raising since these
16 hearing proceedings.
17 Q Well, I'm not asking you to speak legally to
18 them, but --
19 A I read your brief and saw that you brought up
20 constitutional issues.
21 Q Right. But do you believe that asserting --
22 well, you believe protecting constitutional rights is
23 important; correct?
24 A Yes.
25 Q And you want your statutory construct to be

Exhibit 3

1 constitutional, don't you?
2 MS. OKUN: Mr. Brown, these questions are beyond the
3 expertise of this witness to answer. If you want to ask
4 her if she's penalizing you for exercising your
5 constitutional rights, just ask her that.
6 MR. BROWN: Well, we're not asking her to opine on a
7 constitutional issue. We're asking her in general if
8 it's appropriate for this agency to act in a
9 constitutional way and to have the statutes clarified in
10 accordance with the Constitution. I think that's
11 perfectly appropriate. She's the head of -- as I
12 understand, she's the head of this Enforcement -- the
13 Conditional Waiver now. She has discretionary authority.
14 MS. OKUN: That's not an appropriate question for a
15 lay witness.
16 BY MR. BROWN:
17 Q Do you believe -- did you ever take into
18 consideration whether parties are making constitutional
19 issues in terms of whether or not they are acting
20 responsibly or culpably?
21 MS. FORDYCE: Objection. That question calls for a
22 legal conclusion.
23 MR. BROWN: No. We're just asking how she -- she was
24 put up as the sole witness for determining penalties. We
25 are certainly entitled to understand her discretion and

Exhibit 3

1 the factors that go into that.
2 MS. FORDYCE: And if Mr. Beck would like to ask
3 questions about specific factors, then Ms. Nascimento is
4 clearly capable of asking those questions; but when
5 you're asking whether she's able to determine someone's
6 culpability under the law, that's not appropriate.
7 MR. BROWN: I'm not asking --
8 MS. DIAMOND: I would ask you not to direct those
9 comments about the law and the Constitution to our
10 scientist. She's not a lawyer. You can make those kinds
11 of arguments to the Board. We have our lawyer here
12 advising us. Constitutional issues are not appropriate
13 to be addressed to a witness that is not a lawyer.
14 MR. BROWN: This is the sole witness that was put
15 forward on the penalty. There's been no other witness,
16 so I certainly think I have a right to determine the
17 factors that went into the penalty calculation.
18 MS. DIAMOND: You have a right to argue to us and we
19 can hear that, but the constitutional issues are not
20 going to be answered by a scientist.
21 MR. BROWN: We're not asking for the constitutional
22 issues to be answered. We're asking for whether the
23 possibility of a constitutional issue would affect their
24 decision, 'cause they went through a formula as to
25 culpability and as to refusal to cooperate.

Exhibit 3

1 MS. DIAMOND: You can make those arguments to us. We
2 will be deciding those kinds of issues.
3 MR. BROWN: Okay.
4 MS. DIAMOND: I'm not telling you not to make the
5 arguments. I'm just trying to tell you where to direct
6 them.
7 BY MR. BROWN:
8 Q So is it fair to say that you did not, in
9 assessing this penalty, take into account that
10 Balcom Ranch was asserting constitutional issues?
11 A No, because I calculated the penalty before
12 Balcom Ranch had raised any of these constitutional
13 issues in their February 16th brief.
14 Q And is it your testimony that's the first time
15 you've heard of it?
16 A Yes.
17 MR. BROWN: I am going to defer to Mr. Beck, given
18 the time to cross-examine on the issue of penalties. I
19 may have other questions, but I'm going to defer to him.
20 Thank you.
21 MS. DIAMOND: What's the time now?
22 MR. CARLOS: 18 minutes.
23 MS. DIAMOND: 18 minutes left? Okay. Thank you.
24
25

Exhibit 3

1 CROSS-EXAMINATION
2 BY MR. BECK:
3 Q Ms. Nascimento, I want to refer you to
4 Section 4.2, page 4 -- page 4-10 through 4-13.
5 MS. DIAMOND: I'm sorry to interrupt you, but I think
6 we're going to take a five-minute break. Some of the
7 Board members could use that right now and I'm sure that
8 our court reporter could, too.
9 MR. BECK: Certainly.
10 MS. DIAMOND: So we'll be back in five minutes.
11 (Recess)
12 MS. DIAMOND: Okay. We're back. You can continue.
13 MR. BECK: Thank you.
14 BY MR. BECK:
15 Q Ms. Nascimento, are you ready to proceed?
16 With respect to factors cited in Section 23,
17 page 4-10 and the following pages, paragraph D refers to
18 the ability of the Discharger to pay. It cites the
19 Ventura County crop report and the Ventura County
20 assessor's information and then says:
21 "Regional Board staff lacks sufficient
22 financial information necessary to assess
23 the Discharger's ability to pay the total
24 base liability amount."
25 Is that correct?

Exhibit 3

1 A Yes.
2 Q And Section E says:
3 "The effect on the Discharger's ability
4 to continue in its business, Regional Board
5 staff lacks sufficient financial information
6 necessary to assess the effect of the Total
7 Base Liability amount on Discharger to
8 continue its business."
9 Is that correct?
10 A Yes.
11 Q So it would be fair to say, wouldn't it, that
12 when you made -- you and the Prosecution Team made your
13 recommendations with respect to the penalty that is
14 described at page 4-17, the penalty calculation, and with
15 respect to the additional daily rate factors, you had no
16 information about Balcom Ranch's financial condition;
17 isn't that correct?
18 A That's -- that's correct, and you can see that
19 we inserted the neutral multiplying factor of 1 on
20 page 4-17 under "Ability to Pay" so the penalty was
21 neither increased nor decreased based on Balcom's ability
22 to pay.
23 Q Right. I understand. But the daily rate and
24 the total penalty isn't $35,700, but is $193,000,
25 approximately. That's what the Prosecution team is

Exhibit 3

1 seeking today; isn't that correct?
2 A So to be clear, the $35,700 was the initial
3 penalty which staff calculated following the State Water
4 Board's Enforcement Policy and the penalty calculation
5 method approved by State Board. The ACL called for
6 additional penalties for continued noncompliance.
7 Unfortunately, Balcom has remained out of compliance for
8 an additional year and there has been additional staff
9 time accrued over that year because staff has had to
10 continue to work on the case.
11 So our final recommended penalty was 193,800 --
12 or $193,850. So that's the recommended penalty of
13 everything added together. The Board could either assess
14 that recommended penalty or assign another amount as the
15 Board sees fit.
16 Q Okay. I understand. If I refer you to
17 page 4-19, step six refers specifically to ability to pay
18 and ability to continue in business and again it cites
19 the lack of sufficient financial information. That is --
20 as of the date this document was submitted, that was
21 correct, is it not?
22 A Yes.
23 Q Okay. So it's fair to say that you solicited no
24 information and had no information concerning the
25 operating expenses for the debt service of Balcom Ranch

Exhibit 3

1 at the time you made the report?
2 A At the time the ACL was issued, that is the
3 case. After this ACL was issued, I don't think it's fair
4 to say we did not solicit information. At our settlement
5 meeting on July of 2010, I believe we made it very clear
6 in that meeting that these factors are the factors that
7 influence the penalty and if additional information is
8 provided to us, we could then adjust that penalty based
9 on additional information. Balcom Ranch did not provide
10 any additional financial information to the Regional
11 Board. The first financial information we gained was in
12 today's testimony by the CPA.
13 Q Let me ask you a couple of additional questions
14 with respect to the report.
15 With respect to your calculations, you indicated
16 in Exhibit 4.12 that you verified a portion of the land
17 use is irrigated agriculture. How much was that? You
18 said "a portion."
19 A I added up the assessed acres for Parcel 140 and
20 320 and that's approximately 108 acres, and that amount
21 of 108 acres was used to assess Balcom's economic
22 benefit.
23 Q It's true that one only has to enroll the number
24 of acres that are irrigated, isn't it?
25 A Yes.

Exhibit 3

1 Q So you have to determine accurately how many
2 irrigated acres there are on each parcel; correct?
3 A Yes, but that responsibility is incumbent upon
4 the enrolling Discharger. Regional Board staff does not
5 determine the irrigated acreage. When the person
6 enrolls, they state how much is irrigated and how much is
7 other land uses.
8 Q From your site visit, did you include roads or
9 buildings?
10 A As I stated just a moment ago, I included the
11 assessed acreage by the Ventura County Assessor's Office,
12 so it is possible that 108 acres is a slight
13 overestimation of the actual irrigated acreage, but that
14 was all the information available to me.
15 Q Is it true -- is it true that the penalty was
16 based, in terms of the information you gathered, only on
17 your site visit?
18 A No.
19 Q What else was it based on?
20 A The penalty and the ACL was based on violations
21 of the Water Code in terms of not enrolling in the
22 program, not submitting a Report of Waste Discharge, not
23 responding to Regional Board notices.
24 The purpose of the site visit was to potentially
25 identify a contact person and alert Balcom Ranch to

Exhibit 3

1 compliance responsibilities before we moved to the point
2 we are today and to verify the land use, because it has
3 been the case in the past where land use changes, and we
4 wanted to verify that Balcom was, in fact, still
5 irrigated agriculture before we proceeded with either
6 additional notices or actions such as today's.
7 Q A couple of other questions on this line: You
8 took the County assessor's information into account. Did
9 you -- were you aware from any other public records that
10 there were liens recorded against the properties?
11 A No, I was not aware of any liens on the
12 property.
13 Q You've heard today that there are liens in
14 excess of 2.35 million dollars against the property.
15 A I've heard that there are debts against the
16 property, yes.
17 Q Exhibit 4.15 is the Ventura County crop report?
18 A I'm sorry. What exhibit did you say?
19 Q 4.15.
20 A 4.15 I have as the economic benefit memo. Oh,
21 sorry. Sorry. Sorry. 2008 County crop report. Sorry.
22 Q Are you familiar with that report?
23 A I have reviewed this report in the course of my
24 work.
25 Q Did you rely on it in making the penalty

Exhibit 3

1 calculation?
2 A I did not rely on it in making the penalty
3 calculation, no.
4 Q And I'd like to direct your attention to the
5 letter which was submitted back in October, I believe,
6 the letter, the proposed letter --
7 A Uh-huh.
8 Q -- to members of -- to potential enrollees in an
9 alternative waiver program. I'll refer to that as the
10 edited letter.
11 With respect to that letter, when the
12 original -- when VCAILG was formed, I assume that there
13 was a letter that was sent to all the enrollees or
14 potential enrollees in that program. My question to you
15 is did you review the letter that the people who formed
16 VCAILG sent out before it was mailed to potential
17 enrollees?
18 A I have reviewed various correspondence from
19 VCAILG over the years of my overseeing this program. I
20 don't specifically remember their initial request for
21 enrollment. That would have been made like in 2005.
22 MR. BECK: I don't have any further questions of
23 Ms. Nascimento.
24 I'd like to resume my argument, reserving,
25 however, three to five minutes to respond to the comments

Exhibit 3

1 of interested persons.
2 MS. DIAMOND: Okay. That's fine.
3 MR. BECK: Thank you.
4 MS. DIAMOND: So now we have -- so we can go on to
5 the public comments?
6 MS. OKUN: No. He wants to continue his
7 presentation.
8 MS. DIAMOND: I'm sorry. I thought you wanted to do
9 that later. You want to finish your presentation now?
10 MR. BECK: Yeah. That'll be fine.
11 MS. DIAMOND: About how much time is there left?
12 MS. MOFFETT: Six minutes.
13 MS. DIAMOND: So how much time do you want to
14 reserve -- use now and whatever is left, you can reserve.
15 MR. BECK: Okay. Thank you.
16 When I stopped reading the brief before, I was
17 talking about the Civil Code Section 1822.50 and I'd like
18 to resume at that point. If you want to follow along,
19 I'm reviewing from the top of page seven of the brief at
20 line two.
21 The legislative or administrative body cannot
22 reinterpret a prior version of the law in order to render
23 it constitutional. The prior Conditional Waiver statute
24 under which the enforcement action was brought can't be
25 rectified by the corrective, more recent Conditional

Exhibit 3

1 Waiver statute.
2 Based upon the arguments in the Mayoff case,
3 which are quoted extensively, we believe it's appropriate
4 that the Board at most issue a nominal penalty under
5 these circumstances because of the failure to file --
6 follow the established guides of Mayoff.
7 The Conditional Waiver program as applied also
8 includes -- which includes the position of assessment of
9 fees and costs also constitutes an improper
10 constitutional -- an unconstitutional delegation of
11 governmental powers.
12 Balcom Ranch was provided with two options to
13 comply. One of them was to enroll in the -- comply
14 individually, which would have required it to pay an
15 annual waiver fee of approximately $2270, but it would
16 also have been required to incur and pay all costs
17 involved in monitoring, testing, reporting, and complying
18 with the terms of the Conditional Waiver. Those costs
19 are estimated to range between 50- and $80,000 annually.
20 The second and only other option available to
21 Respondent required it to become a member of the VCAILG.
22 According to the website of VCAILG, the seven-member
23 VCAILG executive committee develops the proposed program
24 budget each year, recommends policy, and a 20-member
25 steering committee which consists primarily of growers

Exhibit 3

1 reviews and approves the budget and policy
2 recommendations. The final approval rests with the Farm
3 Bureau Board of Directors.
4 The estimated annual assessment, which has been
5 increasing annually, is now $23 per acre, which would
6 equate to approximately $2,500 for Balcom Ranch.
7 Balcom Ranch's options, therefore, were to
8 either comply with the Conditional Waiver -- were either
9 to spend between 50- and $80,000 a year or approximately
10 $2500 a year. These facts compel the conclusion that the
11 only real option for Balcom Ranch to comply was not
12 economically viable if it wanted to comply individually
13 and really compelled it to sign up with VCAILG.
14 The alternative was to risk enforcement action, which is
15 exactly what's happened here.
16 We think that the Regional Board's approval of
17 VCAILG and its administration by the Farm Bureau under
18 these circumstances constitutes a delegation of the
19 Board's powers to these private organizations.
20 In Eubank versus City of Richmond, a Supreme
21 Court case, 1912, 226 U.S. 137, Supreme Court struck down
22 a statute that allowed two-thirds of property owners to
23 determine a building line restriction on another property
24 owner's property. Many cases since then have held that
25 delegation of power to private individuals to decide what

Exhibit 3

1 others could do with their land was repugnant to the due
2 process clause of the Fourteenth Amendment and equal
3 protection of the law, and the cases are cited at page
4 nine of the brief.
5 We believe the delegation of that authority is
6 suspect where constitutional rights are implicated. The
7 Board is utilizing VCAILG and the Farm Bureau as a proxy
8 to conduct their searches and inspections, in this case
9 without a warrant, but violating Respondent's
10 constitutional rights of association by effectively
11 forcing it to join VCAILG, under threat of enforcement,
12 and the imposition of what we believe is an excessive
13 penalty that does not bear any relationship to the
14 ability of the Respondent to pay or to continue in
15 business.
16 MS. OKUN: Mr. Beck, you have about three minutes
17 left total in your rebuttal. I think you may want to
18 wrap it up.
19 MR. BECK: Thank you.
20 It is true that we went through a process of
21 attempting to form an alternative Discharger Group. The
22 process we went through, I would differ with
23 Ms. Nascimento's testimony that these were suggestions
24 only. It was pretty clear that the only way that this
25 letter was not going to be the subject of an attack was

Exhibit 3

1 if we made all the changes they wanted; and when we made
2 those changes, we had a letter that effectively would not
3 have been any kind of motivation to any other landowner
4 in the county to join an alternative group because there
5 was no action against it at that time.
6 What we learned, in effect, was that the Ranch
7 had -- Balcom Ranch had been targeted, isolated as an
8 alleged Discharger/Violator, and that it was, therefore,
9 being -- selectively the subject of an enforcement
10 action.
11 We'd also argue that we have a right to subpoena
12 witnesses and documents within the control of the Board
13 to the hearing. That's something that we could not have
14 dealt with until after the March 9th prehearing
15 conference and Ms. Okun and her March 10th letter in
16 which you issued your rulings. And we refer again to the
17 Shively versus Stewart case that indicates that we were
18 entitled to subpoena Board-related witnesses to the
19 hearing and here in the situation where in an
20 administrative proceeding the agency is the Prosecution
21 Team as well as the Hearing Officer and determines the
22 ultimate outcome, I think that the procedural safeguards
23 that are required under due process are missing.
24 We've cited the Boal versus Pricewaterhouse
25 case, 1985 California case, that talks about precluding a

Exhibit 3

1 party from issuing a trial subpoena if the documents
2 haven't been subpoenaed or produced prior to the cutoff.
3 We think that we have been limited in our ability to
4 access relevant evidence and to identify documents that
5 were not within our -- within our ambit.
6 Lastly --
7 MS. DIAMOND: Thank you.
8 MR. BECK: May I have one minute?
9 MS. DIAMOND: Could you make it 30 seconds? We've
10 given you an awful lot of extra time.
11 MR. BECK: Yes. Thank you.
12 My final point is this: It's evident from
13 Mr. Park's testimony -- and he is quite competent to
14 testify as the accountant who was knowledgeable about
15 Balcom Ranch's condition -- that Balcom Ranch has a very
16 limited ability to pay and the assessment of a penalty in
17 the nature of $193,000, let alone $35,000, would have a
18 severe impact on its ability to remain a business. This
19 is a party that generates a $236,000 loss every year. It
20 has to get recapitalized annually in order to keep going.
21 MS. DIAMOND: Thank you. I believe you've made your
22 point.
23 We do have one person that --
24 MS. FORDYCE: The Prosecution would like to finish
25 its presentation.

Exhibit 3

1 MS. DIAMOND: Okay. Sorry.
2 MS. FORDYCE: Would you like to hear from the
3 individual person first? I just want to make sure that
4 we have more time.
5 MS. DIAMOND: You do have more time. How much time
6 do you have?
7 MS. MOFFETT: I have 32 minutes left for them.
8 MS. DIAMOND: Would you prefer to do it now or wait
9 until the one --
10 MS. FORDYCE: We're fine with having the person
11 testify, understanding that our time frame --
12 MS. DIAMOND: I understand it's getting late. We
13 have this person to testify, John Krist.
14 MR. KRIST: I don't need the time after all, Madam
15 Chair.
16 MS. DIAMOND: You don't want it?
17 MR. KRIST: No.
18 MS. DIAMOND: Okay. Thank you very much.
19 MS. FORDYCE: I do have a few questions for
20 Ms. Nascimento.
21
22 REDIRECT EXAMINATION
23 BY MS. FORDYCE:
24 Q How do you select cases for enforcement?
25 A We generally select cases for enforcement under

Exhibit 3

1 the Conditional Waiver Program based on the size of the
2 property, the proximity to a water body, the potential
3 risk to that water body, things of that nature. And
4 because we have 95 percent enrollment of all the
5 irrigated acreage in Ventura County, there are relatively
6 few parcels remaining that we apply that criteria to.
7 Q And why did you choose Balcom Ranch specifically
8 as a viable enforcement action?
9 A The particular reason for selecting Balcom Ranch
10 did have to do with its proximity to the Santa Clara
11 River. The Santa Clara River is an impaired water body
12 on the Clean Water Act 303(d) list and it has been
13 impaired for chemicals that are often associated with
14 agricultural operations and we felt that imperative that
15 it be protected and that it was at risk from these
16 parcels nearby.
17 Q Haven't most growers complied with the waiver?
18 A Most growers in our region have complied with
19 the Conditional Waiver by joining a Discharger Group. We
20 have Regional Board approved groups in both Los Angeles
21 County and Ventura County.
22 Participating or complying with the program
23 through a Discharger Group is the most cost-effective
24 means of compliance and is generally sort of the least
25 headache for growers. It affords them sort of less

Exhibit 3

1 day-to-day interaction with the Regional Board. However,
2 we have had individual enrollees. That is an option that
3 is available to growers and we have worked with growers
4 on an individual basis to establish Monitoring Plans that
5 are appropriate for the size and general activities of
6 their operations; and by having those individual
7 Monitoring Plans, that is a way to minimize the costs on
8 the individual's side.
9 Q Does VCAILG administer the waiver?
10 A No.
11 Q So can you explain for the Board, what is --
12 what is VCAILG's role?
13 A VCAILG is a Regional Board approved Discharger
14 Group. It's a body that essentially allows the growers
15 in Ventura County to comply with the waiver on a group
16 basis and have a Comprehensive Monitoring Program and a
17 Comprehensive Reporting Program. So they conduct
18 watershed-wide monitoring in the Santa Clara -- Calleguas
19 and Santa Clarita watershed. So it's a more effective
20 way to administer a regulatory program and it's a more
21 effective way to gather sort of our water quality data.
22 Q Mr. Beck just stated that they were being --
23 they were being forced to join VCAILG. Is joining VCAILG
24 the only option to come into compliance with the Water
25 Code?

Exhibit 3

1 A No. They have the option of joining a
2 Discharger Group, which in Ventura County that would be
3 VCAILG; they have the option for individual enrollment;
4 and they would also have the option to submit a Report of
5 Waste Discharge and receive an individual discharge
6 permit. We also did accept their initial plan of
7 potentially forming their own Discharger Group and we are
8 open to other Discharger Groups being formed.
9 Unfortunately, that plan did not come to fruition and it
10 did not prove to be a means of compliance for
11 Balcom Ranch.
12 Q Had Balcom Ranch been successful in forming its
13 own Discharger Group, would that Discharger Group
14 automatically qualify or be approved by the Regional
15 Board or would it have to go through a separate process?
16 A It's not necessarily an automatic qualification.
17 They would need to submit all of the required enrollment
18 documents, being the Notice of Intent, Monitoring and
19 Reporting Plan, and Quality Assurance Plan. Those
20 documents would have to be prepared on a professional
21 level and provide all relevant technical information to
22 support the monitoring requirements under the Conditional
23 Waiver. Once those were reviewed, the Executive Officer
24 then does have the authority to approve a Discharger
25 Group and issue that Discharger Group a Notice of

Exhibit 3

1 Acceptability.
2 Q You heard Ms. Thomas testify to the challenges
3 of agricultural operations in Ventura County. Has this
4 affected any of the compliance with other growers in
5 Ventura County?
6 A Regional Board staff recognizes that there are
7 many challenges that are faced by agricultural operations
8 throughout Ventura County; however, as I stated earlier,
9 we do have 95 percent compliance. So based on that, I
10 assume that other growers are able to administer both
11 their regulatory obligations and their obligations to run
12 a successful agricultural operation.
13 MR. BECK: Might I just object to the response as
14 nonresponsive. Ms. Nascimento said "I assume" so it's
15 really a speculative answer. It doesn't incorporate
16 anything from her personal knowledge other than the
17 conclusion based on the degree of enrollment.
18 MS. OKUN: The Board can take that into account in
19 weighing the evidence.
20 BY MS. FORDYCE:
21 Q Has any representative from Balcom Ranch ever
22 contacted you to come in and look at the file on this
23 matter?
24 A There has been no request for a file review.
25 Q Had there been a request for a file review,

Exhibit 3

1 would they have been allowed to come in to the Regional
2 Board and look at the file?
3 A Absolutely.
4 Q And had they requested specific documents, would
5 you have provided copies of those documents?
6 A Absolutely.
7 Q Aside from the site visit in 2009 that you
8 testified to, have you driven by the Balcom Ranch site on
9 any other occasions?
10 A I have frequently driven on South Mountain Road
11 in the course of other site visits and other work in
12 Ventura County; and because I know the location of
13 Balcom Ranch, I have, you know, noted when I was passing
14 by Balcom Ranch.
15 Q Okay. And is South Mountain Road a public road?
16 A Yes.
17 Q And when you've driven by the Balcom Ranch on
18 South Mountain Road, what did you generally observe?
19 A I generally observed the citrus parcels that are
20 visible from the road. They have a sign there that says
21 "Balcom Ranch." They have a gate. I've always observed
22 the gate to be open, general things like that.
23 Q All right. Mr. Brown also asked you during
24 Cross-Examination whether it's fair for people to be
25 penalized while engaging in settlement discussions. Do

Exhibit 3

1 you believe that they are being penalized for engaging in
2 settlement discussions?
3 A No, they are not being penalized for being in
4 settlement discussions. The additional penalties are
5 very clearly for continued noncompliance. Balcom Ranch
6 has remained out of compliance all throughout the period
7 of settlement discussions and even in the period before
8 those discussions formally started, so they were being
9 penalized for noncompliance, not for engaging in
10 settlement discussions.
11 Q And how did you notify Balcom Ranch that -- the
12 need to enroll in the waiver or submit a Report of Waste
13 Discharge? Were there e-mails or letters?
14 A Once they had received the ACL and we were in
15 communication with them, we told them verbally both in
16 our settlement meeting in July of 2010, I told Mr. Beck
17 over the phone several times that I was very concerned
18 about the additional accrual of penalties; and, you know,
19 he told me he would relay that information to his client;
20 and there were e-mail records, some of which I believe
21 are in the binder, where staff told them of the concerns
22 of additional penalties and "Please enroll and comply."
23 Q And to date, has Balcom complied --
24 A No.
25 Q -- by submitting a Notice of Enrollment for

Exhibit 3

1 individual enrollment?
2 A No.
3 Q How about group enrollment?
4 A No.
5 Q Have they submitted a Report of Waste Discharge?
6 A No.
7 Q So, in fact, they have actually had three
8 options to comply. Is that true?
9 A Yes.
10 MS. FORDYCE: I have a couple of questions for
11 Ms. Thomas.
12
13 PATRICIA THOMAS,
14 called as a Witness, and having been previously duly
15 sworn by the Panel Chair, was examined and testified as
16 follows:
17
18 CROSS-EXAMINATION
19 BY MS. FORDYCE:
20 Q Is it normal to keep the gate open during
21 business hours?
22 A I wouldn't use the word "normal."
23 Q How often is the gate open?
24 A I can't give you the number of times, but for
25 people who are allowed to enter the Ranch and go back and

Exhibit 3

1 forth with the trucks, the gate is sometimes open --
2 Q You --
3 A -- but it does -- excuse me. It's still -- open
4 or closed, it says "No Trespassing" and it's very
5 visible.
6 Q Understood.
7 You testified that visitors are preapproved
8 before entering the property?
9 A Yes.
10 Q And how -- how does one contact Balcom Ranch to
11 get preapproved?
12 A They make a call.
13 Q And what -- is there a number to call?
14 A Yes. There are numbers to call.
15 Q And how are those numbers given to members of
16 the public?
17 A They're made available when they're requested.
18 Q What I'm trying to understand is how does one
19 request to get onto the property?
20 A You would contact me.
21 Q And how is one supposed to know to contact you?
22 A Well, you contact Balcom Ranch.
23 Q Okay. Are you aware that the Prosecution
24 Team or the Regional Board actually sent several notices
25 to the mailing address associated with Balcom Ranch and

Exhibit 3

1 received no response back?
2 A Am I aware? I have come to learn that there
3 were some notices sent. I also would repudiate that no
4 one made any calls to you. I did not speak with
5 Ms. Nascimento, but I did make calls and try to learn
6 certain amounts of information. I didn't stick my head
7 in the sand.
8 Q Who did you call?
9 A I'm sorry, but I don't have their names. I
10 called members of the Farm Bureau and their VCAILG people
11 to try to learn some things. I did make calls in the
12 government.
13 As I said, this process and who you contact and
14 how you do things isn't the easiest one to navigate.
15 There are an awful lot of administrative agencies
16 connected with EPA.
17 Q Okay. so as a property manager, you testified
18 that you deal with a lot of government agencies; is that
19 true?
20 A I did not state that I -- I said I assisted in
21 property management. I did not say I was the property
22 manager --
23 Q Okay.
24 A -- but I have contact with governmental
25 agencies, yes.

Exhibit 3

1 Q Why did Balcom Ranch not respond to any of the
2 notices?
3 A Again, I don't think that's what I just said.
4 Q You said you contacted the Ventura County Farm
5 Bureau. Did you contact the Regional Board?
6 A I contacted individuals in governmental
7 agencies.
8 Q Okay. Did you contact the Regional Board?
9 A I honestly -- you have a system of a Board, a
10 Panel. I'm sorry. I'm a layperson. I'm not sure I can
11 answer that effectively.
12 Q Are you aware that the letters that were sent to
13 Balcom Ranch actually contained a name, a name of
14 Ms. Nascimento, and a phone number to contact?
15 A I don't --
16 MR. BROWN: Objection; compound. We're talking about
17 a number of different letters.
18 MS. DIAMOND: We cannot hear you --
19 MR. BROWN: I'm sorry.
20 MS. DIAMOND: -- and the question was directed to
21 Ms. Thomas; and if you would like to direct a question to
22 Mr. -- to any of the others, would you do that so that we
23 know who's talking and --
24 MS. FORDYCE: My question was to Ms. Thomas.
25 MR. BROWN: I just interposed an objection.

Exhibit 3

1 MS. FORDYCE: I'm sorry. Can you just repeat the
2 basis?
3 MR. BROWN: That it's compound, but we're talking
4 about apparently a number of letters.
5 MS. FORDYCE: Okay.
6 BY MS. FORDYCE:
7 Q It was more of a general question. Are you
8 aware that the letters contained a specific contact name
9 and a number to call if you have any questions?
10 A Again, I'd like you to clarify what --
11 specifically what you're talking about.
12 Q I'll help you. Let me just get my binder. I'd
13 like to turn your attention to Exhibit 4.10, so it's on
14 4-282. It's a January 3rd, 2010 Notice to Comply.
15 A Excuse me. 4.10?
16 Q It's Tab 4.10. The specific page is 4-284.
17 A Okay.
18 Q Is it true that there are two names listed at
19 the bottom of that letter?
20 A Yes.
21 Q And who are those names?
22 A Sam Unger and Rebecca Veiga Nascimento.
23 Q And is there phone numbers associated with those
24 names --
25 A Yes, there are.

Exhibit 3

1 Q -- and/or e-mail addresses?
2 A Yes.
3 Q Did you ever contact either Mr. Unger or
4 Ms. Nascimento regarding this letter?
5 A No, and I don't remember seeing this letter.
6 Q I'd like to turn your attention to 4-288, which
7 is the November 15th, 2007 Notice of Violation. Again,
8 are there two names listed on that page?
9 A Yes.
10 Q And is there phone numbers associated with those
11 names?
12 A Yes.
13 Q And did you ever contact Mr. Unger or
14 Ms. Nascimento?
15 A No.
16 Q Is it common to get deliveries at Balcom Ranch?
17 A I'm having trouble with the word "common." I'm
18 sorry.
19 Q Do you get deliveries at Balcom Ranch?
20 A Yes.
21 Q So is it -- are we talking about mail, USPS,
22 FedEx, for example?
23 A Only at the very front of the Ranch on South
24 Mountain Road.
25 Q Okay. So when they get to South Mountain Road,

Exhibit 3

1 is someone waiting there to let the gate open? How are
2 they supposed to get onto the property to deliver those
3 items?
4 A There is a mailbox and UPS has a phone number to
5 call.
6 Q Okay. So you testified that the property has
7 citrus trees --
8 A Yes.
9 Q -- and you said specifically Valencia oranges?
10 A Yes.
11 Q You also -- and there's also row crops?
12 A I don't deal with row crops.
13 Q Okay. Okay. Do you have to water the orange --
14 the citrus trees?
15 A Do I ever water the citrus trees?
16 Q Are the citrus trees watered?
17 A They are irrigated at times, yes.
18 Q Okay. And how -- how are those trees irrigated?
19 A Furrow irrigation.
20 Q I'm sorry. Can you explain what that means?
21 A Basically, there are rows that -- there are open
22 spaces between the trees, there is a rut in that row, and
23 there are pipes that pump water slowly down into those
24 rows. Typically it's done in a way that if you were to
25 walk and see, you'd see wet -- some wet ground. It's a

Exhibit 3

1 slow seepage.
2 Q And do you apply -- are fertilizers applied to
3 these citrus trees?
4 A I call them nutrients. I'm not sure what the
5 technical name is.
6 Q I think "nutrients" is fine. Do you apply
7 herbicides?
8 A I don't believe so.
9 Q And you said that you do not apply pesticides;
10 is that correct?
11 A That's correct.
12 Q But you also testified that there's a threat
13 of -- and I'm sorry. I can't repeat the name of the pest
14 you named.
15 A Huanglongbing.
16 Q But you said you don't apply pesticides?
17 A That's correct.
18 MS. FORDYCE: I have no further questions for
19 Ms. Thomas.
20 We'd like to just go into our Rebuttal, if
21 possible.
22 MS. DIAMOND: Do you want to know the time left?
23 MS. FORDYCE: It looks like 15 minutes --
24 MS. DIAMOND: Okay. Thank you.
25 MS. FORDYCE: -- and I think you can't see it from

Exhibit 3

1 here.
2 Okay. For the record, we definitely do object
3 to this attempt at Balcom Ranch submitting the
4 supplemental brief on the date of the hearing. You know,
5 I'm trying to listen to Mr. Brown and Mr. Beck speaking
6 and it's very impossible for me to try to read this and
7 really understand what's in the brief. We definitely
8 object to it being introduced at this time.
9 So without waiving any arguments raised in our
10 reply brief contending that Ms. Nascimento's site visit
11 was not a search under the Fourth Amendment, we really
12 think this is a nonissue. In order to expedite the
13 hearing, you know, I'd like to point out two things.
14 Ms. Nascimento's testified to her visual
15 observations from South Mountain Road, which is a public
16 road. So clearly from that legal vantage point, what she
17 saw, mainly citrus trees, indicated to her that Balcom
18 Ranch is a Discharger and they are subject to the waiver.
19 Also, we are relying on Balcom Ranch's own
20 testimony concerning the citrus trees and other outgrowth
21 from the property. Ms. Thomas testified that they
22 actually do, in fact, have citrus trees, they are
23 irrigated, and also we are allowed to rely on the
24 pictures that were introduced late into evidence today.
25 Those pictures actually indicate that there are, in fact,

Exhibit 3

1 citrus trees on the property; and because of that, they
2 are subject to the Conditional Waiver.
3 And lastly, we'd also like to largely contend
4 that the site visit is not the cornerstone of the
5 Prosecution Team's case. Yes, it is definitely a
6 contributing factor, but what Ms. -- but what we just
7 said, we'd like to rely on Balcom Ranch's own testimony
8 as to party admissions as to what's on the property and
9 as to what she saw from a legal point of vantage.
10 Accordingly, there are also Ventura County
11 assessor records which clearly indicate that the property
12 is used for orchards or orchards and mixed crops. It's
13 clearly on the evidence that we submitted with the
14 Ventura County assessor records.
15 Second, you heard a lot of testimony from
16 Mr. Beck, basically collaterally attacking the waiver.
17 Like I said before, it's irrelevant. It's not
18 appropriate at this proceeding. Any testimony
19 challenging the requirements of the waiver is not
20 appropriate at this time and really is just irrelevant.
21 Many of you have heard me say this before.
22 Discharging is not a right; it is a privilege. In order
23 to discharge, certain requirements need to be met and
24 those requirements are largely -- are largely established
25 by this Regional Board in Ventura County.

Exhibit 3

1 If Balcom Ranch really had a problem with
2 complying with the Conditional Waiver for various
3 reasons, they didn't have to comply with the Conditional
4 Waiver. Again, we said there were other options. They
5 could have applied for an individual Waste Discharge
6 Requirement and staff would have worked with Balcom Ranch
7 on an appropriate permit. They're not required to join
8 VCAILG. There's no conspiracy here. There's options,
9 and clearly Balcom Ranch didn't choose to take advantage
10 of any of those options.
11 You also heard some testimony concerning Balcom
12 Ranch's ability to pay. I'd like to note again that
13 there was no evidence submitted at all by Balcom Ranch
14 concerning these allegations by the deadline in the
15 Notice of Public Hearing.
16 Further, no financial information at any time
17 was ever submitted to the Regional Board Prosecution Team
18 and, therefore, the Prosecution Team has had no
19 opportunity to look at any evidence supporting these
20 claims. Any testimony you hear today concerning the
21 ability to pay is unsupported.
22 We urge the Board that if you are to consider
23 Balcom Ranch's ability to pay, you should also consider
24 the personal assets of each partner. One of those
25 partners is here today, Mark Brown, and the Board should

Exhibit 3

1 feel free to ask questions concerning his personal assets
2 since his own personal accountant was not able to answer
3 those questions to you.
4 Regarding selective enforcement, the Prosecution
5 Team and the Executive Officer, who is delegated general
6 authority to assign enforcement actions, has
7 prosecutorial discretion. There's no discriminatory
8 intent here. Simply, the fact is they have a large
9 acreage and they're close to the river and this is why
10 they were selected. Now, I understand that they don't
11 like the fact they were selected. It doesn't mean that's
12 discriminatory enforcement.
13 So on that, we'd like to recommend that the
14 Panel assess Administrative Civil Liability in the amount
15 of $193,850 for the pre- and post-complaint violations.
16 And as a reminder, they've been out of compliance since
17 2007, and that's four years ago.
18 Thank you.
19 MS. DIAMOND: So at this time, we're going to go to
20 questions from the Board members, the members of the
21 Panel.
22 I'm going to start right over here with
23 Mr. Stringer.
24 MR. STRINGER: Thank you.
25 My initial questions are for Mr. Beck.

Exhibit 3

1 Counselor, I was interested by your Fourth
2 Amendment arguments. I'm wondering -- but you never got
3 to the punch line. What's the remedy?
4 MR. BECK: If I may, let me try to respond to that
5 and also let my co-counsel respond. I think there are a
6 number of remedies and I appreciate the question.
7 I think the remedies would include a range all
8 the way from dismissing the ACL complaint to abating or
9 suspending the proceedings to enable the constitutional
10 infirmities to be corrected. I think that it would
11 include, among other things, providing us with the
12 opportunity to obtain the records and documents that we
13 requested to be outlined in our reply and objections on
14 February 16th. A number of factors -- there are a number
15 of things that could be done to remedy the constitutional
16 issues which are -- there are quite a number of.
17 Those are the ones that come most immediately to
18 mind. I don't know if my co-counsel has any other
19 responses besides those.
20 MR. BROWN: I would simply say that we had these
21 constitutional concerns and the fact that the Conditional
22 Waiver has been supplemented or superseded with a new
23 Conditional Waiver that directly addresses those concerns
24 is actually vindication, and I agree with his issues of
25 remedy.

Exhibit 3

1 I mean, if they were continuing to enforce this
2 Conditional Waiver, there would perhaps be other
3 remedies; but since it's now expired and been replaced by
4 one that's constitutionally acceptable and proper, I
5 don't know.
6 MR. STRINGER: When did you first raise your
7 constitutional claims? It's still not clear to me.
8 MS. THOMAS: Excuse me. I did, although I'm not real
9 articulate about it. When we were sitting in that
10 meeting, I kept talking about the problems that I saw
11 within the Conditional Waiver and even when I would read
12 the Discharger Group information; that basically there
13 was this vague language that gave a broadbrush stroke to
14 whenever someone felt it was necessary, they would come
15 on your property and look around. That's essentially
16 what you're left with.
17 Now, whether that's what they intend to imply,
18 it's what it says, and that's all I had to deal with --
19 MR. STRINGER: Excuse me. So --
20 MS. THOMAS: -- and I'm saying that's one of the
21 problems.
22 MR. STRINGER: By "that meeting," do you mean the
23 meeting last July?
24 MS. THOMAS: Yes. When I sat in on the meeting with
25 Rebecca and another woman who's been in the audience and

Exhibit 3

1 you (indicating).
2 MR. STRINGER: Do we have the date of that meeting?
3 MS. NASCIMENTO: That's the July 15th, 2010 meeting.
4 MR. STRINGER: July 15th? I'm just -- it's -- it's
5 confusing to me -- and perhaps this is a question for
6 Ms. Thomas -- why the papers just weren't filed. You can
7 reserve claims. You obviously have competent counsel.
8 When I get confusing things in the mail, I typically send
9 them to my accountant or read them carefully or ask
10 someone else who may understand them more than I do.
11 I haven't heard an explanation that makes sense
12 to me, frankly, as to why you didn't simply file the
13 papers and reserve your constitutional claims.
14 MS. THOMAS: Again, I'm a layperson and some of
15 that's a legal question, but you're asking for my
16 impression, I think, and I had conversations or did what
17 seems to be the logical thing; but I also feel that the
18 documents and the papers and all that you fill out for
19 all of these things clearly give away your right. And I
20 was brought up to believe that if you want to hold on to
21 something, you don't give it away and try to get it back.
22 It doesn't work that way.
23 So that's my layperson's explanation and that's
24 why I have to tell you I made the calls, I tried to find
25 some answers, and other people did, too. And because as

Exhibit 3

1 I think I said in my remarks, we do appreciate the
2 difficulties of these situations and we aren't deadbeat
3 people out there, you know. We're trying to do the right
4 thing, but our hands were tied. I really feel that our
5 hands were tied.
6 MR. BROWN: And if I may, if you look at the reply
7 brief, you will see that the Prosecution Team repeatedly,
8 and from our perspective unreasonably on numerous issues,
9 including subpoenas and everything else, but I'm not
10 going to get into that -- said, "Oh, you did this," "Oh,
11 you did that, too bad, gotcha, you waived your right."
12 To buttress what Ms. Thomas said, had we joined
13 the group, they would have argued, "Oh, you can't raise a
14 constitutional right now. You consented. You joined."
15 MR. BECK: So I think the response to your question
16 is that our view was that had we filled out the paperwork
17 and joined, enrolled in the Conditional Waiver Program,
18 we would have had to yield any constitutional challenges
19 and would have basically sacrificed the rights that we
20 thought we were losing by virtue of enrolling with regard
21 to all of the constitutional issues that we raise in our
22 trial brief.
23 MR. STRINGER: Those constitutional issues go mostly
24 towards the penalty calculations and the evidence to
25 support those; is that correct?

Exhibit 3

1 MR. BECK: Actually, I don't think that they do.
2 MR. STRINGER: And I obviously haven't had the
3 benefit of reading your trial brief because we just got
4 it. And on that note, I assume that you're aware that we
5 make these decisions at these Panel Hearings on the same
6 day that this hearing is heard, so this is not like a
7 typical trial where a judge takes things under advisement
8 and is able to consider those things, which is why we ask
9 for briefings in advance, so we can consider all your
10 arguments in advance.
11 MR. BECK: I regret that we did not have the ability
12 to produce our trial brief before this morning.
13 Mr. Brown and I were working on it up to last night, but
14 many of the issues crystallized as a result of the
15 prehearing conference that was only held a week ago. So
16 I think that the procedure encumbers everyone on the
17 Panel unfortunately as well as the participants, and it
18 is certainly not the typical manner in which litigation
19 is conducted.
20 I was not aware that the Panel did not have the
21 ability or -- let me put it differently. It is my
22 understanding the Panel can make decisions today but that
23 it also has the right to deliberate and make decisions
24 after today and that it can take additional documentation
25 or testimony or whatever else it feels it needs to make

Exhibit 3

1 an appropriate determination into account.
2 So I did not -- I did not understand that the
3 Panel would be handicapped if it felt it needed
4 additional information, substantively or with respect to
5 any legal issue that came up. Certainly it's not our
6 intention to burden or overburden the Panel, and that's
7 one of the reasons why I commented that if the Panel --
8 it certainly would be fair, in my view, to give the
9 Prosecution Team an opportunity to address the issues in
10 the brief, which largely go to legal issues, not
11 substantive issues.
12 You can tell from our Cross-Examination we
13 weren't challenging the vast majority of the proposed
14 findings or the underlying scientific evidence or the
15 information that was presented by Ms. Nascimento. We
16 focused on a couple of issues and we also focused on the
17 penalty. The penalty issue is only addressed at the
18 latter portion of the brief.
19 And I would also add that while it's true that
20 we did not submit written financial information in
21 advance of this hearing -- we had a number of privacy
22 concerns about that that we expressed -- but we were
23 confused that, you know, we were being told that we
24 should have asked for documents by subpoena a long time
25 ago; but the information and the financial factors,

Exhibit 3

1 ability to pay and continue in business, that's one of
2 the factors that the Board has to take into account in
3 determining any penalty and the burden, therefore, I
4 think would be on the Prosecution Team to provide
5 evidence, but it never asked us for any of that
6 information.
7 We were presenting defensive evidence, and I
8 don't want to go into a great deal of this argument, but
9 my point is that we thought the burden was not ours to
10 defend. It was on the Prosecution to demonstrate that
11 there was an ability to pay and its evidence was
12 incomplete, we thought. We brought Mr. Park here to
13 respond and to clarify those issues, but -- and we
14 certainly feel that he was competent to bring that
15 information to the Board and it was relatively
16 straightforward, short testimony, and it didn't require a
17 great deal of time.
18 MR. BROWN: And I might add if for any reason the
19 Panel believes that the Board does have -- the
20 Prosecution Team doesn't have the burden of proof on
21 financial issues, Counsel made reference in her closing
22 argument that you can hear from me, and I'm prepared to
23 briefly address my lack of assets as well.
24 MR. STRINGER: Ms. Thomas, I have some questions
25 about the property itself. I think you're probably the

Exhibit 3

1 best person to address these to.
2 The road that runs north-south that you assert
3 is a private road --
4 MS. THOMAS: Yes.
5 MR. STRINGER: -- does that service a number of other
6 property owners as well?
7 MS. THOMAS: There -- how do I say this? There's an
8 agreement that the property to the immediate east can use
9 the road, but they have other access roads to their
10 property. They don't need to go through that property;
11 but, in fact, they also have their postings that say "No
12 Trespassing" on their side because -- and gates that open
13 and close depending upon use, because they, too, were
14 concerned about these issues.
15 MR. STRINGER: There are other property owners that
16 abut that road, the north-south road; is that correct?
17 MS. THOMAS: There is --
18 MR. STRINGER: I mean, because from the map we've
19 seen, it looks like you own a parcel to --
20 MR. BROWN: There's only one, to the east.
21 MR. STRINGER: Okay.
22 MR. BROWN: In other words, one whole ranch on the
23 right side of the road and our ranch on the left side of
24 the road.
25 MR. STRINGER: Okay. So you own the property all the

Exhibit 3

1 way up to the river?
2 MR. BROWN: Yes. Well, until you get into the wilds,
3 yes.
4 MR. STRINGER: Okay. And you assert that those signs
5 were up at the time the inspection was made?
6 MR. BROWN: Absolutely.
7 MS. THOMAS: They've been up a very long time and if
8 you look at the pictures, you can see they've been up for
9 a very long time.
10 MR. STRINGER: And that east-west road going beneath
11 your property, that's a public road; is that correct?
12 MS. THOMAS: The east -- which east-west road are you
13 talking about?
14 MR. STRINGER: The one that goes below the --
15 MS. THOMAS: South Mountain?
16 MR. BROWN: South Mountain is a public road.
17 MS. THOMAS: It is a public road?
18 MR. STRINGER: South Mountain is a public road.
19 MS. THOMAS: And to finish the answer to that
20 question, the citrus trees are set back from the road
21 with barriers before you get to them.
22 MR. STRINGER: You can see the citrus trees from the
23 public road?
24 MS. THOMAS: Yes, you can see them, and there's
25 houses right up the road there. It's hard to visualize

Exhibit 3

1 these things. I understand that.
2 MR. STRINGER: I have some questions for the
3 Prosecution Team.
4 How many members are there in VCAILG, do you
5 know?
6 MS. NASCIMENTO: I believe there are approximately
7 1500 landowners enrolled -- oh, sorry. Approximately
8 1500 landowners enrolled as members of VCAILG.
9 MR. STRINGER: And then just a final math question, I
10 guess. How many days between the time of the first --
11 have you done the calculation of the number of days
12 between the time when you first issued the Notice of
13 Violation, I guess it would be, and the first settlement
14 meeting?
15 MS. NASCIMENTO: The number of days between the
16 Notice of Violation and the first settlement meeting? I
17 don't have that number of days right now. I can count
18 them up and get back to you. From --
19 MR. STRINGER: From the time you were first --
20 MS. NASCIMENTO: -- February 15th -- February 18th,
21 2010 to July 10th, 2010?
22 MR. STRINGER: Correct.
23 MS. NASCIMENTO: Yes. I don't have those days, but
24 we can add them up.
25 MS. FORDYCE: I'm sorry. Do you want the start date

Exhibit 3

1 as of the NOV and the complaint? There was a large time
2 frame between the Notice of Violation and the complaint.
3 MR. STRINGER: I'm looking for the start date of the
4 time -- you're tacking on some additional days --
5 MS. NASCIMENTO: Yes.
6 MR. STRINGER: -- or some additional penalties for
7 that second piece of the calculation. I'm looking for
8 the number of days between the start date of those
9 additional penalties and the time of the first settlement
10 meeting.
11 MS. NASCIMENTO: Yes. We'll give you that.
12 MR. STRINGER: Okay. Thank you. That's all I have.
13 MS. DIAMOND: Okay. Ms. Mehranian?
14 MS. MEHRANIAN: I have a question for their counsel.
15 Do you dispute that you're a Discharger?
16 MR. BECK: I'm sorry. I couldn't hear your question,
17 the last word.
18 MS. MEHRANIAN: That you're a Discharger? Do you
19 dispute that you're a Discharger?
20 MR. BROWN: I'm not sure I'm technically competent to
21 answer that, but I do dispute that owning land that we --
22 that it is only a privilege to water one's land from the
23 water underneath one's land and return it to that same
24 place without running off into a watercourse.
25 MS. MEHRANIAN: Do you have a well or wells on your

Exhibit 3

1 property?
2 MR. BROWN: Yes.
3 MS. MEHRANIAN: How many?
4 MR. BROWN: There is one -- there are two wells.
5 MS. MEHRANIAN: If you were questioning where it was
6 not clear if you're a Discharger or not, why was that at
7 some point you said that you would form your own
8 Discharger Group and you didn't? If that was in dispute,
9 why was it discussed later on?
10 MR. BROWN: I didn't say it was in dispute. I said I
11 wasn't competent to answer it; and the answer to your
12 question is we had constitutional concerns with not only
13 the law but the way VCAILG was letting people come on
14 property without any controls; and if we had our own
15 Discharger Group, we would ensure that appropriate
16 constitutional protections were in place for these
17 property owners and --
18 MS. MEHRANIAN: In your mind, are these two issues
19 mutually exclusive: If you have a constitutional claim,
20 then you should not be looking into the possibility of
21 you're a Discharger and it might be that you discharged
22 something that is not good in the waters of the U.S.?
23 MR. BROWN: There are a couple of things to that
24 question. Number one, the troubling thing from my
25 perspective about this is: It would be one thing if our

Exhibit 3

1 particular ranch or the neighbor's particular ranch had a
2 discharge above standards, but there's absolutely no
3 evidence that we have violated any pollution benchmark.
4 Nothing coming from our ranch has ever been proven to be
5 harmful. So what they're really doing here is to find a
6 way to fund testing for the whole basin by charging the
7 ranchers rather than take it out of the State's budget.
8 So -- and I'd also dispute -- you know, it was
9 shocking to us that we had this settlement meeting and
10 then they give us all the names of these people, and of
11 course it takes more time to digest that and so forth,
12 which I thought was a pretty good act of cooperation and
13 it was a reasonably good settlement meeting.
14 We tell them in the settlement meeting, We're
15 going to try to explore a Discharger Group for some of
16 these reasons and then when we draft the letter, we get a
17 letter back that absolutely guts it. It doesn't just
18 say, "There's no present enforcement actions." They give
19 you absolutely no effort to suggest that "Oh, but by the
20 way, though, we're really on this. We're really closely
21 looking at these other Dischargers."
22 They allow no language in that letter. I mean,
23 they just gut it. So anyone receiving this would look at
24 that letter and say, "Well, there's no urgency to act
25 here," and I have no idea why they did that. They didn't

Exhibit 3

1 do it with the VCAILG letters. They allowed VCAILG, I'm
2 sure, to say, you know, This is a pending enforcement
3 action and, you know, everyone's serious about this and
4 so forth.
5 So, you know, your suggestion that we did not
6 take discharging seriously or try to rectify it is not
7 accurate. We made, we believe, good-faith efforts to
8 form this Discharger Group and as I've said before, not
9 to belabor it, we felt that the property rights issues,
10 the constitutional issues, we couldn't just join as they
11 kept asking us to do.
12 MS. MEHRANIAN: Right. I'm trying to separate the
13 issues, but you're trying to bring them together.
14 One more time, did you have any intention to
15 pulling an ROWD?
16 MR. BROWN: Sorry?
17 MS. MEHRANIAN: What was your predominant reason for
18 not having an ROWD, Request for Water Discharger?
19 MR. BROWN: You mean the third option?
20 MS. MEHRANIAN: Right.
21 MR. BLOIS: Yes.
22 MR. BROWN: As far as I knew, I mean, I think -- I
23 think Ms. Nascimento was quite forthcoming and she told
24 us in the settlement meeting, You can't do this
25 individually. It'll -- I mean, she didn't use the word

Exhibit 3

1 "bankrupt you," but it will be tens if not hundreds of
2 thousands of dollars to go on your own and, therefore, we
3 highly -- we're not going to tell you what to do, but we
4 highly recommend you join VCAILG.
5 MS. MEHRANIAN: Thank you.
6 I have one question for Ms. Thomas.
7 Did you say that you received the letters, and
8 the numbers were there and the names were there and in
9 your -- in your testimony, did you say you never called
10 them, that you never -- Sam Unger and Rebecca?
11 MS. THOMAS: I asked about -- her to direct me to
12 specific letters and I said that I -- based upon what she
13 was presenting to me, those were not the letters that I
14 read and I did not call those.
15 MS. MEHRANIAN: You did not receive them --
16 MS. THOMAS: I did not --
17 MS. MEHRANIAN: -- or not see them?
18 MS. THOMAS: I did not see those letters and so I
19 could not call those names and those numbers. She
20 generally initially asked me about letters that were --
21 you know, I didn't know which letters and things she was
22 talking about.
23 MS. MEHRANIAN: Thank you.
24 I have one more question for the Prosecution
25 Team.

Exhibit 3

1 Do we have categories of size of, let's say,
2 orange orchards by small, medium and large? Do we?
3 MS. NASCIMENTO: The average size of an operation in
4 Ventura County is approximately 50 acres. The
5 Conditional Waiver as a regulatory program does not
6 classify or sort agricultural operations based on size.
7 The Water Code does not allow an exemption based on size.
8 We -- the waiver, though, is focused on
9 commercially irrigated agriculture. It is not applied to
10 hobby growers or home gardens.
11 MS. MEHRANIAN: But would it be, because of their
12 certain size or crop or whatever it is, categories of
13 small, medium, large in any --
14 MS. NASCIMENTO: No, ma'am.
15 MS. MEHRANIAN: Thank you.
16 I have no more questions.
17 MS. OKUN: Before we move on, Chair Diamond had a
18 question for me about one of Mr. Brown's comments about
19 the VCAILG letters and I just did want to clarify for the
20 record that Ms. Nascimento did testify she doesn't recall
21 the VCAILG letters. Whether or not they had to threaten
22 enforcement either to form the group or to get anyone to
23 join the group is not in this record. So any assumptions
24 that Mr. Brown may have about what kind of threatening
25 letters VCAILG may have sent out aren't supported by

Exhibit 3

1 anything in the record.
2 MR. BROWN: Well, I've seen some of them.
3 MS. DIAMOND: Okay. Mr. Blois?
4 MR. BLOIS: I have just a few quick questions,
5 hopefully "yes" or "no," and they're for either Mr. Brown
6 or Ms. Thomas; your choice, really.
7 You need to know first that I am a resident of
8 Ventura County, for my entire professional life. I
9 actually grow about 120 eurekas, so I'm familiar with
10 getting cut off by the packing houses and the economic
11 consequences and that sort of thing and I'm also glad to
12 hear that gentlemen farmers are excluded; hobby farmers,
13 I'll call myself.
14 But I say that -- I preface this with the fact
15 that I sympathize with you, I know where your ranch is,
16 I've driven by it numerous times on the way both to and
17 from, but I don't know you guys personally.
18 So my first question, the CPA was unable to
19 answer, and that is, is your property in question, two
20 parcels in question, enrolled under the Williamson Act,
21 which for those who don't know is an attempt by our
22 legislature here many, many years ago to encourage
23 farmers and those in the agricultural community to leave
24 their land rural as opposed to developing it? And when
25 that land is taken out of the Williamson Act, then it

Exhibit 3

1 could potentially be used for development. When it's
2 left in the Williamson Act, the incentive is the tax bill
3 goes down by a magnitude of ten.
4 So is your land in the Williamson Act?
5 MR. BROWN: Yes.
6 MR. BLOIS: Thank you.
7 Ms. Thomas, you testified that you have two
8 wells on your property -- actually, Mr. Brown did.
9 There's evidently two wells on your property. Are those
10 wells numbered or known to the County of Ventura; more
11 specifically, the Groundwater Management Agency?
12 MR. BROWN: I believe so.
13 MS. THOMAS: Yes.
14 MR. BLOIS: Evidently, 95 percent of the farmers in
15 Ventura County, many of which I consider my friends and
16 colleagues, have been able to figure out this
17 bureaucratic morass. Why is it that you've not been able
18 to?
19 MR. BROWN: I think the simple answer to that is --
20 and no disrespect intended to our fellow ranchers. I
21 think the simple answer to that is they believe the Farm
22 Bureau was serving their interests and they followed
23 whatever the Farm Bureau told them to do.
24 MR. BLOIS: All right. That's all I have.
25 MS. THOMAS: I would like to answer that further, if

Exhibit 3

1 I might, please.
2 I have spoken -- we may not know one another,
3 but I've made a tremendous effort to know people in the
4 community and to try to help resolve problems in the
5 community that we all have. And I've spoken to a number
6 of people who are on the board of VCAILG and who are
7 large farmers and owners as well as small ones, and one
8 of the things that I learned in the process of speaking
9 with them was that they, too, were concerned about this
10 and, in fact, were becoming more concerned about it
11 because it had not been resolved; and sometimes it's a
12 choice that you make on issues and exposure and the
13 amount of money you have to do or not do that, and in
14 this case, I think we've -- we've testified to the
15 answers and the reasons that we made.
16 I mean, I wish that there could have been a
17 better way of working this out. But, again, I also have
18 to tell you that this is a very different proceeding in
19 the way that you work and if you've never worked with
20 this agency or any of this before, trying to understand
21 how to do it, do it right, especially when you have
22 litigators that are trained about discovery and
23 everything, it isn't an easy process and you try to just
24 do the very, very best you can.
25 MR. BLOIS: Well, then I have to ask one other

Exhibit 3

1 question. If it's a judicial test that you're looking
2 for, why is it that you made the conscious decision -- or
3 let me rephrase that. Was it a conscious decision to
4 raise the stakes by not dealing with the paperwork?
5 MR. BROWN: It was a confluence of factors. There
6 was the economic issues that we've talked about. We were
7 reasonably prescient that -- when the initial VCAILG
8 acreage calculation was $9 an acre, it's now 24, but that
9 wasn't the primary issue.
10 The primary issue was that, A, we felt we could
11 get some resolution of this, and the settlement meetings
12 proved -- I mean, there were no back-and-forth settlement
13 procedures. I don't want to get into settlement, per se,
14 but we were surprised by that lack of flexibility. And
15 with those two factors present, yes, we felt that there
16 was no assurances that our rights would be protected. We
17 felt it was an important issue for Ventura and California
18 ranchers and other private property owners and we,
19 therefore, felt the test was appropriate.
20 MR. BLOIS: Thank you very much. I have no further
21 questions.
22 MS. DIAMOND: I have a few questions and I'm going to
23 begin with just asking staff, could you tell us all
24 briefly what is the primary -- what was the primary
25 purpose of creating the Ag Waiver?

Exhibit 3

1 MR. UNGER: I'll take a shot at answering that.
2 Basically, staff -- this is Sam Unger, for the
3 Regional Board.
4 We -- in the mid 2000's, we started, as a Board
5 and Board staff, very seriously looking at the number of
6 impaired water bodies throughout our region, the beaches
7 in Santa Monica, trash problems in Los Angeles, various
8 water quality issues in Ventura County, and we came to
9 the conclusion at that time that a lot of the -- many of
10 the water bodies in Ventura County were impaired by
11 chemicals that were commonly used in agricultural
12 operations. I mean, it was no great surprise really. I
13 mean, agricultural is the leading industry in
14 Ventura County.
15 We know from chemical use reports and things
16 like that that there is -- that these agricultural
17 operations use pesticides, herbicides, fertilizers,
18 nutrients and things like that which were all impairing
19 the water bodies.
20 We then looked further into our regulatory
21 authorities. And basically, as you know, we have the
22 NPDES program, but irrigated lands are specifically
23 exempt from that program. They're considered a nonpoint
24 source, and so we then, through development of the TMDLs
25 and how we're going to implement these TMDLs and these

Exhibit 3

1 load reductions, we looked at essentially the regulatory
2 programs that we had in the nonpoint source program and
3 one of those tools was a waiver at that time that had
4 already been modified by the legislature to be a
5 Conditional Waiver.
6 We couldn't just waive discharges of this
7 magnitude. We had to waive them with conditions, and we
8 set down a path as we were working on TMDLs for
9 Calleguas Creek, for Santa Clara River, for Ventura River
10 and some of the coastal water bodies in Ventura County to
11 meet with the discharging groups in Ventura County. We
12 were aware of them because many of the water body -- the
13 watershed groups that we had participated, agricultural
14 interests were seated at that table.
15 Of course the development of the new regulation
16 for an industry that hadn't been regulated before was --
17 took some time. We met with them for over a period of a
18 year in developing the first waiver.
19 At the time, the Farm Bureau took a leadership
20 role, but they did not take the only role. We also met
21 with other growers as well. We circulated many drafts of
22 what became the waiver that this Board adopted in 2005.
23 The staff looked at our colleagues in both
24 Region 3 and Region 5, learning the issues there, and we
25 did a lot of homework and became very well educated in

Exhibit 3

1 agricultural operations and the best sort of regulations
2 that could be used to address these problems.
3 To make a long story short, what then became
4 known is that these operations were very similar in the
5 types of chemicals that were used. I mean, agricultural,
6 although there were some differences, there were broad
7 similarities that made us look at something like an
8 industry-wide, sector-wide Conditional Waiver, and we
9 went out with that Conditional Waiver.
10 There was no -- we had some indication, but
11 VCAILG at the time was just forming to address it. They
12 didn't know essentially how many growers would
13 participate. We did a lot of outreach. We went to many
14 public meetings all over Ventura County and some in
15 Los Angeles County as well. We fielded a lot of
16 questions, had a lot of input, and finally brought the
17 waiver to you that you adopted in November of 2005.
18 So that meant basically -- but the origin of it
19 was to address impaired water bodies both in Los Angeles
20 and Ventura County, primarily Ventura County. And
21 Ventura County came to their own -- we provided a
22 provision that people could form a group to essentially
23 deal with the difficult regulations, the new regulations
24 for people. They could bond together, and we didn't feel
25 that every parcel needed to be tested but only certain

Exhibit 3

1 water bodies, and a group emerged in Ventura County, one
2 group in Los Angeles County, and many of the ranchers
3 enrolled with that group.
4 We also maintained the option for people to
5 enroll as individuals and we also retained an option that
6 they could comply with filing for Waste Discharge
7 Requirements as well.
8 So that's it in a nutshell.
9 MS. DIAMOND: Is it -- and I don't know whether you
10 want to answer this or Ms. Nascimento, but is it a
11 financial advantage to be a part of the group rather than
12 to have an individual WDR?
13 MS. NASCIMENTO: It's generally a financial -- yes,
14 it is generally a financial benefit to comply with the
15 program as a member of a Discharger Group, as opposed to
16 individual monitoring or an individual WDR.
17 The major cost of this program is associated
18 with the water quality monitoring and as Sam described,
19 under the group format, we allow them to have
20 comprehensive watershed-wide monitoring programs and so,
21 therefore, they can share the cost of that monitoring
22 amongst all of the growers in the watershed.
23 Individual monitoring or an individual WDR would
24 require individual site-specific monitoring and all of
25 the costs for that would be incumbent upon that

Exhibit 3

1 individual.
2 MS. DIAMOND: Can you -- do you have an idea of what
3 it would have cost Balcom Ranch had they been enrolled as
4 part of the Ag Waiver in the group --
5 MS. NASCIMENTO: Yes, ma'am. Exhibit --
6 MS. DIAMOND: -- for the year?
7 MS. NASCIMENTO: 4-14 -- it's page 4-312 -- that is
8 an economic benefit memo and it estimates the cost for
9 both individual and group enrollment.
10 You can see on Table 2 that the estimated cost
11 for enrollment in VCAILG for Balcom Ranch is $3,257.
12 MS. DIAMOND: Okay.
13 MS. NASCIMENTO: And that is the cost from 2005 to
14 2009.
15 MS. DIAMOND: Okay. I looked at the table also on
16 4-312 and that was a huge -- there was -- it would
17 have -- there was a huge cost savings. I think you -- on
18 this table, it says it would have been $46,817.20.
19 MS. NASCIMENTO: That's --
20 MS. DIAMOND: Is that correct?
21 MS. NASCIMENTO: Yes. That's the estimated cost for
22 individual enrollment, and the major driver you can see
23 there is the cost of annual water quality monitoring.
24 MS. DIAMOND: Uh-huh.
25 MS. NASCIMENTO: And under the 2005 waiver, in 2007

Exhibit 3

1 and 2008, there was a cost of four monitoring events per
2 year, and generally a monitoring event can cost you about
3 $5,000 because of the suite of pesticides that are
4 required for analysis and toxicity sampling that's
5 required for analysis are both very expensive.
6 MS. DIAMOND: Okay. I wanted to just ask Ms. Thomas
7 a question, and that is the letters were addressed to
8 Balcom Ranch at 943 South Burnside Avenue, Los Angeles,
9 California 90036. Is that the correct address for mail
10 to be sent to? Is that correct?
11 MS. THOMAS: It is an address that is used for
12 Balcom Ranch.
13 MS. DIAMOND: And you receive other mail at that
14 address as well?
15 MS. THOMAS: I believe it comes to that address.
16 MS. DIAMOND: Okay. Now, I guess I'll go back to
17 staff. The Notice of Violation and the letter of
18 November 15th, 2007 correctly addressed to Balcom Ranch
19 at that address, that was -- was that a certified letter?
20 And if it was, did you get an indication that it was
21 received?
22 MS. NASCIMENTO: Yes, ma'am. That was a certified
23 letter. We did receive the return receipt confirming its
24 delivery and that it was signed for by someone at that
25 address, and it's an exhibit in your binder.

Exhibit 3

1 MS. DIAMOND: Yes. I know. I see it. I just wanted
2 to verify that.
3 MS. FORDYCE: We'd also like to note that the 943
4 South Burnside Avenue is the mailing address of record
5 according to Ventura County Assessor's Office.
6 MS. DIAMOND: Okay. One last question of Ms. Thomas.
7 Are you an owner of Balcom Ranch?
8 MS. THOMAS: No.
9 MS. DIAMOND: Are you a tenant?
10 MS. THOMAS: I live on the ranch part-time.
11 MS. DIAMOND: Okay. But you're not an owner?
12 MS. THOMAS: No, ma'am.
13 MS. DIAMOND: So -- and I'd like to ask, who retained
14 counsel? Was it you that retained counsel, Mr. Beck, or
15 was it you, Mr. Brown?
16 MR. BROWN: I retained counsel.
17 MS. DIAMOND: And when did you retain your counsel?
18 MR. BROWN: Well, I serve as counsel, too, but when
19 did I retain Mr. Beck?
20 MS. DIAMOND: Yes.
21 MR. BROWN: I'd let Mr. Beck address that. I'm not
22 sure, but he certainly was at the July settlement
23 meeting.
24 MR. BECK: In the late spring, I think --
25 MS. DIAMOND: Okay.

Exhibit 3

1 MR. BECK: -- of 2010.
2 MS. DIAMOND: Okay. All right. Those are all the
3 questions I have and I assume there are no more questions
4 from our panel. So --
5 MS. NASCIMENTO: Excuse me. Madam Chair?
6 MS. DIAMOND: Yes.
7 MS. NASCIMENTO: Staff has the answer to
8 Mr. Stringer's question.
9 MS. DIAMOND: Okay. Good.
10 MS. NASCIMENTO: So there were 147 days from the days
11 of the ACL, which is February 18th, 2010, to the
12 settlement meeting, which was July 15th, 2010. There
13 were 117 days from March 20th, 2010, which is 30 days
14 post-ACL date, so that would have been the first day that
15 additional penalties began to accrue. And then from
16 March 20th to July 15th, 2010, that's 117 days of
17 additional penalty accruement.
18 MR. STRINGER: Thank you.
19 MS. DIAMOND: Is there any other evidence for the
20 record?
21 MS. FORDYCE: We've submitted all of our evidence.
22 MS. DIAMOND: Okay. Everything's been submitted?
23 Okay. Then I think this would be the time for
24 us to go into deliberations, and I guess we need to
25 decide where we're going to do that. We will deliberate

Exhibit 3

1 and then come back with our decision.
2 MS. THOMAS: Madam Chair, I have a question. Can we
3 take a bathroom break during this?
4 MS. DIAMOND: Yes. We are going to be deliberating
5 and at that time you don't need to be with us, and we're
6 also going to have lunch, but I'm --
7 MS. OKUN: We should go into the boardroom back there
8 (indicating).
9 MS. DIAMOND: Can we agree to have a working lunch
10 while we do our deliberations?
11 MR. BLOIS: Yeah.
12 MS. MEHRANIAN: Yes.
13 MS. DIAMOND: So right now it's about 12:40. Why
14 don't we say we'll be back at 1:30. Is that okay?
15 So you can come back at 1:30 and we should be
16 back with our decisions.
17 (Lunch recess)
18 (Whereupon the Board deliberated)
19 MS. DIAMOND: We're back in session. Welcome,
20 everybody. So our staff, our panel has had an
21 opportunity to deliberate on the item that we just heard,
22 Balcom Ranch, and our decision is the following: We have
23 decided to accept the staff decision. It was a unanimous
24 decision.
25 We feel that the parties have demonstrated from

Exhibit 3

1 the very beginning that they did not want and had no
2 intention to comply with the Ag Waiver.
3 Even with their issues of privacy that they held
4 up before us, they did not even bother to enroll into the
5 new waiver, which was issued six months ago, which
6 included the very privacy issue that they were asserting
7 today.
8 We did not accept the brief. There was no
9 showing why they couldn't have sent it timely. It was an
10 untimely time to give it to us today.
11 The Draft Order is going to be issued and this
12 will come before the full Board and you will be notified
13 of when that will be. At that time of the Board hearing,
14 the full Board can decide to reopen the hearing and tack
15 on any additional penalties if Balcom Ranch does not
16 enroll in the Ag Waiver by then.
17 That is the decision of this Panel and you will
18 be informed of the time of the hearing.
19 So that will conclude the hearing for today on
20 Balcom Ranch.
21 We're going to go on to the next item today,
22 which is Item Number 5 and I just wanted to let everybody
23 know, staff, to turn on your microphones when you're
24 speaking because sometimes that doesn't happen and the
25 reporter can't hear and nobody else can.

Exhibit 3

Tab 4.12

Memo to File, Site Visit of
Parcels 046-0-150-140- and 046-0-150-320,
November 17, 2009

Exhibit 4

California Regional Water Quality Control Board
Los Angeles Region

Linda S. Adams
Cal/EPA Secretary

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: http://www.waterboards.ca.gov/losangeles

Arnold Schwarzenegger
Governor

TO: Memo to File

FROM: Rebecca Veiga Nascimento
Environmental Scientist

DATE: November 18, 2009

SUBJECT: CONDITIONAL WAIVER FOR IRRIGATED LANDS PROGRAM (ORDER NO R4-2005-0080) - SITE VISIT OF PARCEL NUMBERS 046-0-150-140 AND 046-0-150-320, VENTURA COUNTY

Background

On November 3, 2005, the Los Angeles Regional Water Quality Control Board adopted a Conditional Waiver of Waste Discharge Requirements for Dischargers from Irrigated Lands (Order No. R4-2005-0080). The Conditional Waiver requires agricultural operators (dischargers) to enroll irrigated agriculture property under the waiver in order to continue discharging waste to waters of the state. Agricultural operators may enroll as an individual discharger or as a member of a discharger group. The deadline for submittal of enrollment documents to the Regional Board was August 3, 2006.

Site Visit

Date:	November 17, 2009
Time:	3:30 pm
Weather Conditions:	Sunny and clear
Regional Board Staff:	Rebecca Veiga Nascimento and Luis Lapostol
Location:	APN 046-0-150-140, 046-0-150-320. S Mountain Rd & Balcom Canyon Rd, Santa Paula, Ventura, California 93060. (see attached maps)
Watershed:	Santa Clara River Watershed
Size of Parcel:	046-0-150-140: 43.07 assessed acres 046-0-150-320: 65 assessed acres
Landowner:	Balcom Ranch

Objective: The land use designation of these parcels is agriculture; however this parcel is not enrolled in the Conditional Waiver for Irrigated Lands Program. The objective of the site visit was to verify the land use of the parcel.

Observations: Regional Board staff drove the eastern boundary of parcel 046-0-150-140 and the southern boundary of parcel 046-0-150-320 and verified that a portion of the parcel's land use is irrigated agriculture. Parcel 046-0-150-140 is planted with sprinkler irrigated citrus (photo 1, 2, and 3). Staff observed citrus orchard and row crop areas in parcel 046-0-150-320 (photo 4 and 5), as well as a group harvesting in the row crop area.

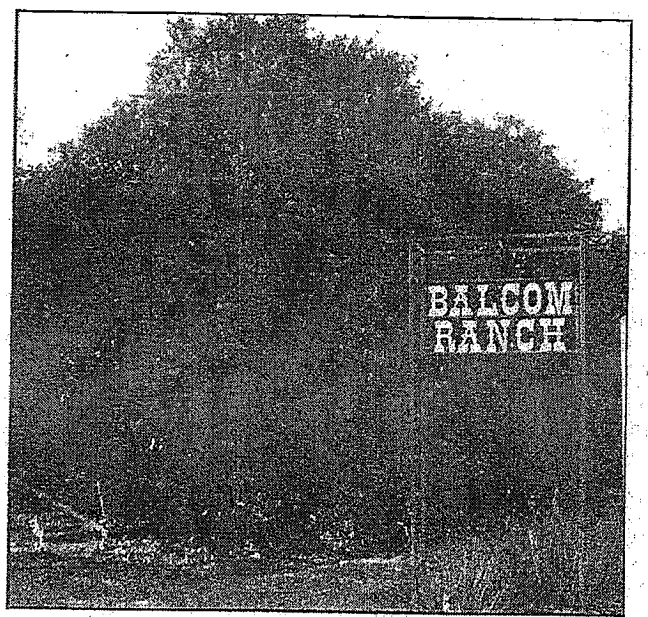

Photo 1 Parcel 046-0-150-140 Irrigated Citrus

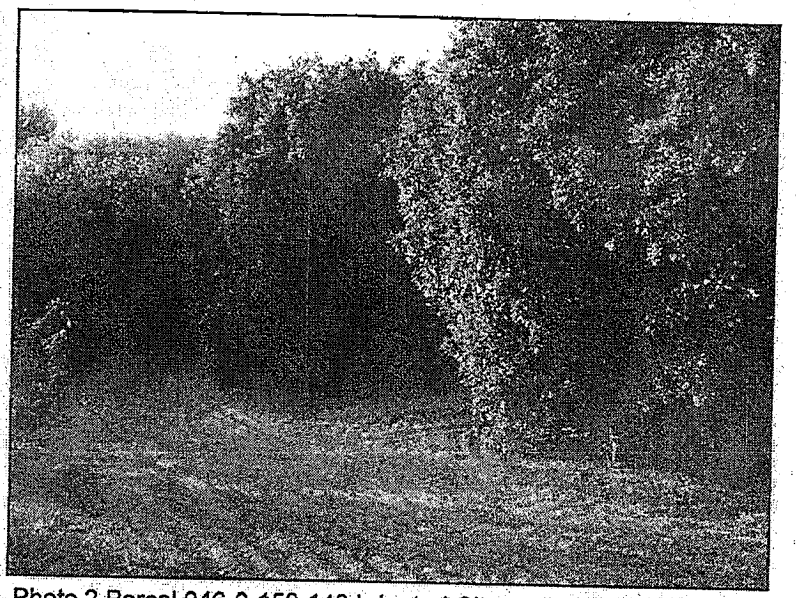

Photo 2 Parcel 046-0-150-140 Irrigated Citrus

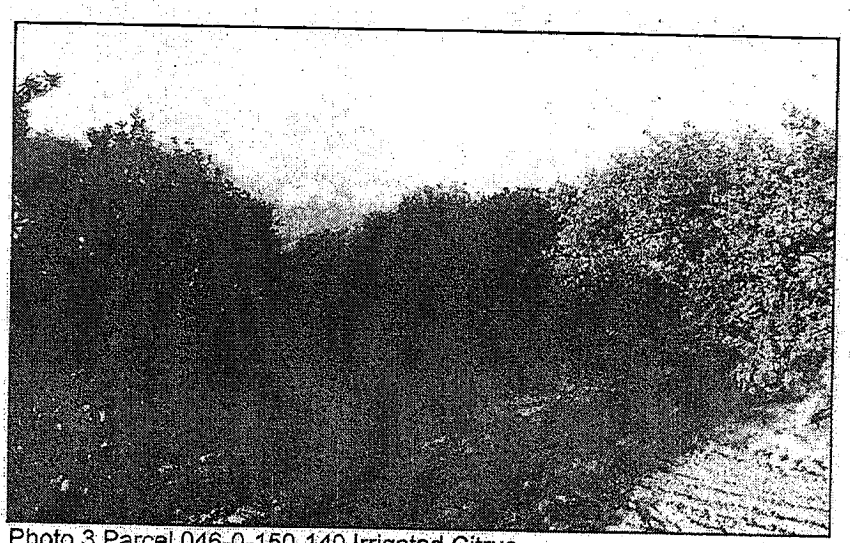

Photo 3 Parcel 046-0-150-140 Irrigated Citrus

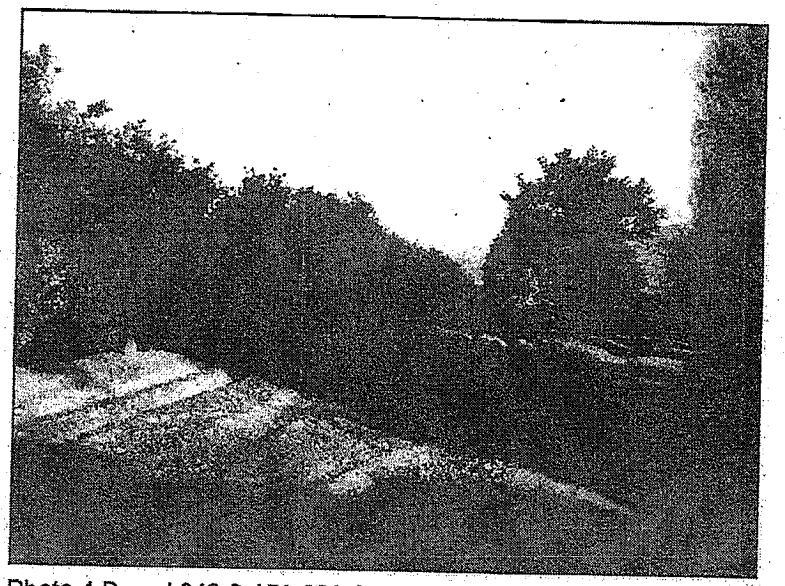

Photo 4 Parcel 046-0-150-320 Citrus Grove

Photo 5 Parcel 046-0-150-320 Irrigated Row Crops

Conclusions: The site visit of these parcels verified that the land use is irrigated agriculture; therefore it should be enrolled under the Conditional Waiver for Irrigated Lands (Order No. R4-2005-0080). The landowner has been notified of the obligation to enroll this property under the Conditional Waiver. The Regional Board mailed the notification certified mailed and received a return receipt confirming delivery to the landowner. The landowner is in violation of the Conditional Waiver for failure to enroll.

Attachment

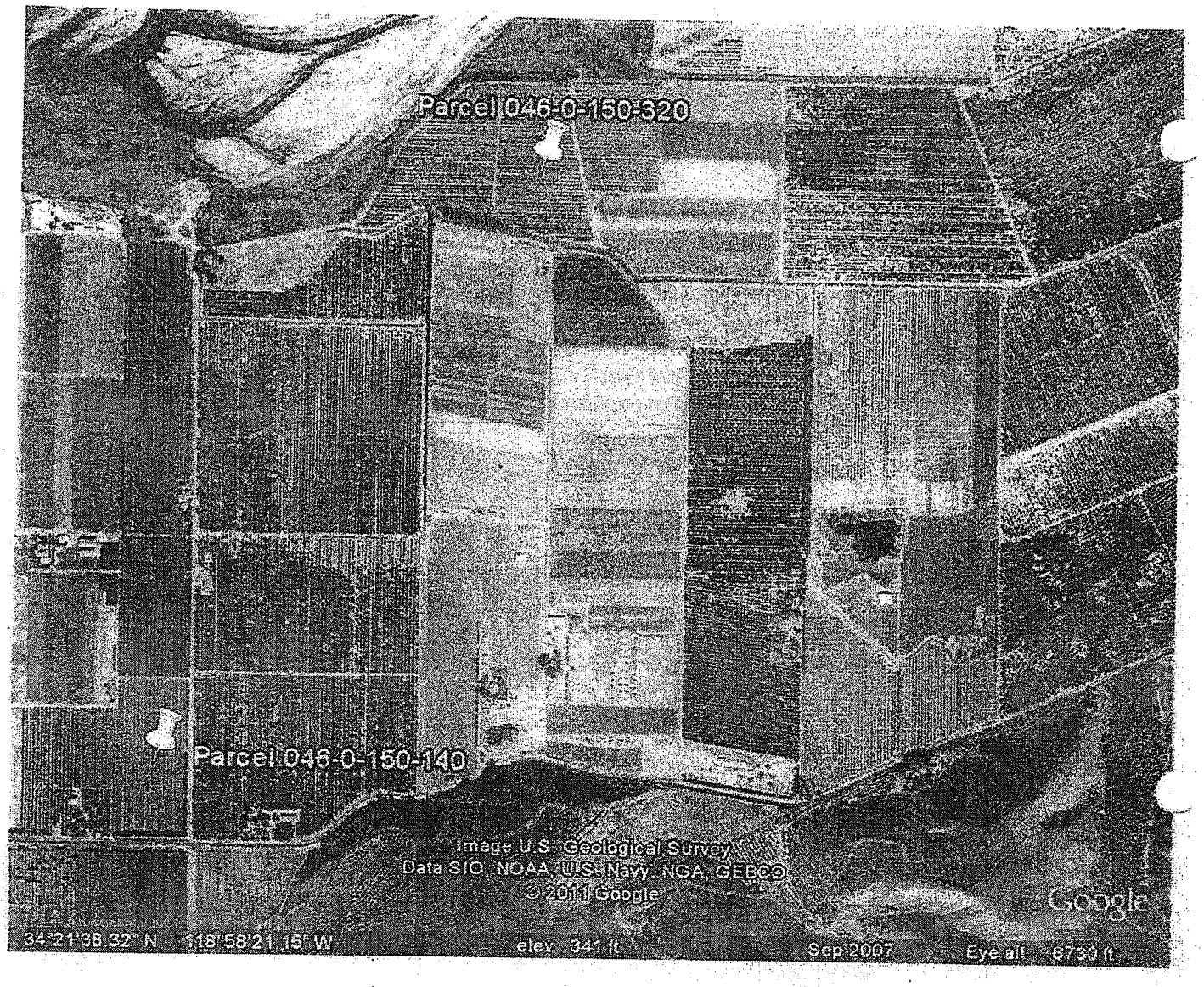
Parcel 046-0-150-320
Parcel 046-0-150-140
Image U.S. Geological Survey
Data SIO, NOAA, U.S. Navy, NGA, GEBCO
© 2011 Google
Google
34°21'38.32" N 118°58'21.15" W
elev 341 ft
Sep 2007
Eye alt 6730 ft

Exhibit 4

Tab 4.11

Notice of Violation
November 15, 2007

Exhibit 5

California Regional Water Quality Control Board
Los Angeles Region

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 -- Internet Address: http://www.waterboards.ca.gov/losangeles

...nda S. Adams
...EPA Secretary

Arnold Schwarzenegger
Governor

November 15, 2007

BALCOM RANCH
943 S BURNSIDE AV
LOS ANGELES, CA 90036

NOTICE OF VIOLATION – FAILURE TO ENROLL UNDER CONDITONAL WAIVER FOR IRRIGATED LANDS (ORDER NO. R4-2005-0080); CALIFORNIA WATER CODE SECTION 13269

Regarding Parcel Number: 046-0-150-320

Dear BALCOM RANCH,

This notice provides important information regarding discharges of wastewater and stormwater from your agricultural operations.

The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) is the public agency with primary responsibility for protection of surface water and groundwater quality within Los Angeles and Ventura Counties. Discharges of wastes and wastewaters from agricultural operations have been shown to contain nutrients, pesticides, and salts, which impair water quality in the Los Angeles region.

As part of our efforts to protect water quality, the Regional Board adopted the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Conditional Waiver) on November 3, 2005 (Resolution No. R4-2005-0080). Compliance with the Conditional Waiver by owners and operators of irrigated lands is required pursuant to the California Water Code (CWC) Section 13269. This section of the Water Code authorizes the Regional Board to waive issuance of waste discharge requirements if the State Board or Regional Board determines that a waiver is consistent with any applicable state or regional water quality control plan and is in the public interest. CWC Section 13269 specifies that waiver conditions shall include, but need not be limited to, the performance of individual, group, or watershed-based monitoring.

In accordance with CWC Section 13269, the Conditional Waiver requires water quality monitoring from agricultural operations to assess the effects of agricultural discharges on waters of the state. The Conditional Waiver provides two options for agricultural dischargers to comply: 1) as a member of a Discharger Group, and (2) as an Individual Owner or Operator. The

Conditional Waiver required submittal of a Notice of Intent, Monitoring and Reporting Program Plan, and Quality Assurance Project Plan to the Regional Board. For those Owners and Operators who chose to become members of a Discharger Group, the Group submits the notices and plans to the Regional Board on behalf of its members. The deadline for enrollment under the Conditional Waiver was August 3, 2006.

According to available records, you own or operate irrigated lands that are subject to the Conditional Waiver. However, the Regional Board has not received your application to enroll under the Conditional Waiver by the deadline or documentation that your operation is enrolled by membership in a Discharger Group.

On January 23, 2007, the Regional Board issued you a Notice to Comply with the terms of the Conditional Waiver. This notice directed you to submit a Notice of Intent, Monitoring and Reporting Program Plan and Quality Assurance Project Plan, or, alternatively, provide evidence of your participation in a Discharger Group to the Los Angeles Regional Board. As of the date of this Notice of Violation, the Regional Board has not received a response to the January 23, 2007 notice.

CWC §13350 states that any person who violates a waiver condition shall be liable civilly, and penalties may by imposed by the Regional Board either on a daily or on a per gallon basis with a potential liability of five thousand ($5,000) for each day the violation occurs. These civil liabilities may be assessed by the Regional Board for failure to comply, beginning with the date that the violations first occurred, and without further warning.

You are hereby directed to immediately comply with the terms of the Conditional Waiver and submit a Notice of Intent, Monitoring and Reporting Program Plan, and Quality Assurance Project Plan, or provide evidence of your participation in a Discharger Group that has complied with the provisions of the Conditional Waiver. Please note that this Notice shall not be deemed to relieve you of liability for any penalties that may have already accrued.

Information about the Conditional Waiver for Irrigated Lands, and examples of required documents and forms are available on the Regional Board's website at:

http://www.waterboards.ca.gov/losangeles/html/permits/waivers/waivers.html.

The list of the Discharger Groups that are currently on record with the Regional Board as submitting Notices of Intent and other required information is provided in Attachment A to this notice. If you are interested in complying with the Conditional Waiver for Irrigated Lands by participating in an established Discharger Group, please contact the Discharger Group directly for group specific enrollment procedures.

Questions regarding the Conditional Waiver for Irrigated Lands Program or this Notice may be directed to the following staff:

Samuel Unger at (213) 576-6622 or,
Rebecca Veiga Nascimento at 213-576-6661.

Sincerely,

Tracy J. Egoscue
Executive Officer

cc: Mr. Michael Levy Esq., Office of Chief Counsel, State Water Resources Control Board
Mr. Bruce Fujimoto, Division of Water Quality, State Water Resources Control Board
Ms. Kathi Moore, Office of the Director, Water Division, U.S. EPA Region IX

Attachment A

Discharger Group Contact Information:

Ventura County Agricultural Irrigated Lands Group
P.O. Box 3160
Ventura, California 93006
Phone: 805-289-0155
(Eligibility: Landowner and/or Grower in Ventura County)

Nursery Growers Association – Los Angeles County Irrigated Lands Group
Care of: Village Nurseries
Attn: Claudette Lerma
1589 N. Main Street
Orange, CA 92867
Phone: 714- 279-3100
clerma@villagenurseries.com.

(Eligibility: Landowner and/or Grower in Los Angeles County)

7006 2760 0000 7339 4020

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Posta	

Postmark Here

Sent To
Street, Apt. N
or PO Box N
City, State, Z

BALCOM RANCH
943 S BURNSIDE AV
LOS ANGELES, CA 90036
Re: Parcel # 046-0-150-320

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

BALCOM RANCH
943 S BURNSIDE AV
LOS ANGELES, CA 90036
Re: Parcel # 046-0-150-320

COMPLETE THIS SECTION ON DELIVERY

A. Signature
☐ Agent
☐ Addressee

B. Received by (Printed Name)
C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Articl
(Tran

PS Form 3811, July 1999 Domestic Return Receipt 102595-02-M-1540

4-300

Exhibit 5

Tab 4.23

Emails regarding Balcom Ranch's letter to other nonenrolled Ventura County landowners

Exhibit 6

Rebecca Veiga Nascimento - RWQCB vs. Balcom Ranch

From: Paul Beck <pab@pablaw.org>
To: rveiga@waterboards.ca.gov
Date: 9/8/2010 9:36 AM
Subject: RWQCB vs. Balcom Ranch
CC: mkesterbrown@gmail.com
Attachments: 2010.08 Ranchowners Final.pdf

Dear Becky:

I apologize for my silence during the past week. I am in the midst of a family medical crisis with my mother. I have taken her to the ER twice and now hospitalized her, but today (hopefully) she will be moved to a rehab facility for pain management and physical therapy. She fell a couple of weeks ago (actually knocked down by a dog) and has suffered microfractures in her back, which are extremely painful. As a result, all of my time since last week has been devoted to her (with a few hours to pack up and move my younger son to college and to participate minimally in parent orientation).

In the midst of all of this, last week, Mark Brown sent me the attached hopefully finalized version of his proposed letter to other landowners in Ventura County, which I have participated in editing. Please let us know whether this letter will meet with the approval of the RWQCB, and once we get the letter out, we will then turn our attention to the plan for responding to the RWQCB civil administrative complaint.

Thank you.

Cordially,

Paul

MARK KESTER BROWN
Member: State Bar of California; Bar of the District of Columbia

(310) 739-3900 | 11150 West Olympic Boulevard
Suite 1020
Los Angeles, California 90064 | *mkesterbrown@attglobal.net*

August 31, 2010

VIA FIRST CLASS MAIL

To various recipients

Re: Regional Water Quality Control Board, Los Angeles Region Enforcement Action

Dear Fellow Ranchowner:

I am an owner of Balcom Ranch, which is located on South Mountain Road in the southern part of Ventura County. Like you, we have recently received a demand letter and an administrative complaint for civil liability from the State of California Environmental Protection Agency's Regional Water Quality Control Board, Los Angeles Region (the "Water Board") regarding alleged violations of the California Water Code ("CWC"), which regulates the management of water and waste discharge, among other things, in the State of California.

We are presently in negotiations with the Water Board concerning our response to its demand letter and administrative complaint. As part of the discussions, the Water Board has provided us with your name and address, as well as the names and addresses of approximately 200 other landowners in Ventura County (your names and addresses are a matter of public record with the Water Board), who are all, like Balcom Ranch, allegedly in violation of the CWC and allegedly have not complied with the waste discharge requirements under the CWC.

I am writing to you and your fellow Ventura County landowners because we face imminent enforcement action, and I believe that we may be able to deal with this matter more effectively (and with less expense) if we organize and respond together. Therefore, I am seeking information from you and an expression of your possible interest in participating in a group for the purpose of our joint compliance or joint defense of the Water Board's administrative complaint.

In addition to being a rancher, I am also an attorney who specializes in real estate-related matters. Your communications with me would be maintained in strict confidence, and any communications you would choose to have with me in the course of determining whether you wish to participate in a joint compliance or joint defense effort would be privileged and protected from disclosure to others by the attorney-client privilege.

If you would like to participate in this effort or even just discuss it with me to see whether you might be interested in doing so, please provide us with the following information:

1. Your contact information, including e-mail address if possible;

2. The physical address of your property or properties;

Exhibit 6

3. A list of the crops or livestock grown or raised on your property or properties, if any;

4. Whether you are a member of the Ventura County Farm Bureau; and

5. The approximate acreage of your property.

Please e-mail or fax your information to the contact links set forth above, or if that is inconvenient, please feel free to call and/or leave a voicemail message with your information. Once sufficient responses have been received, we will schedule a meeting or meetings locally to address these issues and begin to answer your questions and discuss possible strategies.

If you are interested in participating, please provide us the above information within the next 15 days. I look forward to meeting with you and hopefully structuring an effective joint response.

Sincerely,

MARK KESTER BROWN

Exhibit 6

Rebecca Veiga Nascimento - ACL NO. R4-2010-0023 - COMMENTS ON PROPOSED LETTER

From: Rebecca Veiga Nascimento
To: pab@pablaw.org
Date: 9/21/2010 3:02 PM
Subject: ACL NO. R4-2010-0023 - COMMENTS ON PROPOSED LETTER
CC: Fordyce, Jennifer; Newman, Jenny; Rasmussen, Paula

Mr. Beck,

Regional Board staff has reviewed the proposed letter from Mark Brown to other nonenrolled agriculture landowners in Ventura County. We appreciate you giving us the opportunity to look at the proposed letter and make comments prior to being sent out. While we do not wish to dictate the content or style of the letter, we feel it is necessary to point out a few factual errors (listed below) in the proposed letter. Please be advised, however, that in providing feedback, Regional Board staff is not supporting or endorsing Balcom Ranch to send this letter or the potential formation of a Discharger Group, and any letter sent by Balcom Ranch should not state or imply any support or endorsement by the Regional Board. Further, the sending of this letter by Balcom Ranch in no way resolves the pending ACL complaint issued to Balcom Ranch. Regional Board staff is still expecting Balcom Ranch to submit a written response to the ACL complaint by September 22, 2010. Our comments are solely being provided so that recipients of the letter are given accurate information concerning the Regional Board and its conditional waiver for irrigated lands programs. Accordingly, we ask that you correct the factual errors below prior to sending out the letter.

1. Paragraph 1, second sentence:

   Not all landowners in the Excel file of nonenrolled parcels provided to you on July 21, 2010 received an ACL complaint. Thus, please strike the phrase "Like you", which implies that all landowners received an ACL complaint.

2. Paragraph 1, second sentence:

   Please do not refer to correspondence from the Regional Board as a "demand letter". The Regional Board does not send "demand letters" and did not send such a letter to Balcom Ranch. Please refer to Regional Board correspondence in a more generic way, such as a "notice letter". Please make this change to the entire proposed letter.

3. Paragraph 2, first sentence:

   As you are aware, settlement negotiations with Regional Board staff concerning this matter are confidential. Accordingly, please remove any references to settlement discussions in the letter.

4. Paragraph 2, second sentence:

   Please strike the phrase "As part of the discussions,". In its place, we suggest

Exhibit 6

inserting the phrase "In response to our request,".

5. Paragraph 3, first sentence:

   At this time, Balcom Ranch is the only landowner in Ventura County that is facing an imminent enforcement action by the Regional Board. Consistent with Comment 1 above, please do not state or imply that all nonenrolled agriculture landowners in Ventura County are, or will be, immediately facing enforcement actions by the Regional Board. Each Regional Board ACL complaint is developed on an individual case-by-case basis.

6. Paragraph 3, second sentence:

   Please strike the words "joint defense". As stated in comments 1 and 5 above, not all nonenrolled agricultural landowners in Ventura County received an ACL complaint from the Regional Board. Therefore, a "joint defense" is not applicable. Please make this change to the entire proposed letter.

Again, we thank you for the opportunity to provide feedback on the proposed letter. If you have any questions, please contact me at 213-576-6784 or rveiga@waterboards.ca.gov.

Thank you,
Becky

Rebecca Veiga Nascimento
Environmental Scientist
Los Angeles Regional Water Quality Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Phone: 213-576-6784
rveiga@waterboards.ca.gov

Exhibit 6

Rebecca Veiga Nascimento - RE: ACL NO. R4-2010-0023 - COMMENTS ON PROPOSED LETTER

From: Paul Beck <pab@pablaw.org>
To: rveiga@waterboards.ca.gov
Date: 10/3/2010 6:03 PM
Subject: RE: ACL NO. R4-2010-0023 - COMMENTS ON PROPOSED LETTER
CC: mkesterbrown@gmail.com; prasmussen@waterboards.ca.gov; jnewman@waterboar...

Dear Rebecca:

I have just gotten back to my email from the last couple of weeks due to the family health crisis I previously described to you. (My mother has just been discharged and is now back home with full-time care, so I am able to return to my practice.) Understandably, I became heavily backlogged after my mother's fall on August 20 and my need to spend a great deal of my time taking care of her and making arrangements for her care, and thus I am only now beginning to catch up.

I did not have an opportunity even to get back to you until now, but I have seen your email and I understand the suggestions you and your team have made about how Mark Brown's proposed letter should be revised before it goes out. I have sent your email on to Mark, and I have asked him to modify his letter by making all of the changes you have suggested. It is my expectation that this will happen promptly next week.

Obviously, given my absence, it was not possible for us to submit the written response to the ACL complaint which you had requested to be done by September 22. This coming week, based on what has transpired in the last month, I will be trying to deal with half a dozen client crises, two of which will take virtually all of my time for the next few days. Therefore, I am also asking Mark to prepare the response to the ACL complaint. He has advised me that he will be working on the response next week as well.

Please bear with us – we are certainly not ignoring you.

Thanks.

Cordially,

Paul Beck

From: Rebecca Veiga Nascimento [mailto:rveiga@waterboards.ca.gov]
Sent: Tuesday, September 21, 2010 3:02 PM
To: pab@pablaw.org
Cc: Jennifer Fordyce; Jenny Newman; Paula Rasmussen
Subject: ACL NO. R4-2010-0023 - COMMENTS ON PROPOSED LETTER

Mr. Beck,

Regional Board staff has reviewed the proposed letter from Mark Brown to other nonenrolled agriculture landowners in Ventura County. We appreciate you giving us the opportunity to look at the proposed letter and make comments prior to being sent out. While we do not wish to dictate the content or style of the letter, we feel it is necessary to point out a few factual errors (listed below) in the proposed letter. Please be advised, however, that in providing feedback, Regional Board staff is not supporting or endorsing Balcom Ranch to send this letter or the potential formation of a Discharger Group, and any letter sent by Balcom Ranch should not state or imply any support or endorsement by the Regional Board. Further, the

Exhibit 6

sending of this letter by Balcom Ranch in no way resolves the pending ACL complaint issued to Balcom Ranch. Regional Board staff is still expecting Balcom Ranch to submit a written response to the ACL complaint by September 22, 2010. Our comments are solely being provided so that recipients of the letter are given accurate information concerning the Regional Board and its conditional waiver for irrigated lands programs. Accordingly, we ask that you correct the factual errors below prior to sending out the letter.

1. Paragraph 1, second sentence:

   Not all landowners in the Excel file of nonenrolled parcels provided to you on July 21, 2010 received an ACL complaint. Thus, please strike the phrase "Like you", which implies that all landowners received an ACL complaint.

2. Paragraph 1, second sentence:

   Please do not refer to correspondence from the Regional Board as a "demand letter". The Regional Board does not send "demand letters" and did not send such a letter to Balcom Ranch. Please refer to Regional Board correspondence in a more generic way, such as a "notice letter". Please make this change to the entire proposed letter.

3. Paragraph 2, first sentence:

   As you are aware, settlement negotiations with Regional Board staff concerning this matter are confidential. Accordingly, please remove any references to settlement discussions in the letter.

4. Paragraph 2, second sentence:

   Please strike the phrase "As part of the discussions,". In its place, we suggest inserting the phrase "In response to our request,".

5. Paragraph 3, first sentence:

Exhibit 6

At this time, Balcom Ranch is the only landowner in Ventura County that is facing an imminent enforcement action by the Regional Board. Consistent with Comment 1 above, please do not state or imply that all nonenrolled agriculture landowners in Ventura County are, or will be, immediately facing enforcement actions by the Regional Board. Each Regional Board ACL complaint is developed on an individual case-by-case basis.

6. Paragraph 3, second sentence:

Please strike the words "joint defense". As stated in comments 1 and 5 above, not all nonenrolled agricultural landowners in Ventura County received an ACL complaint from the Regional Board. Therefore, a "joint defense" is not applicable. Please make this change to the entire proposed letter.

Again, we thank you for the opportunity to provide feedback on the proposed letter. If you have any questions, please contact me at 213-576-6784 or rveiga@waterboards.ca.gov.

Thank you,
Becky

Rebecca Veiga Nascimento
Environmental Scientist
Los Angeles Regional Water Quality Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Phone: 213-576-6784
rveiga@waterboards.ca.gov

Tab 4.19

Balcom Ranch's Objections and Responses to Notice of Public Hearing and Administrative Proceedings

Exhibit 7

Paul A. Beck (SBN 79760)
Law Offices of Paul A. Beck, APC
13701 Riverside Drive, Suite 701
Sherman Oaks, California 91423
Tel: (818) 501-1141; Fax: (818) 501-1241

Mark K. Brown (SBN 89467)
11150 W. Olympic Blvd., Suite 1020
Los Angeles, California 90064
Tel: (310) 739-3900; Fax: (775) 542-4938

Attorneys for Respondent Balcom Ranch

STATE OF CALIFORNIA

REGIONAL WATER QUALITY CONTROL BOARD

LOS ANGELES REGION

In the Matter of: BALCOM RANCH 21099 SOUTH MOUNTAIN ROAD SANTA PAULA, CA 93060	COMPLAINT NO. R4-2010-0023 BALCOM RANCH'S OBJECTIONS AND RESPONSES TO REVISED NOTICE OF PUBLIC HEARING AND ADMINISTRATIVE PROCEEDINGS DATE: March 17, 2011 TIME: 9:00 a.m. PLACE: 700 North Alameda St. Los Angeles, CA 90012

Exhibit 7

Respondent Balcom Ranch [1] ("Respondent") generally denies the allegations of the Complaint dated February 18, 2010, filed or issued by the Los Angeles Regional Water Quality Control Board.

OBJECTION

Respondent raises a number of constitutional objections to this proceeding, as specified more fully herein. Respondent submits that the Board, or the Hearing Panel before whom the instant administrative hearing is to be presented, is neither legally competent (in terms of its limited jurisdiction) nor qualified or structured to entertain constitutional challenges. Accordingly, Respondent submits that this matter should therefore be held in abeyance pending a judicial determination of such issues.

Respondent asserts the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE
(Violation of Fourth Amendment)

1. The Board predicates its Complaint on a search conducted by its agents and employees. See Complaint, ¶ 13. This search was conducted without notice to Respondent, without the consent of Respondent, and without a warrant. As such, the search violated Respondent's constitutional rights to be free from unreasonable searches and seizures.

---

[1]Balcom Ranch has been labeled as a "discharger" in the February 18, 2010 Administrative Civil Liability Complaint ("Complaint") initiated by the Los Angeles Regional Water Quality Control Board (the "Board"). This characterization is misleading, even as a "shorthand" convenience reference, since the record contains no evidence that Balcom Ranch has ever been a discharger.

2. Moreover, the law, as applied, is unconstitutional, in that it requires a citizen's waiver of its constitutional rights to be free from unreasonable searches and seizures. *See* Complaint, Exhibit E, General Provisions, at 18, ¶ 3.

3. The Board itself has acknowledged the unconstitutionality of the statutory scheme pursuant to which this enforcement action is being conducted by adopting, on or about October 7, 2010, a new Conditional Waiver (Order No. R4-2010-0186) that now bars agents and employees of the Board from entering private property owned by an alleged discharger, except with the consent of the owner of such private property (or its tenant or other permitted occupant).

SECOND AFFIRMATIVE DEFENSE

(Denials of Due Process and Equal Protection)

4. In or about 2006, the Board approved and entered into a program with the Ventura County Farm Bureau (the "Farm Bureau" or "VCFB"), pursuant to which the Farm Bureau has subsequently determined, administered and managed the policies and provisions of the Board's Conditional Waiver program adopted on November 3, 2005.

5. The actions of the Board and the Farm Bureau with respect to the Conditional Waiver program constitute, *inter alia,* a delegation of the Board's regulatory powers to the Farm Bureau and to an exclusive group of private landowners. Such delegation violates Respondent's federal and state constitutional rights to due process and equal protection of the law.

THIRD AFFIRMATIVE DEFENSE

(Violation of Equal Protection – Selective and Discriminatory Enforcement)

6. By virtue of its Complaint and the instant proceeding, the Board has violated and continues to violate Respondent's constitutional right of equal protection by adopting or adhering to a policy of selective and discriminatory enforcement against Balcom Ranch.

FOURTH AFFIRMATIVE DEFENSE

(Expiration of Conditional Waiver)

7. The Conditional Waiver and related regulations upon which the Complaint is predicated have expired. This Complaint cannot proceed.

FIFTH AFFIRMATIVE DEFENSE

(Improper Tax)

8. By virtue of California Water Code Section 13260, *et seq.*, and the Conditional Waiver program, the Board has imposed an illegal and selective tax on Respondent and other agricultural landowners which does not meet the constitutional and statutory requirements for imposition of a tax.

9. As applied, the statutory scheme and the Conditional Waiver program require agricultural landowners to pay for administration, testing and monitoring that should be paid for through governmental agency budgets.

SIXTH AFFIRMATIVE DEFENSE

(Offset and Excuse from Compliance)

10. At considerable financial sacrifice for over 20 years, Respondent has maintained its property in an undeveloped state that affords great environmental and ecological benefits to the general public, including, without limitation, providing significant open space, wildlife habitat preservation, fresh locally-grown produce, and significant reduction in the carbon footprint of Ventura County, all by reason of the tons of carbon dioxide processed by the thousand of citrus and other trees that are grown and maintained on the property.

11. Furthermore, contrary to the allegations and inferences of the Complaint with respect to Respondent's financial condition, which allegations and inferences are without foundation and incorrect, Respondent has lost money virtually every year of its existence in attempting to maintain these environmental and ecological benefits for the locale and for the general public.

12. In addition, Respondent is informed and believes, and based thereon alleges, that the Board and its agents and employees have engaged in conduct that has violated Respondent's and other alleged "dischargers' " constitutional rights and caused Respondent and other alleged "dischargers" significant damage.

13. Accordingly, any proposed penalty, fine or assessment should either be suspended or abated and not assessed at all, or severely reduced.

SEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

14. Respondent sought to create an independent organization as an alternative to the Farm Bureau to respond to the Complaint in the summer of 2010. To implement its proposed course of action, Respondent prepared a letter to be sent to Ventura County's "non-enrolled agricultural landowners" in order to determine their interest in participating in such an organization.

15. However, the Board insisted on clearing Respondent's proposed letter before it was sent out to the prospective members or invitees. In its September 21, 2010 email with its detailed comments back to Respondent, the Board pressured Respondent to modify its proposed letter to such an extent that the letter would no longer be viable and, coupled with the Board's policy of discretionary and selective enforcement as disclosed in its proposed revisions to Respondent's proposed letter, ensured that Respondent would not be able to accomplish its intended purpose in formulating and circulating such a letter to "non-enrolled agricultural landowners".

16. In so doing, the Board interfered with Respondent's attempt to form an alternative to the VCFB. Accordingly, the Board should be estopped from asserting that Respondent must comply with the Conditional Waiver or that it must enroll in the VCFB compliance group.

PRAYER

1. Respondent requests that the Board's Complaint be dismissed, that the Board take nothing by reason thereof and/or assess no penalty; and

2. That Respondent be awarded its attorneys' fees and expenses, including, without limitation, such fees and expenses as it may be entitled to by reason of the application of the California Private Attorney General Doctrine.

WITNESSES

Respondent intends to call the following witnesses:

1. The agents or employees of the Board who visited Respondent's property on or about November 17, 2009 (the "Site Visit").

2. The agents or employees of the Board or other persons most knowledgeable concerning the allegations made in the Complaint.

3. The agents or employees of the Board or other persons most knowledgeable concerning how the Board has calculated its proposed fine or penalty against Balcom Ranch, including without limitation how it calculates its hourly rate and overhead as set forth in the Complaint.

4. The agents or employees of the Board or other persons most knowledgeable concerning how the Board has calculated its proposed fine or penalty against Balcom Ranch, including without limitation how it has calculated its hourly rate and overhead in other enforcement actions.

5. The agents or employees of the Board or other persons most knowledgeable concerning enforcement actions instituted and undertaken by the Board during the period from July 1, 2008 through January 31, 2011, against Ventura County property owners or "dischargers" for their alleged failure(s) to comply with the terms and conditions of the Conditional Waiver program.

6. Ms. Pat Thomas – with respect to the layout of Respondent's property, and the value of crops produced on the property.

7. David Park, CPA – with respect to the financial condition of Balcom Ranch.

Respondent requests that, promptly upon receipt of Respondent's Objections and Responses, the Board's Prosecution Team stipulate to identify and produce the witnesses described and referred to in the foregoing categories numbered 1 through 5, above, for examination by Respondent at the hearing. In the event that such a stipulation is not promptly received by Respondent, Respondent will request that the Board issue subpoenas compelling the attendance of these witnesses at the hearing, pursuant to its statutory authority to do so.

Respondent estimates that it will need a minimum of eight (8) hours to examine the foregoing witnesses, but it reserves the right to adust its estimate depending on the number of witnesses actually produced and the scope and extent of their testimony at the hearing.

DOCUMENTS

Respondent intends to introduce the following documents into evidence at the administrative hearing herein:

1. Letter dated January 31, 2011 from Paul A. Beck to Rebecca Veiga Nascimento regarding discriminatory enforcement;

2. E-mail dated February 10, 2011 from Jennifer Fordyce to Paul A. Beck in response to Mr. Beck's January 31, 2011 letter; and.

3. Memorandum to File dated November 17, 2009 re Site Visit (Board Exhibit 12).

Further, Respondent requests that the Prosecution Team, promptly upon its receipt hereof, stipulate in writing to produce the documents described in categories 1 through 6, inclusive, below, at a reasonable time and place to permit Respondent's inspection and copying thereof and to facilitate Respondent's introduction of such documents or portions thereof into evidence at the hearing. In the event that such stipulation is not promptly received by Respondent, Respondent will request that the Board issue subpoenas duces tecum compelling the production of these documents at a reasonable time and place prior to the hearing, or at the hearing:

1. All documents that discuss, concern or reflect the Site Visit, including without limitation all notes regarding the Site Visit, and all e-mails that discuss, concern or reflect the Site Visit.

2. All documents that discuss, concern or reflect Balcom Ranch and/or the Property, including, without limitation, all communications, including but not limited to e-mail and notes of telephone conversations, with persons not employees of the Board – including, without limitation, the Farm Bureau, the

Ventura County Agricultural Irrigated Lands Group ("VCAILG"), and agents and/or employees of other federal, state or local agencies.

3. All documents that discuss, concern, reflect or constitute a communication between the Board, or any of its agents or other representatives, on the one hand, and VCFB and/or VCAILG, or any of its or their agents or other representatives, on the other hand, regarding any of the following subjects:

   a. Property owners or "dischargers" not complying with the law or applicable regulations, and/or not enrolled in VCAILG;
   b. The possible requirement that search warrants are, or may be, required for entering onto property owners' or "dischargers' " properties; and
   c. The possible violation of the rights, constitutional or otherwise, of property owners or "dischargers" by the Board and/or its agents or employees, and any reasonable steps proposed or contemplated by the Board or its agents or employees to avoid or mitigate such possible violation(s).

4. All documents that discuss, concern, reflect or constitute a communication between the Board, or any of its agents or other representatives, on one hand, and other federal, state or local governmental agencies, including, without limitation, its or their agents or other representatives, on the other hand, regarding any of the following subjects:

   a. Property owners or "dischargers" not complying with the law or applicable regulations, and/or not enrolled in VCAILG;
   b. The possible requirement that search warrants are, or may be, required for entering onto property owners' or "dischargers' " properties; and
   c. The possible violation of the rights, constitutional or otherwise, of property owners or "dischargers" by the Board and/or its agents or

Exhibit 7

employees, and any reasonable steps proposed or contemplated by the Board or its agents or employees to avoid or mitigate such possible violation(s).

5. All documents known to exist between July 1, 2008 and January 31, 2011, that discuss, concern, reflect or constitute communications between the Farm Bureau or VCAILG, or any of their agents or other representatives, on one hand, and the Board, or any of its agents or representatives, on the other hand, regarding any of the following subjects:

   a. Ventura County property owners or "dischargers" who had not or have not complied with the Conditional Waiver;
   b. The failure of the Board to institute and undertake enforcement action against any Ventura County property owners or "dischargers" for their failure to comply with the Conditional Waiver;
   c. The need for the Board to institute and undertake enforcement action against Ventura County property owners or "dischargers" for their failure to comply with the Conditional Waiver; and/or
   d. Any assurances or representations that the Board would institute and undertake enforcement action against Ventura County property owners or "dischargers" for their failure to comply with the Conditional Waiver.

6. All documents that discuss, concern, or reflect enforcement actions instituted and/or undertaken by the Board during the period July 1, 2008 to the present date against Ventura County property owners or "dischargers" for their failure to comply with the Conditional Waiver.

Respectfully submitted,

Dated: February 16, 2011

Law Offices of Paul A. Beck
A Professional Corporation

and

Mark K. Brown

By Paul A. Beck
Paul A. Beck
Attorneys for Respondent Balcom Ranch

Exhibit 7

Law Offices of
PAUL A. BECK
13701 Riverside Drive, Suite 701
Sherman Oaks, California 91423
Telephone: (818) 501-1141
Facsimile: (818) 501-1241
Email: pab@pablaw.org

March 8, 2011

Via Facsimile (916) 341-5199 and Email (LOkun@waterboards.ca.gov)

Lori Okun, Esq.
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814

Re: **Complaint No. R4-2010-0023 for Administrative Civil Liability Against Balcom Ranch for Violation of Water Code § 13260**

Dear Ms. Okun:

We are writing to you in response to the Prosecution Team's "Reply to Respondent's Objections and Responses" (the "Reply") as we feel compelled to share certain observations with you as set forth below.

(1) We note that the Prosecution is now contending that it will oppose any issuance of subpoenas with respect to the witnesses -- particularly the RWQCB-related witnesses -- and will move to quash any subpoenas with respect thereto. *Reply*, at pages 11-12. We respectfully request that this be addressed at the pre-hearing conference tomorrow.

The Prosecution Team suggests, without citing any authority, that it will oppose any "person most knowledgeable" ("PMK") subpoenas and that it will not cooperate in identifying any such personnel. *Reply*, at 11-12. This is patently unreasonable. The depth of the Prosecution Team's opposition to our proposed PMK subpoenas is manifested in its suggestion that even as to its own witnesses, we would have to subpoena those witnesses and pay witness fees to them, before we could possibly conduct any cross-examination. *Reply*, at 12.

We have relied on Government Code § 11450.20 (a) in requesting that subpoenas be issued in this proceeding. Government Code § 11450.20 (a) provides, in pertinent part,

Exhibit 8

that "[s]ubpoenas and subpoenas duces tecum shall be issued by the agency or presiding officer at the request of a party . . . ." (emphasis supplied) We have also relied on the Board's (and the Prosecution Team's) good faith and fundamental fairness in the context of these administrative proceedings in producing witnesses who are unquestionably within or under its control (particularly given that the Prosecution Team has referenced its cooperation and fairness in having provided evidence in the past). *Reply*, at 10.

This position can fairly be characterized as "gamesmanship" as it would appear to handicap our ability to adduce evidence, including both testimony and documents, that are unquestionably relevant to these proceedings, the absence of which would render the upcoming hearing both constitutionally defective from a due process standpoint (see below) and, as a practical matter, virtually meaningless, in that it does not permit Balcom Ranch, as the Respondent, to presenting certain of the witnesses, i.e., all of the witnesses who are under the Prosecution Team's and the Board's control, whom we have timely identified.

(2) As noted above, Balcom Ranch has raised serious constitutional questions and other procedural and substantive issues. We therefore respectfully request that you address the propriety of whether this forum is actually the appropriate forum in which to address such constitutional issues, as well as the related procedural and substantive due process and other issues we have delineated.

(3) In view of the important constitutional and other issues that have been raised, we request that you authorize our cross-examination of the Prosecution Team's witnesses and those individuals who will be presenting its evidence at the hearing.

If the Prosecution Team (acting on behalf of the Board) continues to maintain its refusal to cooperate with our requests that it produce key witnesses whom we have identified, witnesses that the Prosecution Team asked us to identify by February 16, 2011 (which we did), and if the Prosecution Team continues to seek to prevent a meaningful proceeding or hearing from being conducted, Balcom Ranch will most assuredly be deprived of its due process rights in these administrative proceedings.

Accordingly, we respectfully request that the Board or its presiding officer issue the subpoenas we requested in our Response and Objections filed on February 16, 2011 forthwith, and we respectfully suggest that you set a briefing schedule on the Prosecution Team's proposed Motion to Quash, and continue the March 17, 2011 hearing until the

Motion to Quash can be ruled upon, and the parties can proceed in accordance with such ruling.

With all respect, we submit that the Prosecution Team's position, if adopted by the Board, would effectively render this administrative proceeding violative of fundamental due process protections. Please consider our suggestions to issue the subpoenas forthwith and set a briefing schedule for the Prosecution Team's Motion to Quash the subpoenas that we have requested.

Thank you for your consideration.

Cordially,

Paul A. Beck

cc: Jennifer Fordyce, Esq.
Staff Counsel
Office of Chief Counsel
State Water Resources Control Board

Rebecca Veiga Nascimento
Environmental Scientist
Los Angeles Regional Water Quality Control Board

Mark Kester Brown
Balcom Ranch

Exhibit 8

Lori Okun - Re: ACL Complaint No. R4-2010-0023 - Balcom Ranch

From: Lori Okun
To: Beck, Paul
Date: 3/10/11 2:47 PM
Subject: Re: ACL Complaint No. R4-2010-0023 - Balcom Ranch
CC: Boyers, David; Brown', 'Mark; Fordyce, Jennifer; Veiga Nascimento, Rebecca

Parties,

The following responds to Balcom Ranch's Objections and Responses to Revised Notice of Public Hearing and Administrative Proceedings and its question by letter dated March 8, 2011, about whether the Los Angeles Water Board (Board) has jurisdiction to resolve constitutional questions.

Jurisdiction over Constitutional Questions

The Board has jurisdiction to (and must) decide all issues raised in defense of an administrative civil liability complaint, including defenses or evidentiary objections based on alleged constitutional violations. Put another way, raising constitutional defenses does not deprive the Board of jurisdiction in this matter. The Board expresses no opinion on the asserted defenses at this time.

Request for 8 Hours to Cross-Examine Board Staff

This request is denied as Balcom Ranch provided no reason that such lengthy cross-examination is necessary, and made no attempt to identify, meet with or depose these witnesses before the hearing.

Each party will be allotted one hour. The parties may allocate their one hour between opening statements, direct and rebuttal testimony, cross-examination, legal argument and closing statements in their discretion. Any party requesting additional time at the hearing will be expected to explain what additional, relevant evidence will be adduced during the additional time.

Request to Provide Staff Witnesses

The requests to provide staff witnesses (categories 1-5 of Balcom Ranch's Objections and Responses, dated Feb. 16, 2011) are moot because the Prosecution Team already intends to provide witnesses competent to testify about the matters listed in categories 1-5. The only possible exceptions are staff witnesses to testify about penalty calculations in matters unrelated to irrigated agriculture. The Board makes no ruling on the relevance of this testimony at this time, but the relevance is questionable. However, the Prosecution Team shall ensure that Paula Rasmussen and Hugh Marley are present at the hearing.

Request to Issue Subpoenas Duces Tecum

Balcom Ranch correctly points out that the Hearing Procedures did not establish a "discovery cutoff." However, the Hearing Procedures clearly required Balcom Ranch to submit all written evidence by February 16, and did not limit this requirement to evidence that was already in Balcolm Ranch's possession. The subject evidence is not "new" evidence and Balcolm Ranch could have