

## **ENCLOSURE 4**

**Comments from Designated party Pacific Built, Inc.,  
dated June 30, 2006 on the June 16, 2006 revised  
proposed Administrative Civil Liability Order**

10-0049

LEWIS BRISBOIS BISGAARD & SMITH LLP

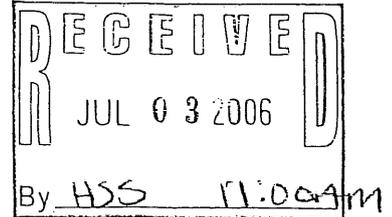
ATTORNEYS AT LAW

2500 VENTURE OAKS WAY, SUITE 200, SACRAMENTO, California 95833

PHONE: 916.564.5400 | FAX: 916.564.5444 | WEBSITE: www.lbbslaw.com

BRUCE L. SHAFFER  
DIRECT DIAL: 916.646.8203  
E-MAIL: shaffer@lbbslaw.com

June 30, 2006



VIA OVERNIGHT DELIVERY

Harold J. Singer  
REGIONAL WATER QUALITY CONTROL BOARD  
Lahontan Region  
2501 Lake Tahoe Boulevard  
South Lake Tahoe, California 96150

Re: Consideration of ACL Concerning Davis, Coffeng, Pacific Built In the Matter  
of C. Geoffrey and Christine Davis, et al.  
Complaint No. R6T-2005-0029

Dear Mr. Singer:

Pursuant to the June 19, 2006 Notice of Continued Public Hearing, enclosed are the original and thirteen (13) copies of Pacific Built's Comments to the prosecution team's revised proposed order in the above matter.

Attached as Exhibit "A" to the Comments is the proposed order that Pacific Built requests the Board consider and enter.

We have also enclosed a copy of the Comments and proposed order for Mr. Dodds.

LOS ANGELES 213.250.1800    SAN FRANCISCO 415.362.2580    SAN DIEGO 619.233.1006    COSTA MESA 714.545.9200    INLAND EMPIRE 909.387.1130    NEW YORK 212.232.1300    LAS VEGAS 702.893.3383    PHOENIX 602.385.1040    TUCSON 520.202.2565    CHICAGO 312.345.1718

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Harold Singer  
REGIONAL WATER QUALITY CONTROL BOARD

Page 2  
June 30, 2006

If you have any questions, please do not hesitate to contact us.

Very truly yours,



Bruce L. Shaffer of  
LEWIS BRISBOIS BISGAARD & SMITH LLP

BLS/pea

Enclosure(s): As indicated above.

cc: David P. Coupe (Via Overnight Delivery) (w/enc.)  
Steven Blum (Via Overnight Delivery) (w/enc.)  
Mark Hudak (Via Overnight Delivery) (w/enc.)  
James Donahue (w/enc.)  
Drew Briner (Via Overnight Delivery) (w/enc.)  
Robert S. Dodds (Via Overnight Delivery) (w/o enc.)

10-0051

1 Drew Briner (SBN 142858)  
Briner Law Offices  
2 P. O. Box 1880  
395 North Lake Blvd.  
3 Tahoe City, CA 96145  
Telephone: (530) 583-8961  
4

5 Bruce L. Shaffer (SBN 62730)  
Lewis Brisbois Bisgaard & Smith LLP  
2500 Venture Oaks Way, Suite 200  
6 Sacramento, CA 95833  
Telephone: (916) 564-5400  
7

8 Attorneys for Pacific Built, Inc.  
9

10 STATE OF CALIFORNIA  
11 REGIONAL WATER QUALITY CONTROL BOARD  
12 LAHONTAN REGION  
13

-ooOoo-

14 In the matter of C. Geoffrey and  
15 Kristine Davis, Hans and Margaret  
Coffeng, and Pacific Built, Inc.:  
16 Violation of Waste Discharge  
Prohibitions prescribed in the  
17 *Water Quality Control Plan for*  
*the Lahontan Region*, for the  
18 Unauthorized Discharge of  
Untreated Wastewater to Lake  
19 Tahoe, at 7770 and 7780 North  
Lake Boulevard, Kings Beach,  
20 Placer County Assessor's Parcel  
Numbers 117-180-017 and -018 WDID  
No. 6A310408003.  
21

COMPLAINT NO.  
R6T-2005-0029  
FOR ADMINISTRATIVE CIVIL  
LIABILITY

COMMENTS BY PACIFIC BUILT,  
INC. TO PROPOSED ORDER BY  
LAHONTAN PROSECUTION

22 Pacific Built, Inc. submits these comments to the proposed order  
23 by the Lahontan prosecution.  
24

INTRODUCTION

25 The proposed order fails to address the legal standard of  
26 liability, and to acknowledge significant facts the Board should  
27 consider in their decision.

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## LEGAL STANDARD

The prosecution order fails to address or even mention the California Supreme Court case of *Younger v. Superior Court* (1976) 16 Cal.3d 30. In *Younger* the Supreme Court held that you must show negligence in order to have liability under Water Code section 13350(a)(3).<sup>1</sup> While this case was decided in 1976, the language of section 13350(a)(3) has not changed since that time, and there is no overriding legal authority. While the 2003 amendment to section 13350 deleted the "intentionally or negligently" language from both section 13350(a)(1) and (a)(2), that language was never part of 13350(a)(3). The three sections of section 13350 are parallel in their wording. The prosecution argument that strict liability applies to section 13350(a) is virtually identical to the argument rejected by the Supreme Court, and is directly contrary to the Supreme Court decision.

Pacific Built requests that the degree of each parties fault, if any, reasonableness of conduct, and contributing fault of third parties be considered by this Board in determining whether to impose a civil liability.

## SECTION 13327 FACTORS

Whether this Board accepts the prosecution contention that strict liability applies, or Pacific Built's contention that a negligence standard applies, this Board should take into account significant facts that the prosecution order does not acknowledge.

### 6.a. Nature, Circumstances, Extent, and Gravity

The prosecution order argues that the incident would not have occurred if Pacific Built had called USA North. Legally, this

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<sup>1</sup>Unless otherwise indicated, cited code sections refer to the Water Code.

1 contention is speculation, and would not be admitted in court.  
2 Moreover, a necessary element of this contention is that Pacific  
3 Built had a legal duty to call USA North and that it violated the  
4 standard of care. Pacific Built did not have such a duty, as it  
5 neither know, nor reasonably could have known, about the existence of  
6 the force main. At the May 11, 2006 hearing, the prosecution  
7 admitted they offered no expert opinion about the standard of care to  
8 be expected from Pacific Built. On the other hand Rodney DuBois, an  
9 expert with extensive USA experience, testified that Pacific Built  
10 did not have a duty to call USA North in this matter.

11 The undisputed facts that the prosecution order does not  
12 acknowledge are that the title reports from both First American Title  
13 Company, and Fidelity National Title Insurance Company failed to  
14 disclose the existence of a sewer easement; the plans and permits  
15 did not identify any easement or the sewer force main in the area of  
16 the work; Pacific Built reviewed the site to determine its physical  
17 characteristics and there were no physical indications of the  
18 existence of the force main; Pacific Built was provided and reviewed  
19 the proposed pier section and elevation, the Arnett bathymetry  
20 survey, 4 photographs, and the project description dated August 2004,  
21 and there was no indication of the existence of the force main;  
22 Pacific Built participated in the pre-grade inspection with TRPA  
23 staff and there was no indication of the existence of the force main;  
24 and during high water the force main is under water.

25 Additionally, Leah Kaufman has been involved in over 150 pier  
26 applications. Ms. Kaufman researched TRPA files and located a 1993  
27 survey for the Davis property, and a 1994 site plan for the Coffeng  
28 property. Ken Arnett performed an updated survey in November 2000.

1 Ken Arnett performed a bathymetry survey in November 2002. Ms.  
2 Kaufman visited the site in 2000 and did not observe "signs.  
3 markings, manholes, clean-outs, or other 'red-flags.' Two other  
4 piers exist to the West of the Davis/Coffeng properties. These piers  
5 are supported by pilings similar to the Davis/Coffeng pier. During  
6 Ms. Kaufman's visits to the site "on many occasions over the years"  
7 she did not observe any "red-flags." None of the information  
8 obtained from the above facts and professional review disclosed any  
9 evidence of the existence of the force main.

10 The force main is marked by NTPUD signs on Highway 28. The force  
11 main is not marked by any signs on the beach at the project site. It  
12 is reasonable to expect the existence of the force main on the  
13 highway. It is not reasonable to expect the existence of the force  
14 main on the beach.

15 The Army Corps of Engineers prepared a report in April of 2003.  
16 This report was provided to the TRPA and Lahontan. The report  
17 disclosed the existence of the force main. Neither TRPA or Lahontan  
18 brought this fact to the attention of Ms. Kaufman, Pacific Built, or  
19 the Davises and Coffengs.

20 The first point is that this was an extensive and exhaustive  
21 permit and site evaluation process, yet nobody involved, including  
22 the Davis and Coffengs, Pacific Built, Leah Kaufman, Ken Arnett, or  
23 other professionals, had any knowledge of the force main, and given  
24 the extensive and exhaustive nature of the process, it is not  
25 reasonable for them to know about the existence of the force main.

26 The second point is if the title reports disclosed the existence  
27 of the force main, if the plans and permits disclosed the existence  
28 of the force main, if the physical characteristics of the site

1 disclosed the existence of the force main, if the numerous surveys  
2 and previous site plan disclosed the existence of the force main, if  
3 the NTPUD would have placed signs on the beach disclosing the  
4 existence of the force main, or if the TRPA and Lahontan had shared  
5 the Corps report disclosing the existence of the force main, this  
6 incident probably would not have occurred.

7 The only argument by the prosecution is that Pacific Built should  
8 have known about the force main because in the mid 1980's Tom Ragan  
9 saw exposed and broken laterals to a gravity sewer in Dollar Point.  
10 Therefore, the prosecution argues, Pacific Built should have called  
11 USA North for this project. The prosecution does not point out that  
12 gravity sewer line have visible manholes at regular intervals.  
13 Additionally, as pointed out by Rodney DuBois, gravity lines are  
14 exempt from the USA North process. (Government Code section 4216(j)).  
15 Therefore, if Pacific Built reasonably should know about gravity  
16 sewers in the shorezone, it would have no duty to contact USA North.

17 If the sewer line on the beach in front of the Davis/Coffengs  
18 property was a gravity line, and Pacific Built and everyone else  
19 missed the visible manholes, and Pacific Built punctured the gravity  
20 line, the prosecution may have a point. However, as force mains are  
21 hidden, and there was no indication of the existence of the force  
22 main from extensive professional review, or in any of the public and  
23 private documents that were a part of this project, it is not  
24 feasible to argue that Pacific Built reasonably should have known  
25 about the existence of the force main.

26 6.b. Whether Discharge is Susceptible to Cleanup or Abatement

27 The prosecution order argues that 17,000 gallons of wastewater  
28 was not susceptible to cleanup. This is not accurate. The NTPUD

1 recovered 39,000 gallons by 6:53 p.m. on July 19, 2005. The NTPUD  
2 also recovered 100% of the wastewater discharge after 6:53 p.m. Th  
3 prosecution obtained their number by subtracting the 39,000 gallons  
4 from the 56,000 gallons that the prosecution represents is the total  
5 discharge from the pipe. However, the 56,000 figure includes  
6 wastewater stored in the pipe, and the wastewater from the N-1 pump  
7 station, that was discharged after 6:53 p.m. This wastewater was  
8 fully recovered.

9 According to Mr. Hagadorn, the total discharge from the pipe up  
10 to 6:53 p.m. was 50,110 gallons. Therefore, the total amount of  
11 wastewater that was not recovered on July 19, 2005 was 11,110 gallons  
12 (50,110 - 39,000). However, the NTPUD also recovered wastewater on  
13 July 20, 2005. Therefore, the total amount of wastewater discharged  
14 was less than 11,000 gallons.

15 6.d.&e. Ability to Pay/Ability to Stay in Business

16 Pacific Built provided tax returns, financial statements, and a  
17 letter from the Small Business Administration denying it a small  
18 business loan. These documents were provided under penalty of  
19 perjury, were accepted into evidence, and are part of the record.  
20 The prosecution did not present any contrary evidence on this issue,  
21 and it is unrealistic to ignore Pacific Built's financial status.  
22 Pacific Built has lost money the last three years, and only showed a  
23 profit of \$14,523 in 2002. It can't borrow money. It doesn't have  
24 the ability to pay a civil assessment from this Board.

25 Additionally, Pacific Built, given their financial status, would  
26 not have the ability to stay in business in the face of a civil  
27 liability from this Board. Pacific Built is a family company.  
28 Pacific Built is one of the very few marine contractors at Lake

1 Tahoe, and it provides a valuable service. A civil assessment would  
2 probably put Pacific Built out of business.

3 6.h. Degree of Culpability

4 This issue is addressed above under nature, circumstances,  
5 extent, and gravity.

6 6.i. Other Matters that Justice may Require

7 The prosecution order fails to acknowledge the testimony of  
8 construction experts and utility experts Bucky Whittier and Morris  
9 Allen. The NTPUD exacerbated the total discharge. The NTPUD,  
10 despite standard and recommended practice, and suggestions to the  
11 contrary, did not perform a temporary emergency repair by installing  
12 a full-circle clamp, which could have stopped or virtually eliminated  
13 the discharge from the sewer force main within approximately 60 to  
14 120 minutes of the break. Additionally, the NTPUD violated its own  
15 Emergency Response Plan, and custom and practice, for failing to have  
16 necessary materials available for an immediate response.

17 According to Mr. Hagadorn, had the NTPUD stopped the flow of  
18 wastewater within 60 to 120 minutes, the total discharge would have  
19 been between 12,804 gallons to 24,834 gallons. Moreover, there could  
20 have been almost complete recovery given the NTPUD recovery figures.

21 The NTPUD failed to follow the Tahoe Truckee Area Emergency  
22 Contingency Plan. The NTPUD failed to follow their own Emergency  
23 Response Plan. The NTPUD failed to follow the normal practice  
24 described in the Army Corps of Engineers April 2003 "Lake Tahoe Basin  
25 Framework Study." The NTPUD actions are directly contrary to the  
26 expert opinions of Bucky Whittier and Morris Allen. The NTPUD  
27 actions are directly contrary to the opinions of Gary Sisson, General  
28 Manager of the Mammoth WWTP, Bob Artis, Collection System Manager of

1 the Lake Arrowhead CSD, Mary Snyder of the Sacramento Regional County  
2 Sanitation District. The NTPUD actions are directly contrary to  
3 standard and prudent emergency response practice. "Anything goes to  
4 stop the flow." The NTPUD's justification for their lack of action  
5 was "...it was not cost effective to initiate the immediate  
6 repair...."

7 What message does this Board want to send to utility companies?  
8 It would be inappropriate to tell the NTPUD that they have nothing to  
9 worry about if they fail to follow the extensively documented  
10 standard of care thereby causing thousands of gallons of wastewater  
11 to be unnecessarily discharged because this Board will hold the  
12 property owners and contractors 100% responsible?

13 CONCLUSION

14 Pacific Built respectfully requests that this Board take the  
15 facts discussed above into account in rendering its decision in this  
16 matter.

17  
18 Dated: June 30, 2006

Respectfully submitted,

19 BRINER LAW OFFICES

20  
21 By:   
22 Drew Briner, Attorneys  
23 for PACIFIC BUILT, INC.

24 LEWIS BRISBOIS BISGAARD & SMITH  
25 LLP

26 By:   
27 Bruce L. Shaffer, Attorneys  
28 for PACIFIC BUILT, INC.

10-0059

**EXHIBIT "A"**

10-0060

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
LAHONTAN REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R6T-2006

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

C. GEOFFREY AND CHRISTINE DAVIS

HANS AND MARGARET COFFENG

PACIFIC BUILT, INC.

FOR ALLEGED VIOLATION OF WASTE DISCHARGE PROHIBITIONS  
PRESCRIBED IN THE *WATER QUALITY CONTROL PLAN FOR THE LAHONTAN  
REGION* FOR THE UNAUTHORIZED DISCHARGE OF UNTREATED DOMESTIC  
SEWAGE WASTEWATER TO THE LANDS BELOW THE HIGH-WATER RIM OF  
LAKE TAHOE

ON JULY 19, 2005

AT 7770 AND 7780 NORTH LAKE BOULEVARD, KINGS BEACH

The California Regional Water Quality Control Board, Lahontan Region ("Water Board") finds:

1. Parties

Hans and Margaret Coffeng are the legal owners of a residential property commonly known as 7770 North Lake Boulevard, Kings Beach, Assessor's Parcel Number 117-180-017. C. Geoffrey and Christine Davis own the residential property commonly known as 7780 North Lake Boulevard, Kings Beach, Assessor's Parcel Number 117-180-018.

Pacific Built, Inc. ("Pacific Built") is a licensed contractor specializing in marine contracting in the Lake Tahoe area.

2. The Project

The Coffengs and Davises constructed a multi-use pier on the common property line between their two properties. They entered into a contract with Pacific Built to construct the pier. Prior to the start of construction, the Coffengs and Davises obtained all permits and approvals for the project, including: a TRPA permit, a Section 401 Certification from the Water Board, an exemption from the California State Lands Commission, a Streambed Alteration permit from the California Department of Fish & Game, and General Permit 16 from the Army Corps of Engineers. In addition, the project was reviewed twice by the interagency Shorezone Review Committee and recommended for approval.

3. Facts Relating To Discharge

A 14" force sewer main is located under the beach area behind the Davis and Coffeng homes. This force main is owned and maintained by the North Tahoe Public Utility District ("NTPUD").

10-0061

There are no signs or other markings to signal the presence of the force main beneath the beach. Instead, there are signs along North Lake Boulevard indicating that the force main is located along or beneath the roadway. One such sign is located alongside North Lake Boulevard 200 feet from the Coffeng residence and appears to indicate that the force main continues along the roadway past the Coffeng and Davis homes. The Davises and Coffengs were not aware that the force main was located under the beach behind their homes. Their local consultants also were unaware of the presence of the force main under the beach in this area.

The Coffengs obtained a title report for their property from First American Title Company, and the Davises obtained a title report from Fidelity National Title Insurance Company. Neither of the title reports disclosed the existence of a sewer easement.

Pacific Built was not aware that the force main was located under the beach in the area of their work. Pacific Built reviewed the project plans approved by the TRPA, the TRPA permit, and the other permits. The plans and permits did not identify any utility easement or the sewer force main in the area of its work. Pacific Built reviewed the site to determine its physical characteristics. Pacific Built reviewed the proposed pier section and elevation, the Arnett bathymetry survey, 4 photographs, and the project description dated August 2004. There was no evidence of any utility easement or the sewer force main in the work area. Pacific Built participated in the TRPA "On-Site Pre-Grading (pre-construction) Inspection. At the inspection, Pacific Built and the TRPA inspected the site and reviewed TRPA permit conditions. There was no evidence of the sewer force main, or discussion of it, at the inspection. Pacific Built did not call the Underground Service Alert for Northern California and Nevada ("USA North") before beginning construction.

On July 19, 2005, Pacific Built was driving pilings for the multi-use pier and punctured the force main. An estimated 56,000 gallons of sewage were released from the force main.

Pacific Built constructed berms and contained much of the spill on the beach area. Workers from several public agencies responded to the scene. A trash pump was employed to pump some of the sewage to the sewer main along North Lake Boulevard. Later, vac-trucks were employed to suction sewage and water from containment areas. A substantial portion of the discharge was removed by these means. An unknown quantity of sewage reached the waters of Lake Tahoe itself.

As a result of the sewage spill, five beaches were closed to the public and all private beaches between the public beaches were closed as well. Four of the public beaches remained closed to the public for 10 days following the discharge and the fifth beach was closed for 16 days.

#### 4. Alleged Violations

The administrative complaint alleges violations of the following prohibitions of the *Water Quality Control Plan for the Lahontan Region* (the "Basin Plan"), adopted pursuant to Water Code section 13243:

10-0062

A. "The discharge of treated or untreated domestic sewage, garbage, or other solid wastes, or any other deleterious material to the surface waters to the Lake Tahoe Basin is prohibited."

B. "The discharge, attributable to human activities, of solid or liquid waste materials, including soil, silt, clay, sand, and other organic and earthen materials to lands below the high-water rim of Lake Tahoe or within the 100-year floodplain of any tributary to Lake Tahoe is prohibited."

Unless excused, the discharge of sewage as a result of the puncture of the force main would be a violation of these provisions.

5. Administrative Civil Liability Authority

The Water Board may impose civil liability for violations of the Basin Plan pursuant to Water Code section 13350(a)(2), which provides:

(a) Any person who ... (2) in violation of any waste discharge requirement, waiver condition, certification, or other order or prohibition issued... by a regional board or the state board, discharges waste... except in accordance with waste discharge requirements or other actions or provisions of this division, shall be civilly liable and remedies may be proposed, in accordance with subdivision (d) or (e).

Untreated sewage constitutes "waste" as defined in Water Code section 13050.

The Water Board notes that there are significant inconsistencies within Water Code section 13350 regarding the standard for liability. Subsection 13350(b) expressly provides for strict liability in the case of discharges of certain hazardous materials. Subsection (a) does not mention strict liability. There are exemptions from strict liability set forth in subsection (c), but they expressly apply only to subsection (b). This anomaly would result in a lower standard for liability under subsection (b) than subsection (a).

In the absence of direction from the State Board or a court, the Water Board will consider the reasonableness of the acts of each party, their degree of culpability or fault, and the contributing fault of third parties in determining whether to impose civil liability under Section 13350(a).

6. Factors Affecting the Imposition of Civil Liability and the Amount of Civil Liability

Water Code section 13327 requires the Water Board to consider enumerated factors when determining the amount of civil liability under water Code section 13350. The Water Board also should consider these factors in determining whether to impose civil liability under Section 13350(a). The Water Board has considered these factors and finds as follows:

10-0063

a. The nature, circumstances, extent, and gravity of the violations

Lake Tahoe has been designated an Outstanding Natural Resource Water because of its extraordinary clarity, purity, and deep blue color. However, the Lake's clarity has been decreasing due to nutrient and fine sediment discharges associated with human activities. As a result, Lake Tahoe is listed on the Federal Clean Water Act Section 303(d) list as impaired due to excessive sediment and nutrients. Under these circumstances, every effort must be made to prevent discharges, and each illegal discharge must be dealt with in a manner that will discourage future discharges.

In this instance, the discharge was tragic and severe. It had a major impact on visitors, residents, and lakeside businesses during the vacation season.

The administrative complaint issued by the Lahontan Assistant Executive Officer claimed that over 120,000 gallons of raw sewage was discharged through the puncture in the force main and sought a civil liability of \$700,000. During the public hearing, Lahontan staff engineers acknowledged that their calculations were incorrect and that only a maximum of 56,000 gallons could have been discharged from the puncture. Following this admission, the prosecuting staff reduced the amount of requested civil liability proportionally, to \$325,000. Experts for the Davis and Coffeng families and Pacific Built testified that the likely amount of discharge was less than 56,000.

Pacific Built did not contact USA North. However the duty to call USA North is not absolute. Under Government Code section 4216.2(a), the contractor is required to contact the appropriate regional center "if the excavation will be conducted in an area which is known, or reasonably should be known, to contain subsurface installations...."

Pacific Built argues that it was not reasonable to suspect that there was a sewer force main buried beneath the beach. The Water Board finds that the signage installed by NTPUD is outdated and misleading, as it would lead a reasonable person to conclude that the force main is located alongside North Lake Boulevard, not beneath the beach, in this neighborhood. Additionally, the two title reports obtained by the Coffengs and Davises did not disclose a sewer easement, none of the surveys disclosed any utilities in the area of the work, there were no physical characteristics or features in the area of the work that disclosed the existence of the force main. Pacific Built reviewed the project plans approved by the TRPA, the TRPA permit, and the other permits. The plans and permits did not identify any utility easement or the sewer force main in the area of its work. Pacific Built reviewed the site to determine its physical characteristics. Pacific Built reviewed the proposed pier section and elevation, the Arnett bathymetry survey, 4 photographs, and the project description dated August 2004. There was no evidence of any utility easement or the sewer force main in the work area. Pacific Built participated in the TRPA "On-Site Pre-Grading (pre-construction) Inspection. At the inspection, Pacific Built and the TRPA inspected the site and reviewed TRPA permit conditions. There was no evidence of the sewer force main, or discussion of it, at the inspection. This factor justifies reducing the liability from the maximum amount.

10-0064

The Water Board is concerned that all public agencies were on notice that there was a force main buried beneath this beach and others along the Lake Tahoe shoreline. These facts were revealed in the 2003 Army Corps of Engineers report that was compiled with the assistance of the Lahontan staff, NTPUD, TRPA, and other local agencies. Despite having this knowledge, none of the agencies incorporated it in their permitting processes. Consequently, the Coffengs and Davises obtained permits and approvals from no less than five agencies – including Lahontan itself - and were never notified that there could be a force main under their beaches that should be investigated.

b. Whether the discharge is susceptible to cleanup or abatement

According to testimony at the public hearing and in the briefs, approximately 50,000 gallons of untreated wastewater escaped from the punctured force main as of 6:53 p.m.. Through the use of berms and other containment, pumping, and vector trucks, a significant amount of the discharge was recovered and taken off-site. Although it is difficult to calculate precisely the amount of sewage that actually reached the waters of Lake Tahoe itself, it is estimated that 11,000 gallons were not recovered by 6:53 on July 19, 2005. However, the NTPUD reported that they recovered an additional 47,000 gallons on July 20, 2005. Therefore, a significant majority of the total discharge was recovered and did not reach Lake Tahoe.

The Water Board notes that the lead agency responsible for dealing with the spill, NTPUD, did not have the necessary repair equipment (a circle clamp) available for this emergency, as required by its own Emergency Response Plan. Had the circle clamp been available, a significant amount of the wastewater discharge may have been contained, thereby lessening the amount of wastewater that reached the waters of Lake Tahoe.

Although any discharge of wastewater beneath the high-water rim of Lake Tahoe is a violation of the Basin Plan, the Water Board finds that civil liability in this instance should be based on the amount of wastewater that was not recovered and actually reached the waters of Lake Tahoe.

c. The degree of toxicity of the discharge

No analysis was performed to determine the degree of toxicity of the wastewater that was discharged, but it is assumed that the discharge contained pathogens that could cause illness and, in rare cases, death to persons who ingest or come in contact with it. Thus, while not toxic, the sewage discharged did create a condition with potentially harmful effects on humans.

d. Ability to pay

Pacific Built submitted tax returns and financial statements that were accepted in evidence. These financial records establish that the company is losing money and has a limited ability to pay a civil liability. The prosecuting staff did not present any testimony or evidence to contradict the information in the financial records submitted by Pacific Built. The Water Board finds that the tax returns, filed under penalty of perjury, and the financial statements, prepared in

10-0065

the ordinary course of business, are reliable and that they establish a limited ability to pay on Pacific Built's part. This factor justifies reducing the liability from the maximum amount.

The Coffeng and Davis families did not argue an inability to pay.

e. The effect on the parties' ability to continue its business

Pacific Built is a family-run business that has been performing marine contracting in the Lake Tahoe area for some 30 years and is one of only a limited number of marine contractors. Pacific Built's representatives claim that a significant civil liability assessment would threaten the company's ability to stay in business. This testimony, consistent with the tax returns and financial records in evidence, support a finding that a substantial civil liability assessment against the company would jeopardize its ability to stay in business. This factor justifies reducing the liability from the maximum amount.

The Davis and Coffeng families were not engaged in business activities, so this factor is not relevant as to these parties.

f. Any voluntary cleanup efforts undertaken by the parties

Pacific Built immediately contacted NTPUD to report the puncture. Pacific Built employees constructed berms to partially contain the spill. Pacific Built's employees provided assistance to NTPUD to evacuate the beaches. Pacific Built employees remained at the site until all cleanup activities were completed. Pacific Built offered additional assistance to NTPUD's crews, including installation of vacor pumps at the puncture point instead of at containment ponds, but NTPUD declined this aid. Pacific Built's efforts after the puncture justify reducing liability from the maximum amount.

g. History of prior violations

The Davis and Coffeng families have no history of prior violations.

Pacific Built itself has no history of violations. A member of the family that owns and operates Pacific Built was involved in dredging operations at Fleur Du Lac in 1989. This 17-year old incident does not indicate a propensity by Pacific Built to ignore applicable regulations so as to warrant an upward adjustment of civil liability.

h. Degree of culpability

The Davis and Coffeng families are not directly responsible for the discharge. They followed all applicable procedures to obtain approval for the multi-use pier. They hired local consultants to assist them in this process. They obtained approvals or permits from five separate public agencies as well as the interagency Shorezone Review Committee. This process took over four years. Once all approvals were obtained, they hired a licensed, bonded and experienced local contractor, Pacific Built, that specializes in pier installation. At no time did the Davises and Coffengs or their consultants attempt to avoid or evade the legal regulations

10-0066

applicable to their project. The Davis and Coffeng families and their consultants acted responsibly at all times.

Although the prosecuting staff contends that the Davis and Coffeng families should be held liable for Pacific Built's failure to call USA North, that position is not consistent with California law. Government Code section 4216.2 places responsibility for calling USA North squarely on the excavator. Government Code section 4216.8 exempts owners of property who contract with a licensed contractor for a project where (as here) no building permit is required. A homeowner should be able to rely on contractors.

Under these circumstances, the Water Board finds that the Davis and Coffeng families should not be held civilly liable under Water Code section 13350(a).

Pacific Built offered expert testimony that the standard of care for marine contractors working on Lake Tahoe did not require they contacting USA North when working on this project. The prosecuting staff did not offer rebuttal expert testimony on this point.

[Alternative 1] The Water Board finds that Pacific Built did not have a duty to call USA North under these circumstances. Pacific Built did not know, and should not reasonably have known, of the possible presence of subsurface utilities in this area. The Water Board finds that the signage installed by NTPUD along North Lake Boulevard was misleading and would cause a reasonable person to believe that the force main was located alongside or beneath the roadway in this vicinity, not under the beach. Additionally, none of the information provided to Pacific Built, and none of the site's physical characteristics, disclosed the existence of the force main. Therefore, it would not be fair to impose civil liability on the contractor for failing to call USA North.

[Alternative 2] The Water Board finds that, given its experience, Pacific Built should have been aware of the possibility that there was a subsurface installation in this area and should have called. This finding is supported by evidence that Pacific Built has performed at least some prior work that involved utilities installed beneath the high water rim at Dollar Point. Had Pacific Built contacted USA North, or contacted NTPUD directly, it is likely that this entire incident could have been avoided.

i. Economic savings resulting from the violation

There were no economic savings resulting from the violation. The violation was an accident, and did not result from an attempt to avoid costs or restrictions.

j. Other matters as justice may require

The sewage spill and resulting beach closures were the subject of much public attention. Interest in the outcome of this proceeding remains high, as evidenced by the attendance and number of speakers at the public hearing. This presents an opportunity for the Water Board to reinforce points made during the hearing.

The public relies on licensed general contractors, surveyors, and other consultants for their expertise and experience. The civil liability imposed in this case should send a message to the contracting community that a high degree of care must be exercised when working in the Lake Tahoe Basin.

An equally high degree of care is expected from the public agencies that safeguard Lake Tahoe and its environs. It is deeply troubling that so many agencies – including this one - reviewed the multi-use pier project and granted approvals or permits without noticing that the construction would be taking place in an area that the agencies knew to have sewer lines beneath the beach. Apparently, none of the applications submitted in connection with this project required notice to or approval from NTPUD. This is an oversight that should be corrected.

NTPUD also should respond quickly by revising its signage and installing appropriate markings on beach areas where it has installed subsurface sewer lines. Had better signage been in place, it is likely that this discharge could have been avoided altogether.

Testimony established that temporary repairs, including the installation of a circle clamp, could have significantly reduced the amount of sewage being discharged from the puncture, but NTPUD did not have the parts available and did not want to perform temporary repairs. The explanation of the NTPUD Executive Director was that temporary repairs would not have been “cost effective.” The Water Board disagrees – every means should have been utilized to reduce the amount of sewage escaping from the force main. Installing a circle clamp, or even a wedge to limit the size of the opening, would not have been very expensive, and the cost would be recoverable from the parties. It is hardly fair to hold the parties fully responsible for the portion of the discharge that could have been avoided by reasonable temporary measures.

7. Civil Liability – California Water Code

For the discharge of wastes to surface waters in violation of the Basin Plan, pursuant to Water Code section 13350(a)(2), the Water Board may impose civil liability pursuant to Water Code section 13350(e)(2). Section 13350(e)(2) provides for civil liability not to exceed \$10.00 per gallon of waste discharged.

In this matter, the maximum liability is \$560,000 for a discharge of 56,000 gallons of sewage. However, the Water Board finds that, in view of the accidental nature of this discharge and the cleanup activities conducted by Pacific Built, civil liability should be based the amount of sewage that was not recovered, which is estimated to be less than 11,000 gallons.

In the administrative complaint, the prosecuting staff does not urge the maximum liability of \$10,00 per gallon. Rather, it recommends a civil liability of \$325,000 for 56,000 gallons, or approximately \$5.80 per gallon. Using that standard, the maximum civil liability for the unrecovered discharge amount would be approximately \$63,800. This maximum is subject to adjustment based on the factors discussed herein.

10-0068

8. Administrative Civil Liability Complaint Issued by Assistant Executive Officer

The Water Board Assistant Executive Officer issued Administrative Civil Liability Complaint No. R6T-2005-0029 on December 14, 2005. The administrative complaint was properly served on all parties named therein.

9. Public Hearing

On May 11, 2006, the Water Board held a public hearing on the administrative complaint. The hearing was properly noticed. The parties were present and represented by counsel. Members of the public were given an opportunity to submit written comments in advance of the hearing and to make oral comments during the hearing. The Water Board has considered all evidence submitted by Lahontan staff, the parties, and the public. The Water Board closed the public hearing portion of the proceeding on May 11.

On July \_\_\_\_, 2006, the Water Board received comments from the prosecuting staff and parties regarding the form of a proposed order and findings and conducted its deliberations on this matter.

10. Findings and Conclusions

The Water Board finds that the Davis and Coffengs families acted responsibly and prudently in engaging local consultants and contractors and by obtaining all necessary permits and approvals before beginning construction of the multi-use pier. It would not be fair or reasonable to hold them civilly liable for the accidental discharge of sewage from their properties under these circumstances. California law does not require that they be held liable for the failure of Pacific Built to contact USA North. No deterrent effect would be achieved by imposing liability on these parties. The Water Board imposes civil liability of \$0.00 on these parties.

[Alternative 1] The Water Board finds that Pacific Built did not have a duty to call USA North because the company did not know, and should not reasonably have known, that there were subsurface utilities in the proposed area of excavation. The Water Board assigns civil liability of \$0.00 to this party.

[Alternative 2] The Water Board finds that Pacific Built should have called USA North before beginning construction and therefore is civilly liable. The Water Board assigns civil liability of \$ \_\_\_\_ to Pacific Built. This amount is based on careful consideration of the following factors:

- Whether Pacific Built had a duty to contact USA North is not clear-cut.
- NTPUD's signage on Lake Boulevard was misleading and may have contributed to Pacific Built's decision not to contact USA North.
- None of the information provided to Pacific Built, and none of the site's physical characteristics, disclosed the existence of the force main.
- Pacific Built has limited ability to pay

10-0069

- Pacific Built would not be able to continue in business if a greater civil liability is imposed.
- Pacific Built notified NTPUD immediately and assisted in cleanup activities
- The amount of civil liability should reflect that a substantial amount of the discharge was contained and recovered. Civil liability should be based on the estimated amount of sewage that actually reached the waters of Lake Tahoe, not the number of gallons that were estimated to have escaped from the force main.
- The amount of civil liability should be reduced to reflect the estimated amount of discharge that could have been avoided through the employment of reasonable temporary repairs.

IT IS HEREBY ORDERED that, pursuant to Water Code section 13350(a)(2):

1. No administrative civil liability shall be imposed on the Davis and Coffeng families and the Administrative Complaint is dismissed as to them.
2. No administrative civil liability is imposed on Pacific Built and the Administrative Complaint is dismissed as to this party.  
/or/
2. Administrative civil liability is imposed on Pacific Built in the amount of \$ \_\_\_\_\_. The entire amount shall become due and payable 90 days after this Order is adopted.
3. If the above civil liability is not paid in full at the Water Board's South Lake Tahoe office by said date, this matter will be referred to the Attorney general for collection.

I, Harold J. Singer, 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, Lahontan Region, on July \_\_, 2006.

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HAROLD SINGER  
EXECUTIVE OFFICER

10-0070

10-0071