Linda S. Adams
Secretary for Environmental Protection

State Water Resources Control Board

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Arnold Schwarzenegger
Governor

OCT 07 2010

CERTIFIED MAIL & EMAIL

Nancee M. Murray, Esq.
Office of the General Counsel
California Department of Fish and Game
1416 9th Street, 12th Floor
Sacramento, CA 95814
nmurray@dfg.ca.gov

Dear Ms. Murray:

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 NOTIFICATION
SWRCB/OCC FILE A-2092

Enclosed is a copy of the draft order of the State Water Resources Control Board (State Water Board) relating to the above-entitled matter. The State Water Board will consider adopting the proposed order at its business meeting on *Tuesday, November 16, 2010,* commencing at *9:00 a.m.* The meeting will be held in the Coastal Hearing Room, Second Floor of the Cal/EPA Building, 1001 I Street, Sacramento, California.

The State Water Board is accepting written comments on the draft order. All written comments shall be based solely upon evidence contained in the record or upon legal argument. Supplemental evidence will not be permitted except under the limited circumstances described in California Code of Regulations, title 23, section 2050.6.

Written comments on the draft order, and any other materials to be presented at the meeting, including power point and other visual displays, must be received **by 12:00 noon on Monday, November 8, 2010**. Please indicate in the subject line, comments to A-2092—November 16th Board Meeting. Those comments must be addressed to:

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor 95814
P.O. Box 100
Sacramento, CA 95812-0100
(tel) 916-341-5600
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Brief oral comments not to exceed five minutes may be made as long as they address only the draft order. As a result of the meeting, the draft order may be adopted as proposed or may be further modified.

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,

Michael A.M. Lauffer
Chief Counsel

Enclosure

cc: **[via U.S. Mail only]**
Mr. Bruce Kinney
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[via U.S. Mail only]
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cc: (Continued)

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DRAFT October 7, 2010

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2010-

In the Matter of the 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
Issued by the
California Regional Water Quality Control Board,
Lahontan Region

SWRCB/OCC FILE A-2092

BY THE BOARD:

In this Order, the State Water Resources Control Board (State Water Board) upholds Administrative Civil Liability (ACL) Order No. R6V-2010-0016 (the ACL Order), which the Lahontan Regional Water Quality Control Board (Lahontan Water Board) adopted on April 15, 2010. The ACL Order assesses the California Department of Fish and Game (CDFG) mandatory minimum penalties (MMPs) in the amount of $225,000 for violating certain effluent limitations and reporting requirements contained in national pollutant discharge elimination system (NPDES) permit, Order No. R6V-2006-0027. On May 11, 2010, CDFG filed a timely petition requesting the State Water Board to reverse the MMPs assessed for exceeding the flow volume and nitrate plus nitrite as nitrogen (n+n) effluent limitations. Based upon the record before the Lahontan Water Board and for the reasons set forth below, we affirm the ACL Order in its entirety.

I. BACKGROUND

CDFG 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 and consists of two hatcheries, two spawning houses, forty-two fingerling tanks, forty fingerling troughs, nine brood ponds, four production raceways, and three settling ponds. The Hatchery produces between 285,000 and 325,000 pounds of catchable fish per year, 14,000,000 trout eggs for distribution statewide, and 1.5 million fingerlings for air planting. The Hatchery's only source of water comes from four natural

springs adjacent to the facility. Due to naturally occurring hydrogeologic conditions, the flow rates vary for all four springs. CDFG has not installed any devices to control or divert excess spring flow around the Hatchery. 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, a water of the United States. Some, but not all, of the wastewater from the Hatchery receives sedimentation treatment before it is discharged.[1]

On June 14, 2006, the Lahontan Water Board adopted Order No. R6V-2006-0027 (the NPDES Permit), which prescribes waste discharge requirements for the Hatchery's discharges to Hot Creek. The NPDES Permit establishes new effluent limitations for, *inter alia*, flow volume and n+n, as well as a monitoring and reporting program to evaluate compliance. While CDFG staff had discussed the effluent limitations with the Lahontan Water Board's contractor who assisted in developing the draft NPDES Permit, CDFG did not raise concerns regarding the effluent limitations directly with the Lahontan Water Board prior to adoption of the NPDES Permit. CDFG also did not ask the Lahontan Water Board for a compliance schedule in the NPDES permit allowing additional time to comply with the effluent limitations. Finally, CDFG did not file a petition with the State Water Board seeking review of the NPDES Permit. Since the Lahontan Water Board's adoption of the NPDES Permit, CDFG has had a difficult time complying with the flow and n+n effluent limitations.

In discharge monitoring reports submitted from August 1, 2006, through May 31, 2009, CDFG noted twenty-four flow volume exceedances and forty-six n+n exceedances. Pursuant to Water Code section 13385, subdivisions (h)(1) and (i)(1), these exceedances resulted in both serious and chronic violations of the NPDES Permit. On December 5, 2008, the Lahontan Water Board issued a Notice of Violation to CDFG for violating the effluent limitations for flow and n+n. CDFG met with staff at the Lahontan Water Board to develop a plan to address the ongoing violations. As a result, on May 11, 2009, the Lahontan Water Board adopted a Time Schedule Order (TSO) pursuant to Water Code section 13300, which was further amended on January 11, 2010. The amended TSO includes interim effluent limitations for flow and n+n, actions and milestones leading to compliance with the NPDES Permit's effluent limitations, and associated compliance dates.[2] As long as CDFG complies with the

[1] Wastewater from the second hatchery and its brood ponds and spawning house does not receive any treatment before it is discharged to a tributary of Hot Creek, also a water of the United States.

[2] See Order No. R6V-2009-0016-A1.

TSO, it will not incur additional MMPs for violations of the NPDES Permit's flow volume or n+n effluent limitations that occur after the adoption of the TSO.

On February 1, 2010, staff of the Lahontan Water Board issued Administrative Civil Liability Complaint No. R6V-2010-0004 (ACL Complaint). The ACL Complaint covers the period August 1, 2006 through May 31, 2009, and includes the twenty-four flow volume and forty-six n+n exceedances, as well as one reporting violation and four potassium permanganate exceedances.[3] On April 15, 2010, the Lahontan Water Board conducted a public hearing on the ACL Complaint. After receiving written testimony, presentations, and other evidence from the designated parties, the Lahontan Water Board reluctantly[4] adopted the ACL Order and imposed MMPs in the amount of $225,000 against CDFG.

II. CONTENTION AND FINDINGS

Contention: CDFG contends that MMPs for exceeding the flow volume and n+n effluent limitations should be reversed because the springs' natural water quality and flow characteristics satisfy the affirmative defense in Water Code section 13385, subdivision (j)(1)(B) (hereinafter referred to as section 13385(j)(1)(B)).

Findings: The Legislature has narrowly defined the circumstances that will preclude the imposition of MMPs when there are chronic or serious violations of NPDES permit effluent limitations. These narrow circumstances are affirmative defenses to the imposition of MMPs. The discharger bears the burden of proving an affirmative defense.[5] To obtain relief, CDFG must affirmatively demonstrate that the springs' naturally occurring characteristics satisfy the requirements of Water Code section 13385(j)(1)(B). Under the circumstances of this case, CDFG has failed to prove that the effluent limitation violations for flow and n+n are subject to the MMP exception.

Section 13385(j)(1)(B) is one of several exceptions to assessing MMPs for serious and chronic violations. It provides that a violation is not subject to an MMP if caused by "[a]n unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the

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[3] In its petition, CDFG does not challenge the MMPs associated with the reporting violation or the potassium permanganate exceedances.

[4] See Order No. R6V-2010-0016, Finding 9 ("Although the Water Board finds that a more appropriate penalty in this case would be $18,000, California Water code [sic] sections 13385(h) and (i) require it to assess mandatory minimum penalties in the amount of $225,000.").

[5] See *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 724 [citing *U.S. v. CPS Chemical Co., Inc.* (E.D.Ark. 1991) 779 F.Supp.437, 442]. See also State Water Board Order No. 2007-0010 (*Escondido Creek Conservancy*).

exercise of due care or foresight."[6] This section is commonly referred to as the "act of God" affirmative defense because its language is textually similar to the "act of God" definition in the Clean Water Act,[7] and textually identical to the "act of God" defense to liability in the Oil Pollution Act of 1990 (OPA)[8] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[9]

CDFG contends that section 13385(j)(1)(B) applies because the violations are a result of the springs' naturally occurring variable flows and concentrations of n+n. CDFG explains that because the Hatchery is a flow-through facility, it does not artificially add to the water's volume of flow or levels of n+n:

> The flow volume levels would discharge to Hot Creek *regardless* of whether or not the Hot Creek Hatchery was there. In the vast majority of instances, the n+n levels in the discharge would flow to Hot Creek *regardless* of whether or not the Hot Creek Hatchery was there. If the CDFG shut down the Hot Creek Hatchery, due to the cost of the penalties at issue or for other reasons, the levels of flow and n+n that currently exist and are the cause of the violations of the discharge limitations in the 2006 NPDES Permit, would continue to occur.[10]

In other words, CDFG contends that an "act of God" or nature caused the effluent limitation violations, not the Hatchery. As such, the issue before the Lahontan Water Board in the first instance, and the State Water Board now, is whether the springs' naturally occurring flow volume and concentration of n+n constitute the "unanticipated, grave natural disaster" or exceptional, inevitable, and irresistible natural phenomenon that section 13385(j)(1)(B) contemplates.

The Lahontan Water Board argues that CDFG has not met its burden of proving the affirmative defense.[11] The springs' natural water quality and flow characteristics were neither unexpected nor unforeseen, and the Hatchery could have prevented the effluent limitation violations through the exercise of due care or foresight. The Lahontan Water Board therefore asserts that CDFG's contention fails as a matter of law.

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[6] Wat. Code, § 13385, subd. (j)(1)(B).

[7] 33 U.S.C. § 1321(a)(12) ("'act of God' means an act occasioned by an unanticipated grave natural disaster.")

[8] See 33 U.S.C. § 2701(1).

[9] See 42 U.S.C. § 9601(1).

[10] Petition, p. 9 (emphasis in original).

[11] Lahontan Water Board, Response to Petition, p. 3 (citing *Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 725).

We agree with the Lahontan Water Board. Not only does the plain language of section 13385(j)(1)(B) not apply to the facts and circumstances here, but also CDFG has failed to meet its burden of proof. Section 13385(j)(1)(B) unambiguously requires:

(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.

We will discuss each aspect of this affirmative defense in order.

First, the existence of the springs and their naturally occurring characteristics are not an unanticipated, grave natural disaster. The springs' flow and n+n characteristics were not unanticipated. CDFG clearly anticipated that the springs would exceed the effluent limitations in the NPDES Permit. Evidence in the record demonstrates that, for at least seven years[12] prior to adoption of its NPDES Permit, CDFG was aware that the springs' n+n concentrations and flow volume would routinely cause effluent limitation violations if the springs continued to perform as they had in the past. For example, semi-annual monitoring data from May 1999 through June 2006 shows that the n+n concentrations in the Hatchery's water supply at all four springs consistently exceeded the effluent limitation proposed for the NPDES Permit. CDFG's previous permit also contained findings that the n+n concentration in the Hatchery's water supply averaged 0.44 mg/L, which well exceeded the 0.23 mg/L average monthly and 0.31 mg/L maximum daily effluent limitations in the NPDES Permit.[13] Regarding flow rates, data from October 1999 through July 2004 demonstrate that flow volume would have exceeded the proposed flow effluent limitations on numerous occasions as well.[14]

In addition, the springs do produce the catastrophic consequences typical of a grave natural disaster. Merriam-Webster's Collegiate Dictionary defines "disaster" to mean "a

[12] See, e.g, Administrative Record, Exhibit Nos. 4, 8, 9, and Disc #1.

[13] See Order No. 6-99-55. This prior order also identified annual average flow rates for each of the Hatchery's four discharge locations. Unfortunately, the numerical values for the annual average flow rates were transferred into the current NPDES Permit as maximum daily flow rates. This modification eliminated a significant amount of accommodation for the natural variability in the springs' flow rates, and increased the risk of exceeding the flow effluent limitations specified in the NDPES Permit. However, CDFG never challenged the effluent limitation for flow, and thus it was never modified.

[14] See Administrative Record, Exhibit No. 9, and Disc #1.

sudden calamitous event bringing great damage, loss, or destruction."[15] An example of an "unanticipated grave, natural disaster" is a major hurricane that occurs in an area and at a time when hurricanes are not typically expected.[16] Here, however, the springs are nothing like an unexpected hurricane. There is nothing sudden or calamitous about the existence of the springs or even the water quality or flow characteristics of the springs, and the springs themselves have not suddenly caused any catastrophic damage to the Hatchery. Consequently, CDFG cannot prove that the effluent limitation violations were the result of an "unanticipated, grave natural disaster."

Second, CDFG has failed to demonstrate how the springs' flow and n+n concentrations are a natural phenomenon of an exceptional, inevitable, and irresistible character.[17] In its Opening Brief to the Lahontan Water Board, CDFG asserted that the springs' flow is exceptional because "it varies naturally, sometimes by orders of magnitude"; inevitable because it arises naturally from a spring; and irresistible because it occurs in nature and CDFG does not augment its volume.[18] Natural variation in either flow or water quality, however, is not the kind of "exceptional" event that the statute contemplates.

Merriam-Webster's Collegiate Dictionary defines "exceptional" to mean "rare" or something that deviates from the norm.[19] Although there is limited jurisprudence that discusses the applicability of section 13385(j)(1)(B),[20] various courts have examined this aspect of the "act of God" defense in CERCLA and the OPA. In *United States v. Stringfellow*, the defendants claimed that the release of hazardous substances from a toxic waste disposal site constituted an "act of God" because heavy rainfall, a natural disaster, caused the release.[21] The court held, however, that heavy rainfall is "not the kind of 'exceptional' natural phenomena to which the narrow act of God defense of [CERCLA] section 107(b)(1) applies."[22] Similarly, the court in

[15] Merriam-Webster's Collegiate Dict., Tenth Edition (2001), p. 329.

[16] See *Apex Oil Co., Inc. v. U.S.* (E.D.La. 2002) 208 F. Supp. 2d 642, 653.

[17] For purposes of this analysis, we assume that the springs' natural water quality and flow characteristics are a "natural phenomenon" as CDFG claims. (Administrative Record, Compact Disc #2.)

[18] Administrative Record, Compact Disc #2, Opening Brief, p. 8.

[19] Merriam-Webster's Collegiate Dict., Tenth Edition (2001), p. 403.

[20] The petitioners rely on *City of Brentwood v. Central Valley Regional Water Quality Control Board* (2004) 123 Cal.App.4th, for the proposition that . However,

[21] *United States v. Stringfellow* (C.D.Cal. 1987) 661 F.Supp. 1053, 1061.

[22] *Ibid.* See also *Clarke v. Michals* (1970) 4 Cal.App.3d 364, 369 (a rainstorm of merely unusual intensity is not an act of God) (internal citation omitted).

Apex Oil Company, Inc. v. United States examined the legislative history of the "act of God" defense in the OPA and noted that

> Congressional intent is clearly that the "exceptional natural phenomenon" (i.e., the "act of God") defense be construed as much more limited in scope than the traditional common law act of God defense. The discharger's burden of proof on the defense of "exceptional natural phenomena" is much more onerous than that required for common law or traditional "act of God" defense. [23]

Other courts interpreting the "act of God" defense emphasize that the event "must be so unusual in its proportions that it could not be anticipated."[24] The facts and circumstances here are the opposite of an unusual, rare, or exceptional occurrence; evidence in the record demonstrates that the springs historically and frequently produce water in quantities and of a quality that would violate the corresponding effluent limitations. As such, a finding that the naturally occurring conditions in the springs are somehow more exceptional than heavy rainfall would be contrary to the holding in *Stringfellow* and would undermine the narrow scope section 13385(j)(1)(B). Because the "exceptional" prong is not satisfied, there is no need to further examine "inevitable" or "irresistible," because all three elements are required for a successful assertion of a "natural phenomenon" affirmative defense.

Third, CDFG cannot prove that "the effects of [the springs] could not have been prevented or avoided by the exercise of due care or foresight." As mentioned above, CDFG anticipated the effects the springs would have on the Hatchery's effluent quality. In *Stringfellow*, the court held that "[t]he rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels." Because the springs' effects were foreseeable like the heavy rains in *Stringfellow*, CDFG likely could have prevented the effluent limitation violations and imposition of MMPs through diversion devices or modification of its operations. In addition, CDFG did not challenge the NPDES Permit's effluent limitations for n+n and flow. Alternatively, had CDFG exercised due care and foresight by actively challenging the proposed effluent limitations during permit development, or by petitioning them to the State Water Board, the effluent limitations might have been less stringent, or a compliance schedule might have been included in the NPDES Permit, resulting in substantially fewer, or even no, MMPs. Because CDFG could have prevented or avoided the effluent limitation violations through the exercise of

[23] *Apex Oil Co., Inc. v. U.S.* (E.D.La. 2002) 208 F. Supp. 2d 642, 652-53.

[24] See, e.g., *Mancuso v. S. Cal. Edison Co.* (1991) 232 Cal.App.3d 88, 103-04; *Clarke v. Michals* (1970) 4 Cal.App.3d 364, 369.

due care or foresight—either through facility upgrades or through administrative challenges—CDFG is not entitled to relief under section 13385(j)(1)(B).

It is well established that in matters relating to the assessment of administrative civil liability, the State Water Board shows great deference to a regional water board's judgment.[25] A regional water board has substantial enforcement discretion in setting the amount of an ACL penalty, and generally the State Water Board will only reverse the decision where there is an abuse of discretion or misapplication of law.[26] Here, we defer to the Lahontan Water Board in only assessing liability in the minimum mandatory amount of $225,000. There is no indication that the Lahontan Water Board has failed to follow the law or has abused its discretion in not adding discretionary civil liabilities for these violations under Water Code section 13385, subdivision (a)(2). Once the monitoring data demonstrated serious and chronic violations of effluent limitations in the NPDES Permit, the Lahontan Water Board was statutorily compelled to assess the MMPs unless there was an appropriate affirmative defense. As explained above, there is no viable affirmative defense.

Given the circumstances of this discharge and its genesis from natural springs, it is understandable that the Lahontan Water Board was reluctant to assess a penalty of that magnitude. Surely the Lahontan Water Board would have reached a more lenient result if the Water Code did not require the assessment of MMPs. However, the Lahontan Water Board's hands were tied, and likewise, we are not in a position to second guess or deviate from the mandatory strictures imposed by the Legislature in Water Code section 13385 and the "onerous"[27] burden of proof it places on certain affirmative defenses. To the extent the situation was avoidable, it would have been during the development of the NPDES Permit. The Lahontan Water Board issued the NPDES Permit in 2006 and the propriety of the NPDES Permit is not before us. While the Lahontan Water Board has already issued an enforcement order that precludes the imposition of further MMPs so long as the discharge is in compliance with the TSO, the Lahontan Water Board and CDFG should be able to prevent the recurrence of these issues during the development of a new NPDES Permit.

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[25] State Water Board Order WQ 88-9 (*City of San Diego*).

[26] State Water Board Order WQ 2001-02 (*City of Los Angeles*).

[27] See, e.g., *Apex Oil Co., Inc. v. U.S.*, *supra*, 208 F. Supp. 2d at p. 653.

III. ORDER

IT IS HEREBY ORDERED THAT Administrative Civil Liability Order No. R6V-2010-0016 is affirmed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on ______________________

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

____

Jeanine Townsend
Clerk to the Board