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March 24, 2008

Bruce H. Wolfe
Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Revised Tentative Resolution No. R2-2008-____ dated March 4, 2008
Authorizing Attorney General Referral Regarding
November 7, 2007 COSCO BUSAN Oil Spill
Hearing Date: April 9, 2008
Hearing Time: 9:00 a.m.

Dear Mr. Wolfe:

We represent and submit the following on behalf of Hanjin Shipping Co., Ltd. Hanjin requests the California Regional Water Quality Control Board not to adopt its Revised Tentative Resolution No. R2-2008 dated March 4, 2008, and not to authorize the Attorney General of the State of California to seek judicially imposed civil penalties under the California Water Code §13350(a), bring other applicable causes of action, or seek other relief against Hanjin as proposed by the Tentative Resolution. This request is made because Hanjin did not "cause or permit" the November 7, 2007, discharge of oil from the M/V COSCO BUSAN and its conduct did not otherwise contribute to the discharge.

According to the March 4 draft of the Tentative Resolution:

Para. A. As of November 7, 2007, Hanjin "leased" the vessel COSCO BUSAN and Hanjin is a "Discharger" of the oil from the ship;

Para. B. On November 7, 2007 the COSCO BUSAN struck a tower supporting the western span of the San Francisco-Oakland Bay Bridge and discharged approximately 53,569 gallons of bunker fuel into San Francisco Bay; and

Para. K. "[T]he Dischargers [including Hanjin] have caused or permitted bunker fuel to be deposited in or on waters of the State and are – at a minimum – civilly liable under Water Code section 13350(a)."

Hanjin was not a "Discharger" because it did not "cause or permit" the fuel to be deposited in the San Francisco Bay. Hanjin should not, therefore, be referred to the Attorney General, and it respectfully requests that it be removed from the Tentative Resolution.

Hanjin Is Not Subject To Civil Liability Pursuant to Water Code §13350(a)

The Tentative Resolution refers to Water Code §13350(a). This statute provides, in pertinent part, as follows:

> "Any person who ... (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other actions or provisions of this division, shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e)."

1. Section 13350(a) Is Not A Strict Liability Provision.

The California Supreme Court has made clear that §13350(a)(3) is not a strict liability statute. In *People ex rel. Younger v. Superior Court of Alameda County*, 16 Cal.3d 30 (1976), the Court construed an earlier version of the statute that contained the same "cause or permit" language as the present version but imposed different penalties than the statute now does. The Attorney General argued that §13350(a)(3) was intended to impose liability without fault. The Court rejected the argument, noting that the Legislature knew how to enact a strict liability statute and had done so in Harbor and Navigation Code legislation enacted in the same session as section 13350(a)(3). The Court stated that it was "unreasonable to conclude that the same Legislature dealing with a related subject, by its use of merely the words 'causes or permits' in subsection (3) of [§13350(a)] intended to impose strict liability." *Id.* at 41. The Court further recognized that imposing strict liability would create "disharmony and inconsistency" in the statutory scheme as a whole because it could result in the anomalous situation that a faultless spiller of petroleum would be subject to a greater civil penalty than an intentional spiller. *Younger* concluded that the legislative purpose of the statute could best be effectuated by construing §13350(a)(3) to impose liability for intentional or negligent conduct only.

Younger and its reasoning still apply. The Legislature knows how to impose strict liability when it intends to do so. Water Code §13350(b), the subsection of the statute that immediately follows §13350(a), is a good example:

> "Any person who, without regard to intent or negligence, causes of permits any hazardous substance to be discharged in or on any of the waters of the state ... shall be strictly liable ..."

The Legislature's election to include the phrases "without regard to intent or negligence" and "shall be strictly liable" in §13350(b) makes clear that the subsection provides for strict liability. Neither these nor any similar phrases are used in §13350(a). If the Legislature had thought that *Younger* was wrongly decided, it has had more than thirty years to correct that decision by adding the strict liability language of §13350(b) to §13350(a). It has not done so, and, therefore, *Younger's* interpretation of §13350(a) is definitive.

There is no basis for a conclusion that Hanjin negligently or intentionally "caused" or "permitted" bunker fuel to discharge into the Bay on November 7, 2007. As detailed below, Hanjin it did not cause or permit the discharge of bunker fuel into the Bay because it did not employ or have control over the vessel, its crew or its pilot. Hanjin did not exercise control over the ship in any way that caused or permitted the ship to discharge oil. Thus, even if a strict liability standard were applied, Hanjin is not liable for the discharge of oil from the M/V COSCO BUSAN on November 7, 2007.

2. Hanjin Did Not "Cause" or "Permit" the Discharge of Bunker Fuel Into the Bay.

The statute does not define the terms "cause" or "permit". In construing §13350(a)(3), the California Supreme Court noted that

> "'... we must interpret [Water Code sec. 13350(a)] in accordance with applicable rules of statutory construction, fundamental among which are those which counsel that the aim of such construction should be the ascertainment of legislative intent so that the purpose of the law may be effectuated (citation); that a statute should be construed with reference to the entire statutory system of which it forms a part in such a way that harmony may be achieved among the parts (citation); and that courts should give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' (Citation.)'"

Younger, supra, 16 Cal.3d at 41, *quoting Merrill v. Department of Motor Vehicles*, 71 Cal.2d 907, 918, (1969) (citations omitted in original).

In the absence of a statutory definition, therefore, the words "cause" and "permit" should be given their ordinary meaning. The Merriam-Webster Dictionary defines "cause" as "to serve as a cause or occasion of <*cause* an accident>" and defines "permit" as "to consent to expressly or formally <permit access to records> or to give leave: authorize".

In construing statutes with similar wordings, California courts have given "cause" and "permit" their ordinary meanings. In *People v. Forbath*, 5 Cal.App.2d Supp. 767 (1935), for example, the Court construed a statute that made it unlawful for a person to "allow, permit or suffer" any vehicle registered in his or her name to park on a street for a specified length of time. The court explained that the words "allow", "permit" and "suffer"

> "... all imply knowledge of, coupled with a duty and power to prevent, the particular act or omission, the allowance, permittance, or sufferance which constitutes the offense. It is important to comprehend that it is not the substantive act or omission, as such, that is declared to be unlawful by ordinances of the type now before us - it is instead the willing toleration thereof, in breach of a duty with power to prevent, that is denounced as an offense."
> *Id.* at 769-70

Similarly, in *Markus v. Justice's Court of Little Lake Township*, 117 Cal.App.2d 391 (1953), the Court of Appeal was required to construe a statute that made it unlawful a person to "cause or permit, or allow" any dog he or she owned to roam from his or her premises. The court found that use word "allow" implies that the person violating the statute be "sufficiently in control, ownership or possession" of the dog to be charged with its behavior, and that "allow" is synonymous with "permit." *Id.* at 398.

Forbath and *Markus* make clear that "cause" or "permit" require the actor to have a duty to act and power to prevent or avoid the prohibited consequence. If a person does not have a duty to act and lacks the power or ability to act, liability cannot attach. These cases, coupled with the ordinary meaning of the words, compel the conclusion that for a party to be liable under §13350(a)(3), it must serve as an active agent in the deposit of petroleum, or consent to or authorize the discharge. At the very least, the person facing liability must have the power to prevent the discharge.

There is no basis for a conclusion that Hanjin "caused" or "permitted" the discharge. Hanjin did not cause or permit the discharge because it had no control over the vessel.

3. The Nature of Hanjin's Time Charter of the Vessel Did Not Permit It Sufficient Control Over the Vessel to Cause or Permit the Discharge of Bunker Fuel Into the Bay.

Paragraph A of the Tentative Resolution states that Hanjin "leased" the COSCO BUSAN. This overstates Hanjin's relationship to the ship. Hanjin was the time charterer of the vessel. Under the New York Produce Exchange time charter between Hanjin and Regal Stone, the owner of the COSCO BUSAN, Hanjin contracted for the use of a vessel for a fixed period of time. As the Time-Charterer, Hanjin was entitled to determine the vessel's destinations and use the space on the vessel to transport the cargo of its customers. The fact that the charterer has some control over the vessel's ports of call or the cargo to be carried does not, however, make it liable for the navigation of the vessel as if it were the owner.

A time charter gives the charterer no property interest in the vessel. Rather, possession and control of the vessel remain with the owner. As time charterer, Hanjin did not maintain the ship's equipment, nor did it control or determine when or under what conditions the vessel sailed or the navigational routes it employed. The vessel is operated by its regular crew and officers who are hired and paid by the owner. The owner navigates the vessel, and responsibility for the acts of a pilot rests with the owner, not the charterer. *See e.g. Robins Dry Dock & Repair Co. v. Flint*, 272 U.S. 303 (1927); *Migut v. Hyman-Michaels Co.*, 571 F.2d 352, 355 (6th Cir.1978); *Assistance, Inc. v. Teledyne Industries, Inc.*, 37 Cal.App.3d 644, 650 (1974) (citing cases); *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332, 1341 (5th Cir. 1987) (time charterer is not responsible for navigational errors committed by the pilot).[1]

Paragraph B of the Tentative Resolution asserts that the COSCO BUSAN struck a tower supporting the western span of the San Francisco-Oakland Bay Bridge, resulting in the discharge of bunker fuel into San Francisco Bay. This allision occurred as the vessel was navigating from the Port of Oakland through the Bay while a pilot was aboard and in command.

Under the time charter, Hanjin's ability to control any aspect of the transit of the COSCO BUSAN was limited to telling the owners which ports of call to make and in what order. Hanjin had no duty, responsibility or ability to choose the crew, its officers or the pilot or to man, navigate or pilot the COSCO BUSAN on November 7, 2007. As a time charterer, Hanjin had no actual control over -- and no ability to control -- the operation of the vessel at the time of the allision. Hanjin therefore, did not

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[1] By contrast, a "demise charterer" is a party who contracts for the vessel itself and assumes exclusive possession, control, command and navigation of it. The demise charterer is treated as the owner for many purposes and is subject to an owner's liabilities. *Assistance, supra,* 37 Cal.App.3d at 649; *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 235 (3d Cir. 1991).

"cause or permit" discharge of bunker fuel into the Bay within the meaning of Water Code §13350(a)(3).

Conclusion

For the foregoing reasons, Hanjin respectfully submits that it did not cause or permit the discharge of bunker fuel into the Bay within the meaning of Water Code §13350. As such, it would be inappropriate to include Hanjin as a "Discharger" in the Board's Tentative Resolution or to authorize the Attorney General to proceed against Hanjin in connection with the November 7, 2007, discharge of oil from the M/V COSCO BUSAN.

Respectfully submitted,

Erich P. Wise
Flynn, Delich & Wise LLP
On behalf of Hanjin Shipping Co., Ltd.

EPW