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STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of California  
Department of Fish and Game for Review of  
Action by the California Regional Water  
Quality Control Board, Lahontan Region In  
Adopting Order No. R6V-2010-0016  
Regarding Hot Creek Hatchery

**CALIFORNIA DEPARTMENT OF FISH  
AND GAME PETITION FOR REVIEW  
AND TO STAY LAHONTAN REGIONAL  
WATER QUALITY CONTROL BOARD  
ADMINISTRATIVE CIVIL LIABILITY  
ORDER NO. R6V-2010-0016**

1           **I. INTRODUCTION**

2           Pursuant to California Water Code § 13320 and 23 CCR § 2050 et seq., the California  
3           Department of Fish and Game (CDFG) hereby petitions to the State Water Resources  
4           Control Board (SWRCB) for review of Administrative Civil Liability Order No. R6V-  
5           2010-0016 (ACL Order) adopted by the Lahontan Regional Water Quality Control Board  
6           (Lahontan Board) on April 15, 2010. A copy of the ACL Order is attached as Attachment  
7           1 to this Petition. CDFG respectfully requests that the SWRCB modify the ACL Order to  
8           reflect the imposition of a Mandatory Minimum Penalty only for the five alleged  
9           violations for which CDFG is not claiming an affirmative defense. CDFG also requests  
10          that the SWRCB adopt an Order that finds, based on the existing administrative record  
11          for this matter, that the affirmative defense set forth in Water Code § 13385(j)(1)(B)  
12          applies to the unique facts and circumstances of the operation of the Hot Creek Hatchery.  
13          There is little dispute regarding the underlying facts of the alleged violations and the  
14          existence of springs and seeps with higher flow volume and nitrate + nitrite content than is  
15          allowed by the current NPDES Permit. The dispute in this instance and that is the essence  
16          of this Petition is a question of law. Specifically, the CDFG believes that pursuant to  
17          Water Code § 13385(j)(1)(B) , Mandatory Minimum Penalties are not required and are not  
18          warranted at the Hot Creek Hatchery in this instance and that the Lahontan Regional  
19          Water Quality Control Board made an error in law when adopting the ACL Order.  
20          Because there is little or no dispute about the underlying facts regarding the ACL Order,  
21          CDFG does not at this time intend to introduce supplemental evidence pursuant to CCR §  
22          2050.6.

23  
24           **II. BACKGROUND**

25          On June 15, 2006 the Lahontan Board adopted Order No. R6V-2006-0027, a new NPDES  
26          permit for the Hot Creek Hatchery issued to CDFG and the United States Forest Service.  
27          On February 1, 2010, the Lahontan Board issued Complaint No. R6V-2010-0004 for  
28          Mandatory Minimum Penalty against CDFG, alleging four types of violations: (1) four

1 exceedances of the potassium permanganate effluent limit, (2) one missing monitoring  
2 report, (3) 24 flow volume exceedances, and (4) 46 nitrate + nitrite effluent limit  
3 exceedances. A hearing on the Complaint was heard before the Lahontan Board on April  
4 15, 2010. CDFG did not contest the penalties for the four alleged potassium  
5 permanganate violations and the one missing monitoring report. CDFG did contest the  
6 contention of the Prosecution Team that liability for the remaining alleged violations was  
7 subject to Mandatory Minimum Penalties. CDFG contended before the Lahontan Board  
8 and still contends that the unique facts and circumstances of the operation of the Hot  
9 Creek Hatchery fits the narrow confines of the affirmative defense to the imposition of  
10 Mandatory Minimum Penalties set forth in Water Code § 13385(j)(1)(B). All of the  
11 substantive issues raised in this Petition were raised in the testimony and briefs submitted  
12 to the Lahontan Board in this matter.

13 On April 15, 2010 the Lahontan Board adopted the ACL Order.. The ACL Order imposes  
14 a liability of \$225,000 upon the CDFG regarding the operation of Hot Creek Hatchery  
15 which is payable to the State Water Pollution Cleanup and Abatement Account by May  
16 15, 2010. CDFG is aggrieved by the improper imposition of Mandatory Minimum  
17 Penalties upon it for the 24 flow volume exceedances and 46 nitrate + nitrite effluent limit  
18 exceedances in that the payment of the amount stated in the ACL Order could not be paid  
19 out the of current budget for the Hot Creek Hatchery, therefore that amount would need to  
20 come from other CDFG programs.

21  
22 **III. THE ACTION OF THE LANONTAN BOARD IN ADOPTING THE ACL ORDER**  
23 **WAS IMPROPER AS TO THE FLOW VOLUM AND NITRATE +NITRATE**  
24 **EXCEEDANCES**

25 **A. Four Potassium Permanganate Exceedances and One Missing Monitoring**  
26 **Report.**

27 CDFG does not dispute the occurrence of the alleged four exceedances of potassium  
28 permanganate in the ACL Order. Similarly, CDFG does not dispute the alleged

1 violation for one missing monitoring report in the ACL Order. CDFG does not  
2 contend that the ACL Order was improper as to these alleged violations. CDFG also  
3 does not content that the following finding in the ACL Order was improper, “[T]he  
4 nitrate + nitrite levels in the facility’s water supply are almost always higher than the  
5 effluent limits established in Board Order No. R6V-2006-0027.”

6  
7 **B. Flow Volume and Nitrate + Nitrite Exceedances in the 2006-2009 Time Period.**

8 CDFG does contend that certain findings in the ACL Order are improper. Specifically,  
9 the ACL Order finds, “[A] although the Water Board finds that a more appropriate  
10 penalty in this case would be \$18,000, California Water code § 13385(h) and (i)  
11 require it to assess mandatory minimum penalties in the amount of \$225,000.” CDFG  
12 believes that this finding is improper because California Water Code § 13385(j)(1)(B)  
13 provides an applicable affirmative defense to the imposition of mandatory minimum  
14 penalties for the flow volume exceedances and the nitrate + nitrite exceedances of the  
15 2006 NPDES Permit for the Hot Creek Hatchery. Therefore, as a question of law,  
16 California Water Code § 13385(h) and (i) do not require the Lahontan Regional Water  
17 Quality Control Board to assess mandatory minimum penalties in the amount of  
18 \$225,000 in the ACL Order.

19  
20 **IV. A STATEMENT OF POINTS AND AUTHORITIES**

21 CDFG filed testimony, an opening brief, and a rebuttal brief with the Lahontan Board in  
22 this matter. CDFG relies on what has been filed to date along with the oral presentation  
23 to the Lahontan Board on April 15, 2010 and does not believe that supplemental evidence  
24 is necessary to support this petition. Pursuant to 23 CCR, § 2050, CDFG presents here a  
25 brief summary of the points and authorities in support of its petition, as already filed with  
26 the Lahontan Board in this matter.

1           **A. Underlying Facts Not Disputed**

2           There is little or no disagreement about the occurrence of violations of the 2006  
3           NPDES Permit for the Hot Creek Hatchery. There is little or no disagreement that the  
4           source of the violations for flow volume are the springs and seeps that are the sole  
5           source of water for the hatchery. (See Ferguson Rebuttal Testimony, Page 3,  
6           Paragraphs 5 and 6; See also DFG Exhibit 1, Starr Testimony, p. 6). There is little or  
7           no disagreement that the source of the violations for nitrate + nitrite exceedances are  
8           the springs and seeps that are the sole source of water for the hatchery. (See ACL  
9           Order, page 5, Paragraph 9; See also Ferguson Rebuttal Testimony, Page 3, Paragraph  
10          4; See also DFG Exhibit 1g and Starr Testimony, pp 6-7 ).

11  
12          **B. The Lahontan Regional Water Quality Control Board Erred as a Matter of Law**  
13          **in not applying Water Code § 13385(j)(1)(B) in the instance of the ACL Order .**

14          **1. Water Code Section 13385(j)(1)(B) applies to Hot Creek Hatchery.**

15          Water Code § 13385(j) provides, in part, the following:

16          (j) Subdivisions (h) and (i) [requiring the imposition of a Mandatory Minimum  
17          Penalty] do not apply to any of the following:

18          (1) A violation caused by one or any combination of the following:

19                (A) An act of war.

20                (B) An unanticipated, grave natural disaster or other natural phenomenon of an  
21                exceptional, inevitable, and irresistible character, the effects of which could  
22                not have been prevented or avoided by the exercise of due care or  
23                foresight....

24          As stated in DFG's testimony, the springs at Hot Creek Hatchery occur naturally  
25          and were present before Hot Creek Hatchery was constructed. (DFG Exhibit 1, p.  
26          6). DFG does not artificially limit the volume of flow that arises from the springs.  
27          (DFG Exhibit 1, p. 6.) DFG does not add to the volume of water used and  
28          discharged at Hot Creek Hatchery by using a source of water other than the springs

1 and seeps that naturally occur in the area. (DFG Exhibit 1, p. 6.) DFG cannot  
2 easily shunt the water that is discharged from the springs out of the watershed using  
3 gravity due to the topography of the area. (See DFG Exhibit 1, Figure 1.) A fish,  
4 the Owens tui chub, listed as endangered under both the Endangered Species Act  
5 (16 U.S.C. § 1531 et seq.) and the California Endangered Species Act (Fish and  
6 Game Code § 2050 et seq.) is present in the area of the two large springs (AB  
7 Supply and the CD Supply Springs) that flow directly into the hatchery (DFG  
8 Exhibit 1 at p. 4.) These two springs are one of only two isolated areas that are  
9 designated as critical habitat for the Owens tui chub by the U.S. Fish and Wildlife  
10 Service. (*Id.*)

11  
12 California courts have only once interpreted Water Code § 13385(j)(1)(B). (See  
13 DFG Opening Brief, p. 6.) In the *City of Brentwood v. Central Valley Regional*  
14 *Water Quality Control Board*, the City of Brentwood (City) operated a wastewater  
15 treatment plant that discharged into Marsh Creek. At the end of 1999 and beginning  
16 of 2000, the City applied for a revised NPDES permit for its existing facility and a  
17 permit for a new facility. In June 2000 the Central Valley Regional Water Quality  
18 Control Board (Central Valley Board) issued the City a single permit for both  
19 facilities. The discharge was composed of both groundwater and treated wastewater  
20 from the plant. The City's discharge violated the dissolved oxygen levels in the  
21 NPDES Permit. The Central Valley Board imposed mandatory minimum penalties  
22 pursuant to Water Code § 13385. In relevant part, the City contended that the  
23 groundwater was most likely the cause of the violations and it speculated that  
24 irrigation, pesticide use and other practices on the agricultural lands surrounding the  
25 plant could have affected the composition of the groundwater component of the  
26 plant's effluent. The Central Valley Board staff speculated that the dissolved  
27 oxygen violations may have been caused by the construction of the City's new plant  
28 and took the position that the City could have prevented the dissolved oxygen

1 violations had they better prepared and planned for it. Unlike the situation in the  
2 *City of Brentwood*, it is beyond question that the source of the exceedance of the  
3 flow discharge limit and the nitrate + nitrite limit in the 2006 NPDES Permit are the  
4 springs and seeps that naturally flow into the hatchery. Unlike the situation in the  
5 *City of Brentwood*, the construction of the Hot Creek Hatchery did not affect the  
6 amount of flow discharged from the springs and seeps or the levels of nitrate +  
7 nitrite in those springs. The springs existed prior to and have not been affected by  
8 the construction of the Hot Creek Hatchery. (DFG Exhibit 1, p. 6.)

9 As further explained in DFG's Opening Brief (See DFG Opening Brief, pp. 4-5) the  
10 language for the affirmative defense to Mandatory Minimum Penalties set forth in  
11 Water Code § 13385(j)(1)(B) mirrors exactly the definition of the term "act of God"  
12 as set forth in the Comprehensive Environmental Response, Compensation and  
13 Liability Act (CERCLA) and the Oil Pollution Act (OPA). The Prosecution Team,  
14 in its rebuttal materials, relied heavily on a case from the Eastern District of  
15 Louisiana interpreting the "act of God" defense to liability under the Oil Pollution  
16 Act (OPA). (*Apex Oil Company, Inc. v. United States* (E.D. La. 2002, 208 F.  
17 Supp.2d, 642). That court upheld the National Pollution Fund Center's Claim  
18 Division (NPFC) determination that Apex Oil Company (Apex) had failed to meet  
19 its burden of proving the act of God defense applied to acts relating to an oil spill.  
20 Apex had claimed that a flood combined with strong and unpredictable currents in  
21 the lower Mississippi River was an unanticipated grave natural disaster or other  
22 natural phenomenon, unavoidable even with the exercise of due care and foresight.  
23 The NPFC determined that Apex had not met its burden of proof, citing factors such  
24 as the tug that Apex used in the storm was underpowered. The court upheld the  
25 NPFC determination.

26 The facts surrounding the operation of the Hot Creek Hatchery are very different  
27 than the facts of the *Apex* case. In essence, the NPFS found that Apex had  
28 contributed to the occurrence of the oil spill. Here, the Hot Creek Hatchery is

1 essentially a flow through facility. (See DFG Exhibit 1, p. 6.) Whatever amount the  
2 springs produce flows through the hatchery and are discharged to the creek. (See  
3 DFG Exhibit 1, p. 6.) The levels of nitrate + nitrite *in the springs before entering*  
4 *the hatchery are often higher* than the discharge level and the effluent limits in the  
5 2006 NPDES Permit. (DFG Exhibit 1g; ACL Order, p. 5). The Prosecution Team  
6 has not asserted and the Lahontan Regional Board did not find that DFG contributed  
7 to the high levels of flow or the high levels of nitrate + nitrite that occur naturally in  
8 the springs and seeps that supply the hatchery.

9 In another case, *U.S. v. Stringfellow*, the United States District Court, Central  
10 District of California determined that heavy rainfall was not an exceptional natural  
11 phenomenon and was not an “act of God” under CERCLA where rains at a toxic  
12 waste disposal site were foreseeable based on normal climatic conditions and where  
13 harm caused by rain on the toxic waste facility could have been prevented through  
14 the design of proper drainage channels. *U.S. v. Stringfellow* (1987) 661 F. Supp.  
15 1053. Unlike the *Stringfellow* situation, drainage channels to shunt the flow of the  
16 springs around the hatchery would be difficult to construct. As stated in DFG  
17 testimony, increased use of an historical bypass channel near the AB spring could  
18 lead to further hybridization of the endangered Owens tui chub and would be  
19 reasonably expected to eliminate the Owens tui chub population from AB Spring.  
20 (See DFG Exhibit 1, p. 4.) The topography of the area makes construction of a  
21 gravity fed drainage channel around the CD Spring difficult if not impossible to  
22 construct. (See DFG Exhibit 1, p. 2.)

23 Both the *Apex* case and the *Stringfellow* case, along with most federal cases  
24 interpreting the act of God affirmative defense, involve some activity (hauling oil  
25 barges, operating a toxic waste site) that then intercepts with an act of God or nature  
26 resulting in damage or an impact to the environment. Here, the springs and seeps  
27 that are the sole source of water for the Hot Creek Hatchery are the sole cause of the  
28 violations of the discharge limitations in the 2006 NPDES Permit. There is no



1 ongoing activity that then intercepts with an act of God or nature and results in  
2 damage or impact to the environment. The flow volume levels would discharge to  
3 Hot Creek *regardless* of whether or not the Hot Creek Hatchery was there. In the  
4 vast majority of instances, the nitrate + nitrite levels in the discharge would flow to  
5 Hot Creek *regardless* of whether or not the Hot Creek Hatchery was there. If the  
6 CDFG shut down Hot Creek Hatchery, due to the cost of the penalties at issue or for  
7 other reasons, the levels of flow and nitrate + nitrite that currently exist and are the  
8 cause of the violations of the discharge limitations in the 2006 NPDES Permit,  
9 would continue to occur. The springs and seeps that supply Hot Creek Hatchery are  
10 an act of God or nature clearly within the meaning of Water Code § 13385(j)(1)(B).  
11

12 **2. The Prosecution Team Interpretation of Water Code § 13385((j)(1)(B) is Not**  
13 **Supported by Case Law**

14 The Prosecution Team presented testimony asserting that CDFG failed to exercise  
15 due care and foresight during and following the NPDES permit development and  
16 adoption process for the 2006 NPDES Permit. (Ferguson Rebuttal Testimony, p. 1.)  
17 In essence, the Prosecution Team argues that CDFG did not clearly enough tell the  
18 Lahontan Board *prior to* adoption of the 2006 NPDES Permit that the Lahontan  
19 Board was about to adopt a NPDES permit that would immediately result in  
20 violations of that permit. Both CDFG and the Lahontan Board and its staff had all  
21 the same data at its disposal, (See Ferguson Rebuttal Testimony, p. 2 and DFG  
22 Exhibit 1g.) yet according to the Prosecution Team and arguably the Lahontan  
23 Board, it is CDFG, not the Lahontan Board that did not exercise due care or  
24 foresight. Most importantly, the Prosecution Team misses the point. The  
25 Prosecution Team does not assert that the effects of the natural phenomenon, the  
26 natural springs and seeps that surround the hatchery, could have been prevented or  
27 avoided by the exercise of due care or foresight by CDFG. Instead, the Prosecution  
28 Team asserts that the *effects of a regulatory process* could have been avoided by

1 the exercise of due care or foresight. The Prosecution Team cites to no case law for  
2 support of its unique interpretation of the act of God affirmative defense. CDFG  
3 presented testimony that the *effects of the natural phenomenon* could not have  
4 been avoided by the exercise of due care or foresight, which is supported by case  
5 law cited by CDFG. (See CDFG Opening Brief; CDFG Rebuttal Brief.)  
6

7 **V. THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD**

8 A true and correct copy of this petition was mailed via First Class mail on May 11, 2010 to  
9 Harold Singer, Executive Officer, Regional Water Quality Control Board, Lahontan  
10 Region.  
11

12 **VI. PETITIONER**

13 The Petitioner, the California Department of Fish and Game, is represented in this matter by  
14 its Office of General Counsel. Contact information is listed in the heading for this Petition.  
15

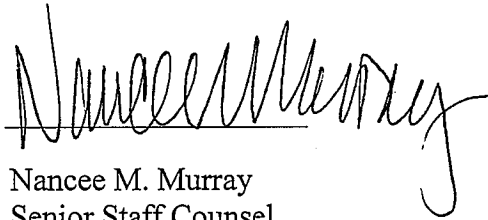
16 **VII. CONCLUSION**

17 CDFG respectfully requests that the SWRCB:

- 18 (1) accept this petition;  
19 (2) grant its request to modify the ACL Order to delete any Mandatory Minimum Penalty  
20 for the flow volume violations and the nitrate + nitrite violations of the 2006 NPDES  
21 Permit; and/or  
22 (3) use whatever authority the SWRCB may have to grant relief to CDFG from the  
23 Mandatory Minimum Penalties contained in the ACL Order and/or the 2006 NPDES  
24 Permit conditions that lead to the ACL Order.

25  
26 23 CCR § 2050 requires that this petition be filed within 30 days of the action by a regional  
27 board. This petition is therefore submitted in a timely manner via electronic mail and  
28 overnight delivery.

Dated: May 11, 2010



Nancee M. Murray  
Senior Staff Counsel  
Department of Fish and Game

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**California Regional Water Quality Control Board**  
**Lahontan Region**



Linda S. Adams  
Secretary for  
Environmental Protection

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Arnold Schwarzenegger  
Governor

**TO:** Bruce Kinney, Deputy Regional Manager  
California Dept. of Fish and Game  
407 West Line Street  
Bishop, CA 93514

James Starr, Fisheries Branch  
California Dept. of Fish and Game  
830 S Street  
Sacramento, CA 95814

**FROM:** *For* Carrie Hackler  
Office Technician

**DATE:** APR 21 2010

**SUBJECT: ADOPTED ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R6V-2010-0016 AGAINST THE CALIFORNIA DEPARTMENT OF FISH AND GAME FOR MANDATORY MINIMUM PENALTY, HOT CREEK FISH HATCHERY, MONO COUNTY**

Enclosed is a copy of Board Order No. R6V-2010-0016 that was adopted at the Regional Board meeting held in South Lake Tahoe, CA on April 15, 2010.

Any person aggrieved by this action of the Regional Water Board may petition the State Water board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must *receive* the petition by 5:00 p.m., 30 days after the date of the Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, state holiday, or furlough day 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.

If you have any questions regarding this matter, please contact Taylor Zentner at (530) 542-5469, or Scott C. Ferguson at (530) 542-5432.

cc: Hot Creek Hatchery Mail List

Enclosure

TBA/adwU:/Enforcement and Special Projects Unit/Hot Creek/Adopted ACL Order/Hot Creek ACL Order Transmittal Letter,4-20.  
File Under: SLT File Room, WDID No. 6B260801001 VVL File Room, WDID No. 6B260801001

*California Environmental Protection Agency*



**Attachment I**

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
LAHONTAN REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R6V-2010-0016

ADMINISTRATIVE CIVIL LIABILITY ORDER AGAINST THE CALIFORNIA  
DEPARTMENT OF FISH AND GAME FOR MANDATORY MINIMUM PENALTY,  
HOT CREEK FISH HATCHERY

\_\_\_\_\_  
Mono County\_\_\_\_\_

The California Regional Water Quality Control Board, Lahontan Region (Lahontan Water Board) finds that the California Department of Fish and Game has violated the following:

- A. Effluent limitations for nitrate plus nitrite as nitrogen, potassium permanganate, and flow as specified in Board Order No. R6V-2006-0027.
- B. Reporting requirements as specified in Board Order No. R6V-2006-0027.

A hearing on Administrative Civil Complaint No. R6V-2010-0004 was held before the Lahontan Water Board on April 15, 2010. Based upon evidence and testimony received at the hearing, the Lahontan Water Board makes the following findings:

1. **Discharger**

The California Department of Fish and Game owns and operates Hot Creek Fish Hatchery (Facility). Board Order No. R6V-2006-0027 (NPDES Permit No. CA0102776) was adopted on June 15, 2006 to regulate waste discharges from the Facility. Board Order No. R6V-2006-0027 identifies the California Department of Fish and Game as the Discharger with primary responsibility. The California Department of Fish and Game is hereinafter referred to as the "Discharger."

2. **Property**

The Facility is operated by the Discharger on property owned by the Los Angeles Department of Water and Power and the United States Forest Service. The Facility is located at 85 Old School Road, Mammoth Lakes, in Mono County.

3. **Facility**

**Hot Creek Fish Hatchery.** The Facility consists of two hatcheries (Hatchery I and Hatchery II), two spawning houses, 42 fingerling tanks, 40 fingerling troughs, nine brood ponds, 42 production ponds, four production raceways, and three settling ponds.

4. **Discharge**

Wastewater from the Facility's four raceways receives sedimentation treatment in two parallel flow-through settling ponds before it is discharged to Hot Creek. Wastewater from Hatchery I, the Hatchery I brood ponds, and the Hatchery I spawning house receives sedimentation treatment in another settling pond (McBurney Pond) before it is discharged to Hot Creek. Wastewater from Hatchery II, the Hatchery II brood ponds, and the Hatchery II spawning house does not receive treatment before it is discharged to a short tributary of Hot Creek.

5. **Enforcement History**

In 2006, Administrative Civil Liability Order No. R6V-2006-0005 was adopted against the Discharger for mandatory minimum penalties associated with the violation of effluent limitations contained in Board Order No. 6-99-55 for total suspended solids.

On December 5, 2008, the Lahontan Water Board issued a Notice of Violation to the Discharger for the violation of effluent limitations for nitrate plus nitrite as nitrogen and flow as prescribed by Board Order No. R6V-2006-0027.

On May 11, 2009, the Lahontan Water Board's Assistant Executive Officer issued a Time Schedule Order to address the ongoing violations of the effluent limitations (nitrate plus nitrite as nitrogen and flow) prescribed by Board Order No. R6V-2006-0027.

On February 1, 2010, the Lahontan Water Board's Cleanup and Enforcement Division Manager issued Administrative Civil Liability Complaint No. R6V-2010-0004 to the Discharger for effluent and reporting violations originally identified in the Notice of Violation and Time Schedule Order.

This Administrative Civil Liability Order for mandatory minimum penalty addresses the violations cited in the February 1, 2010 Administrative Civil Liability Complaint.

6. **Violations – Board Order No. R6V-2006-0027**

Board Order No. R6V-2006-0027 includes the following discharge specifications:

- a. Section IV.A.1.b requires wastewater discharged from the Facility not to exceed the following effluent limits for nitrate plus nitrite as nitrogen at monitoring locations M-001, M-002, M-003, and M-004:
  - i. 0.23 mg/L Average Monthly
  - ii. 0.31 mg/L Maximum Daily

- b. Section IV.A.1.b requires wastewater discharged from the Facility not to exceed the following maximum daily effluent limits for flow:
  - i. At M-001, 6.9 million gallons per day (MGD)
  - ii. At M-002, 6.5 MGD
  - iii. At M-003, 3.8 MGD
  - iv. At M-004, 2.5 MGD
  
- c. Section IV.A.1.b requires wastewater discharged from the Facility not to exceed the following effluent limits for potassium permanganate at monitoring locations M-001, M-002, M-003, and M-004:
  - i. 0.12 mg/L Average Monthly
  - ii. 0.25 mg/L Maximum Daily

Nitrate plus nitrite as nitrogen and flow are Group I pollutants, as specified in Appendix A to section 123.45 of title 40, Code of Federal Regulations.

According to monitoring reports submitted by the Discharger from August 1, 2006 through May 31, 2009, the Discharger violated the NPDES Permit effluent limitations as listed in the table of violations provided in Attachment A, which is made a part of this Order. Additionally, the Discharger failed to submit the monitoring report that was to provide the monthly monitoring results for July 2006, which is also identified in Attachment A.

## **7. Authority and Maximum Potential Civil Liability**

Water Code section 13385(h)(1) requires the Lahontan Water Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for each **serious violation**.

Water Code section 13385(h)(2) provides that a **serious violation** occurs if the discharge exceeds the effluent limitations (a) by 40 percent or more for a Group I pollutant, as specified in Appendix A to section 123.45 of title 40, Code of Federal Regulations, or (b) by 20 percent or more for a Group II pollutant, as specified in Appendix A to section 123.45 of title 40, Code of Federal Regulations.

Water Code section 13385.1(a)(1) provides that a **serious violation** also means a failure to file a discharge monitoring report required pursuant to Section 13383.

Water Code section 13385(i) requires the Lahontan Water Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for each violation, not counting the first three violations, if the discharger does any of the following four or more times in a period of six consecutive months (**chronic violations**):

- a. violates a waste discharge requirement effluent limitation;
- b. fails to file a report pursuant to Water Code section 13260;
- c. files an incomplete report pursuant to Water Code section 13260; or
- 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.

Water Code section 13385(i)(2) defines a "period of six consecutive months" as, "...the period commencing on the date that one of the violations described in this subdivision [Water Code section 13385(i)] occurs and ending 180 days after that date." However, **serious violations** may qualify as chronic violations for the purposes of determining a "period of six consecutive months," and may count as the first three **chronic violations**, though such violations are not counted twice for the purpose of assessing the penalty amount.

According to the definitions of **serious violations** above, the Discharger committed 16 serious violations from August 14, 2006 to May 4, 2009, as shown on lines 2, 7, 37, 38, 41, 48, 51, 53, 69 through 72, and 74 through 77 of the table of violations provided in Attachment A of this Order. The amount of the mandatory minimum penalty for the 16 serious violations (\$3,000 for each of the 16 violations) is **forty-eight thousand dollars (\$48,000)**.

According to the definition of **chronic violations** above, the Discharger committed 74 chronic violations from September 2006 through May 4, 2009, as shown on lines 4 through 77 of the table of violations provided in Attachment A of this Order. Fifteen of these violations also constitute **serious violations** as noted above. However, these 15 violations do not result in double penalties. The 74 **chronic violations** less the 15 **serious violations** to avoid double penalty results in 59 remaining **chronic violations**. The amount of the mandatory minimum penalty for the 59 remaining **chronic violations** (\$3,000 for each of the 59 violations) is **one hundred seventy-seven thousand dollars (\$177,000)**.

The total amount of the mandatory minimum penalty for serious and chronic violations that occurred August 14, 2006 through May 4, 2009 is (\$48,000 + \$177,000) **two hundred twenty-five thousand dollars (\$225,000)**.

#### **8. Administrative Civil Liability Complaint Issued by Water Board Staff**

Water Board staff issued Administrative Civil Liability Complaint No. R6V-2010-0004 to the Discharger on February 1, 2010. The Complaint states that the Discharger violated effluent limitations and reporting requirements contained in Board Order No. R6V-2006-0027 (NPDES Permit No. CA0102776). The Complaint lists the dates and nature of violations and recommends that the Discharger be assessed a



mandatory minimum penalty in the amount of two hundred twenty-five thousand dollars (\$225,000).

#### **9. Effluent Limitations**

The Water Board finds that the effluent limitations for nitrate + nitrite specified in Board Order No. R6V-2006-0027 are inconsistent with the information available to both the Water Board staff and the California Department of Fish and Game at the time of adoption of the permit. The nitrate + nitrite levels in the facility's water supply are almost always higher than the effluent limits established in Board Order No. R6V-2006-0027. The water supply is from naturally occurring springs adjacent to the facility. Although the facility often violated the effluent limits, the nitrate + nitrite levels in the effluent were usually lower than those in the water supply.

Using information about nitrate + nitrite levels in the effluent, Time Schedule Orders (TSO) No. R6V-2009-0016 and R6V-2009-0016-A1 specified new nitrate + nitrite effluent limitations. These limits are 30% or more higher than those contained in Board Order No. R6V-2006-0027. Had Board Order No. R6V-2006-0027 used the numbers in the TSO, the amount of the mandatory minimum penalty would amount to \$18,000. The Department of Fish and Game did not challenge the proposed effluent limitations as the 2006 permit was being developed. Although the Water Board finds that a more appropriate penalty in this case would be \$18,000, California Water code sections 13385(h) and (i) require it to assess mandatory minimum penalties in the amount of \$225,000.

#### **10. California Environmental Quality Act**

This enforcement action is being taken by the Lahontan Water Board to enforce provisions of the Water Code and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 210000 et seq.) in accordance with California Code of Regulations, title 14, section 15321.

#### **11. Petition**

Any person aggrieved by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must *receive* the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order 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.

**IT IS HEREBY ORDERED THAT:**

1. The Administrative Civil Liability recommended in Administrative Civil Liability Complaint No. R6V-2010-0004 is hereby affirmed.
2. The Lahontan Water Board imposes administrative civil liability against the Discharger in the amount of \$225,000.
3. The Discharger must provide payment with a cashier's check or money order in the amount of \$225,000 to the *State Water Pollution Cleanup and Abatement Account* by May 15, 2010.
4. If the Discharger fails to make the specified payment to the *State Water Pollution Cleanup and Abatement Account* within the time limits specified in this Order, the Lahontan Water Board may enforce this Order by applying for a judgment pursuant to Water Code section 13328. The Lahontan Water Board's Executive Officer is hereby authorized to pursue a judgment pursuant to Water Code section 13328 if the criterion specified in this paragraph is satisfied.

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 April 15, 2010.

  
HAROLD J. SINGER  
EXECUTIVE OFFICER

Attachment: A – Table of Violations

# Attachment A - Table of Violations

**Hot Creek Hatchery MMP Violations Table**

No.	Date	Violation Type	Location	Parameter	Description	MMP
1	8/14/2006	Chronic	M-004	Flow	Flow rate of 3.16 MGD at M-004 exceeds the Effluent Limit of 2.5 MGD	0
2	9/12/2006	Serious	Reporting	Reporting	July 2006 monthly SMR due on September 1, 2006. July 2006 monthly SMR never received	1
3	9/26/2006	Chronic	M-002	Flow	Flow rate of 7.0 MGD at M-002 exceeds the Effluent Limit of 6.5 MGD	0
4	Sep-06	Chronic	M-001	Flow	Flow rate of 7.0 MGD at M-001 exceeds the Effluent Limit of 6.9 MGD	1
5	Sep-06	Chronic	M-004	Flow	Flow rate of 2.7 MGD at M-004 exceeds the Effluent Limit of 2.5 MGD	1
6	9/18/2006	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.260 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
7	9/18/2006	Serious*/Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.322 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
8	9/18/2006	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.322 mg/L at M-004 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L	1
9	10/23/2006	Chronic	M-002	Flow	Flow rate of 6.7 MGD at M-002 exceeds the Effluent Limit of 6.5 MGD	1
10	11/13/2006	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.240 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
11	11/13/2006	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.238 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
12	11/13/2006	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.231 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
13	11/13/2006	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.277 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
14	11/29/2006	Chronic	M-001	Potassium Permanganate	Analytical result of 0.674 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.12 mg/L	1
15	11/29/2006	Chronic	M-001	Potassium Permanganate	Analytical result of 0.674 mg/L at M-001 exceeds the Instantaneous Maximum Effluent Limit of 0.25 mg/L	1
16	11/29/2006	Chronic	M-002	Potassium Permanganate	Analytical result of 0.743 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.12 mg/L	1
17	11/29/2006	Chronic	M-002	Potassium Permanganate	Analytical result of 0.743 mg/L at M-002 exceeds the Instantaneous Maximum Effluent Limit of 0.25 mg/L	1
18	3/26/2007	Chronic	M-003	Flow	Flow rate of 4.4 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
19	3/26/2007	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.247 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
20	3/26/2007	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.243 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
21	3/26/2007	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.249 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
22	3/26/2007	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.236 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
23	5/7/2007	Chronic	M-003	Flow	Flow rate of 4.1 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
24	6/4/2007	Chronic	M-003	Flow	Flow rate of 4.94 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
25	6/4/2007	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.251 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
26	6/4/2007	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.239 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
27	7/9/2007	Chronic	M-003	Flow	Flow rate of 4.6 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
28	8/6/2007	Chronic	M-003	Flow	Flow rate of 4.18 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
29	9/10/2007	Chronic	M-003	Flow	Flow rate of 4.2 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
30	9/10/2007	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.236 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
31	9/10/2007	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.243 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
32	12/10/2007	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.266 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
33	2/4/2008	Chronic	M-003	Flow	Flow rate of 4.30 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
34	3/3/2008	Chronic	M-003	Flow	Flow rate of 4.4 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
35	3/3/2008	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.264 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
36	3/3/2008	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.265 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
37	3/3/2008	Serious*/Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.380 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
38	3/3/2008	Serious*/Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.406 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
39	3/3/2008	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.380 mg/L at M-003 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L	1
40	3/3/2008	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.406 mg/L at M-004 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L	1
41	4/7/2008	Serious*/Chronic	M-003	Flow	Flow rate of 5.4 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD by more than 40%	1
42	5/5/2008	Chronic	M-003	Flow	Flow rate of 5.30 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
43	6/2/2008	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.292 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
44	6/2/2008	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.312 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
45	6/2/2008	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.312 mg/L at M-002 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L	1
46	6/2/2008	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.255 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
47	6/2/2008	Chronic	M-003	Flow	Flow rate of 5.4 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
48	6/2/2008	Serious*/Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.364 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
49	6/2/2008	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.364 mg/L at M-004 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L	1

# Attachment A - Table of Violations

**Hot Creek Hatchery MMP Violations Table - Continued**

No.	Date	Violation Type	Location	Parameter	Description	MMP
50	7/7/2008	Chronic	M-001	Flow	Flow rate of 7.0 MGD at M-001 exceeds the Effluent Limit of 6.9 MGD	1
51	7/7/2008	Serious*/Chronic	M-003	Flow	Flow rate of 6.0 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD by more than 40%	1
52	8/4/2008	Chronic	M-001	Flow	Flow rate of 7.3 MGD at M-001 exceeds the Effluent Limit of 6.9 MGD	1
53	8/4/2008	Serious*/Chronic	M-003	Flow	Flow rate of 6.6 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD by more than 40%	1
54	9/8/2008	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.287 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
55	9/8/2008	Chronic	M-003	Flow	Flow rate of 4.8 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
56	9/8/2008	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.316 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
57	9/8/2008	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.316 mg/L at M-004 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L	1
58	10/6/2008	Chronic	M-003	Flow	Flow rate of 4.0 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
59	11/2/2008	Chronic	M-003	Flow	Flow rate of 4.0 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
60	12/1/2008	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.258 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
61	12/1/2008	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.256 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
62	12/1/2008	Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.254 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
63	12/1/2008	Chronic	M-003	Flow	Flow rate of 4.0 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
64	12/1/2008	Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.253 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
65	1/5/2009	Chronic	M-003	Flow	Flow rate of 3.9 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
66	2/2/2009	Chronic	M-003	Flow	Flow rate of 3.88 MGD at M-003 exceeds the Effluent Limit of 3.8 MGD	1
67	3/2/2009	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.272 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
68	3/2/2009	Chronic	M-002	Nitrate + Nitrite	Analytical result of 0.266 mg/L at M-002 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
69	3/2/2009	Serious*/Chronic	M-003	Nitrate + Nitrite	Analytical result of 1.07 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
70	3/2/2009	Serious*/Chronic	M-003	Nitrate + Nitrite	Analytical result of 1.07 mg/L at M-003 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L by more than 40%	1
71	3/2/2009	Serious*/Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.72 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
72	3/2/2009	Serious*/Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.72 mg/L at M-004 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L by more than 40%	1
73	5/4/2009	Chronic	M-001	Nitrate + Nitrite	Analytical result of 0.247 mg/L at M-001 exceeds the Average Monthly Effluent Limit of 0.23 mg/L	1
74	5/4/2009	Serious*/Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.613 mg/L at M-003 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
75	5/4/2009	Serious*/Chronic	M-003	Nitrate + Nitrite	Analytical result of 0.613 mg/L at M-003 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L by more than 40%	1
76	5/4/2009	Serious*/Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.624 mg/L at M-004 exceeds the Average Monthly Effluent Limit of 0.23 mg/L by more than 40%	1
77	5/4/2009	Serious*/Chronic	M-004	Nitrate + Nitrite	Analytical result of 0.624 mg/L at M-004 exceeds the Instantaneous Maximum Effluent Limit of 0.31 mg/L by more than 40%	1
Total Violations Subject to MMP						75

First five of four violations occurring in a period of six consecutive months. Only the serious violation on line 2 is subject to MMP.

\* - One of the 15 serious violations that are not included in the MMP calculation for chronic violations.