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8 **STATE WATER RESOURCES CONTROL BOARD**  
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11 )  
12 In the Matter of Malaga County Water )  
District, Wastewater Treatment Facility )  
13 (WTF) )  
14 Administrative Civil Liability Order )  
No. R5-2013-0090 )  
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PETITION FOR REVIEW; PRELIMINARY POINTS AND  
AUTHORITIES IN SUPPORT OF PETITION [WATER CODE §13320]

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1 Pursuant to Water Code §13320 and 23 CCR 2050, Petitioner, Malaga County  
2 Water District, a County Water District organized and existing pursuant to Water Code  
3 §30000 et seq, hereby petitions the State Water Resources Control Board ("State Board")  
4 for review of Order No. R5-2013-0090 of the California Regional Water Quality Control  
5 Board, Central Valley Region ('Regional Board') assessing an administrative civil liability  
6 against Malaga County Water District ('Malaga' or 'District') in the amount of \$78,000 for  
7 purported, but unproven violations of effluent limitations of waste discharge requirements  
8 under Order 99-100 and R5-2008-0033 (NPDES No. CA 0084239). <sup>1</sup> A copy of the  
9 Administrative Civil Liability Order R5-2013-0090 (the "Order") is attached and incorporated  
10 by reference as Exhibit A. A copy of this petition has been sent to the Regional Board.  
11 The issues and a summary of the basis for the petition follow. Petitioner reserves the right  
12 to file a more detailed memorandum of points and authorities in support of this petition  
13 when the full administrative record is available. <sup>2</sup>

14 1. Name and address of Petitioner.

15 Petitioner is the Malaga County Water District, a county water district organized and  
16 existing under Water Code §30000, Petitioner maintains its office at 3580 S. Frank Street,  
17 Fresno, California, 93725. Malaga is represented by its counsel, who's name and address  
18 are as follows:

19 Neal E. Costanzo  
20 Costanzo & Associates  
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22 Fresno, CA 93720  
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26 <sup>1</sup> All statutory references are to the Water Code unless otherwise indicated.

27 <sup>2</sup> The State Board's regulations require submission of a statement of points and authorities in support of a  
28 petition for review (23 CCR §2050(a)(7), and this document is intended to serve as a preliminary memorandum of  
points and authorities. It is not possible to prepare a complete statement and memorandum in the absence of a  
complete administrative record which is not available.

1 [ncostanzo@costanzolaw.com](mailto:ncostanzo@costanzolaw.com)

2 All notices or other written determination or responses are required to be served on  
3 Malaga's legal counsel.

4 2. Specific Action of the Regional Board the State Board is Requested to  
5 Review.

6 The Regional Board's adoption, and all proceedings of the Regional Board leading  
7 to adoption of Order R5-2013-0090 which is attached as Exhibit A.

8 3. Date of Regional Board Action.

9 The Regional Board issued the Order on an unknown date but its Assistant  
10 Executive Officer declares under penalty of perjury in the attached Order that it was  
11 adopted July 25, 2013. The Order was not served on Malaga until it was mailed on August  
12 16, 2013.

13 4. Statement of Reasons the Regional Board's Action was Inappropriate and  
14 Improper.

15 The Order is inappropriate and improper for each of the following reasons:

16 A. The process and hearing afforded Malaga before the Regional Board  
17 violated Malaga's Constitutional rights to due process and statutory  
18 protections and procedures afforded by the California Water Code,  
19 the California Government Code and the Regional Board's  
20 regulations.

21 B. The penalties are barred both by the doctrine of laches and by the  
22 doctrine of estoppel and the Regional Board wrongly concluded,  
23 contrary to controlling law, that "laches is not recognized as an  
24 affirmative defense and may not be invoked to avoid the imposition of  
25 "mandatory minimum penalties" and improperly failed to even  
26 consider applicability of estoppel or any of the evidence presented  
27 bearing on the issues of laches and estoppel, deciding the issue as  
28 a purely legal question.

1 C. The findings in the Order are not supported by any evidence or  
2 substantial evidence and are premised solely on hearsay and the  
3 testimony of an individual who had no personal knowledge concerning  
4 any purported violation, and the undisputed written evidence  
5 establishes that no violation occurred.

6 D. The Order improperly imposes, in part, penalties that were  
7 permanently suspended pursuant to the Regional Board's agreement  
8 to implementation of compliance projects and pollution control  
9 prevention plans and similar measures, all of which were completed  
10 timely or in accordance with extensions expressly granted, or granted  
11 by implication, by the Regional Board.

12 E. The Order is based on a misinterpretation of §13385, the Regional  
13 Board failed to exercise its discretion, abused its discretion, failed to  
14 proceed in the manner required by law and the resulting order is  
15 arbitrary, capricious and contrary to law.

16 5. Manner in Which Petitioner is Aggrieved.

17 Malaga is aggrieved by the Order because it imposes penalties against it in the  
18 amount of \$78,000.

19 6. Action Requested of the State Board.

20 The State Board is requested to set aside and/or vacate the Order and dismiss the  
21 Administrative Civil Liability Complaint on which it is based.

22 7. Statement of Points and Authorities.

23 A. Introduction

24 This is a proceeding commenced by a complaint issued by Pamela C. Creedon  
25 (Creedon) Executive Officer of the Central Valley Regional Water Quality Control Board  
26 (Regional Board) on May 1, 2013. A copy of the Complaint is attached as Exhibit B. The  
27 Complaint alleges that on July 8, 2010, unidentified Regional Board "staff" issued a Notice  
28 of Violation (NOV) and Draft Record of Violations (ROV) for 20 effluent limitation violations

1 allegedly occurring between March 14, 2008 and January 31, 2010. The NOV was  
2 responded to, according to the complaint, by Malaga's "legal counsel" on January 22,  
3 2010. (Complaint p. 2, ¶¶8 and 9). It alleges that on November 5, 2010, a "revised NOV  
4 and ROV identifying 15 effluent limitation violations" occurring between the same dates  
5 (March 14, 2008 to January 31, 2010) and that legal counsel responded to this NOV/ROV  
6 on January 6, 2011. The complaint alleges that on December 9, 2011 staff issued a NOV  
7 with an updated draft ROV for alleged effluent violations occurring between March 14,  
8 2008 and October 30, 2011. This NOV was again responded to by legal counsel on  
9 January 3, 2012. (Complaint p. 2, ¶¶10-13).

10         The complaint alleges Malaga's "self monitoring reports covering the period from"  
11 February 1, 2004 through March 13, 2008 show eight violations of limitations, three of  
12 which are allegedly subject to mandatory minimum penalties (MMP's) pursuant to,  
13 presumably, the provisions of Water Code (WC) 13385 and alleges that "Attachment A"  
14 "summarizes these violations". Attachment A specifies purported violations the Executive  
15 Officer claims are subject to MMP's beginning not in 2004 but on August 9, 2007 three of  
16 which are specified as "exempt" and continuing to March 31, 2008, the remaining four of  
17 which are specified as "chronic" in the Attachment A. The complaint further alleges that  
18 according to Malaga's "self-monitoring reports covering the period from" March 14, 2008  
19 through December 31, 2012 there were "25 violations of effluent limitations" 21 of which  
20 are allegedly subject to "MMP's". Attachment A to the complaint purportedly summarizes  
21 these violations. The attachment lists 24 dates and purported descriptions of violations,  
22 occurring on those dates, four of which are characterized in the attachment as "exempt".  
23 Contrary to the allegation made by Creedon that these violations occur "through"  
24 December 31, 2012, the violation dates listed begin with April 18, 2008 and conclude on  
25 March 30, 2011. There is no violation alleged to have occurred on any date after March  
26 30, 2011 and the allegation in the complaint, is according to the attachment, demonstrably  
27 false. Yet, the Order includes this precise allegation as a factual finding of the Regional  
28 Board.

1 ¶31 of the complaint alleges that under WC §13385(l), the "Executive Officer"  
2 Creedon, "proposes assessment" of a "administrative civil liability in the amount of  
3 \$72,000" as "MMP's that occurred from 1 February 2004 through 31 December 2012" and  
4 ostensibly identified an Attachment A to the complaint. As noted, however, the attachment  
5 identifies purported violations occurring between August 9, 2007 and March 30, 2011, only.

6 The responses by "legal counsel" to each and all of the NOV/ROV's referred to in  
7 the complaint are dated July 21, 2010 (in response to the July 8, 2010 NOV), January 5,  
8 2011, (in response to the November 5, 2010 NOV), and December 30, 2011, (in response  
9 to the December 9, 2011 NOV) (staff exhibits 7 through 12 inclusive). Each and every one  
10 of the NOV's states that following submission of the requested response by the date  
11 specified, and on which the response was made, the Regional Board "plan(s) to  
12 incorporate the referenced violations", all of which appear on an Attachment A into a  
13 complaint. Never once was any of legal counsel's responses ever responded to by  
14 Regional Board Staff. (See Declaration of Neal E. Costanzo attached as Exhibit C). Nor  
15 did any administrative liability complaint issue following the Regional Board's receipt of  
16 these responses. (Id).

17 Curiously, although the complaint refers to and apparently relies upon the notices  
18 of violation issued between July 8, 2010 and December 9, 2011, no mention is made in the  
19 complaint, and no evidence submitted by the Prosecution Team refers to the more recent  
20 notices of violation issued by Regional Board Staff and responded to by legal counsel on  
21 April 12, 2012 and May 10, 2012, respectively. The response to that NOV dated May 10,  
22 2012 (Costanzo Decl. Exhibit B) was responded to, not by the staff that issued it but by a  
23 staff counsel of the State Water Resources Control Board (State Board) on May 17, 2012.  
24 The impertinent and meaningless response by Staff Counsel was responded to on May 23,  
25 2012. (Costanzo Decl. Exhibit C and D). Less curiously, but even more deceptively, not  
26 mentioned in the complaint is Creedon's July 7, 2010 letter demanding payment for the  
27 'outstanding balance' of administrative civil liability order R5-2006-003 and Malaga's  
28 August 9, 2010, response to that demand (which was never responded to by the Regional

1 Board). (Costanzo Decl. Exhibits E and F). Also not included are two separate  
2 submissions dated April 28, 2011, and never responded to by the Regional Board, which  
3 are submissions by Malaga relating to satisfaction of the requirements of ACL order R5-  
4 2006-0003 and R5-2008-0033 and Cease and Deist Order R5-2008-0032 either showing  
5 completion of or progress toward completion or requests for extensions for completion of  
6 compliance projects the Regional Board agreed in Order No. R5-2006-0032 and Order No.  
7 R5-2008-003 could be completed in lieu of any penalty for many of the violations that are  
8 listed on the NOV's. Violations purportedly occurring between 2008 and after 2010 were,  
9 if they occurred at all, violations that the Regional Board agreed to suspend permits on  
10 performance of the compliance projects, so they are not subject to any penalty assessment  
11 (§13385(i)(3)).

12 B. GOVERNING LAW AND PROCEDURE

13 The complaint is expressly issued on the authority of WC 13323 and 13385 and "is  
14 based on findings that the discharger violated effluent limitations of waste discharge  
15 requirements" for Rescinded Order 99-100 and the aforementioned order R5-2008-003 as  
16 to which Malaga's evidence shows compliance projects in lieu of penalties were allowed  
17 to be completed and were completed in lieu of any penalty assessment for violations  
18 included in the Attachment A to the complaint. What evidence these findings are based  
19 on is not disclosed in the complaint and no evidence was prevented to establish any such  
20 finding. §13323 authorizes an Executive Officer of the Regional Board to issue a complaint  
21 to any person on whom administrative civil liability may be imposed pursuant to Article 2.5.  
22 §13385(c) provides that civil liability may be imposed administratively by a Regional Board  
23 pursuant to the provisions of Article 2.5 commencing with §13323.

24 It is clear from §13323(b), 13327 and 13385(e) that it is the Board itself that is  
25 required to make any determination concerning the complaint or liability under §13385.  
26 The complaint is required to inform the person served that a "hearing" before the Regional  
27 Board "shall" be conducted. (§13323(b)). The WC does not otherwise prescribe the  
28 procedure required to be adhered to by this Board in making a determination on the

1 complaint under §13323 and 13385, so the procedure required to be adhered to are those  
2 prescribed by the Administrative Procedure Act, Government Code §11400 et seq.  
3 Because the "hearing" is one "for determination of facts pursuant to which an agency  
4 (defined to include this Board) formulates and issues a decision" this is an "adjudicative"  
5 proceeding within the meaning of Government Code 11405.2 and 23 CCR 648(a). (See  
6 Government Code 11405.3 (defining agency; 11405.5 (defining a decision as an agency  
7 action of specific application that determines a legal right or duty). If under federal or state  
8 statute or Constitution "an evidentiary hearing for determination of facts is required for  
9 formulation and issuance of the decision, the provisions of Chapter 4.5 of the  
10 Administrative Procedure Act apply. Here, the complaint sought to impose a penalty for  
11 alleged violation of §13385; and federal and state Constitutions, in addition to the  
12 provisions of the Water Code cited above, including §13385 require an evidentiary hearing.  
13 (*Patterson Flying Service v. California Department of Pesticide Regulation* (2008) 161  
14 Cal.App.4th 411, 424-425). All adjudicative proceedings before the Regional Board are  
15 required to be conducted pursuant to Chapter 4.5 of the APA and §11513 of the  
16 Government Code. (23 CCR §648).

### 17 C. ARGUMENT

18 1. THE PROCESS AND HEARING ACCORDED TO MALAGA BY THE  
19 REGIONAL BOARD FAILED TO CONFORM TO THE REQUIREMENTS OF THE  
20 ADMINISTRATIVE PROCEDURE ACT RESULTING IN A DENIAL OF DUE PROCESS  
21 TO MALAGA BECAUSE THE AGENCY DID NOT PROVIDE MALAGA WITH ADEQUATE  
22 NOTICE OR AN OPPORTUNITY TO BE HEARD AND AN OPPORTUNITY TO PRESENT  
23 AND REBUT EVIDENCE.

24 Subsequent to service of the complaint, the individual who mailed the complaint with  
25 a cover letter directing Malaga on when and how to respond (Lonnie Wass), a person  
26 designated by the "Prosecution Team" as a witness", issued a letter which included a  
27 document entitled "Hearing Procedures" specifically applicable to the ACL issued to  
28 Malaga. (Costanzo Declaration Exhibit G). It states the required evidentiary hearing will  
be conducted in accordance with the hearing procedure document which states that it has  
been approved by the "Board Chair"; and then inconsistently states the hearing will be

1 conducted pursuant to the State Board's Regulations, beginning at §648. It states in  
2 accordance with §648 of the regulations "any procedure not provided by" the document is  
3 "deemed waived". As directed by Wass in the letter that transmitted the complaint, Malaga  
4 sent a letter informing Wass Malaga would not be paying any purported penalty, waiving  
5 a hearing or agreeing to settlement negotiations and would contest the complaint at the  
6 required evidentiary hearing. The letter comments on the invalidity of the hearing  
7 procedure document, in particular, the deemed waiver referred to above of any procedure  
8 not provided for by the document, and the manner in which it purports to require the  
9 submission of evidence (which as noted below is apparently not even to the Regional  
10 Board but to an "advisory team" comprised of the Assistant Executive Director and a  
11 vaguely identified lawyer employed by a different Regional Board). (See Hearing  
12 Procedure at p. 2-3). Although unclear, the Hearing Procedure document apparently,  
13 according to the Prosecution Team, specifies this "Advisory Team" as the persons to whom  
14 submissions required in advance of the hearing are to be made. (See Costanzo  
15 Declaration).

16 The Prosecution Team purportedly filed with that "Advisory Team" a "Response" to  
17 Malaga's letter. There is no procedure which allows a party in this proceeding to submit  
18 a response to a letter served on that party to the Board which is to hear and determine the  
19 administrative civil liability complaint. The response identifies and misstates objections and  
20 assertions that appear in the May 23, 2013 letter, most of which relate to the Hearing  
21 Procedure document that was sent to Malaga and had presumably been prepared by the  
22 same individuals who issued the administrative liability complaint. The Prosecution Team  
23 applies for several orders. There are no regulatory or statutory provisions allowing the  
24 making of those applications for those orders. The Prosecution Team's response was  
25 emailed to the Advisory Team on May 28, 2013. The attorney member of the Advisory  
26 Team purportedly issued a ruling on the multiple the applications made in the Prosecution  
27 Team's response and purportedly overruling Malaga's objections to the Hearing Procedure  
28 document, either as set forth in the May 23 letter or the Prosecution Team's response.

1 (Costanzo Decl. Ex. I).

2 The "response" filed following the Prosecution Team's receipt of the May 23 letter  
3 states:

4 "The hearing procedures issued . . . follow the Central Valley Water Board's  
5 pre-approved hearing procedure format. . . . Adoption of the hearing  
6 procedures by the Board's Chairman satisfies the requirements of Section  
7 648(d) as the "presiding officer", the Board Chair has the ability to waive any  
8 additional procedural requirement not specifically provided within the hearing  
9 procedures, including Chapter 5 of the Administrative Procedure Act."

10 No declaration or evidence of these facts is provided with the "response". Assuming  
11 the truth of this assertion, however, it is clear that the hearing procedure notice that was  
12 issued to Malaga is indeed a document that was simply generated by the Prosecution  
13 Team and that specific language included in the notice, that is not specific to Malaga or this  
14 complaint has been taken from some unknown form or format adopted by the Chairman  
15 of the Board in some unknown context, presumably in a different adjudication. Certainly,  
16 the Board Chairman never adopted the "important deadlines" that are a part of the notice.  
17 These were presumably selected unilaterally by the Prosecution Team. If these deadlines  
18 were set by the Chair, they were set without notice or an opportunity to be heard being  
19 given to Malaga. Either way, the deadlines are invalid as they have not been set according  
20 to law.

21 Government Code §11425.10 reads in pertinent part as follows:

22 "(a) The governing procedure by which an agency conducts an adjudicative  
23 proceeding is subject to all of the following requirements:

24 (1) The agency shall give the person to which the agency action is  
25 directed notice and an opportunity to be heard, including the opportunity to  
26 present and rebut evidence.

27 (2) The agency shall make available to the person to which the agency  
28 action is directed a copy of the governing procedure, including a statement  
whether Chapter 5 (commencing with §11500) is applicable to the  
proceeding. . . .

(4) The adjudicative function shall be separated from the investigative,  
prosecutorial, and advocacy functions within the agency as provided in  
§11425.30."

The governing procedure adopted by an agency may include provisions equivalent  
to, or more protective of the rights of the person to which the agency action is directed,

1 than the requirements of §11425.10, but that section prescribes the minimum  
2 requirements. Malaga is plainly entitled to notice and an opportunity to be heard on the  
3 suitability of various procedures purportedly mandated by notice in this proceeding and it  
4 has received no such notice or opportunity to be heard. Further, as the Prosecution Team  
5 acknowledges in its "response" the notice of procedures supplied to Malaga is simply and  
6 only a creation of the Prosecution Team which purports to regulate the manner in which  
7 Malaga may present its evidence and defense. This violates the above quoted  
8 requirement for separation of the prosecutorial and adjudicative functions. The advising  
9 lawyer has no authority or ability to rule on the Prosecution Team's Response or Malaga's  
10 objections to the Hearing Procedures.

11         The Prosecution Team dictated what form Malaga's evidence is to take, when  
12 Malaga is to produce that evidence, how Malaga is to provide that evidence, and the  
13 amount of time during which Malaga will be allowed to present evidence. Subdivision (d)  
14 of §648, of Title 23 in the California Code of Regulations, the provision relied upon in the  
15 notice of hearing procedures for setting these bizarre requirements for the conduct of an  
16 adjudicative proceeding that is required to be conducted as an "evidentiary hearing for  
17 determination of facts" (Government Code §11410.10) does not authorize these Hearing  
18 Procedures. Subdivision (d) of §648 of the regulations provides "the presiding officer may  
19 waive any requirements in these regulations pertaining to the conduct of adjudicative  
20 proceedings including but not limited to the introduction of evidence, the order of  
21 proceeding, the examination or cross examination of witnesses, and the presentation of  
22 argument, so long as those requirements are not mandated by state or federal statute or  
23 by the state or federal constitutions."

24         The subdivision speaks in terms of waiving requirements of the regulations. It does  
25 not provide authorization for establishment of a set procedure including time limitations on  
26 the presentation of evidence, requirements that all evidentiary presentations be made in  
27 writing or numerous other requirements that are purportedly set by the notice of hearing  
28 procedures served on Malaga and prepared by the Prosecution Team. Indeed, the hearing

1 procedures conflict with the provisions of §11425.10 and Government Code §11513 which  
2 is expressly incorporated into the regulations as the applicable procedure in allowing for  
3 each party to have the right to call and cross examine witnesses, introduce exhibits on any  
4 matter relevant even though not covered by direct examination to impeach witnesses,  
5 regardless of which party called the witnesses, and to rebut evidence. Most significantly,  
6 the notice of hearing procedures served on Malaga contains "hearing time limits limiting  
7 the time available" to Malaga to examine, cross examine, rebut witnesses provide opening  
8 and closing statements to 30 minutes total. There is no provision in the regulations that  
9 allows the imposition of such a limit and the imposition of that limit is directly contrary to  
10 Government Code §11425.10 and 11513.

11 Also included is a requirement that "all evidence other than witness testimony to be  
12 presented orally at the hearing be submitted in advance of the hearing". Of course, given  
13 the 30 minute limitation on the presentation of evidence and argument at the hearing, this  
14 amounts to a requirement that all evidence be presented in writing because 30 minutes in  
15 an insufficient amount of time within which to even provide an opening statement on the  
16 facts of this case which spans the course of many years. The notice also purports to  
17 require that all legal and technical arguments or analysis and the name of all witnesses  
18 intended to be called at the hearing be provided. The right of Malaga to present evidence  
19 or a defense cannot be so restricted in accordance with statute or consistent with the due  
20 process clause of the state and federal Constitutions. §648.4 of the regulations specifies  
21 what is required to be provided in advance of the hearing and the Prosecution Team is not  
22 authorized to impose additional requirements on the evidentiary submission to be made  
23 by Malaga.

24 The lawyer may serve as an advisor to assist and advise the decision maker - this  
25 Board - but he is prohibited from furnishing argument, diminishing or modifying the  
26 evidence in the record. He cannot act as the decision maker. (Government Code  
27 §11430.30(a)). The Assistant Executive Officer is presumably subject to the authority,  
28 discretion or direction of the Executive Officer, who issued this complaint so that he is

1 plainly prohibited from taking any role whatsoever in this proceeding, particularly in  
2 advising the decision maker on a decision. (Government Code §11425.30(a)(1) and (2)).

3 The agency is required to give Malaga notice and a meaningful opportunity to be  
4 heard, including the opportunity to present and rebut evidence. (§11425.10(a)(1)). Under  
5 §11415.10, the agency must either conduct its hearing according to the procedures set by  
6 its regulations, or if it fails to set those procedures by regulations, then the provisions of the  
7 APA apply, and they apply despite any conflicting provisions in this agency's regulations.  
8 (§11425.10(b)). The procedures set by the Hearing Document do not conform either to the  
9 APA or this Board's regulations and they are invalid. (See *Niles Freeman Equipment v.*  
10 *Joseph* (2008) 161 Cal.App.4th 765, 789-790). The limitations set by the Hearing  
11 Procedure document are not appropriate to the character of this particular proceeding and  
12 there has been no separate consideration by this Board of what procedure is required to  
13 conform with the APA and with the requirements of procedural due process. (See *Petrillo*  
14 *v. Bay Area Rapid Transit District* (1988) 197 Cal.App.3d 798, 807-808; *Smith v.*  
15 *Organizations of Foster Families Etc.* (1977) 431 US 816; *Shaket v. Osteopakic Medical*  
16 *Board* (1996) 51 Cal.App.4th 223, 230). The statute, regulations, and requirements of due  
17 process are required to be adhered to. The Hearing Procedure requirements set by  
18 Regional Board Staff or the Prosecution Team do not conform to those requirements.

19 Malaga renewed its motion, among others, to have the hearing procedure document  
20 declared invalid; but, the Advisory Team Attorney undertook to rule on (and deny) that  
21 motion. But someone, it is not known whom, issued a new hearing procedure document  
22 which, among other things, increased the amount of time for the hearing from 30 minutes  
23 to 40 minutes. By ruling on Malaga's motions, the Advisory Attorney violated Government  
24 Code §11430.30 because in doing so, and in advising the Board how to rule on evidentiary  
25 objections and how to decide the matter ultimately, he was furnishing argument and  
26 diminishing or modifying evidence in the record. Malaga's motion that he be disqualified  
27 from further participation at the hearing was denied by the Board Chair acting alone,  
28 without reason.

1           There was only one prosecution witness. He was allowed to testify in the form of  
2 a narrative. Malaga's objections to allowing that narrative testimony were overruled by the  
3 Board Chair acting alone and without any reason. When Malaga attempted to cross-  
4 examine this witness, it was simply precluded from asking any questions aimed at  
5 disclosing the fact that the witness based his entire narrative on rank speculation and  
6 hearsay. Malaga was not allowed to question the witness about whether anyone of  
7 Malaga's self monitoring reports disclosed any one of the violations listed in the attachment  
8 to the Complaint. Government Code §11513 provides that evidence is to be elicited  
9 through "examination" and other provisions of the Administrative Procedure Act allow and  
10 require a full and fair opportunity to cross-examine any witness. Malaga was simply denied  
11 those rights and did not receive anything that even remotely resembles a fair hearing.  
12 Numerous other violations of Malaga's procedural due process and statutory rights relating  
13 to the procedure required to be accorded to it are noted below.

14           2.       THE REGIONAL BOARD IMPROPERLY DETERMINED, CONTRARY TO  
15 CONTROLLING LAW, THAT THE DOCTRINE OF LATCHES COULD NOT BE APPLIED  
16 IN ANY CIRCUMSTANCE AND FAILED TO CONSIDER EVIDENCE ESTABLISHING AN  
17 ESTOPPEL.

18           Statutes of limitations found in the Code of Civil Procedure do not literally apply to  
19 administrative proceeding because those statutes apply to civil actions and special  
20 proceedings of a civil nature and administrative proceedings are neither. (See *City of*  
21 *Oakland v. PERS* (2002) 95 Cal.App.4th 29; *Bernard v. Fong Eu* (1979) 100 Cal.App.3d  
22 511, 515; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal.App.4th 325, 329).

23           Under appropriate circumstances, the defense of latches, however, operates in the  
24 same manner to bar a claim by a public administrative agency such as this Board if the  
25 requirements of unreasonable delay and resulting prejudice are met. (*Fountain Valley*  
26 *Regional Hospital and Medical Center v. Bonta* (1999) 75 Cal.App.4th 316, 323-324).  
27 Latches is designed to promote justice by preventing surprises through the revival of claims  
28 that have been allowed to slumber until evidence has been lost, memories have faded and  
witnesses have disappeared. It is unjust not to put the advisory on notice to defend even

1 a just claim within the period of limitations and the right to be free of stale claims in time  
2 comes to prevail over the right to prosecute them. (*Robert J. v. Catherine D.* (2009) 171  
3 Cal.App.4th 1500, 1521).

4 It is well established that the elements of laches, unreasonable delay and resulting  
5 prejudice may be met in one of two ways. First, they may be demonstrated by the  
6 evidence, with the person arguing in favor of laches presenting proof of unreasonable  
7 delay and resulting prejudice. Second, the element of prejudice may be "presumed"  
8 whenever there exists a statute of limitations that is sufficiently analogous to the facts of  
9 the case and the period of that statute of limitations has been exceeded by the public  
10 administrative agency in making its claim. (See *Robert J.*, *supra*, at p. 1522; *Fountain*  
11 *Valley*, *supra*, at p. 324; *Brown v. State Personnel Board* (1985) 166 Cal.App.3d 1151,  
12 1158-1161; *Stevedoring Services v. Prudential Lines Inc* (1986) 181 Cal.App.3d 154, 158;  
13 *Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d 921).

14 In this second situation, the limitations period is "borrowed" from the analogous  
15 statute and the burden of proof shifts to the administrative agency. To defeat the finding  
16 of laches, the agency, here this Regional Board, must show that the delay involved in the  
17 case was excusable and rebut the presumption that such delay resulted in prejudice to the  
18 opposing party, Malaga. (*Id.*) In cases where there is no directly applicable statute of  
19 limitations such as administrative proceedings but a statute of limitations governs an  
20 analogous action of law, the statute of limitations time period is borrowed as the measure  
21 of the outer limit of reasonable delay in determining laches. (See *Brown*, *supra*, 166  
22 Cal.App.3d at p. 1159-1160). Whether such borrowing occurs and whether there is a  
23 consequent transfer of the burden of proof on the claim of laches to the administrative  
24 agency depends upon the strength of the analogy. (*Fountain Valley*, *supra*, at p. 325).  
25 The effect of the violation of an analogous statute of limitations is to shift the burden of  
26 proof to the plaintiff to establish that the delay was excusable and that the defendant was  
27 not prejudiced thereby. (*Id.*; *Robert J.*, *supra*, at p. 1522). This is because the statute of  
28 limitations reflects a "legislative policy judgment that a delay" exceeding the time limit is

1 "inherently unreasonable in the prosecution" of an administrative proceeding. (*Brown,*  
2 *supra*, at p. 1160).

3 It is established law that where, as here, an administrative agency pursues a civil  
4 penalty, there is a directly analogous statute of limitations which is CCP §340. It provides  
5 that an action "upon a statute for penalty or forfeiture, when the action is given to an  
6 individual, or to an individual and the state, is one year. Subdivision (2) of that section  
7 provides that an action upon a statute for a forfeiture or penalties to the people of this state  
8 must be commenced within one year. (See *Myers v. Eastwood Care Center Inc* (1981)  
9 124 Cal.App.3d 491).

10 The Advisory Team Attorney purported to deny Malaga's motions for a separate  
11 prior trial on the question of latches and to exclude all evidence on the ground that it is  
12 legally irrelevant because it is barred by latches in an email authored by the lawyer which  
13 states that it is the ruling is of the Board Chair. But, the Board, according to the Chair, only  
14 directed issuance of an amended "hearing procedures" document, attached as Exhibit E.  
15 The hearing was in fact conducted in two parts. The first part related solely to the issue  
16 of latches. (Ex. D at p. 4). The second part of the hearing concerned the merit of the  
17 complaint. Malaga presented evidence, through testimony by its Board President, who  
18 testified that Malaga adheres to a policy of passing on any fine imposed on it relating to  
19 discharge requirements to the industries operating in Malaga responsible for causing the  
20 offending pollutant to be discharged into Malaga's sewer system. But because the alleged  
21 violations occurred so long ago it would be impossible at this point to determine the person  
22 responsible for causing the offending pollutant to enter the sewage system so that any fine  
23 imposed for these alleged violations would have to be borne by the District. The fine  
24 amounts to some 20% of its operational budget.

25 The evidence showing the delay in commencement of the ACL Complaint was  
26 unreasonable consists of the various Notices of Violation (NOV) and the responses to  
27 those NOV's by Malaga that are the prosecution exhibits 7 through 12. But, the Board did  
28 not consider any of the evidence. Instead, although the hearing procedure document

1 prepared by the Prosecution Team required it to submit in advance of the hearing "all legal  
2 arguments or analysis" it was not until the date of the hearing, in the course of argument  
3 on the latches issue, that the Prosecution Team submitted to the Regional Board the  
4 "Draft" Decision of this Board in the matter of the ACL against Lincoln Avenue Water  
5 Company dated June 24, 2013, which is well before the July 3 deadline for the Prosecution  
6 Team's submission of rebuttal argument and evidence. The Prosecution Team argued,  
7 and the attorney who is part of the Advisory Team advised the Regional Board, that the  
8 doctrine is simply not applicable pursuant to this decision. On that basis, the Regional  
9 Board concurred and ruled that the doctrine was not applicable to this proceeding. It then  
10 adopted an amendment to the proposed order that was submitted to them by the Advisory  
11 Team Attorney on the day of the hearing, and not before, as required by the hearing  
12 procedures prescribed by the Prosecution Team. The amendment to the proposed  
13 decision was the addition of what are now paragraphs 34 through 36 of Order R5-2013-  
14 0090. The proposed amendment and proposed judgment were prepared before the  
15 hearing occurred. But neither was provided to Malaga in advance of the hearing.

16 Rather than actually evaluating or considering any of the evidence submitted on the  
17 latches issue the Board simply accepted the representation of the attorney on the Advisory  
18 Team and the Prosecution Team, after erroneously denying Malaga's motion to recuse this  
19 member of the Advisory Team for violations of the Administrative Procedure Act, that  
20 latches did not and could not under any circumstances be applicable. The three  
21 paragraphs in the Order dealing with latches mimic this Board's decision in Lincoln. In  
22 Lincoln, this Board did indeed decide that the doctrine of latches is inapplicable to a  
23 proceeding for the imposition of a "mandatory minimum penalty" under §13385.

24 The Board's basis for that decision rests on its incorrect interpretation of judicial  
25 precedent. The Regional Board decided the issue in this case on the same basis.  
26 Accordingly, any court reviewing this action will independently review this determination of  
27 a question of law which involves application of statute or judicial precedent. (*Donaldson*  
28 *v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 954). Decisions of

1 administrative agencies are not controlling precedent in California courts, but the decisions  
2 of the California Supreme Court and Courts of Appeal are controlling precedent in the  
3 proceedings of this administrative agency. (*Yamaha Corporation of America v. State Board*  
4 *of Equalization* (1998) 19 Cal.4th 1, 6-11). The Lincoln decision, like the Regional Board's  
5 decision reflected by the Order, is premised on a clearly incorrect interpretation of judicial  
6 precedent. The conclusion in Lincoln, which improperly disregards the shifting of the  
7 burden of proving unreasonable delay and prejudice under *Fountain Valley and Brown v.*  
8 *State Personnel Board, supra*, when there is an analogous statute of limitations that  
9 applies ("burden to establish laches lies with the party raising it", Lincoln at p. 4), is that  
10 this Board is "not convinced that the doctrine of laches is applicable to a "mandatory  
11 minimum penalty". The conclusion is based upon two grounds (1) because the legislative  
12 mandate to impose mandatory minimum penalties do not allow the "Water Boards [to]  
13 invoke equitable principles" (Id at p. 5) and (2) that laches is not available where it would  
14 nullify an important policy adopted for the benefit of the public and the unspoken  
15 conclusion that the provisions relating to mandatory minimum penalties represent a  
16 "important policy adopted for the benefit of the public". (Id). Both grounds are premised  
17 upon this Board's interpretation of judicial precedent. The Board has misinterpreted that  
18 precedent.

19         The Courts of Appeal have, indeed, held that the doctrine of laches (or estoppel)  
20 may not be asserted to prevent a public entity from enforcing an important policy adopted  
21 for the benefit of the public. (*San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 392  
22 (laches did not bar city's claim that sprinkling system in defendant's building violated fire  
23 prevention regulations for high rise buildings and thus constituted a public nuisance);  
24 *Golden Gate Water Ski Club v. Contract Costa* (2008) 165 Cal.App.4th 249, 263 (laches  
25 did not bar county from issuing nuisance abatement order against water skiing club that  
26 builds structures in violation of open space restrictions even though county delayed 35  
27 years issuing order); *Feduniak v. California Coastal Commission* (2007) 148 Cal.App.4th  
28 1346, 1360 (coastal commission not estopped from requiring removal of golf course built

1 without permit on open space easement although commission failed to order removal for  
2 a period of 18 years); *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, (applying  
3 estoppel in a land use case where exceptional circumstances were present).

4         What the Lincoln decision fails to recognize is that each and every one of these  
5 cases which holds latches cannot be applied against a governmental entity arises in  
6 connection with a land use, zoning or nuisance case. The rule is applied because in the  
7 field of a land use the courts are dealing with a "vital public interest - not one that is strictly  
8 between the municipality and the individual litigant. All the residents of the community  
9 have protectable property and personal interest in maintaining the character of the area  
10 as established by comprehensive and carefully considered zoning plans in order to  
11 promote the orderly physical development . . . and to prevent the property of one person  
12 from being damaged by the use of neighboring property in a manner not compatible with  
13 the general location of the two parcels". (*Golden Gate Water Ski Club v. County of Contra*  
14 *Costa, supra*, 165 Cal.App.4th at p. 259-260; see also *Pettet v. Fresno* (1973) 34  
15 Cal.App.3d 813, 822-823). The rule against applying latches in these cases arises  
16 because of the presence of the "strong public policy adopted for the benefit of the public  
17 that is a necessary characteristic of any re-zoning, nuisance or land use law" because  
18 estopping the public entity (or applying latches) does not punish the public entity for its  
19 unreasonable delay and instead injures the public which has a strong interest in  
20 maintaining and using their property without damage from non-conforming uses on a  
21 neighboring property. (Id and see *Fakuda* at p. 1377; *West Washington Properties LLC*  
22 *v. California Department of Transportation* (2012) 210 Cal.App.4th 1136).

23         There is no case which holds that there is any strong rule of policy that serves to  
24 protect the public that bars application of the rule of latches (or estoppel) in any context  
25 other than the land use cases recognized by the courts. No court has recognized the  
26 existence of any strong rule of policy designed to protect the public present in a statute that  
27 provides for the imposition of a civil penalty and no court has held, as this Board has, that  
28 the "mandatory penalty statutes itself evidences a strong legislative policy that certain

1 types of permit violation always result in minimum penalties" or that the legislative adoption  
2 of mandatory minimum penalties to "promote streamlined, cost effective enforcement and  
3 facilitate water quality protection" is the same as a strong rule of policy designed to protect  
4 the public as this Board did in Lincoln. (At p. 5).

5 On the contrary, in cases dealing with statutes which are in fact designed to protect  
6 the public; but which also provide for the imposition of a penalty for violation, equitable  
7 principles, including estoppel and laches cannot be applied to that part of the statute which  
8 does in fact protect the public but are to be applied to the imposition of a penalty. Thus,  
9 in *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, the  
10 contractor failed to pay prevailing wages on a public works project in violation of Labor  
11 Code §1773. The division of labor standards enforcement could recover for the employees  
12 the amounts they had been underpaid and would have been paid had prevailing wages  
13 been paid but was estopped from imposing a penalty for failure to give the contractor  
14 advance notice that the prevailing rate would be applicable. (At p. 641-642). Similarly, in  
15 *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, the Supreme Court  
16 determined that although estoppel could not operate to relieve plaintiff from paying the  
17 difference between the wages it actually paid its employees and prevailing wages,  
18 equitable principles did operate to relieve the contractor from paying statutory penalties for  
19 its failure to pay prevailing wages because it had acted in good faith reliance on the public  
20 entities express representation that prevailing wages were not payable (at p. 996).

21 In short, Lincoln's reliance on the rule against application of equitable principles,  
22 including laches and estoppel when doing so would nullify a strong rule of public policy  
23 designed to protect the public is based upon judicial precedent that only applies in a  
24 specific context and that plainly does not apply to a statute that provides for the imposition  
25 of a penalty, even though the penalty exists to ensure or facilitate compliance with or  
26 enforcement or a statutory requirement which does represent a strong rule of public policy  
27 designed to protect the public. Its interpretation of those decisions is incorrect because  
28 those decisions apply to a specific type of enforcement action where precluding the

1 enforcement would not punish the administrative agency involved for its unreasonable  
2 delay and would instead punish the public. The cases are distinguishable and are in no  
3 way authority for the conclusion reached in Lincoln.

4 The other basis relied on in Lincoln to find laches and estoppel cannot be applied  
5 in a case seeking to impose a mandatory minimum penalties also relies on judicial  
6 precedent to come to that conclusion and misinterprets that precedent as well. *Modern*  
7 *Barber Colleges v. California Employment Stabilization Commission* (1943) 31 Cal.2d 720  
8 simply and only holds that because the legislature explicitly and expressly prohibited the  
9 courts from employing the remedy of mandamus in a proceeding to compel that  
10 commission to vacate its finding that certain persons were employees within the  
11 Unemployment Insurance Act did not violate the Constitutional grant to superior courts of  
12 jurisdiction to issue the writ. There is no similar express prohibition against application of  
13 laches or estoppel found in the Water Code. The statement in *Lass v. Eliassen* (1928) 94  
14 Cal.App. 175, 179 that "rules of equity cannot be intruded in matters that are plain and fully  
15 covered by a positive statute . . . nor will a court of equity ever lend its aid to accomplish  
16 by indirection what the law or its clearly defined policy forbids to be done directly" is made  
17 in the context, again, of a statute which by its express terms meant that the defendant had  
18 no power to execute a conveyance of property unless certain conditions occurred, which  
19 did not occur, and an equitable doctrine or "fiction" could not provide him that power until  
20 the condition had occurred. Lastly *Ghory v. Al-Lahham* (1989) rejected a equitable  
21 defense of unjust enrichment to avoid payment of overtime compensation to an employee  
22 because the employee had signed an agreement to work for a lesser wage could not be  
23 applied because the statute provided that the employee could not receive less than the  
24 legal overtime compensation prescribed by statute "notwithstanding any agreement to work  
25 for a lesser wage". (209 Cal.App.3d 1487, 1492). None of these cases are in any sense  
26 similar to this as there is nothing in the Water Code that expressly precludes application  
27 of equitable principles including estoppel and laches to prohibit the Regional Board from  
28 seeking to impose penalties.

1 Further, nothing in *City Brentwood v. Central Valley Regional Water Quality Control*  
2 *Board* (2004) 123 Cal.App.4th 714 or subdivision (h)(1) of §13385 supports the conclusion  
3 that the "legislature has imposed an affirmative duty to impose the penalties" or that the  
4 legislation deprives the "Water Board's of their discretion to reduce the mandatory  
5 minimum penalty". In fact, coming to that conclusion requires the Board to read out of the  
6 statute subdivision (e) of that section which provides that in determining the amount of any  
7 liability to be imposed under that section the Regional Board, the State Board or the  
8 Superior Court as the case may be "shall take into account the nature, circumstances,  
9 extent and gravity of the violation or violations, whether the discharge is susceptible to  
10 clean up or abatement, the degree of toxicity, the ability to pay, the effect of its ability to  
11 continue its business, any voluntary clean up efforts undertaken or any prior history of  
12 violations and the degree of culpability, economic benefit or savings and providing that "at  
13 a minimum liability should be assessed at a level that recovers the economic benefits, if  
14 any, derived from the acts that constitute the violation". That interpretation disregards the  
15 primary tenant of statutory construction which is that the statute is to be read in context and  
16 as a whole. (*People v. Connor* (2004) 115 Cal.App.4th 669, 691 ("basic principles of  
17 statutory construction require us to interpret a statute as a whole so as to make sense of  
18 the entire statutory scheme and not to view isolated statutory language out of context").  
19 The interpretation ascribed to §13385(h)(1) by this Board, and ultimately by the Regional  
20 Board on the advise of the attorney who is part of the Advisory Team is not even arguably  
21 a correct interpretation of the statute.

22 The binding precedent which this agency is required to adhere to is that set forth by  
23 the Courts of Appeal which provides that latches and estoppel may, in an appropriate case,  
24 be set up against a governmental entity and then if there is a sufficiently analogous statute  
25 of limitations, the burden of disproving the applicability of latches is on the agency. (*Brown*  
26 *v. State Personnel Board* (1985) 166 Cal.App.3d 1151, 1158; *Piscioneri v. Ontario* (2002)  
27 95 Cal.App.4th 1037, 1050 (hearing is required on the question of latches to determine  
28 factual underpinnings of doctrine).

1 Here, the Regional Board failed to even decide the question of latches, treating the  
2 question as one of law and finding under Lincoln that the doctrine does not apply. This is  
3 erroneous as a matter of law. So is the decision in Lincoln. The order is required to be  
4 vacated for this reason alone.

5 3. THE FINDINGS IN THE ORDER ARE NOT SUPPORTED BY ANY  
6 EVIDENCE OR SUBSTANTIAL EVIDENCE AND ARE PREMISED SOLELY ON  
7 HEARSAY AND THE TESTIMONY OF AN INDIVIDUAL WHO HAD NO PERSONAL  
8 KNOWLEDGE CONCERNING ANY PURPORTED VIOLATION, AND THE UNDISPUTED  
9 WRITTEN EVIDENCE ESTABLISHES THAT NO VIOLATION OCCURRED.

8 At the hearing, the sole "witness" testifying in support of the complaint was one  
9 "Lonnie Wass". This "witness" was permitted, over Malaga's objection, to simply provide  
10 a narrative in which he stated, among other things, and in essence that the attachments  
11 to the NOV's (Ex.'s 7, 9 and 11), in fact listed accurately violations of effluent discharge  
12 requirements that were disclosed in Malaga's self monitoring reports for the dates  
13 indicated. The "witness" did not prepare and was not in any sense involved in the  
14 preparation of the NOV's and no testimony was presented by anyone as to how the NOV's  
15 were prepared, what they reflected or who they were prepared by. The self monitoring  
16 reports were included in documents submitted by the Prosecution Team and those self  
17 monitoring reports are for the dates referred to by the NOV's as dates on which violations  
18 occurred. (Ex's 19 through 37). There was no testimony by anyone as to what the self  
19 monitoring reports in fact showed, and whether they in fact showed any violation  
20 whatsoever. The "witness" admitted to having absolutely no personal knowledge or basis  
21 whatsoever - other than presumably hearsay - for testifying that the NOV's accurately show  
22 a violation on a particular date that is in fact reflected in the self monitoring reports for that  
23 date. Malaga's objections to and motions to strike the testimony of this witness as it  
24 related to what was shown by the NOV's, because it is hearsay and because the witness  
25 had no personal knowledge whatsoever concerning preparation of or the basis for the  
26 information reflected in the NOV's, were consistently and repeatedly overruled. <sup>3</sup>

27

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28 <sup>3</sup> Every decision made by the Regional Board was a decision that the Advisory Team Attorney told them they had to make. Thus, with respect to the objections and motions to strike this witness's testimony, the Regional

1 It is established law that the testimony of the witness is not admissible unless the  
2 witness has personal knowledge of the matter to which the witness's testimony relates. If  
3 the witness does not have personal knowledge of the matter he testifies about, his  
4 testimony is necessarily premised on hearsay. (Evidence Code §702, 1200; *People v.*  
5 *Nazory* (2010) 191 Cal.App.4th 727; *Tuchscher Development Enterprises Inc v. San Diego*  
6 *Unified Port District* (2003) 106 Cal.App.4th 1219, 1240). By the Regional Board's own  
7 regulations, an adjudicative proceeding is to be conducted in accordance with provisions  
8 and rules of evidence set forth in Government Code §11513. (23 CCR §648.5.1 (hearsay  
9 evidence is admissible subject to the provisions of Government Code §11513). Insofar as  
10 relevant here, subdivision (d) of §11513 reads as follows:

11 "Hearsay evidence may be used for the purpose of supplementing or  
12 explaining other evidence but over timely objections shall not be sufficient in  
13 itself to support a finding unless it would be admissible over objection in civil  
actions. An objection is timely made if made before submission of the case  
or on reconsideration".

14 It is established law that in the context of an administrative hearing, there is no issue  
15 as to whether hearsay evidence is admissible. It is. (*Walker v. City of San Gabriel* (1942)  
16 20 Cal.2d 879, 880). In the administrative context, however, the issue is the use the  
17 administrative body makes of the evidence. Hearsay evidence may be used for the  
18 purpose of supplementing or explaining evidence at an administrative hearing; but, over  
19 timely objection it is not sufficient in itself to support a finding unless it would be admissible  
20 over objection in a civil action. (*Furman v. Department of Motor Vehicles* (2002) 100  
21 Cal.App.4th 416, 420). There must be substantial evidence to support an administrative  
22 ruling and hearsay, unless it is specifically permitted by statute, is not competent evidence  
23 to that end. (Id; *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536-537;  
24 *Ashford v. Culver City Unified School District* (2005) 130 Cal.App.4th 344, 349-350,  
25 overruled on other grounds in *Voice of the Wetlands v. State Water Resources Control*

26 \_\_\_\_\_  
27 Board's overruling of Malaga's objections and its acceptance of this testimony is based solely and entirely on what  
28 the Regional Board was told by the Advisory Team Attorney. Indeed, the ultimate conclusion that the violations  
were proven, despite the fact that there is no evidence anywhere of any violation, and that as a result, the Regional  
Board had no discretion but to impose the "mandatory minimum penalties" as requested by the Complaint is based  
upon what the Advisory Team Attorney told the Regional Board. The Regional Board did not even make the  
decision.

1 *Board* (2011) 52 Cal.App.4th 499).

2       The Order states (1) that according to self monitoring reports for the period between  
3 February 1, 2004 to March 13, 2008, there were eight violations of effluent limitations,  
4 three of which were subject to Mandatory Minimum Penalties (MMP's); (2) that according  
5 to those same self monitoring reports for the period from March 14, 2006 to December 31,  
6 2012, there were 25 violations of effluent limitations and (3) that two very cryptically  
7 identified violations were "inadvertently marked exempt" and that this inadvertency has  
8 been corrected resulting in an additional \$6,000 in MMP's. (Order at p. 6, ¶¶31-33). There  
9 is no evidence, other than hearsay to support the findings that the self monitoring reports  
10 covering either time period disclose any violation because the only testimony and evidence  
11 there is is of the violations that are purportedly listed in each NOV. There is no evidence  
12 to show, and in fact the witness could not point to any violation shown by any self  
13 monitoring report and there is no evidence that the NOV's accurately identify a violation  
14 that is in fact disclosed by a self monitoring report.

15       The findings in paragraphs 31 and 32 mirror the allegations of paragraphs 29 and  
16 30 of the Complaint. These findings are not based on any evidence, or substantial  
17 evidence, because there is no evidence of what the self monitoring reports show. There  
18 is no evidentiary basis for finding any violation and no basis for the Order. The admissible  
19 evidence (Ex's 7 through 12) the letters conveying and responding to the NOV's establish  
20 as more likely than not that the NOV's do not accurately reflect the self monitoring reports.  
21 In response to Ex. 7, on July 21, 2010, and based on its own review of the self monitoring  
22 reports, Malaga responded to the initial NOV by noting that the listed violations were  
23 inaccurate either because the self monitoring reports did not disclose any violation, or did  
24 not disclose that a exceedence of an effluent limitation qualified as "serious" or "chronic"  
25 or were the results of erroneous testing as demonstrated by contemporaneous testing  
26 results. (Ex. 8).<sup>4</sup>

27

28       <sup>4</sup> There is no such thing as a "chronic" violation. A violation is either "serious" or not. If not, it is not subject to any penalty. As acknowledged by the sole prosecution team witness, chronic does not mean the same thing as serious according to the witness and the statute does not provide for a penalty for any "chronic" violation.

1 On November 5, 2010, the witness himself sent a letter with a record of violations  
2 that he did not prepare. This NOV, Ex. 9, refers to a review of Malaga's July 28, 2010  
3 letter (without indicating why it took nine months to conduct that review) and in accordance  
4 with the points Malaga was making, deletes four "chronic" violations. On January 5, 2011,  
5 Malaga responded (Ex. 10 noting again that the listed violations were "not supported by  
6 the data or are not serious and not subject to any penalty". Further, Malaga notes that  
7 many of a listed violations were violations as to which the Regional Board agreed would  
8 be permanently suspended on completion of certain compliance projects and the  
9 compliance projects had in fact been completed, either timely or within an extension of time  
10 granted by the Regional Board or an extension requested which the Regional Board did  
11 not respond to. (See also Costanzo Ex's at Ex. B). The response to this NOV also noted  
12 that the data did not support any conclusion of a violation and/or related solely to violations  
13 as to which a compliance project was completed in lieu of any penalty as agreed to by the  
14 Regional Board.

15 As a matter of evidence, failing to respond to any of the various assertions made  
16 in the responses to the NOV's, gives rise to affirmative evidence of the truth of the  
17 declarations and assertions appearing in those responses that were never replied to.  
18 (Evidence Code §1221; *Los Robols Motor Lodge v. Department of Alcoholic Beverages*  
19 (1966) 246 Cal.App.2d 198, 205; 3 Witkin, California Evidence (5<sup>th</sup> Ed., 2012) at §§ 104,  
20 105 and 340). This is true because where one party to a dispute, here, Malaga, makes an  
21 assertion or declaration of fact and conveys that to the other in circumstances that would  
22 normally call for a response or an answer or other reaction by the other party, in this case,  
23 the Regional Board staff, that party's silence or equivocal response amounts to an implied  
24 admission and affirmative evidence of the truth that the declaration or assertions not  
25 responded to. (Id). Accordingly, not only is there no evidence of any violation, because  
26 there is no testimony by anyone as to what is actually shown by the self monitoring reports,  
27 the sole basis of the alleged violation, and whether that is accurately reflected in an NOV,  
28 the undisputed evidence here dictates the exact opposite of the result arrived at by the

1 Regional Board. The imposition of fines is unsupported and unsupportable.

2 ¶33 of the Order is baseless. The Complaint alleges \$72,000 in penalties. ¶33  
3 adds \$6,000 to this amount based on a wholly unsupported assertion - which first  
4 appeared in a proposed order submitted the day of the hearing so that Malaga had  
5 absolutely no advanced notice of the addition or an opportunity to evaluate it and present  
6 evidence relating to it - vaguely identified discharges were "inadvertently marked exempt",  
7 presumably on an unidentified NOV, so the fine is increased to \$78,000. There is no  
8 evidence anywhere of any inadvertent marking of a purported violation on an NOV as  
9 exempt, or any evidence of any such violation anywhere because there is no testimony  
10 concerning what is shown by Malaga's self monitoring reports.

11 4. THE ORDER IMPROPERLY IMPOSES, IN PART, PENALTIES THAT WERE  
12 PERMANENTLY SUSPENDED PURSUANT TO THE REGIONAL BOARD'S  
13 AGREEMENT TO IMPLEMENTATION OF COMPLIANCE PROJECTS AND POLLUTION  
14 CONTROL PREVENTION PLANS AND SIMILAR MEASURES, ALL OF WHICH WERE  
15 COMPLETED TIMELY OR IN ACCORDANCE WITH EXTENSIONS EXPRESSLY  
16 GRANTED, OR GRANTED BY IMPLICATION, BY THE REGIONAL BOARD.

17 Many of the violations allegedly subject to MMP's here were the subject of a  
18 previous complaint and order (R5-2008-0033, and 0032, and R5-2006-003 (See Costanzo  
19 Declaration), which the Regional Board agreed would be permanently suspended on  
20 completion of compliance projects which the evidence shows were either timely completed,  
21 completed with an extension, or completed within the time period of an extension  
22 requested but not responded to. (Id). ¶7 of the findings included in the Order states that  
23 because a deadline for compliance with respect to an unidentified 2006 Order \$9,000 of  
24 the total MMP's of \$131,165 "could not be applied to compliance projects that were already  
25 supposed to be completed making this request [a purported inquiry by the District as to  
26 whether \$9,000 could be added to the terms of the ACL Order], null and void". (Order at  
27 ¶7). There was no testimony of any of this. There was no evidence whatsoever of any  
28 request by Malaga that an additional \$9,000 be applied to the subject order allowing  
compliance projects for fines that would have totaled \$131,165. What there is evidence  
of is Creedon's demand which was full responded to for payment of the full \$131,165.

1 (See Costanzo Declaration Ex's A and B). This finding is utterly unsupported by any  
2 evidence as Malaga's response to the NOV's shows the demand that it pay any amount  
3 of penalties that are the subject of this order is unsupported as the compliance projects  
4 that are the subject of the agreement suspending MMP's was fully complied with. There  
5 simply is no evidentiary support for this finding.

6 5. THE ORDER IS BASED ON A MISINTERPRETATION OF §13385, THE  
7 REGIONAL BOARD FAILED TO EXERCISE ITS DISCRETION, ABUSED ITS  
8 DISCRETION, FAILED TO PROCEED IN THE MANNER REQUIRED BY LAW AND THE  
9 RESULTING ORDER IS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

10 As noted, the basis of the Order is the incorrect notion that §13385, notwithstanding  
11 subdivision (e) requiring the Regional Board to take into consideration a number of factors  
12 in determining the amount of the penalty and §13327 requiring consideration of the same  
13 factors a minimum penalty of \$3,000 is required to be imposed for any discharge violation  
14 under the provisions §13385(h)(1) or (i)(1). Courts, and this agency, are required to give  
15 significance to every word, phrase, sentence and part of a statute and an interpretation that  
16 renders any portion of a statute surplusage, unnecessary or a nullity, is to be avoided.  
17 (*Teacher's Retirement Board v. Gornet* (2007) 154 Cal.App.4th 1012, 1028). Here, the  
18 interpretation ascribed to 13385 by this Board and by the Regional Board is directly  
19 contrary to the requirements of rules relating to statutory construction because it renders  
20 entire provisions of the statute surplusage, unnecessary and null and void. The  
21 interpretation is indefensible. The Order is, as noted, premised on nothing but hearsay.  
22 The Order is arbitrary, capricious, and directly contrary to law.

## 23 CONCLUSION

24 For the foregoing reasons, the Order must be vacated and set aside. The  
25 Complaint should be dismissed as it is baseless.

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COSTANZO & ASSOCIATES

Dated: August 26, 2013

By: 

Neal E. Costanzo

Attorneys for Plaintiff

EXHIBIT A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2013-0090

FOR MANDATORY MINIMUM PENALTIES  
IN THE MATTER OF

MALAGA COUNTY WATER DISTRICT  
MALAGA COUNTY WATER DISTRICT WASTEWATER TREATMENT FACILITY  
FRESNO COUNTY

This Order is issued to Malaga County Water District (hereafter Discharger) pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability (ACL). This Order is based on findings that the Discharger violated effluent limitations of Waste Discharge Requirements (WDRs) Order 99-100 and R5-2008-0033 (NPDES No. CA0084239).

The Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds the following:

1. The Discharger owns and operates the Malaga County Water District Wastewater Treatment Facility (Facility), which provides sewerage for the unincorporated community of Malaga and its industrial users. Non-domestic sewage comprises approximately 90 percent of the influent flow to the Facility. Malaga discharges its effluent in one of two ways: secondary-treated wastewater is discharged to unlined evaporation percolation disposal ponds, and tertiary-treated wastewater is discharged to the Fresno Irrigation District Central Canal (Central Canal), a water of the United States.
2. Central Canal is a distributary of the Kings River via the Fresno and Fancher Creek Canals and feeds into other canals and aqueducts to the south and to the west. The Central Canal is hydraulically connected to the Fresno Slough that drains to the San Joaquin River during periods of heavy rain. The Fresno Slough and the San Joaquin River are both waters of the United States.
3. On 28 July 1999, the Central Valley Water Board issued WDRs Order 99-100 (1999 Permit) to regulate, in part, the discharge of secondary-treated wastewater from the Facility to evaporation/percolation ponds and tertiary-treated wastewater from the Facility to Central Canal. On 14 March 2008, the Central Valley Water Board issued WDRs Order R5-2008-0033 (2008 Permit), which prescribes new requirements for the discharge. The 2008 Permit rescinded WDRs Order 99-100, except for enforcement purposes. The WDRs included a Monitoring and Reporting Program and Standard Provisions.
4. On 14 March 2008, the Central Valley Water Board issued Cease and Desist Order R5-2008-0032, which rescinded Cease and Desist Order 5-01-001 and requires the District to cease and desist discharging wastes in violation and threatened violation of WDRs R5-2008-0033.

5. On 26 January 2006, the Central Valley Water Quality Control Board (Central Valley Water Board, or Board) adopted ACL Order R5-2006-0003 (2006 ACL Order) for effluent limitation violations subject to mandatory minimum penalties (MMPs) in the amount of \$1,107,000 that occurred within the review period of 1 February 2000 through 30 June 2004, with the last violation identified on 18 January 2004.
6. On 21 November 2008, the Central Valley Water Board Assistant Executive Officer issued the Discharger ACL Complaint R5-2008-0583 (2008 Complaint) assessing \$9,000 in mandatory minimum penalties (MMPs) pursuant to CWC section 13385(i) for effluent limitation violations of the 1999 Permit that occurred at its Facility within the review period of 1 February 2004 to 13 March 2008, with the first violation occurring on 28 February 2005.
7. On 30 December 2008, the Discharger submitted a signed waiver to waive its right to a hearing within 90 days of issuance of the Complaint and requested that the \$9,000 in MMPs be applied toward compliance projects that were required by the 2006 ACL Order. The 2006 ACL Order allowed \$975,835.00 to be permanently suspended as having been spent by the District for completion of Compliance Projects 1.a and 3 of the 7 proposed compliance projects as defined in the Order. The remaining \$131,165 would be permanently suspended if the District satisfactorily completed all or a combination of Compliance Projects 4, 5, 6, and 7, which totaled or exceeded the remaining MMP amount. The last compliance project deadline per the 2006 ACL Order was 1 January 2009. The 1 January 2009 deadline was not met. Therefore, the \$9,000 MMPs could not be applied to compliance projects that were already supposed to be complete - making this request null and void.
8. On 8 July 2010, Central Valley Water Board staff issued a Notice of Violation (NOV) and draft Record of Violations (ROV) for 20 effluent limitation violations of the 2008 Permit totaling \$60,000 in MMPs. The alleged violations cited in the ROV occurred within the review period of 14 March 2008 to 31 January 2010. The ROV requested a response from the Discharger by 22 July 2010.
9. On 22 July 2010, the Discharger's legal counsel responded contesting the 8 July 2010 NOV/ROV. The response disputed, in part, BOD violations occurring in May and June of 2008.
10. On 5 November 2010, after reviewing the Discharger's comments, Board staff concurred with the Discharger's contention that the May and June 2008 BOD violations were incorrect along with a turbidity violation dated 12/31/2009. Board staff issued a Revised NOV/ROV identifying fifteen effluent limitation violations subject to \$45,000 in MMPs that occurred within the review period of 14 March 2008 to 31 January 2010.
11. On 6 January 2011, the Discharger's legal counsel responded contesting the 5 November 2010 revised NOV/ROV.

12. On 9 December 2011, Central Valley Water Board staff issued an NOV with an updated draft ROV for alleged effluent violations that occurred within a review period of 14 March 2008 through 30 October 2011 totaling \$63,000 in MMPs.
13. On 3 January 2012, the Discharger's legal counsel responded contesting the 9 December 2011 NOV/ROV.
14. Board staff updated the review of Malaga's SMRs to include SMRs through 31 December 2012, and on 1 May 2013, the Executive Officer issued ACL Complaint R5-2013-0527 for effluent limitation violations subject to MMPs in the amount of \$72,000. The 2013 Complaint withdrew the 2008 Complaint and included violations that occurred within the review period of 1 February 2004 through 31 December 2012 as identified in Attachment A to the 2013 Complaint.
15. On 28 May 2013, the Discharger's legal counsel responded stating that any enforcement action relative to the violations listed on Attachment A is barred by operation of law.
16. Board staff has determined that the Discharger is out of compliance with several other components of its NPDES Permit and other Board Orders. Enforcement actions for outstanding enforcement orders and violations not subject to mandatory minimum penalties are under consideration by management and will be handled in separate enforcement actions. The adoption of this ACL Order does not preclude the Central Valley Water Board from taking enforcement on other violations not subject to mandatory minimum penalties.
17. CWC §13385(h)(1) states:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation.
18. CWC §13385 (h)(2) states:

For the purposes of this section, a "serious violation" means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 20 percent or more for a Group I pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 40 percent or more.
19. CWC §13385 subdivision (i)(1) states, in part:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations:

  - A) Violates a waste discharge requirement effluent limitation.

- B) Fails to file a report pursuant to Section 13260
- C) Files an incomplete report pursuant to Section 13260
- D) Violates a toxicity effluent limitation contained in the applicable waste discharge requirements where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

20. CWC section 13385(k) states:

(1) In lieu of assessing all or a portion of the mandatory minimum penalties pursuant to subdivisions (h) and (i) against a publicly owned treatment works serving a small community, the state board or the regional board may elect to require the publicly owned treatment works to spend an equivalent amount towards the completion of a compliance project proposed by the publicly owned treatment works, if the state board or the regional board finds all of the following:

(A) The compliance project is designed to correct the violations within five years.

(B) The compliance project is in accordance with the enforcement policy of the state board, excluding any provision in the policy that is inconsistent with this section.

(C) The publicly owned treatment works has prepared a financing plan to complete the compliance project.

(2) For the purposes of this subdivision, "a publicly owned treatment works serving a small community" means a publicly owned treatment works serving a population of 10,000 persons or less, a rural county, or a reasonably isolated and divisible segment of a larger municipality where the population of the segment is 10,000 persons or less, with a financial hardship as determined

21. CWC section 13323 states, in part:

Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or have failure to act that constitutes a violation of law, the provision authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

22. WDRs Order 99-100 General Discharge Specification B.2 states, "effluent shall have a pH between 6.0 and 9.0 pH units."

23. WDRs Order 99-100 General Discharge Specification B.3 states, "effluent EC shall not exceed that of source water plus 500  $\mu$ mhos/cm or 1000  $\mu$ mhos/cm, whichever is less."

24. WDRs Order 99-100 Discharge 001 (Central Canal) Specification C.3 states, in part, "effluent turbidity shall not exceed a monthly average of 2 NTU and a daily maximum of 5 NTU.

25. WDRs Order R5-2008-0033 Effluent Limitations and Discharge Specifications A.2 states, "Effluent shall not as an average monthly EC, exceed the monthly flow-weighted average

of EC in the source water plus 500 µmhos/cm, or a total of 1,000 µmhos/cm, whichever is more stringent.

26. WDRs Order R5-2008-0033 Effluent Limitations and Discharge Specifications A.4 states, "Effluent shall not exhibit a pH of less than 6.5 or greater than 8.3 standard units.
27. WDRs Order R5-2008-0033 Effluent Limitations (Table 6) – Discharge Point D-001 (Tertiary Treatment) B.1.a states, in part:

TABLE 6. EFFLUENT LIMITATIONS				
Parameter	Units	Effluent Limitations		
		Average Monthly	Average Weekly	Maximum Daily
<b>CONVENTIONAL POLLUTANTS</b>				
Biochemical Oxygen Demand (BOD <sub>5</sub> ) @ 20°C	mg/L	10	15	30
	lbs/day <sup>1</sup>	38	56	113
Total Suspended Solids (TSS)	mg/L	10	15	30
	lbs/day <sup>1</sup>	38	56	113
Settleable Solids	ml/L	0.1	--	0.2
<b>PRIORITY POLLUTANTS</b>				
Bromoform	µg/L	4.3	--	8.6
<b>NON-CONVENTIONAL POLLUTANTS<sup>4</sup></b>				
Ammonia Nitrogen, Total (as N) (May-October) <sup>3</sup>	mg/L	0.8	--	1.1
	lbs/day <sup>1</sup>	3.0	--	4.1
Ammonia Nitrogen, Total (as N) (November -April) <sup>3</sup>	mg/L	0.4	--	0.6
	lbs/day <sup>1</sup>	1.5	--	2.3
Turbidity	NTU	2	--	5 <sup>2</sup>

1. Based on a design flow of 0.45 mgd
2. 5 NTU more than 5% of the 24-hour period, 10 NTU at any time
3. Effective 19 May 2010. In interim, see Table 7
4. Effective 1 November 2008, if the Discharger certifies to the Executive Officer in writing that the ultraviolet system is operational and chlorine is no longer being used for disinfection purposes or detected in the influent, the Executive Officer may, at her discretion, notify the Discharger that these effluent limitations and associated monitoring are suspended.

28. WDRs Order R5-2008-0033 Effluent Limitations – Discharge Point D-001 (Tertiary Treatment) B.1.b states, "Percent Removal: The average monthly percent removal of BOD and total suspended solids shall not be less than 90 percent."
29. WDRs Order R5-2008-0033 Effluent Limitations – Discharge Point D-001 (Tertiary Treatment) B.1.e states, "Total coliform Organisms. Effluent total coliform organisms shall not exceed: i. 2.2 most probably number (MPN)/100 mL as a 7-day median; ii. 23 MPN/100 mL more than once in any month; and iii. 240 MPN/100 ml at any time."
30. WDRs Order R5-2008-0033 Effluent Limitations – Discharge Point D-001 (Tertiary Treatment) B.2 states, "Interim Effluent Limitations – The interim effluent limitation in Table 7 shall apply in lieu of the final effluent limitations specified for the same parameters in Table 6 until the effective date of the final effluent limitations as specified in footnotes 3 and 4, Table 6:

TABLE 7. INTERIM EFFLUENT LIMITATIONS			
Parameter	Units	Effluent Limitations	
		Average Monthly	Maximum Daily
Ammonia	mg/L	--	1.3
Bromoform	µg/L	--	28

31. According to the Discharger's self-monitoring reports covering the period from 1 February 2004 through 13 March 2008, the Discharger committed eight violations of effluent limitations for turbidity, EC, and pH of Order 99-100; three of which are subject to MMPs. Attachment A to this Order summarizes these violations.
32. According to the Discharger's self-monitoring reports covering the period from 14 March 2008 through 31 December 2012, the Discharger committed twenty-five violations of effluent limitations for EC, pH, total ammonia nitrogen (as N), Bromoform, total coliform organisms, BOD, Settleable solids, TSS, and turbidity of Order 2008-0033; twenty-two of which are subject to MMPs. Attachment A to this Order summarizes these violations.
33. On Attachment A of the 2013 Complaint, Violation ID 771679 (11M; pH; 9.0; pH units; 9.2) and Violation ID 878012 (7M; TCO; 240; MPN/100 ml/L; DM; 1600) were inadvertently marked EXEMPT. They are chronic violations and subject to MMPs. Attachment A to this Order has been corrected and \$6,000 has been added to the penalty amount bringing it to \$78,000.
34. General statutes of limitations do not apply to this administrative proceeding. The statutes of limitations that refer to "actions" and "special proceedings" and that are contained in the California Code of Civil Procedure apply to judicial proceedings, not administrative proceedings. Courts evaluating the issue have consistently found that

general statutes of limitations do not apply to administrative proceedings, including enforcement proceedings.

35. Related to the concept of statute of limitations is an equitable principal of laches. Laches is a court-made, equitable doctrine based on the principle that those who neglect their rights may be barred from obtaining relief in equity. It is a defense by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when that delay or negligence has prejudiced the party against whom relief is sought. The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay. Laches is not available where it would nullify an important policy adopted for the benefit of the public. Further, it is well-settled that the burden to establish laches lies with the party raising it.
36. In this case, where there has been a violation subject to statutory mandatory penalties and unless an affirmative defense is proven, the Legislature has imposed an affirmative duty to impose the penalties, thereby depriving the water boards of their discretion to reduce the mandatory minimum penalty. Laches is not recognized as an affirmative defense and may not be invoked to avoid the imposition of mandatory minimum penalties.
37. Issuance of this Administrative Civil Liability Order to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code section 21000 et seq.), in accordance with California Code of Regulations, title 14, section 1532(a)(2).
38. In accordance with CWC §13385(i), the total amount of the mandatory minimum penalty for 26 effluent limitation violations is \$78,000. (See Attachment A).

**IT IS HEREBY ORDERED THAT:**

1. Malaga County Water District, its agents, successors and assigns, shall be assessed an Administrative Civil Liability in the amount of \$78,000.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC 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 date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final 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:

[http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitions/water_quality)

or will be provided upon request.

I, Kenneth D. Landau, Assistant Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 25 July 2013.



Kenneth D. Landau, Assistant Executive Officer

Attachment A: Record of Violations

**ATTACHMENT A  
RECORD OF VIOLATIONS**

**Malaga County Water District, Wastewater Treatment Facility  
Record of violations (1 February 2004- 31 December 2012)  
MANDATORY MINIMUM PENALTIES**

(Data reported under Monitoring and Reporting Program No. 99-100 and R5-2008-0033)

<u>Violation ID<sup>1</sup></u>	<u>Violation Date</u>	<u>Violation Type<sup>2</sup></u>	<u>Violation Description<sup>3</sup></u>	<u>MMP Type<sup>4</sup></u>
696644	07/02/2007	OEV	7M; EC; 784; umhos/cm; M; 820	EXEMPT
696696	08/09/2007	OEV	8M; EC; 1000; umhos/cm; DM; 1033	EXEMPT
771676	08/10/2007	OEV	8M; pH; 9.0; pH units; I; 9.2	EXEMPT
771679	11/25/2007	OEV	11M; pH; 9.0; pH units; I; 9.2	CHRONIC
771678	12/03/2007	OEV	12M; EC; 782; umhos/cm; DM; 820	CHRONIC
771680	12/10/2007	OEV	12M; EC; 1000; umhos/cm; DM; 1700	CHRONIC
748354	02/15/2008	OEV	2M; EC; 816; umhos/cm; DM; 1100	CHRONIC
867973	3/31/2008	OEV	3M; EC; 813; umhos/cm; AM; 825	CHRONIC
868013	4/18/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 8.5	CHRONIC
868014	4/19/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 8.9	CHRONIC
868015	4/20/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 9.0	CHRONIC
868016	4/21/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 8.9	CHRONIC
868098	7/16/2008	CAT1	7M; NH3-N; 1.3; mg/L; DM; 2.5	SERIOUS
868022	7/19/2008	OEV	7M; pH; 6.5-8.3; SU; IM; 9.1	CHRONIC
868021	7/30/2008	OEV	7M; EC; 891; umhos/cm; AM; 911	CHRONIC
868097	10/14/2008	CAT2	10M; Bromoform; 28; ug/L; DM; 36	SERIOUS
868095	10/17/2008	OEV	10M; TCO; 240; MPN/100 ml/L; DM; 300	CHRONIC
868101	11/17/2008	CAT2	10M; Bromoform; 28; ug/L; DM; 32	CHRONIC
868102	06/05/2009	OEV	6M; pH; 6.5-8.3; SU; IM; 8.6	EXEMPT <sup>5</sup>
868104	07/08/2009	OEV	7M; BOD; 15; mg/L; AW; 19	EXEMPT
868105	07/08/2009	OEV	7M; BOD; 56; lbs/day; AW; 61.8	EXEMPT
868109	08/28/2009	CAT1	8M; SS; 0.2; ml/L; DM; 7.5	SERIOUS
868106	08/30/2009	CAT1	8M; SS; 0.1; ml/L; AM; 0.29	SERIOUS
868112	12/7/2009	OEV	12M; pH; 6.5-8.3; SU; IM; 8.5	CHRONIC

893428	07/08/2010	CAT1	7M; NH3-N; 0.8; mg/L; AM; 2.8	SERIOUS
896916	07/08/2010	CAT1	7M; NH3-N; 1.1; mg/L; DM; 2.6	SERIOUS
878012	07/09/2010	OEV	7M; TCO; 240; MPN/100 ml/L; DM; 1600	CHRONIC
893443	11/15/2010	CAT1	11M; TSS; 15; mg/L; AW; 17	CHRONIC
893444	11/30/2010	CAT1	11M; TSS; 90%; % removal; AM; 85%	CHRONIC
893442	11/30/2010	CAT1	11M; TSS; 10; mg/L; AM; 14	SERIOUS
912164	03/24/2011	OEV	3M; Turbidity; 2; NTU; AM; 2.7	CHRONIC
912555	03/30/2011	CAT1	3M; NH3-N; 0.4; mg/L; AM; 0.5.	SERIOUS

1. Violation ID in CIWQS
2. Abbreviations used in this table are defined in table of abbreviations below.
3. Violation Descriptions are coded as follows: Reporting period (e.g., 4M = April); constituent or parameter (e.g., pH, Flow); effluent limitation; units; limitation period; and reported result.
4. Chronic non-serious and serious violations are subject to MMPs. The first three non-serious violations within a six-month period are exempt.
5. More than a six-month break of effluent limitation violations subject to MMPs; thus, chronic count resets.

Abbreviation    Definition

ACL	Administrative Civil Liability
AM	Average Monthly
AW	Average Weekly
BOD	Biochemical Oxygen Demand
CAT1	Violation of Group 1 effluent limitation as defined in Enforcement Policy
CAT2	Violation of Group 2 effluent limitation as defined in Enforcement Policy
CIWQS	California Integrated Water Quality System database
DM	Daily Maximum
EC	Electrical conductivity
IM	Instantaneous maximum
M	Monthly
MMP	Mandatory minimum penalty
MPN	Most Probable Number
NH3-N	Ammonia as nitrogen
NTU	Nephelometric turbidity unit
OEV	Other effluent violation as defined in Enforcement Policy
SS	Settleable solids
SU	Standard unit (for pH)
TCO	Total coliform organisms

<u>MMP VIOLATION TYPE</u>	<u>VIOLATION PERIOD</u> <u>2/01/04 TO 31 December 2012</u>
Group 1 Serious Violations Subject to MMPs	7
Group 2 Serious Violations Subject to MMPs:	1
Chronic (non-serious) Violations Subject to MMPs:	18
Exempt Violations:	6
<b>Total Violations Subject to MMPs:</b>	<b>26</b>

***Mandatory Minimum Penalty = 26 violations x \$3,000 = \$78,000***

# EXHIBIT B

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2013-0527

FOR MANDATORY MINIMUM PENALTIES  
IN THE MATTER OF

MALAGA COUNTY WATER DISTRICT  
MALAGA COUNTY WATER DISTRICT WASTEWATER TREATMENT FACILITY  
FRESNO COUNTY

This Complaint is issued to Malaga County Water District (hereafter Discharger) pursuant to California Water Code (CWC) sections 13385, which authorizes the imposition of Administrative Civil Liability (ACL) and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that the Discharger violated effluent limitations of Waste Discharge Requirements (WDRs) Order 99-100 and R5-2008-0033 (NPDES No. CA0084239).

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds the following:

1. The Discharger owns and operates the Malaga County Water District Wastewater Treatment Facility (Facility), which provides sewerage for the unincorporated community of Malaga and its industrial users. Non-domestic sewage comprises approximately 90 percent of the influent flow to the Facility. Malaga discharges its effluent in one of two ways: secondary-treated wastewater is discharged to unlined evaporation percolation disposal ponds, and tertiary-treated wastewater is discharged to the Fresno Irrigation District Central Canal (Central Canal), a water of the United States.
2. Central Canal is a tributary of the Kings River via the Fresno and Fancher Creek Canals and feeds into other canals and aqueducts to the south and to the west. The Central Canal is hydraulically connected to the Fresno Slough that drains to the San Joaquin River during periods of heavy rain. The Fresno Slough and the San Joaquin River are both waters of the United States.
3. On 28 July 1999, the Central Valley Water Board issued WDRs Order 99-100 (1999 Permit) to regulate, in part, the discharge of secondary-treated wastewater from the Facility to evaporation percolation ponds and tertiary-treated wastewater from the Facility to Central Canal.
4. On 14 March 2008, the Central Valley Water Board issued WDRs Order R5-2008-0033 (2008 Permit), which prescribes new requirements for the discharge. The 2008 Permit rescinded WDRs Order 99-100, except for enforcement purposes.
5. On 14 March 2008, the Central Valley Water Board issued Cease and Desist Order R5-2008-0032 (2008 CDO), which rescinded Cease and Desist Order (CDO) 5-01-001 and requires the District to cease and desist discharging wastes in violation and threatened violation of WDRs R5-2008-0033. The CDO requires

the Discharger, in part, to evaluate the Facility's treatment and disposal capacity and identify short-term and long-term measures to secure adequate treatment and disposal capacity for the volume, type, and concentrations of wastes in the influent projected through at least 2028.

6. On 21 November 2008, the Central Valley Water Board Assistant Executive Officer issued the Discharger ACL Complaint R5-2008-0583 assessing nine thousand dollars (\$9,000) in mandatory minimum penalties (MMPs) pursuant to CWC section 13385(i) for effluent limitation violations of the 1999 Permit that occurred at its Facility from 1 February 2004 to 13 March 2008 (Exhibit 1).
7. On 30 December 2008, the Discharger submitted a signed waiver to waive its right to a hearing within 90 days of issuance of the Complaint and requested that the \$9,000 in MMPs be applied toward compliance projects that were required and past due by ACL Order No. R5-2006-0003, making this request null and void.
8. On 8 July 2010, Central Valley Water Board staff issued a Notice of Violation (NOV) and draft Record of Violations (ROV) for 20 effluent limitation violations of the 2008 Permit totaling \$60,000 in MMPs. The alleged violations cited in the ROV occurred from 14 March 2008 to 31 January 2010. The ROV requested a response from the Discharger by 22 July 2010.
9. On 22 July 2010, the Discharger's legal counsel responded contesting the 8 July 2010 NOV/ROV.
10. On 5 November 2010, after reviewing the Discharger's comments, Central Valley Water Board staff concurred with the Discharger's contention that five of the BOD violations were incorrect and issued a Revised NOV and ROV identifying fifteen effluent limitation violations subject to \$45,000 in MMPs that occurred from 14 March 2008 to 31 January 2010.
11. On 6 January 2011, the Discharger's legal counsel responded contesting the 5 November 2010 the revised NOV/ROV.
12. On 9 December 2011, Central Valley Water Board staff issued an NOV with an updated draft ROV for alleged effluent violations from 14 March 2008 through 30 October 2011 totaling \$63,000 in MMPs.
13. On 3 January 2012, the Discharger's legal counsel responded contesting the 9 December 2011 NOV/ROV.
14. Central Valley Water Board staff has determined that the Discharger is out of compliance with several other components of its NPDES Permit and other Board Orders. Enforcement actions for outstanding enforcement orders and violations not subject to mandatory minimum penalties are under consideration by

management and will be handled in separate enforcement actions. The issuance of this ACLC does not preclude the Central Valley Water Board from taking enforcement on other violations not subject to mandatory minimum penalties.

15. CWC §13385(h)(1) states:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation.

16. CWC §13385 (h)(2) states:

For the purposes of this section, a "serious violation" means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 20 percent or more for a Group I pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 40 percent or more.

17. CWC §13385 subdivision (i)(1) states, in part:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations:

- A) Violates a waste discharge requirement effluent limitation.
- B) Fails to file a report pursuant to Section 13260
- C) Files an incomplete report pursuant to Section 13260
- D) Violates a toxicity effluent limitation contained in the applicable waste discharge requirements where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

18. CWC section 13385(k) states:

(1) In lieu of assessing all or a portion of the mandatory minimum penalties pursuant to subdivisions (h) and (i) against a publicly owned treatment works serving a small community, the state board or the regional board may elect to require the publicly owned treatment works to spend an equivalent amount towards the completion of a

compliance project proposed by the publicly owned treatment works, if the state board or the regional board finds all of the following:

(A) The compliance project is designed to correct the violations within five years.

(B) The compliance project is in accordance with the enforcement policy of the state board, excluding any provision in the policy that is inconsistent with this section.

(C) The publicly owned treatment works has prepared a financing plan to complete the compliance project.

(2) For the purposes of this subdivision, "a publicly owned treatment works serving a small community" means a publicly owned treatment works serving a population of 10,000 persons or less, a rural county, or a reasonably isolated and divisible segment of a larger municipality where the population of the segment is 10,000 persons or less, with a financial hardship as determined

19. CWC section 13323 states, in part:

Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or have failure to act that constitutes a violation of law, the provision authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

20. WDRs Order 99-100 General Discharge Specification B.2 states, "effluent shall have a pH between 6.0 and 9.0 pH units."
21. WDRs Order 99-100 General Discharge Specification B.3 states, "effluent electrical conductivity or EC shall not exceed that of source water plus 500  $\mu\text{mhos/cm}$  or 1000  $\mu\text{mhos/cm}$ , whichever is less."
22. WDRs Order 99-100 Discharge 001 (Central Canal) Specification C.3 states, in part, "effluent turbidity shall not exceed a monthly average of 2 NTU and a daily maximum of 5 NTU."
23. WDRs Order R5-2008-0033 Effluent Limitations and Discharge Specifications A.2 states, "Effluent shall not as an average monthly EC, exceed the monthly flow-weighted average of EC in the source water plus 500  $\mu\text{mhos/cm}$ , or a total of 1,000  $\mu\text{mhos/cm}$ , whichever is more stringent."
24. WDRs Order R5-2008-0033 Effluent Limitations and Discharge Specifications A.4 states, "Effluent shall not exhibit a pH of less than 6.5 or greater than 8.3 standard units."

25. WDRs Order R5-2008-0033 Effluent Limitations (Table 6) – Discharge Point D-001 (Tertiary Treatment) B.1.a states, in part:

TABLE 6. EFFLUENT LIMITATIONS				
Parameter	Units	Effluent Limitations		
		Average Monthly	Average Weekly	Maximum Daily
<b>CONVENTIONAL POLLUTANTS</b>				
Biochemical Oxygen Demand (BOD <sub>5</sub> ) @ 20°C	mg/L	10	15	30
	lbs/day <sup>1</sup>	38	56	113
Total Suspended Solids (TSS)	mg/L	10	15	30
	lbs/day <sup>1</sup>	38	56	113
Settleable Solids	ml/L	0.1	--	0.2
<b>PRIORITY POLLUTANTS</b>				
Bromoform	µg/L	4.3	--	8.6
<b>NON-CONVENTIONAL POLLUTANTS<sup>4</sup></b>				
Ammonia Nitrogen, Total (as N) (May-October) <sup>3</sup>	mg/L	0.8	--	1.1
	lbs/day <sup>1</sup>	3.0	--	4.1
Ammonia Nitrogen, Total (as N) (November -April) <sup>3</sup>	mg/L	0.4	--	0.6
	lbs/day <sup>1</sup>	1.5	--	2.3
Turbidity	NTU	2	--	5 <sup>2</sup>

1. Based on a design flow of 0.45 mgd
2. 5 NTU more than 5% of the 24-hour period, 10 NTU at any time
3. Effective 19 May 2010. In interim, see Table 7
4. Effective 1 November 2008, if the Discharger certifies to the Executive Officer in writing that the ultraviolet system is operational and chlorine is no longer being used for disinfection purposes or detected in the influent, the Executive Officer may, at her discretion, notify the Discharger that these effluent limitations and associated monitoring are suspended.

26. WDRs Order R5-2008-0033 Effluent Limitations – Discharge Point D-001 (Tertiary Treatment) B.1.b states, "Percent Removal: The average monthly percent removal of BOD and total suspended solids shall not be less than 90 percent."
27. WDRs Order R5-2008-0033 Effluent Limitations – Discharge Point D-001 (Tertiary Treatment) B.1.e states, "Total coliform Organisms. Effluent total coliform organisms shall not exceed: i. 2.2 most probably number (MPN)/100 mL as a 7-day median; ii. 23 MPN/100 mL more than once in any month; and iii. 240 MPN/100 ml at any time."

28. WDRs Order R5-2008-0033 Effluent Limitations – Discharge Point D-001 (Tertiary Treatment) B.2 states, "Interim Effluent Limitations – The interim effluent limitation in Table 7 shall apply in lieu of the final effluent limitations specified for the same parameters in Table 6 until the effective date of the final effluent limitations as specified in footnotes 3 and 4, Table 6:

TABLE 7. INTERIM EFFLUENT LIMITATIONS			
Parameter	Units	Effluent Limitations	
		Average Monthly	Maximum Daily
Ammonia	mg/L	--	1.3
Bromoform	µg/L	--	28

29. According to the Discharger's self-monitoring reports covering the period from 1 February 2004 through 13 March 2008, the Discharger committed eight violations of effluent limitations for turbidity, EC, and pH of Order 99-100; three of which are subject to MMPs. Attachment A to this Order summarizes these violations.
30. According to the Discharger's self-monitoring reports covering the period from 14 March 2008 through 31 December 2012, the Discharger committed twenty-five violations of effluent limitations for EC, pH, total ammonia nitrogen (as N), Bromoform, total coliform organisms, BOD, Settleable solids, TSS, and turbidity of Order 2008-0033; twenty-one of which are subject to MMPs. Attachment A to this Order summarizes these violations.
31. In accordance with CWC §13385(i), the total amount of the mandatory minimum penalty for 24 effluent limitation violations is \$72,000. (See Attachment A).

**MALAGA COUNTY WATER DISTRICT IS HEREBY GIVEN NOTICE THAT:**

1. The Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of **\$72,000**, and that this Complaint supersedes ACL Complaint R5-2008-583 and addresses civil liability for effluent limitation violations subject to MMPs that occurred from 1 February 2004 through 31 December 2012. These violations are identified in Attachment A to the Complaint.
2. On **25/26 July 2013**, a hearing on this matter will be held at the Central Valley Water Board meeting, unless by **24 May 2013 19:**
  - a. The Discharger waives the hearing by completing the attached form (checking off the box next to Option 1) and returning it to the Central Valley Water Board, along with payment of the proposed civil liability; or
  - b. The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking

off the box next to Option 2 on the attached form, and returning it to the Board along with a letter describing the issues to be discussed; or

- c. The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking off the box next to Option 3 on the attached form, and returning it to the Board along with a letter describing the issues to be discussed.
3. If a hearing on this matter is conducted, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

If this matter proceeds to hearing, the Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this Complaint through completion of the hearing.

  
for PAMELA C. CREEDON, Executive Officer  
5/1/13  
(Date)

Attachment A: Record of Violations  
Exhibit 1: ACL Complaint R5-2008-0583

**WAIVER FORM  
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent Malaga County Water District (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R5-2013-0527 (hereafter Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served. The person who has been issued a complaint may waive the right to a hearing."

**(OPTION 1: Check here if the Discharger waives the hearing requirement and will pay in full)**

- a. I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board
- b. I certify that the Discharger will remit payment for the civil liability imposed in the amount of **\$72,000** by check that references "ACL Complaint R5-2013-0527" made payable to the "*State Water Pollution Cleanup and Abatement Account.*" Payment must be received by the Central Valley Water Board by **24 May 2013.**
- c. I understand the payment of the above amount constitutes a settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period. Should the Central Valley Water Board receive significant new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.
- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

**(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.)** I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

**(OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.)** I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

\_\_\_\_\_  
(Print Name and Title)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

**ATTACHMENT A  
RECORD OF VIOLATIONS**

**Malaga County Water District, Malaga Wastewater Treatment Facility**

Record of violations (1 February 2004- 31 December 2012)

**MANDATORY MINIMUM PENALTIES**

(Data reported under Monitoring and Reporting Program No. 99-100 and R5-2008-0033)

<u>Violation ID<sup>1</sup></u>	<u>Violation Date</u>	<u>Violation Type<sup>2</sup></u>	<u>Violation Description<sup>3</sup></u>	<u>MMP Type<sup>4</sup></u>
696696	08/09/2007	OEV	8M; EC; 1000; umhos/cm; DM; 1033	EXEMPT
771676	08/10/2007	OEV	8M; pH; 9.0; pH units; I; 9.2	EXEMPT
771679	11/25/2007	OEV	11M; pH; 9.0; pH units; I; 9.2	EXEMPT
771678	12/03/2007	OEV	12M; EC; 782; umhos/cm; DM; 820	CHRONIC
771680	12/10/2007	OEV	12M; EC; 1000; umhos/cm; DM; 1700	CHRONIC
748354	02/15/2008	OEV	2M; EC; 816; umhos/cm; DM; 1100	CHRONIC
867973	3/31/2008	OEV	3M; EC; 813; umhos/cm; AM; 825	CHRONIC
868013	4/18/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 8.5	CHRONIC
868014	4/19/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 8.9	CHRONIC
868015	4/20/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 9.0	CHRONIC
868016	4/21/2008	OEV	4M; pH; 6.5-8.3; SU; IM; 8.9	CHRONIC
868098	7/16/2008	CAT1	7M; NH3-N; 1.3; mg/L; DM; 2.5	SERIOUS
868022	7/19/2008	OEV	7M; pH; 6.5-8.3; SU; IM; 9.1	CHRONIC
868021	7/30/2008	OEV	7M; EC; 891; umhos/cm; AM; 911	CHRONIC
868097	10/14/2008	CAT2	10M; Bromoform; 28; ug/L; DM; 36	SERIOUS
868095	10/17/2008	OEV	10M; TCO; 240; MPN/100 ml/L; DM; 300	CHRONIC
868101	11/17/2008	CAT2	10M; Bromoform; 28; ug/L; DM; 32	CHRONIC
868102	06/05/2009	OEV	6M; pH; 6.5-8.3; SU; IM; 8.6	EXEMPT <sup>5</sup>
868104	07/08/2009	OEV	7M; BOD; 15; mg/L; AW; 19	EXEMPT
868105	07/08/2009	OEV	7M; BOD; 56; lbs/day; AW; 61.8	EXEMPT
868109	08/28/2009	CAT1	8M; SS; 0.2; ml/L; DM; 7.5	SERIOUS
868106	08/30/2009	CAT1	8M; SS; 0.1; ml/L; AM; 0.29	SERIOUS
868112	12/7/2009	OEV	12M; pH; 6.5-8.3; SU; IM; 8.5	CHRONIC
893428	07/08/2010	CAT1	7M; NH3-N; 0.8; mg/L; AM; 2.8	SERIOUS

896916	07/08/2010	CAT1	7M; NH3-N; 1.1; mg/L; DM; 2.6	SERIOUS
878012	07/09/2010	OEV	7M; TCO; 240; MPN/100 ml/L; DM; 1600	EXEMPT
893443	11/15/2010	CAT1	11M; TSS; 15; mg/L; AW; 17	CHRONIC
893444	11/30/2010	CAT1	11M; TSS; 90%; % removal; AM; 85%	CHRONIC
893442	11/30/2010	CAT1	11M; TSS; 10; mg/L; AM; 14	SERIOUS
912164	03/24/2011	OEV	3M; Turbidity; 2; NTU; AM; 2.7	CHRONIC
912555	03/30/2011	CAT1	3M; NH3-N; 0.4; mg/L; AM; 0.5.	SERIOUS

- 1 Violation ID in CIWQS
- 2 Abbreviations used in this table are defined in table of abbreviations below.
- 3 Violation Descriptions are coded as follows: Reporting period (e.g., 4M = April); constituent or parameter (e.g., pH, Flow); effluent limitation; units; limitation period; and reported result.
- 4 Chronic non-serious and serious violations are subject to MMPs. The first three non-serious violations within a six-month period are exempt.
- 5 More than a six-month break of effluent limitation violations subject to MMPs; thus, chronic count resets.

Abbreviation    Definition

ACL	Administrative Civil Liability
AM	Average Monthly
AW	Average Weekly
BOD	Biochemical Oxygen Demand
CAT1	Violation of Group 1 effluent limitation as defined in Enforcement Policy
CAT2	Violation of Group 2 effluent limitation as defined in Enforcement Policy
CIWQS	California Integrated Water Quality System database
DM	Daily Maximum
EC	Electrical conductivity
IM	Instantaneous maximum
M	Monthly
MMP	Mandatory minimum penalty
MPN	Most Probable Number
NH3-N	Ammonia as nitrogen
NTU	Nephelometric turbidity unit
OEV	Other effluent violation as defined in Enforcement Policy
SS	Settleable solids
SU	Standard unit (for pH)
TCO	Total coliform organisms

<u>MMP VIOLATION TYPE</u>	<u>VIOLATION PERIOD</u> <u>2/01/04 TO 31 December 2012</u>
Group 1 Serious Violations Subject to MMPs	7
Group 2 Serious Violations Subject to MMPs:	1
Chronic (non-serious) Violations Subject to MMPs:	16
Exempt Violations:	9
<b>Total Violations Subject to MMPs:</b>	<b>24</b>

***Mandatory Minimum Penalty = 24 violations x \$3,000 = \$72,000***

# EXHIBIT 1



California Regional Water Quality Control Board  
Central Valley Region

Karl E. Longley, ScD, P.E., Chair



Arnold Schwarzenegger  
Governor

Linda S. Adams  
Secretary for  
Environmental  
Protection

1685 E Street, Fresno, California 93706  
(559) 445-5116 • Fax (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>

FILE

21 November 2008

Mr. Russ Holcomb  
Malaga County Water District  
3580 South Frank Street  
Fresno, CA 93725

CERTIFIED MAIL  
7007 3020 0000 1750 0378

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2008-0583 FOR ASSESSMENT OF  
MANDATORY MINIMUM PENALTIES, MALAGA COUNTY WATER DISTRICT WWTF,  
FRESNO COUNTY

Enclosed is an Administrative Civil Liability Complaint (Complaint), issued pursuant to California Water Code (CWC) section 13385, for violations of Waste Discharge Requirements (WDRs) Order 99-100 (NPDES No. CA0084239) that have occurred at the Malaga County Water District (District) Wastewater Treatment Facility (WWTF) in Fresno County. The Complaint charges the District with civil liability in the amount of **nine thousand dollars (\$9,000)**, which represents the sum of the mandatory minimum penalties for effluent limitation violations that occurred at the WWTF during the period of 1 February 2004 through 13 March 2008.

On 10 July 2008, staff issued the District a Notice of Violation and draft Record of Violations of Mandatory Minimum Penalties (MMPs) for the period of 1 February 2004 through 30 April 2008. By 18 September 2008 letter, the District acknowledged the identified violations. Staff has since changed the end of review period from 30 April 2008 to 13 March 2008, when the Central Valley Water Board adopted WDRs Order R5-2008-0033 and rescinded WDRs Order 99-100. This change reduced the civil liability from fifteen thousand dollars to nine thousand dollars.

On 5 August 2008, staff requested that State Water Board staff evaluate the District to determine the District's eligibility for designation as a small community with financial hardship. On 21 August 2008, staff received a memorandum from the Executive Director of the State Water Board confirming that the District's WWTF is a publicly owned treatment works serving a small community with financial hardship within the meaning of CWC section 13385(k)(2). Therefore, the Central Valley Water Board may entertain proposals from the Discharger to have all or a portion of the assessed penalty applied to the construction of a compliance project designed to rectify within five years the conditions that led to the violations.

Pursuant to CWC section 13323, the District may:

- Pay the assessed civil liability and waive its right to a hearing before the Central Valley Water Board by signing the enclosed waiver (checking off the box next to item #4) and submitting it to this office by **30 December 2008**, along with payment for the full amount;
- Agree to enter into settlement discussions with the Central Valley Water Board, which may include proposals for the penalty to be applied towards a compliance project

pursuant to CWC section 13385(k), and request that any hearing on the matter be delayed by signing the enclosed waiver (checking off the box next to item #5) and submitting it, along with a letter stating the issues to be discussed, to this office by 30 December 2008; or

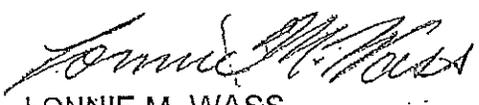
- Contest the Complaint and/or enter into settlement discussions with the Central Valley Water Board without signing the enclosed waiver.

If the District chooses to sign the waiver and pay the assessed civil liability, this will be considered a tentative settlement of the violations in the Complaint. This settlement will be considered final pending a 30-day period of public notice, during which time interested parties may comment on this action by submitting information to this office, attention Jill Walsh. Should the Central Valley Water Board receive new information or comments during this comment period, the Central Valley Water Board's Assistant Executive Officer may withdraw the complaint, return payment, and issue a new complaint.

If the Central Valley Water Board does not receive a signed waiver by 30 December 2008, then a hearing will be scheduled for the 5/6 February 2009 Central Valley Water Board meeting in Rancho Cordova. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify an Administrative Civil Liability Order based on the enclosed Complaint, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability. Specific notice about this hearing and its procedures will be provided under separate cover.

Any comments or evidence concerning the enclosed Complaint must be submitted to this office, attention Jill Walsh, no later than 5 p.m. on 30 December 2008. This includes material submitted by the District to be considered at a hearing and material submitted by interested parties, including members of the public, who wish to comment on the proposed settlement. If the Central Valley Water Board does not hold a hearing on the matter, and the terms of the final settlement are not significantly different from those proposed in the enclosed Complaint, then there will not be additional opportunities for public comment on the proposed settlement. Written materials received after 5 p.m. on 30 December 2008 will not be accepted and will not be incorporated into the administrative record if doing so would prejudice any party.

If you have any questions or comments regarding the Administrative Civil Liability Complaint, please contact Jill Walsh at (559) 445-5130 or Jo Anne Kipps at (559) 445-5035.

  
LONNIE M. WASS  
Supervising Engineer

Enclosure: ACL Complaint R5-2008-0583

See next page for cc list



CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2008-0583

MANDATORY PENALTY  
IN THE MATTER OF

MALAGA COUNTY WATER DISTRICT  
WASTEWATER TREATMENT FACILITY  
FRESNO COUNTY

This Complaint is issued to the Malaga County Water District (hereafter Malaga CWD or Discharger) pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability (ACL), CWC section 13323, which authorizes the Executive Officer to issue this Complaint, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Complaint is based on findings that the Discharger violated provisions of Waste Discharge Requirements (WDRs) Order 99-100 (NPDES No. CA0084239) at its Wastewater Treatment Facility (WWTF).

The Assistant Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds the following:

1. The Discharger owns and operates a wastewater collection, treatment, and disposal system and provides sewerage service for the unincorporated community of Malaga and industrial users. Non-domestic sewage comprises approximately 83 percent of the influent. Tertiary-treated wastewater is discharged to the Fresno Irrigation District Central Canal (Central Canal), a water of the United States.
2. The Central Canal is a distributary of the Kings River via the Fresno and Fancher Creek Canals and feeds into other canals and aqueducts to the south and to the west. The Central Canal is hydraulically connected to Fresno Slough that, during periods of heavy rain, drains to the San Joaquin River, both also waters of the United States.
3. On 28 July 1999, the Central Valley Water Board adopted WDRs Order 99-100 to regulate, in part, the discharge of up to 0.35 million gallons per day (mgd) of tertiary-treated wastewater from the WWTF to Central Canal.
4. On 14 March 2008, the Central Valley Water Board adopted WDRs Order R5-2008-0033, which prescribed new requirements for the discharge and rescinded WDRs Order 99-100.
5. CWC section 13385(i) requires assessment of mandatory penalties and states, in part, the following:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars

cc w/ encl: Ms. Pamela Creedon, Executive Officer, Central Valley Water Board, Rancho Cordova,  
Mr. Kenneth Greenberg, USEPA, Region 9, San Francisco  
Mr. Patrick Pulupa, Office of Chief Counsel, SWRCB, Sacramento  
Mr. Reed Sato, Office of Enforcement, SWRCB, Sacramento  
Ms. Lori Okun, Office of Chief Counsel, SWRCB, Sacramento  
Ms. Emel Wadhvani, Office of Chief Counsel, SWRCB, Sacramento  
Fresno Environmental Health Department, Fresno

(\$3,000) shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations:

- A) Violates a waste discharge requirement effluent limitation.
- B) Fails to file a report pursuant to Section 13260.
- C) Files an incomplete report pursuant to Section 13260.
- D) Violates a toxicity effluent limitation contained in the applicable waste discharge requirements where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

6. CWC section 13323 states, in part, the following:

Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

- 7. WDRs Order 99-100 General Discharge Specification B.2 states, "effluent shall have a pH between 6.0 and 9.0 pH units."
- 8. WDRs Order 99-100 General Discharge Specification B.3 states, "effluent [electrical conductivity or EC] shall not exceed that of source water plus 500  $\mu$ mhos/cm, or 1000  $\mu$ mhos/cm, whichever is less."
- 9. WDRs Order 99-100 Discharge 001 (Central Canal) Specification C.3 states, in part, effluent "turbidity shall not exceed a monthly average of 2 NTU and a daily maximum of 5 NTU."
- 10. On 10 July 2008, Central Valley Water Board staff issued the Discharger a Notice of Violation and a draft Record of Violations identifying violations of WDRs Order 99-100 that are subject to Mandatory Minimum Penalties (MMPs). The draft Record of Violations covers the period of 1 February 2004 through 30 April 2008. According to the Discharger's self-monitoring reports, the Discharger committed one (1) violation of the effluent turbidity limitation, two (2) violations of the effluent pH limitation, and five (5) violations of the effluent EC limitation during the period of 1 February 2004 through 30 April 2008. Attachment A, a part of this Complaint, identifies these eight effluent limitation violations, of which three are chronic violations subject to MMPs pursuant to CWC section 13385(i).
- 11. By 18 September 2008 letter, the Discharger acknowledged the violations identified in the draft Record of Violations identified in Finding 10 and Attachment A to this Complaint.

Following issuance of the Notice of Violation, staff changed the end of the review period from 30 April 2008 to 13 March 2008, when the Central Valley Water Board issued WDRs Order R5-2008-0033.

12. The total amount of the MMPs assessed for the three cited chronic violations is nine thousand dollars (\$9,000).

13. CWC section 13385 (k)(1) states, in part:

In lieu of assessing all or a portion of the mandatory minimum penalties pursuant to subdivisions (h) and (i) against a publicly owned treatment works serving a small community, the state board or the regional board may elect to require the publicly owned treatment works to spend an equivalent amount towards the completion of a compliance project proposed by the publicly owned treatment works, if the state board or the regional board finds all of the following:

(A) The compliance project is designed to correct the violations within five years.

(B) The compliance project is in accordance with the enforcement policy of the state board, excluding any provision in the policy that is inconsistent with this section.

(C) The publicly owned treatment works has prepared a financing plan to complete the compliance project.

14. CWC section 13385 (k)(2) states, in part:

For the purposes of this subdivision, "a publicly owned treatment works serving a small community" means a publicly owned treatment works serving a population of 40,000 persons or fewer or a rural county, with a financial hardship as determined by the state board after considering such factors as median income of the residents, rate of unemployment, or low population density in the service area of the publicly owned treatment works.

15. On 5 August 2008, Central Valley Water Board staff requested State Water Resources Control Board (State Water Board) staff to evaluate the Discharger's eligibility for designation as a small community with a financial hardship.

16. On 21 August 2008, Central Valley Water Board staff received a memorandum from the Executive Director of the State Water Board confirming that the Discharger's WWTF is a publicly owned treatment works serving a small community with a financial hardship within the meaning of CWC section 13385(k)(2). This memorandum can be found as Attachment B, a part of this Complaint.

17. On 26 January 2006, the Central Valley Water Board adopted Administrative Civil Liability Order R5-2006-0003 based on findings of violations of WDRs Order 99-100. The MMPs totaled one million one hundred seven thousand dollars (\$1,107,000). Pursuant to CWC

section 13385(k), the Central Valley Water Board suspended payment of the MMPs as the Discharger proposed to spend an equivalent amount towards completion within five years of an approved compliance project designed to correct the violations. When the full amount of the \$1,107,000 is spent on the project, the penalties will be permanently suspended.

18. By 18 September 2008 letter, the Discharger indicated that, as of 1 June 2008, it had expended \$1,049,588 to complete components of the approved compliance project.
19. The Discharger has also indicated that it anticipates spending approximately \$400,000 more than the \$1,107,000 that it is required to spend on a compliance project pursuant to ACL Order R5-2006-0003. The Discharger may demonstrate that it is going to spend funds in excess of the amount required under ACL Order R5-2006-0003, and these funds may be applied in lieu of assessing the penalties against the Discharger should the Discharger's project meet both the requirements contained in CWC section 13385(k) and those in the State Board's *Water Quality Enforcement Policy*. The Discharger shall submit documentation of its projected expenditures beyond those required under Order R5-2006-0003 within the comment period so that the Board may consider applying these projected expenditures towards the penalties charged in this Complaint. In the event that the Board determines that approving a compliance project is an appropriate way to resolve the allegations contained herein, the Board will develop an ACL Order memorializing that settlement agreement.
20. Issuance of this Administrative Civil Liability Complaint to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with Title 14 California Code of Regulations, section 15321(a)(2).

**MALAGA COUNTY WATER DISTRICT IS HEREBY GIVEN NOTICE THAT:**

1. The Assistant Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of nine thousand dollars (\$9,000).
2. A hearing on this matter will be held at the Central Valley Water Board meeting scheduled on 5/6 February 2009, unless the Discharger does either of the following by 30 December 2008:
  - a. Waives the hearing by completing the attached form (checking off the box next to item #4) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of nine thousand dollars (\$9,000); or

- b. Agrees to enter into settlement discussions with the Central Valley Water Board and requests that any hearing on the matter be delayed by signing the enclosed waiver (checking off the box next to item #5) and returning it to the Central Valley Water Board along with a letter describing the issues to be discussed. This includes documentation that may be submitted to the Board under Finding 19, above.
3. If a hearing on this matter is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

*Loren J. Harlow*

LOREN J. HARLOW, Assistant Executive Officer

*11-21-2008*

Attachment A: Record of Violations

Attachment B: State Board Memorandum dated 18 August 2008 from Dorothy Rice to Jack Del Cohte

JKW: 11/18/08

WAIVER OF 90-DAY HEARING REQUIREMENT FOR  
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent Malaga County Water District (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2008-0583 (hereinafter the "Complaint");
2. I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served" with the Complaint;
3. I hereby waive any right the Discharger may have to a hearing before the California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) within ninety (90) days of service of the Complaint; and
4.  (Check here if the Discharger will waive the hearing requirement and will pay the fine)
  - a. I certify that the Discharger will remit payment for the civil liability imposed in the amount of nine thousand dollars (\$9,000) by check, which contains a reference to "ACL Complaint R5-2008-0583" made payable to the "State Water Pollution Cleanup and Abatement Account." Payment must be received by the Central Valley Water Board by 30 December 2008 or this matter will be placed on the Central Valley Water Board's agenda for adoption as initially proposed in the Complaint.
  - b. I understand the payment of the above amount constitutes a settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period mandated by Federal regulations (40 CFR 123.27) expires. Should the Central Valley Water Board receive new information or comments during this comment period, the Central Valley Water Board's Assistant Executive Officer may withdraw the complaint, return payment, and issue a new complaint. New information or comments include those submitted by personnel of the Central Valley Water Board who are not associated with the enforcement team's issuance of the Complaint.
  - c. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

-or-

5.  (Check here if the Discharger will waive the 90-day hearing requirement, but will not pay at the current time. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted.) I certify that the Discharger will promptly engage the Central Valley Water Board staff in discussions to resolve the outstanding violation(s). By checking this box, the Discharger is not waiving its right to a hearing on this matter. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and Central Valley Water Board staff can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. A hearing on the matter may be held before the Central Valley Water Board if these discussions do not resolve the liability proposed in the Complaint. The Discharger agrees that this hearing may be held after the 90-day period referenced in California Water Code section 13323 has elapsed.
6. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify the proposed Administrative Civil Liability Order, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability.

\_\_\_\_\_  
(Print Name and Title)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

**ATTACHMENT A  
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2008-0583**

**MALAGA COUNTY WATER DISTRICT WWTF  
RECORD OF VIOLATIONS (1 February 2004 to 13 March 2008) MANDATORY PENALTIES  
(Data reported under Monitoring and Reporting Program 99-100)**

Violation ID <sup>1</sup>	Violation Date	Parameter	Units	Period	Violation Type <sup>2</sup>	Limit	Reported Value	MMP (Chronic)	MMP (Serious)
1	2/28/05	Turbidity	NTU	Monthly Average	CAT1	2.0	2.7	E <sup>3</sup>	
2	9/6/05	EC <sup>4</sup>	µmhos/cm	Daily Maximum	OE <sup>5</sup>	811 <sup>5</sup>	840	E <sup>3</sup>	
3	8/9/07	EC	µmhos/cm	Daily Maximum	OE <sup>5</sup>	1,000	1,033	E <sup>3</sup>	
4	8/10/07	pH	pH units	Daily Maximum	OE <sup>5</sup>	9.0	9.2	E <sup>3</sup>	
5	11/25/07	pH	pH units	Daily Maximum	OE <sup>5</sup>	9.0	9.2	E <sup>3</sup>	
6	12/3/07	EC	µmhos/cm	Daily Maximum	OE <sup>5</sup>	782 <sup>5</sup>	820	\$3,000	\$3,000
7	12/10/07	EC	µmhos/cm	Daily Maximum	OE <sup>5</sup>	1,000	1,700 <sup>7</sup>	\$3,000	\$3,000
8	2/15/08	EC	µmhos/cm	Daily Maximum	OE <sup>5</sup>	816 <sup>8</sup>	1,100	\$3,000	\$3,000

<sup>1</sup> Violation ID in CIWQS  
<sup>2</sup> Table of Abbreviations below defines abbreviations used in this table.  
<sup>3</sup> Violation exempt from MMP amount pursuant to CWC Section 13385(1).  
<sup>4</sup> Effluent EC violations considered potentially subject to MMP are those that occurred when daily effluent EC (a) was greater than 1,000 µmhos/cm or (b) was less than 1,000 µmhos/cm but greater than source water EC plus 500 µmhos/cm on days when source water EC was monitored. This approach was followed in evaluating compliance with the effluent EC limitation in AGL Order R5-2006-0003, which was issued for violations subject to MMP's for the period of 1 February 2000 through 30 June 2004.  
<sup>5</sup> Source water EC reported as 311 µmhos/cm on 9/6/05 yields a maximum effluent EC limit of 811 µmhos/cm on that date.  
<sup>6</sup> Source water EC reported as 282 µmhos/cm on 12/3/07 yields a maximum effluent EC limit of 782 µmhos/cm on that date.  
<sup>7</sup> The Discharger provided no information to indicate this value, reported by the lab, is suspect or otherwise inaccurate.  
<sup>8</sup> Source water EC reported as 316 µmhos/cm on 2/15/08 yields a maximum effluent EC limit of 816 µmhos/cm on that date.

Abbreviation Definition

- CAT1 Violation of Group 1 pollutant effluent limitation as defined in Enforcement Policy
- EC Electrical conductivity at 25°C
- CIWQS California Integrated Water Quality System database
- MMP Mandatory Minimum Penalty
- OE<sup>5</sup> Violation of other effluent limitation

ATTACHMENT A  
 ACL COMPLAINT R5-2008-0583  
 MALAGA CWD WWTF  
 RECORD OF VIOLATIONS

VIOLATION SUMMARY						
Violation	Chronic Violations		Serious Violations		Net Number	Net Liability
	Number	Amount	Number	Amount		
pH	2	\$6,000			2	\$6,000
Turbidity	1	\$3,000			1	\$3,000
EC	5	\$15,000			5	\$15,000
Total Violations	8	\$24,000			8	\$24,000
Exempt (E) Violations	5	<\$15,000>			5	<\$15,000>
Net Violations & Penalty	3	\$9,000			5	\$9,000

# EXHIBIT C

1 Neal E. Costanzo SBN 122352  
Michael G. Slater SBN 247302  
2 Costanzo & Associates  
A Professional Corporation  
3 575 E. Locust Avenue, Suite 115  
Fresno CA 93720  
4 Telephone: (559) 261-0163  
Facsimile: (559) 261-0706

5 Attorneys for Malaga County Water District  
6  
7

8 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**  
9 **CENTRAL VALLEY REGION**

10 ) Complaint No. R5-2013-0527  
11 In the Matter of the Administrative Civil )  
Liability )  
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**DECLARATION OF NEAL E. COSTANZO IN SUPPORT OF MOTION OR APPLICATION FOR SEPARATE PRIOR TRIAL ON DEFENSE OF LATCHES, OBJECTIONS TO EVIDENCE AND DETERMINATION OF VALIDITY OF HEARING PROCEDURES ESTABLISHED BY PROSECUTION TEAM**

I Neal E. Costanzo declare:

1. I am the attorney for Malaga County Water District (Malaga) and I am the "legal counsel" referred to as having responded to the Notice of Violation dated July 8, 2010, by letter dated July 22, 2010, to the November 5, 2010, Notice of Violation, responded to by letter of January 6, 2011 and the December 9, 2011, Notice of Violation responded to on January 3, 2010. (See Administrative Liability Complaint (ALC) at ¶¶8 through 13).

2. Not included in evidence submitted to the "Advisory Team" by the "Prosecution Team", or mentioned anywhere in the Complaint is a Notice of Violation dated April 12, 2012 attached and incorporated by reference as Exhibit A or my response to that Notice of Violation attached and incorporated by reference as Exhibit

1 B. This response to that Notice of Violation was in fact responded to by an attorney  
2 employed by the State Water Resources Control Board on May 17, 2012 and I  
3 responded to that letter by letter dated May 23, 2012. The letter by the staff attorney is  
4 attached as Exhibit C and my letter responding to her is attached as Exhibit D. Also not  
5 referred to in the Complaint are included with the "Prosecution Team" evidence  
6 submitted is a July 7, 2010, letter from Pamela Creedon which purports to be a demand  
7 for payment of "outstanding balance of Administrative Civil Liability Order R5-2006-  
8 0003" and my August 9, 2010, response, attached as Exhibits E and F, respectively.

9 3. Included in the Prosecution Team evidence is Order R5-2008-0033, but  
10 not included is Cease and Desist Order R5-2008-0032 and Administrative Civil Liability  
11 Order R5-2006-003. Those documents are submitted with Malaga's evidence.

12 4. In accordance with the letter which transmitted the Administrative Liability  
13 Complaint I sent a letter to Lonnie Wass and Pamela Creedon on May 23, 2013. On  
14 May 28, 2013 Ellen Howard, the "Counsel for the Prosecution Team" submitted a  
15 "Prosecution Response to Objection to Hearing Procedures". The "Response" which  
16 includes a copy of the May 23, 2013 letter together with the "Hearing Procedure for  
17 Administrative Civil Liability Complaint R5-2013-0527" are all attached and incorporated  
18 by reference as Exhibit G. The response was submitted to David Coupe and Ken  
19 Landau, the members of the "Advisory Team" referred to in the Hearing Procedure  
20 document. Coupe is an attorney at the San Francisco Regional Board and Landau is  
21 the Assistant Executive Director, presumably subject to the supervision of the Executive  
22 Director, Creedon. On June 6, 2013, I sent an email to Ms. Howard noting, among  
23 other things, that the Hearing Procedures document did not apprise us to whom  
24 submissions should be filed or how. Howard responded that all submissions were to be  
25 made by Malaga to the Advisory Team. Copies of my June 6, 2013 email to Ms.  
26 Howard together with her response of the same date are attached and incorporated by  
27 reference as Exhibit H.

28 5. On the same date, June 6, 2013, I received an unsolicited email from

1 David Coupe purporting to rule on the multiple requests made in the Prosecution  
2 "Response" and purporting to rule on objections ostensibly made in the May 23, 2013,  
3 letter with respect to the Hearing Procedure document. A copy of that email is attached  
4 and incorporated by reference as Exhibit I.

5 6. Other than as specifically noted above, at no time have I ever received  
6 any response from anyone at the Regional Board or their staff responding to any of the  
7 various correspondence that I have sent addressing Notices of Violations and  
8 Creedon's letter demanding an outstanding balance in excess of \$131,000 which is not  
9 owed.

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

12 //

COSTANZO & ASSOCIATES

13  
14  
15 Dated: June 24, 2013

16 By:  \_\_\_\_\_  
17 Neal E. Costanzo  
18 Attorneys for Plaintiff

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# EXHIBIT A



Linda S. Adams  
Secretary for  
Environmental  
Protection

# California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair

1685 E Street, Fresno, California 93706  
(559) 445-5116 • Fax (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>



Arnold  
Schwarzenegger  
Governor

7 July 2010

Russ Holcomb  
Malaga County Water District  
3580 South Frank Street  
Fresno, CA 93725

## DEMAND FOR PAYMENT OF OUTSTANDING BALANCE OF ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2006-0003, MALAGA COUNTY WATER DISTRICT WASTEWATER TREATMENT FACILITY (CA0084239, RM 373541), FRESNO COUNTY

On 15 April 2005, the Executive Officer of the California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board or Board) issued Administrative Civil Liability Complaint R5-2005-0510 (the "Complaint") to the Malaga County Water District (District). The Complaint charged the District with administrative civil liability in the amount of \$1,107,000 for violations of Waste Discharge Requirements (WDRs) Order 99-100 (NPDES Permit CA0084239). These violations occurred from 1 February 2000 through 30 June 2004, and are subject to Mandatory Minimum Penalties (MMPs) pursuant to California Water Code section 13385(i). On 26 January 2006, the Executive Officer issued Administrative Civil Liability Order R5-2006-0003 (the "Order") to the District in the amount of \$1,107,000. The Order approves the District's implementation of compliance projects (CPs) that would offset \$131,165 in MMPs and permanently suspends \$975,835 in MMPs.

The Order stipulates that the Board will permanently suspend penalties equal to the actual costs expended by the District on all or a combination of CPs 4, 5, 6, and 7 up to the outstanding liability amount of \$131,165. The Order requires the District to pay any amount not permanently suspended if the District fails to complete the CPs within the timelines contained in the Order, and if the Executive Officer demands payment after providing notice to the District of its failure to comply with the Order. Under the terms of the Order, the District is given 30 days from receipt of such notice to remit payment to the State Water Board. The District's failure or inability to acquire sufficient funds shall not be an acceptable defense against a demand for payment.

The Executive Officer hereby notifies the District that the Board considers the District to be in violation of the terms of the Order, and demands payment of the outstanding administrative civil liability. This notice is provided for two reasons. First, the District has failed to meet the compliance project completion dates contained in the Order and, to date, has not completed CPs 4, 5, 6, and 7, which were to have been completed by 1 October 2008. Second, according to the District's 9 December 2009 compliance project update, all but \$70,000 of the planned expenditures for CPs 4, 5, 6, and 7 will be offset by a Small Community Grant issued by the State Water Board and a Community Development Block Grant issued by the California Department of Housing and Community Development. It is the policy of the State Water Board that outstanding liability cannot be offset through grant money.

*California Environmental Protection Agency*

By 6 August 2010, please submit payment of one hundred thirty-one thousand one hundred sixty-five dollars (\$131,165) in the form of a check payable to the State Water Pollution Cleanup and Abatement Account, and submitted to the Central Valley Water Board's Fresno office at the above address. The check shall contain a reference to Administrative Civil Liability Order R5-2006-0003.

It is also important to note that on 21 November 2008, the Board's Assistant Executive Officer issued Administrative Civil Liability Complaint R5-2008-0583 to the District in the amount of \$9,000 for violations of WDRs Order 99-100 (NPDES Permit CA0084239) subject to MMPs that occurred at its WWTF from 1 February 2004 through 13 March 2008. The District's 23 December 2008 letter requests that the additional \$9,000 liability be included in the completion of the CPs approved by the 2006 Order. The District's failure to implement the CPs by the deadlines contained in the Order, and the fact that the CPs will be funded by grants, preclude the Board from authorizing the use of the CPs to offset the penalties at this time.

Board staff has also reviewed the District's self-monitoring reports covering the period from 14 March 2008 through 31 January 2010. The District continues to violate effluent limitations contained in WDRs Order R5-2008-0033, which renews and replaces WDRs Order 99-100, and many of these violations are subject to MMPs. A Notice of Violation and Record of Violations will soon be issued, giving notice that the District has accrued another sixty thousand dollars (\$60,000) of MMPs through 31 January 2010.

If the recent violations are added to the outstanding amount, the District would owe two-hundred thousand, one hundred and sixty-five dollars (\$200,165) while continuing to violate effluent limitations in WDRs Order R5-2008-0033. An alternate proposal involving connecting the District's sewer collection system to the City of Fresno's sewer collection system has been discussed. The Central Valley Water Board is strongly supportive of regionalization efforts, and there may be a way to explore such an option as a way of relieving the District of the liability created by the ongoing effluent limitation violations.

If you have any questions regarding this matter, please contact Jill Walsh at (559) 445-5130.



*for* Pamela C. Creedon  
Executive Officer

cc: Kenneth Greenberg, U.S. EPA, Region IX, San Francisco  
Reed Sato, Office of Enforcement, SWRCB, Sacramento  
Patrick Pulupa, Office of Chief Counsel, SWRCB, Sacramento  
Emel Wadhvani, Office of Chief Counsel, SWRCB, Sacramento  
Charles Garabedian, Jr.; President, Board of Directors, Malaga CWD, Malaga  
Rene Ramirez, Director of Public Utilities, City of Fresno  
Steven Hogg, Assistant Director of Public Utilities, City of Fresno  
Michael Taylor, Provost and Pritchard, Fresno

# EXHIBIT B

NEAL E. COSTANZO  
MICHAEL G. SLATER

LAW OFFICES  
**COSTANZO & ASSOCIATES**  
A PROFESSIONAL CORPORATION  
575 E. LOCUST AVENUE  
SUITE 115  
FRESNO, CALIFORNIA 93720-2928  
(559) 261-0163

FAX (559) 261-0706  
OUR FILE NO. 03024-005

August 9, 2010

Pamela C. Creedon, Executive Officer  
California Regional Water Quality Control Board  
Central Valley Region  
1685 E Street  
Fresno, CA 93706

**Re: Demand for Payment of \$131,165**

Dear Ms. Creedon:

Your July 7, 2010, letter to Malaga County Water District has been referred to me for a response. The demand for payment of \$131,165 ostensibly due as the balance of an amount not permanently suspended under Administrative Civil Liability Order R5-2006-0003 is completely unfounded and is not going to be complied with.

The subject Order states that the Regional Water Quality Control Board (RWQCB) will and has agreed to permanently suspend penalties that are equal to the cost of compliance projects (CPs) which are identified as CPs 4, 5, 6 and 7. The letter argues that the \$131,165 is due under the subject Order for "two reasons," both of which are completely baseless. The first claimed reason for the incorrect conclusion that the stated amount is owed is that the District "failed to meet the compliance project completion dates" which you indicate to be October 1, 2008. RWQCB received a letter from the District dated September 18, 2008, providing a status report on the subject CPs and an extension request to allow completion of the CPs after the October 1, 2008, date specified in the order. RWQCB granted that extension request to and including December 31, 2008. The District sent RWQCB a letter on January 20, 2009, with additional information associated with the CPs and a request that RWQCB consider the executed agreement between the District and the contractor retained to perform the work associated with CPs as sufficient for deferral of penalties or fines associated with the subject Order. RWQCB never responded to this request.

Pamela C. Creedon, Executive Officer  
August 9, 2010  
Page 2

Needless to say, having granted the extension requested initially and, by failing to respond to, or taking action to insist upon strict compliance with the extended deadline, in the face of a written submission by the District indicating that the CPs were moving forward and that an additional extension was necessary to permit completion, RWQCB cannot now take the contrary position that the penalties for which payment is demanded were not, in fact, permanently suspended by the District's "implementation of [those] compliance projects," which, by the terms of the Order, offset the \$131,165 you are now demanding be paid.

The second reason for your claimed right to receive payment of the \$131,165 in penalties that have been offset by implementation of these compliance projects is particularly specious. You claim, for the first time, the existence of a policy of the "State Water Board," that the "outstanding liability cannot be offset through grant money." If any such policy does exist, which is exceedingly doubtful, it would be ineffective as against Malaga County Water District unless reflected by a published, codified regulation of the State Water Board. There is no such regulation. We do not believe there is any such policy. The reason we do not believe there is any such policy is because your conduct with respect to this Order is completely inconsistent with the claimed existence of that policy. There are no references in the subject Order that grant funding of CPs is not allowed. Your letter acknowledges receiving the District's compliance project updates through December 2009. All but approximately \$50,000 (most of which was retention) had been paid by December 2009 to the contractor for the CPs that are the subject of this Order. The technical report for compliance projects submitted to RWQCB expressly acknowledges that the District was submitting applications to the State Water Resources Control Board for assistance and the draft Administrative Liability Order prepared by RWQCB states unequivocally the District's intent to secure funding for the project from various grant programs. Thus, grant funding of CPs is specifically allowed by the subject Order, which plainly would override anything in some apparently unwritten, unpublished policy you claim to exist at the State Water Resources Control Board. The CPs have been completed. Notice of completion was approved by the District Board on July 13, 2010.

Needless to say, RWQCB cannot expressly permit the District to implement the CPs in precisely the manner in which they have been implemented and completed and then claim, contrary to the terms of its order, that the fine is not permanently suspended and offset by completion of the projects. Because your demand for payment is baseless, unfounded and completely inconsistent with the terms of the Order itself, Malaga County Water District has no intention of complying with the demand made in your July 7, 2010, letter. The Notice of Violation mentioned in your letter has already been separately responded to. It is obvious that both of these demands are the product of a completely unauthorized effort by RWQCB staff to promote some ill-defined "regionalization efforts" that would result in the discontinuation of the operation of Malaga's wastewater treatment facilities. These "efforts" are well in excess of the statutory power authority and jurisdiction

Pamela C. Creedon, Executive Officer  
August 9, 2010  
Page 3

of RWQCB and further threats of this nature will be met by the filing of an application for a writ of mandate.

Very truly yours,

**COSTANZO & ASSOCIATES**

Neal E. Costanzo

NEC/tm

cc: Michael Taylor, Provost & Pritchard  
Russ Holcomb

# EXHIBIT C



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

MCWD  
400.02  
(2012)

**Central Valley Regional Water Quality Control Board**

12 April 2012

**CERTIFIED MAIL**  
70112000000117692463

**NOTICE OF VIOLATION**

Mr. Russ Holcomb  
Malaga County Water District  
3580 South Frank Street  
Fresno, CA 93725

**VIOLATION OF WASTE DISCHARGE REQUIREMENTS WDR ORDER R5-2008-0033 AND  
CEASE AND DESIST ORDER R5-2008-0032, MALAGA COUNTY WATER DISTRICT  
WASTEWATER TREATMENT FACILITY (NPDES CA0084239, RM 384386), FRESNO  
COUNTY**

Central Valley Water Board staff (staff) reviewed Malaga County Water District (District) WWTF Waste Discharge Requirements Order (WDR) R5-2008-0033, Cease and Desist Order (CDO) R5-2008-0032 (both adopted on 14 March 2008) and evaluated the District's compliance. The District violated, is in violation of, or threatens to violate the WDR and CDO as follows:

**REPORT REQUIREMENTS**

**WDR R5-2008-0033 requires the following reports:**

- 1) By 12 June 2008, Provision VI. C. 2.a.i required a Toxicity Reduction Evaluation (TRE) work plan that included procedures for accelerated chronic toxicity monitoring and TRE initiation. On 19 June 2008, the District submitted its initial TRE work plan. By 5 August 2008 letter Central Valley Water Board staff (staff) deemed the TRE work plan incomplete.
  - 9 September 2008 – revised report received – report complete - 69 days late.
- 2) By 14 September 2008, Provision VI. C. 2.b required the District to submit a work plan and schedule for providing best practicable treatment or control (BPTC) as required by Resolution 68-16. On 24 July 2008, the District submitted its BPTC evaluation and submitted supplemental information on 9 September 2008 and 1 May 2009. By 24 September 2009 letter, staff deemed the BPTC evaluation incomplete.
  - 23 October 2009 – revised report received – 404 days late
- 3) By 15 September 2008, Provision VI. C. 2.d requires the District to submit a technical report evaluating the groundwater monitoring system. On 15 July 2008, the District submitted the report with supplemental information submitted on 3 November 2008.

KARL E. LONGLEY SCD, P.E., CHAIR | PAMELA G. CREEDON, EXECUTIVE OFFICER  
1885 E Street, Fresno, CA 93708 | [www.waterboards.ca.gov/centralvalley](http://www.waterboards.ca.gov/centralvalley)

- By 24 September 2009 letter, staff deemed the report incomplete. On 23 October 2009, the District submitted an updated evaluation.
- 23 October 2009 – revised report received - 403 days late
- 4) Within 21 days of the end of the quarter, Monitoring and Reporting Requirements No. R5-2008-0033 D. 4. Pretreatment Reporting Requirements require the District to submit quarterly reports (the 4<sup>th</sup> quarter monitoring is to be included with the annual report).
- 2<sup>nd</sup> Quarter 2008 Pretreatment – not received – due 21 July 2008
  - 3<sup>rd</sup> Quarter 2008 Pretreatment – not received – due 21 October 2008
  - 2<sup>nd</sup> Quarter 2009 Pretreatment – not received – due 21 July 2009
  - 3<sup>rd</sup> Quarter 2009 Pretreatment – not received – due 21 October 2009
  - 1<sup>st</sup> Quarter 2010 Pretreatment – not received – due 21 April 2010
  - 2<sup>nd</sup> Quarter 2010 Pretreatment – not received – due 21 July 2010
  - 3<sup>rd</sup> Quarter 2010 Pretreatment – not received – due 21 October 2010
  - 1<sup>st</sup> Quarter 2011 Pretreatment – not received – due 21 April 2011
  - 3<sup>rd</sup> Quarter 2011 Pretreatment - received 10/31/2011-10 days late
- 5) By 28 February each year, Monitoring and Reporting Requirements R5-2008-0033, D. 4 Pretreatment Reporting Requirements, require the District to submit annual pretreatment reports.
- 2008 Annual Pretreatment - received 3 April 2009 - report 34 days late
  - 2009 Annual Pretreatment – not received – due 28 February 2010
  - 2011 Annual Pretreatment - received 1 March 2012 – report 2 days late
- 6) By 19 February each year, Provision VI. C. 5.b.iv Sludge/Biosolids Discharge Specifications require the District to comply with existing federal and state biosolids laws and regulations, including permitting requirements and technical standards included in 40 CFR 503, which requires an annual biosolids report due to USEPA. On 13 March 2012, staff contacted USEPA and was told that the District has never submitted an annual biosolids report.
- 2008 Annual Biosolids – not received – due 19 February 2009
  - 2009 Annual Biosolids – not received – due 19 February 2010
  - 2010 Annual Biosolids – not received – due 19 February 2011
  - 2011 Annual Biosolids – received 15 March 2012, deemed incomplete by USEPA (see attached 20 March 2012 email)
- 7) By 14 July 2008, Provision VI. C. 7.a.ii Treatment Feasibility Study required the District to submit a work plan and time schedule to perform an engineering treatment feasibility study.
- 9 December 2009 - report received - 513 days late.

**CDO R5-2008- 0032 requires the following reports:**

- 8) By 14 April 2008, Ordered item 2.a. required the District to submit a work plan and proposed implementation schedule for improvement of WWTF influent flow metering.
  - 21 April 2008 report received – 7 days late
- 9) By 14 March 2008, Ordered item 2.b. required the District is to submit a technical report certifying the influent flow modifications are complete and meter is properly calibrated. On 6 August 2009 the District submitted flow meter callbration certificate.
  - 9 December 2009 – report received – 635 days late
- 10) By 13 June 2008, Ordered item 3.a required the District to submit the results of a study evaluating the WWTF treatment and disposal capacity with a work plan and time schedule to implement short-term and long-term measures to meet WWTF treatment and disposal needs through at least 2028. On 28 July 2008, the District submitted the report. On 24 September 2009, staff deemed report incomplete and inadequate and required a revised report. A revised report was never received.
  - Treatment and Disposal Capacity – not received – due 13 June 2008
- 11) By 14 March 2011, Ordered item 3.d requires the District complete short-term measures and to submit a technical report certifying modifications were completed as designed. On 29 April 2011, the District submitted report indicating that not all short-term measures were complete.
  - Short-term Measures – all measures not completed – due 14 March 2011

As stipulated in the WDR, and CDO, the District is required to submit technical and monitoring reports pursuant to section 13267 and 13383 of the California Water Code. To date, the reports cited above do not meet the requirements of the WDR and CDO. Please be advised that section 13268 of the California Water Code authorizes assessment of civil administrative liability of up to \$1000 per day a report is late

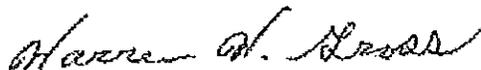
Many of the above referenced reports have not been submitted or were found to be incomplete. Submit any available reports identified as not submitted forthwith. Potential civil liability continues to accrue for late and incomplete reports.

**SELF-MONITORING REPORTS REVIEW**

Staff reviewed the District's self-monitoring reports for non-mandatory minimum penalty violations for the period of 14 March 2008 to 31 January 2012. The District violated, is in violation of, or threatens to violate WDR R5-2008-0033 as follows:

- 12) Facility Effluent Limitations IV.A.2 for exceeding the EC limit at Discharge Point 002 - one violation.
- 13) Receiving Water Limitations V.B.1 for exceeding the EC ground water limitation of 900 umhos/cm - 24 violations
- 14) Receiving Water Limitations V.B.2 for exceeding the nitrogen ground water limitation of 10 mg/L - two violations
- 15) Provision VI. B. for failure to comply with the Monitoring and Reporting Program by submitting deficient self-monitoring reports. From 14 March 2008 to 31 January 2012 there were 65 deficient monitoring violations.
- 16) Provision VI. B. for failure to comply with the Monitoring and Reporting Program by submitting deficient self-monitoring reports. From 14 March 2008 to 31 January 2012 there were 87 deficient reporting violations.
- 17) Provision VI. C. 4. iv for failure to maintain two feet of operating freeboard in the ponds - 272 violations in 2008 and 2009.
- 18) Provision VI. C. 5.c Sludge/Biosolids Disposal Requirements for failing to dispose of biosolids as authorized by the WDR. The District states in its 2011 pretreatment and annual report that it is composting biosolids onsite, contrary to the WDR.

If you have any questions regarding this matter, please contact Jill Walsh at (559) 445-5130 or at [jwalsh@waterboards.ca.gov](mailto:jwalsh@waterboards.ca.gov).



WARREN W. GROSS  
Senior Engineering Geologist  
CEG 1528, CHG 681

Attachment: 20 March 2012 email from USEPA

cc: Ellen Howard, Office of Enforcement, State Water Board, Sacramento  
Dan Radulescu, Central Valley Water Board, Rancho Cordova  
Charles Garabedian, Jr., Malaga County Water District, Fresno  
Michael Taylor, Provost & Pritchard, Fresno  
Neal E. Costanzo, Costanzo & Associates, Fresno

# EXHIBIT D

NEAL E. COSTANZO  
MICHAEL G. SLATER

LAW OFFICES  
**COSTANZO & ASSOCIATES**  
A PROFESSIONAL CORPORATION  
575 E. LOCUST AVENUE  
SUITE 115  
FRESNO, CALIFORNIA 93720-2928  
(559) 261-0163

FAX (559) 261-0706  
OUR FILE NO. 03024-005

May 10, 2012

SENT VIA U.S. MAIL/EMAIL: [jwalsh@waterboards.ca.gov](mailto:jwalsh@waterboards.ca.gov)

Warren W. Gross, Senior Engineering Geologist  
California Regional Water Quality Control  
Board, Central Valley Region  
1685 E. Street  
Fresno, CA 93706

**Re: Notice of Violation Dated April 12, 2012**

Dear Mr. Gross:

Malaga County Water District received your purported Notice of Violation dated April 12, 2012. They have referred it to me for a response because the Notice is premised on a complete disregard of the law that regulates the ability of your agency to issue such notices. The notice is based on clearly fabricated factual allegations.

It is unclear from the notice, as is normally the case with respect to correspondence we receive from you, what it is you are attempting to do by the issuance of this supposed Notice of Violation, and whether there is any violation of the type you refer to in the notice. As you know, Malaga has been the recipient of numerous notices of violation, issued by you, based upon purported, but nonexistent, violations of the very same cease and desist order you reference in this letter and dating back to the issuance of the order. We have consistently responded to these notices of violation by pointing out that your claims are demonstrably incorrect. Each time we respond to one of your purported notices of violation, we never receive any response back from you or your agency.

While your agency does have the authority to impose fines for violations of statute, regulation, or orders statutes and regulations also prescribe what is and is not a violation and the procedures that must be employed to provide notice of a violation and a proposed fine that comport with applicable requirements of Constitutional due process and give the proposed citee appropriate and complete notice and an opportunity to be heard. Your purported notices of violation never conform to any of these requirements and yet they always threaten the imposition of fines. We have advised you previously that your issuance of these purported notices of violations is unlawful and in excess of your agency's authority. We have advised you repeatedly that if you do not stop the issuance of the supposed notices of violation, we will be forced to file in court the appropriate petition for writ of mandate in addition to an administrative complaint directed against you personally. You have failed to heed any of these warnings and appear to be bent on persisting in the

practice of unlawfully threatening the Malaga County Water District with some form of unspecified sanction.

A review of the various items (numbered 1 through 18) in your letter, to the extent the detail disclosed in that letter permits, should demonstrate for you clearly that what you are doing by issuing these notices of violation is making blatantly false misrepresentations for the purpose of advancing an ulterior, but not so very carefully hidden agenda. In the interests of brevity, the items below correspond to the numbered "violations" listed in your letter.

### REPORT REQUIREMENTS

1. TRE Workplan. We agree. The TRE workplan was required by the terms of the order referenced in your letter to be submitted by June 12, 2008. Malaga submitted that report on June 19, 2008. Unless there was an extension, this would mean that the report was submitted 7 days late. You conclude it was submitted 89 days late. Because the 7 day tardy report is a violation that occurred, if at all, more than three years ago, it is not a matter about which the Board may lawfully complain at this point. There is a statute of limitations that applies to your agency. It is precluded from making a determination that a violation occurred, and cannot pursue the violation more than three years after the violation is claimed to have occurred.

We suspect that an extension was provided for submission of this report, but given the fact that your supposed violation is premised upon something that happened far longer than three years ago, we are not going to expend the resources to search our files to determine whether that extension was or was not provided. The violation, if it occurred, simply cannot be pursued by your agency consistent with the requirements of law. Your agency provided comments in response to the TRE report submitted on June 19, 2008, and the District timely responded to those comments by submitting a revised TRE Workplan on September 3, 2008. That workplan was approved by your agency on March 17, 2009. How you conclude the report was submitted 89 days late is a mystery. The mystery, however, is not one that the District is going to make any attempt to resolve, because it simply does not matter. A violation occurring in 2008 simply cannot be pursued.

2. BPTC Workplan and Schedule. The order referred to in your letter does indeed require the BPTC Workplan and Schedule be submitted by September 14, 2008. The District submitted that workplan on July 24, 2008. It supplemented the report on September 9, 2008. Your agency required revisions to what had been submitted and the District responded to those comments on or about October 23, 2009. There is no conceivable violation here. Even if there were, it happened too long ago for your agency to pursue. These facts are indicative of the improper motivation that resulted in the issuance of this particular notice of violation and the prior notices of violation authored by you.

3. Groundwater Monitoring System. Again, the workplan referred to in this item of your letter was submitted prior to the deadline and supplemented thereafter. You repeatedly refer to letters issued by your agency as determinations that the reports are incomplete. That is not what they are. They are simply requests for additional information or corrections or changes to the report that was submitted that were all complied with, in timely fashion. Once again, there is absolutely no basis in fact for your supposed determination of a violation.

4. Quarterly Pretreatment Reports. From the description given in your letter, it is impossible to determine what it is you are referring to as having been not received. With respect to those Pretreatment Reports you indicate were not received at any time prior to April 2010, the lack of receipt cannot be treated as a violation, assuming it occurred at all, because it happened too long ago. With respect to those pretreatment reports you indicate not having received after that date, you need to go back and look at your file. We believe you received each and every one of these reports. The making of false representations in support of a purportedly official notice of violation and apparent attempt to impose some sort of fine or sanction is unlawful and perhaps criminal. If you are requesting that we submit something to you that has not been previously submitted, then you need to apprise us of that fact. Otherwise, we will assume that this item of your letter is yet another false allegation that need not be responded to.

5. Annual Pretreatment Reports. The basis on which you characterize two reports as having been received late is not disclosed. That you claim to not have received a report in February of 2010 should have been brought to the District's attention within a reasonable period of time thereafter. It was not. With respect to these particular reports, and the pretreatment reports you claim to have not received in Item 4 of your letter, you do not indicate one way or another whether you wish to receive a report that you claim not to have received. Please advise us what it is you are seeking by these items so that we may comply, to the extent that is warranted by law.

Your Notice of Violation is light on detail and heavy on conclusions. We cannot evaluate your conclusions without the proper information. Because the dates on which you refer as having received a report does not coincide with the dates our records show the report having been submitted, it is simply not possible to respond to claims that the 2008, 2010, and 2011 reports were submitted late. Further, from our records it does appear that any report not timely submitted was submitted in accordance with an agreement with your agency on extending the due date. We note that you indicate that you did not receive a 2009 report. We have no way of determining whether or not you in fact received this or any other report that you claim not to have received.

6. Biosolids Reports. You indicate several biosolid reports were not received between 2009 and 2011. Those reports are included in the annual reports submitted to your agency. You have received them. You acknowledge receipt of the 2011 biosolids report and claim based on an attached email that this report was deemed incomplete. The

attached email is simply not reasonably susceptible to that interpretation. The email simply, and only states that "some additional information is needed" which is described in the email. You deceptively fail to acknowledge that the email was responded to. Again, this claimed "violation" never occurred and that is apparent from material in your possession.

7. Treatment Facility Study, Workplan and Schedule. There was no response to what was submitted on December 8, 2009. Again, there have been numerous communications with your agency by which deadlines set by the order you refer to have been extended. This is apparently why there was never any complaint by your agency, until your April 12, 2012, letter, about the timeliness of a report received October 9, 2009, nearly four years prior. Needless to say, even if there had been a violation, it is far too late to raise the purported violation now and your agency is precluded by law from attempting to do so.

8. Influent Flow Metering. The response applicable to Item 7 of your letter applies with equal force to Item 8.

9. Certification of Influent Flow of Metering Improvements. Again, the response to Item 7 of your letter is applicable to Item 9.

10. Short Term and Long Term Measures. You indicate that a revised report requested on September 24, 2009, was not received. It is apparent that you are mischaracterizing the September 24, 2009, correspondence from your agency as there is an October 27, 2009, letter to your agency from the District responding to that letter. We cannot discern from your letter what it is you are claiming was "not received," because the claim that something was not received is premised upon a misrepresentation of what occurred.

11. Short Term Measures Completion. You indicate that "short term measures" were not completed as required by March 14, 2011. Yet, you acknowledged receiving the District's April 29, 2011 report which you mischaracterize in Item 11 of your letter. That report apprised you that the March 14, 2011, deadline would not be met, because of funding delays caused by the State of California making it impossible to complete those measures by that due date. This is the first complaint we have received, a year later, about the reported impossibility of meeting that deadline. The fact that the State of California withholds funding for improvements specifically authorized to be made only with that funding cannot possibly amount to any violation of any requirement of any order. If you wish to charge this as a violation or seek some sort of fine or sanction, you need to do so in the manner required by your regulations, which you consistently ignore. Malaga will respond accordingly.

Items 12 through 18 of your letter are indecipherable. Items 12 through 14 do not specify any purported violation occurring at any particular time. We cannot discern what it is you are referring to when you say there have been "24 violations" of "exceeding the EC

Warren W. Gross, Senior Engineering Geologist  
May 10, 2012  
Page 5

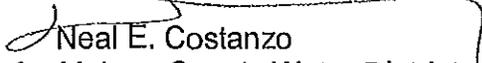
. . . Limitation," for example, occurring on unspecified dates, or disclosed by unspecified documents. We presume you are simply referring, once again, to the standard "Attachment A" that has accompanied all prior notices of violation we have received from you. Items 15 and 16 refer to the period between March 14, 2008, and January 31, 2012, without identifying any particular violation occurring on any particular date. Again, we presume this is a reference to your prior "Attachment A." You will note that you received, consistently, responses to each and every one of those purported notices of violation that you apparently attempt to repeat here. The same is true of Item 17, apparently, since we cannot determine what violations you are referring to from the reference that they occurred sometime in "2008 and 2009."

Even you should be able to recognize that a "notice of violation" as provided for by your agency's regulations, is something that is legally required to provide precise, accurate notice of an alleged violation and a meaningful opportunity to respond. Your April 12, 2012, letter does none of that. If you are attempting to identify some violation, and impose some requirement or sanction, the law requires that you specifically identify the alleged violations and actually provide a meaningful opportunity to respond. Without any precise identification of any of the violations referred to in Items 12 through 18 of your letter, the District cannot intelligently respond.

We have repeatedly advised you that you are acting in excess of your agency's jurisdiction and in direct violation of your own agency's regulations relating to how it is required to address what are claimed to be violations of any requirement or order of the regional board. Your persistent issuance of what are effectively meaningless notices of violation is, itself, a violation of law. We would welcome the opportunity to address with you, face to face, whatever legitimate concerns or complaints your agency has about Malaga's wastewater treatment and discharge activities; but, we very obviously cannot, and will not, continue to respond to your apparently unauthorized issuance of notices of violation that make absolutely no sense. The next notice of violation we receive which is issued by you will be responded to by a petition either in the Superior Court or before the Regional Water Quality Control Board which seeks to specifically restrain you and your agency from disregarding the requirements you are obligated to observe by law.

Very truly yours,

**COSTANZO & ASSOCIATES**

  
Neal E. Costanzo  
Attorney for Malaga County Water District

NEC/js

cc: Michael Taylor  
Russ Holcomb

EXHIBIT E



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## State Water Resources Control Board

May 17, 2012.

*Via US Mail Only*

Mr. Neal Costanzo  
Costanzo & Associates  
575 E. Locust Avenue, Suite 115  
Fresno, California 93720-2928

**SUBJECT: NOTICE OF VIOLATION DATED APRIL 12, 2012**

Dear Mr. Costanzo,

The State Water Resources Control Board's Office of Enforcement represents the Central Valley Regional Water Quality Control Board (Central Valley Water Board) enforcement staff who issued Malaga County Water District the April 12, 2012, Notice of Violation (NOV). We are in receipt of your bumptious May 10, 2012, letter in response to the NOV. As you know, a NOV is not a formal enforcement action but rather a notice of an alleged instance of noncompliance with Central Valley Water Board requirements.

The cited instances of noncompliance in the April 12, 2012, NOV were identified by the staff after a comprehensive review of the file to determine whether Malaga County Water District complied with the terms of Waste Discharge Requirement Order No. R5-2008-0033 (Permit) and Cease and Desist Order No. R5-2008-0032 (CDO). The staff identified discrete categories of violation where Malaga County Water District did not comply with Central Valley Water Board directives in the Permit or the CDO. If the Central Valley Water Board staff, in consultation with the Executive Officer, decides to propose a penalty for any alleged violations, then Malaga County Water District will receive notice of an administrative civil liability hearing and an opportunity to be heard by the Central Valley Water Board that comports with all procedural due process requirements.

Please direct all legal correspondence pertaining to Malaga County Water District to my attention and to my colleague, Staff Counsel Ellen Howard, by U.S. Postal Service to the State Water Resources Control Board, Office of Enforcement, 1001 I Street, 16<sup>th</sup> Floor, Sacramento, California, 95816. You may also send correspondence via electronic mail to the following addresses: [MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov) and [EHoward@waterboards.ca.gov](mailto:EHoward@waterboards.ca.gov).

Sincerely,

A handwritten signature in cursive script, appearing to read "Mayumi E. Okamoto".

Mayumi E. Okamoto  
Staff Counsel  
Office of Enforcement

cc: See next page.

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

cc: (via email only)

**Central Valley Regional Water Quality Control Board**

Mr. Clay Rodgers  
Assistant Executive Officer  
[CRodgers@waterboards.ca.gov](mailto:CRodgers@waterboards.ca.gov)

Mr. Lonnie Wass, Supervisor  
Non-15, NPDES, UST, Stormwater & Cleanup Section  
[LWass@waterboards.ca.gov](mailto:LWass@waterboards.ca.gov)

Mr. Warren Gross  
Senior Engineering Geologist  
Non-15, NPDES, UST, Stormwater & Cleanup Section  
[WGross@waterboards.ca.gov](mailto:WGross@waterboards.ca.gov)

Ms. Jill Walsh  
Compliance/Enforcement Monitoring Data Unit  
Non-15, NPDES, UST, Stormwater & Cleanup Section  
[JWalsh@waterboards.ca.gov](mailto:JWalsh@waterboards.ca.gov)

**State Water Resources Control Board**

Ms. Ellen Howard  
Staff Counsel  
Office of Enforcement  
[EHoward@waterboards.ca.gov](mailto:EHoward@waterboards.ca.gov)

# EXHIBIT F

NEAL E. COSTANZO  
MICHAEL G. SLATER

LAW OFFICES  
**COSTANZO & ASSOCIATES**  
A PROFESSIONAL CORPORATION  
575 E. LOCUST AVENUE  
SUITE 115  
FRESNO, CALIFORNIA 93720-2928  
(559) 261-0163

FAX (559) 261-0706  
OUR FILE NO. 03024-005

May 23, 2012

Mayumi E. Okamoto  
Staff Counsel  
Office of Enforcement  
State Water Resources  
Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**Re: Notice of Violation (NOV) Dated April 12, 2012**

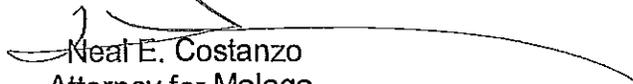
Dear Ms. Okamoto:

You are incorrect, I am not aware that a "NOV is not a formal enforcement action but rather a notice of an alleged instance of non-compliance with Central Valley Water Board Requirements". The only notices of violation authorized by statute or regulation are formal enforcement actions. Staff has no authority whatsoever to make a determination that a violation occurred, or to provide notice that he has made that determination to Malaga County Water District. Unfortunately, because we receive these NOV's constantly, always issued by the same individual, and noting purported violations that plainly never occurred, we always feel compelled and will continue to respond to the issuance of these NOV's by pointing out that they are premised entirely on the willingness of a staff person to make boldly false statements. We believe your agency is failing to act in accordance with the law. If we receive another NOV purporting to make determinations that some requirement was not complied with by Malaga County Water District, we will file a Petition for Writ of Mandate seeking an order enjoining you from continuing with this unauthorized practice.

Malaga County Water District will not sit idly by while staff members unlawfully make determinations of violations and publish those determinations to other persons or entities or agencies. We know what the agenda of the Central Valley Water Board is and it will not be permitted to rely on its unlawful and demonstrably false NOV's to advance that agenda.

Very truly yours,

**COSTANZO & ASSOCIATES**

  
Neal E. Costanzo  
Attorney for Malaga  
County Water District

NEC/js

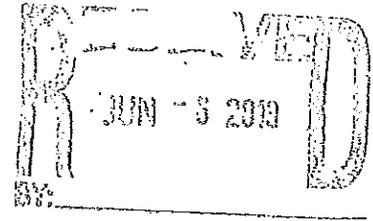
cc: Russ Holcomb

EXHIBIT G

**Walsh, Jill@Waterboards**

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**From:** Howard, Ellen@Waterboards  
**Sent:** Tuesday, June 04, 2013 4:22 PM  
**To:** Walsh, Jill@Waterboards  
**Subject:** FW: ACLC R5-2013-0527: Prosecution Team Response to Objections to Hearing Procedures  
**Attachments:** 20130528\_185749.pdf



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**From:** Howard, Ellen@Waterboards  
**Sent:** Tuesday, May 28, 2013 7:14 PM  
**To:** Coupe, David@Waterboards; Landau, Ken@Waterboards  
**Cc:** Walsh, Jill@Waterboards; Wass, Lonnie@Waterboards; Gross, Warren@Waterboards; Rodgers, Clay@Waterboards; Creedon, Pamela@Waterboards; [ncostanzo@costanzolaw.com](mailto:ncostanzo@costanzolaw.com); [rholcomb@malagacwd.org](mailto:rholcomb@malagacwd.org); Ralph, James@Waterboards  
**Subject:** ACLC R5-2013-0527: Prosecution Team Response to Objections to Hearing Procedures

FOR PURPOSES OF EX PARTE COMMUNICATIONS, THE DISCHARGER IS CC'ED ON THIS EMAIL

Mr. Landau and Mr. Coupe-

On May 23, 2013 the Prosecution Team received correspondence related to the above-referenced ACLC against Malaga County Water District. Attached, please find the Prosecution Team's response to the Objections to the Hearing Procedures raised in the May 23 letter. For your convenience, a copy of Malaga's original letter has been included as an attachment to our reply.

A hard copy of this communication will also be mailed to the discharger.

Ellen Howard  
Counsel for the Prosecution Team

Ellen Howard  
Staff Counsel, Office of Enforcement  
State Water Resources Control Board  
1001 "I" Street  
Sacramento, CA 95814  
916.341.5677

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

In the matter of Administrative Civil Liability  
Complaint No. R5-2013-0527

Prosecution Team Response to Objection to  
Hearing Procedures

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**PROSECUTION RESPONSE TO OBJECTION TO HEARING PROCEDURES;  
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2013-0527**

TO ALL PARTIES HEREIN;

The Prosecution Team is in receipt of a 23 May 2013 letter addressed to various members of the Central Valley Water Board Prosecution Staff from Malaga County Water District (Malaga). The letter, which has been attached to this brief and referenced herein, contains multiple loosely defined challenges to Administrative Civil Liability Complaint R5-2013-0527 (May 2013 ACLC). The 23 May 2013 letter, which has been submitted with this brief as Attachment A, does not clearly define specific objections to factual allegations or procedural process associated with the May 2013 ACLC. However, after repeated review of the obtuse arguments contained in counsel's letter, the Prosecution Team has deciphered four categories of challenges to the Regional Board's Hearing Procedures as Issued and its regulatory authority. The Prosecution Team is responding to those challenges as set forth below.

**I. Malaga's Objections to the Hearing Procedures for the May 2013 ACLC are Untimely**

Firstly, Malaga argues that the Hearing Procedures are improper. The Prosecution Team notes that this objection was not made until 23 May 2013, thirteen (13) days after the deadline to submit Objections to the Hearing Procedures contained in the Hearing Procedures document itself. As such, Malaga's objection is untimely.

Malaga correctly points out that the Hearing Procedures were not contained within the May 2013 ACLC package. Due to a clerical oversight, the Hearing Procedure document was inadvertently left out of the

mailing containing the ACLC. Staff immediately noticed this error and sent a second mailing containing the Hearing Procedures on 3 May 2013. This was sent via certified mail and were signed for by Malaga staff on 6 May 2013. The hearing procedures were also sent via email addressed to both Malaga's counsel as well as to the Malaga's general manager via the email address listed in CIWQS (Attachment B). Records from the CIWQS Help Center show that the email address on file for Malaga is valid and has successfully received correspondence on multiple occasions over the last 6 months (Attachment C). The Prosecution Team finds it very hard to believe that no one from Malaga received the Hearing Procedures until 16 May 2013 as alleged in the 23 May 2013 letter. We request that the Advisory Team reject this objection because it was not filed before the 10 May 2013 deadline.

## **II. Malaga's challenges to the contents of the Hearing Procedures are Not Supported by Statute or Regulation**

Even if the Advisory Team chooses entertain Malaga's untimely objections, the Prosecution disagrees with Malaga's assertions that the Hearing Procedures do not meet the requirements of the California Code of Regulations. Malaga argues that the Hearing Procedures issued for the May 2013 ACLC are an "absolute nullity" and were not issued under authority of the presiding officer for this adjudicatory proceeding in accordance with 23 CCR §648 et.seq (p. 2-3). It argues that the Hearing Procedures are inappropriate because they "require the submission of all evidence on an unspecified date in advance of the hearing" and that they have improperly waived the requirements of 23 CCR §648 et.seq. without the input of the presiding officer as required by §648(d). Counsel's conclusions are baseless and without merit.

Firstly, Malaga's claim that the Hearing Procedures require it to "submit evidence at an unspecified date" is simply inaccurate. Page 6 of the Hearing Procedures clearly states that 25 June 2013 is the Discharger's deadline to submit all information required under "Submission of Evidence and Policy Statements."

Secondly, Malaga's claim that the Hearing Procedures do not meet the requirements of the California Code of Regulations is incorrect. The Hearing Procedures issued to Malaga with the May 2013 ACLC follow the Central Valley Water Board's pre-approved Hearing Procedure format. These pre-approved hearing procedures were adopted by the Board Chair after thorough review by the Board's legal advisors to ensure that they meet all statutory requirements and regulatory requirements for adjudicatory proceedings. Adoption of the hearing procedures by the Board's chairman satisfies the requirements of Section 648(d); as the "presiding officer," the Board Chair has the authority to waive any additional procedural requirement not specifically provided within the Hearing Procedures, including Chapter 5 of the Administrative Procedure Act (Gov. Code §11500 et seq.). Malaga's obtrusive argument that it is "not going to comply with [the Regional Board's] purported hearing procedures" and suggestion that we should instead "follow the statute" (assumedly the Administrative Procedure Act) is simply not supported by the requirements of any regulation or statute.

Furthermore, Malaga's claim that that the Hearing Procedures are a violation of the Constitution is utter morology. The Hearing Procedures issued to Malaga are consistent with the Hearing Procedures issued for all other Administrative Civil Liability Complaints brought before the Central Valley Water Board. Malaga has been granted sufficient due process under the Hearing Procedures to submit evidence in its own defense and present testimony and cross-examine witnesses at hearing.

### **III. Malaga's Argument that the Violations Contained in the May 2013 ACLC are Untimely is an Issue for the Regional Board to Decide**

Malaga argues that "any enforcement action relative to [violations between August 9, 2007 and November 30, 2010] are barred by operation of law," and that "the Executive Officer of your agency has falsely stated, presumably to avoid the legal bar referred to above, that violations occurred "through 31 December 2012'." Counsel seems to be making an oblique reference to either the statute of limitations for civil actions (California Code of Civil Procedure §§312-366) or the defense of laches in equity, and arguing that some of the violations at issue in the May 2013 ACLC should not be imposed by the Central Valley Water Board.

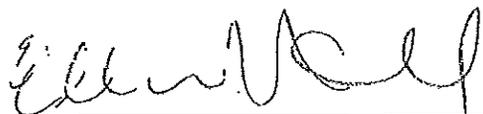
Malaga has every right to argue that the penalties in the Complaint are untimely. However, this is a substantive argument against the proposed penalty that should be raised before the Central Valley Water Board, and not an issue to be decided by the Advisory Team as part of ruling on the Objections to the Hearing Procedures. As such, the Prosecution Team will not respond to these arguments in this submission. The Prosecution Team suggests that Malaga raise these issues as part of its Submission of Evidence and Policy Statements, and the Prosecution Team will plan to respond to these arguments as part of our Rebuttal Evidence.

**IV. Malaga's Argument That It Did Not Violate Water Code Section 13385 and/or That Violations Were Already Resolved Are Arguments to Be Decided by the Regional Board**

Likewise, Malaga argues that the violations at issue in the May 2013 Complaint do not meet the definition of "chronic" under Water Code §13385(i), or were already resolved by a Compliance Project. These are also substantive arguments against the proposed penalty that should be raised before the Central Valley Water Board at hearing, and not an issue to be decided by the Advisory Team at this juncture. The Prosecution Team suggests that Malaga raise these issues in its Evidence submission, and we will likewise respond to them in our Rebuttal.

Dated: May 28, 2013

Respectfully submitted,

By:   
Ellen Howard, Counsel  
CALIFORNIA REGIONAL WATER  
QUALITY CONTROL BOARD, CENTRAL  
VALLEY REGION PROSECUTION TEAM

## Attachment A

NEAL E. COSTANZO  
MICHAEL G. SLATER

LAW OFFICES  
**COSTANZO & ASSOCIATES**  
A PROFESSIONAL CORPORATION  
575 E. LOCUST AVENUE  
SUITE 116  
FRESNO, CALIFORNIA 93720-2928  
(559) 261-0163

FAX (559) 261-0706  
OUR FILE NO. 03024-005

May 23, 2013

**Via US Mail & Email:** lonnie.wass@waterboards.ca.gov  
Lonnie Wass, Supervising Engineer &  
Pamela Creedon, Executive Officer  
Central Valley Regional  
Water Quality Control Board  
1685 E. Street  
Fresno, CA 93706

**Re: Administrative Civil Liability Complaint R5-2013-05274 Assessment  
of Mandatory Minimum Penalties (MMP), Malaga County Water  
District (Malaga), Waste Water Treatment Facility (WWTP); and  
NPDES 0084239, RM 390069, Fresno County**

Dear Ms. Wass and Ms. Creedon:

The referenced "Administrative Civil Liability Complaint" (Complaint) together with your May 1, 2013, letter has been referred to me for a response.

As I have noted probably six times previously, each and all of the purported violations that are referred to in your complaint are alleged to have occurred, by the Attachment A to that complaint, primarily between August 9, 2007 and November 30, 2010. There are two purported violations that are alleged to have occurred in March of 2011. Any enforcement action relative to these alleged violations, and all of them, is barred by operation of law. Any evidence in support of the alleged violations would be legally irrelevant and inadmissible in any proceeding. It is clear the Complaint, which is in many respects absolutely non-sensical, was not drafted or even reviewed by an attorney, as it fails to conform to the most rudimentary requirements of a complaint.

What I find offensive is that the Executive Officer of your agency has falsely stated, presumably to avoid the legal bar referred to above, that the violations occurred "through 31 December 2012". The violations, however, are all allegedly set forth in your Attachment A and there is no allegation of any violation occurring anywhere near December 31, 2012. Of course, this is the same Attachment A that accompanied a series of notices of violation that are referred to in the complaint and which the District duly responded to, normally through me. Each and all of the 'violations' listed in the Attachment A, as you have been told previously, do not amount to violations of any requirement and provide no basis for the imposition of MMP's. The proposed Administrative Civil Liability is based upon a purported violation or violations that are not supported by the data or are not violations subject to

MMP's as defined by Water Code §13385, in particular, those violations classified as chronic. Malaga disagrees with the interpretation of §13385(i)(2) that is consistently set forth in fn 6 of Attachment A reproduced in this complaint and as it appeared in numerous notices of violation that we received, that there must be a six month period without any violation in order for a violation to be exempt under §13385(i)(2)(A). Furthermore, many of the alleged violations contained in Attachment A to the Complaint are the subject of a compliance project or projects and/or a pollution prevention plan that your agency expressly agreed could be performed in lieu of any MMP. The issuance of this complaint which now apparently attempts to sanction Malaga twice for violations as to which you agreed would be satisfied by the completion of certain compliance projects means that the vast majority of the purported violations listed in Exhibit A are barred for a different reason other than the passage of time alone.

Your May 1, 2013, letter in addition to the complaint itself purportedly gives the District three options as follows:

1. Waive the right to a hearing on the complaint and pay the proposed civil liability fine;
2. Enter into settlement discussions with the Board and request that any hearing on the complaint be delayed; or
3. Contest the complaint and/or enter into settlement negotiations with the Board.

Please be advised that Malaga will contest the complaint and will appear at the hearing to be conducted on July 25 and 26, 2013. Malaga has no desire to enter into settlement negotiations with any agency that has demonstrated, repeatedly, that it will not abide by a settlement agreement made previously. You should be aware that the filing of what is plainly a frivolous complaint which is so plainly barred by operation of law subjects your agency to an order awarding Malaga all costs and attorneys fees incurred as a result (Government Code §1455.30).

Your May 1, 2013, letter suggests that "any comments or evidence concerning the enclosed complaint must be supplied" to your agency by May 24, 2013 and that this includes "materials submitted by the District to be considered at a hearing. . .". You are sorely misinformed about the procedural requirements that apply to the administrative processing of your complaint. This is demonstrated further by the "Hearing Procedure for Administrative Civil Liability Complaint R5-2013-0527" which similarly purports to require the submission of all evidence, on an unspecified date in advance of the hearing. The hearing procedure document further states that "In accordance with §648(d) [of Title 23 of the California Code of Regulations] any procedure not provided by this hearing procedure is deemed waived". For your information, subdivision (d) of §648 states that the "presiding officer may waive any requirements in these regulations pertaining to the conduct of adjudicative proceedings including but limited to the introduction of evidence, the order of proceeding, the examination or cross-examination of witnesses and the presentation of

argument, so long as those requirements are not mandated by state or federal statute or by state or federal constitutions". You are not the presiding officer. Moreover, what you are attempting to waive is Malaga's due process rights under the federal and state Constitutions and Malaga does not consent to your attempt to waive these procedures. You are not purporting to waive any "requirements" of the regulations, you are attempting to waive on behalf of Malaga the rights it has as a party accused of violating the Water Code. You, as a state agency are required to conform precisely to your own regulations and to the provisions of the statute which relate to this complaint. Malaga will insist on strict compliance. Lastly, your hearing procedure document discloses that you are contemplating conducting a hearing before a board that is not impartial in that they are being asked to decide the correctness of the decision of their own Executive Officer. Any hearing before the Board would be an unconstitutional proceeding in that the Board is not impartial. Malaga is not going to comply with your purported hearing procedures. Malaga is going to comply with the statute. The attempts to limit the time during which presentations of evidence may be made and the context in which that can be done is a clear violation of the Constitution. This hearing procedure document, is an absolute nullity. Any requirements relating to a hearing procedure must be prescribed by statute or regulation or by the presiding officer consistent with statute or regulation.

Lastly, you provided with your hearing procedure document which was issued by mail (purportedly) on May 3, 2013 but was not received in our office, interestingly, until May 16, 2013, a list of deadlines which had already passed by the date of our receipt of your falsely dated document.

Needless to say, it seems unlikely that your hearing is going to proceed as scheduled given your written threats to deprive Malaga County Water District of due process and the written representations we have received that you are not going to conform to those regulations and statutes that are applicable to the complaint you imprudently issued. Kindly advise me whether you are authorized to receive service of process on behalf of the Central Valley Regional Water Quality Control Board which is, apparently, the entity that is threatening to preside over this unlawful proceeding against Malaga. If we fail to hear from you, we will simply serve you in the manner which any state agency is allowed to be served which may or may not provide you with sufficient advance notification of a need to respond to our application for an injunction and writ of mandate.

Very truly yours,

**COSTANZO & ASSOCIATES**

Neal E. Costanzo

NEC/js

## Howard, Ellen@Waterboards

---

**From:** Walsh, Jill@Waterboards  
**Sent:** Friday, May 03, 2013 3:39 PM  
**To:** Creedon, Pamela@Waterboards; Carrigan, Cris@Waterboards; Howard, Ellen@Waterboards; Okun, Lori@Waterboards; Coupe, David@Waterboards; Greenberg.ken@Epa.gov; EnvironmentalHealth@co.fresno.ca.us  
**Cc:** ncostanzo@costanzolaw.com; Russ Holcomb (rholcomb@malagacwd.org); Wass, Lonnie@Waterboards; Gross, Warren@Waterboards  
**Subject:** Administrative Civil Liability Complaint R5-2013-0527  
**Attachments:** MALAGA\_HRNG\_PRCDR\_MAY\_3\_JKW.PDF

Good Afternoon,

Attached please find the Hearing Procedure for Administrative Civil Liability Complaint (ALCL) R5-2013-0527 issued to Malaga County Water District on 1 May 2013. It was inadvertently left out of the original ACLC package.

If you have any questions, feel free to contact me.

Jill Walsh  
Sanitary Engineering Associate  
Central Valley Regional Water Quality Control Board -- Fresno  
1685 "E" Street  
Fresno, CA 93706  
Phone: (559) 445-5130  
Fax: (559) 445-5910



Central Valley Regional Water Quality Control Board

3 May 2013

Russ Holcomb  
General Manager  
Malaga County Water District  
3580 South Frank Street  
Fresno, CA 93725

CERTIFIED MAIL:  
7011 0110 0001 2272 4540

**HEARING PROCEDURE FOR ADMINISTRATIVE CIVIL LIABILITY R5-2013-0527, MALAGA COUNTY WATER DISTRICT, WASTEWATER TREATMENT FACILITY, (NPDES CA0084239, RM 390069), FRESNO COUNTY**

On 1 May 2013 the Executive Officer of the Central Valley Water Board issued Administrative Civil Liability Complaint R5-2013-0527 (ACLC) to Malaga County Water District, alleging violation of Water Code section 13385 for effluent limitation violations. The original ACLC package did not contain the attached *Hearing Procedure*. Please find a copy of this form attached to this correspondence.

If you have any questions, please contact Ellen Howard at (916) 341-5677 or [ehoward@waterboards.ca.gov](mailto:ehoward@waterboards.ca.gov), or Jill Walsh at (559) 445-5130 or [jwalsh@waterboards.ca.gov](mailto:jwalsh@waterboards.ca.gov).

Lonnie Wass  
Supervising Engineer

Enclosure: Hearing Procedure

cc w/ encl: Neal Costanzo, Law Offices of Costanzo & Assoc., Fresno

cc w/ encl (via e-mail):

Pamela Creedon, Central Valley Water Board, Rancho Cordova  
Cris Carrigan, Office of Enforcement, SWRCB, Sacramento  
Ellen Howard, Office of Enforcement, SWRCB, Sacramento  
Lori Okun, Office of Chief Counsel, SWRCB, Sacramento  
David Coupe, Office of Chief Counsel, SWRCB, Sacramento  
Kenneth Greenberg, USEPA, Region 9, San Francisco  
Fresno County Environmental Health Division, Fresno

KARL E. LONGLEY SCD, P.E., CHAIR | PAMELA C. CREEDON P.E., BOEE, EXECUTIVE OFFICER

1685 E Street, Fresno, CA 93706 | [www.waterboards.ca.gov/centralvalley](http://www.waterboards.ca.gov/centralvalley)

Central Valley Regional Water Quality Control Board

HEARING PROCEDURE  
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT  
R5-2013-0527

ISSUED TO  
MALAGA COUNTY WATER DISTRICT  
WASTEWATER TREATMENT FACILITY  
FRESNO COUNTY

SCHEDULED FOR 25/26 JULY 2013

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Overview

Pursuant to Water Code section 13323, the Executive Officer has issued an Administrative Civil Liability (ACL) Complaint to Malaga County Water District alleging violations of Water Code section 13385 for the discharge of wastewater from its wastewater treatment plant that exceeded permitted effluent limitations. The ACL Complaint proposes that the Central Valley Water Board impose administrative civil liability in the amount of \$72,000. A hearing is currently scheduled to be conducted before the Board during its 25/26 July 2013 meeting.

The purpose of the hearing is to consider relevant evidence and testimony regarding the ACL Complaint. At the hearing, the Central Valley Water Board will consider whether to issue an administrative civil liability order assessing the proposed liability, or a higher or lower amount. The Board may also decline to assess any liability, or may continue the hearing to a later date. If less than a quorum of the Board is available, this matter may be conducted before a hearing panel. The public hearing will commence at 8:30 a.m. or as soon thereafter as practical, or as announced in the Board's meeting agenda. The meeting will be held at:

11020 Sun Center Drive, Suite 200, Rancho Cordova, California.

An agenda for the meeting will be issued at least ten days before the meeting and posted on the Board's web page at:

[http://www.waterboards.ca.gov/centralvalley/board\\_info/meetings](http://www.waterboards.ca.gov/centralvalley/board_info/meetings)

Hearing Procedure

~~The hearing will be conducted in accordance with this Hearing Procedure, which has been approved by the Board Chair for the adjudication of such matters. The procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and are available at:~~

~~<http://www.waterboards.ca.gov>~~

~~Copies will be provided upon request. In accordance with Section 648(d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in Section 648(b) and herein, Chapter 5 of the Administrative Procedures Act (Gov. Code, § 11500 et seq.) does not apply to this hearing.~~

The Discharger shall attempt to resolve objections to this Hearing Procedure with the Prosecution Team BEFORE submitting objections to the Advisory Team.

### Separation of Prosecutorial and Advisory Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Board (the "Prosecution Team") have been separated from those who will provide legal and technical advice to the Board (the "Advisory Team"). Members of the Advisory Team are: Ken Landau, Assistant Executive Officer and David Coupe, attorney. Members of the Prosecution Team are: Pamela Creedon, Executive Officer; Clay L. Rodgers, Assistant Executive Officer; Lonnie M. Wass, Supervising Engineer, Warren W. Gross, Senior Engineering Geologist; Jill K. Walsh, Sanitary Engineering Associate, Ellen Howard, Attorney, and James Ralph, Attorney.

Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Pamela Creedon regularly advises the Central Valley Water Board in other, unrelated matters, but is not advising the Central Valley Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Central Valley Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Central Valley Water Board or the Advisory Team regarding this proceeding.

### Hearing Participants

Participants in this proceeding are designated as either "Designated Parties" or "Interested Persons." Designated Parties may present evidence and cross-examine witnesses and are subject to cross-examination. Interested Persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested Persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). At the hearing, both Designated Parties and Interested Persons may be asked to respond to clarifying questions from the Central Valley Water Board, staff, or others, at the discretion of the Board Chair.

The following participants are hereby designated as Designated Parties in this proceeding:

1. Central Valley Water Board Prosecution Team
2. Malaga County Water District

### Requesting Designated Party Status

Persons who wish to participate in the hearing as a Designated Party must request designated party status by submitting a request in writing so that it is received no later than the deadline listed under "Important Deadlines" below. The request shall include an explanation of the basis for status as a Designated Party (i.e., how the issues to be addressed at the hearing affect the person, the need to present evidence or cross-examine witnesses), along with a statement explaining why the parties listed above do not adequately represent the person's interest. Any objections to these requests for designated party status must be submitted so that they are received no later than the deadline listed under "Important Deadlines" below.

### Primary Contacts

**Advisory Team:**  
Kenneth Landau  
11020 Sun Center Drive, Suite 200, Rancho Cordova, CA 95670  
Phone: (916) 464-3291  
klandau@waterboards.ca.gov

David P. Coupa, Senior Staff Counsel  
c/o San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612  
Phone: (510) 622-2306  
Fax: (510) 622-2460  
dcoupe@waterboards.ca.gov

**Prosecution Team:**

Lonnie Wass; Supervising Engineer  
1685 E Street, Fresno, CA 93706  
Phone: (559) 445-5116; fax: (559) 445-5910  
lwass@waterboards.ca.gov

Ellen Howard, Staff Counsel  
State Water Resources Control Board, Office of Enforcement  
Physical Address: 1001 I Street, Sacramento, CA 95814  
Mailing Address: P.O. Box 100, Sacramento, CA 95812  
Phone: (916) 341-5677; fax: (916) 341-5284  
Ellen.Howard@waterboards.ca.gov

James Ralph, Staff Counsel  
State Water Resources Control Board, Office of Enforcement  
Physical Address: 1001 I Street, Sacramento, CA 95814  
Mailing Address: P.O. Box 100, Sacramento, CA 95812  
Phone: (916) 322-3227, fax: (916) 341-5284  
James.Ralph@waterboards.ca.gov

**Discharger**  
Russ Holcomb, General Manager  
Malaga County Water District  
3580 South Frank Street,  
Fresno, CA 93720  
Phone: (530) 485-2341  
rholcomb@malagacwd.org

**Ex Parte Communications**

Designated Parties and Interested Persons are forbidden from engaging in ex parte communications regarding this matter. An ex parte communication is a written or verbal communication related to the investigation, preparation, or prosecution of the ACL Complaint between a Designated Party or an Interested Person and a Board Member or a member of the Board's Advisory Team (see Gov. Code, § 11430.10 et seq.). However, if the communication is copied to all other persons (if written) or is made in a manner open to all other persons (if verbal), then the communication is not considered an ex parte communication. Communications regarding non-controversial procedural matters are also not considered ex parte communications and are not restricted.

### Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each Designated Party shall have a combined 30 minutes to present evidence (including evidence presented by witnesses called by the Designated Party), to cross-examine witnesses (if warranted), and to provide a closing statement. Each Interested Person shall have 3 minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received no later than the deadline listed under "Important Deadlines" below. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Board Chair (at the hearing) upon a showing that additional time is necessary. Such showing shall explain what testimony, comments, or legal argument requires extra time, and why it could not have been provided in writing by the applicable deadline.

A timer will be used, but will not run during Board questions or the responses to such questions, or during discussions of procedural issues.

### Submission of Evidence and Policy Statements

The Prosecution Team and all other Designated Parties (including the Discharger) must submit the following information in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the Central Valley Water Board to consider. Evidence and exhibits already in the public files of the Central Valley Board may be submitted by reference, as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3. Board members will not generally receive copies of materials incorporated by reference unless copies are provided, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the Designated Party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.

Prosecution Team: The Prosecution Team's information must include the legal and factual basis for its claims against each Discharger; a list of all evidence on which the Prosecution Team relies, which must include, at a minimum, all documents cited in the ACL Complaint, Staff Report, or other material submitted by the Prosecution Team; and the witness information required under items 3-4 for all witnesses, including Board staff.

Designated Parties (including the Discharger): All Designated Parties shall submit comments regarding the ACL Complaint along with any additional supporting evidence not cited by the Central Valley Water Board's Prosecution Team no later than the deadline listed under "Important Deadlines" below.

Rebuttal: Any Designated Party that would like to submit evidence, legal analysis, or policy statements to rebut information previously submitted by other Designated Parties shall submit this rebuttal information so that it is received no later than the deadline listed under "Important Deadlines" below. "Rebuttal" means evidence, analysis or comments offered to disprove or contradict other submissions. Rebuttal shall be limited to the scope of the materials previously submitted. Rebuttal information that is not responsive to information previously submitted may be excluded.

Copies: Board members will receive copies of all submitted materials. The Board Members' hard copies will be printed in black and white on 8.5"x11" paper from the Designated Parties' electronic copies. Designated Parties who are concerned about print quality or the size of all or part of their written materials should provide an extra nine paper copies for the Board Members. For voluminous submissions, Board Members may receive copies in electronic format only. Electronic copies will also be posted on the Board's website. Parties without access to computer equipment are strongly encouraged to have their materials scanned at a copy or mailing center. The Board will not reject materials solely for failure to provide electronic copies.

Other Matters: The Prosecution Team will prepare a summary agenda sheet (Summary Sheet) and will respond to all significant comments. The Summary Sheet and the responses shall clearly state that they were prepared by the Prosecution Team. The Summary Sheet and the responses will be posted online, as will revisions to the proposed Order.

Interested Persons: Interested Persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible, but they must be received by the deadline listed under "Important Deadlines" to be included in the Board's agenda package. Interested Persons do not need to submit written comments in order to speak at the hearing.

Prohibition on Surprise Evidence: In accordance with California Code of Regulations, title 23, section 648.4, the Central Valley Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Board Chair may exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will *not* be considered by the Central Valley Water Board and will not be included in the administrative record for this proceeding.

Presentations: Power Point and other visual presentations may be used at the hearing, but their content shall not exceed the scope of other submitted written material. These presentations must be provided to the Advisory Team at or before the hearing both in hard copy and in electronic format so that they may be included in the administrative record.

Witnesses: All witnesses who have submitted written testimony shall appear at the hearing to affirm that the testimony is true and correct, and shall be available for cross-examination.

#### Evidentiary Documents and File

The ACL Complaint and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 11020 Sun Center Drive, Rancho Cordova, CA 95670. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Central Valley Water Board's Chair. Many of these documents are also posted on-line at:

[http://www.waterboards.ca.gov/centralvalley/board\\_decisions/tentative\\_orders/index.shtml](http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml)

Although the web page is updated regularly, to assure access to the latest information, you may contact Wendy Wyels (contact information above) for assistance obtaining copies.

#### Questions

Questions concerning this proceeding may be addressed to the Advisory Team attorney (contact information above).

### IMPORTANT DEADLINES

*All required submissions must be received by 5:00 p.m. on the respective due date.*

1 May 2013	<ul style="list-style-type: none"> <li>▪ Prosecution Team issues ACL Complaint, Hearing Procedure, and other related materials.</li> </ul>
10 May 2013	<ul style="list-style-type: none"> <li>▪ Objections due on Hearing Procedure.</li> <li>▪ Deadline to request "Designated Party" status.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
10 May 2013	<ul style="list-style-type: none"> <li>▪ Deadline to submit opposition to requests for Designated Party status.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
24 May 2013	<ul style="list-style-type: none"> <li>▪ Discharger's deadline to submit <i>90-Day Hearing Waiver Form</i>.</li> </ul> <p><u>Electronic or Hard Copy to:</u> Prosecution Team Primary Contact</p>
30 May 2013*	<ul style="list-style-type: none"> <li>▪ Advisory Team issues decision on requests for designated party status.</li> <li>▪ Advisory Team issues decision on Hearing Procedure objections.</li> </ul>
5 June 2013*	<ul style="list-style-type: none"> <li>▪ Prosecution Team's deadline for submission of information required under "Submission of Evidence and Policy Statements," above.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
25 June 2013*	<ul style="list-style-type: none"> <li>▪ Remaining Designated Parties' (including the Discharger's) deadline to submit all information required under "Submission of Evidence and Policy Statements" above. This includes all written comments regarding the ACL Complaint.</li> <li>▪ Interested Persons' comments are due.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
2 July 2013*	<ul style="list-style-type: none"> <li>▪ All Designated Parties shall submit any rebuttal evidence, any rebuttal to legal arguments and/or policy statements, and all evidentiary objections.</li> <li>▪ Deadline to submit requests for additional time.</li> <li>▪ If rebuttal evidence is submitted, all requests for additional time (to respond to the rebuttal at the hearing) must be made within 3 working days of <i>this</i> deadline.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
3 July 2013*†	<ul style="list-style-type: none"> <li>▪ Prosecution Team submits Summary Sheet and responses to comments.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p>

	Electronic and Hard Copies to: Advisory Team Primary Contact, Advisory Team Attorney
25/26 July 2013*	" Hearing

*\* Dischargers have the right to a hearing before the Board within 90 days of receiving the Complaint, but this right can be waived (to facilitate settlement discussions, for example). By submitting the waiver form, the Discharger is not waiving the right to a hearing; unless a settlement is reached, the Board will hold a hearing prior to imposing civil liability. However, if the Board accepts the waiver, all deadlines marked with an "\*" will be revised if a settlement cannot be reached.*

*† This deadline is set based on the date that the Board compiles the Board Members' agenda packages. Any material received after this deadline will not be included in the Board Members' agenda packages.*

**Attachment C**

**Howard, Ellen@Waterboards**

---

**From:** Hall, Melissa@Waterboards  
**Sent:** Tuesday, May 28, 2013 12:03 PM  
**To:** Bennett, Jarma@Waterboards  
**Cc:** Howard, Ellen@Waterboards  
**Subject:** RE: emails

Thank you.

---

**From:** Bennett, Jarma@Waterboards  
**Sent:** Tuesday, May 28, 2013 11:11 AM  
**To:** Hall, Melissa@Waterboards  
**Subject:** RE: emails

The CIWQS Help Center does not have any non-deliverables in their Outlook email box (which would cover the last 90 days).

---

**From:** Bennett, Jarma@Waterboards  
**Sent:** Tuesday, May 28, 2013 10:31 AM  
**To:** Hall, Melissa@Waterboards  
**Subject:** emails

Here is an export of the emails we have record of sending to "@malagacwd.org." The text doesn't look too good in Excel, but hopefully you get the gist of it from what you can read. If you want to see the online version on specific ones, let me know and I can show you or take screen shots.

Let me know if you have any questions about it.

I've sent an email to the ciwqs help center to see if we have received any non-deliverables from those sent emails.

Jarma Bennett  
Office of Information Management and Analysis  
California State Water Resources Control Board  
(916) 341-5532; [jbennett@waterboards.ca.gov](mailto:jbennett@waterboards.ca.gov)



# EXHIBIT H

## Neal Costanzo

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**From:** Neal Costanzo  
**Sent:** Thursday, June 06, 2013 1:47 PM  
**To:** Neal Costanzo  
**Subject:** .Fwd: ACLC R5-2013-0527: Prosecution Team Submission of Evidence and Policy Statements

Sent from my iPhone

Begin forwarded message:

**From:** "Howard, Ellen@Waterboards" <Ellen.Howard@waterboards.ca.gov>  
**Date:** June 6, 2013, 1:38:27 PM PDT  
**To:** Neal Costanzo <NCostanzo@costanzolaw.com>, "Landau, Ken@Waterboards" <Ken.Landau@waterboards.ca.gov>, "Coupe, David@Waterboards" <David.Coupe@waterboards.ca.gov>  
**Cc:** "rholcomb@malagacwd.org" <rholcomb@malagacwd.org>, "Rodgers, Clay@Waterboards" <Clay.Rodgers@waterboards.ca.gov>, "Walsh, Jill@Waterboards" <Jill.Walsh@waterboards.ca.gov>, "Gross, Warren@Waterboards" <Warren.Gross@waterboards.ca.gov>, "Wass, Lonnie@Waterboards" <Lonnie.Wass@waterboards.ca.gov>, "Creedon, Pamela@Waterboards" <Pamela.Creedon@waterboards.ca.gov>, "Ralph, James@Waterboards" <James.Ralph@waterboards.ca.gov>  
**Subject:** RE: ACLC R5-2013-0527: Prosecution Team Submission of Evidence and Policy Statements

Mr. Costanzo; The Prosecution Team's conduct in this matter fully comports with all ethical rules and the Regional Board's lawfully-adopted hearing procedures.

Pages 2 and 3 of the Hearing Procedures for this item contain contact information for Ken Landau and David Coupe, who are serving as the Advisory Team for the July Board Meeting. A copy of these Hearing Procedures was emailed to you at this email address on 3 May 2013 and delivered via certified mail and signed for by representatives of Malaga County Water District on 6 May 2013.

As my communication indicates, you are being provided with electronic copies of our entire evidence submission via CD, a copy of which was mailed to you and Malaga yesterday. This meets the requirements of the Hearing Procedures.

The remainder of your hyperbolic misstatements require no response.

Ellen Howard  
Counsel for the Prosecution Team

Ellen Howard  
Staff Counsel, Office of Enforcement  
State Water Resources Control Board  
1001 "I" Street  
Sacramento, CA 95814

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**From:** Neal Costanzo [<mailto:NCostanzo@costanzolaw.com>]  
**Sent:** Thursday, June 06, 2013 9:19 AM  
**To:** Howard, Ellen@Waterboards; Landau, Ken@Waterboards; Coupe, David@Waterboards  
**Cc:** [rholcomb@malagacwd.org](mailto:rholcomb@malagacwd.org); Rodgers, Clay@Waterboards; Walsh, Jill@Waterboards; Gross, Warren@Waterboards; Wass, Lonnie@Waterboards; Creedon, Pamela@Waterboards; Ralph, James@Waterboards  
**Subject:** RE: ACLC R5-2013-0527: Prosecution Team Submission of Evidence and Policy Statements

Ms. Howard.

Please stop direct communication with my client who you know to be represented by an attorney in this matter. Your conduct violates the ethical rules. You are to serve me with everything, not my client. Secondly, kindly advise me with whom and how you are filing these submissions with the agency that is hearing this matter. The notice of hearing procedures (which is an absolute nullity) that the prosecution team prepared without any authorization and in direct violation of law relating to the separation of the adjudicative and prosecutor functions does not tell us with whom our submissions are to be filed or how. The regulations of the regional board do not address how filings are to be made either. Lastly, since you cannot comply with the requirements that your prosecution team established unlawfully, because you have failed to submit any evidence or testimony by the due date you unlawfully set, Malaga cannot develop any response because we don't know what your evidence is and apparently we will not receive any of the evidence you intend to submit as reflected by the "index" you submitted. Certainly we will not have adequate time to review anything that you do provide by June 25, the deadline the prosecution team unlawfully established for the submission of Malaga's evidence. Needless to say, we will be objecting to the submission of any evidence in support of the complaint because it is plainly time barred. Thank you.

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**From:** Howard, Ellen@Waterboards [<mailto:Ellen.Howard@waterboards.ca.gov>]  
**Sent:** Wednesday, June 05, 2013 4:35 PM  
**To:** Landau, Ken@Waterboards; Coupe, David@Waterboards  
**Cc:** [rholcomb@malagacwd.org](mailto:rholcomb@malagacwd.org); Neal Costanzo; Rodgers, Clay@Waterboards; Walsh, Jill@Waterboards; Gross, Warren@Waterboards; Wass, Lonnie@Waterboards; Creedon, Pamela@Waterboards; Ralph, James@Waterboards  
**Subject:** ACLC R5-2013-0527: Prosecution Team Submission of Evidence and Policy Statements

FOR PURPOSES OF EX PARTE COMMUNICATIONS, THE DISCHARGER IS CC'ED ON THIS EMAIL

Mr. Landau and Mr. Coupe-

The Prosecution Team for the above-mentioned ACLC hereby submits its Evidence and Policy Statements as required by the Hearing Procedures. Due to the voluminous nature of the documents being submitted as evidence, the Prosecution Team is only submitting a copy of the index and the witness list along with this email. A copy of these exhibits will be burned on to a compact disk and mailed to all members of the Advisory Team and the Discharger. In addition, a single hard-copy of all evidence submitted as part of the Prosecution Team's case in chief will be produced at the Central Valley Water Board Rancho Cordova office.

Please do not hesitate to contact me if you have any questions.

Ellen Howard

Counsel for the Prosecution Team

Ellen Howard  
Staff Counsel, Office of Enforcement  
State Water Resources Control Board  
1001 "I" Street  
Sacramento, CA 95814  
916.341.5677

# EXHIBIT I

## Neal Costanzo

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**From:** Coupe, David@Waterboards <David.Coupe@waterboards.ca.gov>  
**Sent:** Thursday, June 06, 2013 4:46 PM  
**To:** Howard, Ellen@Waterboards; Creedon, Pamela@Waterboards; Rodgers, Clay@Waterboards; Walsh, Jill@Waterboards; Neal Costanzo; rholcomb@malagacwd.org; Gross, Warren@Waterboards; Wass, Lonnie@Waterboards; Ralph, James@Waterboards  
**Cc:** Landau, Ken@Waterboards  
**Subject:** ACLC R5-2013-0527: Malaga Water District

All:

This email makes pre-hearing rulings and provides additional information concerning the Central Valley Water Board's consideration of a pending enforcement action against Malaga County Water District. This email specifically responds to (1) Ms. Howard's email and attached Response to Objections of May 28, 2013 (Response) and (2) Mr. Costanzo's email of June 6th, 2013.

I. Ms. Howard's Response

As a member of the Advisory Team, I am in receipt of Ms. Howard's Response dated May 28, 2013. Her Response includes an Attachment A, which is a letter dated May 23, 2013 from Mr. Costanzo to Lonnie Wass and Pamela Creedon at the Central Valley Water Board. It should be noted that the Advisory Team was not put on notice of Mr. Costanzo's objections and did not receive Mr. Costanzo's correspondence dated May 23, 2013 until it was submitted by Ms. Howard as Attachment A to her Response on May 28, 2013 to all parties.

Ms. Howard's Response consists of four parts. She first claims that Mr. Costanzo's objections dated May 23, 2013 are untimely. It appears that Mr. Costanzo's written objections were not made to the Prosecution Team until 23 May 2013, thirteen days after the deadline to submit written objections to the Hearing Procedure. Furthermore, the Advisory Team never received a copy of the written objections from Malaga as specifically required in the Hearing Procedure. (Hearing Procedure at p. 6.)

With that said, it appears that there may be a factual question concerning when Mr. Costanzo actually received the Hearing Procedure and whether it was received after the May 10 deadline to file objections to the Hearing Procedure. Therefore, to the extent that Ms. Howard seeks to have Mr. Costanzo's objections dismissed as untimely, and given that the hearing for this matter is not scheduled for more than another month and one-half, this request is **DENIED**. However, it should be pointed out to the Designated Parties that the failure to comply with the Hearing Procedure may result in the exclusion of evidence or testimony as this may constitute prejudice to any designated party or the Central Valley Water Board. (Cal. Code Regs., tit. 23, § 648.4, subd. (d); see also Hearing Procedure at p. 5.)

Ms. Howard's second argument is that Malaga's challenges to the contents of the Hearing Procedure are not supported by statute or regulation. In response to Mr. Costanzo's claim that the Hearing Procedure is "an absolute nullity" because it presumably was not issued under authority of the presiding officer, (i.e., the Board Chair), Mr. Costanzo's objection is **DENIED**. The adjudicatory hearing scheduled for the July 25/26 Board Meeting will be conducted in accordance with the Hearing Procedure, the applicable statutes and regulations governing adjudicatory proceedings before the Central Valley Water Board, and any pre-hearing rulings by the Advisory Team after any necessary consultation with the Board Chair. It should be noted that the Hearing Procedure has been pre-approved by the Board Chair and after review by members of the Advisory Team.

Furthermore, to the extent that Mr. Costanzo objects that the Hearing Procedure is a violation of Malaga's due process rights, this objection is **DENIED**. Malaga has ample opportunity under the Hearing Procedure and under applicable statutes and regulations governing adjudicatory proceedings before the Central Valley Water Board to adequately and sufficiently defend its interests against the Prosecution Team's allegations in their Complaint. In addition, Mr. Costanzo's claim that a hearing before the Central Valley Water Board is not impartial "in that they [the Central Valley Water Board] are being asked to decide the correctness of the decision of their own Executive Officer" is misplaced. Consistent with due process and applicable case law, and pursuant to the Hearing Procedure, the Central Valley Water Board has established two separate and independent teams for this pending adjudicatory matter. One team, the Prosecution Team, is responsible for bringing enforcement actions to the Central Valley Water Board for its consideration. A second team, the Advisory Team, provides neutral legal and technical advice to the Board. At a duly noticed hearing, the Board then considers whether to adopt, reject, or modify the Prosecution Team's proposed action.

Ms. Howard's third argument responds to Mr. Costanzo's claim that the allegations are untimely. This issue is a substantive issue for the Central Valley Water Board to consider after consideration of the evidence and testimony from the Designated Parties and upon the technical and legal advice of the Advisory Team at the hearing. To the extent that Mr. Costanzo seeks to invalidate the Hearing Procedure on this ground, this objection is **DENIED**.

Similarly, the extent to which the violations at issue are "chronic" pursuant to Water Code section 13385, subdivision (i) or were already resolved by a Compliance Project, these are also substantive issues for the Central Valley Water Board to consider at the hearing. To the extent that Mr. Costanzo seeks to invalidate the Hearing Procedure on this basis, this objection is also **DENIED**.

## II. Mr. Costanzo's Email of June 6th

Mr. Costanzo's email appears predominantly if not exclusively directed to Ms. Howard and does not ask the Advisory Team to make any ruling on a particular procedural matter at this time. Therefore, no specific ruling is required by the Advisory Team.

With that said, the Advisory Team notes that Mr. Costanzo seeks to know "[w]ith whom and how you are filing submissions with the agency that is hearing this matter." This information is detailed in the Hearing Procedure. To the extent that Mr. Costanzo has additional questions of strictly a procedural nature concerning this matter, he may contact me via email with a copy to all parties. In addition, the Advisory Team notes that the Hearing Procedure does provide information concerning to whom submissions are to be filed and in what manner. (See, e.g., Hearing Procedure at p. 6 under Important Deadlines.)

Finally, Mr. Costanzo once again makes the claim that the Hearing Procedure is "an absolute nullity." To the extent that Mr. Costanzo is seeking to renew an objection that the Hearing Procedure is somehow void or of no legal effect, this objection is **DENIED**.

As always, if you have any additional questions of strictly a procedural nature, please send an email to me and Mr. Landau with a copy to all parties.

David P. Coupe  
Attorney III and Member of the Advisory Team  
c/o San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612  
Phone: (510) 622-2306  
Fax: (510) 622-2460  
E-mail: [dcoupe@waterboards.ca.gov](mailto:dcoupe@waterboards.ca.gov)

## PROOF OF SERVICE

The undersigned declares:

I, Julia Sellers, the undersigned, declare that:

I am employed in the County of Fresno, State of California. I am over the age of eighteen years, and am not a party to the within action. My business address is 575 E. Locust Avenue, Suite 115, Fresno California 93720.

I am familiar with the regular mail collection and processing practice of said business, and in the ordinary course of business the mail is deposited with the United States Postal Service that same day.

On this date, August 26, 2013, I served the foregoing documents described as:

**PETITION FOR REVIEW: PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION [WATER CODE §13320]**

on all parties to this action by causing a true copy thereof to be:

(X) Overnight Mail, Email & Fax:

Jeannette Bashaw, Legal Analyst  
Office of Chief Counsel  
State Water Resources Control Board  
1001 I Street, 22<sup>nd</sup> Floor [94814]  
Sacramento, CA 95812-0100  
Fax: (916) 341-5199  
Email: ~~jeannette~~.bashaw@waterboards.ca.gov

(X) Placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail

David P. Coupe  
Attorney III  
c/o San Francisco Bay Regional  
Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Ellen Howard  
Staff Counsel, Office of Enforcement  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

(X) Email

[ellen.howard@waterboards.ca.gov](mailto:ellen.howard@waterboards.ca.gov)  
[david.coupe@waterboards.ca.gov](mailto:david.coupe@waterboards.ca.gov)  
[klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)  
[jwalsh@waterboards.ca.gov](mailto:jwalsh@waterboards.ca.gov)  
[lwass@waterboards.ca.gov](mailto:lwass@waterboards.ca.gov)  
[wgross@waterboards.ca.gov](mailto:wgross@waterboards.ca.gov)  
[crogers@waterboards.ca.gov](mailto:crogers@waterboards.ca.gov)  
[pcreedon@waterboards.ca.gov](mailto:pcreedon@waterboards.ca.gov)  
[jralph@waterboards.ca.gov](mailto:jralph@waterboards.ca.gov)  
[rholcomb@malagacwd.org](mailto:rholcomb@malagacwd.org)

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

Dated: August 26, 2013

  
\_\_\_\_\_  
Julia Sellers