California Natural Resources Agency
DEPARTMENT OF FISH AND GAME
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ARNOLD SCHWARZENEGGER, Governor
JOHN McCAMMAN, Director

Public Comment
A-2092 Hot Creek Fish Hatch.
Deadline: 12/1/10 by 12 noon

November 8, 2010

Jeannette L. Bashaw
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VIA ELECTRONICA MAIL
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Subject: PETITION OF CALIFORNIA DEPARTMENT OF FISH AND GAME (ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R6V-2010-0016 FOR HOT CREEK FISH HATCHERY, 85 OLD SCHOOL ROAD, MAMMOTH LAKES, MONO COUNTY), LAHONTAN WATER BOARD: BOARD MEETING RESCHEDULED TO DECEMBER 14, 2010
SWRCBIOCC FILE A-2092

Dear Ms. Bashaw:

Please find enclosed the California Department of Fish and Game's written comment on the draft Order in the above described matter. A copy of the petition is being sent to you via United States Postal Service on this date.

Please send a receipt of transmission regarding this written comment to Nancee Murray at nmurray@dfg.ca.gov.

Sincerely,

Thomas R. Gibson
General Counsel

Enclosure

cc: see page two

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

Petition of California Department of Fish and Game Administrative Civil Liability Order No. R6V-2010-0016 for Hot Creek Fish Hatchery, 85 Old School Road, Mammoth Lakes, Mono County. Lahontan Water Board: SWRCB/OCC File A-2092

CALIFORNIA DEPARTMENT OF FISH AND GAME

WRITTEN COMMENTS ON DRAFT ORDER

I. INTRODUCTION

A. Background

DFG owns and operates the Hot Creek Fish Hatchery (Hatchery) on property owned by the Los Angeles Department of Water and Power and the United States Forest Service. The Hatchery was constructed in 1941 in a large mountain meadow at the base of the Sierra Mountains near the edge of a large table and has been in operation since that time.(DFG Exhibit 1, p.3) The Hatchery's only source of water comes from two larger natural springs and several smaller springs. The entire Hatchery site is inundated with tiny naturally occurring springs and seeps that in some instances can be measured; while others seep up from within the channel making it impossible for the Hatchery to document an actual volume of flow entering the Hatchery water system.(DFG Exhibit 1, p.3). The Hatchery is essentially a flow-through facility, whereby the spring water flows into the Hatchery, is used for Hatchery operations, and then discharges into Hot Creek. DFG does not add any volume of water to the natural flow from the springs and seeps to operate the Hatchery. (DFG Exhibit 1, p. 6.)

On June 14, 2006, the Lahontan Regional Water Quality Control Board (Regional Board) adopted five NPDES permits for five hatcheries operated by the CDFG. The Regional Board adopted Order No. R6V-2006-0031 for Black Rock Hatchery, located in Inyo County; Order No. R6V-2006- 0030 for Fish Springs Hatchery located in Inyo County, Order No. R6V-2006-0029 for Mt. Whitney Hatchery located in Inyo County; Order No. R6V-2006-0027 for Hot Creek Hatchery located in Mono County; and Order No. R6V-2006-0028 for Mojave River Hatchery, located in San Bernardino County. For its own convenience and because it had contract funds available to hire an outside consultant to write the NPDES permits, the Regional Board sent five proposed orders out to DFG staff at or about the same time, gave DFG a limited amount of time to respond to all five proposed orders and adopted all five orders at the same meeting on June 14, 2006. DFG staff did request that the consultant to the Regional Board alter the flow limitations in the proposed permit and were told by the consultant that "it could not be changed because that was the figure in the previous permit. "(DFG Exhibit 1, p. 4)

In DFG's September 25, 2006 Self Monitoring Report, the Hatchery Manager requested that either an increase or elimination of flow volume limits be implemented by the Regional Board Staff (See DFG Exhibit 1i). DFG continued to request either an increase in the flow limit or the elimination of the flow limit with each Self Monitoring Report. (See Regional Board Materials for Consideration of Complaint No. R6V-2010-004 tabs 5,6,7,9,10,11,12,13,15,16,17,18,19,20,21,22,23,24,25,26,and 27). DFG received no response to these requests.

In the Spring of 2007, DFG staff began a series of phone calls and emails with Regional Board staff discussing the problem of the flow volume limitation and nitrate + nitrite (n+n) limitation in the Hatchery NPDES permit. Regional Board staff responses were that they were busy, staff was aware of the problem with the Hatchery NPDES permit and that staff would get to it after the February 2008 Regional Board meeting. (DFG Exhibit 1k).

On December 8, 2008, the Regional Board issued a Notice of Violation (NOV) for a list of alleged violations for the time period of August 14, 2006 to May 5, 2008. (DFG Exhibit 1p).

On May 11, 2009, the Regional Board adopted a Time Schedule Order (TSO) pursuant to Water Code section 13300. Due to the many springs and seeps that inundate the meadow in which the Hatchery is located, the TSO again underestimated flow volume and therefore the Regional Board further amended the TSO on January 11, 2010.

On February 1, 2010 Regional Board staff issued Administrative Civil Liability Complaint No. R6V-2010-0004 (ACL) for Mandatory Minimum Penalty against DFG, alleging four types of violations: (1) four exceedances of potassium permanganate effluent limit, (2) one missing monitoring report, (3) 24 flow volume exceedances, and (4) 46 n+n + nitrite effluent limit exceedances. On April 15, 2010 the Regional Board conducted a public hearing on the ACL and imposed penalties in the amount of $225,000 against DFG.

II. REVIEW BY THE SWRCB OF REGIONAL BOARD ACTION

Water Code section 13320(a) states that any aggrieved person may petition the SWRCB to review an action of a Regional Board within 30 days of such action. Water Code section 13320(b) provides that the evidence before the SWRCB shall consist of the record before the regional board "*and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.*" (emphasis added).

A. Water Code Section 13385(j)(1)(B)

Water Code section 13385 provides for civil liability for a person or entity that violates a NPDES permit. Water Code section 13385(h)(1) provides a mandatory minimum penalty of $3000 for each serious violation of a NPDES permit. Water Code section 13385(i)(1) provides a penalty of $3000 for specified violations of a NPDES permit such as exceeding an effluent limitation, failing to file a report required by a NPDES permit or filing an incomplete report. Water Code section 13385(j)(1)(B) provides, in part, that the mandatory minimum penalty set forth in Water Code section 13385(h) and (i) do not apply to "[a]n unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effect of which could not have been prevented or avoided by the exercise of due care or foresight."

Water Code section 13385 was amended in 1999 by Assembly Bill 1104 and Senate Bill 709. The Legislative Counsel's Digest for SB 709 refers to provisions in the bill that would recover the economic benefits derived from the acts that constitute a violation. SB 709 added subsections 13385(h)(i) and (j) to the Water Code. The language in Water Code section 13385(j)(1)(B) mirrors exactly the definition of the term "act of God" set forth in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)(42 U.S.C. section 9601 et seq.), as well as the Oil Pollution Act (OPA)(33 U.S.C. section 2701(1) et seq.) and is similar to the definition in the Clean Water Act (33 U.S.C. section 1321(a)(12). (DFG Opening Breif, pp.4-5.)

In the 11 years since the California Legislature enacted Water Code section 13385(j)(1)(B), no Regional Water Quality Control Board has approved the use of this section of the Water Code and the SWRCB has not applied this defense to a matter that has come before it. Now is the time to use the defense that the Legislature created at the same time that the "mandatory" penalties were enacted. The Legislature knew that unique circumstances would arise requiring flexibility with those penalties. And the Hot Creek Hatchery is unparallelled. DFG operates 24 hatcheries in California. No other hatchery has the same unique situation with a sole source springs that arise naturally from the ground and are not pumped into the hatchery with a controlled inflow amount, a flow through system where DFG does not add water to that system, and a federally and state listed endangered species present in that source spring water.

B. This Review Involves A Question of Law, Not A Question of Fact.

DFG and the Regional Board agree as to the relevant facts as stated in the Notice of Violation that is the Regional Board's basis for the ACL Order. DFG does not dispute the occurrence of the alleged four exceedances of potassium permanganate or the alleged one missing monitoring report in the ACL Order. DFG does not dispute the fact of the occurrence of the 24 flow volume exceedances or the 46 nitrate + nitrite (n+n) exceedances. DFG agrees with the factual finding in the ACL Order that stated [T]he 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." DFG does dispute the Regional Board's application of Mandatory Minimum Penalties, as a matter of law, for the 24 flow volume exceedances and the 46 nitrate + nitrite exceedances. However, DFG believes that the Regional Board erred in not applying Water Code section 13385(j)(1)(B) to the penalties assessed under Water Code section 13385(h) and (i).

C. The Regional Board Erred as a Matter of Law.

The standard of review used by a court of law to review conclusions of law by an administrative agency is de novo, or independent review. (*State Water Resources Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 722, 39 Cal. Rptr. 3d 189, 227) (citing *Pollack v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404, 107 Cal. Rptr. 2d 39.)

The SWRCB has previously ruled on the standard of review to apply when reviewing a Regional Board action. The SWRCB noted in *In the Matter of the Petition of Exxon Company* that the SWRCB is not subject to the exact standards that bind a court. The SWRCB went on to note the Water Code section 13320(b) provision of allowing the SWRCB to consider additional relevant evidence and that the SWRCB has several options if the SWRCB decides that the Regional Board action was improper, including not only remanding the action to the Regional Board, but also taking the appropriate action itself. "The scope of review thus appears to be closer to that of independent review."(*In the Matter of the Petition of Exxon Company,* (1985) Cal. State Water Resource Control Board., Order No. WQ 85-7, 10.)

Additionally, the Water Quality Enforcement Policy adopted by the SWRCB on November 17, 2009 provides, regarding SWRCB review of assessments in Administrative Civil Liability Actions, "[i]n reviewing a petition challenging the use of this methodology by a Regional Water Board, the State Water Board will generally defer to the decisions made by the Regional Water Boards in calculating the liability amount unless it is demonstrated that the Regional Water Board made a clear factual mistake **or error of law,** or that it abused its discretion." (*Water Quality Enforcement Policy*, p. 10. Emphasis added.) Here, the Regional Board erred as a matter of law in its application of the facts to the affirmative defense asserted by DFG, thus a deferential standard of review is not warranted and the review should be de novo, or an independent judgment.

There are few, if any, cases where a mandatory minimum penalty issued by a Regional Board has been fully reviewed by the SWRCB and resulted in a published SWRCB Order. Since a court of law, however, will independently review conclusions of law made by an administrative agency, and the SWRCB has itself previously stated that it considers the appropriate scope of review to be closer to that of independent review, the SWRCB should review this Regional Board order imposing $225,000 in penalties against DFG under a de novo, or independent judgment standard.

D. Burden of Proof

The Draft Order correctly states that DFG bears the burden of proof in asserting the affirmative defense set forth in Water Code section 13385 (j)(1)(B). DFG bears that burden of proof by a *preponderance of the evidence*. (See DFG Opening Brief, pp. 4-5.) A preponderance of the evidence is merely, "evidence which as a whole shows that the fact sought to be proved is more probable than not." (*Id.* p. 5, citing Black's Law Dictionary). A preponderance of the evidence is a much lower standard of proof than "clear and convincing" or "beyond a reasonable doubt" that the Legislature could have specifically required when Water Code section 13385(j)(1)(B) was adopted in 1999. The draft Order cites to a case where a court interpreting the "act of God" defense in the Oil Pollution Act determined that the burden of proof for this defense is more onerous than that required for common

law or traditional "act of God" defense (draft Order, p. 7.) Yet even a potentially "onerous" burden of proof is still that of a preponderance of the evidence. The California Water Code does not provide a different burden of proof for alleged violations of an NPDES permit and the California Evidence Code provides that except as otherwise provided by law, the burden of proof requires proof by a preponderance of evidence. (See DFG Opening Brief, p. 5.)

III. LACK OF CAUSATION

The imposition of liability for the flow and n+n exceedances is improper because the operation of the Hatchery did not cause the NPDES flow volume or n+n exceedances. In *Mancuso v. Southern California Edison Co.*, cited in the draft Order, the court stated that if the consequences of the natural event, not matter how foreseeable, could not have been prevented or mitigated then clearly the defendant cannot be liable. In such event, there is no proximate causation.((1991) 232 Cal.App.3d 88, 104.) This is a restatement of a fundamental principal that for liability to attach there must be some causal link between the actions of the wrongdoer and the harm that ultimately resulted.

In the matter before the Board DFG contends that assessment of the mandatory minimum penalty for the flow and n+n exceedances is improper due to a lack causation. While the Hatchery reported the exceedances, the Hatchery in no way caused to the exceedances. As stated earlier, *all* water used by the facility and discharged downstream comes from natural upstream springs and seeps. These natural sources are the *sole* cause of the total volume of water discharged from the facility. Similarly, the evidence before the SWRCB shows that the n+n exceedances were more likely than not caused by the springs and seeps and not the operation of the Hatchery. Samples of influent taken by DFG show that over the course of a decade, from May 1999 through January 2010, levels of n+n exceeded the limit stated in the 2006 NPDES permit. (DFG Exhibit 1g.) Only one sample *of the influent waters* did not exceed the level permitted in the 2006 NPDES permit for *discharge waters.* (DFG Exhibit 1g.) As discussed below, the flow volume of the influent water and the levels of n+n could not have been prevented or avoided by the exercise of due care or foresight.

In the cases cited in the draft Order, the actions of the party asserting the "act of God" defense contributed to and were a source of the harmful effect on the environment. In *Stringfellow,* the harmful effect was due to hazardous chemicals stored at the defendant's facility. (*U.S.* v. *Stringfellow* (1987) 661 F. Supp. 1053, 1059.) The heavy rainfall that contributed to harmful release was incapable of the CERCLA violation by itself. Had the defendant's facility not existed, no harm would have occurred. In *Apex Oil Co., Inc. v. U.S.*, the harmful effect occurred because the defendant transported slurry oil on a river where flood conditions had created dangerous currents. (*Apex Oil Co., Inc. v. U.S.* (E.D. La. 2002) 208 F.Supp.2d 642, 645.) The defendant's actions created a scenario where the natural phenomenon, the exceptionally strong currents, interacted with the defendants conduct to create the harmful effect on the environment. Absent the presence of the defendant's barges on river the release and harmful effect would never have occurred.

Here, as discussed above, the evidence shows that the springs and seeps that supply water to the Hatchery are the *sole* cause of the flow volume exceedances and that the springs and seeps are more likely than not the *sole* cause of the n+n level exceedances in the 2006 NPDES permit. In addition, the draft Order gives undue weight to one factor, foreseeabilty of the natural phenomenon, and does not

adequately address other factors which are necessary to determine liability, such as causation and ability to prevent or avoid the natural phenomenon.

IV. THE SPRINGS AND SEEPS THAT FLOW INTO THE HOT CREEK HATCHERY ARE A NATURAL PHENOMENON

The draft Order finds that the springs and seeps that supply water to the Hatchery are not exceptional, therefore the draft Order stops there and determines that no further investigation is necessary.. DFG disagrees.

Water Code section 13385(j)(1)(B) provides that Mandatory Minimum Penalties need not be imposed if the violation was caused by:

(1) an unanticipated, grave, natural disaster; **or**
(2) other natural phenomenon of an
    (a) exceptional,
    (b) inevitable, and
    (c) irresistible character;
(3) the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

DFG does not contend that the springs and seeps that surround the Hatchery are an unanticipated, grave, natural disaster. DFG does contend that the springs and seeps that surround the Hatchery are a natural phenomenon of an exceptional, inevitable *and* irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. DFG accepts the assumption in the draft Order that the naturally occurring springs and seeps that surround the Hatchery are a "natural phenomenon." (draft Order, p. 6, fn. 17.)

A. Exceptional

The draft Order cites a dictionary definition that defines "exceptional" to mean rare or something that deviates from the norm. (See draft Order, p. 6).The DFG Opening Brief used a Webster's dictionary that defined exceptional as unusual. (See DFG Opening Brief, p. 8.) If the SWRCB staff continued to scan dictionaries, it is very likely other definitions would emerge. Using both dictionary definitions, the flows from the seeps and springs that surround the Hatchery are not only unusual, but also rare, or flows that deviate from the norm. The Hatchery is located in this mountain meadow *because* of the springs and seeps that supply the water to the hatchery. These springs and seeps produce a high volume of constant flow that is rare for the high desert region in which they are located. The springs and seeps continue to produce flow at a volume that is so unpredictable that the first Time Schedule Order had to be amended because it did not adequately adjust the range needed to capture the wild swings in volume produced by the springs and seeps.

The draft Order relies heavily on *United States v. Stringfellow* ((1987) 661 F. Supp. 1053), to conclude that the springs at the Hatchery are not "exceptional" (draft Order, p. 7.) DFG disagrees with that interpretation. In denying the "act of God" defense there, the *Stringfellow* court looked at *three* factors to determine that the natural phenomenon was not "exceptional." (661 F. Supp. At 1061.)

First, the court found the rainfall was foreseeable and therefore *one* factor used in concluding that the natural phenomenon was not "exceptional." (*Id.*) What is implicit in using foreseeability as factor to determine whether the "act of God" defense should apply, however, is the ability of the party claiming the defense to take reasonable action to prevent future harm. As discussed further below, the effects of the springs and seeps could not have been prevented or avoided by DFG.

The second factor the *Stringfellow* court looked at was whether the defendants could have prevented the harm. In *Stringfellow*, foreseeablity alone was not sufficient to deny the affirmative defense. The court stated that the foreseeable condition allowed the defendants the opportunity to prevent the harm through proper design of their facility. (*Id.*) Unlike *Stringfellow*, any change to the Hot Creek facility would not prevent the flow volume or n+n exceedance from occurring. The only way for CDFG to have complied with the flow limitations would have been to divert the water around the Hatchery. While this would appear to prevent the exceedance by limiting the discharge from the Hatchery, the diverted water would simply be redeposited downstream. The end result is the same volume of water discharged into the environment. Similarly, the n+n levels in the influent water almost always exceed the levels permitted in the 2006 NPDES permit, and while normal operation of the Hatchery does contribute to lowering the n+n levels in the discharge waters (See DFG Exhibit 1g), a change in the design of the Hatchery would not prevent the naturally occurring levels of n+n in the first instance.

The last factor the court in *Stringfellow* looked at was whether the heavy rain was the sole cause of the release. (*Id.*) The heavy rains in *Stringfellow* were not capable by themselves of causing the harm. It required actions on the part of the defendant, in storing hazardous material that combined with the natural phenomenon and resulted in the release and the harm to the environment. Here, the natural springs that feed the Hatchery are the sole cause of the flow volume exceedance. Absent any action by DFG, the resulting violation would still have occurred. The facts here are clearly distinguishable from *Stingfellow*, and the springs and seeps are clearly "exceptional."

B. Inevitable

Webster's Dictionary defines inevitable as "incapable of being avoided or prevented." (DFG Opening Brief, p. 8.) The flow from the springs and seeps that enter the Hatchery existed before the Hatchery was constructed in 1941 and have continued ceaselessly since that time. (DFG Exhibit 1, p. 2.) DFG does not add volume to that flow to operate the Hatchery. (*Id., p. 6).* As further discussed below, the flows from the springs and seeps are incapable of being avoided or prevented due in part to the geography of the area and the presence of an endangered species in the main supply springs.

C. Irresistible

Webster's Dictionary defines irresistible as "impossible to resist."(DFG Opening Brief, p. 8.) As further discussed below, the flows from the springs and seeps are incapable of being shunted around the Hatchery due in part to the geography and in to the presence of an endangered species in the main supply springs.

D. Effects of Springs and Seeps Could Not Have Been Prevented or Avoided by the Exercise of Due Care or Foresight.

As discussed in detail in DFG's Opening Brief and DFG testimony submitted, DFG cannot easily shunt the water that is discharged from the springs and seeps out of the watershed using gravity due to the topography of the area. (DFG Exhibit 1, Figure 1.) Adjacent to the two main water supply springs, AB and CD, is a natural table that acts as a barrier to shunting water in that direction. In addition, AB and CD springs are listed as critical habitat for the Owens tui chub and AB spring is one of only two areas left in the world known to contain the federally and state listed endangered Owens tui chub. Redirecting flow from the AB spring around the Hatchery and connecting it with Hot Creek would likely lead to upstream movement of hybridized tui chubs into the spring, resulting in hybridation and the loss of that population for recovery purposes. (DFG Exhibit 1, p. 4.)

The draft Order states that the effects of the springs could have been prevented or avoided by the exercise of due care or foresight because "CDFG likely could have prevented the effluent limitation violations and imposition of MMPs through diversion devices or modification of its operations."(Draft Order, p. 7.) This is simply not true and is refuted by the DFG testimony that has been submitted. The Hatchery is stuck between a (rock) table and a hard place, specifically the likely loss of a population of the endangered species, the Owens tui chub. Unlike in *Stringfellow*, where the toxic waste disposal site could have easily created drainage channels to shunt water around the toxic disposal site, shunting water around the Hatchery is difficult if not impossible. Unlike the situation in *the City of Brentwood* case, there is not a quick mechanical fix to remedy either the flow or the n+n exceedance. (See *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004)123 Cal.App 4th, 714.) In the *City of Brentwood*, the Central Valley Regional Board determined that the City could have prevented the dissolved oxygen violations had they simply installed air blowers. Here, a quick mechanical fix would not solve the problem of a flow volume exceedance. In addition, as demonstrated by DFG Exhibit 1g, the Hatchery *more often than not* lowers the n+n levels in the water that is discharged to the creek. What more the Hatchery could do to lower the *naturally occurring* n+n levels in the spring water is unclear.

Because the draft Order could not rely on physical facts at the Hatchery to establish that the effects of the springs could have been prevented or avoided by the exercise of due care or foresight, the draft Order turns to argument. The draft Order states that DFG staff could have prevented the imposition of MMPs through "administrative challenges" (draft Order. p. 8.) This argument entirely misses the point. Could "administrative challenges" lower the flow volume of the water supply springs? No. Could "administrative challenges" lower the n+n + nitrite level in the influent water to the Hatchery? No. Unlike the cases cited in the draft Order, there is no obvious physical solution for the Hatchery. Unlike *Stringfellow,* drainage ditches here are difficult if not impossible to construct. Unlike *Apex Oil,* it is not about a company's choice of a small tug combining with a natural disaster to create harm to the environment. Unlike *City of Brentwood,* the source of the exceedance is clear and there is no quick mechanical, physical fix.

IV. CONCLUSION

DFG does not dispute the fact of the missing July 2006 monthly report or the reported exceedance at four discharge locations of potassium permanganate on November 29, 2006. DFG and the Regional Board agree that the flow discharge limits and the n+n effluent limits that are stated in the 2006 Permit have been exceeded. Those facts are clear. DFG disagrees with the legal conclusion in the draft Order that the SWRCB must impose the mandatory minimum penalties for those exceedances. While the SWRCB has demonstrated great deference to a regional board decision regarding questions of fact regarding the assessment of an administrative civil liability, as to questions of law the standard is that of independent judgment, and the SWRCB should use its independent judgment in this matter.

DFG has demonstrated that it is more probable than not that the cause of the flow discharge exceedance is the unregulated flow that originates in the natural springs and seeps, flows into the Hatchery, and is discharged to Hot Creek without DFG adding any volume of water to that natural flow. DFG has demonstrated that it is more probable than not that the cause of the exceedance of the n+n effluent limit is the naturally high levels of n+n in the natural springs that flow into the Hatchery. DFG has demonstrated that it has met the narrow requirements of the act of God defense as provided in the Water Code, as the sole source of the exceedances are the natural springs and seeps that are a natural phenomenon, of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

In addition to the legal argument, there are equities to consider. No harm to the environment results from the flow volume exceedance or the n+n effluent limit exceedance. In fact, as demonstrated by DFG Exhibit 1g, the Hatchery more often than not *lowers* the n+n levels in the discharge water from the levels in the influent water. In the many cases cited in the draft Order in which the act of God defense had been asserted, some harm to the environment had occurred and some factual dispute as to the sole source of the harm or exceedance existed. Here, the springs are clearly the sole source of the flow and n+n exceeedances all of which would exist with our without the Hatchery and no actual harm has occurred.

DFG staff reported the flow volume exceedance rate problem to the private contractor principally responsible for writing the NPDES permit for the Hot Creek Hatchery prior to its adoption, and was told the number could not be changed (DFG Exhibit 1, p. 4.) DFG reported the problem to the Regional Board regarding the flow volume exceedance on September 25, 2006, just three months after the NPDES permit was adopted, and requested again that the flow volume limit be increased or the limit eliminated. DFG repeated that request with every subsequent monitoring report submitted to the Regional Board. DFG staff saw the problem in advance, requested the change, requested that change another *twenty one* times, and received no substantive response from the Regional Board until DFG received Notice of Violation on December 5, 2008.

The Water Quality Enforcement Policy adopted by the SWRCB states in part, regarding the timeframe for issuing mandatory minimum penalties, that the intent of these provisions of the California Water Code is to assist in bringing the State's permitted facilities into compliance with waste discharge requirements, and states that the Water Boards should expedite mandatory minimum penalties issuance if the total proposed mandatory penalty amount is $30,000 or more. (*Water Quality Enforcement Policy,* p. 23.) As stated above, DFG reported the problem with the Hatchery NPDES

permit on September 25, 2006. On December 5, 2008, more than 2 years later, after many verbal and email communications between Regional Board staff and DFG staff about the problem with the Hatchery NPDES permit, DFG received a NOV with a proposed penalty of $225,000. Here, the Regional Board staff failed to expedite mandatory minimum penalties issuance until the proposed penalty was well beyond $30,000 – instead waiting until it was eightfold times over that amount, to the monetary benefit of the Regional Board, and detriment to the DFG.

In closing, the proposed penalty of $225,000 is wholly improper legally and equitably. The SWRCB should use it own authority to take appropriate action and reduce the penalty amount to reflect only the one missing monitoring report and the four potassium permanganate exceedances. (Water Code section 13320(c).) In the alternative, the SWRCB should direct that the Regional Board take appropriate action to achieve the same result.

If there are any questions or comments, please contact Sarah Olinger, Staff Counsel, in the Office of Chief Counsel, at (916) 322-4142 or email solinger@waterboards.ca.gov.

Sincerely,

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