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Attorneys for Petitioner
Casden Properties, LLC

BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Administrative Civil Liability Complaint No. R4-2008-0199-M Casden Properties, LLC	**CASDEN PROPERTIES, LLC'S PETITION FOR REVIEW; REQUEST FOR HEARING** California Water Code § 13320

Pursuant to California Water Code § 13320, Casden Properties, LLC ("Casden") hereby respectfully petitions the California State Water Resources Control Board (the "State Board") to set aside Order on Complaint No. R4-2008-0199-M (the "Order") adopted by the Regional Water Quality Control Board, Los Angeles Region (the "Regional Board") on June 2, 2011, and requests an opportunity to be heard on this matter.

I. NAME AND ADDRESS OF PETITIONER

Casden Properties, LLC
9090 Wilshire Blvd.
Beverly Hills, CA 90211
(310) 385-5027
Email: KSwikart@casprop.com

II. ACTION OF REGIONAL BOARD BEING PETITIONED

The Regional Board's adoption of Order on Complaint No. R4-2008-0199-M. A true and correct copy of the Order is attached hereto as Attachment A.

III. DATE OF REGIONAL BOARD ACTION

The Order was adopted by the Regional Board on June 2, 2011, and served via certified mail on June 8, 2011.

IV. STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER

The Order is inappropriate and improper for the following reasons:

A. The Regional Board wrongly declined to apply relief from mandatory minimum penalties under SB 1284 (Ducheny) Stats. 2010, ch. 645 (amendments to Water Code Sections 13385 and 13385.1), effective January 1, 2011:

1. The Regional Board wrongly found that Water Code Section 13385.1(a)(2) was not retroactive because Casden did not submit a statement under Water Code Section 13385.1(a)(2)(A) within thirty (30) days of notice by the Board.

2. The Regional Board wrongly held that Order No. R4-2003-0111, *Waste Discharge Requirements for Discharges of Groundwater from Construction and Project Dewatering to Surface Waters in Coastal Watersheds of Los Angeles County and Ventura Counties,* General NPDES Permit No. CAG 994004 (the "Groundwater Permit") requires reporting of all discharges from Casden's sump, including irrigation water, despite concluding that no groundwater discharges occurred.

B. The Regional Board wrongly imposed penalties for exceeding the copper effluent limitations under Order No. R4-2008-0032, *Waste Discharge Requirements for Discharges of Groundwater from Construction and Project Dewatering to Surface Waters in Coastal Watersheds of Los Angeles and Ventura Countys*, General NPDES Permit NO. CAG994004, given it was not a discharge of groundwater. Moreover, the Regional Board incorrectly imposed multiple penalties for the same violation.

C. The mandatory minimum penalties are excessive in violation of the Eighth Amendment of the Constitution.

D. The penalties were barred by the statute of limitations and doctrine of laches.

E. The Regional Board was without jurisdiction to hold the hearing as it was more than 90 days after the issuance of the Administrative Complaint for Liability. Water Code § 13323(b).

F. The process and hearing afforded before Hearing Panel and Regional Board violated Casden's Constitutional right of due process and statutory protections and procedure afforded by the California Water Code, Government Code and Regional Board regulations and policies.

V. MANNER IN WHICH PETITIONER IS AGGRIEVED

Casden is aggrieved by the Order as it imposes penalties of $675,000.

VI. ACTION REQUESTED OF THE STATE BOARD

Casden hereby requests the State Board to accept this Petition and set aside the Order. Title 23, Cal. Code of Regs., § 2052(a)(2)(B).

VII. STATEMENT OF POINTS AND AUTHORITIES

A statement of points and authorities is filed concurrently herewith as Attachment B and incorporated herein by reference. *See also* Paragraph IV above. Casden reserves the right to supplement its points and authorities in support of this Petition once the full administrative record is compiled by the Regional Board.

VIII. STATEMENT THAT A COPY OF PETITION HAS BEEN SENT TO THE REGIONAL BOARD

A copy of the subject petition has been sent concurrently to the Regional Board.

IX. ISSUES AND OBJECTIONS RAISED BEFORE THE REGIONAL BOARD

Casden has raised the substantive issues and objections asserted in this petition before a hearing panel designated by the Regional Board and before the Regional Board, including but not limited to: (1) in Casden's written brief and materials submitted to the Regional Board on February 16, 2011; (2) at the hearing conducted before a hearing panel of the Regional Board on March 17, 2011; (3) in Casden's Response to the Hearing Panel Report and Proposed Order transmitted on May 19, 2011; and (4) at the hearing held before the Regional Board on June 2, 2011. In addition, Casden raised numerous additional objections before the Hearing Panel and Regional Board, as addressed in the Memorandum of Points & Authorities and as will be set forth in the Administrative Record.

X. REQUEST FOR HEARING TO PRESENT ADDITIONAL EVIDENCE

Casden hereby requests that the State Board conduct a hearing on this matter for the purpose of oral argument and to receive additional evidence.

For the reasons stated herein, Casden respectfully requests that the State Board set aside the Resolution and Order.

Dated: July 5, 2011

Respectfully Submitted,

By: _____

Peter Duchesneau (Bar No. CA/168917)
Manatt, Phelps & Phillips, LLP
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Los Angeles, CA 90064-1614
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Counsel for Petitioner
Casden Properties, LLC

300267402.2

Attachment A

California Regional Water Quality Control Board
Los Angeles Region

320 West Fourth Street, Suite 200, Los Angeles, California 90013
(213) 576-6600 • Fax (213) 576-6640
http://www.waterboards.ca.gov/losangeles

Linda S. Adams
Acting Secretary for Environmental Protection

Edmund G. Brown Jr.
Governor

June 8, 2011

Ms. Kay Swikart
Casden Properties, LLC
9090 Wilshire Boulevard, 3rd Floor
Beverly Hills, CA 90211

Certified Mail
Return Receipt Requested
Claim No. 7010 3090 0002 1022 2827

DIRECTIVE FOR ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R4-2008-0199-M AGAINST CASDEN PROPERTIES, LLC, WILSHIRE DOHENY BUILDING, 9090 WILSHIRE BOULEVARD, BEVERLY HILLS, CALIFORNIA (ORDER NOS. R4-2003-0111 AND R4-2008-0032, NPDES PERMIT NO. CAG944004, CI-6733)

Dear Ms. Swikart:

On December 17, 2010, the Chief Prosecutor of the Regional Water Quality Control Board, Los Angeles Region (Regional Board) issued Administrative Civil Liability Complaint No. R4-2008-0199-M (ACLC) against Casden Properties, LLC, in the amount of $675,000 for two hundred twenty-one (221) reporting violations and four (4) effluent limit violations of limits contained in Regional Board Order Nos. R4-2003-0111 and R4-2008-0032.

On March 17, 2011, a hearing on the ACLC was held by a Hearing Panel of the Regional Board pursuant to California Water Code (CWC) § 13228.14 and 13323. The Panel subsequently submitted to the Regional Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended an administrative liability of $675,000 in mandatory minimum penalties.

On June 2, 2011, the Regional Board approved the Panel's recommendation and imposed administrative civil liability on Casden Properties, LLC and issued Order on Complaint No. R4-2008-0199-M (ACLO), a copy of which is attached hereto and incorporated herein by reference, which directs payment of $675,000 in mandatory minimum penalties.

As noted in Finding 9 of the ACLO, the assessment is due and payable no later than thirty (30) days from the date on which this Order is issued. A check in the amount of $675,000 (payable to the State Water Resources Control Board Cleanup and Abatement Account) must be received by the Regional Board on or before July 5, 2011.

In the event that Casden Properties, LLC fails to comply with the requirements of this Directive, the Executive Officer or his delegee is authorized to refer this matter to the Office of Attorney General for enforcement.

If you have any questions please contact Ms. Kristie Kao at (213) 620-6368 regarding this matter.

Sincerely,

Samuel Unger

Samuel Unger, P.E.
Executive Officer

Enclosure: Order on Complaint No. R4-2008-0199-M

cc: Ms. Lori Okun, Office of Chief Counsel, State Water Resources Control Board
Ms. Julie Macedo, Office of Chief Counsel, State Water Resources Control Board
Mr. Peter Duchesneau, Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard, Los Angeles, CA 90064

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:	)	**Order on Complaint No. R4-2008-0199-M**
	)	**Mandatory Minimum Penalty for**
Casden Properties, LLC	)	**Violation of California Water Code § 13376**
Wilshire Doheny Building	)	**and**
9090 Wilshire Boulevard	)	**Order Nos. R4-2003-0111 and R4-2008-0032**
Beverly Hills, CA 90211	)	**(NPDES No. CAG994004)**

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board) has found and determined that Casden Properties, LLC (hereinafter Permittee) violated requirements contained in California Water Code (CWC) § 13376 and Order Nos. R4-2003-0111 and R4-2008-0032.

2. The Permittee operates the Wilshire Doheny Building (facility) located at 9090 Wilshire Boulevard in the City of Beverly Hills, California, which is subject to the waste discharge requirements and limitations set forth in Los Angeles Water Board Order Nos. R4-2003-0111 and R4-2008-0032.

3. The Prosecution Team identified four (4) copper effluent limit violations of Order No. R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in Exhibit "A" attached hereto and incorporated herein by reference.

4. The Prosecution Team identified two hundred twenty-one (221) late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in the Exhibit "A" attached hereto and incorporated herein by reference.

5. On December 17, 2010, the Chief Prosecutor issued Complaint No. R4-2008-0199-M to the Permittee in the amount of $675,000 for the two hundred twenty-five (225) effluent limit and late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 subject to mandatory minimum penalties, as identified in Exhibit "A".

6. On March 17, 2011, this matter was heard in Los Angeles, California before a Los Angeles Water Board Hearing Panel (Panel) consisting of Board Members Ms. Francine Diamond, Mr. Steve Blois, Ms. Maria Mehranian, and Mr. Charles Stringer.

The Hearing Panel subsequently submitted to the Los Angeles Water Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended administrative civil liability, a copy of which is attached hereto and incorporated herein by reference.

7. Based on evidence presented in the hearing and in the administrative record, the Hearing Panel determined that there are two hundred twenty-five (225) effluent limit and late reporting violations subject to mandatory minimum penalties in the amount of $675,000 as identified in Exhibit "A" attached.

8. Upon considering the Hearing Panel report and making an independent review of the record, the Los Angeles Water Board during its meeting on June 2, 2011 adopted the Hearing Panel's Findings of Fact and Conclusions of Law, as modified in Exhibit "B" attached, as the findings of the board. The Los Angeles Water Board adopted the Findings and Conclusions of the Hearing Panel Report, as modified by Exhibit "B" and upheld the imposition of the Panel's proposed administrative civil liability on the Permittee. The Los Angeles Water Board directed payment of a total assessment of $675,000 on Complaint No. R4-2008-0199-M.

9. This Order on Complaint is effective and final upon issuance by the Los Angeles Water Board. Payment must be received by the Los Angeles Water Board no later than thirty days from the date on which this Order is issued.

10. In the event that the Permittee fails to comply with the requirements of this Order, the Executive Officer is authorized to refer this matter to the Office of Attorney General for enforcement.

11. 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 Regional Water Board action, except that if the thirtieth day following the action 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 or will be provided upon request.

IT IS HEREBY ORDERED that, pursuant to § 13323 of the CWC, the Permittee shall make a cash payment of $675,000 (payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days after the date of issuance of this Order.

In the event that the Permittee fails to comply with the requirements of this Order on Complaint No. R4-2008-0199-M, the Executive Officer is authorized to refer this matter to the Office of Attorney General for enforcement.

I, Samuel Unger, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the California Regional Water Quality Control Board, Los Angeles Regional, and that such action occurred on June 2, 2011.

Samuel Unger

Samuel Unger
Executive Officer

ACLO No. R4-2010-0199-M

EXHIBIT "A"
Violation Summary

Casden Properties, LLC
CI No. 6733

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/ Chronic	Water Code Section 13385	Penalty
03/25/10	1st Quarter 2010	Daily Maximum	Copper	44.6	24	ug/L	2	86%	Serious	(h)1	$3,000
03/31/10	1st Quarter 2010	Monthly Average	Copper	44.6	12.5	ug/L	2	257%	Serious	(h)1	$3,000
06/24/10	2nd Quarter 2010	Daily Maximum	Copper	32.5	24	ug/L	2	35%	Serious	(h)1	$3,000
06/30/10	2nd Quarter 2010	Monthly Average	Copper	32.5	12.5	ug/L	2	160%	Serious	(h)1	$3,000
										Total	**$12,000**

ACLO No. R4-2010-0199-M

EXHIBIT "A"
Violation Summary

Casden Properties, LLC
CI No. 6733

Reporting Period	Violation Type	Due Date	Received Date	Days Late	# of Complete 30-Day Periods	Serious/ Chronic	Water Code Section 13385	Amount Per 30-Day Period	Penalty
4th Quarter 2005	Late Report	02/15/2006	01/23/2009	1,073	35	Serious	(h)(1)	$3,000	$105,000
1st Quarter 2006	Late Report	05/15/2006	01/23/2009	984	32	Serious	(h)(1)	$3,000	$96,000
2nd Quarter 2006	Late Report	08/15/2006	01/23/2009	892	29	Serious	(h)(1)	$3,000	$87,000
3rd Quarter 2006	Late Report	11/15/2006	01/23/2009	800	26	Serious	(h)(1)	$3,000	$78,000
4th Quarter 2006	Late Report	02/15/2007	01/23/2009	708	23	Serious	(h)(1)	$3,000	$69,000
1st Quarter 2007	Late Report	05/15/2007	01/23/2009	619	20	Serious	(h)(1)	$3,000	$60,000
2nd Quarter 2007	Late Report	08/15/2007	01/23/2009	527	17	Serious	(h)(1)	$3,000	$51,000
3rd Quarter 2007	Late Report	11/15/2007	01/23/2009	435	14	Serious	(h)(1)	$3,000	$42,000
4th Quarter 2007	Late Report	02/15/2008	01/23/2009	343	11	Serious	(h)(1)	$3,000	$33,000
1st Quarter 2008	Late Report	05/15/2008	01/23/2009	253	8	Serious	(h)(1)	$3,000	$24,000
2nd Quarter 2008	Late Report	08/15/2008	01/23/2009	161	5	Serious	(h)(1)	$3,000	$15,000
3rd Quarter 2008	Late Report	11/15/2008	01/14/2009	60	1	Serious	(h)(1)	$3,000	$3,000
							Total		**$663,000**
							Settlement Total		**$675,000**

Exhibit "B"
ACLC No. R4-2010-0199M
Casden Properties, LLC
CI No. 6733

FINDINGS OF FACT

9. The Permittee provided credible written evidence and testimony that it never discharged dewatered groundwater. The Prosecution Team failed to prove the Permittee discharged dewatered groundwater. Rather, the discharge consisted of collected and channelized irrigation water from street-level planters and water from other rinsing, including garage wash-down water. However, it is undisputed that the Permittee sought and obtained coverage under the Permit. The Permit required monitoring of all sampling stations, and reporting of the monitoring results. (*See, e.g.,* AR, p. 6.30, 6.90). Nothing in the Permit allows the Permittee to choose to report only certain types of effluent discharges (groundwater). In fact, Monitoring and Reporting Program No. CI-6733 stated that if there is no discharge, a report must be filed to so state. (Reporting Requirements I.B, AR p. 6.29.) The Permittee submitted quarterly reports for Fourth Quarter 2007, First Quarter 2008, Second Quarter 2008, Third Quarter 2008, First Quarter 2010 and Second Quarter 2010. Each quarterly report reported discharges from the sump during the subject reporting period~~'s 2009 reports admitted that discharges had occurred, and the Permittee reported them in January 2009~~. In addition, the Permittee stated that it did not previously seek to avoid MMPs under section VII.D.2 (*Defining a "Discharge Monitoring Report" Where There Is No Discharge to Waters of the United States)* of the *Water Quality Enforcement Policy* because there had been discharges from the facility.

10. The Permit regulates other types of discharges, including without limitation incidental collected stormwater from basements, which is similar to some of the discharge here, and to other wastewaters. The list of covered discharges is not exclusive. The Permit requires the Permittee to file monitoring reports for all effluent discharged from its sump. The Permit does not exempt irrigation runoff discharged through the sump. By repeatedly seeking NPDES permit coverage, the Permittee admitted that it was discharging pollutants to a water of the United States. (*See, Brentwood, supra,* at 723 (monitoring reports are admissions of reported effluent violations).) The Permittee did not establish that the discharges were regulated by another permit. Whether or not the permittees under the *Waste Discharge Requirements of Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles* (Order No. 01-182) could have accepted the Permittee's discharges without a NPDES permit (see Finding 10, p. 6.37 and Finding B. 6, pp. 6.110-6.111), the Permittee obtained and was subject to the requirements of the Permit. ~~In addition to copper~~Once it started sampling, the Permittee reported exceedences of copper on two occasions.~~, for~~ For an unknown period of time prior to September 24, 2007 the ~~discharge contained~~

~~the~~Permittee used the additive Flo-Zyme in the sump. The Permittee is seeking local permits to direct the discharge to the sanitary sewer in the future. However, as of the hearing date the Permittee had not sought to terminate NPDES permit coverage. The Permittee's repeated efforts to seek state and local permits are inconsistent with the Permittee's argument that it does not need a permit for the discharge because the discharges were covered by Order No. 01-182. Similarly, Permittee's counsel conceded at the hearing that a discretionary penalty may be appropriate for the failure to file, just not a mandatory one. Thus, the discharges were reportable under the Permit.

11. The Permittee contends the Legislature intended S.B. 1284 to apply to its situation. In support, the Permittee submitted the Assembly Committee on Environmental Safety and Toxic Materials analysis of the bill as amended on June 2, 2010. The Permittee stated in its May 19, 2011 Response to Hearing Panel Report and Proposed Order (Response), that the Permittee referred to the legislative history "merely to show that the genesis of SB 1294 being with the Pico Water District that had incurred mandatory minimum penalties in an amount similar to that which Casden faced." (Response, p. 7.) Based on this representation, official notice of additional bill analyses is not necessary.~~This analysis, which relates to the June 2 amendment of the bill, states that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act." (AR, p. 6.352.) However, as described in the following paragraphs, this sentence was based on an earlier version of the bill, and was removed from the final Senate Bill Analysis. Therefore, the Los Angeles Water Board cannot infer any intent to apply the new provision to the Permittee's factual scenario based on that statement.~~

12. As introduced (February 19, 2010), S.B. 1284's effective date provision read, "The amendments made to this section by this act during the second year of the 2009-10 Regular Session of the Legislature apply to violations without regard to the date on which the violations occurred or occur." The bill would have eliminated mandatory minimum penalties in all three of the following situations:

> (4) A violation for a failure to file a discharge monitoring report for which the state board or a regional board does not inform the discharger of the alleged violation within 90 days of the date on which the discharge monitoring report was required to be filed.
>
> (5) A violation that consists of a failure to file a discharge monitoring report for any period in which no discharge occurred.
>
> (6) A violation that consists of a failure to file a discharge monitoring report for any period in which discharges do not violate effluent limitations contained in waste discharge requirements that include numeric effluent limitations.

~~13.The Senate Committee on Environmental Quality's analysis concluded that it was unfair to apply the new exemptions to existing violations. (http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1251-1300/sb_1284_cfa_20100416_174742_sen_comm.html (4/19/10).)~~

~~14.~~13. The Senate amended the bill on April 26 to delete the effective date provision.

~~15.~~14. The June 2 Senate amendment deleted proposed subdivisions (j)(4)-(6), cited above, and added language similar to what appeared in the final version. The June 2 version created the two exemptions, referred to below as a no-discharge exemption and a first-time-offender exemption. At that point, the bill did not require the discharger to cure the violations within any particular time after receiving notice. The requirements for the no-discharge exemption only required a statement that there were no discharges and an explanation for the failure to file. The first-time-offender exemption only required that the discharger had not received previously notice of a violation (i.e., notices for violations other than the current violation(s)), and that no effluent limit violations were associated with the current failure to file. The June 2 version added a new retroactive effective date provision, which applied the changes to any violations for which penalties had not been imposed before January 1, 2011, regardless of the date of violation. ~~Like the analysis cited by the Permittee, the Senate Floor analysis of this version stated that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act."~~

~~16.~~15. The Assembly amended the bill on June 23. This version changed the no-discharge exemption to include the 30-day requirement and added the requirement that there be no "reportable" discharges. The first-time-offender exemption was revised, among other things, to specify that the discharger not "on any occasion" previously receive notice of a failure to file, and to require the discharger to file the missing reports within 90 days after notification. The effective date provision was expanded to include complaints issued on or after July 1, 2010, regardless of the date of violation.

~~17.~~16. The August 20 Senate amendment changed the 90-day compliance requirement for first-time offenders to 30 days. ~~With respect to the effective date, the Senate Floor Analysis states that the bill "applies to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010 without regard to the date on which the violations occurred." This statement of the effective date replaced the prior language stating that the bill applied to dischargers with outstanding notices of violation at the date of the enactment. Although several prior analyses issued after the June 23 amendment continued to include language from prior analyses stating that the bill applied to dischargers with outstanding notices of violation[1], the final bill analysis did not include any such statement.~~

~~[1] Senate analysis of August 20 and June 23 amendments; Assembly Judiciary Analysis of June 23 amendment (June~~

CONCLUSIONS OF LAW

6. Water Code section 13385.1, subdivision (a)(2) does not exempt the Permittee from mandatory minimum penalties. Subdivision (a)(2) applies "to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." (Water Code § 13385.1, subd. (e).) The Complaint was filed after July 1, 2010, so subdivision (a)(2) applies if the Permittee satisfies all requirements of subdivision (a)(2). Subdivision (a)(2) requires that~~applies if~~ (i) the Discharger submits a "statement that there were no discharges to waters of the United States reportable under the applicable waste discharge requirements during the relevant monitoring period," supported by additional information or evidence upon request, (ii) the statement states why the reports were late, and (iii) the statement is submitted before the applicable discharge monitoring report is due or within 30 days after the Regional Water Board provides notice of the late report. ~~Subdivision (a)(2) applies "to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." (Water Code § 13385.1, subd. (e).) The Complaint was filed after July 1, 2010, so subdivision (a)(2) potentially applies. However, in order to qualify for the mandatory minimum penalty relief that subdivision (a)(2) provides, a discharger must meet all applicable requirements, including the requirement to file the statement within 30 days of notice.~~

7. Although subdivision (e) explicitly provides for retroactive application of subdivision (a)(2), nothing in section 13385.1 provides an exception to the 30-day requirement for violations that occurred or notices that were issued before the enactment of subdivision (a)(2). The 30-day requirement is unambiguous, and it is not necessary to resort to legislative history or other rules of statutory analysis. Even if it were ambiguous, nothing in the statute or the legislative history evidences any legislative intent to require the Water Boards to provide a new notice and opportunity to cure, make the 30-day requirement inapplicable to violations outstanding as of January 1, 2011, or provide a grace period to dischargers who filed the delinquent reports before January 1, 2011. The similarity between the penalties in this case and the penalties assessed against the Pico Water District do not address what the Legislature intended by "reportable" discharges or whether the Legislature intended to make the 30-day requirement inapplicable under this fact scenario. Although the Permittee had no reason under the *Water Quality Enforcement Policy* to file the statement before January 1, 2011, the Legislature could have waived this requirement for dischargers with outstanding violations as of January 1, 2011, or dischargers who cured outstanding violations or received notices of late reports prior to January 1, 2011. No such provisions appear in the statutory language.

~~29, 2010)~~

8. Even if the 30-day requirement were somehow inapplicable to the Permittee~~In addition~~, the Permittee would not qualify for the relief provided under subdivision (a)(2) because the Permittee had reportable discharges during the relevant monitoring periods. The discharges were reportable under the Permit for the reasons set forth in Findings of Fact 9-10.

9. The Permittee did not demonstrate that the Prosecution Team treated the Permittee differently than other similarly situated dischargers. The Prosecution Team explained that Glenborough Cahuenga, LLC was treated differently because that case involved a no-discharge situation and was resolved according to the *Water Quality Enforcement Policy* before S.B. 1284 took effect. Similarly, the Prosecution Team in the matter of the Crescenta Valley Water District found that the discharger had no discharges to waters of the United States during six of the seven reporting periods for which the discharger was initially cited.

10. The Permittee asserts the mandatory minimum penalty statute is unconstitutional. The California Constitution prohibits the Los Angeles Water Board or the State Water Board from declaring that Water Code section 13350 is unconstitutional or refusing to enforce the statute on that basis. (Cal. Const., art. III. § 3.5; State Water Board Orders No. WQ 86-13 (BKK Corporation), pp. 4-5; WQ 85-10 (Lake Madrone Water District), p. 5.) The board makes the following findings to assist in any subsequent review of this Order. The NPDES permitting program relies on a system of self-reporting. (*Brentwood, supra,* at 723.) The Legislature recognized this when it subjected reporting violations to mandatory minimum penalties. "In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonable related to a proper legislative goal." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) A statute is presumed to be constitutional and must be upheld unless its unconstitutionality clearly, positively and unmistakably appears." (*Id.* at 404.) A statute may be unconstitutional as applied if the penalties are mandatory and potentially unlimited in duration. (*Id.* at 399; *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352.) *Hale* did not universally condemn penalties that indefinitely accumulate on a daily basis until the violation is corrected. In fact, it expressly declined to do so. (*Hale, supra*, 22 Cal.3d at 404.) Here, the penalties were not potentially unlimited because a discharger can file the late reports and stop penalties from accruing or file a statement that no monitoring was performed, as the Permittee did in this case. Thus, the statute does not have the potential to be unconstitutional as applied.

Attachment B

MANATT, PHELPS & PHILLIPS, LLP
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Casden Properties, LLC

BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Casden Properties, LLC Administrative Civil Liability Complaint No. R4-2008-0199-M	**CASDEN PROPERTIES, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES**

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

On June 2, 2011, the Los Angeles Regional Water Quality Control Board (the "Regional Board") considered this matter of first impression concerning the application of SB 1284, newly enacted relief from the Mandatory Minimum Penalties ("MMP") for the failure to timely file discharge monitoring reports.[1] Facing mandatory minimum penalties pursuant to an administrative complaint for liability ("ACL") issued on December 17, 2010, Casden sought relief from MMPs under SB 1284 for twelve late discharge monitoring reports under the waste discharge requirements pursuant to Order No. R4-2003-0111, *Waste Discharge Requirements for Discharges of Groundwater from Construction and Project Dewatering to Surface Waters in Coastal Watersheds of Los Angeles County and Ventura Counties,* General NPDES Permit No. CAG 994004 ("Groundwater Permit"). Within 30 days of SB 1284's effective date, Casden submitted the statement called for under the new requirements indicating that it did not have a reportable discharge under its waste discharge requirements ("WDR") during the periods of the late reports as it never had discharged any groundwater. Nonetheless, the Regional Board denied Casden relief and imposed MMPs of $663,000 upon Casden for the late reports and another $12,000 for non-groundwater discharges exceeding copper limitations under the WDR. Despite finding Casden's statement credible and holding that no groundwater had been discharged, the Regional Board ignored the express intent set forth in SB 1284, held that SB 1284 did not apply since Casden did not timely submit its statement, and found that the WDR regulated the sump so therefore any other discharges, even otherwise exempt irrigation water, were reportable.

As set forth below, the Regional Board blatantly erred with its interpretation of SB 1284 and its finding that the Groundwater Permit regulated the sump making all discharges from it reportable. The express provisions of SB 1284 plainly provide that the new law "shall" apply without regard to the date on which the violations occurred where a complaint has not been filed before July 1, 2010. The Groundwater Permit does not regulate the sump, but rather is clearly

[1] SB 1284 (Ducheny) Stats. 2010, ch. 645 (amendments to Water Code Sections 13385 and 13385.1).

and necessarily limited to discharges of groundwater. MMPs of $663,000 for the mere failure to file 12 quarterly reports where it is undisputed that no groundwater was discharged are excessive, as conceded by even the Regional Board members, and are unconstitutional.

II. BACKGROUND

A. The Alleged Discharge and Permit

The subject of this matter concerns a multi-story office building located at 9090 Wilshire Boulevard in Beverly Hills that primarily houses medical offices ("9090 Wilshire").[2] At the time of the building's construction in 1986, the City of Beverly Hills required that the building contain a dewatering system to protect the structure in the event of groundwater infiltration. To discharge captured groundwater from the dewatering system to the storm drain, the building became subject to the Groundwater Permit. Under the Groundwater Permit, Casden was allowed to discharge up to 7,200 gallons per day of groundwater.

As found by the Regional Board, despite the initial concern that groundwater might infiltrate the building, groundwater levels ultimately ended up beneath the building foundation and never seeped into the building. The Regional Board concluded that groundwater was never discharged from the building. Ex. 1, June Transcript, p. 138:9-14; Ex. 2 (Exhibit B[3] to Order on Complaint No. R4-2008-0199-M, or "Order"), Findings, ¶9 ("The Permittee provided credible written evidence and testimony that it never discharged dewatered groundwater. The Prosecution Team failed to prove the Permittee discharged dewatered groundwater."). Rather, from time to time, limited amounts of water, primarily irrigation water captured from planters and piped to a common sump in the building, was periodically discharged to the storm sewer. AR,[4] pp. 6.259-314. Over the quarterly periods at issue, this discharge ranged from zero (0) gallons to a maximum of only 112.5 gallons a day, vastly below the 7,200 gallons per day permitted for groundwater discharge under the Groundwater Permit. AR, pp. 6.203-226.

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[2] The building is owned by Casden Doheny Property, LP.

[3] Exhibit B of the Order contains the Findings of Fact, or "Findings."

[4] Citations to "AR" are citations to the final hearing binder prepared for the March 17, 2011 hearing panel. This binder is part of the official administrative record of the proceeding.

B. Regional Board Decision

On June 2, 2011, the Regional Board found that Casden failed to timely submit twelve monitoring reports from the fourth quarter of 2005 through third quarter of 2008, as required pursuant to waste discharge requirements under the Groundwater Permit. Ex. 1 (Order on Complaint No. R4-2008-0199-M, or "Order"). For the failure to timely submit the quarterly reports, the Regional Board imposed MMPs totaling $663,000, based upon California Water Code section 13385.1, which provides for mandatory minimum penalties of $3,000 for every 30 days a discharge monitoring report is late.. The Regional Board imposed another $12,000 penalty based upon its finding of four separate violations for purported discharges that occurred in the first and second quarters of 2010, which exceeded the daily maximum and monthly average copper limits.

The Regional Board rejected Casden's assertion that it is entitled to relief from MMPs for the alleged late reports under the provisions of SB 1284, signed into law on September 30, 2010, and effective as of January 1, 2011. Casden asserted that one of the two new exceptions to MMPs for late discharge monitoring reports applied:

> [A]t any time prior to the date a discharge monitoring report is required to be filed or within 30 days after receiving written notice from the state board or a regional board of the need to file a discharge monitoring report, if the discharger submits a written statement to the state board or the regional board that includes both the following:
>
> (i) A statement that there were no discharges to waters of the United States reportable under the applicable waste discharge requirements during the relevant monitoring period.
>
> (ii) The reason or reasons the required report was not submitted to the regional board by the deadline for filing that report. Water Code Section 13385.1(a)(2)(A).

On January 28, 2011, pursuant to Water Code Section 13385.1(a)(2)(A), Casden submitted a written statement to the Regional Board indicating that no groundwater discharges reportable under the applicable waste discharge requirements occurred during the monitoring periods at issue and explaining the reason the reports were not timely submitted. AR, p. 6.262.

The Regional Board, however, refused to provide Casden relief from MMPs under SB 1284. The Regional Board held that Casden's statement submitted within 30 days of the statute's effective date, was nonetheless too late. In effect, Casden would have had to submit its statement prior to the enactment of SB 1284, regardless of the lack of any such provision of law at the time. Moreover, the Regional Board found that Section 13385.1(a)(2) did not apply since Casden's non-groundwater discharges that occasionally occurred were nonetheless reportable under the Groundwater WDR. It concluded that the WDR requires reporting for all discharges from the building's sump regardless of whether the discharges are separate and have never intermixed with groundwater. Ex. 3, March Transcript, 138:9-14; Findings, ¶9, 10.

Before imposing the Order, the attorney member of the Regional Board concluded:

> I just initially want to echo everyone's frustration with the lack of discretion on M.M.P.s, as we've said that a number of times. I agree with that as well as today. My focus as a panel member in rethinking all of these things over the last few days and today has really been on the interpretation of 1284, and I just want to say that I remain comfortable with our interpretation of the statute.
>
> At the same time, it's a classic example, I **think, of the results of sausage making in Sacramento, and it's a convoluted mess, frankly, from my perspective. The statute is, to me, not abundantly clear in a situation where it needs to be**, although, again, I'm comfortable with the judgment call that we've made on our interpretation of the statute, and I look forward to seeing what other panels and courts do with it. June Transcript, p. 62:2-18 (remarks of Charles Stringer, emphasis added).

As set forth below, this view of SB 1284 hardly reflects the degree of clarity in the statute necessary to override the statute's acknowledged purpose and express provisions to the contrary.

III. SB 1284 RETROACTIVELY APPLIES TO CASDEN'S VIOLATIONS AND AFFORDS RELIEF FROM MANDATORY MINIMUM PENALTIES

There is only one possible interpretation of SB 1284 -- that alleged violators with ACLs issued on or after July 1, 2010 -- must be afforded an opportunity to submit a statement to the Regional Board pursuant to Section 13385.1(a)(1)(A), after the effective date of the statute, January 1, 2011. This is evident taking into account:

- The express provision of the Legislature's intent set forth in Section 13385.1(e) that SB 1284 apply regardless of when the violation occurred, unless a complaint had been

filed by July 1, 2010;

- The impossibility of otherwise providing relief where a complaint was filed after July 1, 2010 and before the effective date of SB 1284, since the requisite statement for ascertaining relief did not previously exist;
- The purpose of SB 1284 was to afford relief from draconian MMPs, such as in the present case where the even Regional Board concedes the penalty amount does not fit the violation; and
- The necessity of harmonizing all components of a statute to give effect to each provisions in light of the statute's purpose.

A. <u>The Legislative Intent of SB 1284 Shows it Clearly Applies to Casden</u>

The Regional Board erred in concluding that Casden was not entitled to relief under Water Code Section 13385.1(a)(2). Its interpretation of SB 1284 is contrary to well accepted canons of statutory interpretation, the intended purpose of the bill, and the express provisions of the bill, which provides:

> The amendments made to this section by Senate Bill 1284 of the 2009-10 Regular Session of the Legislature ***shall*** apply to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred. Water Code section 13385.1(e). (Emphasis added.)

The interpretation of a statute begins with its express terms. *Catlin v. Superior Court*, 51 Cal.4th 300, 304 (2011). A court must "construe the words of a statute in context, and to the extent possible, harmonize provisions relating to the same subject matter." *Robson v. Upper San Gabriel Valley Municipal Water Dist.*, 142 Cal. App. 4th 877, 884-885 (2006). When interpreting a statute a court must harmonize all its parts, if possible, reconciling them in a manner that carries out the purpose of the statute. *Id.* "Every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." *Katz v. Los Gatos-Saratoga Joint Union High School Dist.*, 117 Cal. App. 4th 47, 54 (2004) (citations omitted). Where several codes are to be construed, "they 'must be regarded as blending into each other and forming a single statute.' [Citation.] Accordingly, they 'must be read together and so

construed as to give effect, when possible, *to all the provisions thereof.*' [Citation.]" *Id.* (emphasis added). "[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." *Clements* v. *T.R. Bechtel Co.*, 43 Cal.2d 227, 233 (1954). This principle has been called a "golden rule of statutory interpretation." *Armstrong* v. *County of San Mateo,* 146 Cal. App.3d 597, 615 (1983). An agency should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose. See *W. Oil & Gas v. Monterey Bay Unified Air Pollution*, 49 Cal.3d 408, 425 (1989).

Citing Water Code Section 13385.1(e), the Regional Board concedes that Water Code Section 13385.1(a)(2)(A) "applies to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." Ex. 2, Conclusions, ¶ 6. The Regional Board also concedes that there was never before a requirement for the statement created by SB 1284, set forth in Section 13385.1(a)(2)(A), and that Casden had no reason to file the statement before January 1, 2011 (SB 1284's effective date). *Id.* Nonetheless, in a quizzical *non sequitur*, the Regional Board concluded that Casden did not qualify for relief under Section 13385.1(a)(2)(A) because "nothing in section 13385.1 provides an exception to the 30-day requirement for violations that occurred or notices that were issued before the enactment of subdivision (a)(2)." Ex. 1, Conclusions, ¶7.

The Regional Board erred as it failed to harmonize and reconcile all parts of the statute in a manner that carries out the purpose of SB 1284. Nothing in the Regional Board's interpretation reconciles the impossibility of meeting the statement requirement where a complaint was filed on or after July 1, 2010 and prior to the statute being enacted and taking effect. Section 13385.1(e) plainly commands in mandatory language that it **"shall apply"** so long as a complaint had not been filed as of July 1, 2010. Principles of statutory construction do not allow an administrative agency to disregard a component of a new law simply because the Legislature could have addressed it in a more detailed fashion or because the Legislature could have speculatively acted

in other ways.

Despite Casden's repeated requests to the Prosecution and the Regional Board, neither could ever come up with a single example reconciling how a discharger that received a complaint after July 1, 2010 and before the effective date of the SB 1284, could be afforded relief under Section 13385.1(a)(2) – as expressly mandated in the statute – without being afforded an opportunity to provide the requisite statement after SB 1284 took effect on January 1, 2011. Possibly recognizing the inherent flaws in its logic, ***the Regional Board never identifies when the notice occurred with regard to Casden that triggered its 30-day timeframe for it have to submitted its statement.*** Implicitly, the Regional Board contends that Casden's notice violation would have triggered such clock. Yet, such an interpretation is directly at odds with Legislature's directive that the bill apply so long as a complaint had not been filed as of July 1, 2010. Not only would a complaint on or after July 1, 2010 constitute notice according to such an interpretation, but also any earlier notices, such as a notice of violation, that must be issued by the Regional Board *before* filing a complaint would serve as such a notice thwarting any relief, eviscerating the very specific command of Section 13385.1(e) to the contrary.

Further, ignoring the express language of SB 1284, the Regional Board goes so far as to justify its interpretation by speculating that the Legislature could have expressly waived the statement requirement for dischargers with outstanding violations as of January 1, 2011. Ex. 2, Conclusions, ¶ 7. Yet, contrary to such speculation about what the Legislature *could have* done, the Regional Board neglects to recognize that the Legislature, which could have just as easily stayed silent as to SB 1284's application prior to its effective date, took pains to enact subdivision (e), providing that such relief *shall apply* to violations for which a complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred and despite that the statement requirement did not previously exist. Given that it is uncommon for statutes to include such provisions of expressed legislative intent specifying the application to pre-enactment matters, subdivision (e) must be afforded great weight.

B. <u>The Regional Board's Interpretation of SB 1284 is Contrary to Its Purpose</u>

The Regional Board's compartmentalized reading of SB 1284 is plainly at odds with the bill's purpose to provide relief from MMPs, as evident by the legislative history. When possible, interpretation of a statute should give effect to all of its provisions and accords with the purpose of the statute. *Robson v. Upper San Gabriel Valley Municipal Water Dist., supra,* at 884-885.

Starting with its introduction, SB 1284 was specifically intended to provide relief from the unjust impositions of MMPs for late reporting violations that clearly did not warrant such draconian penalties with the intention that the amendments were to apply without regard to the date on which the violations occurred. AR, p. 6.356. Thereafter, the bill was amended on four occasions (AR, pp. 6.370-6.440), where this and other provisions were amended before reaching their final form. AR, p. 6.442. While initial provisions of Section 13385.1(e) were removed due to concerns that dischargers might attempt to recoup payment of past resolved mandatory minimum penalty violations, SB 1284 was thereafter amended to expressly apply regardless of when the violations occurred, so long as either an ACL or judicial complaint had not been issued prior to July 1, 2010. This ruled out the concern over opening up resolved cases, but made clear of the legislature's intent that it afford relief to pending cases where a complaint had not been issued prior to July 1, 2010.

C. Affording Dischargers Who Receive Complaints After July 1, 2010, An Opportunity to Submit a Statement Under Water Code Section 13385.1(a)(2)(A) Would Not Void the Violation, but Only Shifts the Remedy from MMPs to Discretionary Penalties

Contrary to the reasoning of the Regional Board, allowing a party an opportunity to submit a statement under SB 1284 where an ACL was issued after July 1, 2010, would not in any way change the existence of a previously issued notice of violation and would not provide an opportunity to cure a violation. Ex. 2, Conclusions, ¶ 7. Rather, the alleged violations remain. Section 13385.1(a)(2)(A) only changes a violation from being a serious violation subject to mandatory minimum penalty to being subject to discretionary penalties. *See* Water Code §§ 13385(a)(3) and (e).

The Prosecution's allegations that affording retroactive relief under Section 13385.1(a)(2)(A) would open the floodgates to claimants and that a great burden would be

imposed on the Regional Board enforcement staff to issue notices are simply not true and belied by the Regional Board's practice under the State Board's Water Quality Enforcement Policy, State Water Resources Control Board, May 20, 2010 (the "Enforcement Policy")[5] and its pre-enactment extension of other relief under SB 1284. Such relief would pertain to only a very limited number of matters with complaints pending at the time of SB 1284's enactment and only as to such dischargers that could otherwise meet SB 1284 requirements for relief. If it would change anything, it would substantially ease the burden on Regional Board staff since settlement would be promoted in light of more reasonable and appropriate penalties without MMPs. Indeed, almost all cases afforded relief from MMPs by the regional boards and the State Board under the prior Enforcement Policy and SB 1284 have been resolved through settlement. Allowing an opportunity for the limited number of dischargers with complaints pending prior to SB 1284's effective date to submit a statement under Section 13885.1(a)(2) and settle the penalties, even if issuance of a special notice by the Regional Board was necessary, would take considerable less resources than the Regional Board staff having to prosecute a matter through a hearing, for the Regional Board to hear it, and for the State to address the multiple layers of appeals thereof.

D. The Regional Board Has Inconsistently Afforded Relief From Mandatory Minimum Penalties

The regional boards and State Board have reduced MMPs by millions of dollars for late reporting violations under the Enforcement Policy and SB 1284. Any notion that somehow Casden would be receiving unique treatment could not be any farther from the truth. Rather, it is Casden that is being unfairly singled out and not extended the same relief afforded to other dischargers.

Since passage of SB 1284, the Regional Board has afforded relief to numerous parties from MMPs for late reports, including under the same circumstances as Casden. This further supports that SB 1284 should be applied in this matter and demonstrates the Regional Board's refusal to apply SB 1284 in the present case is arbitrary and capricious in violation of the Constitutional right to due process, prohibition against excessive penalties and equal protection of

[5] Available at http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

the law.

As with its avoidance of the plain language of SB 1284, the Regional Board brushes aside inconvenient truths concerning how it has handled other matters, such as in the matters of Glenborough Cahuenga, LLC, ACL Complaint R4-2008-0175-M ("*Glenborough*") and Crescenta Valley Water District, ACL Complaint No. R4-2009-0010-M ("*Crescenta Valley*"). Both matters are entirely inconsistent with the Regional Board's actions as to Casden. Both concern late reporting violations that occurred prior to the enactment of SB 1284 that were resolved by the Regional Board after SB 1284 took effect and it can not be disputed that neither discharger submitted a statement within 30 days of pre-enactment notices by the Regional Board.

1. *Glenborough*

Glenborough concerned the very same Groundwater WDR and late reporting violations as alleged against Casden. After the effective date of SB 1284, the Regional Board reduced MMPs for a notice of violation issued December 19, 2008. The discharger had been permitted by the Regional Board staff to submit a statement on December 8, 2010.[6] After submission of the statement, as part of a settlement, MMPs of $225,000 were reduced to $0 for three late quarterly reports from 2006, spanning 74 30-day late reporting periods. AR, p. 6.453-495.. Mandatory minimum penalties for three other late quarterly reports from 2007, spanning 31 30-day late reporting periods, were also reduced from $72,000 to $9,000 under Water Code section 13385.1(b)(another provision of SB 1284). *Id.* The settlement, however, did not become effective until January 18, 2011, after the public comment period and after the effective date of SB 1284. AR, p. 6.493.

In its attempt to distinguish *Glenborough* from this matter, the Regional Board concluded:

[6] Although a December 8, 2010 letter by the prosecution references that the Glenborough settlement was reached through application of the Enforcement Policy, this is contrary to the facts and the law. To start with, as expressed in numerous letters to Glenborough and in many other cases, the Regional Board initiated using SB 1284 to resolve mandatory minimum penalties upon its enactment. AR, p. 6.478-6.483(a handwritten note on the first page presumably written by Regional Board staff emphasizes "SB 1284 not Enf Policy"). The discharger's statement in *Glenborough* did not comply with the Enforcement Policy as it was not made under penalty of perjury as required under the policy(but not required by SB 1284). Further, it did not address the reason why the reports were late, as required under the policy. More importantly, the statement was submitted after SB 1284 was enacted and the settlement was not effective until after SB 1284 took effect.

> Casden "did not demonstrate that the Prosecution Team treated the Permittee differently than other similarly situated discharges. For instance, the Prosecution explained that Glenborough Chauenga, LLC was treated differently because that case involved a no-discharge situation and was resolved according to the Water Quality Enforcement Policy before S.B. 1284 too[k] effect." Ex. 2, Conclusions, ¶9.

Yet, the Regional Board's and the Prosecution's explanation that Glenborough was resolved before SB 1284 took effect belies the facts and the law. The lack of a discharge is irrelevant to distinguish the application of SB 1284 in the two matters and the opportunity afforded to Glenborough to submit a statement contending that no discharge occurred . The Regional Board fails to reconcile how Glenborough was permitted to submit a statement so it could assert such a lack of discharge when the indisputable fact is that the *Glenborough* settlement did not take effect until January 18, 2011,[7] after the effective date of SB 1284. AR, pp. 6.484, 6.493. As plainly stated in all ACLs by the water board prosecutors, U.S. Environmental Protection Agency ("U.S. EPA") regulations require 30 days of public notification of any *proposed* settlement of civil liability occasioned by violation of the Clean Water Act to take effect, including a NPDES permit violation. 40 C.F.R. §§ 22.18, 22.45 (2011). Accordingly, despite SB 1284 being in effect for *Glenborough*, the Regional Board allowed the discharger to submit a statement for pre-enactment violations so it could demonstrate that no discharge purportedly occurred.

2. *Crescenta Valley*

With regard to the *Crescenta Valley* matter, which was heard by the same hearing panel immediately after Casden's panel hearing, ***MMPs for six late filed reports consisting of 78 thirty-day periods were reduced from $234,000 to $0.*** *Crescenta Valley* matter was also not finalized until after the effective date of SB 1284. Despite no mention of Crescenta Valley having even submitted the requisite statement, the facts are indisputable that no statement of any kind as to the lack of a discharge was submitted by Crescenta Valley within 30 days of the notice of violation of June 9, 2008. Yet, on December 17, 2010, the Prosecution's recommendation to

[7] The settlement, of course, is not truly final until the discharger actually pays the settlement amount and complies with any mandatory provisions.

the hearing panel was to assess $0 in penalties for six of the seven late reports given the claimed lack of discharge. Ex. 4 (Exhibit "A" to the ACLC No. R4-2010-0010-M, included as part of Casden's written comments prior to June 2 Regional Board Meeting).

Despite the significant reduction and elimination of any penalties for six out of its seven late reports, Crescenta Valley declined the December 17, 2010 settlement offer, since it included $54,000 in penalties for one late report. Instead, Crescenta Valley chose to proceed to its hearing before a hearing panel on March 17, 2011, challenging that penalty pursuant to a different SB 1284 exception under Water Code Section 13385.1(b)(1). In light of Crescenta Valley's refusal to accept the settlement proposal, the violations of the other late reports remained at issue. Under the U.S. EPA regulations referenced above, neither the Regional Board, nor the Prosecution, had authority to simply dismiss the violations for the six late reports without a notice of settlement or hearing. Nor is it permitted by the Enforcement Policy, which does not change the fact the that violation occurred, but rather changes the violation from being subject to MMPs to discretionary.[8] At Crescenta Valley's March 17, 2011 hearing, three months after the enactment of SB 1284, the hearing panel accepted the Prosecution's recommendation to not impose MMPs for the six late reports and to issue penalties for the remaining late quarterly report. Ex. 4 (the Crescenta Valley Hearing Panel Report and Proposed Order is Exhibit 4 to Casden's May 19, 2011 written comments). On May 5, 2011, five months after SB 1284 was enacted, the Regional Board accepted the hearing panel's recommendation. Ex. 5. The Regional Board fails to reconcile how Crescenta Valley was afforded relief after the effective date of SB 1284, but not Casden. Again, for the Regional Board to consider such relief, it had to first accept a statement by Crescenta Valley that no reportable discharge under the WDR occurred.

As to the one report for which a $54,000 mandatory minimum penalty was imposed and challenged by Crescenta Valley, Crescenta Valley's opposition focused on Section 18835.1(b)(1), a different provision of SB 1284 than that at issue in this proceeding. This may have lead to

[8] "Under these circumstances, that report would not ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations, and therefore, the late submittal of such a report would be subject to discretionary civil liabilities, but would not be subject to MMPs." Enforcement Policy, at 27.

confusion by the Regional Board with regard to Casden's case.[9] The requirements under the first exemption for mandatory minimum penalties, Section 18835.1(a)(2)(A), as asserted by Casden, are distinct and different from the second exemption, Section 18835.1(b)(1), which Crescenta Valley raised, and leads to a different outcome concerning its retroactive application. With regard to Section 18835.1(a)(2)(A), there was no previous provision under the Water Code for submitting the requisite statement. Accordingly, as described in detail above, the only way to reconcile Section 13385.1(e) with Section 13385.1(a)(2)(A) is to afford alleged discharger in receipt of a complaint after July 1, 2010, an opportunity subsequent to the effective date of the statute to submit a statement, as Casden did. On the other hand, to obtain relief under the second exemption under SB 1284, Section 13385.1(b)(1), the discharger must "file[] a discharge monitoring report that had not previously been timely filed within 30 days after the discharger receives written notice, including notice transmitted by electronic mail, from the state board or regional board concerning the failure to timely file the report." As a result, unlike the statement required under Section 13385(a)(1)(A) which never could have occurred before the enactment of SB 1284, relief under Section 13385.1(b)(1) is premised upon the discharger having filed its the late monitoring report within 30 days of notice, which is an action that could have occurred prior to the enactment of SB 1284.

IV. AS THE HEARING PANEL DETERMINED, NO GROUNDWATER DISCHARGES OCCURRED AND THE GROUNDWATER PERMIT DOES NOT REQUIRE OTHER WATER DISCHARGES TO BE REPORTED.

In denying the application of Section 13385.1(a)(2), the Regional Board also ruled that the "[p]ermit requires the Permittee to file monitoring reports for all effluent discharged from its sump." Ex. 2, Findings, ¶10. The Regional Board does not provide any evidence or cite to legal authority in support of its ruling. *Topanga Assn. for a Scenic Community v. County of Los Angeles,* (1974) 11 Cal.3d 506 (boards must render findings to support their ultimate rulings).

The Regional Board's ruling is in error since the Groundwater WDR does not regulate the

[9] Tellingly, the initial draft HPR served on Casden contained many incorrect references to the wrong SB 1284 exemption, Section 13385.1(b). Ex. 3 (Ex. 6 to Casden's written comments prior to June 2, 2011 Regional Board hearing) Much of the HPR in the Casden matter interpreting the application of Section 13385.1(a)(2)(A) merely parrots the HPR in the Crescenta Valley matter regarding Section 13385.1(b)(1) and gives no recognition to the distinctions between the two provisions.

sump. Rather, the Groundwater WDR regulates discharges of groundwater to the storm water sewer. Here, the Regional Board found that there were no discharges of groundwater. Instead, the periodic discharges were mainly irrigation water. Ex. 3, 138:9-14; Ex. 2, Findings, ¶9. Accordingly, the groundwater regulated under the groundwater permit never once intermixed with the irrigation water or other water discharged to the storm water system and thus there can be no argument that the discharges were subject to the reporting or other requirements of the Groundwater Permit.

A. The Regional Board's Interpretation Eviscerates Amendments to SB 1284

Under the first exemption set forth in Water Code Section 13385.1(a)(2)(A), SB 1284 provides relief when a subject discharge was not "reportable under the applicable waste discharge requirements." When the exemption in question was first proposed in SB 1284 on June 6, 2010, the exemption would have required a "statement that there were no discharges to waters of the United States during the relevant monitoring period," matching the Enforcement Policy. AR, p. 6. 395; Enforcement Policy, p. 27. However, this provision was subsequently amended on June 23, 2011 and ultimately enacted to require a "statement that there were no discharges to waters of the United States *reportable under the applicable waste discharge requirements* during the relevant monitoring period." AR, p. 6.408 (emphasis added). The Regional Board's construction of the exemption gives no independent meaning to this purposeful amendment, eviscerating any effect of this purposeful modification to SB 1284, contrary to long-standing rules of statutory interpretation. See, *e.g.*, *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 638 ("Significance should be given, if possible, to every word, phrase, sentence and part of an act.")

B. The Sump is Not Subject to the WDRs

Without any factual or legal support, let alone explanation, the Regional Board boldly claims that the WDR "requires the Permittee to file monitoring reports for all effluent discharged from its sump." Ex. 2, Findings, ¶ 10. This is contrary to the terms of the WDR, the law, and past State Board interpretations of general NPDES permits. The findings of an administrative agency must be sufficient to enable the parties to determine whether and upon what basis they should seek review and to allow a reviewing court to determine the basis for the agency's action.

Topanga Assn. for a Scenic Community v. *County of Los Angeles*, 11 Cal.3d 506, 514 (1974). This alone is reason to overturn the Regional Board's order. Nowhere in the Groundwater Permit does it specify the sump as being regulated or that any other uncommingled effluent discharged from the sump is reportable under discharge monitoring reports.

The State Board has previously recognized that general NPDES permits do not specify the location of the discharge, such as the sump. Indeed, initially, most general permits were not subject to MMPs for effluent or reporting violations since the location of the discharge was not specified as required under the MMP statute at the time. The State Board further concluded that even where the discharge location may be specified in the notice of intent or in monitoring requirements, it was not clearly incorporated in the permits and therefore the location was not specified in the waste discharge requirements for general permit enrollees.[10] Only after AB 495 amended Water Code section 13385.1, effective January 1, 2006, to remove the requirement for the discharge location to be specified in the WDRs did the State Board start applying MMPs to violations of general NPDES permits.[11]

C. <u>The Groundwater Permit Does Not Regulate Casden's Non-Groundwater Discharges</u>

According to its terms, the Groundwater Permit is plainly for the purpose of regulating groundwater discharges, not the other alleged discharges by Casden.

Under "Discharge Description," the Groundwater Permit provides:

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[10] "The location of the discharge for an enrollee under a general permit is specified in the Notice of Intent or Request of Waste Discharge application submitted to the Water Boards and may also be typically included in the enrollment letter and in the specific monitoring and reporting programs. Since those documents are not clearly incorporated in the permit, the location is not specified in waste discharge requirements for general permit enrollees." *Report of the Statewide Initiative On Mandatory Minimum Penalty Enforcement*, State Water Resources Control Board, May 2009, p. 9; footnote 4.

[11] *See Report of the Statewide Initiative On Mandatory Minimum Penalty Enforcement*, State Water Resources Control Board, May 2009, p. 9:

> <u>AB495</u> (Montanez) (Stats. 2005, ch. 145 (A.B.495), § 1) amended *Water Code section 13385.1*, effective January 1, 2006, to remove the requirement for the discharge location to be specified in the WDRs. As a result, wastewater dischargers regulated under the NPDES wastewater program and the NPDES stormwater program are subject to the MMP if the location is specified in waste discharge requirements for violations occurring from January 1, 2000 to December 31, 2005. Most general NPDES permits, including stormwater NPDES permits, do not specify the location of discharge and are therefore not subject to MMPs for effluent or reporting violations occurring from January 1, 2000 to December 31, 2005 but they are applicable to violations occurring from January 1, 2006 on.

> 5. Discharges covered by this permit include but are not limited to, treated or untreated groundwater generated from permanent or temporary dewatering operations. In addition, this permit covers discharges form cleanup of contaminated sites where other project Specific General Permts may not be appropriate, such as groundwater impacted by metals and/or other toxic compounds. This permit also covers discharges from dewatering operations in the vicinity of creeks where surface waters and groundwaters are hydrogically connected and have similar water chemistry. [. . .]
>
> 6. Wastewater discharge from permanent or temporary dewatering activities, include but are not limited to the following:
>
> a. Treated or untreated wastewater from permanent or temporary construction dewatering operations.
>
> b. Groundwater pumped as a aid in the containment and/or containment and/or cleanu of contaminant plume.
>
> c. Groundwater extracted during short-term and long-term pumping/aquifer tests
>
> d. Groundwater generated from well drilling, construction or dewatering and purging of wells.
>
> e. Equipment decontamination water
>
> f. Subterranean seepage dewatering
>
> g. Incidental collected stormwater from basements.
>
> AR, p. 6.36.

Continuing, the Groundwater Permit states that "[t]his order regulates the discharge of groundwater that may or may not be impacted by toxic compounds and/or conventional pollutants." AR, p. 6.39

When specifying the types of discharges that are eligible for coverage, the Groundwater Permit clearly makes the Casden flows ineligible for coverage under the Order. Under "Eligibility," the Groundwater Permit states:

> This order covers discharges to surface waters of treated or untreated ***groundwater from*** dewatering operations and other wastewaters. (AR, p. 6.43 A.1)

Thus, the discharges must be composed of groundwater, and can either be from (1) dewatering operations or (2) other wastewaters. Such "other wastewaters" are those described in paragraph 6 of the Groundwater Permit on p. 6.26, including "Groundwater pumped as a aid in the

containment and/or containment and/or cleanup of contaminant plume," "Groundwater extracted during short-term and long-term pumping/aquifer tests," and "Groundwater generated from well drilling, construction or dewatering and purging of wells." AR, p. 6.26. The "and other wastewater" clause *cannot conveniently expand at the agency's whim to embrace non-like flows* under federal and California law. 40 C.F.R. § 122.28(a)(2), Water Code § 13263(i).

An assortment of other provisions in the Groundwater Permit provide further clarification that irrigation water discharges and other non-eligible flows are not regulated by the Groundwater Permit and not included in the Groundwater Permit's Monitoring and Reporting Program. AR, pp. 6.29 to 6.34, 6.43 ¶ A.1, 6.44, ¶ 3.

D. <u>The Regional Board Cannot Bootstrap All Other Forms of Discharges Under the Groundwater Permit</u>

To evade the descriptions limiting the regulated discharges set forth in the Groundwater Permit, the Regional Board wrongly concludes that the Casden discharge is "similar to some of the discharge[s listed in the Permit]" and that because "[t]he list of covered waters [in the Permit] is not exclusive," the Casden discharges are close enough so as to be regulated. Ex. 2, Findings, ¶ 10. The Regional Board's concession that the Casden discharge is *not the same*, but merely somehow "similar," further compels the conclusion that the discharge is not regulated under the Permit. The Regional Board is not authorized to regulate on the basis of mere similarity here, besides the fact that the Casden discharge was anything but similar to the regulated discharges under the Groundwater Permit.

The record contains no evidence that supports a finding that irrigation water is like groundwater in this context. While the Prosecution seizes on what they would prefer to view as an all-expansive savings clause --"but are not limited to"-- in the list of discharge types regulated under the Permit, that clause merely refers to the subsequent descriptions in paragraph 5 concerning cleanup of contaminated sites and creekside dewatering, neither of which implicate irrigation water. AR, p. 6.36. Such savings clauses cannot be used to construe the wholesale application of the Groundwater Permit beyond its intended purpose and the law, becoming a catch-all for any form of discharge, which would constitute an abuse of the general-permitting

process. Where would it end?

Although the HPR appears to rely on a statement made by the Regional Board's Chief of the General Permitting Unit as the basis for this finding (see Ex. 3 at 94), the Chief could not explain how irrigation water was similar to incidental collected stormwater from basements. The same staffer also failed to specify any support for his theory as to why all discharges from the sump are covered under the groundwater permit, though he was given a clear opportunity (see, *e.g.*, Ex. 3 at 99). Indeed, despite an 18-page rebuttal brief and ample notice of Casden's defense, the Prosecution never raised its contention that non-groundwater discharges were nonetheless reportable under the WDR and that the WDR regulated the sump, until it sought to surprise Casden at the hearing before the hearing panel over Casden's objections.

In fact, irrigation water is distinctly different in a variety of ways from incidentally collected storm water. Here, excess irrigation water, potable Beverly Hills water, is piped directly from the planters, unlike storm water collecting from the groundwater surface and infiltrating into the basement. Importantly, irrigation water is exempt from storm water permitting under the *Waste Discharge Requirements of Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles* (Order No. 01-182; the "MS4 Permit") [12] and the City of Beverly Hills storm water ordinance (City of Beverly Hills Code, 9-4-501, *et seq.*).

E. <u>The Regional Board's Findings Run Afoul of Federal Regulations</u>

The Regional Board's finding that the list of regulated discharges under the Groundwater Permit is not exclusive is also contrary to federal regulations, which preclude expanding the scope of a general permit to include unspecified and non-like discharges. 40 C.F.R. § 122.28(a)(2); *see* AR, p. 6.35, ¶ 2. Under this regulation, the Regional Board is prohibited from regulating "non-like discharges" within a general permit.

Under both federal and state law, general permits must be drawn to cover like discharges, and cannot expand at the convenience of the regulatory authority. 40 C.F.R. § 122.28(a)(2),

[12] The 2008 Groundwater Permit expressly prohibits coverage for *discharges* already covered by another general permit. AR, p. 6.110, ¶3. Note that the language used here is not "sumps" or "outlets" or "discharge points." Rather, it is expressly the *discharges* that are the subject of the regulation and what is included or excluded from coverage under any permit.

Water Code § 13263(i). The sump is not regulated under a general permit. See, *e.g.*, Water Code § 13360(a). Instead, a general permit regulates discharges of pollutants. 33 U.S.C. § 1311(a); Water Code § 13263.

F. The Groundwater Permit Requirements Clearly Require Only Groundwater Discharges Be Reported

The Groundwater Permit explicitly requires sampling and reporting of "*groundwater*." AR, p. 6.37, para. 8, (emphasis added). These samples are to be representative of the groundwater, and the results of the sampling must be reported. In particular, the Permit provides:

> The frequency of monitoring for constituents regulated under this permit will vary according to ***the quality of the groundwater*** prior to any necessary treatment and discharge. ***The groundwater quality shall be determined based on analytical results of constituents listed in the supplemental analysis,*** which shall be submitted with the NPDES application or the Notice of Intent Form. AR, p. 6.56 (emphasis added).

There is no requirement that non-groundwater be sampled under the Permit, therefore there is nothing to report. Casden's samples do not contain groundwater and could therefore not be representative of the groundwater, and thus are not reportable.

G. The Regional Board Has No Enforcement Authority under the Groundwater Permit Against Casden for Non-Groundwater Discharges

There is no legal or logical support for Casden's non-groundwater discharges being regulated under the Groundwater Permit since the discharges are separate and divisible, proven not to have been commingled with eligible discharges.[13] The MS4 Permit is the applicable waste discharge requirements for Casden's non-groundwater discharges to the storm sewer, with the City of Beverly Hills being the primary enforcement agency. Ex. 6. If Casden were found to be discharging non-groundwater discharges to the storm water system in violation the MS4 Permit or the City of Beverly Hills storm water ordinances (City of Beverly Hills Code, 9-4-501, *et seq.*), Casden would be subject to enforcement from the City fo Beverly Hills. (The City, in turn, could

[13] Under the Board staff's position, if Casden had two separate sumps leading to the same storm sewer, then the irrigation water discharges would not be subject to the Groundwater Permit. This is yet another absurd result of staff's position, and the more reasonable result must prevail when construing the two permits.

be subject to enforcement by the Regional Board under the MS4 Permit.)

The Groundwater Permit is not only inapplicable to Casden's non-groundwater discharges, but the discharge of irrigation water is exempt for storm water permitting under the MS4 Permit and the City of Beverly Hills storm water ordinances. The Prosecutor conceded at the hearing that the MS4 Permit would be applicable to irrigation water from Casden to a storm sewer system, but claimed that since the irrigation water was captured by Casden's sump it was subject to the Groundwater Permit claiming that "everything that comes out of Casden's sump is governed by its permits." Transcript at 97-99. Subsequently, the Chief of Permitting informed Casden that he did not think the irrigation water would require a WDR if piped around the sump. Ex. 3, p. 109:20-24.

H. Seeking Coverage Under The Permit For Potential Groundwater Discharges Does Not Confirm The Flows Are Not Regulated By Another General Permit.

The Regional Board concluded that, "[b]y repeatedly seeking NPDES permit coverage, the Permittee admitted that it was discharging pollutants to a water of the United States[,]" citing *City of Brentwood v. Central Valley Regional Water Quality Control Board,* 123 Cal.App.4th 714, 723. Ex. 2, Findings, ¶10. The WDR and notices of intent are clear that the permit was only intended for purposes of groundwater discharges, which the Regional Board found to not have occurred. AR, pp. 6.503-594; Ex. 2, Findings, ¶ 9. Nowhere in the WDR is the sump the regulated. There is no requirement that nongroundwater discharges that are not commingled with groundwater discharges be reported. See Groundwater Permits, AR, pp. 6.25-6.159.

The sole case relied on by the Court of Appeal in *Brentwood* was issued by a district court in eastern Arkansas. That case stands only for the proposition that data provided in monitoring reports can serve as admissions of effluent violations. Nothing in *Brentwood* stands for the conclusion that seeking coverage under a general permit amounts to an admission that all subsequent discharges from the building are regulated and reportable under the Groundwater Permit or some other permit. *Brentwood, supra,* at 723.

Further, the Regional Board's finding that Casden did not establish that the discharges were regulated by the MS4 permit puts the "cart before the horse" and is also inconsistent with

the terms of the MS4 Permit and the City of Beverly Hills storm water ordinance, 9-4-501, et seq., as explained above. Ex. 2, Findings, ¶10; Ex. 6. In making this finding, the Regional Board fails to recognize that the Groundwater Permit coverage was only for the purpose of discharging groundwater should it infiltrate into Casden's building. It remains undisputed that Casden did not discharge groundwater. Ex. 2, Findings, ¶ 9.

Moreover, the Regional Board's finding that the "Permittee's repeated efforts to seek state and local permits are inconsistent with the Permittee's argument that it does not need a permit for the discharge because the discharges were covered by Order No. 01-182" makes no sense and is irrelevant. Ex. 2, Findings, ¶10. Casden's notices of intent make clear that it sought the permit for potential groundwater discharges. Casden's efforts to obtain coverage, though perhaps uninformed, did nothing more than to preserve the ability to discharge groundwater from the building to the storm water system in the event it occurred and nothing more. It is neither inconsistent with, nor evidence that the non-groundwater discharges are not regulated under the MS4 Permit or otherwise. Likewise, the Regional Board's claim that Casden's counsel conceded that discretionary penalties may be appropriate for the failure to file a report, not just a mandatory one, serves as absolutely no evidence that discharges were reportable or that SB 1284 should not apply. The Regional Board asserts that a monitoring report must be timely submitted regardless of whether a discharge occurred or not under the Groundwater Permit, unless it was subject to exceptions in the Enforcement Policy, or now under SB 1284. Enforcement Policy, pp. 26-27. Casden's counsel merely agreed that SB 1284 does not change that a violation exists for filing a late report. Rather, it allows relief from mandatory penalties and permits discretionary penalties instead where no reportable discharges occurred.

I. Neither Discharges for the Fourth Quarter 2005 to Third Quarter 2007 Period, Nor Violations of WDR Limits, Have Not Been Proven.

The Regional Board found that Casden reported discharges from the Fourth Quarter of 2007 to the Second Quarter of 2010. Ex. 2, Findings, ¶9. Because these reports provided that the discharges were from non-groundwater sources and that the Regional Board found that no groundwater was ever discharged, the Regional Board has no basis to find and cannot speculate

that such discharges occurred then or that permit limits were exceeded.

The Regional Board also erroneously speculates that Casden discharged copper and Flow-Zyme for unspecified periods of time including that prior to September 24, 2007 and that these speculative discharges violated discharge limits. Ex. 7, Findings, ¶10. However, prior to 2009, copper was *not* listed as a specific sampling constituent or effluent limitation applicable to Casden's groundwater discharge monitoring. AR, pp. 6.28, 6.31. Casden's expert, Mr. Lofy, testified as such and that he was not aware of any exceedances having occurred during such time. Ex. 3, pp. 130:7-131:13. Nor has any other evidence been provided that Casden discharged copper during such time. The Regional Board therefore cannot speculate as to the copper content and cannot retroactively impose a condition that did not exist. Similarly, the Regional Board implies that discharges of Flow-Zyme may have occurred, despite absolutely no supporting evidence, nor any test results confirming that had such occurred it exceeded any applicable effluent limitations. Ex. 7, Findings, ¶10; Ex. 3, pp. 135:11-137:22.[14] Indeed, the Regional Board's September 24, 2007 inspection report provides no evidence that a discharge of Flow-Zyme occurred at any time and confirms the contrary: "[d]uring the inspection the water level was below the activation point ***and no discharge occurred to the storm drain***." AR, p. 6.172 (emphasis added).

V. PROPOSED PENALTIES ARE EXCESSIVE AND UNCONSTITUTIONAL

A. The Penalties Violate The Excessive Fine Provisions in the U.S. and California Constitutions

The mandatory minimum penalty statute, and the grossly excessive penalties imposed against Casden pursuant to the statute, violate the U.S. and California Constitutions. The Regional Board members made clear their opinion that they had no discretion, felt their hands were tied and that the penalties imposed were clearly excessive. For instance, as echoed by the other Board members, Board member Blois stated:

> Well, it's -- it was clear to me at the hearing -- I was one of the four Hearing Panel members -- and it's clear to me now that what we

[14] Casden's counsel was not so much even provided an opportunity to respond to such allegations made at the close of the hearing before the hearing panel. *Id.*

> have here is a situation where Casden has been trapped by a series of events and circumstances that really were beyond their control. I feel really badly, but I can't change it, and I think that our Board agrees that -- and I guess the Hearing Panel agreed, too, that their testimony was credible. I don't think that they -- what I would consider to fall under the bad actor category. They're good guys, but they were trapped in a situation that they didn't realize, and I think that includes our staff, also. ***Nonetheless, these mandatory minimum penalties are something that we can't change, and you know, I wish -- I think that the punishment here and the magnitude of the fine is way out of proportion with the facts of the case, but unfortunately, I can't change it.*** I wish I could. So at any rate, I feel badly, but there's nothing I can do. Ex. 1, pp. 59:14-60:14 (emphasis added).

Similarly, Chair Diamond expressed:

> I have nothing more to add to this. I feel that the decision was made that had to be made. I feel that the -- all parties here did the very best job that they could. The attorneys for Casden, the Prosecution Team, our advisers, staff were in this strange situation, but the fact of the matter is we have no discretion. As we said it at the Hearing Panel, we came to that decision. ***It's not a decision that we feel comfortable with, but we feel that the statute speaks for itself. It's clear to the extent that we have no discretion***. Ex. 1, pp. 62:19-62:25 (emphasis added).

The mandatory minimum penalties under Section 13385.1(a) are intended to be punitive, rather than remedial in nature.[15] The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "[T]he *Due Process Clause of the Fourteenth Amendment to the Federal Constitution*...makes the *Eighth Amendment's* prohibition against excessive fines and cruel and unusual punishments applicable to the States. [Citation.] The *Due Process Clause* of its own force also prohibits the States from imposing 'grossly excessive' punishments... ." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434 (2001).* The California Constitution contains similar protections. *Article I, section 17*, prohibits "cruel or unusual punishment" and "excessive fines"; *article I, section 7*, prohibits the taking of property "without due process of law." *Lockyer v. R.J. Reynolds Tobacco Company,* 37 Cal. 4th 707, 728 (2005)

[15] As the State Board has previously reported: "The legislative history of *Water Code section 13385.1* indicates that the Legislature enacted the statute primarily to ensure better reporting by dischargers that might otherwise avoid penalties for violations of their *Clean Water Act* permits by failing to submit monitoring reports that could disclose permit violations." *Report of the Statewide Initiative On Mandatory Minimum Penalty Enforcement*, State Water Resources Control Board, May 2009, p. 28.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* The court takes into account four considerations: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." *Lockyer v. R.J. Reynolds Tobacco Company,* 37 Cal. 4th 707, 728 (2005) (quoting *Bajakajian,* 524 U.S. at 337-338). In *Hale v. Morgan*, 22 Cal. 3d 388 (1978), a unanimous court found an escalating and limitless fine imposed against landlords clearly and unmistakably unconstitutional and wholly disproportionate to any legitimate legislative goal.

1. The MMPs Have No Correlation to Culpability

The MMP statute fails to take culpability into account. In the case of Casden, with regard to culpability, as indicated above, the Regional Board found Casden's testimony to be credible and recognized that Casden's conduct was not egregious. As Casden explained, its failure to file the reports on time was due to the lack of understanding and attention on the part of certain staff. However, Casden clearly did not purposely fail to file the reports with the intention of avoiding compliance with discharge limits, skirting penalties for other violations, or saving costs. The Regional Board's claim that it has no discretion as to the penalty under the MMP statute and that the alleged violations in this case are based on strict liability, not on egregiously culpable behavior confirms why the MMPs violate the Constitution by lacking any correlation with culpability.

2. There is No Relation between Harm and the MMPs

The MMP statute providing for penalties that may accrue for an indefinite time without any relation to harm is highly unreasonable and unconstitutional, especially in light of the Regional Board's position that there is also no statute of limitations. To make matters worse, as here, the Regional Board repeatedly fails to comply with its own internal policies for the time in which to enforce violations involving MMPs thereby escalating MMPs to hundreds of thousands of dollars for the mere failure by a discharger to file a quarterly discharge monitoring report.

Enforcement Policy, p. 8.

In this instance and under the MMP statute, there is absolutely no relationship between the amount of penalty and the harm. Here, no harm occurred. It is undisputed that there were no discharges of groundwater at all. Recognizing the lack of harm, the Regional Board resorts to pointing out that there were violations of copper standards during later reporting periods. Yet, as explained above, there is absolutely no evidentiary support for such a claim during the period at issue for the late reports when Casden was not even required to monitor for copper. Moreover, it is hard to put any weight with regard to such harm where the water that was discharged was in minuscule quantities compared with the permissible amounts under the WDR (which Casden contends was not regulated by the WDR as explained above), originated from potable drinking water sources from the City of Beverly Hills, and considering that everyone else in Beverly Hills irrigating with the same water is exempt from storm water permitting and can freely discharge it to the same storm water system.

Nor does the MMP statute taken into account or do anything to prevent harm from occurring. As the State Board has previously reported,"[t]he legislative history of Water Code section 13385.1 indicates that the Legislature enacted the statute primarily to ensure better reporting by dischargers that might otherwise avoid penalties for violations of their Clean Water Act permits by failing to submit monitoring reports that could disclose permit violations." *Report of the Statewide Initiative On Mandatory Minimum Penalty Enforcement*, State Water Resources Control Board, May 2009, p. 28. However, imposing additional penalties for every additional 30 day period that a report is late does nothing to advance the stated purpose and prevent late reports in first place. Any such discharger with nefarious intentions as described by the State Board could simply submit a late report within the first 30 days after its due date and avoid the accumulation of further penalties. Rather, the windfall of the additional penalties has affected inadvertent violators, such as in this case, who fail to recognize their error until such penalties have disproportionally accrue. Further, there is simply no reasonable justification for the MMP penalty scheme indefinitely imposing a $3,000 penalty for every thirty days a quarterly report is late with absolutely no correlation to harm or conduct. Once an entity neglects to prepare a report

and conduct the monitoring, additional penalties for late reports cannot turn the clock back. Violations for exceeding permit limits carry separate additional penalties. Given that there are continuing quarterly reporting requirements with each late report amounting to a separate violation carrying its own penalties, the penalty accrual for every 30 days a report is late adds no value in fostering timely compliance for future quarters.

The Regional Board incorrectly indicates that the penalties are not potentially unlimited and claims that the MMP statute does not have the potential to be unconstitutional. Ex. 2, ¶ 10. This stands at odds with the State Board's previous conclusions, which recognizes that MMPs could continue to be accrued in perpetuity:

> Because penalties under *Water Code section 13385.1* are assessed for each complete 30 days following the deadline for submitting a report, ***penalties may potentially accrue for an indefinite time.*** Dischargers that fail to conduct their required monitoring cannot go back and recreate and submit the data for a prior monitoring period. In such a case, an MMP for a missing report will continue to be assessed and reassessed for each 30 days following the deadline for submission until an ACL complaint for MMPs is issued. *Report of the Statewide Initiative On Mandatory Minimum Penalty Enforcement*, State Water Resources Control Board, May 2009, p. 28. (Emphasis added.)

The Regional Board also indicates that the MMPs stopped accruing for Casden after it submitted its late reports. Yet, its members clearly recognized that as a result of the MMP statute, the amount of "the magnitude of the fine is way out of proportion with the facts of the case." By the time the Regional Board had issued an NOV in November 2007, mandatory minimum penalties had already accrued to $221,000. A.R., pp. 6.161-180. Yet, at such time, the Regional Board did not alert Casden of the magnitude of MMPs that had already accrued and only informed Casden that it may be liable for a penalty of $3,000, not for every 30 days a report remained late. *Id.* It was not until December 2008, that the Regional Board quantified and imposed mandatory minimum penalties on Casden, which by such time had ballooned to $663,000. A.R., pp. 6.181-188.

3. Penalties Imposed for Similar Conduct and Under Similar Statutes Show that the MMPs Imposed Upon Casden Are Clearly Excessive

The Regional Board makes no attempt to show that there are other requirements that carry

similar mandatory minimum penalties. Indeed, other similar requirements carry far less penalties. No other California environmental statutes impose mandatory minimum penalties in such a fashion.

The Regional Board pointed out that in determining whether the statute and penalty are unconstitutional it should also be taken into account "whether a wide range of culpable conduct is subject to a uniform penalty, the range of injuries resulting from conduct subject to a uniform penalty, [and] the relative severity of penalties imposed for similar conduct." Ex. 7, ¶11; *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352-353.[16] Here, it is anything but uniform and could not be more chaotic. As explained above, drawing an extremely fine line, the Regional Board imposed MMPs of $663,000 upon Casden and imposed no penalties at all for the *very same conduct* (i.e., the failure to timely submit discharge reports) in *Glenborough* and *Crescenta Valley*. Making matters worse, there was no uniformity with regard to how the Regional Board allowed the dischargers in *Glenborough* and *Crescenta Valley* to submit a statement or otherwise claim the lack of a discharge, but refused to accept Casden's statement.

In yet another matter, R4-2010-0159-M (*Jamison*), the Regional Board prosecution staff quietly decided to just altogether drop MMPs of *$837,000* for the same alleged violations under the same WDR as Casden. On December 17, 2010, the same day as Casden, the Regional Board issued an ACL to Jamison for $837,000 MMPs involving 13 late reporting violations from Fourth Quarter 2004 to First Quarter 2010.[17] An NOV had been issued to Jamison on June 9, 2008. A hearing was set for March 17, 2011, also the same date as Casden's hearing. Yet, despite the Regional Board's initial refusal to accept Jamison's claims that it had filed the reports on time and Jamison lacking any documentation to prove so, shortly before the hearing, the Regional

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[16] The Regional Board's refusal to apply SB 1284 to the ACL at issue here and instead impose MMPs, in light of relief that was provided to other parties by the Regional Board and State Board even before the statutory amendments came into effect, is unreasonable and constitutes selective enforcement in violation of the U.S. Constitution's 5th and 14th Amendments and violates due process. *See, e.g., Baluyut v. Superior Court*, 12 Cal. 4th 826 (1996), quoting *Snowden v. Hughes*, 321 U.S. 1 (1944) ("the unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination"). The prosecution's selective enforcement has deprived Casden of a fundamental right and due process.

[17] The *Jamison* file is part of the administrative record of this proceeding and Casden can cite it more precisely once the record is officially identified. Ex. 1, p. 44:24.

Board staff simply decided to quietly drop the violations altogether.[18] On the other hand, in Casden's circumstance, the Regional Board did every thing possible to find why it could not accept the statement under SB 1284 and burdened Casden with having to retain two experts and expend numerous hours of employee and counsel time to ultimately demonstrate what Casden set forth in its statement – that no groundwater discharge occurred.

Countless other environmental and health-related statutes in California and elsewhere provide for penalties that effectively address violations without the draconian limitless escalation of mandatory minimum penalties. For instance, penalties in other jurisdictions for the same type of late reports under the NPDES program carry far less onerous penalties and provide for discretion. If this matter were being enforced administratively by the U.S. EPA, the *maximum* fine for each untimely report would be $25,000.[19] *See* Interim Clean Water Act Settlement Penalty Policy, Attachment 1, page 2 (March 1, 1995).[20] After taking circumstances into account, the penalty would fall far below the maximum. Similarly, for violations of air quality regulations in California, administrative civil penalties of $10,000 for each violation, are subject to discretion with a cap of $100,000 per penalty assessment proceeding. Health & Safety Code § 42410. California Health & Safety Code Section 42403 sets forth factors for considering the appropriate penalty for air quality violations.

A simple look at other penalties that have been recently imposed for discharges that indisputably involve circumstances of greater culpability and carry far more potential for harm demonstrates the inequitable results of the MMPs imposed upon Casden:

- On May 24, 2011, after the San Francisco Regional Water Quality Control Board initially asserted a penalty of $633,600, the City of San Bruno, California settled to pay a penalty of $621,100 for violating its NPDES permit by discharging *over 1.9 million gallons spanning 148 sanitary sewer overflows* that occurred between December 2004 and December 2009, which entered surface and ground waters.[21]

[18] See, *supra*, fn. 17.
[19] Casden further asserts that the mandatory minimum penalties are preempted by federal law under the Clean Water Act.
[20] http://cfpub.epa.gov/compliance/resources/policies/civil/cwa/
[21] http://www.waterboards.ca.gov/rwqcb2/board_info/agendas/2011/July/San_Bruno/Settlement_Agreement.pdf

- In *Matter of Eco Resources*, on January 28, 2011, the State Board settled alleged penalties of $26,223,600 for violations of WDRs involving the operations of several wastewater treatment plants for a payment of $500,000 and another credit of $500,000 for certain actions that Eco had voluntarily undertaken.[22] (By comparison, as to Casden, given the MMP statute, the Regional Board refused to settle for anything less than the full amount of MMPs of $675,000.)
- Noka Shipping Company Ltd. agreed to pay a $900,000 penalty after pleading guilty to discharging oily waste into the sea from a cargo vessel off Texas and failing to notify the U.S. Coast Guard of safety hazards aboard the vessel, federal prosecutors announced June 8, 2011 (*United States v. Noka Shipping Co. Ltd.*, S.D. Tex., No. 2:11-cr-00534, 6/7/11).[23]

4. Financial Impact of the Penalties

Like so many other companies in California during this unprecedented recession, Casden would have great difficulty in paying such a steep fine. In this matter, even the hearing panel conceded the financial impact upon Casden would be significant given the size of the penalties. Ex. 7, ¶ 11.

VI. THE STATUTE OF LIMITATIONS PRECLUDES THIS ACTION AND THE EQUITABLE DOCTRINE OF LACHES ESTOPS THE REGIONAL BOARD FROM ISSUING PENALTIES

The applicable statute of limitations and the doctrine of laches bar the Regional Board from enforcing Sections 13385 and 13385.1 against Casden. The Regional Board has known of the alleged violations for over three years and issued an NOV on November 7, 2007. AR, pp. 161-180. California Code of Civil Procedure section 338(i) provides a three-year statute of limitations for:

> An action commenced under the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code). The cause of action in that case shall not be deemed to have accrued until the discovery by the State Water Resources Control Board or a regional water quality control board of the facts

[22] http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/eco_resources/eco_stiporder.pdf
[23] http://op.bna.com/env.nsf/id/fwhe-8hmsps/$File/Noka%20Shipping%20Plea%20Agreement.pdf

constituting grounds for commencing actions under their jurisdiction.[24]

Further, despite the Regional Board's claim that Code of Civil Procedure section 338(i) does not apply, the Regional Board is nonetheless barred from acting under the doctrine of laches. *Fountain Valley Regional Hospital and Medical Center v. Bonta*, 75 Cal. App. 4th 316, 323-325 (1999). In cases in which a party asserts doctrine of laches as a bar to a claim by a public agency, and no statute of limitations directly applies, but there is a statute of limitations governing an analogous action at law (e.g., Code of Civ. Proc. section 338(i)), the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches. *Ibid.* Whether or not such a borrowing should occur depends upon the strength of the analogy. *Ibid.* Here, the strength of the analogy is spot-on. Thus, a three-year period is the appropriate measuring stick for the laches defense.

Further, the Regional Board has unreasonably delayed its prosecution to the great prejudice of Casden. *Bonta*, 75 Cal. App. 4th at 324. The first alleged late report was due on February 15, 2006, nearly five years before the ACL was filed. The Regional Board did not issued a notice of violation until November 7 2007, and did not file the ACL until December 17 2010. Not only is prejudice *presumed* if the analogous statute of limitations is exceeded, but given the passage of time, Casden's ability to defend itself was greatly impaired, as witnesses and other evidence become far more difficult to locate, including the long departed employee responsible for the late discharge reports. Of the twelve allegedly late monitoring reports, all but three have due dates of more than three years ago. The Regional Board has not rebutted the presumption of prejudice here. The unreasonable accumulation of penalties greatly prejudices Casden. The Regional Board's unreasonable delay is demonstrated by the fact that its own seven-

[24] *See Wilshire Westwood Assoc. v. Atl. Richfield Co*, 20 Cal. App. 4th 732, 740 (1993) ("A plaintiff is charged with 'presumptive' knowledge so as to commence the running of the statute once he or she has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation." [Citations omitted.]) *See also, Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board*, 39 Cal. 3d 57, 62 (1985) ("The purpose of any limitations statute is to require diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs . . . ."); *Douglas v. Douglas* (1951) 103 Cal. App. 2d 29, 34 35 (The policy of the law is to prevent stale claims from springing up after the lapse of long periods of time and pursuant to this policy, statutes of limitations are enacted on the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time. [citations omitted])

month recommendation for enforcement in the then-existing Enforcement Policy and even the eighteen-month recommendation in the current Enforcement Policy were exceeded.

VII. THE ALLEGED COPPER VIOLATIONS MUST BE DISMISSED

In light of the discharge not being regulated under the WDRs, the alleged effluent limit violations in the first and second quarters of 2010, based upon reported copper concentrations of 44.6 and 32.5 μg/L of copper, is also misplaced.[25] As explained above, the non-groundwater discharges are not regulated under the Groundwater Permit. The irrigation water discharges are regulated and are exempt under the LA County MS4 Permit and City of Beverly Hills storm water ordinance. The alleged violations should therefore be dismissed.

Even if a penalty were appropriate, the proposed penalty is inappropriately duplicative. The Regional Board has not, but must, responded to Casden's argument that the proposed penalties are inappropriately duplicative and makes no findings as such in violation of *Topanga*. AR, p. 6.230. The ACL charges Casden with two separate violations of copper limits, dailey and monthly, arising out of a single discharge involving an exceedance of one pollutant. The Regional Board can only charge one violation in these circumstances. *See, e.g., Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140-1142 (11th Cir. 1990) ("we find that because discharge of a single pollutant may be the cause of both daily and monthly violations, fining the violator twice may result in imposing two fines for the same illegal act. We decline to interpret the statute to create this result.").

VIII. VIOLATIONS OF DUE PROCESS AND STATUTORY RIGHTS

From the issuance of the ACL through to the June 2, 2011 Regional Board hearing, this proceeding has been replete with violations of due process and statutory and regulatory procedure to the great prejudiced of Casden.[26] Practically every Casden objection was greeted with the

[25] The source of the water is from the Beverly Hills potable water supply and the water is within relevant drinking water standards for copper, including EPA's Maximum Contaminant Level of 1300 μg/L and California's Public Health Goal of 300 μg/L. http://www.oehha.ca.gov/water/phg/allphgs.html. A recent test of the irrigation water taken from the building found copper levels consistent with levels previously obtained in sampling. Copper levels in four sample locations of the irrigation water taken on February 9, 2011 ranged from 47 to 167 μg/L. AR, pp. 6.343-350. Copper levels sampled at the discharge sampling point have been detected up to 60.6 μg/L. AR, p. 6.224.

[26] Exhibit 8 provides a partial chronology of facts involving these procedural violations.

Chair's overruling it, and in certain cases, the ruling came even before the Regional Board members even had possession of the information necessary to fairly resolve the objection.[27] Casden incorporates by reference its objections lodged in this matter before the hearing board and the Regional Board. Of these numerous violations, three are highlighted below.

A. The Prosecution's Argument That Non-Groundwater Discharges were Reportable under the Groundwater Permit.

The Prosecution had upwards of six weeks to submit its evidence regarding reportability, but chose to withhold it until the hearing. On January 28, 2011, Casden filed its statement with the Regional Board under Section 13385.1(a)(2)(A). On February 16, 2011, Casden filed its detailed brief and evidence with the Prosecution. The Prosecution's deadline for submitting its rebuttal to Casden's defenses, including concerning the issue of reportability, was ten days before the hearing, March 7, 2011, which is the date that the final binder was required to be submitted to the hearing panel under the Hearing Notice and Procedures. AR, p. 6.13. Yet, the Prosecution did not serve its 19-page rebuttal brief until March 11, 2011, and only after Casden objected to the Prosecution's request to serve its rebuttal brief virtually on the eve of the hearing.[28] Moreover, over Casden's objections, the Prosecution refused to disclose its presentation prior to the hearing. Incomprehensibly, the Prosecution *did not once address the reportability issue* in its rebuttal brief or at any other time prior to the hearing, apparently planning instead to introduce evidence by surprise at the hearing. This violated Casden's right to due process as well as:

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[27] For instance, the Chair dismissed Casden's request to have part of the record its email response to eleventh-hour modifications to the Findings of Fact and Conclusions of Law made by the Hearing Panel Advisor, on the basis that it was untimely. Ex. 1, p. 16:4-7. *None of the Regional Board members had even seen Casden's email response at that point, including the date stamps on the communication that would have been relevant to its timeliness.*

[28] Despite the failure of the Prosecution to meet the March 7, 2011 deadline, the Hearing Panel Chair declined to enforce the deadline, stating in a March 15, 2011 ruling, as to Casden's objections, that the requirement to meet the March 7, 2011 deadline was "based only on the Hearing Notice; there is no independent legal requirement to pre-submit a presentation."

1. Regulations governing the proceeding provide that "[i]t is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits." Title 23, Cal. Code Regs. § 648.4.

2. The hearing notice.

3. The Bagley-Keene Open Meetings Act requires meeting materials to be made public ten days before the meeting. Gov't Code § 11125.1.

4. The Los Angeles Regional Water Quality Control Board Executive Order, Standard ACL Complaint Hearing Notice and Process, March 5, 2008. Attachment "Two" to the Executive Order provides that ten days before the hearing, the rebuttal should be included in the final binder.[29]

The Prosecution's introduction of evidence as to reportability and its presentation was also in contravention of a March 15, 2011 ruling by the Hearing Panel Chair with regard to objections by Casden that provided "***as long as the Prosecution Team's hearing presentation does not exceed the scope of its direct evidence*** [what was submitted on March 7, 2011 by the Prosecution], ***the allegation in the Complaint and matters properly considered rebuttal, the failure to submit a PowerPoint does not appear to have prejudiced Casden.***" Yet, the Prosecution's reportability argument at the March 17, 2011 hearing exceeded the scope of what it presented in its direct evidence on March 7, 2011 and in its rebuttal brief, where it did not provide *any* evidence or argument on reportability. Though the March 15, 2011 ruling set forth that "Casden may object at the hearing to any 'surprise' testimony or any testimony that it believes exceeds the scope of the Prosecution Team's direct evidence or rebuttal" and that "[i]f Casden demonstrates any prejudice, the board will fashion an appropriate remedy to ensure Casden

[29] "DAY 80. The final Hearing Panel binder is served on the parties and sent to the Hearing Panel. This is to comply with the Bagley-Keene Open Meetings Act which requires that an agenda and meetings materials be made public ten days prior to the meeting. This allows the Prosecution Team to incorporate public comments, the Discharger's evidence, ***and the Prosecution Team's rebuttal evidence into this final binder.*** [. . .]" *See* Los Angeles Regional Water Quality Control Board, Executive Order, Standard ACL Hearing Notice and Complaint Process, March 5, 2008, available at http://www.waterboards.ca.gov/losangeles/water_issues/programs/enforcement/document_standards/Hearing%20Template%20Explanation.pdf.

receives a fair hearing," Casden's prompt objections on this very ground were nevertheless overruled. Ex. 3, pp. 26:13 to 27:8.

Moreover, Casden's requests for additional time to address the new evidence were repeatedly denied. Despite Casden having raised these issues in its written comments of May 19, 2011, the Regional Board's failed to grant a rehearing on the topic. Casden's request for a mere hour to address the Regional Board at the June 2, 2011, hearing was denied. Casden was granted only 10 minutes.

B. <u>The Illegal Manner In Which The Hearing Panel Report Was Prepared and Issued</u>

The initial Hearing Panel Report ("HPR") and subsequent changes made to it before the Regional Board hearing was prepared and issued without the hearing panel members' input and review. This greatly prejudiced Casden.

For instance, at the hearing, the hearing panel announced its decision that SB 1284 applied to Casden's violations, except that it concluded that the non-groundwater discharges were nonetheless reportable under the permit so therefore relief did not apply:

> First of all, the Board finds that Casden's testimony and their witnesses about the nature of the water they were discharging, the wastewater they were discharging, is credible. The Board found that they agreed with the testimony that the water appeared to be from the landscape irrigation system and not groundwater.
>
> ***They also found that SB 1284 applies to these violations; however, the discharges were reportable discharges under the permit and, therefore, the relief offered by SB 1284 does not apply*** and so the Board is going to accept the Prosecution Team's recommended penalty and assess the MMPs. (emphasis added). Ex. 3, p. 138: 9-20.

Inexplicably, the HPR changed the panel's conclusions of law and stated that SB 1284 could not apply to Casden's violations since Casden could not have filed a statement within 30 days of notice. Ex. 7, ¶¶ 6, 7 and 8. Further highlighting the change in the decision, in stark

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contrast to the Hearing Panel's announced decision where the reportability[30] of the discharges was sole reason that it found SB 1284 did not apply to Casden, the Hearing Panel Report's conclusions of law barely mention it: "In addition, the Permittee had reportable discharges during the relevant monitoring periods." Ex. 7, ¶8. At the June 2 Regional Board hearing, the Hearing Advisor characterized the changes and additions to the Hearing Panel Report as merely supplemental information, because the decision announced on March 17, 2011 was not complete. Ex. 1, p. 11: 9-15. The Hearing Panel Advisor also incorrectly stated that the "statute [Water Code §13228.14] does not say anything about who is to prepare the report or any other procedures for preparation of the report" Ex. 1, p. 9:10 to 9:24. While the Hearing Panel Members later claimed at the June 2 Regional Board hearing, after deliberating behind closed doors, that their decision had not changed, not one of them at the hearing before the Hearing Panel attempted to correct or clarify the announced the decision at the time. Such changes from the transcript and the HPR speak for themselves as to what occurred.

The HPR issued without the prior express consent of all hearing panel members violates Water Code Section 13228.14(a), which requires that a panel of at least three of the regional board conduct the hearing and that "[a]fter the hearing, *the panel* shall report its proposed decision and order to the regional board . . ." In this instance, the HPR, apparently drafted by the panel's advisor, was prepared and issued without the full hearing panel having subsequently met or having had any calls on the matter.[31] Ex. 9. Nowhere under the law is there authorization for the hearing panel advisor to prepare and issue the report with the approval of one hearing panel member or based upon a the panel's delegation of authority. Delegation and voting by proxy is

[30] The term "reportability" herein refers whether discharges were reportable under the applicable waste discharge requirements as provided in Water Code Section 13385.1(a)(2)(A)(i).

[31] Moreover, Bagley-Keene Open Meeting Act requires that the Hearing Panel provide notice prior to the hearing panel meeting again, including in closed session, to address the hearing panel report. This applies whether the panel meets in person, telephonically or a series of individual telephone calls or email communications. *Stockton Newspapers, Inv. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105. See also, 65 Ops.Cal.Atty.Gen. 63, 66 (1982); 63 Ops.Cal.Atty.Gen. 820, 828-829 (1980); Tit. 23, Cal. Code Regs., § 647.2.

prohibited. 62 Ops.Cal.Atty.Gen. 479, 482-490;68 Ops.Cal.Atty.Gen. 65, 70. Further, it is a violation of Government Code Section 11430.30 for an advisor to "furnish, augment, diminish, or modify the evidence in the record."

C. The Time and Manner Afforded to Casden to Present Its Case Before the Hearing Panel and Regional Board Was Prejudicial

Each of Casden's requests for reasonable time was declined. These requests were made prior to the March 17 hearing panel, during the allotted time at the hearing panel with good cause, and prior to the June 2 Regional Board hearing. Given the complexity of the novel legal issue before it and the amount of the penalty in controversy, the time afforded Casden violated its right of due process. Other factors, such as the obvious rush to conclude the panel's hearings on March 17 before the building closed, the new matters raised by the Prosecution (e.g., reportability), and the admitted confusion with the changes from the announced hearing panel decision and the HPR, further prejudiced Casden without being afforded more time.

In opening the Regional Board hearing on June 2, 2011, the Hearing Panel Advisor gave what amounts to a caricature of Casden's arguments, painting any contrary argument as insignificant or repackaged. June Transcript, pp. 10-12. Despite fully briefed arguments to the contrary, not one question was raised to the Hearing Panel Advisor about these discrepancies. The Hearing Panel Advisor discouraged any inquiry into a subject of dispute, making it seem like it was improper despite the Regional Board's role of independent review (June Transcript, 10: 11-17, emphasis added):

> The Board members make an independent review of the record, but they don't conduct a new hearing. They don't have to take additional evidence. *In fact, they don't necessarily have to accept additional public comment. Having a new hearing before the full Board defeats the purpose of having the Hearing Panel in the first place.*

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This statement is unfounded, and contrary to Water Code Section 13228.14's admonition that a party at a hearing panel is not precluded from appearing before the full Regional Board.

IX. REGIONAL BOARD HEARING WAS UNTIMELY

Prior to and at the June 2, 2011 hearing, Casden objected to the Regional Board hearing as untimely under Water Code Section 13323(b). The Chair overruled the objection. Ex. 1, p. 16:4-7.

Water Code Section 13323(b) requires a hearing before the Regional Board within 90 days of service of the ACL. The initial Regional Board hearing was set for May 5, 2011, over 130 days after the ACL was issued.[32] The Regional Board overruled the objection on the basis that the hearing panel conducted its hearing on March 17, 2011, within 90 days of the ACL issuance. However, the Water Code is clear that the Regional Board must hear the ACL within 90 days, not a hearing panel of the Regional Board.

Water Code Section 13323(b) provides:

> The complaint shall be served by certified mail or in accordance with Article 3 (commencing with Section 415.10) of, and Article 4 (commencing with Section 416.10) of, Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure, and shall inform the party so served that ***a hearing before the regional board*** shall be conducted within 90 days after the party has been served. The person who has been issued a complaint may waive the right to a hearing. (Emphasis added.)

Amendments made to Water Code Section 13323 in 2002 clearly demonstrate that the hearing must occur before the Regional Board within 90 days, not a hearing panel. *2002 Cal ALS 420; 2002 Cal AB 1393; 2002 Cal Stats. ch. 420.* Prior to being amended, Water Code Section 13323 required a hearing within 60 days of issuance of the ACL and that "[t]he hearing shall be before a panel of the regional board, consisting of three or more members of the regional board as it may specify, or before the regional board." The statute was amended to extend the time from 60 to 90 days for the hearing to occur, but required that the hearing to have occurred before the regional board, eliminating the provision for the hearing to occur before a panel of the regional board

[32] The Regional Board hearing was continued until June 2, 2011 at the request of Casden.

within 90 days. *Id.* Unlike Section 13323(b), Section 13323(c) concerning ACLs issues by the State Board, requires that the hearing must take place within 90 days before either the State Board or before a designated member under Section 183. Section 13323(b) has no reference to Section 13228.14 concerning regional board hearing panels.

X. CONCLUSION

For the reasons set forth above, Casden respectfully requests that the State Board dismiss the ACL in its entirety as having been heard too late before the Regional Board. Should the State Board not dismiss the ACL in its entirety, Casden requests that the State Board find the Regional Board's Order inappropriate and improper, void the penalties imposed upon Casden, find that Casden should be afforded relief from MMPs under Water Code Section 13385.1(a)(2),and either direct the Regional Board to reconsider the penalties in light of the application of Water Code section 13385.1(a)(2) or take appropriate action itself.

Dated: July 5, 2011

MANATT, PHELPS & PHILLIPS, LLP
Peter R. Duchesneau
Dana P. Palmer

By: _____
Peter Duchesneau
Attorneys for Respondent
CASDEN PROPERTIES, LLC

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EXHIBIT 1

1 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
2 LOS ANGELES REGION
3 FRANCINE DIAMOND, CHAIRPERSON
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5
6 In the Matter of:)
7 THE REGIONAL BOARD)
PUBLIC MEETING/HEARING)
8 ITEM NO. 11)
9)
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13
14
15 PARTIAL TRANSCRIPT OF PROCEEDINGS
16 Los Angeles, California
17 Thursday, June 2, 2011
18
19
20
21
22 Reported by:
23 MELISSA TRESSEN
CSR No. 13367
24
Job No.:
25 B7106WQLA(P)

1 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
2 LOS ANGELES REGION
3 FRANCINE DIAMOND, CHAIRPERSON
4
5
6 In the Matter of:)
7 THE REGIONAL BOARD)
PUBLIC MEETING/HEARING)
8 ITEM NO. 11)
9
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15 PARTIAL TRANSCRIPT OF PROCEEDINGS, taken at
16 700 North Alameda Street, Board Room, Los Angeles,
17 California, commencing on Thursday, June 2, 2011,
18 heard before the LOS ANGELES REGIONAL WATER QUALITY
19 CONTROL BOARD PANEL, reported by MELISSA TRESSEN,
20 CSR No. 13451, a Certified Shorthand Reporter
21 in and for the State of California.
22
23
24
25

1 APPEARANCES:
2 Francine Diamond, Chair
3 Mary Ann Lutz, Vice Chair
4 Madelyn Glickfeld, Board Member
5 Steve Blois, Board Member
6 Maria Mehranian, Board Member
7 Charles Stringer, Board Member
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1 I N D E X

2 ITEM NO.: PAGE

3 11 - Consideration of Complaint No. R4-2008-0199-M to assess Mandatory 35
4 Minimum Penalties in amount of $675,000 pursuant to California
5 Water Code 13385, subdivision (h), and 13385.1 against Casden
6 Properties, LLC for violations of its waste discharge requirements
7 contained in Order Nos. R4-2003-0111 and R4-2008-0032
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Mr. Duchesneau 17
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11 58

12 Ms. Macedo 28
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13 48

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1 Los Angeles, California, Thursday, June 2, 2011
2 (Partial Transcript)
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4
5 MS. DIAMOND: Now we move on to the first scheduled
6 hearing, which is the panel hearing recommendation on
7 Item number 11.
8 Ms. Fordyce, just do an Item number 11.
9 MS. FORDYCE: Okay. Item 11 is -- I'm going to
10 step down because I'm technically on the Prosecution
11 Team.
12 MS. DIAMOND: So we'll let our staff begin.
13 Okay. So for Item number 11, which is
14 Casden Properties, I will make this statement: I will
15 now call agenda Item 11, which is the item to review a
16 recommendation of a Hearing Panel related to complaint
17 number R4-2009-0199-M (sic) to assess mandatory minimum
18 penalties in the amount of $675,000 against the
19 Discharger, Casden Properties, L.L.C. for late submittal
20 of monitoring reports required by the monitoring and
21 reporting program contained in order number R4-2003-0111
22 and R4-2008-0032 and for four violations of copper
23 limitations in order R42008-0032.
24 A hearing was held before a panel of the
25 Los Angeles Water Board on March 17th, 2011.

1 Would all those intending to speak on this
2 matter please rise and raise your right hands.
3 (Swearing in)
4 MS. DIAMOND: Thank you. As the Hearing Panel
5 Chair for this item, I will present this item to the
6 Board. A Hearing Panel consisting of Los Angeles Water
7 Board members Maria Mehranian, Charles Stringer,
8 Steve Blois, and myself held a hearing on the
9 administrative civil liability complaint on
10 March 17th, 2011.
11 The Prosecution Team's complaint recommended
12 that the Board assess mandatory minimum penalties
13 against Casden Properties, L.L.C. in the amount of
14 $675,000 for violations of monitoring and reporting
15 requirements and the copper limitations. The panel
16 heard presentations from the Prosecution Team and
17 Casden Properties, L.L.C.
18 The panel recommends that the Los Angeles
19 Water Board issue the minimum penalty as recommended by
20 the Prosecution Team. The Hearing Panel's report and
21 proposed order is contained in Tab 11-4 starting on
22 page 11-153 of your agenda binder.
23 In addition, Casden Properties, L.L.C.
24 submitted a written brief on May 19th, 2011, in response
25 to the Hearing Panel Report. The Prosecution Team

1 responded by e-mail on May 23rd, 2011. Both documents
2 have been included in the record for this matter.
3 Briefly, the panel determined that the
4 Discharger was subject to mandatory minimum penalties of
5 $675,000 because the Discharger recorded two violations
6 of the daily maximum effluent limitation for copper and
7 two violations of the monthly average effluent
8 limitation for copper. In addition, the Discharger
9 filed late reports for the fourth quarter 2005 through
10 the third quarter 2008. This results in 221 late
11 reporting violations.
12 The panel also found that the Discharger does
13 not qualify for a reduced penalty under Water Code
14 Section 13385.1(a)(2) because the Discharger had
15 discharges that were reportable under its waste
16 discharge requirements.
17 In addition, that section only provides relief
18 from mandatory minimum penalties if the Discharger files
19 a statement that there were no reportable discharges.
20 The statement must be filed within 30 days after
21 receiving notice of the delinquent reports and does not
22 provide an exemption for notices that were provided
23 before the statute was enacted. Therefore, the panel
24 recommends that the Board assess mandatory minimum
25 penalties of $675,000.

1 The Discharger contends that the panel hearing
2 changed its recommendation after the March 17th hearing.
3 That is not correct. It is the practice of the
4 Los Angeles Water Board that the Hearing Panel announces
5 its recommendation at the hearing. The announcement is
6 for the parties' information only and is not intended to
7 be a complete statement of the issues in the case.
8 The panel concluded that section
9 13385.1(a)(2), also known as Senate Bill 1284, did not
10 apply to the Discharger for both of the reasons cited
11 above, and this was correctly reflected in the Hearing
12 Panel Report.
13 A proposed Board order has been drafted and
14 included in the record now before the Los Angeles Water
15 Board. Our counsel, Lori Okun, has recommended some
16 changes to the proposed order in response to the
17 Discharger's May 19th response brief.
18 Ms. Okun will now explain those changes and
19 address some other issues raised in the Discharger's
20 response.
21 MS. OKUN: Thank you. What I'd like to briefly do
22 is address the procedural objections that the Discharger
23 raised in the May 19th brief. The Discharger also
24 included some legal and factual argument that,
25 essentially, restated or expanded upon argument that had

1 previously submitted in this case. So I'm not planning
2 to address those, but I'd be happy to answer any
3 questions from the Board member, if you have any.
4 In terms of the procedure, I'll first go over,
5 briefly, the Hearing Panel procedures under the Water
6 Code. The Hearing Panel statute requires that the
7 Hearing Panel Report its proposed decision and order to
8 the full Board and provide copies to any party who
9 requests a copy at the hearing.
10 The statute doesn't say anything about who is
11 to prepare the report or any other procedures for
12 preparation of the report. In this case, the report was
13 prepared. It was reviewed and signed by Chair Diamond,
14 and I did provide copies to all the parties over a month
15 ago because this matter was originally scheduled for
16 hearing at the May 5th Board meeting.
17 There's no requirement that the panel announce
18 all of its findings on all of the issues in the matter
19 at the panel hearing. If the panel wants to meet after
20 the conclusion of the panel hearing to discuss the
21 contents of the hearing -- panel hearing report, the
22 panel could do so, but it would have to do that at a
23 noticed meeting, and there were no such discussions in
24 this case. There were no subsequent meetings.
25 I did speak to three of the four Board members

1 this morning. I didn't have a chance to speak to
2 Ms. Mehranian, but the other panel members confirmed
3 that they did not meet. They did not have e-mailed or
4 phone called communications among themselves without a
5 Hearing Panel Report, and since three of them didn't
6 have conversations, there would be nobody left for
7 Ms. Mehranian to communicate with.
8 So that's the process for putting together the
9 Hearing Panel Report. The next step is that the full
10 Board has to issue an order. The panel's report is only
11 a recommendation. The Board members make an independent
12 review of the record, but they don't conduct a new
13 hearing. They don't have to take additional evidence.
14 In fact, they don't necessarily have to accept
15 additional public comment. Having a new hearing before
16 the full Board defeats the purpose of having the Hearing
17 Panel in the first place.
18 After whatever public comment the full Board
19 wants to take, the Board can accept, reject, or modify
20 the Hearing Panel modification. The Hearing Panel
21 members also participate in the decision of the full
22 Board and they're not bound by the Hearing Panel Report.
23 If additional comments are submitted that leave the
24 Board to conclude that some changes should be made to
25 the findings, that doesn't require a change to the

1 Hearing Panel Report.
2 It is what it is. It's already submitted, but
3 if necessary, the full Board, including the Hearing
4 Panel members can make any necessary changes to the
5 Board's order to reflect the record and the Board's
6 findings. And as in the case with any other order the
7 Board issues, the full Board order on the matter has to
8 include findings.
9 The Discharger contends that the Hearing Panel
10 changed the decision that it made at the Hearing Panel
11 and that this was somehow improper or illegal. As I
12 said, there is no requirement for the Board to make a
13 complete announcement -- the Hearing Panel to announce
14 all the issues in the case, and it didn't do so in this
15 case.
16 There is some confusion about the statement
17 that I actually made on behalf of the Hearing Panel
18 after deliberations about the meaning of the word
19 "applied." I announced that the changes made in
20 S.B. 1284 apply to the Discharger consistent with the
21 Hearing Panel's findings.
22 What I meant was that the complaint was issued
23 within the period of time that is covered by the retro
24 activity provisions in Senate Bill 1284. That didn't
25 mean that the Discharger doesn't also have to meet all

1 applicable requirements in order to take advantage of
2 the relief, and that is clearly expressed in the
3 Hearing Panel Report.
4 There were some arguments in the May 19th
5 brief about new evidence of legislative history and a
6 contention that some improper ex parte communications
7 were involved with that legislative history. First of
8 all, the issue is moot now because in light of the
9 Discharger's submission in response to the Hearing Panel
10 Report, I have advised the Board that it's not necessary
11 to include that legislative history. So we can take
12 that out of the findings in the proposed order.
13 And when I say I've advised the Board, the
14 format in which I did that was to submit to the Board
15 members a copy of revised findings. I also sent a copy
16 of those revised findings to the parties. In addition,
17 the ex parte restrictions don't apply because the
18 legislative history was transmitted in the form of a
19 Hearing Panel Report that was available to all of the
20 parties. It wasn't something that I submitted to the
21 panel directly in closed session or elsewhere.
22 There's an argument in the May 19th brief that
23 the Discharger made at the hearing that they were
24 treated differently that other similar dischargers.
25 That's not new. What was added was a reference to the

1 Crescenta Valley Water District matter that was also
2 heard at the March 17th panel hearing.
3 That Discharger is similar to the Glenborough
4 Discharger that the Prosecution Team addressed at the
5 March 17th meeting. So there's, essentially, nothing
6 new there. They're just referencing another Discharger
7 that's similar to Glenborough that's addressed in the
8 transcript, and it was addressed by the Prosecution
9 Team.
10 Finally, on the issue of whether Casden's
11 discharges were reportable, it made a number of
12 procedural objections before the hearing. These were
13 already before the March 17th hearing. These were
14 addressed in written rulings that the Chair and I
15 prepared, and there's nothing new on that in the
16 March 19th brief, except they raised some arguments
17 about the rebuttal.
18 And I just did want to point out on that
19 issue, they pointed to the fact that staff could provide
20 testimony on the issue of reportability. It was clear
21 that that issue was raised before the hearing, and it's
22 reflected in some e-mails in the procedural rulings.
23 The Discharger did have the opportunity to cross-examine
24 staff on that issue to provide closing arguments, and
25 the permits are all in the record, and that was the

1 basis for the reportability discussion.
2 With respect to the M.S.4 permit, there is
3 additional discussion of that in the brief. That was
4 also raised previously, but the Discharger is arguing
5 more clearly now is that this Board has no ability to
6 enforce any violations under the dewatering permit
7 against the Discharger and that enforcement action can
8 only be taken under the M.S.4 permit.
9 I don't think that I need to address that any
10 further, but I can answer questions on that. Similarly,
11 they've argued that the violations for copper would only
12 be enforceable under the M.S.4 permit. The Prosecution
13 Team did submit an e-mailed response to that brief, and
14 the Board has been provided with both the brief and the
15 Prosecution Team's response.
16 In response to the Discharger's comments in
17 the brief, I've proposed some changes to the Board's
18 order, to the findings in the Board's order. All of
19 those changes were in response to the Discharger's
20 comments in the brief with one exception. There was a
21 site to the California constitution that was missing. I
22 should have advised including that earlier. So I added
23 that as well.
24 But the changes that are being proposed aren't
25 changes to the Hearing Panel Report. These are changes

1 to the Board's own order and the findings in the Board's
2 order. The Board has to adopt findings, and basically,
3 it adopts findings of the Hearing Panel by reference,
4 but in this case because of the Discharger's comments,
5 before the Board adopts those findings, it needs to
6 correct them, basically.
7 I think that was clear from what was provided.
8 I can provide further clarification in the order. I
9 tried to stay as close as possible to the format that
10 the Board uses for its Hearing Panel Reports and orders,
11 but apparently, there is some confusion about whether
12 Hearing Panel Reports being changed reports' borders
13 being changed, and when we get to deliberations, I can
14 suggest some very minor changes to make that more clear.
15 As I said, I drafted those changes and
16 provided them to the parties. That's not required. I
17 did it as courtesy to the parties. Despite the fact
18 that the changes were in response to the Discharger's
19 comment, the Discharger did send an e-mail yesterday
20 objecting to the revisions.
21 The e-mail was received very late. The Board
22 hasn't been provided a copy of it. I didn't have an
23 opportunity to read it until last night. I don't know
24 whether the Prosecution Team has had an opportunity to
25 review it. So I'm recommending that that e-mail not be

1 included in the record.
2 So I'll need a ruling from the Chair on that
3 issue.
4 MS. DIAMOND: We don't accept things the day of the
5 hearing because we don't have an opportunity to review
6 them. So as our required practice, we will not be able
7 to accept it.
8 MS. OKUN: Two things on that, the Discharger does
9 have the opportunity to state any objections it would
10 like to the process when it makes its presentation before
11 you today. So rejecting that e-mail doesn't affect that.
12 In addition, there was a Public Records Act
13 Request contained in the e-mail, and although the e-mail
14 will not be in the record, we do have to respond to the
15 Public Records Act Request, and I will do that next
16 week.
17 That's all I wanted to say. I can answer any
18 questions, and if not, we can move on.
19 MS. DIAMOND: I think right now, then, if we have
20 no questions, then would we begin with the Discharger or
21 the Prosecution Team?
22 MS. OKUN: With the Discharger.
23 MS. DIAMOND: With the Discharger. Okay. I hope I
24 can remember how to pronounce your name. I'm so sorry.
25 Peter Duchesneau.

1 MR. DUCHESNEAU: Madam Chair and members of the
2 Board, thank you for entertaining me. Again, I'm Pete
3 Duchesneau appearing on behalf of Casden for this
4 matter. For the record, I've requested an hour. I've
5 been granted 10 minutes. So again, I will be speaking
6 very quickly and won't have time to go through my entire
7 presentation, but I do need to address a few things up
8 front.
9 First of all, with respect to my e-mail that
10 was sent yesterday morning with objections, the reason
11 why it was sent yesterday morning was because after
12 hours the day before, on Tuesday evening, is when I
13 received the proposed changes to the Hearing Panel
14 decision, somehow after the fact that it was issued as
15 well as the order.
16 So I promptly submitted those objections the
17 very next morning, and that's the reason for the timing.
18 So I renew the request that those objections be
19 entertained.
20 The other objection I would like to raise
21 today, which was among the e-mail objections, is with
22 regard to that this hearing is untimely, and this is
23 something I need to raise and get a ruling on from the
24 Board, that under section 13323 of the water code, a
25 hearing before the Regional Board on an A.C.L. must be

1 heard within 90 days of the A.C.L.'s issuance.
2 Now this hearing was originally set before the
3 Regional Board on May 5th, albeit it was moved to today
4 to accommodate my schedule, but the original hearing
5 date of May 25th was well past the 90 day timeframe. So
6 I do ask that the Regional Board make a ruling on this
7 objection and that based upon that objection that this
8 case be dismissed.
9 MS. OKUN: The hearing on the A.C.L. was held on
10 March 17th. The statute is clear that the panel hearing
11 is of the Board. As I said earlier, there's no need to
12 hold a pre-hearing before the full Board. So that was
13 within the 90 days.
14 MR. DUCHESNEAU: And if I could just respond to
15 that, the statute is absolutely clear that the Hearing
16 Panel is not a decision of the Board, and it's not the
17 Board. It's a panel that is conducting a hearing that's
18 only a recommendation in the end, and that the actual
19 Board is sitting here for the first time to hear this
20 matter, and again, that Board can change the decision
21 anyway it sees fit as well.
22 MS. DIAMOND: Do you have anything in response?
23 MS. OKUN: The hearing was held on March 17th.
24 That's what the statute requires. If the Board wants to
25 make additional changes, it can do so, but the panel was

1 actually holding the hearing.
2 MS. DIAMOND: Okay. So I would suggest you move
3 on.
4 MR. DUCHESNEAU: Okay. So just for the -- I need
5 this for the record, Madam Chair.
6 MS. DIAMOND: It was within the statute -- it was
7 within the time period required by law.
8 MR. DUCHESNEAU: And the Board's denying the
9 objection?
10 MS. DIAMOND: Yes.
11 MR. DUCHESNEAU: Okay. Thank you. All right. I'm
12 not going to belabor some of the points because my time
13 is limited here, but I'm going to address three points
14 for, and that again, is with regard to these 12 late
15 reports that were -- that are at issue for Casden's
16 office building where it had a groundwater discharge
17 permit.
18 Casden did look to prevail on the relief that
19 was supported by 1284, S.B. 1284, and that submitted a
20 statement on January 28th, and this is what the Board,
21 the panel of the Board found on March 17th, and that's
22 up in front of you.
23 This is a quote from the transcript at page 138,
24 lines 9 to 20: "First of all, the Board finds that
25 Casden's testimony and their witnesses about the nature

1 of the water they were discharging, the wastewater they
2 were discharging, is credible. The Board found that they
3 agreed with the testimony that the water appeared to be
4 from the landscape irrigation system and not groundwater."
5 And the Hearing Panel decision is consistent with that
6 finding.
7 But the decision went on, and that was, quote,
8 "They also found that S.B. 1284 applies to these
9 violations." S.B. 1284 applies to these violations;
10 however, the discharges were reportable discharges under
11 the permit and therefore relieved. Offered by S.B. 1284
12 does not apply.
13 So at a minimum, you can at least have some
14 empathy for me why I believe that the Hearing Panel
15 decision was changed, and I don't have time to argue
16 about the procedure and how that might have been
17 improper. I'm going to spend my time arguing about the
18 substance again, and I've already briefed how the
19 procedure was improper.
20 But one thing to note, again, is that the
21 Hearing Panel is statutorily authorized. It is the
22 panel itself, the entire panel, that needs to issue that
23 report, and the Hearing Panel can only make the changes
24 to the decision that was issued, and as it's been
25 indicated that the panel did not meet subsequently in

1 any way, shape, or form. So I am still confused about
2 that.
3 So let's look at S.B. 1284, and again,
4 provisions 13385.1(a)(2) provided some relief from these
5 mandatory minimum penalties getting out of hand for late
6 reports, and it indicated that within 30 days of a
7 notice from the Board, they need to file a discharge
8 monitoring report. A statement could be filed
9 indicating that no discharges to waters in the United
10 States reportable under the W.D.R. occurred, and then
11 explain the reasons why.
12 Casden did that on January 28th within the 30
13 days of the enactment of this statute. Here's the real
14 issue: 13385.1(e) provides the amendments made to this
15 section, to 1284, shall apply to violations for which an
16 A.C.L. or judicial complaint had not been filed before
17 July 1st, 2010, without regard to the date on which the
18 violations occurred.
19 So the legislation has expressed very clearly
20 its intent how this relief should be aborted
21 retroactively, and there's only one interpretation. If
22 one looks at the case law as to how one interprets a
23 statute, you need to reconcile all the provisions
24 together, and you cannot nullify a provision if you
25 can interpret it in a way that it wouldn't do that.

1 The way that the Hearing Panel Report is
2 drafted, it nullifies this provision E, with respect to
3 A.C.L.s that were issued July 1st and after and before
4 the enactment. There's never been one example provided
5 how an A.C.L. could be issued on July 2nd and be
6 afforded this type of relief. Because again, the
7 important thing to remember here is that this provision
8 for a statement never existed before S.B. 1284 was
9 enacted, yet the legislature is saying, "It will apply
10 here so long as the A.C.L. was an issue before July 1st,
11 2010." It could have stayed silent on that, but it
12 didn't.
13 Now, there might be some confusion here with
14 the matter that was heard immediately after the Casden
15 hearing after Casden was excused. That was the
16 Crescenta Valley matter. And in that case, what was
17 actively argued before the Hearing Panel that evening
18 was the other provision of S.B. 1284 relief, and that's
19 under 13385.1(b)(1), and that's where if the Discharger
20 submitted its late discharge report within 30 days of
21 being noticed by the Board and showed that there weren't
22 any effluent limitation violations, then it could be
23 afforded that relief.
24 But see, this is quite different here where
25 again, the panel ruled that it wasn't retroactive, but

1 this is quite different because the discharge report,
2 that requirement, its submittal requirement, existed
3 before the enactment of S.B. 1284.
4 So one can construe that provision to say that
5 if you didn't get it done before the enactment, then you
6 can't take advantage of it. But under the other relief
7 afforded by the statute that Casden wishes to prevail
8 itself on, there is no way it was an impossibility that
9 anybody could have submitted that statement before it's
10 enacted because that requirement never existed.
11 So Casden would have had and did submit that
12 statement on January 28th. They submitted it within 30
13 days in the act of the enactment when I think could
14 really interpret it to mean that another notice needed
15 to be provided by the Board to give an opportunity for
16 this affirmative defense to be provided. This is merely
17 just an affirmative defense, in a sense.
18 It's not eviscerating that the violation
19 occurred. It just takes it out of the mandatory minimum
20 penalties scheme. That's all it does and allows for
21 discretion on your part to decide what's the appropriate
22 penalty. So Casden did that. It did submit evidence
23 that there was no groundwater discharge because there
24 was never any groundwater infiltration and explained why
25 the late reports had not been provided on time.

1 Now, the interpretation that the Hearing Panel
2 makes eviscerates this new requirement. The legislature
3 thought enough to modify what was pending in the bill at
4 the time on June 23rd, 2010, where it changed the
5 requirement that no discharges occurred at all to a
6 statement requiring only that no discharges that were
7 recordable under the applicable waste discharge
8 requirement occurred.
9 So what happened, the Hearing Panel did agree
10 that no discharges of groundwater occurred, but went on
11 to say that -- concluded that nonetheless, irrigation
12 water was required to be reported, and this is
13 something, I think, in the light of the decision of the
14 Hearing Panel, I think it's worthwhile for you to take a
15 step back on it.
16 And that is that if there was no groundwater
17 that was being discharged at all, then we don't have a
18 situation where there was any co-mingling of the water
19 with the groundwater. Where that, mind you, that would
20 be a much more difficult situation to argue, but here
21 it's been determined groundwater never existed. So the
22 only thing that's being discharged is this
23 irrigation-related water, and it is our position that
24 irrigation water is just not regulated under this W.D.R.
25 for groundwater infiltration.

1 The Hearing Panel Report says any effluent
2 from the S.U.M.P. is regulated, which just is not the
3 case. The S.U.M.P. is not regulated. What's regulated
4 under W.D.R. are the types of discharges, and here, of
5 course, it's groundwater that is being regulated.
6 MS. DIAMOND: Can you finish up pretty soon because
7 your 10 minutes is --
8 MR. DUCHESNEAU: I will. I've highlighted again
9 the plain wording of the W.D.R. It repeatedly just is
10 focused on groundwater dewatering and the like.
11 I do want to jump to a couple things. There
12 was mention about the other matters that are pending or
13 that were pending before the Board, such as Glenborough
14 and Crescenta Valley, and with regard to those, I think,
15 again, the point has been missed in the Hearing Panel
16 Report about why that is inconsistent.
17 So in Glenborough, for instance, what happened
18 there is that there was a statement that was allowed to
19 be afforded to Glenborough, the very same permit.
20 Glenborough submitted their statement in December 2010,
21 despite the N.O.V. being in 2008. Those penalties were
22 reduced to zero from $279,000.
23 But the point here that is not addressed by
24 the Hearing Panel is that that settlement was not
25 accepted by the Regional Board until after the effective

1 date of S.B. 1284. And E.P.A. requires a 30-day public
2 notice period that was provided, and that notice period
3 ended January 18th.
4 Mr. Unger then sent this letter saying, "Okay.
5 The settlement is accepted." So that has never been
6 reconciled how the Board can extend that relief to
7 Glenborough when it's after the effective date of the
8 S.B. 1284 statute.
9 There's also been much to do about how it
10 would be unconscionable in so many words, that somehow
11 Casden could be afforded relief from this. I just want
12 to reference a matter here. Jamison, similar -- same
13 permit again, $837,000, notice for the same hearing on
14 March 17th. The Board staff eventually decided to just
15 withdraw it. Said, "Oh, well, we have insufficient
16 evidence based on some statements that late reports from
17 2004 through 2010 were ever submitted," and they just
18 withdrew it altogether.
19 But Crescenta is the one that I really -- and
20 I want to move into the record pursuant to Title 23 --
21 MS. DIAMOND: Can I -- you've already had about two
22 more minutes. So can you do it one more minute and then
23 we'll move on to the Prosecution Team?
24 MR. DUCHESNEAU: Okay. I'm going to move into the
25 record then the Jamison A.C.L. file and the Crescenta

1 file pursuant to Title 23, California Code of Regulation
2 648.3 evidenced by reference. And Crescenta is what I
3 want to point out to you. You heard this matter after
4 Casden's matter, and I don't know if you ever even
5 picked up on what you decided, but Crescenta had a lot
6 of other violations for late reports, yet what was
7 decided is that in December they offered Crescenta
8 Valley a settlement, reducing $234,000 penalties for
9 late reports based on the fact that there wasn't a
10 discharge.
11 Crescenta then decided not to agree to that
12 settlement and went to hearing and then eventually, you
13 ruled against them on the other issue under the other
14 provision of S.B. 1284. So that decision and that
15 provision to reduce those mandatory minimum penalties
16 never even took effect until again, after the effective
17 date of 1284.
18 So the Board's process for doing this is very
19 inconsistent in following it through. But I think what
20 the bigger issue is what to really appreciate here. The
21 Board has found ways to get out of the mandatory minimum
22 penalties statute where it clearly just doesn't seem
23 appropriate for what's at issue. And again, I think
24 that if one takes a step back, S.B. 1284 clearly applies
25 to Casden's situation. They did submit the statement,

1 and since there was no groundwater discharge, there was
2 no co-mingling of any of the irrigation water discharge
3 and --
4 MS. DIAMOND: Thank you.
5 MR. DUCHESNEAU: -- and therefore, it just wasn't
6 reportable under the W.D.R.
7 MS. DIAMOND: Thank you very much.
8 We're going to have the Prosecution Team come
9 up now.
10 MS. OKUN: Ms. Diamond, we'll have to get a ruling
11 on the Discharger's request to incorporate evidence by
12 reference as he mentioned regarding Crescenta Valley and
13 Jamison, but I'd rather wait until after the Prosecution
14 Team has an opportunity to address the Board and then I
15 will give you my opinion on that.
16 MS. DIAMOND: Just one minute.
17 Okay. We're ready.
18 MS. MACEDO: Good morning, Madam Chair and Board
19 members. My name is Julie Macedo, senior staff counsel
20 in the Office of Enforcement and counsel for the
21 Prosecution Team. The Prosecution Team appreciates the
22 opportunity to address you this morning and would
23 appreciate some reciprocity in the event that we go
24 over, but we would like the Board to adopt the Hearing
25 Panel's recommendation and discuss just a few of the

1 issues raised by Casden in objecting to the Hearing
2 Panel's draft order and the process of issuing this
3 administrative civil liability against Casden. Ms. Okun
4 addressed many of the procedural issues. So I will try
5 not to repeat those, but several issues remain.
6 First, the facts. Do the applicable permits
7 covers Casden's discharges if the discharges are
8 irrigation water and not groundwater? Yes.
9 Mr. Anijielo, chief of the Regional Board Permitting
10 Unit, testified before the panel that irrigation water
11 is considered a wastewater and that any discharges,
12 including irrigation water from the S.U.M.P. are
13 covered. See transcript Item 11, page 109 at lines 4
14 through 5, and 11, page 106 at lines 18-25.
15 Casden argues that irrigation water is
16 equivalent to stormwater, which is regulated by the
17 M.S.4 permit. Not true. The panel heard testimony that
18 Casden used the chemical additive flowzyme (phonetic),
19 which was collected in the S.U.M.P. We know for a fact
20 that the S.U.M.P.'s discharges exceeded the effluent
21 limit for copper.
22 The very structure of the S.U.M.P. collecting
23 discharges also must lead to the conclusion that
24 Casden's facility is properly regulated by the
25 N.P.D.E.S. permit and not the M.S.4. On May 24th,

1 Mr. Duchesneau, who just spoke, also spoke with
2 Mr. Anijielo and asked about terminating Casden's
3 permit.
4 Mr. Anijielo informed him that the pipe to the
5 S.U.M.P. would have to be kept. To terminate a permit
6 is not simply a paper transaction, but the steps to be
7 taken are consistent that the Regional Board's position
8 that the collection of groundwater, irrigation water, or
9 even stormwater may create a discharge point properly
10 regulated by the N.P.D.E.S. permit. Paragraph 6 of 2003
11 permit and paragraphs 2 and 3 of the 2008 permit make
12 this clear.
13 Next, let's discuss the legal issues. First,
14 Casden's argument with regard to 13385.1(e) and Casden's
15 conclusion that the legislator wanted to give everyone
16 another bite at the apple and a chance for a penalty
17 reduction regardless of how many written notices a
18 particular facility had received. Essentially, Casden
19 would elevate the gap period of July 2010 to
20 January 1st, 2011, to a place of greater importance than
21 all of the cases to be decided under the effective date
22 of the statute, which is January 1 of this year.
23 This is not good statutory construction, and
24 it ignores Casden's admission that the legislature was
25 aware of the 2010 enforcement policy. It is more

1 reasonable to read the plain language of the statute and
2 apply it to the dischargers, as the Prosecution Team
3 argues. The proponents of the new exceptions in 13385.1
4 argued for broad exceptions, and the language before you
5 is the proper remedy as designed by the legislature, the
6 central theme of which is the requirement of written
7 notice prior to the imposition of penalties.
8 I'll also point out, contrary to
9 Mr. Duchesneau's presentation today, he says that the
10 Crescenta and Casden issues are different with regard to
11 13385.1(e), and he said that the statute must be made
12 consistent as a whole, and that's absolutely correct,
13 and the only way to make the statute consistent as a
14 whole is to adopt the Prosecution Team's interpretation
15 of 13385.1(e) as applied to 13385.1(a)(2)(a) and
16 dischargers like Casden and 13385.1(b) as in dischargers
17 such a Crescenta.
18 Next, Casden argues that it is receiving
19 disparate treatment from the Regional Board and points to
20 the Glenborough and Jamison cases. I've spoken to
21 counsel on both of these matters, and they were decided
22 correctly, but do not compel a different outcome than
23 the one the Prosecution Team is seeking against Casden.
24 This is because of when the cases were decided or what
25 evidence the Regional Board staff had to support them.

1 The more relevant cases for comparison are
2 future cases decided under new 13385.1 provisions. For
3 example, the Crescenta matter decided just last month
4 and discussed during the same panel hearing as Casden,
5 confirmed that the new exceptions are not
6 all-encompassing and were limited in accordance with the
7 statute's terms.
8 As to procedural issues, Casden argues that
9 the Prosecution Team's rebuttal brief was late. It was
10 served on March 11th instead of March 7th with the
11 hearing binder. The Prosecution Team also did not
12 provide its PowerPoint to Casden until the hearing.
13 As I argued before the hearing and since, there is no
14 requirement that the Prosecution Team produce its
15 PowerPoint early.
16 The State Water Board's regulations do not
17 require rebuttal to be submitted in writing, California
18 Code of Regulations, Title 23, Section 648.4. The
19 advisor, Ms. Okun, determined that having a brief is
20 more helpful to the Board than lengthy oral
21 presentations and actually reduces prejudice to
22 dischargers.
23 Furthermore, Casden has misrepresented the
24 Prosecution Team's argues made before the Hearing Panel,
25 claiming that they exceeded direct evidence. I believe

1 Ms. Okun resolved this this morning, but Casden is
2 trying to place an artificial limit on the Prosecution
3 Team's argument and ignore Ms. Okun's prior ruling of
4 this morning and March 15th.
5 The PowerPoint covered direct evidence argues
6 raised in the complaint and also in rebuttal. Casden
7 describes the Prosecution Team's arguments as
8 reportability. First, it was the Prosecution Team's
9 position that the Dischargers were reportable because
10 it sought recording violations for them by filing an
11 administrative civil liability complaint.
12 Furthermore, the Prosecution Team is allowed
13 to rebut Casden's argument. Casden argued that its
14 discharges were irrigation water and therefore, its
15 discharges were no longer covered by the permit, despite
16 20 plus years of coverage and not properly terminating
17 the permit by capping the pipe leading to the S.U.M.P.
18 The Prosecution Team's argues at the panel
19 hearing and today rebut Casden's conclusions. The
20 Prosecution Team's main argument is that the permits
21 applied to Casden's discharges and the permits had
22 reporting requirements that Casden ignored. Casden's
23 misrepresentation of Prosecution Team's argues are
24 baseless and contrary to rulings in this matter.
25 Casden also makes several objections about the

1 advisor's and Board's conduct. These I will leave for
2 the advisor and Board to address. Most of them have
3 been addressed by Ms. Okun, but I will urge the Board
4 to consider the appropriate remedy.
5 Casden has made numerous objections, but the
6 sheer volume should not persuade you. Casden has every
7 right to make its objections, but the appropriate remedy
8 is not to let Casden have unlimited time or to exclude
9 the Prosecution Team's proper argument. At the first
10 hearing, Casden got an argument to present its -- excuse
11 me -- Casden got an hour to present its argument and
12 question witnesses.
13 Objections have been received whenever Casden
14 made them. An objection was received yesterday, and I
15 do not have any objection to that being included in the
16 record, as long as the Prosecution Team is given an
17 opportunity to respond. Casden submitted a 64-page
18 objection to the Hearing Panel Report and proposed
19 order, and the Prosecution Team, meaning myself, did not
20 move to strike it. Instead, it was accepted into the
21 administrative record with a brief response from me.
22 Casden made further objections yesterday
23 regarding a revised draft order into the date of the
24 hearing. The advisor and Board are resolving these
25 issues, and we hope that the clear record will assist in

1 determining these matters, and we hope the Board keeps
2 in mind that it is not customary to re-hold a hearing
3 before the entire Board of the same length as the
4 evidentiary hearing. So the Prosecution Team
5 appreciates the 10-minute opportunity that we have been
6 given today.
7 Simply put, Casden has had an adequate
8 opportunity to be heard, and the Prosecution Team has
9 not objected to the full extent when it submits writings
10 that are either passed on to the advisor and to the
11 Board.
12 In response to the copper issues, briefly the
13 Board's comments regarding flowzyme does not mean that
14 the copper effluent limitation -- or excuse me --
15 violations are not proper. The Biona Creek T.M.D.L.
16 added metals on October 29th, 2008. Casden was covered
17 under the 2008 N.P.D.E.S. permit and had copper
18 exceedances in 2010. The penalties sought for these
19 violations are not duplicative or proper.
20 Finally, I'll make some comments about policy.
21 Policy cannot and does not trump facts or regulations in
22 this matter. Casden's discharges are properly covered
23 under its permit, and its reporting violations are
24 properly subject to M.M.P.s. The plain language of the
25 new 13385.1(a)(2)(a) in combination with 13385.1(e) do

1 not result in a reduction of Casden's penalties.
2 This case also presents an issue of Casden's
3 repeated requests for coverage to the Board and actions
4 consistent with the permit coverage, at least until
5 penalties were assessed. This type of revising 20 years
6 of statement by dischargers representatives and
7 operational history is dangerous and could lead to
8 greater uncertainty for the regulated community, and
9 especially for the Water Board staff.
10 We recommend the Board adopt the panel
11 hearing's recommendation. Thank you.
12 MS. DIAMOND: Thank you. We are going to take a
13 five-minute break, and we're going to go into an
14 executive session, and this is a good time for us to
15 that because I believe our reporter needs a little
16 break.
17 Do we need to announce anything else before
18 we do that, Ms. Okun?
19 MS. OKUN: No. I think we should rule on the
20 procedural objections at this point, and I actually do
21 have one or two questions for the Prosecution Team. I
22 don't know if the Board has any questions or either of
23 the parties. If you do, I suggest that you ask those
24 questions before deliberations.
25 MS. DIAMOND: Ask the questions now before we

1 deliberate?
2 MS. OKUN: Yes.
3 MS. DIAMOND: All right. Do we have any questions?
4 Ms. Glickfeld, who do you have questions for?
5 MS. GLICKFELD: The prosecution. First of all, I
6 wasn't a member of the Hearing Panel. So you'll have to
7 forbear. I read the transcript. I read everything, but
8 I'm still a little a confused about the issue of the
9 irrigation water.
10 MS. MACEDO: Okay.
11 MS. GLICKFELD: And the Discharger is contending
12 that the S.U.M.P. is not regulated. It's the
13 groundwater that's regulated.
14 MS. MACEDO: That's correct.
15 MS. GLICKFELD: And they're contending that
16 there -- they're also contending that there was no
17 groundwater going through the S.U.M.P. during the time
18 that these violations were -- reporting violations
19 occurred; is that correct?
20 MS. MACEDO: I believe that's correct, if I'm
21 following your question. The Prosecution Team's
22 position --
23 MS. GLICKFELD: Is it correct that there was no
24 groundwater going through during those times?
25 MS. MACEDO: The Hearing Panel Report found that

1 there was no groundwater, and the decision was not based
2 on groundwater getting into the S.U.M.P. Our position
3 is that because we believe that the S.U.M.P. is
4 regulated because it's a discharge point under the
5 N.P.D.E.S. permit, but regardless of whether it was
6 groundwater, irrigation water, and even incidental
7 stormwater are regulated by both the 2003 and 2008
8 permits, and I can direct you to the permit language
9 that states that.
10 MS. GLICKFELD: So you're contending that the
11 permit for the groundwater does include --
12 MS. MACEDO: It's not a groundwater permit. It's
13 a discharge permit.
14 MS. GLICKFELD: It's a discharge permit.
15 MS. MACEDO: Yes.
16 MS. GLICKFELD: So this is different than when I
17 discharge down my driveway to the street?
18 MS. MACEDO: It is, and the S.U.M.P. acts as the
19 physical difference, but yes, you're not collecting
20 stormwater in that case if you're discharging stormwater
21 down a storm drain. You're not collecting it that
22 allows it to mix with other chemicals, such as flowzyme
23 in the irrigation water, or other chemicals in the
24 S.U.M.P., which we know were exceeded for copper. Rain
25 water would not have exceedances for copper. So the

1 S.U.M.P. acts as a physical barrier, but the type of
2 discharge is also regulated.
3 MS. GLICKFELD: Okay. Thank you very much.
4 MS. DIAMOND: Any other questions?
5 Ms. Okun, do you have anything to add before
6 we go into your executive session?
7 MS. OKUN: I have two questions for Ms. Macedo.
8 The first one is, you said several times that the
9 Prosecution Team is urging adoption of the Hearing Panel
10 recommendation.
11 Are you expressing any opinion on the
12 recommended changes that I've circulated?
13 MS. MACEDO: I was fine with the changes. I will
14 comment that, like you, my schedule was -- I was in
15 transit yesterday. So I didn't have an opportunity to
16 review and compare and prepare a response. If the issue
17 is have I checked all of them and do I have any
18 objections, I don't. I believe that the record was made
19 clear today.
20 My e-mail on, I believe, May 23rd, my biggest
21 issue was that Mr. Duchesneau, in his May 19th objection
22 and also during today that he concluded the Hearing
23 Panel -- that S.B. 1284 applied and that somehow the
24 exceptions applied and then the Board changed its mind.
25 I think you clarified that record.

1 MS. OKUN: And my second question is I just want to
2 confirm that I understand the record correctly. On
3 January 23rd, 2009, the Board received some of the late
4 reports, but not all of them, but there was also a
5 statement that monitoring hadn't occurred prior to, I
6 think, it was October. I can't remember if it was 2007
7 or 2009.
8 Is that statement what stopped the accrual of
9 additional penalties under the enforcement policy?
10 MS. MACEDO: Yes. I'm just confirming with staff,
11 yes.
12 MS. OKUN: Thank you. That's all I have. And if
13 the Board would prefer, we can address the procedural
14 objections and evidentiary objections after
15 deliberations.
16 MS. MACEDO: I just have a quick comment in terms
17 of the e-mail received yesterday and then your comment,
18 Ms. Okun. I believe the issues were objection to the
19 Hearing Panel Report changes, the 90-day hearing, and
20 then you also mentioned the ex partes. I think, that
21 was directed to you and not to me; right?
22 MS. OKUN: Yeah, actually, I wasn't asking for the
23 Prosecution Team's response to yesterday's e-mail. I
24 was asking for any comments you may have on the proposed
25 changes to the findings that I circulated.

1 MS. MACEDO: Okay. Yeah, I was fine with the
2 findings, and I addressed my argument today to
3 incorporate those findings, including that
4 groundwater -- you know, the Board or the Hearing Panel
5 did not find groundwater made it into the S.U.M.P., and
6 we -- our position is consistent that the permit still
7 regulates Casden's discharges.
8 MR. DUCHESNEAU: Madam Chair, I neglected to move
9 my presentation into the record. I would ask that the
10 record reflect that.
11 MS. DIAMOND: It is in the record by virtue of the
12 fact that you gave an oral presentation.
13 MR. DUCHESNEAU: Okay. And a copy has been
14 provided, too.
15 MS. DIAMOND: This isn't the way we normally
16 operate. If you have something that you want to say in
17 the next 10 or 20 seconds, you can come up to the
18 microphone, identify yourself for the record, please.
19 MR. DUCHESNEAU: Yeah, this is Pete Duchesneau on
20 behalf of Casden again, and my only point is in regard
21 to the objections that Casden has lodged throughout this
22 proceeding that Casden should not be faulted for lodging
23 objections. You may disagree with them at times, but
24 it's just -- it's right to do so. It's a complicated
25 process with a significant amount of penalties at issue.

1 So I just ask that you don't hold the mere fact that we
2 object.
3 MS. DIAMOND: We don't and we agree with you.
4 MR. DUCHESNEAU: Thank you.
5 MS. DIAMOND: So we are going to go into executive
6 session and be back within five to ten minutes.
7 (Recess)
8 MS. DIAMOND: So we're back on the record on Item
9 number 11, and we've been in executive session
10 deliberations, and I'm going to ask Ms. Okun, would you
11 like to address the Board and get us going on this part
12 of our deliberations?
13 MS. OKUN: First of all, to put this issue to rest
14 about whether the Hearing Panel changed its decision, I
15 would like to ask the four members of the Hearing Panel
16 whether the Hearing Panel Report that Chair Diamond's
17 (inaudible) correctly reflected the panel's
18 deliberations at the hearing, and could you each answer,
19 please.
20 MR. BLOIS: Steve Blois. It did.
21 MS. MEHRANIAN: Maria Mehranian. It did.
22 MR. STRINGER: I've reviewed them as well, and I
23 think they did.
24 MS. DIAMOND: Of course it did, yes.
25 MS. OKUN: And to be clear on the issue of the

1 Discharger's contention about augmenting the evidence
2 that the additional legislative history, which we are
3 now not going to be accepted through the record. It was
4 not part of the deliberations, that was statements were
5 consistent with the Board's discussion and the
6 legislative history and the findings in the report --
7 I'm sorry -- the panel's discussion, but that wasn't
8 something that was provided at the closed session.
9 Next, to address the Discharger's request to
10 incorporate by reference the documentation related to
11 the Jamison matter and the and the Crescenta Valley
12 Water District. I actually have a question for
13 Mr. Duchesneau.
14 MS. DIAMOND: We'd all like you to speak up a
15 little bit.
16 MS. OKUN: Oh, I'm sorry.
17 It's not clear to me exactly which documents
18 you're seeking to incorporate into the record, whether
19 it's the entire file in that matter or the settlement or
20 the proposal. I'm not familiar with the Jamison matter.
21 So I don't know which documents --
22 MR. DUCHESNEAU: Sure. Pete Duchesneau for Casden.
23 It would be the file with respect to the A.C.L.
24 proceedings for those two matters, the Jamison and the
25 Crescenta Valley matter.

1 MS. OKUN: The entire files?
2 MR. DUCHESNEAU: Limited to the A.C.L. proceedings
3 for those violations at issue in those proceedings.
4 MS. OKUN: Okay. And I'm not familiar with the
5 Jamison file, but I know that the Crescenta Valley
6 matter went to hearing. So the file would be -- are you
7 talking about the entire administrative record for that
8 matter or just the Board's decision or the complaint?
9 MR. DUCHESNEAU: Well, I think, for simplicity,
10 would just be the entire record for that matter, the
11 A.C.L. matter. My understanding is it's not that large,
12 and that it would be simpler just to add the entire
13 administrative record for that A.C.L. matter.
14 MS. OKUN: Okay. That was it. Thank you.
15 MR. DUCHESNEAU: Thank you.
16 MS. OKUN: Also, on the issue of the e-mail that
17 was received yesterday, I think the Chair is prepared to
18 change her ruling to exclude that. If the Board members
19 have not seen that e-mail -- I think the Prosecution
20 Team has -- and I don't have a paper copy of it,
21 unfortunately. So I'm going to read that into the
22 record.
23 After I do that, the Chair is prepared to
24 grant the request to incorporate the Jamison and
25 Crescenta Valley documents into the record, but I would

1 like to give the Prosecution Team an opportunity to
2 respond to those requests including, if you could
3 address whether there's a subset of Crescenta Valley
4 documents that would be more appropriate to include.
5 I think on those issues the Prosecution Team
6 has already adequately explained why those two matters
7 are distinguishable, and I think that it actually would
8 help the review of this case to have that documentation
9 in the record.
10 So now I'll read the e-mail from June 1, 2011,
11 at 10:26 a.m.:
12 "Objection to revisions to Hearing Panel
13 Report and proposed order. Casden objects to
14 the proposal to revise the Hearing Panel
15 Report and proposed order made last night,
16 essentially, a day before the hearing. There
17 is no basis and no authority for yet again
18 changing the purported proposed report and
19 proposed order of the Hearing Panel after the
20 fact. Casden objects on the following basis:
21 Water Code Section 13228.14(a), which
22 requires the a panel of at least three of the
23 Regional Board conduct the hearing and that,
24 quote, 'after the hearing, the Panel shall
25 report its proposed decision and order to the

1 Regional Board,' closed quote. Delegation
2 and voting by proxy is prohibited.
3 62 Ops.Cal.Atty.Gen. 479, 482-490;
4 68 Ops.Cal.Atty.Gen 65, 70.
5 "Water Code Section 13228.14(c) right
6 to independent review by the Regional Board.
7 "Government Code Section 11430.30
8 prohibiting an advisor from furnishing,
9 augmenting, diminishing, or modifying the
10 evidence in the record.
11 "The Bagley-Keene Open Meeting Act,
12 Government Code Sections 11120, et seq.,
13 including the timing and to the extent that
14 Panel members have communicated as to
15 revising the Hearing Panel Decision without
16 public notice. Should the Hearing Panel seek
17 to revise its report, proper meeting notice
18 and opportunity for comment must be provided.
19 "The policy of the State and Regional
20 Boards to discourage the introduction of
21 surprise testimony and exhibits, Title 23,
22 California Code of Regulations Section 648.4.
23 "The hearing notice and the Hearing
24 Panel closing of its record and hearing, and
25 the Constitutional right of due process.

1 "Casden requests to be informed as to
2 whether or not the Hearing Panel, the
3 Regional Board, or any respective individual
4 members thereof, have either received the
5 proposed revisions to the Hearing Panel
6 Report or proposed decision, or have met,
7 had telephone calls, or have had any other
8 communications among themselves with the
9 Hearing Panel, Regional Board, or State Board
10 staff, or anyone else with regard to the
11 Hearing Panel Report and proposed order
12 before and after the March 17, 2011, hearing.
13 "Pursuant to the California Public
14 Records Act, Government Code Section 6250
15 et seq., Casden requests all documentation,
16 including electronic, regarding the same.
17 "Based upon the ever changing purported
18 Hearing Panel Report and proposed order, the
19 improper means by which it has been changed
20 subsequent to the Hearing Panel's decision
21 announced on March 17th, 2011, and Casden's
22 previous objections, including with regard
23 to issues on the reportability of discharges
24 under the W.D.R., Casden moves for a limited
25 rehearing on this matter with regard to the

1 retroactivity of S.B. 1284 and the issue as
2 to whether the discharges are reportable
3 under the W.D.R.
4 "Should the rehearing not be granted,
5 Casden requests additional time to address
6 the Regional Board and should be granted
7 one hour to address the Board.
8 "Objection and motion to dismiss A.C.L.
9 based upon untimely hearing. Casden further
10 objects to the hearing tomorrow, today, as
11 it is untimely in violation of Water Code
12 Section 13323, which requires that the
13 hearing before the Regional Board be
14 conducted within 90 days after the party has
15 been served with the A.C.L. The original
16 hearing date of this matter, May 5th, 2011,
17 was set more than 90 days after the A.C.L.
18 was served on or about December 17th, 2010.
19 accordingly, the A.C.L. should be dismissed.
20 by appearing, Casden does not waive its
21 objection."
22 And now we can hear from the Prosecution Team
23 on this e-mail and the issue of the Jamison and
24 Crescenta Valley Water District matters.
25 MS. MACEDO: Thank you, Ms. Okun. This is

1 Julie Macedo for the Prosecution Team. As to the
2 e-mail, I support the revisions to the Hearing Panel
3 Report and encourage the Board to adopt the order as
4 proposed in the hearing binder.
5 In terms of the arguments raised by Casden in
6 the e-mail, I think I've made my record as to what I
7 disagree with. I would point out, specifically, that it
8 doesn't sound like there are ex parte communications,
9 but you're going to look into that.
10 I disagree with Mr. Duchesneau's comments and
11 agree with your comments, Ms. Okun, about the advisor
12 and the preparation of the Hearing Panel Report.
13 As to the request for additional time or a
14 limited rehearing, we noted earlier that the parties
15 received, I think, ample time for presentation of
16 materials in that Mr. Duchesneau was allowed to
17 cross-examine and present his arguments at hearing.
18 I understand this matter involves a lot of
19 money, but that doesn't require an unlimited amount of
20 presentation time, and as I conceded during my
21 presentation earlier, he's had an almost unlimited
22 opportunity to submit post-hearing briefing. I do not
23 object to objections when they come in. I'm fine with
24 them being on the record or in the record, excuse me, as
25 long as we have an opportunity to respond.

1 And as to the untimely hearing, we disagree
2 with the 90-day objection, and certainly, if
3 Mr. Duchesneau wants to take on the entire weight that
4 Region 4 does its hearings, he's willing to do so, but
5 I'm not willing to concede that any impropriety
6 occurred.
7 MS. OKUN: What about the issues of the two -- the
8 Jamison and Crescenta Valley matters?
9 MS. MACEDO: In terms of the files, neither was my
10 matter, and again, I tend to -- if Mr. Duchesneau is
11 requesting the entire file related to enforcement, I
12 don't have a problem with that because if I object, he
13 will object to my objection. But in terms of the file,
14 as I understand it, Crescenta was just decided. So it
15 should be concluded as through the Board action as of
16 last month.
17 And as to Jamison, I believe it went to a
18 stipulated order. So in terms of enforcement in the
19 file, I would say from the A.C.L. forward, but I think
20 he wants more documents than that, and I'm fine with the
21 entire administrative record. I don't think that's for
22 simplicity sake. I think that's what he wants.
23 MS. OKUN: On Jamison, my understanding is that
24 it's not more than the A.C.L. forward. I don't know
25 what else is in the file. And also, just to be clear,

1 if there are any enforcement confidential documents, I
2 don't know if there are or not, but talking about the
3 public files documenting settlement offer of whatever
4 order was issued.
5 MS. MACEDO: Yes, of course. In terms of -- this
6 isn't relevant for the Casden matter, but the Office of
7 Enforcement has responded to two Public Records Act
8 requests that sought the Crescenta and Jamison files,
9 and we've made documents available, everything that
10 would be available under Public Acts Request, that may
11 be broader, the administrative record.
12 I see no reason to include the materials that
13 would not be in the administrative record, such as
14 confidential settlement communications or
15 attorney/client or privileged materials, as you
16 mentioned.
17 MS. OKUN: The documents that were made available
18 were related to this case, to Mr. Duchesneau?
19 MS. MACEDO: Duchesneau did a Public Records Act
20 Request immediately prior to the March 17th panel
21 hearing and another one immediately prior to this
22 hearing.
23 MS. OKUN: Mr. Duchesneau, is it acceptable to just
24 include those documents that were -- for Jamison, at
25 least, that were produced in response to the Public

1 Records Act Request so we know what we're including.
2 And then for Crescenta Valley, we can include the
3 administrative record?
4 MR. DUCHESNEAU: I believe it would be. That would
5 actually be more than I'm actually moving or requesting
6 to have admitted. So that's why I was actually trying
7 to, believe it or not, streamline this a little bit.
8 MS. OKUN: I would love to have it streamlined.
9 I'm just trying to figure out -- because we're talking
10 about a file I've never heard of or seen, and I want to
11 make sure that the record in this matter is clear about
12 what's being admitted.
13 MR. DUCHESNEAU: Let me propose --
14 MS. MACEDO: Well, I think we're on the same page.
15 We want the administrative record in both Jamison and
16 Crescenta, and I know the counsel in both those matters.
17 I can provide identifying details to Ms. Okun, and I'm
18 willing to take on some sort of reporting to you about
19 what materials those are since you have seen maybe more
20 than what you're asking to be included.
21 MR. DUCHESNEAU: I would be fine with that. It's
22 basically, again, that it would be the record for the
23 administrative complaints. So you would have it from
24 the notice of violation through those complaints and the
25 resolution, I think, would be the way to put it.

1 MS. MACEDO: The Public Record Act Request, as far
2 as I recall, includes the entire permitting file. So I
3 don't want -- you know, because you didn't know what
4 they asked for to make it broader than it needs to be.
5 MS. OKUN: Okay. We're not going to be putting in
6 permitting files for Crescenta Valley. I'm familiar
7 with the administrative records for Jamison. The
8 parties stipulated to what the administrative record is,
9 and the Board can initially notice that.
10 I am somewhat concerned about what happens if
11 there is any disagreement about what the record
12 concludes, and there is no way to resolve that today.
13 Either we can rely on the parties' representations that
14 they're talking about the same documents and just state
15 that the administrative record is incorporated, or leave
16 it all out, or continue the matter to make explicit
17 what's included.
18 MS. DIAMOND: So this is -- this will be part of
19 our deliberations.
20 Can we get an understanding if the Prosecution
21 Team and Mr. Duchesneau agree as to what can -- what the
22 administrative record is on those two matters,
23 Crescenta Valley and Jamison so that -- and we can
24 approve what they agree to so that we don't -- I don't
25 think that any of us want to have a rehearing on this.

1 MS. OKUN: I agree with that. We can do that.
2 We'll have to take a short break to let them come up
3 with a list. It should be a pretty discreet list, or
4 they can come up and do it with the tape recorded
5 running.
6 MS. DIAMOND: Can that be done before us now or
7 between the two of you in about a minute or two?
8 MS. MACEDO: It's up to Mr. Duchesneau. So I'm
9 willing to find out what materials he wants and agree
10 to them if the list is reasonable.
11 MR. DUCHESNEAU: Well, why don't we go off the
12 record. I'll talk to Counsel and see if we can come up
13 with a list.
14 MS. DIAMOND: Let's see if we can get back within
15 two minutes to us on this matter. We'll be breaking for
16 no more than two minutes.
17 (Recess)
18 MS. DIAMOND: Okay.
19 MS. MACEDO: Okay. I believe we've agreed on
20 words. So we will make available the updated read
21 enforcement files, no matter what the color of the file,
22 subject to all applicable privileges.
23 MS. OKUN: And I'm sorry, but I just can't
24 recommend that because I don't know what applicable
25 privileges are. I don't know who's going to assert

1 them. I don't know if I'm going to agree if they are
2 asserted, and it's impossible to determine what the
3 record is in this case.
4 For the Crescenta Valley matter, we just
5 concluded the hearing. I know what the administrative
6 record is. That's very clear. We can include that.
7 For Jamison, my recommendation would be that the Board
8 either not accept those documents. The Discharger
9 hasn't properly complied with our regulation for
10 incorporating documents by record -- by reference
11 because you have to specify with particularity which
12 documents and which portions are being included.
13 In addition, apparently, these were provided
14 before the March 17 hearing anyway, and there is no
15 explanation of why this is being provided so late.
16 There's been some discussion of it, and I think that's
17 adequate, but if the Board does want to include some
18 documentation, I would suggest making a discreet list
19 of the documents without benefit of looking at the file
20 that could include any notices of violation, client
21 settlement offers, and the final Board order. And I
22 think that would be an acceptable way to resolve it.
23 MS. DIAMOND: Mr. Duchesneau, what do you have to
24 say to what Ms. Okun just said?
25 MR. DUCHESNEAU: Well, I think the resolution

1 worked out with the prosecutor would accurately describe
2 it, and I'm not concerned about the privilege issue
3 because that's something the Board does dealing with
4 Public Records Act Request. I'd be willing to agree to
5 the administrative record for the Crescenta Valley
6 matter, as I think that seems to be okay with Counsel.
7 And then with regard to the Jamison matter,
8 we could have that then so limited as the advisor has
9 suggested, and that would include then the Notice of
10 Violation, the Administrative Complaint, and the
11 settlement offers and correspondence that related to
12 that complaint and the documents regarding the
13 resolution of that matter.
14 MS. DIAMOND: So essentially, you're -- are you
15 agreeing with -- Ms. Okun, is that what you are agreeing
16 to --
17 MS. OKUN: Everything -- well, two things. The
18 correspondences related to the settlement offer, I don't
19 know what that is. So that wasn't part of my list, and
20 then the resolution, I don't know if that -- Sam, did
21 that take the form of an order or was there a settlement
22 agreement?
23 MR. UNGER: No, it was an agreement.
24 MS. OKUN: Okay. So it would be -- the Notice of
25 Violation Administrative Civil Liability Complaint

1 Settlement Offer and the Administrative Civil Liability
2 Order.
3 MS. DIAMOND: Is that agreeable to you?
4 MR. DUCHESNEAU: With one addition, that there was
5 an order when they changed the A.C.L., I think Mr. Unger
6 also sent a letter withdrawing some of the proposed
7 penalties as well, and that was dated, I believe, in
8 March of 2011.
9 MS. DIAMOND: Ms. Okun.
10 MS. OKUN: That's fine.
11 MR. DUCHESNEAU: Thank you for accommodating.
12 MS. DIAMOND: It sounds like you two are now in
13 agreement.
14 MR. DUCHESNEAU: Yes, thank you.
15 MS. DIAMOND: Ms. Okun, do you have anything else?
16 MS. OKUN: I have one change to read to the
17 proposed order, one additional change just to clarify
18 that what the Board is doing is adopting its own
19 finding, not modifying the Hearing Panel Report, and
20 that appears in section 8 of the draft order, paragraph
21 8. The first sentence would be changed to read
22 "Upon" --
23 MS. DIAMOND: What page is that in our binder?
24 MS. OKUN: It's not in the binder. I have this
25 written out by hand. I'll get my handwritten copy to

1 the parties to look at. It's paragraph 8 on page 2 of
2 the draft order, "Upon considering the Hearing Panel
3 Report" -- ready?
4 MS. DIAMOND: Okay.
5 MS. OKUN: "Upon considering the Hearing Panel
6 Report and making an independent review of the record,
7 the Los Angeles Water Board, during its meeting on
8 today's date, adopted the Hearing Panel's findings of
9 fact and conclusions of law as modified in Exhibit B
10 attached, as the findings of the Board."
11 MS. DIAMOND: Okay.
12 MS. OKUN: Is that clear?
13 MS. DIAMOND: Yes.
14 MS. OKUN: There have been a number of objections
15 in this case, and I think we've addressed them all, but
16 just for the record, I would like the Chair to confirm
17 that all of the objections that the Discharger has
18 raised based on the process have been overruled.
19 MS. DIAMOND: Yes.
20 MR. DUCHESNEAU: Excuse me, Madam Chair,
21 Pete Duchesneau, I need to revisit what Ms. Okun was
22 referring to because I --
23 MS. DIAMOND: Could you identify yourself for
24 the record, please?
25 MR. DUCHESNEAU: Pete Duchesneau for Casden.

1 Because I just could not locate what was being modified.
2 All right. Thank you. So just so the record is clear,
3 this is the version of the proposed order that was sent
4 out on Tuesday evening, if I understand correctly, on
5 May 31st?
6 MS. OKUN: Yes.
7 MR. DUCHESNEAU: Thank you.
8 MS. OKUN: And I have nothing further. So if the
9 Board would like to enter into deliberations.
10 MS. DIAMOND: Okay. So now we'll go into Board
11 member deliberations.
12 Any questions or comments before we have a
13 vote on this item?
14 MR. BLOIS: Well, it's -- it was clear to me at
15 the hearing -- I was one of the four Hearing Panel
16 members -- and it's clear to me now that what we have
17 here is a situation where Casden has been trapped by a
18 series of events and circumstances that really were
19 beyond their control.
20 I feel really badly, but I can't change it,
21 and I think that our Board agrees that -- and I guess
22 the Hearing Panel agreed, too, that their testimony was
23 credible. I don't think that they -- what I would
24 consider to fall under the bad actor category. They're
25 good guys, but they were trapped in a situation that

1 they didn't realize, and I think that includes our
2 staff, also.
3 Nonetheless, these mandatory minimum penalties
4 are something that we can't change, and you know, I
5 wish -- I think that the punishment here and the
6 magnitude of the fine is way out of proportion with the
7 facts of the case, but unfortunately, I can't change it.
8 I wish I could.
9 So at any rate, I feel badly, but there's
10 nothing I can do. I think that the testimony about the
11 nature of the water is one of the things that changed
12 from the building design, the S.U.M.P., the whole
13 system, the facts of the case, but it's something that
14 did happen, and we can't go back on it.
15 MS. DIAMOND: Ms. Mehranian.
16 MS. MEHRANIAN: Yes, from my standpoint, it was
17 where the Crescenta Valley issue comes up. You know, I
18 wanted to make sure that there is really parity between
19 these two, and my understanding is that, you know, the
20 Crescenta Valley case, there was no discharge at all
21 versus not reportable.
22 So I just want to make sure that the decision
23 still considers the parity and fairness between the two
24 decisions, and it's not ad hoc and double standards. So
25 that's where I am in upholding the Panel's

1 recommendation.
2 MS. DIAMOND: Ms. Lutz.
3 MS. LUTZ: Thank you. Having not been a panel
4 member, I, like Madelyn, read through everything, and
5 first, I want to thank everybody who was a panel member.
6 It sounds like it was a very long, arduous day, and this
7 case, in particular, I reached some of the same
8 conclusions that Mr. Blois voiced about the constraints
9 that we have with regard to the M.M.P.s, and we have
10 voiced these frustrations before in other hearings.
11 And we are -- it is not in our jurisdiction to
12 change the values of the M.M.P.s when we find that
13 M.M.P.s are actually necessary. So we don't have the
14 ability to do that. I think one of the other comments
15 that was important to me in reading this, and in the
16 discussion was about the actual permit itself and what
17 was being permitted, and there was much discussion in
18 the -- at the hearing and then a little bit today about
19 the discharge, whether it was irrigation, whether it was
20 stormwater, whether whatever it was.
21 The permits permits discharge, and it can be
22 dry weather, wet weather discharge. It's still
23 discharge, and that permit did oversee the discharge
24 from that outfall. And so I, too, think that we need to
25 uphold the Panel's recommendations with the changes that

1 have been proposed to us.
2 MR. STRINGER: I just initially want to echo
3 everyone's frustration with the lack of discretion on
4 M.M.P.s, as we've said that a number of times. I agree
5 with that as well as today. My focus as a panel member
6 in rethinking all of these things over the last few days
7 and today has really been on the interpretation of 1284,
8 and I just want to say that I remain comfortable with
9 our interpretation of the statute.
10 At the same time, it's a classic example, I
11 think, of the results of sausage making in Sacramento,
12 and it's a convoluted mess, frankly, from my
13 perspective. The statute is, to me, not abundantly
14 clear in a situation where it needs to be, although,
15 again, I'm comfortable with the judgment call that we've
16 made on our interpretation of the statute, and I look
17 forward to seeing what other panels and courts do with
18 it. Thank you.
19 MS. DIAMOND: I have nothing more to add to this.
20 I feel that the decision was made that had to be made.
21 I feel that the -- all parties here did the very best
22 job that they could. The attorneys for Casden, the
23 Prosecution Team, our advisers, staff were in this
24 strange situation, but the fact of the matter is we have
25 no discretion.

1 As we said it at the Hearing Panel, we came to
2 that decision. It's not a decision that we feel
3 comfortable with, but we feel that the statute speaks
4 for itself. It's clear to the extent that we have no
5 discretion.
6 So I will ask for a motion to adopt the -- to
7 adopt this order with the changes that were made today.
8 MS. LUTZ: I'll make the motion that we adopt the
9 order, the recommendation order of the Panel with the
10 changes that were made today, either verbally or in
11 writing today.
12 MS. MEHRANIAN: Second.
13 MS. DIAMOND: It's been moved and seconded.
14 All those in favor.
15 (All in favor by Board members)
16 MS. DIAMOND: Opposed.
17 Motion passes. Thank you very much.
18 (End of partial transcript)
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EXHIBIT 2

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:	)	Order on Complaint No. R4-2008-0199-M
	)	Mandatory Minimum Penalty for
Casden Properties, LLC	)	Violation of California Water Code § 13376
Wilshire Doheny Building	)	and
9090 Wilshire Boulevard	)	Order Nos. R4-2003-0111 and R4-2008-0032
Beverly Hills, CA 90211	)	(NPDES No. CAG994004)

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board) has found and determined that Casden Properties, LLC (hereinafter Permittee) violated requirements contained in California Water Code (CWC) § 13376 and Order Nos. R4-2003-0111 and R4-2008-0032.

2. The Permittee operates the Wilshire Doheny Building (facility) located at 9090 Wilshire Boulevard in the City of Beverly Hills, California, which is subject to the waste discharge requirements and limitations set forth in Los Angeles Water Board Order Nos. R4-2003-0111 and R4-2008-0032.

3. The Prosecution Team identified four (4) copper effluent limit violations of Order No. R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in Exhibit "A" attached hereto and incorporated herein by reference.

4. The Prosecution Team identified two hundred twenty-one (221) late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in the Exhibit "A" attached hereto and incorporated herein by reference.

5. On December 17, 2010, the Chief Prosecutor issued Complaint No. R4-2008-0199-M to the Permittee in the amount of $675,000 for the two hundred twenty-five (225) effluent limit and late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 subject to mandatory minimum penalties, as identified in Exhibit "A".

6. On March 17, 2011, this matter was heard in Los Angeles, California before a Los Angeles Water Board Hearing Panel (Panel) consisting of Board Members Ms. Francine Diamond, Mr. Steve Blois, Ms. Maria Mehranian, and Mr. Charles Stringer.

The Hearing Panel subsequently submitted to the Los Angeles Water Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended administrative civil liability, a copy of which is attached hereto and incorporated herein by reference.

7. Based on evidence presented in the hearing and in the administrative record, the Hearing Panel determined that there are two hundred twenty-five (225) effluent limit and late reporting violations subject to mandatory minimum penalties in the amount of $675,000 as identified in Exhibit "A" attached.

8. Upon considering the Hearing Panel report and making an independent review of the record, the Los Angeles Water Board during its meeting on June 2, 2011 adopted the Hearing Panel's Findings of Fact and Conclusions of Law, as modified in Exhibit "B" attached, as the findings of the board. The Los Angeles Water Board adopted the Findings and Conclusions of the Hearing Panel Report, as modified by Exhibit "B" and upheld the imposition of the Panel's proposed administrative civil liability on the Permittee. The Los Angeles Water Board directed payment of a total assessment of $675,000 on Complaint No. R4-2008-0199-M.

9. This Order on Complaint is effective and final upon issuance by the Los Angeles Water Board. Payment must be received by the Los Angeles Water Board no later than thirty days from the date on which this Order is issued.

10. In the event that the Permittee fails to comply with the requirements of this Order, the Executive Officer is authorized to refer this matter to the Office of Attorney General for enforcement.

11. 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 Regional Water Board action, except that if the thirtieth day following the action 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 or will be provided upon request.

IT IS HEREBY ORDERED that, pursuant to § 13323 of the CWC, the Permittee shall make a cash payment of $675,000 (payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days after the date of issuance of this Order.

In the event that the Permittee fails to comply with the requirements of this Order on Complaint No. R4-2008-0199-M, the Executive Officer is authorized to refer this matter to the Office of Attorney General for enforcement.

I, Samuel Unger, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the California Regional Water Quality Control Board, Los Angeles Regional, and that such action occurred on June 2, 2011.

Samuel Unger

Samuel Unger
Executive Officer

ACLO No. R4-2010-0199-M

EXHIBIT "A"
Violation Summary

Casden Properties, LLC
CI No. 6733

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/ Chronic	Water Code Section 13385	Penalty
03/25/10	1st Quarter 2010	Daily Maximum	Copper	44.6	24	ug/L	2	86%	Serious	(h)1	$3,000
03/31/10	1st Quarter 2010	Monthly Average	Copper	44.6	12.5	ug/L	2	257%	Serious	(h)1	$3,000
06/24/10	2nd Quarter 2010	Daily Maximum	Copper	32.5	24	ug/L	2	35%	Serious	(h)1	$3,000
06/30/10	2nd Quarter 2010	Monthly Average	Copper	32.5	12.5	ug/L	2	160%	Serious	(h)1	$3,000
										Total	**$12,000**

EXHIBIT "A"
Violation Summary

Reporting Period	Violation Type	Due Date	Received Date	Days Late	# of Complete 30-Day Periods	Serious/ Chronic	Water Code Section 13385	Amount Per 30-Day Period	Penalty
4th Quarter 2005	Late Report	02/15/2006	01/23/2009	1,073	35	Serious	(h)(1)	$3,000	$105,000
1st Quarter 2006	Late Report	05/15/2006	01/23/2009	984	32	Serious	(h)(1)	$3,000	$96,000
2nd Quarter 2006	Late Report	08/15/2006	01/23/2009	892	29	Serious	(h)(1)	$3,000	$87,000
3rd Quarter 2006	Late Report	11/15/2006	01/23/2009	800	26	Serious	(h)(1)	$3,000	$78,000
4th Quarter 2006	Late Report	02/15/2007	01/23/2009	708	23	Serious	(h)(1)	$3,000	$69,000
1st Quarter 2007	Late Report	05/15/2007	01/23/2009	619	20	Serious	(h)(1)	$3,000	$60,000
2nd Quarter 2007	Late Report	08/15/2007	01/23/2009	527	17	Serious	(h)(1)	$3,000	$51,000
3rd Quarter 2007	Late Report	11/15/2007	01/23/2009	435	14	Serious	(h)(1)	$3,000	$42,000
4th Quarter 2007	Late Report	02/15/2008	01/23/2009	343	11	Serious	(h)(1)	$3,000	$33,000
1st Quarter 2008	Late Report	05/15/2008	01/23/2009	253	8	Serious	(h)(1)	$3,000	$24,000
2nd Quarter 2008	Late Report	08/15/2008	01/23/2009	161	5	Serious	(h)(1)	$3,000	$15,000
3rd Quarter 2008	Late Report	11/15/2008	01/14/2009	60	1	Serious	(h)(1)	$3,000	$3,000
							Total		**$663,000**
							Settlement Total		**$675,000**

Exhibit "B"
ACLC No. R4-2010-0199M
Casden Properties, LLC
CI No. 6733

FINDINGS OF FACT

9. The Permittee provided credible written evidence and testimony that it never discharged dewatered groundwater. The Prosecution Team failed to prove the Permittee discharged dewatered groundwater. Rather, the discharge consisted of collected and channelized irrigation water from street-level planters and water from other rinsing, including garage wash-down water. However, it is undisputed that the Permittee sought and obtained coverage under the Permit. The Permit required monitoring of all sampling stations, and reporting of the monitoring results. (*See, e.g.,* AR, p. 6.30, 6.90). Nothing in the Permit allows the Permittee to choose to report only certain types of effluent discharges (groundwater). In fact, Monitoring and Reporting Program No. CI-6733 stated that if there is no discharge, a report must be filed to so state. (Reporting Requirements I.B, AR p. 6.29.) The Permittee submitted quarterly reports for Fourth Quarter 2007, First Quarter 2008, Second Quarter 2008, Third Quarter 2008, First Quarter 2010 and Second Quarter 2010. Each quarterly report reported discharges from the sump during the subject reporting period~~'s 2009 reports admitted that discharges had occurred, and the Permittee reported them in January 2009~~. In addition, the Permittee stated that it did not previously seek to avoid MMPs under section VII.D.2 (*Defining a "Discharge Monitoring Report" Where There Is No Discharge to Waters of the United States)* of the *Water Quality Enforcement Policy* because there had been discharges from the facility.

10. The Permit regulates other types of discharges, including without limitation incidental collected stormwater from basements, which is similar to some of the discharge here, and to other wastewaters. The list of covered discharges is not exclusive. The Permit requires the Permittee to file monitoring reports for all effluent discharged from its sump. The Permit does not exempt irrigation runoff discharged through the sump. By repeatedly seeking NPDES permit coverage, the Permittee admitted that it was discharging pollutants to a water of the United States. (*See, Brentwood, supra,* at 723 (monitoring reports are admissions of reported effluent violations).) The Permittee did not establish that the discharges were regulated by another permit. Whether or not the permittees under the *Waste Discharge Requirements of Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles* (Order No. 01-182) could have accepted the Permittee's discharges without a NPDES permit (see Finding 10, p. 6.37 and Finding B. 6, pp. 6.110-6.111), the Permittee obtained and was subject to the requirements of the Permit. ~~In addition to copper~~Once it started sampling, the Permittee reported exceedences of copper on two occasions.~~, for~~ For an unknown period of time prior to September 24, 2007 the ~~discharge contained~~

~~the~~Permittee used the additive Flo-Zyme in the sump. The Permittee is seeking local permits to direct the discharge to the sanitary sewer in the future. However, as of the hearing date the Permittee had not sought to terminate NPDES permit coverage. The Permittee's repeated efforts to seek state and local permits are inconsistent with the Permittee's argument that it does not need a permit for the discharge because the discharges were covered by Order No. 01-182. Similarly, Permittee's counsel conceded at the hearing that a discretionary penalty may be appropriate for the failure to file, just not a mandatory one. Thus, the discharges were reportable under the Permit.

11. The Permittee contends the Legislature intended S.B. 1284 to apply to its situation. In support, the Permittee submitted the Assembly Committee on Environmental Safety and Toxic Materials analysis of the bill as amended on June 2, 2010. The Permittee stated in its May 19, 2011 Response to Hearing Panel Report and Proposed Order (Response), that the Permittee referred to the legislative history "merely to show that the genesis of SB 1294 being with the Pico Water District that had incurred mandatory minimum penalties in an amount similar to that which Casden faced." (Response, p. 7.) Based on this representation, official notice of additional bill analyses is not necessary.~~This analysis, which relates to the June 2 amendment of the bill, states that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act." (AR, p. 6.352.) However, as described in the following paragraphs, this sentence was based on an earlier version of the bill, and was removed from the final Senate Bill Analysis. Therefore, the Los Angeles Water Board cannot infer any intent to apply the new provision to the Permittee's factual scenario based on that statement.~~

12. As introduced (February 19, 2010), S.B. 1284's effective date provision read, "The amendments made to this section by this act during the second year of the 2009-10 Regular Session of the Legislature apply to violations without regard to the date on which the violations occurred or occur." The bill would have eliminated mandatory minimum penalties in all three of the following situations:

> (4) A violation for a failure to file a discharge monitoring report for which the state board or a regional board does not inform the discharger of the alleged violation within 90 days of the date on which the discharge monitoring report was required to be filed.
>
> (5) A violation that consists of a failure to file a discharge monitoring report for any period in which no discharge occurred.
>
> (6) A violation that consists of a failure to file a discharge monitoring report for any period in which discharges do not violate effluent limitations contained in waste discharge requirements that include numeric effluent limitations.

~~13.The Senate Committee on Environmental Quality's analysis concluded that it was unfair to apply the new exemptions to existing violations. (http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1251-1300/sb_1284_cfa_20100416_174742_sen_comm.html (4/19/10).)~~

~~14.~~13. The Senate amended the bill on April 26 to delete the effective date provision.

~~15.~~14. The June 2 Senate amendment deleted proposed subdivisions (j)(4)-(6), cited above, and added language similar to what appeared in the final version. The June 2 version created the two exemptions, referred to below as a no-discharge exemption and a first-time-offender exemption. At that point, the bill did not require the discharger to cure the violations within any particular time after receiving notice. The requirements for the no-discharge exemption only required a statement that there were no discharges and an explanation for the failure to file. The first-time-offender exemption only required that the discharger had not received previously notice of a violation (i.e., notices for violations other than the current violation(s)), and that no effluent limit violations were associated with the current failure to file. The June 2 version added a new retroactive effective date provision, which applied the changes to any violations for which penalties had not been imposed before January 1, 2011, regardless of the date of violation. ~~Like the analysis cited by the Permittee, the Senate Floor analysis of this version stated that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act."~~

~~16.~~15. The Assembly amended the bill on June 23. This version changed the no-discharge exemption to include the 30-day requirement and added the requirement that there be no "reportable" discharges. The first-time-offender exemption was revised, among other things, to specify that the discharger not "on any occasion" previously receive notice of a failure to file, and to require the discharger to file the missing reports within 90 days after notification. The effective date provision was expanded to include complaints issued on or after July 1, 2010, regardless of the date of violation.

~~17.~~16. The August 20 Senate amendment changed the 90-day compliance requirement for first-time offenders to 30 days. ~~With respect to the effective date, the Senate Floor Analysis states that the bill "applies to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010 without regard to the date on which the violations occurred." This statement of the effective date replaced the prior language stating that the bill applied to dischargers with outstanding notices of violation at the date of the enactment. Although several prior analyses issued after the June 23 amendment continued to include language from prior analyses stating that the bill applied to dischargers with outstanding notices of violation[1], the final bill analysis did not include any such statement.~~

~~[1] Senate analysis of August 20 and June 23 amendments; Assembly Judiciary Analysis of June 23 amendment (June~~

CONCLUSIONS OF LAW

6. Water Code section 13385.1, subdivision (a)(2) does not exempt the Permittee from mandatory minimum penalties. Subdivision (a)(2) applies "to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." (Water Code § 13385.1, subd. (e).) The Complaint was filed after July 1, 2010, so subdivision (a)(2) applies if the Permittee satisfies all requirements of subdivision (a)(2). Subdivision (a)(2) requires that~~applies if~~ (i) the Discharger submits a "statement that there were no discharges to waters of the United States reportable under the applicable waste discharge requirements during the relevant monitoring period," supported by additional information or evidence upon request, (ii) the statement states why the reports were late, and (iii) the statement is submitted before the applicable discharge monitoring report is due or within 30 days after the Regional Water Board provides notice of the late report. ~~Subdivision (a)(2) applies "to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." (Water Code § 13385.1, subd. (e).) The Complaint was filed after July 1, 2010, so subdivision (a)(2) potentially applies. However, in order to qualify for the mandatory minimum penalty relief that subdivision (a)(2) provides, a discharger must meet all applicable requirements, including the requirement to file the statement within 30 days of notice.~~

7. Although subdivision (e) explicitly provides for retroactive application of subdivision (a)(2), nothing in section 13385.1 provides an exception to the 30-day requirement for violations that occurred or notices that were issued before the enactment of subdivision (a)(2). The 30-day requirement is unambiguous, and it is not necessary to resort to legislative history or other rules of statutory analysis. Even if it were ambiguous, nothing in the statute or the legislative history evidences any legislative intent to require the Water Boards to provide a new notice and opportunity to cure, make the 30-day requirement inapplicable to violations outstanding as of January 1, 2011, or provide a grace period to dischargers who filed the delinquent reports before January 1, 2011. The similarity between the penalties in this case and the penalties assessed against the Pico Water District do not address what the Legislature intended by "reportable" discharges or whether the Legislature intended to make the 30-day requirement inapplicable under this fact scenario. Although the Permittee had no reason under the *Water Quality Enforcement Policy* to file the statement before January 1, 2011, the Legislature could have waived this requirement for dischargers with outstanding violations as of January 1, 2011, or dischargers who cured outstanding violations or received notices of late reports prior to January 1, 2011. No such provisions appear in the statutory language.

~~29, 2010)~~

8. Even if the 30-day requirement were somehow inapplicable to the Permittee~~In addition~~, the Permittee would not qualify for the relief provided under subdivision (a)(2) because the Permittee had reportable discharges during the relevant monitoring periods. The discharges were reportable under the Permit for the reasons set forth in Findings of Fact 9-10.

9. The Permittee did not demonstrate that the Prosecution Team treated the Permittee differently than other similarly situated dischargers. The Prosecution Team explained that Glenborough Cahuenga, LLC was treated differently because that case involved a no-discharge situation and was resolved according to the *Water Quality Enforcement Policy* before S.B. 1284 took effect. Similarly, the Prosecution Team in the matter of the Crescenta Valley Water District found that the discharger had no discharges to waters of the United States during six of the seven reporting periods for which the discharger was initially cited.

10. The Permittee asserts the mandatory minimum penalty statute is unconstitutional. The California Constitution prohibits the Los Angeles Water Board or the State Water Board from declaring that Water Code section 13350 is unconstitutional or refusing to enforce the statute on that basis. (Cal. Const., art. III, § 3.5; State Water Board Orders No. WQ 86-13 (BKK Corporation), pp. 4-5; WQ 85-10 (Lake Madrone Water District), p. 5.) The board makes the following findings to assist in any subsequent review of this Order. The NPDES permitting program relies on a system of self-reporting. (*Brentwood, supra,* at 723.) The Legislature recognized this when it subjected reporting violations to mandatory minimum penalties. "In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonable related to a proper legislative goal." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) A statute is presumed to be constitutional and must be upheld unless its unconstitutionality clearly, positively and unmistakably appears." (*Id.* at 404.) A statute may be unconstitutional as applied if the penalties are mandatory and potentially unlimited in duration. (*Id.* at 399; *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352.) *Hale* did not universally condemn penalties that indefinitely accumulate on a daily basis until the violation is corrected. In fact, it expressly declined to do so. (*Hale*, *supra*, 22 Cal.3d at 404.) Here, the penalties were not potentially unlimited because a discharger can file the late reports and stop penalties from accruing or file a statement that no monitoring was performed, as the Permittee did in this case. Thus, the statute does not have the potential to be unconstitutional as applied.

EXHIBIT 3

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

LOS ANGELES REGION

FRANCINE DIAMOND, PANEL CHAIR

In the Matter of the)
Regional Board Public)
Meeting/26th Panel Hearing)
)
ITEM NO. 6)
)

PARTIAL TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, March 17, 2011

Reported by:

MARCENA M. MUNGUIA,
CSR No. 10420

Job No.:
B6698WQLA(P)

1 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
2 LOS ANGELES REGION
3 FRANCINE DIAMOND, PANEL CHAIR
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7 In the Matter of the)
Regional Board Public)
8 Meeting/26th Panel Hearing)
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9 ITEM NO. 6)
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15 Partial Transcript of Proceedings, taken at
16 700 North Alameda Street, Board Room, Los Angeles,
17 California, on Thursday, March 17, 2011,
18 heard before the LOS ANGELES REGIONAL WATER QUALITY
19 CONTROL BOARD, reported by Marcena M. Munguia,
20 CSR No. 10420, a Certified Shorthand Reporter
21 in and for the State of California.
22
23
24
25

1 APPEARANCES:
2 PANEL CHAIR: Francine Diamond
3 BOARD MEMBERS: Steve Blois
Maria Mehranian
4 Charles Stringer
5 EXECUTIVE OFFICER: Samuel Unger
6 ASSISTANT EXECUTIVE OFFICER: Deborah Smith
7 ASSISTANT CHIEF COUNSEL: Lori Okun
8 STAFF COUNSEL: Jennifer Fordyce
9 For the Prosecution Team, BALCOM RANCH: Jennifer Fordyce
10 Rebecca Veiga Nascimento
11 Sam Unger
12 For the Respondent BALCOM RANCH: Paul Beck
Mark Brown
13 Patricia Thomas
David Park
14
For the Prosecution Team, PORT OF LOS ANGELES: Ann K. B. Carroll
15 Hugh Marley
Cassandra Owens
16
For the Permittee PORT OF LOS ANGELES: Kenneth Mattfeld
17 Christopher Foley
18 For the Prosecution Team, CASDEN PROPERTIES, LLC: Julie Macedo
19 Kristie Kao
20 Augustine Anijielo
For the Permittee CASDEN PROPERTIES, LLC: Peter R. Duchesneau
21 Dana Palmer
Kay Swikart
Robert Lofy
22 Charles Buckley
23 For the Prosecution Team, CRESCENTA VALLEY WATER DISTRICT: Mayumi Okamoto
24 Pansy Yuen
Hugh Marley
Paula Rasmussen
25

1 APPEARANCES (continued):
2 For the Permittee CRESCENTA VALLEY WATER DISTRICT: James D. Ciampa
James Bodnar
3 ALSO PRESENT: Ronji Moffett
Alex Carlos
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1 Los Angeles, California, Thursday, March 17, 2011
2 (Partial transcript)
3
4
5
6 MS. DIAMOND: Moving right along, we're going to go
7 to Items Number 6 and 7.
8 Good afternoon. I'm going to be starting on
9 Items Number 6 and 7. We're going to read the opening
10 statement for this Panel hearing. I'm sorry -- yes.
11 The next two agenda items are involving
12 Administrative Civil Liability complaints against Casden
13 Properties and Crescenta Valley Water District. These
14 two matters are not connected in any way, but there are
15 certain legal issues that are common to both matters.
16 In the interest of the efficiency, the
17 prosecuting attorneys for these two matters will give a
18 single presentation on those legal issues. This joint
19 presentation, including the transcript and any PowerPoint
20 slides, will be part of the record for each matter.
21 The joint presentation will address recent
22 amendments to the Mandatory Minimum Penalty requirements
23 of Section 13385 of the Water Code. The amendments are
24 known as SB 1284 and reduce the amounts of MMPs for
25 certain reporting violations. The joint presentation is

Page 7

1 limited to general information about SB 1284, including
2 its history and the prosecuting attorneys' legal position
3 about its legal effective date.
4 No specific testimony or discussion on reporting
5 requirements or alleged violations by either Discharger
6 will be included in the joint presentation. The
7 attorneys for all parties have agreed to this procedure.
8 Following the joint presentation, I will open
9 the hearing for the Casden Properties matter. After that
10 matter is concluded, I will open the hearing for the
11 Crescenta Valley matter. I will provide additional
12 information about the order of proceedings at that time.
13 The Prosecuting attorneys are Julie Macedo in
14 the Casden Properties matter and Mayumi Okamoto in the
15 Crescenta Valley matter. Since they are providing legal
16 argument and not evidence, I will not administer the oath
17 at this time.
18 The attorneys for Casden Properties and
19 Crescenta Valley Water District will have the opportunity
20 to respond to the joint presentation and state any
21 objections during their separate hearings.
22 Board members and the Board's advisors may ask
23 questions at any time.
24 Ms. Macedo and Ms. Okamoto, will you please
25 proceed.

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1 MS. OKAMOTO: Thank you, Chair Diamond.
2 My name is Mayumi Okamoto and I'm an attorney
3 with the Office of Enforcement, and Ms. Macedo as well is
4 an attorney from the Office of Enforcement, and we
5 represent the Prosecution Team for Items Number 6 and 7.
6 Both Ms. Macedo and I would like to request that
7 whatever remaining time we have in this 20-minute
8 presentation is allocated over to our case-in-chief
9 presentations, if that's possible.
10 Items 6 and 7 are complaints to assess Mandatory
11 Minimum Penalties for late-reporting violations. Both
12 items potentially involve the application of new
13 subdivisions of 13385.1 enacted by Senate Bill, or
14 SB 1284.
15 Effective January 1st, 2011, these new
16 subdivisions amend the MMP provision dealing with
17 late-reporting violations.
18 For Item 6, subdivision (a)(2) dealing with
19 no-discharge scenarios will be discussed by Ms. Macedo.
20 For Item 7, subdivision (b) dealing with
21 Dischargers where no effluent violations occurred will be
22 discussed by myself in this presentation.
23 In order to provide background on SB 1284, I'll
24 briefly take you through a chronology of the
25 late-reporting provisions.

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1 January 1st, 2004, 13385.1 was added to assess
2 MMPs for the failure to file monitoring reports by the
3 deadlines in the Permits Monitoring Reporting Program.
4 This is the general rule governing MMPs and late reports,
5 and I will refer to this as the "$3,000 every 30 days
6 late" rule, as the penalty accrues every 30 days
7 following the deadline for the required report.
8 On May 20th, 2010, the Office of Administrative
9 Law approved the State Water Board's Water Quality
10 Enforcement Policy. Portions of the Enforcement Policy
11 modified the definition of a Discharge Monitoring Report
12 where no discharges to waters of the United States
13 occurred.
14 Additionally, these provisions provided guidance
15 on the rule with respect to the modified definition. If
16 the required report is not received by the deadline, the
17 Enforcement Policy creates a presumption that discharges
18 did occur, but that presumption is rebuttable if the
19 Discharger does the following: The Discharger submits a
20 written statement to the Regional Board signed under
21 penalty of perjury stating that, first, no discharges to
22 waters of the United States occurred during the relevant
23 monitoring period and, second, states the reasons why the
24 report was not timely submitted to the Regional Board.
25 Note that the Enforcement Policy provisions, as

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1 you see on the screen, do not specifically provide a
2 deadline in which a statement has to be submitted to the
3 Regional Board.
4 Furthermore, the rebuttable presumption puts the
5 onus on the Discharger to submit a statement and the
6 Regional Board is not required to affirmatively provide
7 written notice to the Discharger.
8 On September 30th, 2010, Governor Schwarzenegger
9 approved SB 1284, legislation which was introduced during
10 the 2009/2010 session. January 1st, 2011 became the
11 effective date for provisions enacted by SB 1284.
12 So how does SB 1284 amend provisions dealing
13 with late-reporting violations? Well, it does a few
14 things. First, it adds new subdivisions; it provides
15 exceptions to the rule which are limited, in that
16 specific requirements need to be met; and finally,
17 certain provisions -- specifically, subdivision (b)
18 sunsets on January 1st, 2014. So it's a limited term in
19 which that provision is applicable.
20 During the interim period or the gap period
21 between the approval date of SB 1284, which was
22 September 30th, 2010, and the effective date of
23 January 1st, 2011, guidance in the Enforcement Policy
24 provisions continued to be followed for reports where no
25 discharges to waters of the U.S. occurred.

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1 So why was this the chosen approach? Well,
2 first, the Enforcement Policy approach was adopted by the
3 State Water Board and it provided guidance on the rule in
4 those particular scenarios; and secondly, the Enforcement
5 Policy provisions are broader than the provisions enacted
6 by SB 1284 and benefited the Discharger in that it didn't
7 put a time constraint on when a Statement of No Discharge
8 needed to be submitted to the Regional Board.
9 MS. MACEDO: As Ms. Okamoto stated, I'm Julie Macedo.
10 I'm a Senior Staff Counsel with the Office of
11 Enforcement. I understand today has been and will
12 continue to be a long day, so I appreciate the Board's
13 fortitude.
14 This slide presents the actual text of Water
15 Code 13385.1(a)(2)(A). I won't read it because I believe
16 it's all in front of you, but the following slide
17 presents limitations as to what type of statement will be
18 accepted by a Discharger: A statement that there were no
19 discharges to waters of the United States reportable
20 under the applicable waste discharge requirements during
21 the relevant monitoring period; the reason the required
22 report was not submitted to the Regional Board by the
23 deadline for filing that report.
24 The next slide draws your attention to critical
25 language, we feel, in 13385.1 (a)(2)(A). Notice that the

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1 highlighted language requires either the late report or
2 the statements to be provided "at any time prior to the
3 date a Discharge Monitoring Report is due or within 30
4 days after receiving written notice from the State Board
5 or a Regional Board of the need to file a Discharge
6 Monitoring Report."
7 In summary, to qualify under 13385.1(a)(2)(A),
8 you must submit the reports on time or within 30 days of
9 written notice; instead of the permit -- excuse me.
10 Instead of the report, an acceptable statement can be
11 provided by the deadline or within 30 days of written
12 notice which provides that there were no reportable
13 discharges to water; and a credible reason why the report
14 was not submitted by the deadline.
15 Note that 13385.1(a)(2)(A) has a limitation that
16 the Enforcement Policy does not contain. The Enforcement
17 Policy did not contain a deadline for submitting the
18 statement and the Enforcement Policy was before the
19 legislature during the 2009/2010 legislative session.
20 After January 1st, 2011, the effective date of
21 13385.1(a)(2)(A), Regional Boards must follow the
22 statutory direction as set forth in that statute.
23 While the Enforcement Policy provided guidance
24 and gave Dischargers the benefit of submitting a
25 statement without a time limitation, 13385.1(a)(2)(A)

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1 provides that a Regional Board cannot accept a statement
2 submitted more than 30 days after the DMR is due or
3 written notice has been provided.
4 This is clearly narrowing the policy. The
5 Enforcement Policy was enacted ten years after the
6 enactment of the first MMP statutes and several years
7 after the change in definition which expanded the
8 definition of "serious violation" to include the failure
9 to file a report. So the legislature is presumed to have
10 ten years of these types of cases and the statewide
11 report on MMPs and the Enforcement Policy before it when
12 it chose to narrow the policy.
13 This slide provides the text of 13385.1(e),
14 which provides that:
15 "The amendments made to this section by
16 Senate Bill 1284 shall apply to violations
17 for which an ACLC has not been filed before
18 July 1, 2010, without regard to the date on
19 which the violation can occur."
20 This slide provides an example of how
21 13385.1(a)(2)(A) and 13385.1(e) act in concert. In 2007,
22 the Discharger fails to submit reports. On March 1st,
23 the Regional Board prepares an ACLC and serves it on the
24 Discharger. By March 31st, the Discharger then submits
25 either the late reports or an acceptable statement that

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1 there were no discharges and the reason the reports were
2 not timely filed.
3 This allows the Discharger to take advantage of
4 the exception in 13385.1(a)(2)(A) and also falls within
5 the 13385 plain language. The ACLC was not filed on or
6 before July 1st, 2010, although the violations did occur
7 prior to that date.
8 You'll hear testimony today about both the plain
9 language of the statute and the legislative history. If
10 a statute is clear on its face, consideration of
11 legislative intent is improper. The Board's role is to
12 read the statute and determine whether it is clear on its
13 face. The plain language is the best indication of the
14 legislature's intent. If you feel the statutes are
15 subject to two reasonable interpretations, you can look
16 to legislative intent to help you resolve any ambiguity.
17 MS. OKAMOTO: Water Code Section 13385.1(b) varies a
18 little bit from the subdivision that Ms. Macedo just
19 spoke of, in that it contemplates scenarios where a
20 discharge to waters of the U.S. did occur versus a
21 scenario where no discharges of waters to the U.S.
22 occurs.
23 13385.1(b) provides, notwithstanding the rule,
24 or as an exception to the rule, MMPs shall continue to
25 apply for serious late-reporting violations but only for

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1 each required report and not in the 30-day incremental
2 periods if both of the following conditions are met:
3 First, the Discharger did not on any occasion previously
4 receive an ACLC or a civil complaint for failure to
5 timely file reports; second, a Notice of Violation for
6 the failure to timely file reports; or third, a notice of
7 the obligation to file a Discharge Monitoring Report.
8 And the second -- the second condition is that the
9 discharges during that reporting period do not violate
10 effluent limitations in the permit.
11 In addition, the exception to the rule shall
12 only apply to a Discharger who does both of the
13 following: files a report that had not been previously
14 filed within 30 days after receiving written notice
15 regarding the failure to timely file a report; and
16 second, if the Discharger pays all penalties that are
17 assessed under the exception to the rule within 30 days
18 after an order is issued.
19 In addition, subdivision (b) makes clear that
20 the failure to file a report is still subject to
21 discretionary penalties and that the effective term of
22 this exception sunsets on January 1st, 2014.
23 So for subdivision (b), we're looking at an
24 effective date of this subdivision beginning January 1,
25 2011, sunsetting on January 1st, 2014.

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1 So in summary, under the exception in
2 subdivision (a)(2) that Ms. Macedo spoke of, the failure
3 to file a report is not subject to MMPs under the rule if
4 the Discharger submits the report on time or within 30
5 days of written notice or, instead of the report, submits
6 a written statement by the deadline or within 30 days of
7 notice stating that there are no reportable discharges
8 during the relevant monitoring period and the reasons why
9 the report was not timely submitted. If these
10 requirements are met, then the exception will apply to
11 those violations where an ACLC has not been filed before
12 July 1st, 2010, regardless of when those violations
13 occurred.
14 Under the exception in subdivision (b), MMPs
15 will continue to apply but only for each required report
16 and not every 30 days; if the Discharger did not
17 previously receive written notice; the discharges during
18 the period did not violate effluent limitations; the
19 Discharger files the report within 30 days of receiving
20 written notice; and finally, the Discharger pays all
21 penalties assessed within 30 days. If these requirements
22 are met, then the exception will apply to those
23 violations where an ACLC had not been filed before
24 July 1st, 2010, regardless of when those violations
25 occurred.

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1 Thank you. And that concludes our joint
2 presentation.
3 MS. DIAMOND: Thank you.
4 MS. OKUN: What was the time on that?
5 MS. MACEDO: 13.
6 MR. CARLOS: Seven minutes left.
7 MS. OKUN: The Chair will give you seven minutes in
8 addition in the other two presentations.
9 MS. OKAMOTO: Thank you.
10 MS. MACEDO: Thank you.
11 MS. DIAMOND: I'm going to read the opening statement
12 for -- this is the date, time, and place set for Item
13 Number 6.
14 I'll start over with the microphone on.
15 This is the date, time, and place set for Item 6
16 which is a hearing in the matter of Administrative Civil
17 Liability, Complaint Number R4-2008-0199-M, issued to
18 Casden Properties, LLC for Mandatory Minimum Penalties.
19 This hearing is taking place at 700 North
20 Alameda Street, Los Angeles, California.
21 This hearing is being held before a duly
22 authorized Panel of members of the Los Angeles Regional
23 Water Quality Control Board.
24 I am Francine Diamond, Chair of the Los Angeles
25 Water Board. Also serving on the Panel are

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1 Charles Stringer, Maria Mehranian, and Steve Blois, who
2 are also members of the Regional Water.
3 The Panel is being advised by Sam Unger, our
4 Executive Officer, and Laurie Okun, Assistant Chief
5 Counsel. Julie Macedo, Staff Counsel with the State
6 Water Board's Office of Enforcement is assisting the
7 Prosecution Team, but neither she nor the Prosecution
8 staff are advising the Regional Board in this matter.
9 The Prosecution staff is a party for the purposes of this
10 proceeding.
11 The official record of the testimony at this
12 hearing will be created by our court reporter. We are
13 also using a tape recorder today, but the tape recording
14 will not be an official record of the hearing.
15 The transcript and PowerPoint slides regarding
16 SB 1284 that Ms. Macedo and/or Ms. Okamoto previously
17 presented are hereby made a part of this record.
18 At the end of this hearing, we will close the
19 matter in this record and the Panel will discuss and
20 arrive at a proposed report of findings of fact,
21 conclusions of law, and recommend a decision for
22 consideration by the full Board. Our recommendation will
23 be presented to the Regional Board at a future meeting.
24 You will be notified of the date and location of
25 that hearing and at that time, the Board may adopt,

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1 reject or modify the recommendation of this Panel.
2 Absent unusual circumstances, you will not have another
3 opportunity to provide argument or evidence to the full
4 Board. Thus, you are encouraged to present today all the
5 evidence that you would like this Panel or the full Board
6 to consider.
7 If anyone in the audience wishes to address the
8 Panel today, please fill out a speaker card and hand it
9 to the clerk.
10 I've received speaker cards for the following
11 people: Dana Palmer on behalf of Casden. I hope I
12 pronounce this correctly. Peter -- tell me.
13 MR. DUCHESNEAU: Duchesneau.
14 MS. DIAMOND: -- Duchesneau on behalf of Casden;
15 Kay Swikart for Casden; Ronald Lofy for Casden; Charles
16 Buckley for Casden.
17 We will proceed as follows: First we will hear
18 from the Prosecution Team. Then the representatives of
19 Casden Properties may cross-examine the Prosecution
20 Team's staff witnesses and present their case, and then
21 any interested persons will have an opportunity to
22 address the Panel.
23 The Prosecution Team may then provide rebuttal
24 and a closing statement and Casden Properties may provide
25 a closing statement if they so choose. Casden Properties

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1 has one hour total allotted for their presentations. The
2 time limit's including the combined time for
3 presentations and any Cross-Examination or closing
4 statements.
5 The Prosecution Team has 40 minutes since their
6 presentation also includes the joint presentation on
7 SB 1284.
8 The Panel members may ask questions of the
9 parties at any time but will generally wait until the end
10 of the presentation. Interruptions for Board questions
11 do not count towards your time limits.
12 I will now administer the oath, and if you
13 intend to speak or provide testimony on any of these
14 matters on Casden Properties, please stand and raise your
15 right hand and answer this question.
16 (Whereupon all prospective witnesses were
17 collectively sworn)
18 MS. DIAMOND: The deadlines for submitting written
19 comments and documentary evidence was January 18th for
20 interested persons and February 16th for Casden
21 Properties. The items that were received by the
22 deadlines are hereby made a part of the record.
23 The Prosecution Team's rebuttal brief is also a
24 part of the record, as Ms. Okun will explain in a minute.
25 If you use any visual aids illustrating

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1 previously submitted evidence with your presentation, you
2 must leave a copy with the Panel so that material can be
3 made a part of the record. No other documentary evidence
4 will be accepted into the record unless I make a specific
5 ruling to allow it.
6 Ms. Okun will now address several procedural
7 matters that arose before the hearing.
8 MS. OKUN: The first thing is I don't think
9 Chair Diamond read the names of the Prosecution Team who
10 will be presenting the case, so I'll just let you
11 introduce yourselves.
12 MS. MACEDO: We will during the course of the
13 presentation, if that's acceptable.
14 MS. OKUN: That's fine.
15 In terms of the procedural matters, as
16 Ms. Diamond indicated, the rebuttal brief has been
17 accepted into the record.
18 In addition to the rebuttal brief, there were a
19 number of e-mails related to procedural objections -- I
20 can't tell if you're raising your hand to speak or --
21 MS. MACEDO: No.
22 MS. OKUN: -- procedural objections related to both
23 the joint presentation and to the rebuttal brief. With
24 respect to the joint presentation, those objections were
25 withdrawn; and with respect to the rebuttal brief, I have

1 put all the e-mail correspondence into the record. I
2 gave each party a copy of all the e-mails so that I don't
3 have to read those into the record. If you notice that
4 anything's missing after the hearing, please let me know
5 within a week of this hearing, but I think that it's
6 complete.
7 With respect to the rebuttal brief, there were
8 some objections to it and I've documented in an e-mail
9 correspondence that one sentence was stricken and also
10 provided some other responses to those objections, and
11 those have been provided to the Board members. I made
12 clear what cautions and advice I've given to the Board
13 members, so that's all been documented. Thanks.
14 MS. DIAMOND: Do any of the Panel members have any
15 ex parte communications in regard to this matter?
16 Okay. So we'll proceed with the Prosecution's
17 presentation.
18 MS. KAO: Good afternoon, Madam Chair and members of
19 the Panel.
20 My name is Kristie Kao and I'm a Water Resource
21 Control Engineer with the Regional Board in the
22 Enforcement Unit.
23 I am presenting for the Panel's consideration a
24 Mandatory Minimum Penalty for Casden Properties, LLC for
25 violating their Waste Discharge Requirements. The

1 purpose of this presentation is to brief you on the basis
2 of the MMP and to present a recommendation to the Board.
3 For the record, I would like to move into the
4 administrative record Exhibits 1 through 27 and submit
5 into evidence Exhibits 5 through 27 of your package.
6 The Permittee owns the Wilshire-Doheny building
7 located at 9090 Wilshire Boulevard in Beverly Hills,
8 California. The facility is permitted to discharge up to
9 7200 gallons per day of wastewater from the dewatering
10 system into a nearby storm drain. The wastewater flows
11 through the storm drain system into Ballona Creek, a
12 navigable water of the United States.
13 On August 5th, 2004, the Executive Officer
14 determined that the waste discharges from the Permittee's
15 facility met the conditions to be enrolled under Order
16 Number R4-2003-0111. The 2003 permit was subsequently
17 rescinded and replaced with Order Number R4-2008-0032.
18 The Permittee was so enrolled effective November 18th,
19 2009.
20 The 2008 permit includes daily maximum and
21 monthly average effluent limitations for copper of 24 and
22 12.5 micrograms per liter, respectively. Any discharge
23 containing pollutants violating the effluent limitations
24 set forth in the Waste Discharge Requirements, or WDRs,
25 is prohibited by California Water Code Section 13376.

1 Among the provisions of the Permittee's WDRs are
2 the requirements to implement a Discharge Monitoring
3 Program and to prepare and submit quarterly NPDES
4 monitoring reports to the Regional Board, pursuant to the
5 authority of Water Code Section 13383.
6 On December 17, 2010, the Regional Board issued
7 Complaint Number R4-2008-0199-M to the Permittee for four
8 effluent limit violations of copper and 221
9 late-reporting violations, and that is Tab 6.2 of your
10 packet.
11 Water Code Section 13385(h) requires the
12 Regional Board to assess an MMP of $3,000 per each
13 serious violation. A serious violation as defined by
14 this section is:
15 "Any waste discharge that violates the
16 effluent limitations contained in the
17 applicable waste discharge requirements for
18 a Group II pollutant by 20 percent or more."
19 Water Code Section 13385.1(a)(1) requires the
20 Regional Board to assess Mandatory Minimum Penalty that
21 follows the $3,000 every 30 days late rule, as explained
22 during the joint opening presentation. Therefore, all
23 225 violations are subject to Mandatory Minimum Penalties
24 in the amount of $675,000.
25 The maximum Civil Liability allowed by the Water

1 Code for the violations cited is $10,000 per day of
2 violation plus $10 for every gallon discharged but not
3 cleaned up, exceeding 1,000 gallons.
4 If the unpermitted discharge -- if the
5 unpermitted discharge violations were subject to
6 discretionary penalties, the potential maximum Civil
7 Liability would greatly exceed the MMPs sought by this
8 ACLC.
9 In response to the ACLC and draft Hearing Panel
10 Package, the Permittee alleges that the effluent
11 violations are misplaced because they believe that the
12 water being discharged is not groundwater, and therefore
13 not regulated by the WDRs, the violations should be
14 dismissed. Also, they believe that the copper violations
15 are within relevant drinking water standards.
16 The Permittee also states that even if a penalty
17 were appropriate, the proposed penalty is inappropriately
18 duplicative because the ACLC charges two separate
19 violations arising out of a single discharge involving an
20 exceedance of one pollutant.
21 Whether the violations arose from groundwater or
22 potable water, the 2008 permit states that wastewater
23 discharge from permanent or temporary dewatering
24 activities can include, but are not limited to the
25 following: treated or untreated wastewater from

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1 permanent or temporary construction dewatering
2 operations; subterranean seepage dewatering; incidental
3 collected stormwater from basements; or processed and
4 nonprocessed wastewater that meet the eligibility
5 requirements or eligibility criteria and could not be
6 covered under other specific general NPDES permits.
7 Therefore, the irrigation water that is pumped
8 to the sump would be included as an appropriate
9 discharge; however, regardless of how the discharge is
10 characterized or if a discharge even occurred, the permit
11 requires the Permittee to submit quarterly Monitoring
12 Reports.
13 MR. DUCHESNEAU: Madam Chair, this is Pete
14 Duchesneau. I'm speaking on behalf of Casden. I would
15 like to move to strike that last argument with regard to
16 the application of the permit to the nongroundwater
17 discharges, consistent with the earlier ruling on
18 Casden's motion with regard to the rebuttal brief and
19 with regard to the policy of the State Board against
20 surprises, due process, and prejudice. This was an
21 argument that has not been raised before in any respect.
22 MS. MACEDO: I'd like to address that argument.
23 In Casden's brief submitted by Mr. Duchesneau,
24 Footnote 4 specifically in my brief set forth all of the
25 responses to Casden's original arguments and certainly

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1 whether Casden is covered by a permit at all or has made
2 a discharge or a reportable discharge under the terms of
3 its WDRs is relevant; and I believe you ruled, Ms. Okun,
4 that that testimony was proper.
5 MS. OKUN: Can you back up to the last slide?
6 Well, first of all, I think you're out of chair,
7 Ms. Macedo, but I agree this is a proper subject.
8 MS. DIAMOND: I agree. And so will you continue.
9 MS. KAO: The Permittee's argument that the effluent
10 limit violations for copper are within relevant drinking
11 water standards is flawed. Drinking water standards are
12 based on the protection of human health while effluent
13 limitations in the dewatering permit are meant to be
14 protective of both aquatic organisms and human health;
15 therefore, the most stringent limitation applies.
16 In Casden's case, it is required to comply with
17 the heavy metal TMDLs applicable of Ballona Creek, and
18 these heavy metal limitations are mandatory.
19 MS. MACEDO: I don't mean to interrupt, Ronji. We
20 don't have a time. Did you stop it and not start it
21 again?
22 MS. MOFFETT: Yes. He's stopping it.
23 MS. KAO: Regarding the duplicative effluent
24 violations, the 2008 permit states:
25 "The Discharger shall be deemed out of

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1 compliance with effluent limitations if the
2 concentration of the priority pollutant in
3 the monitoring sample is greater than the
4 effluent limitation" and "If only one sample
5 is taken during the calendar month and the
6 analytical result for that sample exceeds
7 the average monthly effluent limitation, the
8 Discharger will be considered out of
9 compliance for that calendar month."
10 Therefore, the effluent limits for copper were
11 exceeded for both the daily maximum and average monthly
12 limitations.
13 And you can see that on page 6.131 of your
14 package.
15 Augustine Anijielo, the General Permitting Unit
16 Chief, will present the next several slides.
17 Thank you.
18 MR. ANIJIELO: Good afternoon, Madam Chair, members
19 of the Panel. My name is Augustine Anijielo and I am the
20 Chief of the General Permitting Unit.
21 On February 15, 1996, on February 11, 2004, and
22 on February 2, 2009, Casden submitted a completed
23 application to renew its NPDES permit. Casden
24 established the need for groundwater discharge and the
25 need for its permits to be renewed each time.

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1 On each occasion, the Regional Board renewed
2 Casden's permits. Never once did Casden object to staff
3 renewal of the permits. The general permit authorized
4 groundwater, incidental stormwater runoff, and other
5 miscellaneous waste discharges.
6 Casden is authorized to discharge from its sump
7 through Discharge Outfall M-001. Regardless of the
8 source of water into the sump, discharges from that sump
9 must comply with the provisions and requirements of the
10 general NPDES permit. Casden Properties is appropriately
11 regulated for discharge from its sump to waters of the
12 United States.
13 Other permitting issues: Dischargers are
14 required to submit water quality analytical data of their
15 influent and their permitting conditions for enrollment
16 under a general permit. All prior violations that are
17 detected above this current criteria are given effluent
18 limitations in the permit coverage.
19 Pre-permitting screening of groundwater by
20 Casden in January 2009 indicated copper concentration at
21 35.9 micrograms per liter. The screening criteria for
22 copper is 3.7 micrograms per liter, triggering a copper
23 effluent limitation.
24 The receiving water for Casden's discharges is
25 Ballona Creek. Ballona Creek has a mandatory TMDL for

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1 copper, lead, selenium and zinc. The discharge from
2 Casden must comply with the Ballona Creek heavy metals
3 TMDL, the California Toxic Rule, and other applicable
4 criteria. Casden actually is benefiting from higher
5 copper TMDL limitations that are mandatory instead of
6 more stringent CTR limitations for copper.
7 To terminate a permit, Casden has to take some
8 affirmative action. They must request in writing that
9 the Regional Board terminate the permit and state that
10 the facility has stopped all discharges from the
11 facility. Not filing a Notice of Intent will not
12 terminate enrollment under a general permit. Permits
13 will not terminate, too, if there are remaining
14 enforcement issues. If there are no remaining
15 enforcement issues, the Regional Board will schedule an
16 inspection to verify that the discharge has stopped.
17 Then and only then, termination will be confirmed by a
18 letter signed by the Executive Officer of the Regional
19 Board.
20 Now Kristie will continue with the rest of it.
21 MS. KAO: For the record, this is Kristie Kao.
22 Staff concludes that the Permittee violated
23 Water Code Section 13376 and Order Numbers R4-2003-0111
24 and R4-2008-0032 for which a Mandatory Minimum Penalty in
25 the amount of $675,000 must be assessed for these

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1 violations.
2 The Prosecution Team recommends that the Panel
3 make findings of fact and conclusions of law affirming
4 Complaint Number R4-2008-0199-M for the Mandatory Minimum
5 Penalty of $675,000.
6 A draft Hearing Panel report, Proposed Order,
7 and amended Exhibit A are included in Exhibit 4, Tab 6.4
8 of your Hearing Panel package.
9 Thank you.
10 Now our legal counsel, Ms. Julie Macedo, will
11 present the Prosecution Team's response to the
12 Permittee's legal arguments.
13 MS. MACEDO: Again, for the record, I'm Julie Macedo,
14 Senior Staff Counsel, and counsel for the Prosecution
15 Team.
16 I'll be presenting information about the history
17 of Casden's facility and its coverage under an NPDES
18 permit and demonstrate why the limited exception in
19 SB 1284 does not apply to Casden. It is only now that
20 MMPs could assess that Casden raised its argument as set
21 forth in its submission.
22 This slide, Exhibit 6.5 and page 36 in your
23 binder, is the 2003 Notice of Intent for Casden to be
24 covered under the applicable NPDES at that time. It
25 clearly covers incidental discharges such as Casden. The

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1 highlighted text reflects the discharges that are covered
2 by these types of permits.
3 The following slide is the 2008 version of the
4 NPDES permit. Casden continued to be covered under the
5 applicable permit and is currently covered under
6 R4-2008-0032. Regardless of the characterization of
7 Casden's discharge, when it is covered under the permit,
8 Casden is obligated to fulfill its reporting
9 requirements.
10 This letter was presented in the Casden
11 submission, Item 620 in your binder at page 312. Casden
12 submitted this letter dated June 27, 1985 from a company
13 performing a dewatering study at Casden's facility. The
14 letter states:
15 "In addition, we collected and
16 submitted for testing a water sample
17 collected at dewatering depth. Those
18 contaminants analyzed and reported are those
19 we find are commonly requested by those
20 agencies issuing both temporary and
21 permanent discharge permits."
22 This slide, Exhibit 6.22 in your hearing package
23 and page 6.499, is a 1987 inspection report by a member
24 of the Regional Water Quality Control Board, Region 4.
25 This Compliance Inspection Report informed Casden that it

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1 was required to keep monitoring reports, but the reports
2 were not up to date.
3 This document is 6.501 of your binder. It is a
4 letter from Casden to the Regional Board in 1987. I'd
5 like to draw your attention to the language of Casden's
6 vice president at the time. Casden stated that it was
7 not discharging effluent into the Wilshire Boulevard
8 Storm Drain, as originally contemplated during the
9 initial permit process, but Casden specifically subjected
10 itself to permit requirements, such as reporting
11 obligations.
12 Casden's language was "of course that invokes
13 the need for quarterly reporting requirements pursuant to
14 the permit conditions." This indicates a clear awareness
15 that by subjecting itself to the permit, Casden was also
16 agreeing to reporting requirements.
17 As a reminder and a general background, there
18 are basically two penalty structures in the Water Code
19 for discharges. Discretionary penalties are sought for
20 unpermitted discharges and MMPs are sought when there are
21 reporting or effluent violations exceeded -- strike
22 that -- are sought when -- MMPs are sought when reporting
23 violations under permits or effluent limits under permits
24 are exceeded by the Permittee's discharges.
25 Casden must fall within one of these two

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1 categories, just like all Dischargers. While MMPs had
2 not been created at the time of this letter, Casden was
3 obligating itself to quarterly monitoring and its
4 associated costs.
5 This slide, Exhibit 6.24 in your binder and
6 pages 506 and 507, was an Application for Coverage under
7 the NPDES permit. The statements were made by Casden
8 Engineer Lynn Delacorte (phonetic), and Casden's
9 president at the time, Henry Casden. Their statements
10 indicated groundwater was being discharged in an amount
11 of up to 28,800 gallons a day.
12 In 2004, Casden filed yet another Notice of
13 Intent to be covered by an NPDES permit indicating
14 groundwater or wastewater would be discharged.
15 The NOI also describes the high groundwater
16 table and the permanent need for dewatering at Casden's
17 facility. A different Casden Chief Engineer,
18 Art Foreman, and President Robert Hildebrand, that in the
19 1996 package were involved, but similar statements were
20 made -- almost 20 years of coverage had been provided
21 without incident at this point.
22 Exhibit 6.26 at page 517 in your hearing package
23 binder is that 2004 Notice of Intent Lofy Engineering
24 provided for Casden. Consistent with previous notices of
25 intent, the description of the discharged material was

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1 consistent with previous Casden submissions and there was
2 no mention of irrigation water in this Notice of Intent.
3 Exhibit 6.7 for the record is page 161 of your
4 binder.
5 In November of 2007, Casden was sent a Notice of
6 Violation by the Regional Board. That Notice of
7 Violation was addressed to Kay Swikart, who had by that
8 time assumed responsibilities as building manager for
9 Casden. The NOV was issued as a result of a
10 September 24, 2007 inspection by Regional Board staff.
11 This exhibit is 6.27 and is page 181 in your hearing
12 binder.
13 On December 22, 2008, the Regional Board
14 provided Casden with an offer to participate in the
15 expedited payment program relating to its NPDES permits.
16 Please note the absence of response by Casden to either
17 the NOV or this initial settlement offer.
18 This document submitted in 2009 after receiving
19 both the Notice of Intent and the initial expedited
20 payment letter was submitted by Ms. Swikart, who
21 continued to assert that the Casden facility discharged
22 groundwater and sought coverage under the applicable
23 NPDES permit. The highlighted portions are of the Notice
24 of Intent signed by Ms. Swikart under penalty of perjury,
25 describing Casden's intended discharges. The small box

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1 says that they were existing since 1987 and it is dated
2 January 24, 2009.
3 In a February 18, 2009 letter to the Regional
4 Board, Ms. Swikart wrote and expressed that Casden was,
5 quote, "caught by surprise as it is never our intent or
6 practice to violate the permit guidelines," yet she went
7 on to claim that the fault rested entirely with Casden's
8 Chief Building Engineer who was assuring Casden that it
9 was operating within compliance. The remainder of the
10 letter explained that the fine was too high for Casden to
11 pay because of the current financial crisis.
12 Between 2009 and 2010, there were some
13 additional exchanged settlement communications between
14 the parties, but since the Regional Board is constrained
15 in reducing the MMPs to obtain a settlement, the parties
16 were unable to resolve the matter and filed the ACLC on
17 December 17th, 2010.
18 After the ACLC had been issued, Ms. Swikart
19 presented on January 28, 2011 a statement purporting to
20 be pursuant to 13385.1(a)(2)(A) effective on January 1st,
21 2011 claiming that no discharges to the waters of the
22 United States occurred that were reportable under
23 Casden's WDRs. The reasons given for the absent
24 monitoring reports was error by the building engineer at
25 the time. In addition to this statement being untimely,

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1 the Regional Board staff did not find it credible.
2 In her declaration to the Casden submission made
3 on February 26th of this year, Ms. Swikart stated that
4 Casden's discharges were irrigation water runoff and not
5 groundwater. This contradicts numerous sworn statements
6 by other Casden personnel and Ms. Swikart herself.
7 The statement that "The sump collects and
8 periodically discharges irrigation water runoff from
9 street-level planters and other rinsing that is captured
10 and piped to sump," in Footnote 4 in the Casden
11 submission is indicating that that type of conduct is not
12 regulated or is more properly regulated under the MS4
13 permit continues to represent the misunderstandings of
14 the actual permit requirements that Casden has subjected
15 itself to for more than 25 years.
16 Mr. Lofy is a testifying witness on behalf of
17 Casden and he has said it himself and presented
18 previously inconsistent statements. In submitting
19 Casden's amended Notice of Intent package in April 2004
20 and in 2009, Mr. Lofy provided a representative
21 groundwater sample. Those exhibits are 26 and 27,
22 respectively, in your packet.
23 In presenting self-monitoring reports for the
24 fourth quarter of 2007, Mr. Lofy states that:
25 "Recordation of groundwater pumping

1 data began October 22nd, 2007. For reasons
2 that have not been made clear to this
3 office, no groundwater sampling and analyses
4 and/or reporting have been performed since
5 the permit was granted in 2004."
6 However, in the same report, Mr. Lofy states
7 that Casden's flow is from irrigation water.
8 The fact that Casden is submitting these
9 self-monitoring reports with the assistance of Lofy
10 Engineering for 2007, 2008, 2009, and 2010 acknowledges
11 that Casden has a reporting obligation under its permit.
12 These inconsistencies on Casden's behalf lead
13 the Regional Board to conclude that Casden may be
14 discharging groundwater, as represented, or irrigation
15 water, as more recently represented; but Casden has
16 clearly failed to comply with the reporting requirements
17 of the permit, nor has Casden applied for termination of
18 coverage.
19 Casden's statement on January 28, 2011
20 purporting to qualify under 13385.1(a)(2)(A) does not
21 serve to reduce its MMP penalty because it is untimely
22 and not credible due to its self-serving nature and
23 Casden's prior inconsistent statements.
24 This slide presents Casden's interpretation of
25 13385.1(e), which can be found on Casden's submission at

1 Exhibit 6.20, page 230. Casden states -- or excuse me.
2 Attorneys for Casden state:
3 "Section 13385.1(e) leaves only one
4 possible interpretation -- that the 30 days
5 within which a party must submit a statement
6 after receiving notice from the Regional
7 Board, must be after the effective date of
8 the statute, January 1, 2011."
9 This would invalidate every notice given to the
10 Discharger prior to -- given to every Discharger prior to
11 January 1, 2011. There is no evidence that this was the
12 legislature's intent. This would further invalidate all
13 written notices to Dischargers given by Regional Boards
14 across the state prior to January 1, 2011, or perhaps
15 Casden means that the effective date of the
16 13385.1(a)(2)(A) is the date of written notice, even
17 though the statute was not written by the Regional Board
18 but the legislature who passed SB 1284.
19 Under that interpretation, all written
20 statements by Dischargers would have had to have been
21 received by January 31st, 2011. Casden's statement of
22 January 28th would be the only qualifying statement in a
23 statutory provision that does not include a sunset
24 provision to qualify for the exception. This
25 interpretation is described in item one on the present

1 slide.
2 Another possibility is that Casden is arguing
3 written notice must come after January 1st, 2011, the
4 effective date of the SB 1284 amendments, in which case
5 it would validate every notice that Regional Boards have
6 provided and require an enormous effort on the part of
7 the Regional Boards to provide a more updated notice, and
8 the effect of this interpretation would mean that if the
9 Regional Board did provide notice under January 1, 2011,
10 all Dischargers would have 30 days to submit a qualifying
11 statement under 13385.1(a)(2)(A). The only limitation on
12 this argument appears to be in extreme cases of
13 credibility problems like Casden's. Otherwise, it would
14 create an exception to MMPs for reporting violations so
15 large, it almost does away with the general rule.
16 My next slide presents an example of how the
17 Prosecution Team interprets 13385.1(e) and how it works
18 with the limitations set forth in other sections.
19 Recall this example from my portion of the joint
20 presentation. While all Permittees are expected to know
21 the terms of their permits and abide by them,
22 13385.1(a)(2)(A) and subdivision (e) provide a safety
23 check against MMPs when no written notice has ever been
24 provided prior to the issuance of an MMP complaint.
25 As these provisions are applied in the future,

1 we can think of many more examples of how
2 13385.1(a)(2)(A) and subdivision (e) work together to
3 fulfill the legislature's intent without jumping through
4 Casden's hoop.
5 A second example is presented in my next slide.
6 In this example, the Discharger fails to submit reports
7 for the first quarter of 2008 and on May 1st, 2011 the
8 Regional Board issues an NOV or late reports. If an ACLC
9 follows on May 15th, 2011, the Discharger has until
10 May 31st to submit a qualifying statement and avoid MMPs.
11 Clearly the Statute's purpose was to provide
12 written notice to the Discharger before MMPs are raised.
13 In the second example, the May NOV is the first written
14 notice to the Discharger. If the Discharger submits a
15 statement that complies with the terms of
16 13385.1(a)(2)(A), no MMP will issue.
17 This time limitation is going to come up in
18 13385.1(a)(2)(A) again and again in hearings throughout
19 this year and throughout the Regions. If you look at
20 this slide and this example, if the ACLC were issued
21 instead of on May 15th but on June 15th, a statement
22 received after that date would not be timely, the
23 exception would not apply, and the MMPs would continue to
24 be assessed.
25 Compare and contrast my examples with written

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1 notices to Casden. It received numerous written notices
2 of its violations. It articulated its understanding to
3 the permit reporting requirements way back in May 1997
4 and it continued to apply for permit coverage even after
5 an NOV and settlement offer had been received.
6 Casden refers to another Region 4 matter
7 resolved in 2010 on its behalf. The Casden matter is
8 factually and legally distinct from Glenborough, the
9 previous Region 4 matter. Glenborough received an NOV in
10 2004 and was issued an ACLC in 2008. Glenborough's
11 statement was that no discharges to surface water was
12 submitted in December 2010 when the Enforcement Policy
13 governed. Recall from the joint presentation that the
14 Enforcement Policy did not have a time limitation, as set
15 forth in 13385(a)(2)(A). Glenborough's statement was
16 also credible to the Regional Board's staff.
17 This slide illustrates side by side why
18 Glenborough and Casden were treated differently. Note
19 that the MSRs Casden submitted prior to the issuance of
20 the ACLC indicated the Casden facility had flow, but
21 Ms. Swikart's statement regarding no reportable discharge
22 under Casden's WDR were submitted after Casden became
23 represented by counsel and were submitted in the context
24 of the enforcement process. Casden has every right to
25 make every possible argument in its defense, but the

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1 Regional Board is entitled to weigh the statements
2 submitted by Casden over the course of 25-plus years
3 against the ones submitted more recently that are both
4 internally inconsistent and seek to exempt Casden from
5 any permitting scheme.
6 Casden further raises due process, equal
7 protection, laches arguments against these MMPs.
8 Due process has been found to be satisfied by
9 finding a reasonable relationship between the proper
10 legislative goal of enacting MMPs and penalties that
11 encourage timely reporting, which increase here as
12 reports are submitted further and further after the
13 initial deadline. Procedural due process has been
14 satisfied by providing Casden with the opportunity to
15 present argument on its behalf, such as at today's
16 hearing.
17 Casden's equal protection argument is based on
18 the different outcome in the Glenborough matter. Equal
19 protection can be violated when parties similarly
20 situated receive disparate treatment. As I have
21 explained, Glenborough and Casden were not similarly
22 situated.
23 The equitable defense of laches does not apply
24 to MMPs, as this Board recently found in Order Number
25 R4-2008-0058-M.

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1 MR. DUCHESNEAU: Excuse me, Madam Chair.
2 Pete Duchesneau again for the record. I would
3 like to object to any reference or reliance on
4 R4-2008-0058-M. It is my understanding that that case is
5 on appeal right now and it wasn't previously cited or
6 raised before, but it is on appeal. I don't think that
7 would be valid on any --
8 MS. MACEDO: I have no problem to the statement that
9 that notice is on appeal, although there was a laches
10 argument raised in my reply brief because Mr. Duchesneau
11 raised a laches argument in his rebuttal brief.
12 MS. OKUN: Isn't that Order cited in the proposed
13 Hearing Panel report?
14 MS. MACEDO: I'm not aware of that answer.
15 MR. DUCHESNEAU: I would say this. Nonetheless, if
16 it's on appeal, regardless, it's something that cannot be
17 cited or relied upon.
18 MS. OKUN: Whether or not it's on appeal, the Board's
19 ACL's orders are not precedential so the Board can
20 consider the fact that it reached this decision in a
21 prior matter, but the Board's not bound by that, so --
22 MS. MACEDO: That's fine.
23 I'll direct the Board to my argument in the
24 reply brief regarding other California cases where laches
25 do not apply to administrative proceedings and not solely

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1 rest on the Redondo Beach opinion which was decided by
2 this Board. If I may continue --
3 MS. OKUN: All right. So I'll advise the Chair to
4 strike the references to R4-2008-0058-M.
5 MS. DIAMOND: Okay. They're struck.
6 MS. MACEDO: There's a typographical error in my
7 rebuttal brief on page 15, line 25. The first words of
8 category F should be that "Statutes of limitation do not
9 apply to administrative proceedings."
10 Casden's argument in Footnote 14 of its brief is
11 that the Regional Board should have known of these
12 violations sooner and that laches requires diligent
13 prosecution. It is, therefore, ironic that Casden
14 received several written notices of its violation and
15 that it is claiming its key personnel such as its
16 building manager, hired consultants and corporate
17 officers, including presidents and vice presidents of the
18 company, are not charged with knowing permit requirements
19 and the operation of its own company.
20 Instead, they are asking for a significant
21 administrative burden to be placed back on the Regional
22 Board not only to reissue notices but also to determine
23 what statements are factual and which are not.
24 The entire environmental regulatory system is
25 based on self-monitoring, self-reporting, and especially

1 since these statements were submitted under penalty of
2 perjury, the Regional Board is authorized to rely on
3 them.
4 In closing, Casden also tries to avoid the MMPs
5 for its effluent violations for copper, arguing that the
6 groundwater samples are acceptable according to relevant
7 drinking water standards. Casden must comply with the
8 more stringent standard as set forth in Casden's NPDES
9 permit. This was set forth in Ms. Kao's presentation.
10 In conclusion, the MMP statutes do not allow the
11 Regional Board to modify the penalty unless limited
12 affirmative defenses in 13385(j) are proven. Those were
13 discussed in an earlier matter on today's agenda.
14 Such defenses were not raised here. Instead,
15 Casden challenges the entire MMP structure as applied to
16 it on due process and equal protection grounds and also
17 argues preemption, laches, and SB 1284. These arguments
18 are without merit.
19 Just as the Regional Board cannot modify the
20 penalties it sought against the Discharger, the
21 Prosecution Team cannot settle for a lesser amount or
22 forgo enforcement entirely.
23 The most recent legislative confirmation of MMPs
24 occurred only last summer through the additional language
25 discussed during the joint presentation for Items 6 and

1 7. This statutory change reflected in both the plain
2 language and the intent of the legislature did not create
3 an exception so large that it practically swallows the
4 general rule of MMPs, as Casden will argue.
5 The Prosecution Team respectfully requests that
6 the Board affirm Complaint Number R4-2008-0199-M for a
7 Mandatory Minimum Penalty of $675,000.
8 The Prosecution Team would like to reserve its
9 remaining time for rebuttal.
10 MS. DIAMOND: Thank you.
11 So we'll now hear from Casden. Who's going to
12 be -- and however you want to do that, just come to the
13 microphone and identify yourself.
14 MR. DUCHESNEAU: Madam Chair, my name is Pete
15 Duchesneau. I'm with Manatt, Phelps & Phillips. I
16 represent Casden.
17 I would also like to again introduce some of the
18 folks that are here with me here today: my colleague
19 Dana Palmer; and on behalf of Casden, Ms. Swikart,
20 Kay Swikart; and two other witnesses who you will hear
21 from today, Dr. Lofy and Mr. Rob Buckley.
22 I'm going to go through and rifle through my
23 presentation in about 20 minutes and then about 30
24 minutes of witness testimony and try to reserve 10
25 minutes in the end.

1 For one point of clarification, I would like to
2 seek -- and that is -- forgive me -- I will probably
3 mispronounce your last name. It's something like with
4 mine. I should be better at pronouncing.
5 But Mr. Anijielo, with regard to him, I would
6 like to reserve my Cross-Examination for him until I'm
7 done with my presentation and possibly with some
8 witnesses, if that is okay with the Panel.
9 MS. DIAMOND: Fine.
10 MR. DUCHESNEAU: Okay. Thank you. I, too, would
11 like to move into evidence as well as the administrative
12 record Exhibits 14 through 18 and 20 through 23, as well
13 as this presentation that I will be providing.
14 As you can see up there, I'm going to provide a
15 brief background, discuss the alleged violations, then
16 talk about 1284, talk about why under 1284 the Mandatory
17 Minimum Penalties are not applicable in this situation;
18 and as you will see, this case is in large part about
19 legal interpretation; and then as well as why the
20 excessive proposed penalties would violate the Eighth
21 Amendment of the Constitution and touch upon, also,
22 laches in the statute of limitations.
23 In honor of St. Patrick's Day, I would like to
24 quote the Irish poet Oscar Wilde. "Consistency is the
25 last refuge of the unimaginative." And if you're like my

1 sons last night who have quite the imagination, they were
2 trying to catch a leprechaun and they didn't catch one.
3 Then again, they are very inconsistent, so they proved
4 Mr. Wilde right.
5 On the other hand, you will see as we present
6 evidence today that Casden has been consistent with
7 regard to the lack of groundwater charges since the
8 building was constructed. The record is extremely clear.
9 You will hear from the witnesses as well to show you that
10 their story has not been inconsistent, and I would
11 respectfully say it's been the Prosecution in the way
12 they have not only interpreted 1284 but have picked and
13 chosen from the evidence and not properly represented
14 what it is.
15 So, again, what we're talking about here is an
16 office building at 9090 Wilshire Boulevard in the city of
17 Beverly Hills. The building contains a dewatering system
18 to protect the structure from groundwater infiltration,
19 because at the time they were developing the building in
20 the mid '80s, there was some concern that indeed there
21 might be some groundwater that could actually infiltrate
22 into the building.
23 As you will see and hear testimony on, in the
24 end that never happened; but by the time they got to
25 constructing the building, that was already in the

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1 designs. And we will go through that with you.
2 Casden, rightly or wrongly, though, had signed
3 up for the Groundwater Discharge Permit, as has been
4 indicated. The ones that are relevant for the late
5 reports or the ones -- is R4-2003-0111 and that is,
6 again, Waste Discharge Requirements for Discharges of
7 Groundwater.
8 One thing to note, they're permitted up to 7,200
9 gallons per day. The record is abundantly clear that
10 there has never been a discharge of any sort anywhere
11 near that and indeed only a minute fraction of that, if
12 at all, at that time.
13 So the Prosecution has put 12 monitoring reports
14 at issue that have been late. Under the Mandatory
15 Minimum Penalties structure for 12 monitoring reports for
16 an office building that did not have discharges of
17 groundwater, they are seeking $663,000 of penalties. And
18 additionally, there's another $12,000 in penalties for a
19 different reporting period in 2010 and that's with regard
20 to the exceedance of the copper limits under the WDR, and
21 we will talk about the ingredients and the potable water,
22 but they are seeking $12,000 for discharging potable
23 water from the irrigation system and two fines per
24 sample.
25 Well, we can agree about one thing with the

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1 Prosecution; and that is that in September of 2010, the
2 Governor signed SB 1284 into law, which was intended to
3 provide some relief from the Mandatory Minimum Penalty
4 structure that apparently was getting out of hand.
5 On January 1st, 2010 (sic), we also agree with
6 each other and that is that it took effect.
7 Now, SB 1284, as you did hear, has two statutory
8 exceptions to Mandatory Minimum Penalties. The first one
9 under 13385.1(a)(2) is with regard to if you do not have
10 a reportable discharge under the operable Waste Discharge
11 Requirement, meaning a few other requirements, then you
12 could seek to have relief from the Mandatory Minimum
13 Penalties structure. It doesn't mean you didn't have a
14 violation, but seek relief from the Mandatory Minimum
15 Penalties.
16 The other provision we'll call the second
17 exception is 13385.1(b) which isn't at issue for Casden
18 right now, but that is with regard to if you had a
19 reportable discharge under the applicable WDR, you didn't
20 have exceedances in the effluent limits.
21 So let's look at 1284. So this is a quote of
22 1284, and if one is able to meet these requirements, then
23 the violation changes from being under the Mandatory
24 Minimum Penalties and goes to discretion. And so what
25 does it say? It says:

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1 "Any time prior to the date a Discharge
2 Monitoring Report is required to be filed or
3 within 30 days after receiving written
4 notice from the State Board or a Regional
5 Board of the need to file a Discharge
6 Monitoring Report, if the Discharger submits
7 a written statement to the State Board or
8 the Regional Board that includes the
9 following." And, again, this would get them
10 out of that Mandatory Minimum Penalty. "A
11 statement that there were no discharges to
12 waters of the United States reportable under
13 the applicable Waste Discharge Requirements
14 during the relevant monitoring period."
15 And I've highlighted that and we'll be talking
16 about that later, and then "The reason or reasons why the
17 required report was not submitted."
18 It's very important to read the very last part
19 of SB 1284 in the statute. This is where the legislature
20 thought so much of this to actually stress its
21 legislative intent in the statute itself. And what did
22 it say? It said:
23 "The amendments made to this section by
24 SB 1284 shall apply," "shall apply to
25 violations for which an administrative civil

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1 liability complaint or a judicial complaint
2 has not been filed before July 1, 2010,
3 without regard to the date on which the
4 violations occurred."
5 "Shall apply." Shall apply on July 2nd, 2010.
6 So why is this important again? This Section (e) leaves
7 only one possible interpretation with regard to the other
8 section, 13385.1(a) and this does not -- this
9 interpretation does not invalidate the whole penalty. It
10 takes it from the Mandatory Minimum Penalty structure to
11 discretionary. And let's talk about that.
12 Well, why can't you reconcile the two sections
13 together? Well, to start off with, these statements were
14 never required in the law before the effective date of
15 SB 1284. Now, while the Water Board had an Enforcement
16 Policy that seemed to be similar -- and we'll show you
17 the differences -- these statements are different from
18 the Enforcement Policy and they were never required by
19 the law previously. So it's a little hard to
20 retroactively require somebody to do a statement when
21 they didn't have an opportunity or a reason to do so
22 before. And Casden, I will show you, really is a prime
23 example of why that is.
24 The other thing I think to consider is that the
25 Prosecution has shown you an example where they said,

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1 "Well, what if you got an ACL on March 1st, 2011?"
2 That's after July 1st, 2010 and then you can do your --
3 you could have done your statement, but that's not what
4 the provision is over here. If you look here, the
5 legislature said very specifically in the code,
6 "July 1st, 2010."
7 So the Prosecution says, "Well, you had an NOV
8 in 2007. You didn't get a statement in within 30 days.
9 You can't take effect of this." Well, I think this whole
10 room understands to have a complaint, you would have had
11 to have had a Notice of Violation before that. And even
12 without that, a complaint itself would have served of
13 course as a notice and the legislature said, Hey, you
14 have a complaint on July 2nd, 2010? These requirements
15 will apply to you, and regardless of when those
16 violations occurred.
17 And I raised this with the Prosecution and I
18 have yet to hear from anybody how one can consider it
19 otherwise. So whether it's in July of 2010 an ACL or a
20 Notice of Violation came out or August, September,
21 November, December, under this legislation was very clear
22 saying, Hey, you can take advantage of either of these
23 requirements.
24 Casden received their ACL in December of 2010.
25 The other misconception I think that the Prosecution has

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1 attempted here is to say that somehow this is an
2 exception that Casden has figured out, you know, to be
3 the only one.
4 First of all, Casden's position is that given
5 this, the only way to interpret the statute is that
6 there's another notice that would need to be made. It
7 doesn't mean that another Notice of Violation necessarily
8 has to be done. These are still violations, but there's
9 another notice that would trigger the opportunity if you
10 could take advantage of this. The other misnomer, if you
11 think about it, is somehow Casden is saying Somehow this
12 is going to open up everything and get rid of these
13 violations.
14 That's not true. You still have to meet the
15 requirements of SB 1284. You would have to say -- be
16 able to attest to that you didn't have a discharge
17 regulated under the WDR and then explain the reasons; but
18 I suspect that, you know, it's a small percentage of the
19 community regulated that would be able to test that they
20 didn't have a discharge that was regulated under the WDR.
21 So as you will see coming up here, it's been
22 alleged that -- and I think it is a backhanded
23 compliment -- that once I got involved that somehow
24 Casden started to make things up to be able to file these
25 statements; but you'll see in the record that it could

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1 not be any further from the truth, although I take it,
2 again, as much of a compliment. But given this
3 particular situation and Casden had no reason to ever
4 submit a statement before because under the Enforcement
5 Policy before -- similar but not the same -- you had to
6 be able to attest you had absolutely no discharge.
7 Casden couldn't do that.
8 But once this was passed, January 1st took
9 effect, then Casden realized that they could submit a
10 statement to say, We've never had a discharge of water
11 that was reportable under the applicable Waste Discharge
12 Requirements because we don't have groundwater
13 infiltration. This is a groundwater discharge permit.
14 And they also explained the reasons, as
15 required, why the reports were late.
16 We'll also talk about really what those NOIs
17 mean and they do not attest to that, in fact, groundwater
18 is being discharged. The quotes that you saw was just a
19 selection of the permit that you were getting coverage.
20 You could certainly question the wisdom of Casden for
21 continuing to sign up for coverage, but you will see that
22 that does not amount to evidence of actual groundwater.
23 You will see evidence there is no groundwater
24 discharge and that's been the case for the past couple of
25 decades.

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1 So the Prosecution doubts the credibility of
2 Casden. With regard to the statement, you will hear from
3 witnesses what we did with regard to that investigation
4 and determined that there was no groundwater
5 infiltration, or I should say they confirmed it. Yes,
6 some small quantities at times of potable water from the
7 irrigation runoff does get collected from another system
8 that feeds into the same sump. It's there and you'll
9 notice in our brief that irrigation water runoff is
10 exempt under L.A. County stormwater permit. The WDR
11 regulates discharges of treated or untreated groundwater
12 generated from dewatering operations.
13 So Casden diligently investigated this, did not
14 take it lightly, and you'll hear about that from
15 Ms. Swikart coming up, as well as some of the other
16 witnesses, but they did inspections to double-check what
17 they understood to be already the case. They looked at
18 the building plans and they did other things such as look
19 at geotechnical reports from the building's construction
20 and historic groundwater elevations.
21 Now, the Prosecution pointed out this document
22 as evidence that somehow the groundwater was contaminated
23 being discharged. What the Prosecution didn't really
24 point out to is that they were just pointing to the fact
25 that groundwater had been tested and if it was going to

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1 be discharged, this report said it might need to have a
2 permit. But what the Prosecution doesn't say up there
3 is, "In our opinion," mid paragraph, "shoring and
4 excavation could proceed to 35 feet with no hindrance
5 from groundwater."
6 I very much encourage you -- this is a
7 three-page report. Read through it and see how confident
8 this consultant was that they actually didn't finish
9 their job or didn't do more work that they might have
10 done because they realized that groundwater was contrary
11 to what they thought going in was going to be -- was not
12 going to be an issue.
13 Now, the Prosecution also showed you this
14 (indicating). This is an inspection report from 1987,
15 two years after that other report I showed you and just
16 sometime after the building opened in about 1986.
17 Well, what did the Prosecution not show you that
18 was written in this report by the hand of a Regional
19 Board staff member? Well, read the remarks on the
20 bottom, and I will quote for you. It says:
21 "Company does not have a groundwater
22 discharge from this building."
23 MS. MACEDO: I'll object. I'd like to object for the
24 record that the portion that Mr. Duchesneau just read in
25 appears to be the Regional Board staff member is

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1 repeating something that a Casden employee stated. It
2 was not a conclusion by the Regional Board employee.
3 MR. DUCHESNEAU: In all fairness, I certainly don't
4 mind reading the whole statement into the record. This
5 is a regulatory report that was obtained from the
6 Regional Board's file on this matter and it also shows
7 state of mind for the inspector, but it does say:
8 "Mr. Steinberg stated that someone made
9 a mistake. Company does not have a
10 groundwater discharge from this building.
11 He will submit a letter."
12 And I will also submit to you that the letter
13 that you saw from Counsel was the letter in following up
14 from that, and that letter is Exhibit 23 and I suggest
15 you read that letter, because it just confirms this
16 statement. And for the record, the statement I am -- the
17 report I am talking about here is Exhibit 22 at page 499.
18 MS. OKUN: If all of these letters are in the record,
19 then they speak for themselves. I don't think it's
20 necessary to strike any testimony about the letters, and
21 we can move on.
22 MR. DUCHESNEAU: Thank you.
23 MS. OKUN: You're free to testify about the letters
24 and the implications that you'd like the Board to draw
25 from the letters, but you don't need to read them.

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1 MR. DUCHESNEAU: Okay. If I could ask the time? My
2 timer went off.
3 MR. CARLOS: Yes. It's back up.
4 MR. DUCHESNEAU: Thank you. Again, the Prosecution
5 has alleged that Casden's being inconsistent and making
6 things up along the lines here. I will just direct you
7 to the monitoring reports that were lately submitted, but
8 submitted by Mr. -- prepared by Mr. Lofy, Exhibit 14
9 through I think 18. And, again, those monitoring reports
10 again mention at the time that the flow was from
11 irrigation water and some other wash-off.
12 And then this also -- also, this letter was
13 cited by the Prosecution that was prepared by
14 Ms. Swikart, and you'll hear from her. And, again,
15 Prosecution neglects to point out that in 2009, January
16 2009, without having a statement requirement, without
17 there being a reason even particularly raised, Casden was
18 already telling them that "Look it, this is from
19 irrigation water." Casden's been consistent since day
20 one at this.
21 And then indeed, Casden submitted its statement.
22 As I said before, you'll hear more about what they based
23 it on.
24 Now, I want to get back to the language of
25 SB 1284 and why is this all important about the

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1 groundwater. SB 1284 was specifically amended to be
2 different from the Enforcement Policy of the State Board.
3 This (indicating) is an excerpt from 1284 when it was
4 amended on June 23rd, 2010. Prior to June 23rd, 2010,
5 that italicized record -- and for the record, this is
6 Exhibit 20 and this version of the bill is pages 397
7 through 410 and I have an excerpt from page 408.
8 You can see from the italicized language, they
9 changed it from the language that the Board policy was,
10 where there would be "no discharges to waters of the
11 United States"; that you had to attest to in your
12 statement to "no discharges to waters of the
13 United States reportable under the applicable Waste
14 Discharge Requirements during the relevant monitoring
15 period."
16 Now, again, the Prosecution is trying to say
17 somehow Casden is looking for special treatment, and that
18 can't be further from the case. The Board has been
19 implementing and operating 1284 on a number of cases
20 prior to this and indeed the Regional Board has afforded
21 relief from Mandatory Minimum Penalties under a
22 circumstance very, very similar to a Casden and I
23 respectfully disagree with our Prosecution as to how we
24 might compare these two cases, so let's talk about it.
25 That case was Glenborough, the matter of

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1 R4-2008-0175-M. And in that case, the settlement for
2 that case was reached and agreed to by the Discharger
3 December 8th, 2010. That's after 1284 was enacted.
4 However, very important here, the settlement -- no
5 mention of this by the Prosecution -- was not effective
6 until January 18th, 2011. That is uncontested.
7 1284 took effect, of course, uncontested,
8 January 1st, 2011, and as the Prosecution indicated, the
9 Enforcement Policy is now trumped on, in so many words,
10 by 1284.
11 The NOV in this case was issued on
12 December 18th, 2011. The statement that Glenborough
13 submitted was two years later. In 2010, they submitted a
14 statement for 2010 (sic), December 8, and what did the
15 Board do? The Board staff? Well, they dismissed all the
16 late reports pursuant to that statement that were subject
17 to that statement, and they were late reports from 2006,
18 and they dismissed outright all penalties, $279,000.
19 Ironically, or maybe not ironically, it's the
20 very same Prosecution staff involved in this case
21 approved by a Chief of Compliance, the E.O. eventually,
22 and this was publicly noticed.
23 As you will see, this letter to Glenborough
24 counsel, this is exhibit -- part of Exhibit 20, pages 467
25 to 483. The staff is offering 1284 as an avenue to help

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1 resolve these matters in this letter. They are offering
2 it under the other prong, and under the other prong, this
3 is (b), for not having influent exceedances, they do
4 reduce it to the three violations for -- to be only
5 $3,000 per a violation. However, that was not good
6 enough for Glenborough and Glenborough had many other
7 violations for late reports and so Glenborough persisted
8 and talked to the staff and eventually submitted this
9 statement on December 8, 2010.
10 And the Prosecution has again really put at
11 issue the credibility of Casden and has really looked
12 down at the amount of evidence that Casden has brought
13 forward with regard to the supporting of its statement.
14 Well, I think it's very appropriate then to take a look
15 at this next exhibit, and this is part of Exhibit 20,
16 page 484. It's a statement dated December 8, 2010 by
17 Glenborough, and this is the basis that this individual
18 gave for no discharges and I'd read it.
19 "Based on my inquiry of the person or
20 persons who manage the system, or those
21 persons directly responsible for gathering
22 the information, the information submitted
23 herein is, to the best of my knowledge and
24 belief, true, accurate, and complete."
25 So what happened? The Prosecution, if you look

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1 up here, dismissed all those charges, and that amounted
2 to dismissing for those three reports $225,000 in
3 penalties and then under the other exception lowered them
4 to $3,000 each, and so it got rid of another $54,000 in
5 penalty for Glenborough, despite the fact that this was
6 not effective until clearly and indisputable after
7 January 1st, 2011, the effective date of SB 1284, as you
8 will see here on this letter.
9 This is the letter from Mr. Unger back to
10 Glenborough, indicating that they have now signed the
11 agreement, given the public notice period had finally
12 expired, and this is January 18th, 2011. And for the
13 record, this is part of Exhibit 20, Exhibit 493.
14 I will also note that it's indisputable that
15 paragraph 20 of the complaint against Casden in this
16 matter, Exhibit 2, page 6, makes very clear that any
17 settlements like this aren't proposed until after the
18 public comment period.
19 I'm going to pick up the pace here a little bit
20 more, given the time we have.
21 I do want to touch upon again that the fines
22 proposed, over $600,000 for 12 late reports from an
23 office building where they didn't even have groundwater
24 discharge that's regulated under the permit, I would
25 submit to you is in violation of the Eighth Amendment of

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1 the Constitution against excessive fines.
2 We have briefed this more, our brief that's in
3 Exhibit 20; but just to tell you briefly, the amount of
4 forfeiture must bear some reasonable relationship to the
5 gravity of the offense that it's designed to punish. I
6 would submit, again, whether or not we can bicker about
7 if irrigation water from potable water is, you know,
8 above the permit limits is -- I think any relationship in
9 terms of the harm and the penalty needs to be put into
10 the context. And, again, of course look at the
11 culpability here, the relationship between harm and the
12 penalty.
13 Similar statutes -- however similar statutes are
14 handled and I will submit to you and please find other
15 statutes with onerous of a Mandatory Minimum Penalty
16 regime as you have here; and if this was under EPA, it
17 would be a $25,000 penalty maximum per report and I'd
18 also submit to you that's why you need to look at
19 Glenborough and how the Board has handled very similar --
20 or staff -- similar situations as well, because that
21 would be looked at as to whether these are excessive
22 fines. Statute of limitations: Again, I understand
23 the Board's position that statute of limitations do not
24 apply. 338(i) is a three-year statute. I'd submit to
25 you that it does apply.

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1 But nonetheless, the law is clear that also
2 laches could be looked at by the courts as to agencies
3 and, again, there's no notice issue here that -- the
4 discovery issue, I should say. The agency knew about
5 these since December of 2007 yet didn't issue the ACL
6 until three years later and Casden is prejudiced by this
7 delay, and the burden is on the Prosecution to show how
8 laches does not apply. As I mentioned, one of the Casden
9 employees is Don, who was actually there and responsible
10 during the time period and, again, the penalties for
11 violation prior to the December 2007 date should be
12 stricken.
13 So I will save the rest of my presentation for
14 later for concluding statements. I am now going to call
15 some witnesses.
16 I would like to call Kay Swikart. And if it's
17 okay, she can stay in her seat. I'm going to try to make
18 this as least cumbersome as possible. I'm a little bit
19 more formal than maybe is needed, but I am also hoping
20 that this is going to keep the timing together.
21 My colleague Mr. Palmer, we've worked out I'm
22 going to hand him the exhibits I'm going to use for
23 Ms. Swikart, so he's going to get a little traction back
24 and forth on his feet.
25 So having said that, I'll just give you the

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1 first example. You can just hang on to it until we're
2 ready to use it.
3
4 KAY SWIKART,
5 called as a Witness, and having been previously duly
6 sworn by the Panel Chair, was examined and testified as
7 follows:
8
9 DIRECT EXAMINATION
10 BY MR. DUCHESNEAU:
11 Q Ms. Swikart, please state your full name for the
12 record.
13 A Kay Swikart.
14 Q And who do you work for?
15 A Casden Properties.
16 Q And how long have you worked for Casden,
17 approximately?
18 A Since September 2007.
19 Q And what is your position?
20 A Property manager.
21 Q And as property manager, do you manage several
22 buildings?
23 A Yes.
24 Q And one of those buildings is 9090 Wilshire
25 Boulevard, Beverly Hills?

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1 A Yes.
2 Q Okay. And have you ever testified before?
3 A No.
4 Q So you're a little nervous?
5 A Yes.
6 Q Okay. I will tell you a bit of a St. Patrick's
7 Day joke. Why should you never iron a four-leaf clover?
8 You don't want to press your luck.
9 Now, let's turn back to 2007, shortly after you
10 started with Casden. And in 2007, do you recall
11 receiving any form of communication by the Regional Board
12 with regard to 9090 Wilshire Boulevard?
13 A Vaguely.
14 Q And to the -- well, let me do this. I'm going
15 to show you Exhibit 6 -- Exhibit 7.
16 MR. DUCHESNEAU: Mr. Palmer, please hand it to the
17 witness.
18 BY MR. DUCHESNEAU:
19 Q And I'm showing this to you to help refresh your
20 recollection, but why don't you let me know, what do you
21 recall hearing from the Water Board in the end of 2007?
22 A Okay.
23 THE REPORTER: I'm sorry. I can't hear you.
24 MS. DIAMOND: Is your microphone on?
25 THE WITNESS: Yes, I do recall receiving some written

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1 correspondence.
2 BY MR. DUCHESNEAU:
3 Q Okay. What do you generally recall about the
4 correspondence that you received, to the best of your
5 knowledge?
6 A I do recall that it was something that our
7 building engineer should handle at that time.
8 Q And did you understand it had something to do
9 with water from the -- regarding water discharges or
10 anything else or a permit?
11 A Yes.
12 Q Okay. And in terms of your recollection, what I
13 have handed to you is a letter dated November 7th, 2007
14 and it's from the Water Board to Ms. Swikart, and is that
15 what you were kind of referring to?
16 A Yes.
17 Q It's consistent with your memory of time;
18 correct?
19 A Yes.
20 Q All right. So it was about two months after you
21 arrived at Casden?
22 A Yes.
23 Q Okay. And what do you recall doing with this
24 letter once you got it?
25 A I delegated this task to the Chief Building

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1 Engineer at that time.
2 Q And who is this Chief Building Engineer?
3 A Art Foreman.
4 Q And why did you provide it to Mr. Foreman?
5 A Mr. Foreman has been there for a long time,
6 almost ten years or so, and he's more familiar with the
7 mechanical portion of the building and he, I'd say, could
8 handle this more.
9 Q So you thought it was within his
10 responsibilities?
11 A Yes.
12 Q Okay. And is Mr. Foreman still with Casden?
13 A No.
14 Q When did he leave, about?
15 A First quarter, 2008.
16 Q Okay. Now I'm going to move on here.
17 When was the next time that you heard from the
18 Regional Board regarding this matter we just discussed
19 concerning 9090 Wilshire?
20 A December 2008.
21 Q And I'm going to hand to you Exhibit 8 from the
22 binder, if you could take a look at Exhibit 8. And for
23 the record, it's a December 22nd, 2008 letter from the
24 Board to Casden, settlement offer. Is that what you
25 were -- had in mind?

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1 A Yes.
2 Q And what is your understanding? What was the
3 letter, briefly?
4 A It was a settlement offer for nonfiling.
5 Q Okay. And what did you do once you got this
6 letter that's Exhibit 8?
7 A I immediately called our consultant, Mr. Ron
8 Lofy, to have him help us resolve this problem.
9 Q Okay. And to your knowledge, were these late
10 reports ever prepared and filed?
11 A Yes.
12 Q And I'm going to hand to you Exhibit 14 from the
13 hearing materials. Okay. And you've seen these before.
14 Are those the reports that you were referring to that
15 were filed with the Water Board?
16 A Yes.
17 Q Okay. And when were they filed, according to
18 the letter?
19 A January 2009.
20 Q And the letter's dated January 16th, 2009;
21 correct?
22 A Correct.
23 Q And after the reports were filed with the Board,
24 did you meet with the Regional Board staff?
25 A Yes.

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1 Q And with whom did you meet with?
2 A Ms. Mercedes Merino and Mr. Hugh Marley.
3 Q And approximately when did you meet with them?
4 MS. OKUN: Excuse me. Ms. Swikart, is your
5 microphone on? I'm having trouble hearing you.
6 THE WITNESS: It is on. Maybe I'll speak louder.
7 BY MR. DUCHESNEAU:
8 Q Okay. And I will try to remind you.
9 So when, approximately, did you meet with the
10 Board staff?
11 A That was in February.
12 Q In February?
13 A Uh-huh.
14 Q A couple of weeks after the reports were
15 submitted?
16 A Yes.
17 Q And when you met with the staff at that time in
18 February of 2009, did you ever inform the staff as to
19 what you believed the source of the water was that had
20 been discharged?
21 A Yes.
22 Q And what did you tell them?
23 A I explained to them that it's my understanding
24 it's overflow of irrigation waters from the planters that
25 are located at the exterior of the building.

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1 Q And after that, did you ever follow up with a
2 letter to the Water Board?
3 A Yes, I did.
4 Q Okay. I'm going to show to you another exhibit.
5 It's Exhibit 21 in the record.
6 MR. DUCHESNEAU: For the record, it's a
7 February 18th, 2000 letter from Ms. Swikart of Casden to
8 Mercedes Merino.
9 BY MR. DUCHESNEAU:
10 Q Is that the letter you were referring to?
11 A Yes.
12 Q Is that your signature?
13 A Yes.
14 Q And you believe it to be true -- a true and
15 accurate copy?
16 A Yes.
17 Q And at the time you submitted it, did you
18 believe it to be true and accurate?
19 A Yes.
20 Q And in your letter, did you inform the staff
21 again as to your understanding as to source of the water
22 discharge?
23 A Yes, I did.
24 Q And why don't you read aloud from the letter on
25 page 498, for the record, what the sentence -- what you

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1 told the staff in your letter.
2 A "The water discharged from our building is
3 mainly a collection of the irrigation water,
4 without any additives, that penetrates the
5 landscape pattern surrounding the building."
6 Q And to your recollection, did the Board staff
7 ever inform you at that time that they disagreed with
8 your understanding as to the source of the water?
9 A No.
10 Q Okay. We're going to move on now to 2009 and
11 I'm going to hand to you Exhibit 27 in the Board
12 materials, which starts on page, I think, 557, if you can
13 take a look at that. Do you recognize this document?
14 A Yes.
15 Q And what is it, to your understanding?
16 A This is a Notice of Intent.
17 Q Okay. And just for the record, it's a
18 document -- it's page numbers 557 through 594, and if you
19 turn your attention to page 563, that's your signature?
20 A Yes.
21 Q Now, when you signed this NOI, in your mind,
22 were you attesting that Casden had actual groundwater
23 discharges at the time?
24 A No.
25 Q And why were you submitting this NOI, in your

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1 mind?
2 A I was told by the Regional Board that this
3 permit had existed since the inception of the building
4 and the renewal is due and we must renew.
5 Q And who told you that?
6 MS. DIAMOND: Excuse me. We have a parking issue. A
7 couple of us are going to need to move our cars now, so
8 can we take like a little ten-minute break? We are
9 concerned that if we don't move our cars, they may not be
10 there.
11 MR. DUCHESNEAU: Sure. It's at your pleasure. I
12 would say also I only have five or ten minutes, but I'll
13 leave that to your pleasure.
14 MS. DIAMOND: I think we may have a 5:00 o'clock with
15 our cars.
16 MR. DUCHESNEAU: Then let me be the last to keep you.
17 MS. DIAMOND: We'll be right back.
18 (Recess)
19 MS. DIAMOND: Okay. So let's resume. Also, could we
20 get a reading of the time, where we are on the time?
21 MR. CARLOS: 24 minutes.
22 MS. DIAMOND: Okay.
23 MR. UNGER: Is that remaining?
24 MS. DIAMOND: Is that remaining for Casden?
25 MR. CARLOS: For Casden. And for Prosecution, 15 and

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1 a half minutes.
2 MS. MACEDO: Plus seven.
3 MR. CARLOS: The seven has already been added.
4 MR. DUCHESNEAU: Madam Chair, consistent with the
5 previous rulings, I would submit and make an offer of
6 proof since some of these arguments from the Prosecution
7 were not previously raised in any detail that I may need
8 a small amount of additional time.
9 I would just submit maybe that we play it by
10 ear. As you can tell, I'm trying to talk quickly. I'm
11 originally from New Jersey. I can talk pretty quickly,
12 but maybe we can cross that bridge when it happens.
13 MS. OKUN: Well, I'm originally from New York so I
14 can talk faster than you can.
15 MR. BROWN: Fair enough.
16 MS. OKUN: There haven't been any hearsay or other
17 objections to the documents you submitted, so you're free
18 to conduct your examination of your witnesses in any way
19 you'd like, but I think you can move things along a
20 little more quickly without going through or by avoiding
21 all the formalities of identifying the documents and
22 authenticating the documents. I think we can stipulate
23 that they're authentic and they're part of the record.
24 MR. DUCHESNEAU: I appreciate that. We'll try to go
25 through a lot quicker then as well, but we'll, okay, see

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1 what occurs.
2 BY MR. DUCHESNEAU:
3 Q In that event, Ms. Swikart, you have one more
4 exhibit to address? And for the record, that's
5 Exhibit 20. It's pages 259 through 310, which is
6 Exhibit B to the Casden submittal, and what is the
7 exhibit, Ms. Swikart?
8 A It's a declaration.
9 Q And is that your declaration?
10 A Yes.
11 Q And when you signed it, you believed it to be
12 true and accurate, didn't you?
13 A Yes.
14 Q Okay. Turning your attention to Exhibit 1
15 attached to your declaration --
16 A Yes.
17 Q -- and that's your signature on that letter that
18 you signed? That's the statement you prepared for Casden
19 to submit to the Regional Board under SB 1284?
20 A Yes.
21 Q All right. And for the record, that's page 262
22 of the binder and, again, you believed that to be true
23 and accurate when you submitted it, didn't you?
24 A Yes.
25 Q And why don't you read what you wrote about

1 groundwater in your letter?
2 A "No groundwater was generated from permanent
3 or temporary dewatering operations;
4 therefore, no groundwater was discharged."
5 Q And prior to submitting this statement, did you
6 conduct a diligent investigation?
7 A Yes.
8 Q All right. Let's quickly walk through the steps
9 that you did to prepare your statement. What was the
10 first step that you did?
11 A I searched for the files in our archives and I
12 also conferred with our consulting engineer Ron Lofy.
13 Q And what type of files did you look for in your
14 archives?
15 A We looked for building plans, engineering
16 records, or anything related to a sump pump at the time
17 the building was built.
18 Q Okay. And you've mentioned you conferred with
19 some folks. Who did you confer with?
20 A Some of the Casden management staff and the
21 maintenance personnel who are familiar with the building.
22 Q Okay. Maybe it would help if you'd just refer
23 to them by the names.
24 A Amir Eshkol; he's the Vice President of
25 Construction. And Ron Mayhew, Vice President of

1 Community Development.
2 Q Okay. Anyone else?
3 A Our Maintenance Engineer, Provencio Chavez.
4 Q Okay. Why don't you briefly summarize, what did
5 you do with regard to assessing the irrigation system in
6 understanding whether it was connected to the sump or
7 not?
8 A We looked into our building plans. We looked
9 into the plumbing plans and it showed on the plumbing
10 plan that there are lines going from the three planters
11 at the exterior of the building into P-I, which is the
12 next-level parking, and then that line ran into P-II and
13 P-III and into the sump area.
14 Q And some of those plans were attached as
15 Exhibit 2 to your declaration?
16 A Yes.
17 Q Okay. And did you do anything else with regard
18 to assessing the irrigation system?
19 A Yes; inspected the building, physically went out
20 to the building and visually traced the pipes.
21 Q Why don't you explain why you could visually
22 trace the pipes?
23 A Why?
24 Q Yes. How could you see the pipes?
25 A The pipes are exposed, actually. It goes

1 from the interior of the parking structure. It's right
2 along the walls, and then it goes straight into the lower
3 level, P-II, and then it goes into P-III, and then it
4 runs along the ceiling and goes straight into the sump
5 area.
6 Q Okay. And with regard to groundwater, what did
7 you do to understand the groundwater, whether it
8 infiltrates into that sump under those conditions?
9 A We reviewed a geotechnical report that was
10 produced right before the building was built.
11 Q And did you speak with anybody to confer with
12 them on that?
13 A Yes. Ron Mayhew. He reviewed the report and
14 explained where the groundwater level is.
15 Q And what did you conclude about the groundwater
16 level with Mr. Mayhew?
17 A Concluded that the groundwater level is lower
18 than the lowest point of our building.
19 MR. DUCHESNEAU: Okay. At this point in time, I have
20 nothing else for Ms. Swikart. I'm going to now switch
21 over to actually Dr. Lofy.
22
23 ROBERT J. LOFY,
24 called as a Witness, and having been previously duly
25 sworn by the Panel Chair, was examined and testified as

1 follows:
2
3 DIRECT EXAMINATION
4 BY MR. DUCHESNEAU:
5 Q Dr. Lofy, why don't you state your name.
6 A Ronald J. Lofy.
7 Q And who do you work for?
8 A Lofy Engineering.
9 Q And, briefly, your educational background?
10 A Bachelor of Science in civil engineering, Master
11 of Science in sanitary engineering, Doctorate in civil
12 and environmental engineering with a minor in chemical
13 engineering.
14 Q And any professional licenses?
15 A Yes. I'm a registered California Professional
16 Engineer.
17 Q Okay. And in a real quick nutshell, summarize
18 all that professional experience.
19 A I have been a Consulting Engineer all of my
20 professional career for the last 44 years and I've done
21 just about everything you can imagine that environmental
22 engineers and consulting engineers do.
23 Q And with regard to WDRs, do you have experience
24 with WDRs?
25 A Yes.

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Q Do you have experience with groundwater?
A Yes, I do.
Q Approximately when was -- well, Casden Properties has hired you before?
A Yes, they have.
Q And approximately the first time they hired you?
A 2004.
Q And what was that for?
A Physically to file a Notice of Intent to Renew a Permit, groundwater discharge permit.
Q Okay. We'll get back to that in a minute. Has Casden ever hired you to prepare any late quarterly reports?
A Yes.
Q And this was for 9090 Wilshire?
A Yes.
Q Approximately when did they retain you?
A December of 2008, January of 2009.
Q And who from Casden retained you?
A Ms. Swikart.
Q Okay. And I will hand to you some exhibits. You've seen these before. For the record, they're Exhibits 14 through 18 from the binder, and just what are they, Dr. Lofy?
A These are the late reports that were submitted

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to try to stop the clock on the fines and penalties.
Q Okay. So you understand those are the reports at issue in this hearing; correct?
A That is correct.
Q Okay. And at the time you prepared the reports, what was your understanding of the water that was discharged?
A By that time, we had about five or six quarters of water data which basically confirmed or correlated very well with the representations that it was garage wash-down water and percolation from the planter areas, irrigation water.
Q The irrigation water? And had you thought that the reporting was inconsistent in terms of being irrigation water and so forth, with your understanding of the source, would you have reported it?
A No, I would not have.
Q And based on your experience, do you think the volume of discharge was too low for it to be groundwater and infiltration?
A Very definitely so.
Q Why so?
A Based on my empirical experience, we definitely see anywhere from thousands of gallons to hundreds of thousands of gallons per day and this was only in the

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order of maybe a couple of gallons per day, average, up to a maximum of a little over a hundred gallons per day.
Q Okay. And in the permit here, the WDR is up to 7,000 gallons per day; correct?
A Yes.
Q Okay. I'm going to move on quickly now here. Going back to that 2004 date, I'm going to hand you an exhibit. It's Exhibit 25 and 26 from the binder. Do you recognize those exhibits?
A Yes, I do.
Q And those are the Notices of Intent from 2004 you referenced that you prepared?
A Yes.
Q So you prepared those; right?
A That is correct.
Q And at the time you prepared those, that Notice of Intent, what was your familiarity with the building? That was your first assignment?
A That was my first assignment with the building. I had no prior experience with the building at all.
Q Okay. And was it your intent when you submitted that that you were representing its actual groundwater and filtration was occurring?
A I just assumed it was that because it was renewal of an existing permit.

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Q And when you're making the statement on the permit, you're just selecting the type of permit you're applying for; right?
A That's correct.
Q And with regard to the sample that's referenced in the Exhibit 26, where was that sample taken from? It says it's a groundwater sample.
A It was taken from the P-III garage-level sump.
Q So it wasn't really the intention to say that it's actual groundwater, is it?
A I did not know any difference.
Q Okay. And with regard to the next exhibit, I'm going to provide to you from Exhibit 20. This is Exhibit E to Casden's brief. It starts on page 342. If you can just take a look, what is that?
A 342, you said?
Q Well, or 343, the Bates stamps at the bottom right. I'm sorry I'm rushing you here.
A Right. That's basically the Cal Science laboratory report on four copper samples that we took.
Q And you collected those samples; right?
A That is correct.
Q And tell us where you collected them from?
A I collected them from each of the individual hold bigs from the four planters surrounding the building

at street level.
Q Okay. And you even signed the chain of custody?
A Yes.
Q And you sent it to a lab. What lab?
A Cal Science Environmental Laboratories.
Q They're certified?
A Yes.
Q And you sent them to analyze separately --
A Yes.
Q -- for copper?
A Yes.
Q And the results are listed in that document; correct?
A Yes.
Q To your understanding, they're true and correct?
A Yes.
Q And those are the copper levels of the potable water that was coming out of those depths; correct?
A That's correct.
Q Nothing else for you. Thank you.
MR. DUCHESNEAU: Mr. Buckley, you're up next.

CHARLES I. BUCKLEY,
called as a Witness, and having been previously duly sworn by the Panel Chair, was examined and testified as

follows:

DIRECT EXAMINATION
BY MR. DUCHESNEAU:
Q Why don't you state your name for the record.
A Charles I. Buckley.
Q Are you currently employed?
A Yes.
Q And who are you employed by?
A California Environmental.
Q And what's California Environmental?
A An environmental groundwater consultant firm.
Q And are you a principal with California Environmental?
A Correct.
Q For how long?
A 1988.
Q And provide a brief description of your education.
A Bachelor's of Science in engineering, geology from UCLA; graduate work in hydrogeology From Cal State L.A.
Q And do you hold any professional certifications?
A Yes. I'm a registered professional geologist in the State of California, a certified engineering

geologist and a certified hydrogeologist.
Q Okay. And, again, do justice to your decades of experience in two minutes about your work, about what do you do and your background and what type of work?
A Primarily involved in assessing and remediation of contaminated properties in the general Los Angeles area. I've been doing that since 1985.
Q And is that important to have an understanding and experience with groundwater levels?
A We work with groundwater on a daily basis, correct.
Q Okay. And you were retained on behalf of Casden in this matter; correct?
A Yes, I was.
Q And for what purpose?
A To research the historic groundwater conditions in the area of the 9090 Wilshire Boulevard.
Q Okay. I'm going to hand you part of Exhibit 20. It's pages 315 to 339 and it's Exhibit C to Casden's submittal. And tell us what that is.
A That's my report of February 16th, 2011.
Q And with regard to your evaluation, did you -- you actually completed your evaluation; right?
A I did.
Q And that's your signature?

A Correct.
Q And you think it's true and correct, don't you?
A The signature is true and correct.
Q Well, the report as well?
A Yes, sir.
Q Okay. With regard to -- did you reach conclusions based on your assignment?
A Yes, I did.
Q Before we get to those conclusions, just briefly describe what you did for research.
A Well, I was provided a geotechnical report done prior to construction of the building. That was an R.T. Franklin geotechnical investigation. They drilled four borings, two of which penetrated the groundwater, and both of those borings they found groundwater about more or less 39 feet below the ground surface, and that corresponded to an elevation of about 140, 141 feet above mean sea level.
I also reviewed the hydro dewatering report. That's been referred to already in testimony. And that report, they drilled a 2-foot diameter boring to about 55 feet. The important fact from that report that I gleaned was that they put in a piezometer, which is an accurate measure of groundwater, and they allowed that piezometer to stabilize over a period of time and obtained an

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1 accurate groundwater level which was about 41 feet below
2 the ground surface; again, about 140 feet below the
3 ground.
4 Q Okay. Maybe just briefly describe the other
5 types of basic research you did and then we'll get into a
6 little bit more detail.
7 A Okay. The other research we did, we researched
8 the geotracker database, online database that provides
9 some historic data on groundwater monitoring. We also
10 reviewed the seismic hazards map which contains the
11 Beverly Hills -- that contains historic groundwater data.
12 We reviewed the construction plans for the building, the
13 as-built plans, especially pertaining to level P-III
14 which contains the drainage information for the sub
15 drains; and other than that, it was about it.
16 Q And as a matter of fact, you've attached some of
17 this information to your declaration; right?
18 A Right.
19 Q And you actually went to the Board and looked at
20 one of the Board files for a place across the street from
21 the building; is that correct?
22 A That's correct. There was a file. Actually,
23 that file's at the Los Angeles County Department of
24 Public Works. They were the lead agency. We got the
25 file. It had information on groundwater for monitor

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1 wells installed directly across from the Casden property
2 at the time. It was a Unocal gas station. The
3 groundwater data was from about 1988 to 1993 and that
4 data showed similar groundwater elevations as we found on
5 the -- from the Casden geotechnical and groundwater
6 investigations, about 140 to 142 feet.
7 Q Okay. And you said you reached an opinion.
8 What was your opinion?
9 A Well, the opinion -- again, when you put all
10 that information together -- and understanding that the
11 elevation of the lowest point of the gravity sub drain
12 system beneath the Casden building is 145 feet, so that
13 no groundwater can enter or be drained unless it's above
14 that elevation, so that's the critical elevation, about
15 145 feet, everything would have to be above that to drain
16 it, that sub drain, and be collected in the sump, we
17 found historically it appeared that the groundwater
18 elevations had never reached higher than about 142 feet
19 so that the groundwater had never intercepted the sub
20 drain system beneath the Casden building of 9090 Wilshire
21 Boulevard.
22 Q So you had deduced some of that from the
23 building plans; correct?
24 A Correct.
25 Q And the historic geotechnical work directly on

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1 the site; correct?
2 A Correct.
3 Q And then historic data from across the street?
4 A Correct.
5 Q And then some data from LACDP in terms of the
6 area as well?
7 A Correct.
8 Q And so in your opinion, has groundwater seeped
9 into the 9090 Wilshire Boulevard building in the relevant
10 time frame for these late reports?
11 A Not based on the information I've reviewed.
12 MR. DUCHESNEAU: All right. Thank you very much.
13 Okay. I would like to call -- again, forgive
14 me -- Mr. Anijielo.
15 Okay. Thank you. You can stay seated. That's
16 fine with me.
17
18 AUGUSTINE ANIJIELO,
19 called as a Witness, and having been previously duly
20 sworn by the Panel Chair, was examined and testified as
21 follows:
22
23 CROSS-EXAMINATION
24 BY MR. DUCHESNEAU:
25 Q I'm looking at your presentation and you were

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1 describing other wastewater discharges covered by this
2 permit. You can process and not process wastewater that
3 meet the eligibility criteria. You cannot be covered by
4 the other specific general NPDES permits, and you cite to
5 page 110.
6 Page 110, I will note for the record, is the
7 permit R4-2008-0032, and that was not the WDR that was in
8 place at the time for the lately submitted reports, was
9 it, that were from late 2005 until sometime in 2008?
10 A This was not.
11 Q Okay. And then there was also a reference -- I
12 will hand to you an -- sorry. I cut myself off there.
13 I'm going to hand to you an exhibit. It's
14 Exhibit 5, and for the record, it's page 25 through
15 page 82 and it is -- it does include the groundwater WDR,
16 which is R4-2003-0111, which was in effect at the time.
17 And if you pay -- if you turn the page to
18 page 36 of that report, and there's a description of
19 discharge there, which I believe was at one point raised.
20 Can you tell me in that description where it indicates
21 that irrigation water would be covered by this permit?
22 A The irrigation water is -- we've got it as
23 "incidental collected."
24 Q Well, if you turn your attention to paragraph
25 6G, can you read what 6G is?

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A "Incidental collected stormwater from business."
Q Okay. So irrigation water is not stormwater, is it?
MS. DIAMOND: Excuse me. Would you give us the pages that you're talking about in the binder?
MR. DUCHESNEAU: I am sorry. It's page 36.
MS. OKUN: 6.36.
MS. DIAMOND: Okay. Let us just get to that page.
BY MR. DUCHESNEAU:
Q Okay. And if you -- do you have any understanding with regard to Order Number, let's see, 0182? That's the NPDES permit for municipal stormwater and urban runoff.
A Generally it is.
Q And is it your understanding that indeed, as a matter of fact, that it exempts irrigation runoff? Correct?
A It does not exempt irrigation runoff. Whatever it -- what it says is that it is not prohibited from being discharged. So in these cases, like in our general permit, the Order Number 2003-0111, it does not necessarily state that it -- it can cover other things other than the --
Q Okay. But, sir, I'm limited in time.
My question for you, actually, is that that

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permits exempts irrigation runoff; for instance, that runoff from irrigation water at a building as it runs down the curb, that's not going to be requiring a stormwater permit, does it?
A It's -- it says that it's not prohibited from being discharged.
Q Okay.
A That doesn't say that it can. It's prohibited from getting the permit. We -- the original Board, the way we look at it --
Q I understand, but I'm limited to time, so I don't mean to be disrespectful --
MS. MACEDO: I object. If you ask him a question, you need to let him answer.
MR. DUCHESNEAU: But I'm asking a question with regard to the stormwater and I'm just limited in time, so I can let the witness go on. I'm just trying to reserve some time.
MS. MACEDO: Which permit are you talking about? An NPDES permit or the MS4?
MR. DUCHESNEAU: I am talking about the municipal stormwater permit for urban runoff which exempts irrigation runoff --
THE WITNESS: Yeah.
MR. DUCHESNEAU: -- which exempts irrigation runoff.

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THE WITNESS: See, that permit, the original Executive Officer can on his own recommend this permit could be covered on that individual in a general permit. Like in your facility, in the facility in question, since the permit covers groundwater and miscellaneous waste treatment, everything that comes out from that sub drain, from the sump, are covered in other permits.
BY MR. DUCHESNEAU:
Q Okay. I would also like you to turn to page 43.
MS. DIAMOND: 43?
MR. DUCHESNEAU: Yes, ma'am, and this is part of the 2003 groundwater discharge permit.
BY MR. DUCHESNEAU:
Q And, again, if you go to your slide which was from the wrong permit, but nonetheless, you indicate on your slide that -- you say, Other wastewater discharges covered by this permit include the process" and so forth, "wastewater, that meet eligibility criteria." And if you go and look at "eligibility," look at number 1. It says, "This order covers discharges of surface water of treated or untreated groundwater from dewatering operations and other wastewaters"; right?
A That's right.
Q But not irrigation water. It doesn't say that, does it?

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A "Other wastewaters." Irrigation water is considered a wastewater.
MR. DUCHESNEAU: Okay. I have nothing else.
I will reserve what time I have. Thank you.
MS. DIAMOND: Can you tell us what time he has?
MR. CARLOS: A little over a minute.
MS. DIAMOND: Are you reserving the minute? You have one minute. You want to reserve it?
MR. DUCHESNEAU: I will reserve it. Again, I had submitted before that if I could indulge the Panel, if necessary, to have a little bit more time. Thank you.
MS. DIAMOND: I think we're going to go on now at this late hour with our Prosecution Team.
MS. MACEDO: Okay. I'm going to go kind of rapid fire because I know we do have limited time and I appreciate the Board's patience.

REDIRECT EXAMINATION

BY MS. MACEDO:
Q Augustine, following up on the questions just asked to you by Mr. Duchesneau, this was your slide you presented earlier today. The third bullet, I want to make sure people understand this. Incidental waters, whether they're irrigation or groundwaters that are pumped to the sump and then discharged, are they properly

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1 covered under the NPDES permit?
2 A Yes, they are.
3 Q If you wouldn't mind --
4 MR. DUCHESNEAU: I will just object to the extent
5 it's calling for a legal conclusion.
6 BY MS. MACEDO:
7 Q Augustine, what's your position at the Regional
8 Board?
9 A My position is that everything that is
10 discharged from the sump to the outfall --
11 Q I'm sorry. What's your position, your
12 employment position?
13 A I'm the Chief of the General Permitting Unit.
14 Q Do you make determinations about what is and
15 what is not covered by permit?
16 A I do.
17 Q Thank you. Can you please turn to page 229 in
18 the hearing binder. It's Exhibit 6.20.
19 A Okay.
20 Q I believe you were just asked questions about
21 this by Mr. Duchesneau about "incidental runoff from
22 landscape irrigation related to the MS4."
23 A Yes.
24 Q Does this -- do you agree with this footnote?
25 A As it pertains to the permit, not really.

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1 Q Okay. Incidental runoff from Casden's facility
2 that is discharged through the pump is covered by
3 Casden's permit; correct?
4 A Correct.
5 MS. MACEDO: Thank you.
6
7 KAY SWIKART,
8 called as a Witness, and having been previously duly
9 sworn by the Panel Chair, was examined and testified as
10 follows:
11
12 CROSS-EXAMINATION
13 BY MS. MACEDO:
14 Q Ms. Swikart -- I apologize for mispronouncing
15 your name -- when you filed the 2009 Notice of Intent to
16 continue coverage under the NPDES permit for the Casden
17 facility, did you read it?
18 A No.
19
20 HUGH MARLEY,
21 called as a Witness, and having been previously duly
22 sworn by the Panel Chair, was examined and testified as
23 follows:
24
25

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1 DIRECT EXAMINATION
2 BY MS. MACEDO:
3 Q Mr. Marley, you had a meeting with yourself,
4 Ms. Swikart, and Mercedes, another employee at the
5 Regional Board, regarding settlement after the NOV had
6 been issued to Casden; is that correct?
7 A Yes.
8 Q Can you explain to me what you told Ms. Swikart
9 about Casden's opportunities to reduce their MMPs at that
10 time?
11 A We explained the MMP process and the fines that
12 could have been accrued with the late reports and that if
13 we got from Casden a statement, a signed statement there
14 were no discharges, telling us that there were no
15 discharges during that time frame, then they would not be
16 susceptible to Mandatory Minimum Penalties for those late
17 reports.
18 Q And did Ms. Swikart indicate that she could
19 provide such a statement?
20 A She did not.
21 Q And why not?
22 A She stated that somebody else was in charge at
23 the time, somebody else was responsible for those
24 reports, and she could not validate that there was no
25 discharge at that time, during that period.

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1 ROBERT LOFY,
2 called as a Witness, and having been previously duly
3 sworn by the Panel Chair, was examined and testified as
4 follows:
5
6 CROSS-EXAMINATION
7 BY MS. MACEDO:
8 Q Mr. Lofy, you're paid by Casden; correct?
9 A Yes.
10 Q Is it a consulting agreement or is it an
11 employee relationship?
12 A It is a consulting agreement.
13 Q What's the end date of that consulting
14 agreement?
15 A Actually, let me correct myself. Basically, I'm
16 on call. They give me assignments and I just assume
17 those jobs.
18 Q I apologize for interrupting.
19 Do you have any information that leads you to
20 believe you will not be retained by counsel after this
21 testimony?
22 MR. DUCHESNEAU: Objection; speculation.
23 THE WITNESS: I don't know if I'll be hired or not.
24 I have no idea.
25

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1 BY MS. MACEDO:
2 Q Did you ever advise Casden to terminate its
3 NPDES permit?
4 A I believe I did.
5 Q And what was its response?
6 A I believe they were taking it internally to
7 decide, and I did not hear one way or the other.
8 Q When did you make that recommendation?
9 A I don't know exactly when. I'm going to guess
10 it was maybe -- I don't recall exactly when. I know that
11 I did make that recommendation though.
12 Q Okay. You tried to clarify statements on some
13 Notices of Intent that your engineering company provided,
14 including description of groundwater samples. Did you
15 expect the Regional Board to rely on your statements?
16 A Yes.
17 Q That included a description of Casden's
18 discharges being from dewatering activities?
19 A That was based on my understanding at the time
20 of what was going on.
21 Q Did you know that it was being signed under
22 penalty of perjury?
23 A Of course I did.
24 Q Did you indicate to the Regional Board that some
25 of the Notice of Intents should be disregarded because it

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1 was false or misleading?
2 MR. DUCHESNEAU: Objection; misstates the document.
3 The document speaks for itself.
4 THE WITNESS: It was my understanding at the time
5 that we were dealing -- first of all, in 2004, just by
6 the inference that it was a permit, that it was going to
7 be groundwater, so I never questioned it.
8 MS. MACEDO: I don't have any further questions for
9 the witnesses, but I would like to point out that the
10 Prosecution Team stands by its statements that we've
11 made.
12 I realize this Board, this Board in particular,
13 is frustrated with MMPs often because of their mandatory
14 nature. This is a particular exception that is limited
15 in nature. These arguments are going to be raised over
16 and over again and I disagree with Mr. Duchesneau's
17 speculation that the interpretation of his 13385.1(e) is
18 only a small percentage of people and that his exception
19 would not result in a complete wipeout of the MMP program
20 which has been in effect for more than ten years.
21 I'd further like to say that one major component
22 of what the Board has to decide is credibility here. You
23 have several members of the Regional Board staff and a
24 history of 26 years of statements by Casden indicating
25 groundwater discharges. The statement that they are now

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1 irrigation water discharges is relevant information, but
2 it does not -- it does not deviate from the fact that the
3 NPDES permit for Casden is still in effect and they're
4 still discharging.
5 Casden cannot have it both ways. If you look at
6 the Casden briefs submitted by Counsel, it would like to
7 argue that it has benefited from 26 years of being
8 covered under the permit and regardless of the type of
9 material it is discharging, it is now no longer subject
10 to discretionary penalties or MMPs. It would like to
11 choose maybe the system it would prefer to be penalized
12 under.
13 Instead, because of its repeated and unwavering
14 requests to be covered by this permit, it has the benefit
15 of that, but it subjects itself to monitoring requests,
16 reports, and MMPs. MMPs were issued here and the
17 constitutional arguments about excessive fines I feel
18 ring hollow in the light of fines stop when you report,
19 and we have testimony from individuals from Casden
20 indicating that they continued to fill out Notices of
21 Intent without reading the documents and are trying to
22 shift the burden onto the Regional Board to verify every
23 statement submitted to the Board under penalty of
24 perjury.
25 In addition to that, Mr. Duchesneau's argument

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1 and reading of 13385.1(e) requires a significant
2 administrative burden on the Board. I don't feel that
3 this is the way to operate a self-monitoring
4 environmental system. In California, we trust that the
5 information submitted to the Board is reliable. It is
6 not our job to go out and verify it.
7 In summary, I think these MMPs -- it's a tough
8 call. I realize that SB 1284 is new. I realize the
9 Board members are going to have questions. We're happy
10 to do that. We're happy to respond to them, but it must
11 apply. It needs to apply here and it needs to apply
12 going forward.
13 Thank you.
14 MR. DUCHESNEAU: Mr. Marley just said in his meeting
15 in 2009 when he met with Ms. Swikart he said, "Hey, if
16 you can tell us there was no discharge, you can be out of
17 these penalties." She didn't say that. She said, "Hey,
18 we had a discharge, but it was irrigation." There was no
19 motivation for her to otherwise be making it up. You saw
20 the record continuously and you've heard the experts, no
21 groundwater infiltrated.
22 So what's really at issue here is that Casden is
23 being fined over $600,000, over $650,000 for irrigation
24 water that was discharged out of the sump, water that was
25 potable, and I just don't think that that is the intent

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1 of the statute.
2 I would strongly urge you to see how we
3 interpret the statute. The Prosecution just did not at
4 all be -- was able to explain how do you interpret the
5 statute between the first exception and the section (e)
6 of that statute. The legislature was clear. If there
7 wasn't an ACL before July 1st, 2010, it applies, and that
8 is the only interpretation that can be had.
9 And with that, I do thank you very much for your
10 time. Thank you.
11 MS. DIAMOND: Thank you.
12 MR. DUCHESNEAU: For the record, I'm sorry. I made
13 it within actually my full time.
14 MS. DIAMOND: Thank you very much. Congratulations.
15 MR. BLOIS: I appreciate that.
16 MS. DIAMOND: Then we're going to begin with our
17 Board questions and we're going to start with
18 Mr. Stringer. It's your turn to begin; is that right?
19 MR. STRINGER: I'm not sure, but I'll go at it. I
20 actually just have a few questions.
21 Counselor, just to clarify, this distinction
22 between irrigation water and groundwater, is it -- are
23 you making the assertion that your interpretation of the
24 permit is what makes that distinction relevant or is
25 there some other body of law that you're pointing to?

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1 MR. DUCHESNEAU: Well, what makes that relevant is
2 SB 1284. SB 1284 isn't about whether or not you have a
3 violation. It's about how are you penalized for that
4 violation. So in this instance, you have some late
5 reports from Casden and so the only issue here is, is
6 this going to be discretionary for the Hearing Panel or
7 does the Hearing Panel have to abide by that 30-day rule,
8 as the Prosecution said, that's continuously accumulating
9 for every 30 days the report is late?
10 The permit is for groundwater discharges. 1284
11 was -- as we showed, the legislature was very specific to
12 say "reportable under the applicable Waste Discharge
13 Requirement." That's why we took the pains to
14 demonstrate why it's not the groundwater and why you can
15 trace the irrigation.
16 MR. STRINGER: So it does have to do with what the
17 permit says. I understand what the statute says, so it
18 does go back to whether the permit covers irrigation
19 waters; is that correct?
20 MR. DUCHESNEAU: It would to the extent, right, that
21 the permit covers it. We again submit that you don't
22 need a permit for irrigation water. It's only needed for
23 the groundwater.
24 MR. STRINGER: And what's your basis for saying that
25 you don't need the permit for irrigation water?

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1 MR. DUCHESNEAU: The permit is very clear. If you go
2 to those paragraphs five and six that we were just
3 discussing and if you look at that, it's very specific
4 that it's all groundwater related to the infiltration
5 type or dewatering, related irrigation water. Again, if
6 you're irrigating, potable water, it's getting into the
7 storm drain, that's exempt from the other permit for --
8 as we cited to municipalities.
9 MR. STRINGER: So --
10 MS. MACEDO: Can I respond or no?
11 MR. STRINGER: You obviously have a different
12 perspective on this.
13 MS. MACEDO: Well, I'd like to reply. I think
14 Mr. Duchesneau made two points. One, he's referring to
15 the permit and as both Ms. Kao and Augustine -- I
16 apologize I can't say your last name either -- the permit
17 language of 2003 said "including but not limited to" and
18 then the 2008 permit expanded that language.
19 Mr. Duchesneau's reliance on the MS4 permit is
20 totally inappropriate in avoidance to avoid penalties
21 entirely. And his comment about SB 1284 and how it
22 changes the penalty structure, the Prosecution and
23 frankly the entire Office of Enforcement stands by the
24 proposition that the legislature, when in enacting that,
25 had the body of MMP law before it and created at least

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1 (a)(2)(A) to deal with this specific problem that
2 Mandatory Penalties could be issued without notice. And
3 so this provides pretty much a safe harbor for somebody
4 who is, you know, getting an MMP without any prior notice
5 from the Regional Board. That is not the case in
6 Casden's situation.
7 And then finally responding to Mr. Duchesneau's
8 argument that they could be subject to discretionary
9 penalties, I think that's a misstatement of the MMP
10 structure in general. MMPs are the floor of what must be
11 ordered, as opposed to the discretionary setup and
12 factors under 13385. It sounds like Mr. Duchesneau is
13 choosing to avoid the MMPs because it's a large number in
14 his case and so we'll go with the discretionary figure,
15 which in his case might be lower based on gallonage.
16 That's not the way the program works. It's not
17 a choose-your-own-penalty type of system, and I disagree
18 with his characterization of the permits. And it's
19 not -- it's not that it's irrigation water.
20 To make the point clearer, as staff explained it
21 to me who doesn't have a science background, if the
22 irrigation water was going from Casden to a storm drain
23 system, that would be an applicable MS4 discharge; but
24 because irrigation water was being captured by Casden's
25 sump, everything that comes out of Casden's sump is

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1 governed by its permits, and we think the evidence is
2 clear that it has continued to seek and maintain coverage
3 for 26 years. You can have coverage. You just have to
4 be subject to penalties.
5 MR. DUCHESNEAU: If you wouldn't mind just for a
6 brief response --
7 MR. STRINGER: Sure, of course.
8 MR. DUCHESNEAU: A clarification here, 'cause Counsel
9 keeps referring to Casden is looking for a zero penalty,
10 and even though that's not necessarily so, but one with
11 the relevance for the Glenborough matter was to show,
12 again, what the Board has done before; and in that case,
13 again, the statement was submitted, the Board actually
14 discharged $270,000 or some thousand dollars of
15 penalties. However, all 1284 does in this first
16 exception is it changes it from this Mandatory Minimum
17 structure -- again, that can get out of hand, such as
18 this -- to discretionary --
19 MS. MACEDO: That's --
20 MR. DUCHESNEAU: -- and if that's the case after
21 that, then the Board has the discretion as to how it
22 views the penalties, but this isn't a matter of whether
23 or not it's a violation. It's a matter of again how it's
24 defined.
25 MR. STRINGER: And I understand.

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1 And just on that point, actually, you -- in your
2 closing remarks, you characterized this as being about a
3 big penalty for minor discharges.
4 I mean, isn't this about a substantial penalty
5 for blowing off reporting requirements? 'Cause we issue
6 penalties plenty of times in cases where there are no
7 discharges at all.
8 MR. DUCHESNEAU: Well, I would submit, again, when
9 does one start drawing the line as to what's a reasonable
10 percent? I would submit $650,000 for late reports is not
11 the appropriate penalty, as we've said before. If you
12 look at other regimes and so forth, that would be
13 rather -- rather steep. I would also like to mention
14 that in terms of -- especially when one looks at again
15 the harm of the potable water going through it, as
16 counsel just said. This wasn't a lease going down the
17 curb going into the stormwater; that would be okay, so
18 what's the harm of that?
19 And I would refer you to page 36 of that WDR and
20 you can read it for yourself so I don't take up your
21 time, but paragraphs five and six and you'll see again
22 that this WDR is very much focused on groundwater, on
23 seepage.
24 MR. STRINGER: So your argument is that MMPs don't
25 apply. That's really what this comes down to, and they

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1 don't apply because of this new statute?
2 MR. DUCHESNEAU: Because of the new statute.
3 MR. STRINGER: Right. So I actually have some
4 questions to the Prosecution Team.
5 MS. MACEDO: Sure.
6 MR. STRINGER: I'm a bit -- to me, you look at a
7 statute and you read its plain language and that's what
8 you apply, and there seems to be some -- some significant
9 else that needs to be done to get to where I think
10 they're trying to go and I'm trying to think this through
11 in a very simple and straightforward way. I believe you
12 did it a long time ago.
13 MS. MACEDO: Do you want me to point it out and pull
14 up the slide?
15 MR. STRINGER: So can you just walk us through again,
16 your --
17 MS. MACEDO: I'd like --
18 MR. STRINGER: Your interpretation of the statute --
19 MS. MACEDO: Sure. I'd like the time line slide.
20 MR. STRINGER: -- and I should have said "briefly."
21 MS. MACEDO: No. I apologize.
22 13385(a)(2)(A) does not give everyone the
23 opportunity to provide a statement; (a)(2)(A) is
24 self-limited -- this was covered in the joint
25 presentation -- both in time because it has to be filed

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1 within 30 days and it's also limited by the type of
2 statement that is susceptible to qualify for this
3 exception.
4 MR. STRINGER: Now, I'm going to ask questions as you
5 go. I hope that's okay.
6 How can you file a statement if you -- before
7 the statute didn't even exist? I mean, to Counsel's
8 point, I think he made that argument.
9 MS. MACEDO: In terms of Glenborough's statement,
10 what happened was he was already arguing -- I think
11 one --
12 MR. STRINGER: No. I believe his argument was that
13 the statute didn't come into effect until January 1st.
14 How can you file the statement prior to that on a statute
15 that doesn't yet exist?
16 MS. MACEDO: Well, as he points out, I think some of
17 his disparate treatment argument of Casden versus
18 Glenborough is that Glenborough submitted a statement and
19 it was technically before the effective date of the
20 statute because the Enforcement Policy governed at the
21 time, so the Enforcement Policy allowed you to present a
22 similar statement to Casden's and thereby reduce your
23 MMPs.
24 MR. STRINGER: Okay.
25 MS. MACEDO: Okay? So I think Mayumi explained it

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1 and, you know, sort of as the MMP guru, she's now
2 explained it to me that gap period, way back in her joint
3 presentation, from July when we knew SB 1284 was on the
4 horizon until January 1st when we knew it would come into
5 effect, we gave every Discharger the benefit of the
6 doubt.
7 We looked at the Enforcement Policy. It was
8 broader than the statute. The statute didn't apply. We
9 didn't feel the need to sort of pull back the policy, and
10 we really can't, you know, approve a pull back or a
11 modification would be sort of underground regs and
12 something that's not approved by the Office of
13 Administrative Law. But in every case, Glenborough
14 included, we gave the Discharger the benefit of what we
15 believed the policy was reflected by the legislature.
16 MR. STRINGER: How did you give Casden the benefit of
17 the doubt in this case?
18 MS. MACEDO: I'm sorry. Casden was the only party we
19 didn't because regardless of when Casden's statement was
20 submitted, whether it was -- it was clearly 30 days after
21 the first written notice, absolutely. The notice was in
22 2007. But we didn't feel that its statement would be
23 credible at any time. The statement --
24 MR. STRINGER: Its statement saying that it didn't
25 have any discharge?

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1 MS. MACEDO: That's right. We think that that was
2 in -- it was in disagreement with flow from
3 self-monitoring reports. So at the same time it was
4 saying there were no discharges, independent reports from
5 them previously were being submitted that said something
6 was being discharged; and at the same time, we had 26
7 years -- and this is an unusual case, but we had 26 years
8 of, in staff's opinion, feeling, you know, inconsistent
9 statements. And the Regional Board has discretion to
10 accept or reject those statements. It has discretion in
11 the statute to request more information. It certainly
12 has discretion when considering 13385 factors and their
13 context. It has discretion as to apply this benefit that
14 reduces a penalty, whether it be 200,000 or 600,000.
15 13385.1(a)(2)(A) can serve to take a penalty
16 down to zero. I don't think you should do that if the
17 Discharger itself isn't credible.
18 MR. DUCHESNEAU: Could I respond?
19 MR. STRINGER: Counselor, yes, please.
20 MR. DUCHESNEAU: There's a couple of things.
21 Again, as I pointed out in my presentation,
22 we're not talking the Enforcement Policy. As I pointed
23 out, the legislature was very, very specific on June 23rd
24 when it amended the Bill going through this legislature.
25 It changed the language from what was proposed that

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1 tracked the Enforcement Policy. And so Counsel said that
2 there was no discharge whatsoever. I think you can tell
3 through, going through our case for the past couple of
4 hours, we've never said that. Indeed, we were given the
5 opportunity two years ago to say it, but Ms. Swikart did
6 not say that because she felt she couldn't.
7 So we're not saying, again, as we've said it,
8 that there hasn't been some water that's gone out of that
9 pipe. What we said is we know for sure, and nobody's
10 shown us differently, that it's not groundwater and we've
11 been consistent from the '80s, in 2009, two years before
12 SB 1284 gave us a reason to try to start saying, "We
13 don't think it's regulated under the WDR."
14 MS. MACEDO: Your permit does not only cover
15 groundwater.
16 MR. DUCHESNEAU: I respectfully ask that I can at
17 least just address the Panel.
18 MS. MACEDO: Sorry. I apologize.
19 MR. DUCHESNEAU: Again, we might have a difference of
20 opinion on that point --
21 MR. STRINGER: I'm aware of the difference.
22 MR. DUCHESNEAU: -- but constantly my client is being
23 mischaracterized. We actually had a motion to this
24 effect that, again, they've been credible. They haven't
25 said that they haven't had a discharge at all. They

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1 actually were given that opportunity by Mr. Marley to do
2 that. They haven't.
3 There hasn't been any technical evidence to be
4 able to disagree with these experts about the fact that
5 the groundwater hasn't infiltrated, including Counsel,
6 this reference saying she now disagreed with the flow
7 rates, but they put on absolutely no information to
8 support that and I would move to strike that because
9 there's no evidence in the record to support that that's
10 to Casden's surprise.
11 So you know what? Again, I think we've told it
12 like it is. I think the other thing about your question
13 that I would just like to go back to, your earlier
14 question, and that is how do you rectify that you didn't
15 have a requirement for the statement before the effective
16 date? You can't use the Enforcement Policy. We've shown
17 you it's different. You can't. You've also got to look
18 at (e), subdivision (e) of the statute, which again is
19 pointing to July 1st, 2010. So as long as you don't have
20 a complaint before July 1st, 2010, this applies.
21 And so take July 2nd, 2010, you get a complaint.
22 Well, that would also be a notice. That's about as stark
23 a notice as you can get that you have a violation; and
24 before that, you're going to have a Notice of Violation
25 as well.

1 So you get one on July 2nd, 2010 and that very
2 provision saying, This applies. You never had an
3 opportunity or reason to have that statement before this
4 action.
5 So, you know, how can one reconcile that? This
6 wipes out six months of the year in ink as to how this
7 could apply.
8 MS. MACEDO: My reconciliation of (e) is that (e)
9 does not make any reference to the statement. It just
10 doesn't.
11 13385.1(a)(2)(A) and the other subdivisions are
12 going to apply going forward and with no sunset date; (e)
13 does not make any reference to the statement although
14 it's the entire point of (a)(2)(A). (a)(2)(A) and (e)
15 can work together. We've provided two example slides.
16 MR. DUCHESNEAU: I have to respond to that because
17 I'd just say again, look at (e). I've asked Counsel
18 since day one when I got involved to explain, How do you
19 reconcile this? Look at (e). It's not "except in that
20 first exception." It's saying, The amendments made by
21 SB 1284 shall apply, period, under this scenario.
22 And the example given by Counsel here, they're
23 talking about an ACL, a complaint in March of 2011.
24 Let's say January 2nd, 2011. What about July 2nd through
25 December 31st during -- you know, during the period of

1 time when you didn't have a statement required and that
2 statement from an Enforcement Policy was different. And
3 as a matter of fact that was offered, I guess, to Casden
4 at the time and they couldn't take advantage of that
5 statement? Now Casden has a different law, a different
6 requirement, and in their judgment they thought they
7 could now have an opportunity to do that statement. And,
8 again, that statement just affects the way the penalty is
9 applied, and that's what we're talking about.
10 MR. STRINGER: That's all for now. I may have some
11 further questions.
12 MS. DIAMOND: Maria?
13 MS. MEHRANIAN: Thank you. So with those questions,
14 I have two. I probably have very few, too.
15 This is for Casden. Counselor, do you also --
16 when we talked about SB 1284 and when does it start
17 applying, I want to know in your time line how far
18 back -- what is your time line of it, that it should be
19 applied?
20 MR. DUCHESNEAU: Sure. If I understand your
21 question, let me try to explain how 1284, that first
22 exception could -- would be interpreted. And if I don't
23 answer your question, let me know.
24 MS. MEHRANIAN: Sure.
25 MR. DUCHESNEAU: My viewpoint of that, again, is

1 we're in a transitional period. The statute's become in
2 effect and there's a time that we've explained prior to
3 the statute, if you meet those requirements, if they
4 didn't have a complaint before July, that sort of
5 thing --
6 MS. MEHRANIAN: Right.
7 MR. DUCHESNEAU: -- then you can take advantage of
8 it. So my understanding from reading that is you've got
9 to look at that 30 days. They have 30 days from notice
10 of the Board --
11 MS. MEHRANIAN: Uh-huh.
12 MR. DUCHESNEAU: -- to do this statement sometime
13 after the 1st of January, the effective date.
14 Now, Casden submitted the statement actually
15 within 30 days of January 1st, but I actually don't -- I
16 think it's really 30 days from when you get a notice
17 after the Board and that's how one would really read it.
18 And I would point out one other thing; and that
19 is we referred to that other matter, Glenborough, and
20 it's important to remember again while Counsel argues
21 that, Well, that was under the Enforcement Policy and
22 that didn't have a 30-day period, it's not relevant when
23 Glenborough signed that statement. What's relevant is
24 that it's undisputable that that settlement did not take
25 effect until SB 1284 was effective. That settlement

1 didn't take effect until January 18th, 2011 and at that
2 point in time, it's already been acknowledged that's
3 certainly when 1284 will be effective, and that's never
4 been explained.
5 MS. MEHRANIAN: And then I think this might be a
6 repetitive question. Probably it was asked, or probably
7 not, but I still am not clear of it.
8 The reason that you think the MMPs is not
9 applicable is because of the new statute or like you're
10 not a Discharger? I'm trying to see your view of this
11 again.
12 MR. DUCHESNEAU: It's because of the new statute.
13 MS. MEHRANIAN: That new statute?
14 MR. DUCHESNEAU: And the new statute, the way it
15 reads, says If you fail to file these reports on time, if
16 you're able to meet these requirements, then you can
17 submit a statement that again becomes a discretionary
18 penalty and not this Mandatory Minimum Penalty; and it's
19 because, again, of this new statute in January.
20 We're not denying that Casden was -- you know,
21 had these NOI's and had this permit, and you can question
22 their wisdom of having carried on with this permit so
23 long. We're not -- we haven't challenged that the
24 reports weren't late and, therefore, in violation. What
25 we're saying is As you consider what is the penalty for

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1 this violation, we have a new statute. Perhaps
2 gratuitous in terms of timing, but at the same point,
3 it's a new statute on the books that has changed the way
4 Mandatory Minimum Penalties apply.
5 MS. MEHRANIAN: This is a more general question.
6 It's my last question for you.
7 Somehow I'm still unclear of how differently you
8 saw and interpreted what the permits should be from what
9 the Board saw this and I'm wondering how in the process
10 it was never reconciled. Was it like -- I would think --
11 simply I would think why wouldn't you just do it the way
12 they asked you to do it at the right time so that it
13 doesn't get to the point it got?
14 MR. DUCHESNEAU: Well, let me -- if I follow your
15 question, you know, certainly Casden regrets not getting
16 in its reports on time and, again, that is something that
17 it should have done. What our issue has been here in
18 this hearing, though, is really what is the appropriate
19 penalty for that, for not having submitted 12 late
20 reports? And, again, that's why I submit that I think,
21 you know, nearly $700,000 for an office building
22 disposing potable drinking water is a little too much.
23 MS. MEHRANIAN: Okay. I'm clear.
24 And then one last question for the Prosecution
25 Team. What is the total discharge gallon average in the

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1 constituents clear to us now?
2 MS. MACEDO: They didn't provide that information.
3 MS. MEHRANIAN: We don't know?
4 MS. MACEDO: Yes.
5 MR. DUCHESNEAU: Could I respond to that?
6 MS. MEHRANIAN: Sure.
7 MR. DUCHESNEAU: I would actually disagree with that.
8 The Discharge Monitoring Reports which Mr. Lofy testified
9 to, and they're in your records as I think Exhibits 14
10 through 18, actually show you what those levels were and
11 they range anywhere from zero up to about give or take
12 100 gallons per day. The WDR requirement or allowance is
13 7,200 gallons per day, and you've heard the experts here
14 say that the low levels that were found to be discharged
15 are not consistent with groundwater infiltration at all
16 as well, on top of all the other information.
17 MS. MACEDO: I guess I'd just respond that while the
18 permit allows them to discharge up to 7,200 gallons, one
19 NOI indicated that they were discharging 28,800 and I
20 think for us it goes back to the issue of they submitted
21 all these statements under penalty of perjury and we
22 don't know what to believe.
23 And for the missing reports, the reason
24 reporting violations were put in the statute was because
25 during those periods, the Water Quality Board doesn't

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1 have an opportunity to respond and doesn't know what is
2 being discharged, and so we feel that the SB 1284
3 amendments took into account certainly the Enforcement
4 Policy which existed at that time but also the larger
5 Enforcement Policy, that we need credible information
6 from these Dischargers.
7 MS. MEHRANIAN: Thank you. That's all I have.
8 MR. BLOIS: I'll try and make this quick.
9 MR. DUCHESNEAU: I'm sorry. I was a little slow in
10 the door. Could I just interrupt one moment to respond
11 on one thing? I won't belabor on the points.
12 MR. BLOIS: Make it quick.
13 MR. DUCHESNEAU: I'm sorry. That was -- again, I'd
14 just encourage you to look at these Notices of Intent
15 that the Prosecution has relied upon to claim that that
16 shows it was 24,000 gallons or something of discharge.
17 Again, if you look at that, the applications
18 that say, We want this type of permit in the case of
19 groundwater discharge, it's not representing that it was
20 indeed that much. And, again, you've heard the evidence
21 in terms of everything else from that '87 inspection
22 report saying no groundwater was being discharged.
23 MS. DIAMOND: I think the best way for us to
24 continue, especially given the late hour, is for the
25 Board members to ask questions of whomever they want and

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1 then if they have other questions for you, they'll direct
2 them directly to you.
3 MR. BLOIS: I'm going to try and keep mine short and
4 sweet, but I really wish in this case the Casden would
5 have -- when hydroquip discovered that the groundwater
6 was lower than they thought it was going to be, would
7 have changed the building design to eliminate the
8 groundwater sump and put it into the sewer system or
9 something else. Obviously that's not done, so -- but
10 back to the point of your characterization,
11 Mr. Duchesneau, of potable water versus irrigation water,
12 evidently we have potable water going in to irrigate in
13 planters and that has got some sort of a French drain
14 system that takes the water down to a sump in the lowest
15 parking level. Would you drink that water coming into
16 that sump?
17 MR. DUCHESNEAU: I actually would. I'll tell you
18 why. It's not even a French drain system as much as it's
19 direct piping from the planters, then going down into the
20 sump and I would surmise I've drank worse water than
21 that.
22 MR. BLOIS: Thank you.
23 Ms. Swikart, several questions. Do you know if
24 there's an R.P. device or a back-flow preventer on the
25 pipes that feed the irrigation system in the planter

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1 systems?
2 MS. SWIKART: I don't know that.
3 MR. BLOIS: Mr. Duchesneau, does anybody on Casden's
4 team know the answer to that question?
5 MR. DUCHESNEAU: If I heard your question correctly,
6 you asked if there's a back-flow stoppage device for the
7 planters?
8 MR. BLOIS: For the potable water that feeds the
9 irrigation system.
10 MR. DUCHESNEAU: Right. To my knowledge, no, but
11 again let me clarify maybe why, and that is that, again,
12 the planters have piping connected so when there's
13 irrigation water runoff from the planters, you know,
14 you're irrigating more than is needed, it's going then
15 down the pipe down to the sump.
16 MR. BLOIS: No. I think you misunderstand my
17 question.
18 MR. DUCHESNEAU: Okay.
19 MR. BLOIS: It's Building Code to have a back-flow
20 preventer and the back-flow preventer is designed to
21 protect cross-contamination or cross-connection; and the
22 minute that it leaves the potable water system and hits
23 the irrigation of the planters, Public Health Code
24 defines that, and I think that's a legal term, although
25 I'm certainly not an attorney, as being "nonpotable" from

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1 that point on, and I think that's my concern.
2 I would respectfully disagree with your
3 characterization of that particular water as being
4 potable water, even though it comes from DWP or potable
5 water source.
6 I do want to ask Ms. Swikart, what size are the
7 irrigation lines that feed those planters, do you know?
8 MS. SWIKART: It's like between 2- to 3-inch pipe.
9 MR. BLOIS: And do you recall what size the lines
10 were that drained the excess water out of the planters
11 down into the sump, the ones that you could see on the
12 inside of the parking structure?
13 MS. SWIKART: Approximately -- I thought it was
14 between 2- to 3-inch, too.
15 MR. BLOIS: Okay. So that's not a lot of water.
16 MS. SWIKART: No.
17 MR. BLOIS: Is there any way to take that sump
18 discharge and put it -- connect it into something other
19 than the storm drain system?
20 MS. SWIKART: To a sewer line, you mean?
21 MR. BLOIS: Correct.
22 MS. SWIKART: Yes. That's what we're working on at
23 this time.
24 MR. BLOIS: And do you require a permit from some
25 public agency to do that --

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1 MS. SWIKART: Yes.
2 MR. BLOIS: -- or can you do that without any permit?
3 MS. SWIKART: No. It would be through a permit and
4 we're working with several consultants to make sure that
5 it's going through the proper channel to get that done.
6 MR. BLOIS: And I'm going back in dim memory, but
7 have you requested that that happen and been denied by
8 the City Building Department or any other entity?
9 MS. SWIKART: No. We just started that process, so
10 we have not been denied.
11 MR. BLOIS: You have not been denied the ability to
12 do that?
13 MS. SWIKART: No. I'm sorry. Hopefully not.
14 MR. BLOIS: Okay.
15 MS. MACEDO: I'm sorry. There was a comment over
16 here.
17 MR. BLOIS: Let me finish this one. I agree with
18 Fran.
19 You've answered my questions on elevation. I do
20 have a question for Mr. Buckley, however.
21 You've testified that, in your opinion, the
22 water table is definitely below the lowest level of the
23 building, which would include the sump. Have you taken
24 into consideration how much the water table fluctuates
25 between summer and winter, or is there a significant

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1 fluctuation involved at this site?
2 MR. BUCKLEY: The answer to your first question, yes,
3 considered the fluctuation. The answer about the
4 fluctuation is in this particular water body, there's not
5 a lot of fluctuation. The groundwater level is fairly
6 stable in this upper unconfined groundwater zone.
7 MR. BLOIS: Great. Thank you.
8 I have one other picayune question for Mr. Lofy.
9 You testified to a lot of things, but one of the almost
10 side comments you made was you mentioned wash-down water.
11 Is there a significant amount of wash-down water involved
12 here?
13 MR. LOFY: That, I do not know for sure. I just was
14 informed by Casden people that that was one of the
15 possible sources, so I basically was going by what they
16 had told me.
17 MR. BLOIS: 'Cause -- and this is important to me
18 because it turns out not to be so picayune because if
19 you've got irrigation water from your planters, that
20 could be directed to the gutter in the street and into a
21 storm drain system and if that same water from that same
22 source is going into a sump pump and ending up in that
23 same public storm drain system, maybe it could be
24 classified as irrigation water; but if there's wash-down
25 involved, that's my problem.

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1 And so as near as I can tell, this sump is in
2 the middle of a three-floor parking structure so anything
3 that collects in the three floors of that parking
4 structure is going to end up in that sump; correct?
5 MR. LOFY: I'm led to believe that is a possibility,
6 yes.
7 MR. BLOIS: Okay. One other question then for you,
8 Mr. Lofy. In the late reports that you submitted, did
9 you -- were there any violations of the permit's effluent
10 limits?
11 MR. LOFY: When you refer to the late reports,
12 between like December of 2007 and December of 2008, to
13 the best of my knowledge, there were not. And the reason
14 for that was the new permit just came into effect and our
15 violations, I believe, were solely due to the copper.
16 That's my recollection, anyway.
17 MR. BLOIS: So you mentioned there were violations of
18 copper or were there not?
19 MR. LOFY: There were violations of copper in this
20 last year, yes.
21 MR. BLOIS: And in Exhibits 14 through 18, were there
22 exceedances of the copper limits?
23 MR. LOFY: Yes. The last four quarters there have
24 been exceedances of the copper.
25 MR. DUCHESNEAU: Could I just clarify, 'cause I

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1 think -- and then you can clarify it if I'm wrong, but I
2 think Mr. Lofy was referring to the 2010 --
3 MR. LOFY: Yes, 2010.
4 MR. DUCHESNEAU: -- 2010. And, sir, I think you were
5 referring to the ones up to 2008. Mr. Lofy was referring
6 to the new requirements under the new permit that we've
7 got.
8 MR. BLOIS: What I'm trying to get at is could
9 someone from Casden sign a statement to the effect that
10 they did have effluents, but they didn't exceed any
11 permit limits? Could that statement be made by Casden?
12 MR. LOFY: In terms of their previous permits, I
13 believe that would probably be correct, yes.
14 MR. BLOIS: Okay. I have no further questions.
15 Thanks.
16 MS. DIAMOND: Do you have any further questions,
17 Charlie?
18 MR. STRINGER: I don't think so, no.
19 MS. DIAMOND: I just wanted to clarify -- basically,
20 I just have one question.
21 Mr. Duchesneau, you've said that we're here
22 because of 12 monitoring reports that were late; is that
23 correct?
24 MR. DUCHESNEAU: Yes.
25 MS. DIAMOND: Okay. And can I just ask you why they

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1 were late?
2 MR. DUCHESNEAU: Sure, and I can also defer to
3 Ms. Swikart because this is attested to in the statement
4 that was submitted in January to the Board or to the
5 Board staff. And, again, the reasons why we said it was
6 late is because the individual who handled the compliance
7 at the time really didn't do it.
8 And, Ms. Swikart, maybe you can explain more,
9 but that's basically what was the reason.
10 MS. DIAMOND: Are you basically saying that before
11 those reports, there might have been other reports that
12 were filed in a timely manner by this same person or by
13 somebody else?
14 MR. DUCHESNEAU: My understanding is that before
15 those reports that there had been timely reports filed
16 and there are some in the record.
17 MS. DIAMOND: And who would have submitted those
18 timely reports before these late reports happened?
19 MR. DUCHESNEAU: I'm sorry. I don't know offhand
20 other than on behalf of Casden.
21 MS. DIAMOND: I'm just having a hard time
22 understanding why, given your company is a very
23 sophisticated company and you have lots of resources and
24 we see that you have fine -- Casden has fine legal
25 representation and engineering and science

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1 representation, why it came to be that reports were not
2 done? I mean, this is the basis for how we know what is
3 discharged into the waters of the United States. We need
4 to have these reports, whether you discharged nothing,
5 no -- there is no contamination or not, but these are a
6 very important part of the whole system that we operate
7 under and so it's very important whether you, you know,
8 violated the copper limits or any other limits or none,
9 that the reports are done and I think that to me, that is
10 the big question.
11 Why were -- because if you -- because if 1284
12 didn't exist and we operated under the previous statute,
13 you would still be out of compliance for not doing the
14 reports. So I guess what -- I'm going to ask you this
15 question and you can just say whether I'm correct or not.
16 You're saying that yes, you did not turn them in. Casden
17 did not turn them in. They were late. But because of
18 the new 1284, you should not be subject to fines, the
19 MMPs, because there is some way that you can justify
20 not -- that not having -- not applying but if 1284 didn't
21 happen, if we didn't have 1284, that the former regime,
22 statute, would apply and you would have MMPs? Am I
23 understanding that correctly?
24 MR. DUCHESNEAU: Basically, a few just
25 clarifications. So, right, putting aside the other

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1 arguments we've raised in terms of is it really
2 constitutional to penalize somebody for --
3 MS. DIAMOND: I know. I'm not asking you those. I
4 understand those arguments.
5 MR. DUCHESNEAU: But in terms of the reports were
6 late, they were submitted eventually, but you're right.
7 This is a matter of how do you calculate the penalty and,
8 right, whether you have to abide by the Mandatory Minimum
9 regime of 3,000 every 30 days or something more in your
10 discretion, looking at the circumstances?
11 MS. DIAMOND: I don't have any further questions, but
12 our attorney -- our advisor does.
13 MS. OKUN: Ms. Swikart, has Casden filed an
14 application to terminate coverage under the permit?
15 MS. SWIKART: No.
16 MS. OKUN: Why not?
17 MS. SWIKART: We are in the process of converting
18 this to sewer line. This is after -- this is after we
19 found out that these reports are due. We started filing
20 reports on a quarterly basis and now we're planning to
21 convert this to sewer line; and once that's done, after
22 obtaining the proper permit, I feel we should terminate
23 the permit.
24 MS. OKUN: Okay. Thank you.
25 MS. SWIKART: But if we could terminate the permit --

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1 MS. OKUN: I'm sorry.
2 MS. DIAMOND: Yes, Mr. Unger?
3 MR. DUCHESNEAU: If we terminated the permit --
4 MS. DIAMOND: Mr. Unger has a question.
5 MR. UNGER: This is for Ms. Swikart. I presume that
6 for the landscaping that drains into the sump, you use a
7 commercial landscaping crew or do you do it yourself
8 or --
9 MS. SWIKART: We do it ourself.
10 MR. UNGER: Do you apply any fertilizers or
11 pesticides or herbicides or any chemicals of that nature?
12 MS. SWIKART: No.
13 MR. UNGER: None whatsoever?
14 MS. SWIKART: No.
15 MR. UNGER: Thank you.
16 MS. SWIKART: You're welcome.
17 MS. DIAMOND: Mr. Marley, I'm going to ask you if you
18 would like to respond to the issue of herbicides or
19 pesticides.
20 MR. MARLEY: Actually, I had a couple of comments in
21 response to Mr. Blois's statement. I was just waiting
22 until everybody was done.
23 MS. DIAMOND: All right. Thank you. Go ahead.
24 MR. MARLEY: Number one, during our meetings with
25 Ms. -- Kay, one of the first things we did mention was

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1 ways of terminating the discharge to the storm drain and
2 that included hooking up to the sewer and we highly
3 encouraged her at that time to explore that option as one
4 of the options we were suggesting to her.
5 And number 2, if you look at page 6-163 of your
6 report, you'll see that when Jose, our inspector, was at
7 the site, he noticed that they were adding a chemical to
8 the sump to control odor, something called Flo-Zyme.
9 MS. DIAMOND: Yes. I thought I saw that. I remember
10 that.
11 MR. MARLEY: And the Notice of Violation that was
12 subsequently given, there was reference to that and they
13 were told to stop adding that. They were additives. It
14 wasn't potable water that was going on. It was water
15 piped on the plungers going down to the sump, and at
16 least for some period of time an additive was added to
17 it.
18 MS. DIAMOND: So can I just follow up with that? Are
19 you saying that the answer to the question about -- that
20 Mr. Unger had about adding pesticides or an additive was
21 incorrect and that -- 'cause I do see in this letter,
22 November 7th letter, signed by our previous Executive
23 Officer, that the chemical Flo-Zyme was first -- was
24 used. And so I'm just wondering if you're disagreeing
25 with the comment, the answer to the question about

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1 whether additives were used.
2 MR. MARLEY: I'm saying additives were used. They
3 were observed in use and we told them to stop.
4 MS. DIAMOND: And I recall also reading more in this,
5 that they were ordered to stop using it.
6 So I guess I'll ask you, after you were ordered
7 to stop using Flo-Zyme, was that discontinued?
8 MS. SWIKART: Yes.
9 MS. DIAMOND: And for how long a period was that
10 used?
11 MS. SWIKART: It was stopped right after
12 Mr. Marley --
13 MS. DIAMOND: No, but how long had you used it before
14 you were ordered to stop?
15 MS. SWIKART: I'm not sure, because that was before I
16 started employment with them.
17 MS. DIAMOND: I guess I'd like to know what is the
18 possible impact of using Flo-Zyme?
19 MR. MARLEY: I do not know.
20 MS. DIAMOND: Does anybody?
21 MR. ANIJIELO: Yes. Pesticides in a different
22 concentration can create toxicity to aquatic organisms.
23 MS. DIAMOND: Thank you.
24 I think we're at that point we are going to go
25 into deliberations and come back with a decision.

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So can we use that room still.
So we're going to go in there and we ask that you stay. Hopefully we'll be back in about 15 or 20 minutes.
(Whereupon the Board deliberated)
MS. DIAMOND: We're back in session and the decision has been reached and I've asked our advisor and lawyer, Lori Okun, if she would please give that decision.
MS. OKUN: First of all, the Board finds that Casden's testimony and their witnesses about the nature of the water they were discharging, the wastewater they were discharging, is credible. The Board found that they agreed with the testimony that the water appeared to be from the landscape irrigation system and not groundwater.
They also found that SB 1284 applies to these violations; however, the discharges were reportable discharges under the permit and, therefore, the relief offered by SB 1284 does not apply and so the Board is going to accept the Prosecution Team's recommended penalty and assess the MMPs.
I think the Board may want to talk generally about MMPs. The Board was reluctant to assess this penalty, but Mandatory Minimum Penalties are mandatory and the Board had no discretion in the matter. So they will be recommending to the -- the Panel will be

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recommending to the full Board that they issue an Order consistent with staff's recommendation.
MS. DIAMOND: Well, I guess I would say, and other Board members can also say, that MMPs and particularly this amount of money that is part of this -- that is in this decision is not a comfortable thing for us; however, we do feel bound by the statute and -- the statute and the law and we don't have any discretion. That's been clear on all MMPs. That is the reason that MMPs were first legislated, because they didn't want Boards to have discretion. And so we are bound by this, and I just think that all of us feel that the MMPs are not something that we are always happy with, but we have no discretion.
So that's what I would like to say about that.
If anybody else has anything else to add -- I think I speak for all of us and I thank you all for your time and we feel that everybody did a really good job. We're very happy with the presentations, the effort, and the work product of all sides, and this was a very difficult situation for us, but it's a situation we find ourselves in and we have no discretion.
MR. DUCHESNEAU: Thank you for your time. I know it's very late in the day and we've been going for a long time, so thank you.
(End of partial transcript)

EXHIBIT 4

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BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,

LOS ANGELES REGION

In the Matter of Administrative Civil Liability Complaint No. R4-2008-0199-M Casden Properties, LLC	**CASDEN PROPERTIES, LLC'S RESPONSE TO HEARING PANEL REPORT AND PROPOSED ORDER**

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I. INTRODUCTION

This matter concerning an issue of first impression pertaining mandatory minimum penalties ("MMPs") for late quarterly reports under Water Code Section 13385.1(a), in an amount among the highest ever imposed by the Regional Water Quality Control Board (the "Regional Board"), exemplifies a double standard and violates the Constitution. Despite Casden Properties, LLC ("Casden") timely complying with the requirements of the hearing notice and the subsequent untimely submission of a 19-page rebuttal brief by the Prosecution, the Prosecution was permitted over Casden's objections to raise new arguments and evidence at the hearing asserting that Casden's non-groundwater discharges were reportable under Order No. R4-2003-0111, *Waste Discharge Requirements for Discharges of Groundwater from Construction and Project Dewatering to Surface Waters in Coastal Watersheds of Los Angeles County and Ventura Counties,* General NPDES Permit No. CAG 994004 (the "Groundwater Permit"). Not only did the hearing panel overrule Casden's objections, but it refused to grant Casden additional time to respond to this new argument, which ultimately was the crux of the hearing panel's decision that newly enacted Water Code Section 13385.1(a)(1)(A) by SB 1284[1] did not provide relief from the imposition of MMPs for Casden. Now, to make matters worse, the Hearing Panel Report and Proposed Decision (the "HPR") has substantively altered the decision announced on the record at the hearing, which was clearly that SB 1284 otherwise would have applied to Casden to provide relief from MMPs, but for its discharges being reportable under its permit. Despite the uneven playing field of allowing the Prosecution's surprise argument and the refusal to grant Casden additional time to respond at the hearing, official notice[2] of new evidence after the record was closed is now sought purportedly on behalf of the hearing panel in an attempt to support the post-hearing changes to the decision. References to these eleventh-hour additions make up nearly half of the HPR's Findings of Fact ("Findings").

[1] SB 1284 (Ducheny) Stats. 2010, ch. 645 (amendments to Water Code Sections 13385 and 13385.1).

[2] The origin of the attempted official notice is unclear, but the action of taking such notice was not necessarily initiated by the entire panel. Casden reserves all rights to challenge improperly noticed records and all other evidence not entered in a timely or transparent fashion.

As explained below, not only does this proceeding violate the statutory authority of the Regional Board and Casden's Constitutional right of due process, but the decision set forth in the HPR imposing $675,000 in penalties is wrong as a matter of law and in violation of the Eighth Amendment of the Constitution.

II. EXECUTIVE SUMMARY

Casden implores the Regional Board to take a step back and take a critical look at the HPR and the patently unfair process afforded to Casden at multiple junctures in this matter. In the end, it is not in the interest of the Regional Board, which is to serve as a neutral arbitrator of this matter, to permit such the errors in the process or in the proposed decision.

On March 17, 2011, over Casden's objections and despite the Prosecution having been on notice of Casden's claim since January 28, 2011, the hearing panel permitted the Prosecution to introduce surprise testimony regarding new arguments that Casden's non-groundwater discharges were reportable. This tact was in blatant violation of Regional Board policy, the hearing notice, and contrary to earlier rulings of the hearing panel chair, among other things. Yet, it was the sole issue that the hearing panel sided with the Prosecution on, finding that Casden's non-groundwater discharges were reportable under the Groundwater Permit and therefore the relief offered by SB 1284 could not be afforded to Casden. For the reasons explained below, which Casden was not provided an adequate opportunity to present before, this conclusion is erroneous as the Groundwater Permit does not regulate the sump, nor the discharge of irrigation or other non-groundwater by Casden.

Since the hearing, the hearing panel's decision, which was announced on the record that evening, has inexplicably been changed in a manner adverse to Casden. While the hearing panel found that SB 1284 applied to Casden's violations, had it not found that there were other reportable discharges under the Groundwater Permit, the HPR now claims that SB 1284 does not apply regardless. Such a change is inexcusable and against due process and the law. As set forth below, Sections 13385.1(a)(1)(A) and 13385.1(e) can only be reconciled in a manner where it applies to Casden. Throughout this proceeding, Casden has been shocked at the steadfast resistance of the Prosecution to afford relief from MMPs in an amount that is way over the top for

the alleged violations and circumstances and completely out of line with fines the Regional Board has levied for activities impacting the region's water quality. Now, apparently the hearing panel has decided to do whatever it can to thwart the application of SB 1284, despite the purpose of this newly enacted statute. Casden is far from asking for special treatment. Numerous parties have been afforded relief from mandatory minimum penalties by the regional boards. While the record is clear that the Regional Board staff have found imaginative ways to provide relief to other parties, Casden asks nothing more than to be afforded relief under the straightforward application of SB 1284. In light of the purpose of SB 1284 and its express terms, the Regional Board should grant Casden relief from mandatory minimum penalties.

III. THE HEARING PANEL REPORT AND PROPOSED ORDER CHANGES THE HEARING PANEL'S DECISION ANNOUNCED AT THE HEARING

The HPR unlawfully changes the hearing panel's decision announced at the March 17, 2011 hearing and was apparently issued without the full hearing panel's express concurrence. In support of the decision's change, the HPR relies upon legislative bill analyses, which amounts to new evidence considered after the decision was announced and after the closing of the hearing record.[3] The changes made in the report deviating from the decision made at the hearing are not only incorrect as a matter of law, but the manner in which such changes are made violates provisions of the Water Code, Government Code, the hearing notice, State Water Resource Control Board Board hearing policies and procedures, and due process.

A. The Hearing Panel Report Illegally Changed the Decision that SB 1284 Applied to Casden's Violations

In response to ACLC No. R4-2008-0199-M, Casden asserted that relief from MMPs was afforded by the recently enacted SB 1284. AR, Item 6.20. Under SB 1284, Casden contended that, rather than MMPs of $675,000, discretionary penalties should be applied for twelve late reports that were required by the terms of the Groundwater Permit. After the effective date of SB

[3] As addressed in Section IV, besides relying upon bill analyses outside of the hearing record, it appears that the drafting of the HPR was influenced by the hearing in Crescenta Valley Water District, ACL Complaint No. R4-2009-0010-M, that occurred immediately after Casden's hearing on March 17, 2011, to which Casden was neither a party nor present. Importantly, as explained below, the issues addressed in the Crescenta Valley Water District matter concerned a different provision of SB 1284.

1284, Casden promptly filed the requisite statement indicating that it did not have any reportable discharges during the reporting periods at issue because the permit regulates groundwater and there was no groundwater infiltration during the applicable period. AR, p. 6.262. At the hearing and reflected in the HPR, the hearing panel found that Casden never discharged groundwater, but had discharged water from other sources, mainly irrigation water. Transcript, 138-139; HPR, ¶9.

As the hearing panel members will recall, the major point of contention addressed at the hearing was the statutory interpretation and application of SB 1284 to Casden's violations. At the hearing, the hearing panel announced its decision that SB 1284 applied to Casden's violations, except that it concluded that the non-groundwater discharges were nonetheless reportable under the permit so therefore relief did not apply:

> First of all, the Board finds that Casden's testimony and their witnesses about the nature of the water they were discharging, the wastewater they were discharging, is credible. The Board found that they agreed with the testimony that the water appeared to be from the landscape irrigation system and not groundwater.
>
> ***They also found that SB 1284 applies to these violations; however, the discharges were reportable discharges under the permit and, therefore, the relief offered by SB 1284 does not apply*** and so the Board is going to accept the Prosecution Team's recommended penalty and assess the MMPs. (emphasis added). Transcript, 138: 9-20.

Inexplicably, the HPR now makes conclusions of law that SB 1284 could not apply to Casden's violations since Casden could not have filed a statement within 30 days of notice. HPR, ¶¶ 6, 7 and 8. Further highlighting the change in the decision, in stark contrast to the Hearing Panel's announced decision where the reportability[4] of the discharges was sole reason that it found SB 1284 did not apply to Casden, the Hearing Panel Report's conclusions of law barely mention it: "In addition, the Permittee had reportable discharges during the relevant monitoring periods." HPR, ¶8.

[4] The term "reportability" herein refers whether discharges were reportable under the applicable waste discharge requirements as provided in Water Code Section 13385.1(a)(2)(A)(i).

B. The Hearing Panel Report and Proposed Order Violates the Water and Government Codes

The HPR issued without the prior express consent of all hearing panel members violates Water Code Section 13228.14(a), which requires that a panel of at least three of the regional board conduct the hearing and that "[a]fter the hearing, *the panel* shall report its proposed decision and order to the regional board . . ." In this instance, the HPR, apparently drafted by the panel's advisor, was prepared and issued without the full hearing panel having subsequently met or having had any calls on the matter.[5] Ex. 1. Nowhere under the law is there authorization for the hearing panel advisor to prepare and issue the report with the approval of one hearing panel member or based upon a the panel's delegation of authority. Further, it is a violation of Government Code Section 11430.30 for an advisor to "furnish, augment, diminish, or modify the evidence in the record."

C. The Hearing Panel Got it Right the First Time as to SB 1284's Retroactive Application: SB 1284 Applies to Casden's Violations

The HPR's interpretation of SB 1284 is contrary to well accepted canons of statutory interpretation. A court must "construe the words of a statute in context, and to the extent possible, harmonize provisions relating to the same subject matter. When interpreting a statute a court must harmonize all its parts, if possible, reconciling them in a manner that carries out the purpose of the statute." *Robson v. Upper San Gabriel Valley Municipal Water Dist.*, 142 Cal. App. 4th 877, 884-885 (2006) (citations omitted). "[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." *Clements* v. *T.R. Bechtel Co.*, 43 Cal.2d 227, 233 (1954). This principle has been called a "golden rule of statutory interpretation." *Armstrong* v. *County of San Mateo,* 146 Cal. App.3d 597, 615 (1983). An agency should not

[5] Moreover, Bagley-Keene Open Meeting Act requires that the Hearing Panel provide notice prior to the hearing panel meeting again, including in closed session, to address the hearing panel report. This applies whether the panel meets in person, telephonically or a series of individual telephone calls or email communications. *Stockton Newspapers, Inv. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105. See also, 65 Ops.Cal.Atty.Gen. 63, 66 (1982); 63 Ops.Cal.Atty.Gen. 820, 828-829 (1980); Cal. Code Regs., Tit. 23, § 647.2.

adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose. See *W. Oil & Gas v. Monterey Bay Unified Air Pollution*, 49 Cal.3d 408, 425 (1989). From any perspective, the Legislature's purpose in enacting SB 1284 was to provide relief from MMPs, and so this purpose must guide the Regional Board in its interpretation of the statute.

Citing Water Code Section 13385.1(e), the HPR concedes that Water Code Section 13385.1(a)(2)(A) "applies to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." HPR, Conclusions of Law ("Conclusions"), ¶ 7. The HPR also concedes that there was never before a requirement for the statement created by SB 1284, set forth in Section 13385.1(a)(2)(A), and that Casden had no reason to file the statement before January 1, 2011 (SB 1284's effective date). *Id.* Nonetheless, in a quizzical *non sequitur*, the HPR concludes that "in order to qualify for the mandatory minimum penalty relief that subdivision (a)(2) provides, a discharger must meet all applicable requirements, including the requirement to file the statement within 30 days of notice." HPR, Conclusions, ¶6.

Nothing in the HPR interpretation reconciles the impossibility of complying with the statement requirement prior to the statute being enacted and taking effect and the inconvenient truth that Section 13385.1(e) plainly commands in mandatory language that it **"shall apply"** so long as a complaint had not been filed as of July 1, 2010. Despite Casden's repeated requests to the Prosecution before and during the hearing, the Prosecution could not come up with a single example reconciling how a discharger that received a complaint after July 1, 2010 and before the effective date of the SB 1284, could be afforded relief under SB 1284 – as expressly provided for in the statute – without an opportunity to provide the requisite statement after January 1, 2011. Neither does the HPR. Under the HPR's interpretation, a complaint filed on July 2, 2010 or afterwards, would itself constitute the requisite notice and therefore plainly thwart the requirement of subdivision (e). Indeed, under the HPR's interpretation, any of the earlier notices, such as a notice of violation, that must be issued by the Regional Board *before* filing a complaint prior to July 1, 2010, would serve as notice preventing relief under Section 13385.1(a)(2)(A), despite the very specific command of Section 13385.1(e) to the contrary. When possible,

interpretation of a statute should give effect to all of its provisions and accords with the purpose of the statute. *Robson v. Upper San Gabriel Valley Municipal Water Dist., supra,* at 884-885. The Prosecution and HPR's interpretation does not and is contrary to the purpose of the statute to provide relief from MMPs.

D. The Hearing Panel Report's Reliance Upon New Evidence Is Inappropriate and Does Nothing to Further the Interpretation of SB 1284

In an attempt to support the changed portions of the hearing panel's decision, the hearing panel advisor has proposed--after the decision was already announced--that the Regional Board take official notice of legislative bill analyses that were not previously included as part of the hearing record, nor considered at the hearing. Proposed Order, ¶ 8; Ex. 2. This violates Government Code Section 11430.30 and is contrary the hearing panel's own directive:

> At the end of this hearing, we will close the matter in this record and the Panel will discuss and arrive at a proposed report of findings of fact, conclusions of law, and recommend a decision for consideration by the full Board. Transcript, 18:18-22.

Moreover, the HPR's after-the-fact reliance upon the bill analyses for interpreting SB 1284 is wholly misplaced. To start with, the HPR egregiously misrepresents Casden's legislative intent argument as to SB 1284. The HPR asserts that Casden wrongly based its argument that SB 1284 was retroactive based upon an Assembly Committee analysis that concerned a version of the bill that was later amended. HPR, Findings, ¶¶ 11, 15. Not so. As evident from its brief, Casden's only citation to the referenced Assembly Committee analysis was merely to show the genesis of SB 1284 being with the Pico Water District that had incurred mandatory minimum penalties in an amount similar to that which Casden faced. AR, pp. 6.231-6.232. In the very next paragraph in its brief, Casden addressed how SB 1284 was amended and changed from its introduction through its enactment. *Id.* Casden's statutory arguments do not rely on bill analyses, but rather the express terms of the enacted statute, which is where a court begins when it construes a statute. *Catlin v. Superior Court*, 51 Cal.4th 300, 304 (2011).

Further, ignoring the express language of SB 1284, the HPR utterly speculates regarding the Legislature's intent by picking and choosing from what is and is not included in the various

general bill analyses without regard to the statutory text. *Catlin v. Superior Court, supra,* at 304 (extrinsic aides like legislative history may only be consulted after statutory text is found to be susceptible to more than one interpretation). Amazingly, the HPR goes so far as to justify its interpretation by speculating that the Legislature could have waived the statement requirement for dischargers with outstanding violations as of January 1, 2011. HPR, Conclusions, ¶ 7. Yet, contrary to such speculation about what the Legislature *could have* done, the HPR neglects to recognize that the Legislature, which could have easily stayed silent as to SB 1284's application prior to its effective date, *actually legislated* subdivision (e) providing that such relief *shall apply* to violations for which a complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred and despite the new statement requirement. Given it is uncommon for statutes to include such provisions of expressed legislative intent specifying the application to pre-enactment matters, subdivision (e) must be afforded great weight.

E. Affording Dischargers Who Receive Complaints After July 1, 2010, An Opportunity to Submit a Statement Under Water Code Section 13385.1(a)(2)(A) Would Not Void the Violation, but Only Shifts the Remedy from MMPs to Discretionary Penalties

Contrary to the reasoning of the HPR, allowing a party an opportunity to submit a statement under SB 1284 where an ACL was issued after July 1, 2010, would not in any way change the existence of a previously issued notice of violation and would not provide an opportunity to cure a violation. HPR, Conclusions, ¶ 7. Rather, the alleged violations remain. Section 13385.1(a)(2)(A) only changes a violation from being a serious violation subject to mandatory minimum penalty to being subject to discretionary penalties. *See* Water Code Sections 13385(a)(3) and (e). The Prosecution's allegations that such an interpretation would open the floodgates to claimants under SB 1284 or that a great burden would be imposed on the enforcement staff are not supported and simply not true. Such an issue would pertain to only a limited number of matters pending at the time of SB 1284's enactment and only as to such dischargers that could meet the requirements for the relief. If it changes anything, it would likely ease the burden on the staff as settlement would be encouraged in light of more reasonable penalties.

IV. THE REGIONAL BOARD PROSECUTION STAFF HAS INCONSISTENTLY AFFORDED RELIEF FROM MANDATORY MINIMUM PENALTIES

The regional boards have dropped mandatory minimum penalties thereby reducing penalties by millions of dollars for late reporting violations under the Water Quality Enforcement Policy, State Water Resources Control Board, May 20, 2010 (the "Enforcement Policy") and SB 1284. Any notion that somehow Casden would be receiving unique treatment could not be any farther from the truth. Rather, it is Casden that is being unfairly singled out and not extended the same benefits afforded to other dischargers.

As with its avoidance of the plain language of SB 1284, the HPR brushes aside tough questions concerning the manner with which the Regional Board has handled other matters, such as Glenborough Cahuenga, LLC (ACL Complaint R4-2008-0175-M) ("Glenborough"), which concerned the very same Groundwater Permit and late reporting violations as alleged against Casden. Moreover, as explained below, the same evening as Casden's hearing, the identical hearing panel adopted the recommendation of the Prosecution not to impose MMPs for late filed reports by the Crescenta Valley Water District (ACL Complaint No. R4-2009-0010-M). Crescenta Valley's penalties were reduced from $288,000 to $54,000.

With regard to Glenborough, the HPR concludes that the "Permittee did not demonstrate that the Prosecution Team treated the Permittee differently than other similarly situated discharges. The Prosecution explained that Glenborough Chauenga, LLC was treated differently because that case involved a no-discharge situation and was resolved according to the Water Quality Enforcement Policy before S.B. 1284 too effect." HPR, Conclusions, ¶9. ***Yet, the HPR and the Prosecution's explanation that Glenborough was resolved before SB 1284 took effect belies the evidence.*** The indisputable fact is that the Glenborough settlement was not signed by the Regional Board and finalized until at the earliest January 18, 2011,[6] after the effective date of SB 1284. AR, p. 6.493. As plainly stated in all ACLs by the water board prosecutors, U.S. Environmental Protection Agency ("U.S. EPA") regulations require 30 days of public notification

[6] The settlement, of course, is not truly final until the discharger actually pays the settlement amount and complies with any mandatory provisions.

of any proposed settlement of civil liability occasioned by violation of the Clean Water Act, including a NPDES permit violation. 40 C.F.R. §§ 22.18, 22.45 (2011). If a settlement were final prior to this public notification period, there would be no point of advising the public and soliciting its input. Further, contrary to the HPR's interpretation of SB 1284, after enactment of SB 1284, Glenborough was provided an opportunity by the Regional Board to submit a statement in December 2010, concerning late reports under the same Groundwater Permit at issue for Casden concerning violations first noticed in December 2008. AR, p. 6.484.

Likewise, with regard to the Crescenta Valley Water District matter, which was heard by the same hearing panel immediately after Casden's hearing, ***mandatory minimum penalties for six late filed reports consisting of 78 thirty-day periods were reduced from $234,000 to $0.*** Ex. 3. The Crescenta Valley Water District matter was also not finalized until after the effective date of SB 1284. Despite no mention of Crescenta Valley Water District having submitted the requisite statement, the Prosecution's recommendation to the hearing panel was to assess $0 in penalties for six of the seven late reports, as set forth in Exhibit "A" to the ACLC No. R4-2010-0010-M. Ex. 3. Crescenta Valley did not accept the December 17, 2010 settlement offer, since it included $54,000 in penalties for one other late report and chose to proceed to the hearing held on March 17, 2011, challenging that penalty under a different exception under Water Code Section 13385.1(b)(1) also enacted by SB 1284. Under the U.S. EPA regulations referenced above, neither the Regional Board, nor the Prosecution, has no authority to simply dismiss the violations for the six late reports without a notice of settlement or hearing. Nor is it permitted by the Enforcement Policy, which does not change the fact the that violation occurred, but rather, it changes the violation from being subject to mandatory minimum penalties to discretionary.[7] At Crescenta Valley's hearing, three months after the enactment of SB 1284, the hearing panel accepted the Prosecution's recommendation and did not impose mandatory minimum penalties for six of the late reports Ex. 4. On May 5, 2011, five months after SB 1284 was enacted, the Regional Board accepted the Hearing Panel's recommendation. Ex. 5.

[7] "Under these circumstances, that report would not ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations, and therefore, the late submittal of such a report would be subject to discretionary civil liabilities, but would not be subject to MMPs." Enforcement Policy, at 27.

As to the one report for which a $54,000 mandatory minimum penalty was imposed and challenged by Crescenta Valley, Crescenta Valley's opposition focused on a different provision of SB 1284 than that involved in the Casden proceeding. This may have lead to confusion with regard to Casden's case.[8] The requirements under the first exemption for mandatory minimum penalties, Section 18835.1(a)(2)(A), as asserted by Casden, are distinct and different from the second exemption, Section 18835.1(b)(1), which Crescenta Valley raised, and leads to a different outcome concerning its retroactive application. With regard to Section 18835.1(a)(2)(A), as the HRP concedes, there was no previous provision for submitting the required statement. Accordingly, as described in detail above, the only way to reconcile Section 13385.1(e) with Section 13385.1(a)(2)(A) is to afford alleged discharger in receipt of a complaint after July 1, 2010, an opportunity subsequent to the effective date of the statute to submit a statement, as Casden did. On the other hand, to obtain relief under the second exemption under SB 1284, Section 13385.1(b)(1), the discharger must "file[] a discharge monitoring report that had not previously been timely filed within 30 days after the discharger receives written notice, including notice transmitted by electronic mail, from the state board or regional board concerning the failure to timely file the report." As a result, unlike the statement required under Section 13385(a)(1)(A) which never could have occurred before the enactment of SB 1284, relief under Section 13385.1(b)(1) is premised upon the discharger having filed its the late monitoring report within 30 days of notice, which is an action that could have occurred prior to the enactment of SB 1284.

V. THE CASDEN DISCHARGES WERE NOT "REPORTABLE UNDER THE APPLICABLE WASTE DISCHARGE REQUIREMENTS" AND THE FIRST SB 1284 EXEMPTION THEREFORE PROVIDES RELIEF.

The HPR confines its findings on "reportability" to two paragraphs which are largely devoid of legal citation, support, or even logic. HPR, Findings, ¶¶ 9, 10. The HPR's conclusion leads to the absurd result where the discharge to the storm drain of irrigation water from one

[8] Tellingly, the initial draft HPR served on Casden contained many incorrect references to the wrong SB 1284 exemption, Section 13385.1(b). Ex. 6. Much of the HPR in the Casden matter interpreting the application of Section 13385.1(a)(2)(A) merely parrots the HPR in the Crescenta Valley matter regarding Section 13385.1(b)(1) and gives no recognition to the distinctions between the two provisions.

commercial building subjects that building owner to hundreds of thousands of dollars in penalties for the mere failure to report, while *the exact same irrigation water* can be freely discharged from a neighboring building. Such a result, if not overturned, would constitute an arbitrary and capricious exercise of governmental power.

A. <u>While the March 17, 2011 Hearing Panel Decision Turned Specifically on Reportability, Procedural Violations Concerning This Issue Were Numerous</u>

As a matter of law, both the Prosecution and the Hearing Panel committed procedural violations in the handling of issues involving reportability and this significantly prejudiced Casden. Exhibit 7 provides a chronology of facts involving these procedural violations. The Prosecution had upwards of six weeks to submit its evidence regarding reportability, but chose to withhold it until the hearing. On January 28, 2011, Casden filed its statement with the Regional Board under Section 13385.1(a)(2)(A). On February 16, 2011, Casden filed its detailed brief and evidence with the Prosecution. The Prosecution's deadline for submitting its rebuttal to Casden's defenses, including concerning the issue of reportability, was ten days before the hearing, March 7, 2011, which is the date that the final binder was required to be submitted to the hearing panel under the Hearing Notice and Procedures. AR, p. 6.13. Yet, the Prosecution did not serve its 19 page rebuttal brief until March 11, 2011, and only after Casden objected to the Prosecution's request to serve its rebuttal brief virtually on the eve of the hearing.[9] Moreover, the Prosecution refused to disclose its presentation prior to the hearing. Incomprehensibly, the Prosecution *did not once address the reportability issue* in its rebuttal brief or at any other time prior to the hearing, apparently planning instead to introduce evidence by surprise at the hearing. This violated Casden's right to due process as well as:

- Regulations governing the proceeding provide that "[i]t is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits." Title 23, Cal. Code Regs. § 648.4.

[9] Despite the failure of the Prosecution to meet the March 7, 2011 deadline, the Hearing Panel Chair declined to enforce the deadline, stating in a March 15, 2011 ruling, as to Casden's objections, that the requirement to meet the March 7, 2011 deadline was "based only on the Hearing Notice; there is no independent legal requirement to pre-submit a presentation."

- The hearing notice.
- The Bagley-Keene Open Meetings Act requires meeting materials to be made public ten days before the meeting. Gov't Code § 11125.1.
- The Los Angeles Regional Water Quality Control Board Executive Order, Standard ACL Complaint Hearing Notice and Process, March 5, 2008. Attachment "Two" to the Executive Order provides that ten days before the hearing, the rebuttal should be included in the final binder.[10]

The Prosecution's introduction of evidence as to reportability and its presentation was also in contravention of a March 15, 2011 ruling by the Hearing Panel Chair with regard to objections by Casden that provided "***as long as the Prosecution Team's hearing presentation does not exceed the scope of its direct evidence*** [what was submitted on March 7, 2011 by the Prosecution], ***the allegation in the Complaint and matters properly considered rebuttal, the failure to submit a PowerPoint does not appear to have prejudiced Casden.***" Yet, the Prosecution's reportability argument at the March 17, 2011 hearing exceeded the scope of what it presented in its direct evidence on March 7, 2011 and in its rebuttal brief, where it did not provide *any* evidence or argument on reportability. Though the March 15, 2011 ruling set forth that "Casden may object at the hearing to any 'surprise' testimony or any testimony that it believes exceeds the scope of the Prosecution Team's direct evidence or rebuttal" and that "[i]f Casden demonstrates any prejudice, the board will fashion an appropriate remedy to ensure Casden receives a fair hearing," Casden's prompt objections on this very ground were nevertheless overruled. Transcript, 26:13 to 27:8. Moreover, Casden's requests for additional time to address the new evidence were denied.

[10] "DAY 80. The final Hearing Panel binder is served on the parties and sent to the Hearing Panel. This is to comply with the Bagley-Keene Open Meetings Act which requires that an agenda and meetings materials be made public ten days prior to the meeting. This allows the Prosecution Team to incorporate public comments, the Discharger's evidence, ***and the Prosecution Team's rebuttal evidence into this final binder.*** [. . .]" *See* Los Angeles Regional Water Quality Control Board, Executive Order, Standard ACL Hearing Notice and Complaint Process, March 5, 2008, available at http://www.waterboards.ca.gov/losangeles/water_issues/programs/enforcement/document_standards/Hearing%20Template%20Explanation.pdf.

It is hard to dispute that, given that the hearing panel's March 17, 2011 decision turned exclusively on reportability, the failure of the Prosecution to raise such arguments and evidence prior to the hearing date severely prejudiced Casden.

B. The Hearing Panel's Interpretation Wholly Eviscerates the Availability of Relief Afforded by Water Code Section 13385.1(a)(2)(A)

Under the first exemption set forth in Water Code Section 13385.1(a)(2)(A), SB 1284 provides relief when a subject discharge was not "reportable under the applicable waste discharge requirements." When the exemption in question was first proposed in SB 1284 on June 6, 2010, the exemption would have required a "statement that there were no discharges to waters of the United States during the relevant monitoring period," matching the Enforcement Policy. AR, p. 6. 395; Enforcement Policy, p. 27. However, this provision was subsequently amended on June 23, 2011 and ultimately enacted to require a "statement that there were no discharges to waters of the United States *reportable under the applicable waste discharge requirements* during the relevant monitoring period." (emphasis added) AR, p. 6.408. The HPR gives no independent meaning to these italicized words, eviscerating any effect of this purposeful modification to SB 1284, contrary to long-standing rules of statutory interpretation. See, *e.g.*, *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 638 ("Significance should be given, if possible, to every word, phrase, sentence and part of an act.")

C. As the Hearing Panel Determined, No Groundwater Discharges Occurred and the Groundwater Permit Does Not Require Other Water Discharges To Be Reported.

The HPR postulates that the "Permit requires the Permittee to file monitoring reports for all effluent discharged from its sump." HPR, Findings, ¶10. But the HPR does not provide a single citation in support this claim, which is contrary to the federal Clean Water Act and Porter-Cologne. The Regional Board does not and cannot regulate the sump. See, *e.g.*, Water Code § 13360(a). Instead, the Regional Board regulates discharges of pollutants, (33 U.S.C. § 1311(a); Water Code § 13263), and the regulation of such discharges can under certain rules be controlled via general permits (40 C.F.R. § 122.28(a)(2), Water Code § 13263(i)). Under both federal and

state law, general permits must be drawn to cover like discharges, and cannot expand at the convenience of the regulatory authority. Here, there were no discharges of groundwater regulated by the permit sought to be enforced by the Regional Board. Instead, the discharges were of irrigation water, and it is the nature of the discharges that controls which body of law and regulations that applies. As shown below, irrigation water discharges are subject to the LA County municipal stormwater permit. In this matter, the panel concluded that there was no evidence of groundwater being discharged. Transcript, 138:9-14; HPR, Findings, ¶9. Accordingly, the groundwater regulated under the groundwater permit never intermixed with the irrigation or other water discharged to the stormwater system and thus there can be no argument that the discharges were subject to the reporting or other requirements of the groundwater permit. This correct statement of the law accords with and gives meaning to the words inserted in SB 1284's first exemption on June 23, 2010 concerning reportability *under the applicable waste discharge requirements*. Like every other commercial or residential discharger of irrigation water in the City of Beverly Hills (the "City"), Casden had no reporting obligation as to the discharge of irrigation water in the relevant period, and if there was any question as to the propriety of the irrigation water discharges to the City's storm sewer system, the regulatory authority for enforcement belongs to the City as a permittee to the LA County municipal stormwater permit, which is the "applicable waste discharge requirements" for purposes of SB 1284's first exemption.

1. The Groundwater Permit Does Not Regulate Casden's Non-Groundwater Discharges

According to its terms, the Groundwater Permit is plainly for the purpose of regulating groundwater discharges, not the other alleged discharges by Casden.

Under "Discharge Description," the Groundwater Permit provides:

> 5. Discharges covered by this permit include but are not limited to, treated or untreated groundwater generated from permanent or temporary dewatering operations. In addition, this permit covers discharges form cleanup of contaminated sites where other project Specific General Permts may not be appropriate, such as groundwater impacted by metals and/or other toxic compounds. This permit also covers discharges from dewatering operations in the vicinity of creeks where surface waters and groundwaters are

hydrogically connected and have similar water chemistry. [. . .]

6. Wastewater discharge from permanent or temporary dewatering activities, include but are not limited to the following:

a. Treated or untreated wasterwater from permanent or temporary construction dewatering operations.

b. Groundwater pumped as a aid in the containment and/or containment and/or cleanu of contaminant plume.

c. Groundwater extracted during short-term and long-term pumping/aquifer tests

d. Groundwater generated from well drilling, construction or dewatering and purging of wells.

e. Equipment decontamination water

f. Subterranean seepage dewatering

g. Incidental collected stormwater from basements.

AR, p. 6.36.

Continuing, the Groundwater Permit states that "[t]his order regulates the discharge of groundwater that may or may not be impacted by toxic compounds and/or conventional pollutants." AR, p. 6.39

When specifying the types of discharges that are eligible for coverage, the Groundwater Permit clearly makes the Casden flows ineligible for coverage under the Order. Under "Eligibility," the Groundwater Permit states:

> This order covers discharges to surface waters of treated or untreated ***groundwater from*** dewatering operations and other wastewaters. (AR, p. 6.43 A.1)

Thus, the discharges must be composed of groundwater, and can either be from (1) dewatering operations or (2) other wastewaters. These "other wastewaters" are those described in paragraph 6 of the Groundwater Permit on p. 6.26, including "Groundwater pumped as a aid in the containment and/or containment and/or cleanup of contaminant plume," "Groundwater extracted during short-term and long-term pumping/aquifer tests," and "Groundwater generated from well drilling, construction or dewatering and purging of wells." AR, p. 6.26. *The "and other wastewater" clause cannot expand to embrace non-like flows per federal and California law.* 40 C.F.R. § 122.28(a)(2), Water Code § 13263(i).

An assortment of other provisions in the Groundwater Permit provide further clarification that irrigation water discharges and other non-eligible flows are not regulated by the Groundwater Permit and not included in the Groundwater Permit's Monitoring and Reporting Program. AR, pp. 6.29 to 6.34, 6.43 ¶ A.1, 6.44, ¶ 3.

2. The Regional Board Cannot Bootstrap All Other Forms of Discharges Under the Groundwater Permit

To get around the limited description of regulated discharges set forth in the Groundwater Permit, the HPR wrongly concludes that the Casden discharge is "similar to some of the discharge[s listed in the Permit]" and that because "[t]he list of covered waters [in the Permit] is not exclusive," the Casden discharges are "close enough" so as to be regulated. HPR, Findings, ¶ 10. The Hearing Panel Report's concession that the Casden discharge is *not the same*, but merely "similar" compels the conclusion that the discharge is not specifically regulated under the Permit. The Regional Board is not authorized to regulate on the basis of similarity here, and the Casden discharge was anything but similar here.

In particular, the HPR finds that "[t]he Permit regulates other types of discharges, including without limitation incidental collected stormwater from basements, which is similar to some of the discharge here, and to other wastewaters." There is no basis for the conclusion that "similar" discharges are regulated, nor any explanation as to how the irrigation water, which is not listed in the Groundwater Permit, is similar to the stormwater or any other of the listed sources of discharges in the Groundwater Permit. Although the HPR appears to rely on a statement made by the Regional Board's Chief of the General Permitting Unit as the basis for this finding (see Transcript at 94), the Chief did not explain how irrigation water was incidental collected stormwater from basements. The same staffer also failed to support his theory as to why all discharges from the sump are covered under the groundwater permit (see, e.g., Transcript at 99).

In fact, irrigation water is treated specifically under the *Waste Discharge Requirements of Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles* (Order

No. 01-182; the "MS4 Permit"). Section III.D.[11] Incidental collected stormwater from basements is quite different from the circumstances involved with Casden, which involved non-stormwater collected and piped directly to the sump and not stormwater that infiltrated and collected in basements.

3. The HPR's Findings Run Afoul of Federal Regulations

The HPR's finding that the list under the Groundwater Permit is not exclusive is also contrary to federal regulations, which preclude expanding the scope of a general permit to include unspecified and non-like discharges. 40 C.F.R. § 122.28(a)(2); see AR, p. 6.35, ¶ 2. Under this regulation, the Regional Board is prohibited from regulating "non-like discharges" within a general permit. The record contains no evidence that supports a finding that irrigation water is like groundwater in this context. While the Prosecution seizes on what they would prefer to view as an all-expansive savings clause--"but are not limited to"--in the list of discharge types regulated under the Permit, that clause merely refers to the subsequent descriptions in paragraph 5 on p. 6.36 concerning cleanup of contaminated sites and creekside dewatering, neither of which implicate irrigation water. Such savings clauses cannot be used to construe the wholesale application of the Groundwater Permit beyond its intended purpose and the law, becoming a catchall for any form of discharge. Where would it end?

4. The Groundwater Permit Requirements Clearly Require Only Groundwater Discharges Be Reported

The Groundwater Permit explicitly requires sampling and reporting of "*groundwater*." (Item 6.5, p. 6.37, para. 8, emphasis added) These samples are to be representative of the groundwater, and the results of the sampling must be reported. In particular, the Permit provides:

> The frequency of monitoring for constituents regulated under this permit will vary according to **the quality of the groundwater** prior to any necessary treatment and discharge. **The groundwater quality shall be determined based on analytical results of constituents listed in the supplemental analysis**, which shall be

[11] The 2008 Groundwater Permit expressly prohibits coverage for *discharges* already covered by another general permit. AR, p. 6.110, ¶3. Note that the language used here is not "sumps" or "outlets" or "discharge points." Rather, it is expressly the *discharges* that are the subject of the regulation and what is included or excluded from coverage under any permit.

> submitted with the NPDES application or the Notice of Intent Form. (AR, p. 6.56)

There is no requirement that non-groundwater be sampled under the Permit, therefore there is nothing to report. Casden's samples would not contain groundwater and could therefore not be representative of the groundwater, and thus are not reportable.

D. The Regional Board Has No Enforcement Authority under the Groundwater Permit Against Casden for Non-Groundwater Discharges

The Groundwater Permit is not only inapplicable to Casden's non-groundwater discharges, but the discharge of irrigation water is exempt for storm water permitting under the MS4 Permit and the City of Beverly Hills storm water ordinances in the (City of Beverly Hills Code, 9-4-501, *et seq.*). The Prosecutor conceded at the hearing that the MS4 Permit would be applicable to irrigation water from Casden to a storm sewer system, but claimed that since the irrigation water was captured by Casden's sump it was subject to the Groundwater Permit claiming that "everything that comes out of Casden's sump is governed by its permits." Transcript at 97-99. There is no legal or factual support for such a claim. As demonstrated above, the Groundwater Permit regulates discharges of groundwater, it is not a permit for the sump.

The MS4 Permit is the applicable waste discharge requirements for Casden's non-groundwater discharges to the storm sewer, with the City of Beverly Hills being the primary enforcement agency. If Casden were found to be discharging non-groundwater discharges to the storm water system in violation the Beverly Hills ordinance, Casden would be subject to enforcement from the City. (The City, in turn, could be subject to enforcement by the Regional Board under the MS4 Permit.) Where, as here, multiple sources of water are connected to the storm sewer system, whether or not through a single sump, and discharges are divisible and proven not to have been commingled with eligible discharges, as in this case, there is no legal or logical support for Casden's non-groundwater discharges being regulated under the Groundwater Permit.[12]

[12] Under the Board staff's position, if Casden had two separate sumps leading to the same storm sewer, then the irrigation water discharges would not be subject to the Groundwater Permit. This is yet another absurd result of

E. **Seeking Coverage Under The Permit For Potential Groundwater Discharges Does Not Confirm The Flows Are Not Regulated By Another General Permit.**

The HPR concluded that, "[b]y repeatedly seeking NPDES permit coverage, the Permittee admitted that it was discharging pollutants to a water of the United States." See *Brentwood*, *supra*, at 723 (monitoring reports are admissions of reported effluent violations). HPR, Findings, ¶10. The sole case cited in *Brentwood* from a district court in eastern Arkansas stands only for the proposition that data provided in monitoring reports can serve as admissions of effluent violations. Nothing in *Brentwood* stands for the conclusion that seeking coverage under a general permit amounts to an admission that all subsequent discharges from the building are regulated and reportable under the Groundwater Permit or some other permit.

Further, the HPR finding that, the "[p]ermittee did not establish that the discharges were regulated by another permit" is misplaced as it inconsistent with the terms of the MS4 Permit and the City of Beverly Hills storm water ordinance, 9-4-501, et seq., as explained above. HPR, Findings, ¶10. In making this finding, the HPR here fails to recognize that the Groundwater Permit coverage was only for the purpose of discharging groundwater should it infiltrate into Casden's building. It remains undisputed that Casden did not discharge groundwater. HPR, Findings, ¶ 9.

Moreover, the HPR finding that the "Permittee's repeated efforts to seek state and local permits are inconsistent with the Permittee's argument that it does not need a permit for the discharge because the discharges were covered by Order No. 01-182" makes no sense. HPR, Findings, ¶10. Casden's repeated efforts to obtain coverage does nothing more than to preserve the ability to discharge groundwater from the building to the storm water system in the event if occurred and is neither inconsistent with, nor evidence that the non-groundwater discharges are not regulated under the MS4 Permit or otherwise. Likewise, the HPR's claim that Casden's counsel conceded that discretionary penalties may be appropriate for the failure to file a report, not just a mandatory one, serves as absolutely no evidence that discharges were reportable. The Regional Board claims that a monitoring report must be timely submitted regardless of

staff's position, and the more reasonable result must prevail when construing the two permits.

whether a discharge occurred or not under the Groundwater Permit, unless it was subject to exceptions in the Enforcement Policy, or now under SB 1284. Enforcement Policy, pp. 26-27. Casden's counsel merely agreed that SB 1284 does not change that a violation exists for filing a late report. Rather, it allows relief from mandatory penalties and permits discretionary penalties instead where no reportable discharges occurred.

F. Neither Discharges for the Fourth Quarter 2005 to Third Quarter 2007 Period, Nor Violations of WDR Limits, Have Not Been Proven.

The HPR finds that "[t]he Permittee's 2009 reports admitted that discharges had occurred, and the Permittee reported them in January 2009." HPR, Findings, ¶10. Besides the fact that such reports provided that the discharges were from non-groundwater sources, the referenced 2009 reports cannot be used as evidence of discharges in the Fourth Quarter 2005 to Third Quarter 2007 period, as they did not apply to such periods. The evidence exists and the HPR has no basis and cannot speculate that such discharges occurred then or that permit limits were exceeded.

The HPR also erroneously speculates that Casden discharged copper and Flow-Zyme for an unknown period of time prior to September 24, 2007 and violated discharge limits. HPR, Findings, ¶10. However, prior to 2009, copper was *not* listed as a specific sampling constituent or effluent limitation applicable to Casden's groundwater discharge monitoring. AR, pp. 6.28, 6.31. Casden's expert, Mr. Lofy, testified as such and that he was not aware of any exceedances having occurred during such time. Transcript, 130:7-131:13. Nor has any other evidence been provided that Casden discharged copper during such time. The Prosecution merely speculated and never presented any evidence that any discharges of Flow-Zyme ever occurred, nor is there any testing confirming such occurred or exceeded applicable effluent limitations. Transcript, 135:11-137:22. Casden's counsel was not so much even provided an opportunity to respond to such allegations made at the close of the hearing. *Id.* Indeed, the September 24, 2007 inspection report provides no evidence that a discharge of Flow-Zyme occurred at any time and confirms the contrary: "During the inspection the water level was below the activation point ***and no discharge occurred to the storm drain***." AR, p. 6.172 (emphasis added).

VI. THE ALLEGED COPPER VIOLATIONS MUST BE DISMISSED

As the irrigation water discharges are regulated under the LA County MS4 Permit, the copper effluent limitations in the Groundwater Permit do not apply. Because there are no copper effluent violations for individual dischargers or irrigation water under the LA County MS4 Permit, the alleged violations must be dismissed. Even assuming that copper effluent limitations were somehow incorporated in the LA County MS4 Permit—which they are not—the HPR has not but must respond to Casden's argument that the proposed penalties are inappropriately duplicative. AR, p. 6.230.

VII. CONCLUSION

Casden respectfully requests that the Regional Board find that SB 1284 applies to Casden's violations, that no reportable discharges occurred, and that MMPs cannot be imposed.

Dated: May 19, 2011

MANATT, PHELPS & PHILLIPS, LLP
Peter R. Duchesneau
Dana P. Palmer

By: _____
Peter Duchesneau
Attorneys for Respondent
CASDEN PROPERTIES, LLC

300256129.3

EXHIBIT 1

Palmer, Dana

From: Lori Okun [LOkun@waterboards.ca.gov]
Sent: Wednesday, April 20, 2011 10:37 AM
To: Palmer, Dana; Duchesneau, Peter; Julie Macedo
Cc: Jennifer Fordyce; Paula Rasmussen
Subject: RE: Casden Properties LLP MMP Order

Mr. Duchesneau,

The hearing panel has not subsequently met or had any calls on this matter. Consistent with the board's practice, the Hearing Panel chair has approved the written report, which memorializes the Hearing Panel's recommendation.

-Lori Okun

>>> "Duchesneau, Peter" <pduchesneau@manatt.com> 4/20/2011 10:33 AM >>>
Ms. Okun -

I am still in the process of reviewing these items, which came in yesterday evening. However, following up on Ms. Macedo's question, has the full hearing panel reviewed the report yet and have they subsequently met or had any calls on this matter?

Peter R. Duchesneau
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-----Original Message-----
From: Julie Macedo [mailto:JMacedo@waterboards.ca.gov]
Sent: Wednesday, April 20, 2011 10:28 AM
To: Palmer, Dana; Duchesneau, Peter; Lori Okun
Cc: Jennifer Fordyce; Paula Rasmussen
Subject: Re: Casden Properties LLP MMP Order

Ms. Okun -

Confirming that this Hearing Panel is acceptable to use in the mailing,

even though unsigned? It does appear to be in final form. Thanks! -
Julie

>>> Lori Okun 4/20/2011 10:02 AM >>>

Counsel,

Enclosed please find a corrected Hearing Panel Report for the May 5, 2011 board meeting. This has been corrected to fix incorrect references to Water Code section 13385.1(b) that appeared in Findings of Law 6-7 of the prior version.

-Lori Okun

##
IRS CIRCULAR 230 DISCLOSURE: To comply with requirements imposed by recently issued treasury regulations, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written by us, and cannot be used by you, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another person any transaction or matter addressed herein. For information about this legend, go to http://www.manatt.com/circ230
##

EXHIBIT 2

Palmer, Dana

From: Lori Okun [LOkun@waterboards.ca.gov]
Sent: Tuesday, April 19, 2011 5:52 PM
To: Palmer, Dana; Duchesneau, Peter; Julie Macedo
Cc: Jennifer Fordyce; Paula Rasmussen
Subject: Casden Properties LLP MMP Order
Attachments: CI 6733 Proposed Order On Complaint.pdf; casden - Item Summary.pdf; CI 6733 Hearing Panel Report.pdf

Counsel,

Enclosed please find the Hearing Panel Report, Proposed Order and Agenda Item Summary for the May 5, 2011 board meeting. Casden Properties will receive a copy of the agenda under separate cover. I also have Word versions of the bill analyses that the Panel recommends the Board officially notice. These were downloaded from www.leginfo.ca.gov. I will provide them upon request.

You may address the Regional Board at the meeting and provide comments about the proposed decision, although it is not required. Absent extraordinary circumstances, no new evidence will be allowed to be presented at the meeting, unless you can explain why the evidence wasn't available on the date of the panel hearing.

Please let me know by 5:00 PM on May 2, 2011 how long each party would like to address the Board on this matter so that I may discuss your request with the Board Chair.

-Lori Okun

EXHIBIT 3

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:	)	Complaint No. R4-2009-0010-M
	)	Mandatory Minimum Penalty for
Crescenta Valley Water District	)	Violation of California Water Code § 13376
Well No. 2 Rehabilitation Project	)	and
4029 Lowell Avenue	)	Order No. R4-2003-0108
La Crescenta, California	)	(NPDES No. CAG994005)

This Complaint to assess the mandatory minimum penalty pursuant to California Water Code (CWC) § 13385.1 is issued to the Crescenta Valley Water District (hereinafter Permittee) based on a finding of violations of waste discharge requirements prescribed in Order No. R4-2003-0108 (NPDES No. CAG994005, CI No. 9167).

The Chief Prosecutor of the Regional Water Quality Control Board, Los Angeles Region (Regional Board) finds the following:

1. The Permittee discharged up to 1.51 million gallons per day (MGD) of groundwater from the Well No. 2 Rehabilitation project (hereinafter facility) located at 4029 Lowell Avenue, La Crescenta, California into a nearby storm drain (Latitude 34°13'28", Longitude 118°15'20"). The wastewater was susceptible of containing pollutants which can degrade water quality and impact beneficial uses of water, and which are defined as wastes under the Porter-Cologne Water Quality Control Act (CWC § 13000 et seq.). The wastewater flowed through the storm drain system into Verdugo Wash, tributary to the Los Angeles River, a navigable water of the United States.

2. On September 7, 2006, the Executive Officer of the Regional Board determined that the waste discharges from the Permittee's facility met the conditions to be enrolled under Order No. R4-2003-0108 adopted by the Regional Board on August 7, 2003, and the facility was so enrolled effective September 7, 2006. Order No. R4-2003-0108 serves as General NPDES Permit No. CAG994005 (*General National Pollutant Discharge Elimination. System Permit and Waste Discharge Requirements for Discharges of Groundwater From Potable Water Supply Wells to Surface Waters in Coastal Watersheds of Los Angeles and Ventura Counties*).

3. On February 19, 2009, the Regional Board was notified by the Permittee that it had ceased discharging groundwater from the facility since December 23, 2006 and requested termination of coverage under Order No. R4-2003-0108. Regional Board staff inspected the facility on May 7, 2009, and verified that there was no longer any discharges of groundwater from the facility.

4. On May 12, 2009, the Executive Officer of the Regional Board terminated the Permittee's coverage under Order No. R4-2003-0108 for the subject facility except for enforcement purposes. The late reporting violations described herein occurred while the Permittee was enrolled under Order No. R4-2003-0108.

5. Among the provisions of Order No. R4-2003-0108 are the requirements to implement Monitoring and Reporting Program No. CI-9167 and to prepare and submit monthly self-monitoring reports to the Regional Board pursuant to the authority of CWC § 13383. Order No. R4-2003-0108 required the Permittee to implement such a program during the term of its enrollment.

6. Monitoring and Reporting Program No. CI-9167 required the Permittee to submit monitoring reports to the Regional Board by the date in the following schedule:

Reporting Period	Report Due
January – March	May 15
April – June	August 15
July – September	November 15
October – December	February 15

7. On May 12, 2008, Regional Board staff Jose Morales conducted an investigation of the facility. Staff's facility inspection report noted that the Permittee failed to submit seven required monitoring reports by the deadlines listed above. Those reports were for the quarterly reporting periods of 3rd and 4th Quarter 2006, 1st, 2nd, 3rd, and 4th Quarter 2007, and 1st Quarter 2008.

8. On June 9, 2008, the Executive Officer of the Regional Board issued a Notice of Violation (NOV) to the Permittee for failing to submit the monitoring reports listed immediately above. One of those reports was the 4th Quarter 2006 self-monitoring report, which was due on February 15, 2007. A copy of the May 12, 2008 inspection report was attached to the NOV.

9. In response to the June 9, 2008 NOV, the Permittee submitted all of the outstanding quarterly self-monitoring reports for the subject reporting periods on August 28, 2008, eighty (80) days after receiving written notice provided in the June 9, 2008 NOV. The 4th Quarter 2006 monitoring report was submitted a total of five-hundred sixty (560) days after the due date of February 15, 2007.

10. On January 13, 2009, the Chief Deputy Executive Officer of the Regional Board issued the Permittee Settlement Offer No. R4-2009-0010-M to participate in the Expedited Payment Program (Settlement Offer). The Settlement Offer included a Notice of Violation notifying the Permittee of one (1) effluent limit violation and late reporting violations associated with the 3rd and 4th Quarter 2006, 1st, 2nd, 3rd, and 4th Quarter 2007, and 1st Quarter 2008 quarterly monitoring reports.

11. Since issuance of Settlement Offer No. R4-2009-0010-M, Regional Board staff dismissed one (1) effluent violation and late reporting violations associated with the 3rd Quarter 2006, 1st, 2nd, 3rd, and 4th Quarter 2007, and 1st Quarter 2008 quarterly monitoring reports based on the State Water Resources Control Board's Water Quality Enforcement Policy, which redefines a discharge monitoring report where there is no discharge during the relevant monitoring period. However, the late reporting violations associated with the 4th Quarter 2006 quarterly monitoring report remain outstanding because there was a discharge during that reporting period.

12. Submitting the 4th Quarter 2006 monitoring report five-hundred sixty (560) days after the due date of February 15, 2007 constitutes eighteen (18) serious violations under CWC § 13385.1 and these serious violations are subject to mandatory minimum penalties. These violations are identified in Exhibit "A" attached hereto and incorporated herein by reference.

13. CWC § 13385.1 (a)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars ($3,000) for a "serious violation" defined by that section as "a failure to file a discharge monitoring report required pursuant to Section 13323 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance limitations contained in waste discharge requirements that contain effluent limitations. This section applies to violations occurring on or after January 2004.

14. The maximum amount of administrative civil liability assessable pursuant to CWC § 13385(c) is $10,000 per day of violation.

YOU ARE HEREBY GIVEN NOTICE THAT:

15. The Chief Prosecutor recommends that the Regional Board assess the Permittee a mandatory minimum penalty in the amount of $54,000 for the late reporting violations associated with the 4th Quarter 2006 monitoring report cited in Exhibit "A". This Complaint addresses administrative civil liability for violations that are specifically identified in Exhibit "A" as subject to a mandatory minimum penalty. Refer to Exhibit "A" for the calculation of the amount of mandatory minimum penalty.

16. The Permittee may waive its right to a hearing and pay the recommended civil liability. Should the Permittee choose to waive its right to a hearing, an authorized agent must sign the waiver form attached to this Complaint and return it to the Regional Board by 5:00 pm on January 18, 2011. If the hearing is waived, a check in the amount of $54,000 (payable to the State Water Pollution Cleanup and Abatement Account) must be received by the Regional Board by 5:00 pm on January 18, 2011.

17. If the Regional Board does not receive a waiver and full payment of the recommended penalty by January 18, 2011, the Complaint will be heard before the Regional Board or Regional Board Hearing Panel pursuant to California Water Code §§ 13228.14 and

13323. The attached Notice of Public Hearing and Hearing Procedures contains that date, time, location, and specific procedures of the scheduled hearing of this matter.

18. If a hearing on this matter is held, the Regional Water Board will consider whether to affirm, reject, or modify (i.e. increase the proposed civil liability above the mandatory minimum) the proposed civil liability, or whether to refer the matter to the Attorney General for assessment of judicial civil liability.

19. There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not administrative proceeding. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.)

20. Notwithstanding the issuance of this Complaint, the Regional Board shall retain the authority to assess additional penalties for violations of the requirements of the Permittee's waste discharge requirements for which penalties have not yet been assessed or for violations that may subsequently occur.

21. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code § 21000 et seq., in accordance with California Code of Regulations, title 14, § 15321.

22. Regulations of the US Environmental Protection Agency require public notification of any proposed settlement of the civil liability occasioned by violation of the Clean Water Act including NPDES permit violations. Accordingly, interested persons will be given 30 days to comment on any proposed settlement of this Complaint.

Paula Rasmussen

Paula Rasmussen, Chief
Compliance and Enforcement Section
Los Angeles Regional Water Quality Control Board

December 17, 2010

WAIVER FORM

FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R4-2009-0010-M

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent the Crescenta Valley Water District (hereinafter "Permittee") in connection with Administrative Civil Liability Complaint No. R4-2009-0010-M (hereinafter the "Complaint"). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

☐ *Check here if the Permittee waives the hearing requirement and will pay the recommended liability.*

a. I hereby waive any right the Permittee may have to a hearing before the Regional Water Board.

b. I certify that the Permittee will remit payment for the civil liability imposed in the amount of $54,000 by check that references "ACL Complaint No. R4-2009-0010-M" made payable to the "*Cleanup and Abatement Account*". Payment must be received by the Regional Water Board by January 18, 2011 or this matter will be placed on the Regional Board's agenda for a hearing as initially proposed in the Complaint.

c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period expires. Should the Regional Water Board receive significant new information or comments from any source (excluding the Water Board's Prosecution Team) during this comment period, the Regional Water Board's Chief Prosecutor may withdraw the complaint, return payment, and issue a new complaint. I understand that this proposed settlement is subject to approval by the Regional Water Board, and that the Regional Water Board may consider this proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Permittee having waived the right to contest the allegations in the Complaint and the imposition of civil liability.

d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Permittee to further enforcement, including additional civil liability.

_____
(Print Name and Title)

_____
(Signature)

_____
(Date)

ACLC No. R4-2010-0010-M

EXHIBIT "A"
Violation Summary

Crescenta Valley Water District
CI No. 9167

Reporting Period	Violation Type	Due Date	Received Date	Days Late	# of Complete 30-Day Periods	Serious/ Chronic	Water Code Section 13385	Amount Per 30-Day Period	Penalty
3rd Quarter 2006	Late Report	11/15/2006	08/28/2008	652	21	Serious	(h)(1)	$3,000	$0
4th Quarter 2006	Late Report	02/15/2007	08/28/2008	560	18	Serious	(h)(1)	$3,000	$54,000
1st Quarter 2007	Late Report	05/15/2007	08/28/2008	471	15	Serious	(h)(1)	$3,000	$0
2nd Quarter 2007	Late Report	08/15/2007	08/28/2008	379	12	Serious	(h)(1)	$3,000	$0
3rd Quarter 2007	Late Report	11/15/2007	08/28/2008	287	9	Serious	(h)(1)	$3,000	$0
4th Quarter 2007	Late Report	02/15/2007	08/28/2008	560	18	Serious	(h)(1)	$3,000	$0
1st Quarter2008	Late Report	05/15/2008	08/28/2008	105	3	Serious	(h)(1)	$3,000	$0
							Total		$54,000
							MMP Total		$54,000

EXHIBIT 4

HEARING PANEL REPORT AND PROPOSED ORDER

Crescenta Valley Water District
ACL Complaint No. R4-2009-0010-M

This matter was heard on March 17, 2011 in Los Angeles, California before a panel consisting of Los Angeles Water Board Members Mr. Steve Blois, Ms. Francine Diamond, Ms. Maria Mehranian, and Mr. Charles Stringer. Mr. James D. Ciampa and Mr. James Bodnar appeared on behalf of the Crescenta Valley Water District (Permittee). Ms. Pansy Yuen, Mr. Hugh Marley, Ms. Paula Rasmussen, Ms. Mayumi Okamoto, and Ms. Julie Macedo appeared for the Prosecution Team.

The Panel members find:

FINDINGS OF FACT

1. The Permittee operated the Well No. 2 Rehabilitation Project located at 4029 Lowell Avenue in the City of La Crescenta, California. The Permittee discharged wastewater consisting of groundwater seepage generated during the rehabilitation project into a local storm drain (Latitude 34°13'28", Longitude 118°15'20"). The Permittee was authorized to discharge up to 1.51 million gallons per day (MGD). The wastewater flowed from the storm drain into Verdugo Wash, a tributary to the Los Angeles River, a navigable water of the United States. The wastewater contained pollutants defined as waste under the Porter-Cologne Water Quality Control Act (Water Code § 13000 et seq.).

2. The Permittee's wastewater discharges from the facility contained pollutants and were subject to California Water Code (Water Code) section 13376 and Los Angeles Water Board Order No. R4-2003-0108 (Permit). Water Code section 13376 p7rohibits the discharge of pollutants to surface waters, except as authorized by waste discharge requirements that implement the provisions of the Federal Clean Water Act. The Permit set forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time.

3. The Permit required the Permittee to implement Monitoring and Reporting Program No. CI-9167 and to prepare and submit self-monitoring reports to the Los Angeles Water Board pursuant to Water Code section 13383. These requirements applied throughout the Permittee's term of enrollment.

4. Monitoring and Reporting Program No. CI-9167 required the Permittee to submit monitoring reports to the Los Angeles Water Board by the dates in the following schedule:

Reporting Period	Report Due
January – March	May 15
April – June	August 15
July – September	November 15

Members Mr. Steve Blois, Ms. Francine Diamond, Ms. Maria Mehranian, and Mr. Charles Stringer. Mr. James D. Ciampa appeared on behalf of the Crescenta Valley Water District. Ms. Pansy Yuen, Ms. Mayumi Okamoto, and Ms. Julie Macedo appeared for the Prosecution Team. The Hearing Panel subsequently submitted to the Los Angeles Water Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended administrative civil liability, a copy of which is attached hereto and incorporated herein by reference.

6. Based on evidence presented in the hearing, the Hearing Panel determined that there were eighteen (18) late reporting violations subject to mandatory minimum penalties in the amount of $54,000 as identified in Exhibit "A" attached. The Hearing Panel also determined that § 13385.1(b)(1) does not apply to reduce the mandatory minimum penalty from $54,000 to $3,000.

7. Upon considering the Panel's report and making an independent review of the record, the Los Angeles Water Board during its meeting on May 5, 2011 upheld the imposition of the Panel's proposed administrative civil liability on the Permittee. The Los Angeles Water Board directed payment of a total assessment of $54,000 on Complaint No. R4-2009-0010-M.

8. This Order on Complaint is effective and final upon issuance by the Los Angeles Water Board. Payment must be received by the Los Angeles Water Board no later than thirty days from the date on which this Order is issued.

9. In the event that the Permittee fails to comply with the requirements of this Order, the Executive Officer or his delegee is authorized to refer this matter to the Office of Attorney General for enforcement.

10. Any person aggrieved by this action of the Los Angeles Water Board may petition the State Water Resources Control Board (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 Los Angeles Water Board action, except that if the thirtieth day following the action 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 or will be provided upon request

IT IS HEREBY ORDERED that, pursuant to § 13323 of the CWC, the Permittee shall make a cash payment of $54,000 (check payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days after the date of issuance of this Order.

In the event that the Permittee fails to comply with the requirements of this Order on Complaint No. R4-2009-0010-M, the Executive Officer or his delegee is authorized to refer this matter to the Office of Attorney General for enforcement.

I, Samuel Unger, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the California Regional Water Quality Control Board, Los Angeles Region, and such action occurred on May 5, 2011.

_____
Samuel Unger, P.E.
Executive Officer

EXHIBIT 6

HEARING PANEL REPORT AND PROPOSED ORDER

Casden Properties, LLC
ACL Complaint No. R4-2008-0199-M

This matter was heard on March 17, 2011 in Los Angeles, California before a panel consisting of Regional Board Members Ms. Francine Diamond, Mr. Steve Blois, Ms. Maria Mehranian, and Mr. Charles Stringer. Mr. Peter Duchesneau, Mr. Dana Palmer, Ms. Kay Swikart, Mr. Robert Lofy and Mr. Charles Buckley appeared on behalf of Casden Properties, LLC (Permittee). Ms. Kristie Kao, Mr. Augustine Anijielo, Ms. Julie Macedo and Ms. Mayumi Okamoto appeared for the Prosecution Team.

The Panel members make the following:

FINDINGS OF FACT

1. The Permittee operates the Wilshire Doheny Building located at 9090 Wilshire Boulevard in the City of Beverly Hills, California. The Permittee discharges wastewater from a dewatering system into a nearby storm drain. The Permittee is authorized to discharge up to 7,200 gallons per day of wastewater from the dewatering system. The wastewater is susceptible of containing copper and other pollutants which can degrade water quality and impact beneficial uses of water, defined as wastes under the Porter-Cologne Water Quality Control Act (CWC § 13000 et seq.). The wastewater then flows from the storm drain into Ballona Creek, a navigable water of the United States.

2. The Permittee's wastewater discharges from the facility contain pollutants and are subject to the requirements and limitations set forth in California Water Code (CWC) § 13376 and Regional Board Order Nos. R4-2003-0111 and R4-2008-0032. CWC § 13376 prohibits the discharge of pollutants to surface waters, except as authorized by waste discharge requirements that implement the provisions of the Federal Clean Water Act. Order Nos. R4-2003-0111 and R4-2008-0032 (collectively, the "Permit") set forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time.

3. CWC § 13385(h)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars ($3,000) for each serious violation. Pursuant to CWC § 13385(h)(2), a "serious violation" is defined as any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or for a Group I pollutant by 40 percent or more. Appendix A of Part 123.45 of Title 40 of the Code of Federal Regulations specifies the Group I and II pollutants.

4. CWC § 13385.1(a)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars ($3,000) for a "serious violation" defined by that section as "a failure to file a discharge monitoring report required pursuant to Section 13383 for each complete period of 30 days following the

deadline for submitting the report, if the report is designed to ensure compliance limitations contained in waste discharge requirements that contain effluent limitations. This section applies to violations occurring on or after January 1, 2004.

5. The Prosecution Team identified four (4) copper effluent limit violations of Order No. R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in Exhibit "A" attached hereto and incorporated herein by reference.

6. The Prosecution Team identified two hundred twenty-one (221) late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in Exhibit "A" attached hereto and incorporated herein by reference.

7. On December 17, 2010, the Chief Prosecutor issued Complaint No. R4-2008-0199-M to the Permittee in the amount of $675,000 for four (4) effluent limit violations and two hundred twenty-one (221) late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 subject to mandatory minimum penalties, as identified in Exhibit "A".

8. On considering the written record and evidence presented at the hearing the Panel finds that there are four (4) effluent limit violations and two hundred twenty-one (221) late reporting violations subject to mandatory minimum penalties in the amount of $675,000. The Panel finds that those violations occurred as reported by the Permittee.

9. The Permittee provided credible written evidence and testimony that it never discharged dewatered groundwater. The Prosecution Team failed to prove the Permittee discharged dewatered groundwater. Rather, the discharge consisted of collected and channelized irrigation water from street-level planters and water from other rinsing, including garage wash-down water. However, it is undisputed that the Permittee sought and obtained coverage under the Permit. The Permit required monitoring of all sampling stations, and reporting of the monitoring results. (*See, e.g.,* AR, p. 6.30, 6.90). Nothing in the Permit allows the Permittee to choose to report only certain types of effluent discharges (groundwater). In fact, Monitoring and Reporting Program No. CI-6733 stated that if there is no discharge, a report must be filed to so state. (Reporting Requirements I.B, AR p. 6.29.) The Permittee's 2009 reports admitted that discharges had occurred, and the Permittee reported them in January 2009.

10. The Permit regulates other types of discharges, including without limitation incidental collected stormwater from basements, which is similar to some of the discharge here, and to other wastewaters. The list of covered discharges is not exclusive. The Permit requires the Permittee to file monitoring reports for all effluent discharged from its sump. The Permit does not exempt irrigation runoff discharged through the sump. By repeatedly seeking NPDES permit coverage,

the Permittee admitted that it was discharging pollutants to a water of the United States. (*See, Brentwood, supra,* at 723 (monitoring reports are admissions of reported effluent violations).) The Permittee did not establish that the discharges were regulated by another permit. Whether or not the permittees under the *Waste Discharge Requirements of Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles* (Order No. 01-182) could have accepted the Permittee's discharges without a NPDES permit (see Finding 10, p. 6.37 and Finding B. 6, pp. 6.110-6.111), the Permittee obtained and was subject to the requirements of the Permit. In addition to copper, for an unknown period of time prior to September 24, 2007 the discharge contained the additive Flo-Zyme. The Permittee is seeking local permits to direct the discharge to the sanitary sewer in the future. However, as of the hearing date the Permittee had not sought to terminate NPDES permit coverage. The Permittee's repeated efforts to seek state and local permits are inconsistent with the Permittee's argument that it does not need a permit for the discharge because the discharges were covered by Order No. 01-182. Similarly, Permittee's counsel conceded at the hearing that a discretionary penalty may be appropriate for the failure to file, just not a mandatory one. Thus, the discharges were reportable under the Permit.

11. The Permittee contends the Legislature intended S.B. 1284 to apply to its situation. In support, the Permittee submitted the Assembly Committee on Environmental Safety and Toxic Materials analysis. This analysis, which relates to the June 2 amendment of the bill, states that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act." (AR, p. 6.352.) However, as described in the following paragraphs, this sentence was based on an earlier version of the bill, and was removed from the final Senate Bill Analysis. Therefore, the Los Angeles Water Board cannot infer any intent to apply the new provision to the Permittee's factual scenario based on that statement.

12. As introduced (February 19, 2010), S.B. 1284's effective date provision read, "The amendments made to this section by this act during the second year of the 2009-10 Regular Session of the Legislature apply to violations without regard to the date on which the violations occurred or occur." The bill would have eliminated mandatory minimum penalties in all three of the following situations:

> (4) A violation for a failure to file a discharge monitoring report for which the state board or a regional board does not inform the discharger of the alleged violation within 90 days of the date on which the discharge monitoring report was required to be filed.
>
> (5) A violation that consists of a failure to file a discharge monitoring report for any period in which no discharge occurred.
>
> (6) A violation that consists of a failure to file a discharge monitoring report for any period in which discharges do not violate effluent limitations

contained in waste discharge requirements that include numeric effluent limitations.

13. The Senate Committee on Environmental Quality's analysis concluded that it was unfair to apply the new exemptions to existing violations. (http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1251-1300/sb_1284_cfa_20100416_174742_sen_comm.html (4/19/10).)

14. The Senate amended the bill on April 26 to delete the effective date provision.

15. The June 2 Senate amendment deleted proposed subdivisions (j)(4)-(6), cited above, and added language similar to what appeared in the final version. The June 2 version created the two exemptions, referred to below as a no-discharge exemption and a first-time-offender exemption. At that point, the bill did not require the discharger to cure the violations within any particular time after receiving notice. The requirements for the no-discharge exemption only required a statement that there were no discharges and an explanation for the failure to file. The first-time-offender exemption only required that the discharger had not received previously notice of a violation (i.e., notices for violations other than the current violation(s)), and that no effluent limit violations were associated with the current failure to file. The June 2 version added a new retroactive effective date provision, which applied the changes to any violations for which penalties had not been imposed before January 1, 2011, regardless of the date of violation. Like the analysis cited by the Permittee, the Senate Floor analysis of this version stated that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act."

16. The Assembly amended the bill on June 23. This version changed the no-discharge exemption to include the 30-day requirement and added the requirement that there be no "reportable" discharges. The first-time-offender exemption was revised, among other things, to specify that the discharger not "on any occasion" previously receive notice of a failure to file, and to require the discharger to file the missing reports within 90 days after notification. The effective date provision was expanded to include complaints issued on or after July 1, 2010, regardless of the date of violation.

17. The August 20 Senate amendment changed the 90-day compliance requirement for first-time offenders to 30 days. With respect to the effective date, the Senate Floor Analysis states that the bill "applies to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010 without regard to the date on which the violations occurred." This statement of the effective date replaced the prior language stating that the bill applied to dischargers with outstanding notices of violation at the date of the enactment. Although several prior analyses issued after the June 23 amendment continued to include language from prior analyses stating that the bill applied to

dischargers with outstanding notices of violation[1], the final bill analysis did not include any such statement.

CONCLUSIONS OF LAW

1. The discharges of effluent containing copper in excess of the effluent limitations of Order No. R4-2008-0032 into navigable waters of the United States and failure to comply with the monitoring and reporting requirement of Order Nos. R4-2003-0111 and R4-2008-0032, as found in Findings of Fact No. 8 and Exhibit "A", constitute four (4) violations of effluent limitations and two hundred twenty-one (221) late reporting violations.

2. Effluent limitations and water quality criteria must protect all beneficial uses. (Clean Water Act sections 301, 303, 401; 40 CFR §§ 122.44, 131.10, 131.11.) The copper violations are not excused merely because they are based on aquatic life criteria that are more stringent than maximum contaminant levels (MCLs) for human health protection.

3. There are no statutes of limitations that apply to this administrative proceeding. The statutes of limitations in the California Code of Civil Procedure that refer to "actions" and "special proceedings" apply to judicial proceedings, not administrative proceedings. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405(2), p. 510.

4. The equitable doctrine of laches does not apply to mandatory minimum penalties. Laches is an equitable defense. (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1494.) Principles of equity cannot be used to avoid statutory mandates, such as those seen in the mandatory penalty scheme established by Water Code section 13385. (*Ghory v. Al-Lahhan* (1989) 209 Cal.App.3d 1487, 1492; *Jiagbogu v. Mercedes Benz* (2004) 118 Cal.App.4th 1235, 1244.) The mandatory minimum penalty statutes were intended to remove Water Board discretion regarding certain penalties. (State Water Resources Control Board Order WQ 2007-0010 (*Escondido Creek Conservancy*).)

5. Even if laches applied to mandatory minimum penalties, the Permittee has the burden of proving all affirmative defenses. (*City of Brentwood v. Central Valley Regional Water Quality Control Board* (2004) 123 Cal.App.4th 714, 726; State Water Resources Control Board Order WQ 2007-0010 (*Escondido Creek Conservancy*).) The monitoring reports in question were due quarterly from February 15, 2006 through November 15, 2008. Los Angeles Water Board staff issued Notices of Violation on November 7, 2007 and December 22, 2008. Thus, the Permittee was on notice of this matter. No interest accrued pending issuance of the complaint. The Permittee has not identified any prejudice from the delay, or that the delay was unreasonable. The Permittee filed the reports on

[1] Senate analysis of August 20 and June 23 amendments; Assembly Judiciary Analysis of June 23 amendment (June 29, 2010)

January 14 and 23, 2009, which ended further accrual of penalties. The December 22, 2008 letter included a settlement offer. Staff extended the response date numerous times at the Permittee's request. The last requested extension expired on July 1, 2009, which was after the Permittee filed the reports. The Discharger was able to submit monitoring reports in January 2009 that stopped additional penalties from accruing. The prior Chief Building Engineer did not leave the Permittee's employ until after the Permittee received the November 7, 2007 notice of violation. The Permittee was able to locate documents dating back to the 1980's and to provide expert testimony regarding the nature of its discharge. The August 5, 2004 and November 18, 2009 letters regarding continuation of coverage advised the Permittee of the monitoring requirements. The complaint does not seek interest, economic savings or other additional amounts due to the passage of time. Thus, even assuming laches applied to mandatory minimum penalties, the Permittee has not established that it applies here.

6. Water Code section 13385.1, subdivision (a)(2) does not exempt the Permittee from mandatory minimum penalties. Subdivision (a)(2) applies if (i) the Discharger submits a "statement that there were no discharges to waters of the United States reportable under the applicable waste discharge requirements during the relevant monitoring period," supported by additional information or evidence upon request, (ii) the statement states why the reports were late, and (iii) the statement is submitted before the applicable discharge monitoring report is due or within 30 days after the Regional Water Board provides notice of the late report. Subdivision (a)(2) applies "to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." (Water Code § 13385.1, subd. (e).) The Complaint was filed after July 1, 2010, so subdivision (b)(1) potentially applies. However, in order to qualify for the mandatory minimum penalty relief that subdivision (a)(2) provides, a discharger must meet all applicable requirements, including the requirement to file the statement within 30 days of notice.

7. Although subdivision (e) explicitly provides for retroactive application of subdivision (b)(1), nothing in section 13385.1 provides an exception to the 30-day requirement for violations that occurred or notices that were issued before the enactment of subdivision (b)(1). The 30-day requirement is unambiguous, and it is not necessary to resort to legislative history or other rules of statutory analysis. Even if it were ambiguous, nothing in the statute or the legislative history evidences any legislative intent to require the Water Boards to provide a new notice and opportunity to cure, make the 30-day requirement inapplicable to violations outstanding as of January 1, 2011, or provide a grace period to dischargers with outstanding violations who filed the delinquent reports before January 1, 2011. Although the Permittee had no reason to file the statement before January 1, 2011, the Legislature could have waived this requirement for dischargers with outstanding violations as of January 1, 2011, or discharger who cured outstanding violations prior to January 1, 2011. No such provisions appear in the statutory language.

8. In addition, the Permittee had reportable discharges during the relevant monitoring periods.

9. The Permittee did not demonstrate that the Prosecution Team treated the Permittee differently than other similarly situated dischargers. The Prosecution Team explained that Glenborough Cahuenga, LLC was treated differently because that case involved a no-discharge situation and was resolved according to the *Water Quality Enforcement Policy* before S.B. 1284 took effect.

10. The NPDES permitting program relies on a system of self-reporting. (*Brentwood, supra,* at 723.) The Legislature recognized this when it subjected reporting violations to mandatory minimum penalties. "In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonable related to a proper legislative goal." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) A statute is presumed to be constitutional and must be upheld unless its unconstitutionality clearly, positively and unmistakably appears." (*Id.* at 404.) A statute may be unconstitutional as applied if the penalties are mandatory and potentially unlimited in duration. (*Id.* at 399; *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352.) *Hale* did not universally condemn penalties that indefinitely accumulate on a daily basis until the violation is corrected. In fact, it expressly declined to do so. (*Hale, supra*, 22 Cal.3d at 404.) Here, the penalties were not potentially unlimited because a discharger can file the late reports and stop penalties from accruing, as the Permittee did in this case. Thus, the statute does not have the potential to be unconstitutional as applied.

11. Even where a statute has the potential to be unconstitutional as applied, constitutionality must be determined on a case-by-case basis (*ibid.*), taking into consideration several factors, including the amount of discretion available to the trier of fact, the potential for the penalties to accumulate indefinitely, the relative sophistication of the plaintiff and defendant, egregious behavior by the defendant, whether a wide range of culpable conduct is subject to a uniform penalty, the range of injuries resulting from conduct subject to a uniform penalty, the relative severity of penalties imposed for similar conduct, and the financial impact of the penalties (*Kinney, supra,* at 352-353; *Hale, supra*, 22 Cal.3d at 404-405; *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373 (upholding fines of over $9.5 million despite lack of environmental damage).) In this case, the Los Angeles Water Board lacks the discretion to avoid mandatory minimum penalties unless a discharger establishes an affirmative defense. The penalties did not accumulate indefinitely, and the Permittee could have avoided penalties by filing the required reports before January 2009. The alleged violations in this case are based on strict liability, not on egregiously culpable behavior. Mandatory minimum penalties were not designed to penalize egregiously culpable behavior, but rather to ensure compliance with self-monitoring requirements that are critical to the permitting program. The Permittee failed to file the missing reports for several years, despite notices of the violations and prior notice that monitoring requirements applied. Later monitoring showed

four violations for copper. The discharge is to Ballona Creek, which is impaired and subject to a total maximum daily load for copper. Thus, the Permittee's violations were culpable, but not as flagrant as those at issue in *Ojavan Investors.* Since mandatory penalties do not allow the board to exercise discretion, the statute results in similar penalties for similar conduct in cases where the discharger does not have an affirmative defense under S.B. 1284, the *Water Quality Enforcement Policy* or otherwise. The penalties apply to a narrow range of conduct: violations of effluent limitations and failure to file reports. The Permittee did not provide specific evidence of the financial impact of the penalties. Given the size of the penalties the board presumes the impact is significant. On balance, the Permittee has not established that the penalty is "clearly, positively and unmistakably" unconstitutional or that it is unconstitutional as applied.

12. $675,000 is the mandatory minimum penalty amount that must be assessed against the Permittee under CWC § 13385 for the violations identified in Exhibit "A".

13. The maximum amount of administrative civil liability assessable for the violations alleged in Complaint No. R4-2008-0199-M pursuant to CWC § 13385 is $10,000 per day of violation plus $10 times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

RECOMMENDED MANDATORY MINIMUM PENALTY

The amount of $675,000 should be imposed on the Permittee as a mandatory minimum penalty for the violations found herein to have been committed by the Permittee. A proposed Order on Complaint No. R4-2008-0199-M is attached.

_____ Date _____

Francine Diamond
Chair

Attachments:

Exhibit "A"
Proposed Order on Complaint No. R4-2008-0199-M

EXHIBIT 7

Chronology of Events Implicating Procedural Violations

The following table details a non-exclusive list of procedural violations that have occurred in this proceeding concerning reportability.

Date	Event
January 1, 2011	Effective date of SB 1284.
January 26, 2011	Preliminary Hearing Panel binder served by Prosecution as per Hearing Notice.
January 28, 2011	Prosecution Receives Casden's Statement pursuant to Water Code Section 1885.1(a)(2)(A), indicating no reportable discharges occurred under WDR
February 16, 2011	Prosecution Receives Casden's brief, presentation and evidence, including with regard to Reportability Requirement, as per Hearing Notice deadline.
March 7, 2011	Prosecution serves "Final" Hearing Binder and Presentation; per Hearing Notice. Neither rebuttal brief, nor p*resentation by Prosecution, as required. See Hearing Notice (Item 6.2, p. 6.13)* and Executive Order. Per Executive Order and Bagley-Keene Open Meeting Act, deadline by which *all rebuttal evidence* was to have been included in final binder. *No rule or law exempts written evidence contained in a PowerPoint presentation from this deadline.*
March 8, 2011	Prosecution notifies Advisor and Casden of intent to submit rebuttal brief no later than March 15, 2011, two days before hearing. Casden objects to late submission of rebuttal brief and presentation..
March 9, 2011	Advisor Okun transmits Chair's ruling to permit Prosecution's filing of rebuttal brief by 9am on March 14. and advises that "[i]f you are seeking to introduce written rebuttal evidence in addition the brief, I suggest you provide that evidence to opposing counsel as soon as possible."
March 10, 2011	Pre-Hearing Conference
March 11, 2011	Prosecution serves 19-Page Rebuttal Brief, but no *Presentation. Rebuttal Brief does not address reportability issue.*
March 14, 2011	Casden objects to Prosecution's Rebuttal Brief and failure to

	submit presentation, including on basis of surprise
March 15, 2011	Advisor informs Parties of Ruling on Objections: (1) strikes sentence in Section G, (2) finds that the Prosecution's "failure to submit the PowerPoint is unrelated to whether the Prosecution Team may submit a written rebuttal brief," that the ***requirement is based only on the Hearing Notice; there is no independent legal requirement to pre-submit a presentation"*** and rules that ***"as long as the Prosecution Team's hearing presentation does not exceed the scope of its direct evidence, the allegation in the Complaint and matters properly considered rebuttal, the failure to submit a PowerPoint does not appear to have prejudiced Casden."*** Despite 19-page rebuttal brief, Chair refuses to extend Casden's time estimate made prior to rebuttal brief being permitted.
March 15, 2011	Prosecution confirms that PowerPoint has not been provided to Casden
March 17, 2011, At Hearing	Prosecution Argues Reportability Issue For First Time (see, *e.g*, Transcript at 25:21 to 26:12), Not Giving Any Advance Notice. Presentation Clearly Exceeds Scope of Direct Evidence Provided in [March 7, 2011] Materials.
March 17, 2011, At Hearing	Casden Objects on Record, Moves to Strike, and is Overruled. (Transcript, 26:13 to 27:8)
March 17, 2011, At Hearing	Casden Makes Offer of Proof for More Time, but is Never Accommodated (Transcript, 76:4 to 77:1, 97: 7-13)
March 17, 2011, At Hearing	Panel Members inquire with Prosecution Flow Zyme Question. Casden Not Given Opportunity to respond. (Transcript, 137)
March 17, 2011, At Hearing	Hearing Panel issues decision finding all discharges required to be reported under WDR.
April 20, 2011	Hearing Panel Report is served, changing rationale for March 17, 2011 decision.

EXHIBIT 5

Final per Mayumi Okamoto

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

D

In the matter of:	)	**Order on Complaint No. R4-2009-0010-M**
	)	**Mandatory Minimum Penalty for**
Crescenta Valley Water District	)	**Violation of California Water Code §§ 13376, 13383**
Well No. 2 Rehabilitation Project	)	**and**
4029 Lowell Avenue	)	**Order No. R4-2003-0108**
La Crescenta, CA	)	**(NPDES No. CAG994005)**

R

YOU ARE HEREBY GIVEN NOTICE THAT:

A

1. The Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board) has found and determined that the Crescenta Valley Water District (hereinafter Permittee) violated requirements contained in California Water Code (CWC) §§ 13376, 13383, and Order No. R4-2003-0108.

2. The Permittee operated the Well No. 2 Rehabilitation Project (facility) located at 4029 Lowell Avenue in the City of La Crescenta, California. The Permittee's wastewater discharges from the facility were subject to the waste discharge requirements and limitations set forth in Los Angeles Water Board Order No. R4-2003-0108. On May 12, 2009, the Executive Officer of the Los Angeles Water Board terminated the Permittee's coverage under Order No. R4-2003-0108 for the subject facility except for enforcement purposes.

F

3. The Prosecution Team identified eighteen (18) late reporting violations of Order No. R4-2003-0108 and Monitoring and Reporting Program No. CI-9167 subject to mandatory minimum penalties resulting from the Permittee's submission of its 4th Quarter 2006 monitoring report five hundred sixty (560) days after the required deadline. The late reporting violations described herein occurred while the Permittee was enrolled under Order No. R4-2003-0108. The violations are identified in the Exhibit "A" attached hereto and incorporated herein by reference.

T

4. On December 17, 2010, the Chief Prosecutor issued Complaint No. R4-2009-0010-M to the Permittee in the amount of $54,000 in mandatory minimum penalties for the eighteen (18) late reporting violations of Order No. R4-2003-0108 and Monitoring and Reporting Program No. CI-9167, as identified in Exhibit "A".

5. On March 17, 2011, this matter was heard in Los Angeles, California before a Los Angeles Water Board Hearing Panel (Panel) consisting of Los Angeles Water Board

Members Mr. Steve Blois, Ms. Francine Diamond, Ms. Maria Mehranian, and Mr. Charles Stringer. Mr. James D. Ciampa appeared on behalf of the Crescenta Valley Water District. Ms. Pansy Yuen, Ms. Mayumi Okamoto, and Ms. Julie Macedo appeared for the Prosecution Team. The Hearing Panel subsequently submitted to the Los Angeles Water Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended administrative civil liability, a copy of which is attached hereto and incorporated herein by reference.

6. Based on evidence presented in the hearing, the Hearing Panel determined that there were eighteen (18) late reporting violations subject to mandatory minimum penalties in the amount of $54,000 as identified in Exhibit "A" attached. The Hearing Panel also determined that § 13385.1(b)(1) does not apply to reduce the mandatory minimum penalty from $54,000 to $3,000.

7. Upon considering the Panel's report and making an independent review of the record, the Los Angeles Water Board during its meeting on May 5, 2011 upheld the imposition of the Panel's proposed administrative civil liability on the Permittee. The Los Angeles Water Board directed payment of a total assessment of $54,000 on Complaint No. R4-2009-0010-M.

8. This Order on Complaint is effective and final upon issuance by the Los Angeles Water Board. Payment must be received by the Los Angeles Water Board no later than thirty days from the date on which this Order is issued.

9. In the event that the Permittee fails to comply with the requirements of this Order, the Executive Officer or his delegee is authorized to refer this matter to the Office of Attorney General for enforcement.

10. Any person aggrieved by this action of the Los Angeles Water Board may petition the State Water Resources Control Board (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 Los Angeles Water Board action, except that if the thirtieth day following the action 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 or will be provided upon request

IT IS HEREBY ORDERED that, pursuant to § 13323 of the CWC, the Permittee shall make a cash payment of $54,000 (check payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days after the date of issuance of this Order.

In the event that the Permittee fails to comply with the requirements of this Order on Complaint No. R4-2009-0010-M, the Executive Officer or his delegee is authorized to refer this matter to the Office of Attorney General for enforcement.

I, Samuel Unger, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the California Regional Water Quality Control Board, Los Angeles Region, and such action occurred on May 5, 2011.

_____
Samuel Unger, P.E.
Executive Officer

EXHIBIT 6

(PARTIAL)

STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ORDER NO. 01-182
NPDES PERMIT NO. CAS004001
WASTE DISCHARGE REQUIREMENTS
FOR
MUNICIPAL STORM WATER AND URBAN RUNOFF DISCHARGES WITHIN THE COUNTY OF LOS ANGELES, AND THE INCORPORATED CITIES THEREIN, EXCEPT THE CITY OF LONG BEACH

December 13, 2001
(Amended on September 14, 2006 by Order R4-2006-0074; August 9, 2007 by Order R4-2007-0042; December 10, 2009 by Order R4-2009-0130; and October 19, 2010 pursuant to the peremptory writ of mandate in L.A. Superior Court Case No. BS122724)

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Amended by Orders R4-2006-0074, R4-2007-0042, and R4-2009-0130, and further amended pursuant to L.A. Superior Court Case No. BS122724

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STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

ORDER NO. 01-182
NPDES PERMIT NO. CAS004001
WASTE DISCHARGE REQUIREMENTS
FOR
MUNICIPAL STORM WATER AND URBAN RUNOFF DISCHARGES WITHIN THE COUNTY OF LOS ANGELES, AND THE INCORPORATED CITIES THEREIN, EXCEPT THE CITY OF LONG BEACH

The California Regional Water Quality Control Board, Los Angeles Region (hereinafter referred to as the Regional Board) finds:

A. Existing Permit

The Los Angeles County Flood Control District, the County of Los Angeles, and 84 incorporated cities within the Los Angeles County Flood Control District (see Attachment A, List of Permittees), hereinafter referred to separately as Permittees and jointly as the Discharger, discharge or contribute to discharges of storm water and urban runoff from municipal separate storm sewer systems (MS4s), also called storm drain systems. The discharges flow to water courses within the Los Angeles County Flood Control District and into receiving waters of the Los Angeles Region. These discharges are covered under countywide waste discharge requirements contained in Order No. 96-054 adopted by this Regional Board on July 15, 1996, which replaced Order No. 90-079 adopted by this Regional Board on June 18, 1990. Order No. 96-054 also serves as a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of municipal storm water.

8. This Order may be modified or alternatively revoked or reissued prior to its expiration date, in accordance with the procedural requirements of the NPDES program, and the CWC for the issuance of waste discharge requirements.

IT IS HEREBY ORDERED that the Los Angeles County Flood Control District, Los Angeles County, and the Cities of Agoura Hills, Alhambra, Arcadia, Artesia, Azusa, Baldwin Park, Bell, Bellflower, Bell Gardens, Beverly Hills, Bradbury, Burbank, Calabasas, Carson, Cerritos, Claremont, Commerce, Compton, Covina, Cudahy, Culver City, Diamond Bar, Downey, Duarte, El Monte, El Segundo, Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne, Hermosa Beach, Hidden Hills, Huntington Park, Industry, Inglewood, Irwindale, La Cañada Flintridge, La Habra Heights, Lakewood, La Mirada, La Puente, La Verne, Lawndale, Lomita, Los Angeles, Lynwood, Malibu, Manhattan Beach, Maywood, Monrovia, Montebello, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pasadena, Pico Rivera, Pomona, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, Rosemead, San Dimas, San Fernando, San Gabriel, San Marino, Santa Clarita, Santa Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood, Westlake Village, and Whittier, in order to meet the provisions contained in Division 7 of the CWC and regulations adopted thereunder, and the provisions of the CWA, as amended, and regulations and guidelines adopted thereunder, shall comply with the following:

Part 1. DISCHARGE PROHIBITIONS

Part 1. A. The Permittees shall effectively prohibit non-storm water discharges into the MS4 and watercourses, except where such discharges:

1. Are covered by a separate individual or general NPDES permit for non-storm water discharges; or

2. Fall within one of the categories below, and meet all conditions when specified by the Regional Board Executive Officer:

   a) Category A - Natural flow:

      (1) Natural springs and rising ground water;

      (2) Flows from riparian habitats or wetlands;

      (3) Stream diversions, permitted by the State Board; and

      (4) Uncontaminated ground water infiltration [as defined by 40 CFR 35.2005(20)].

   b) Category B - Flows from emergency fire fighting activity.

   c) Category C - Flows incidental to urban activities:

      (1) Reclaimed and potable landscape irrigation runoff;

(2) Potable drinking water supply and distribution system releases (consistent with American Water Works Association guidelines for dechlorination and suspended solids reduction practices);

(3) Drains for foundations, footings, and crawl spaces;

(4) Air conditioning condensate;

(5) Dechlorinated/debrominated swimming pool discharges;

(6) Dewatering of lakes and decorative fountains;

(7) Non-commercial car washing by residents or by non-profit organizations; and

(8) Sidewalk rinsing.

The Regional Board Executive Officer may add or remove categories of non-storm water discharges above. Furthermore, in the event that any of the above categories of non-storm water discharges are determined to be a source of pollutants by the Regional Board Executive Officer, the discharge will no longer be exempt from this prohibition unless the Permittee implements conditions approved by the Regional Board Executive Officer to ensure that the discharge is not a source of pollutants. Notwithstanding the above, the Regional Board Executive Officer may impose additional prohibitions of non-storm water discharges in consideration of antidegradation policies and TMDLs.

Part 1. B. Discharges of Summer Dry Weather flows from MS4s[3] into Marina del Rey Harbor Basins D, E, or F, including Mothers' Beach, that cause or contribute to exceedances of the bacteria Receiving Water Limitations in Part 2.6 below, are prohibited.[4]

Part 2. RECEIVING WATER LIMITATIONS

1. Except as provided in Part 2.6 below, discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.

[3] [Intentionally left blank]

[4] Responsibility for such prohibited discharges is determined as indicated in Footnote 2 part (1) of Table 7-5.1 of the Basin Plan. All Permittees within a subwatershed are jointly responsible for compliance with the limitations imposed in Table 7-5.1 of the Basin Plan.

(PARTIAL)

Article 5. Stormwater And Urban Runoff Pollution Control

9-4-501: FINDINGS:

The city council finds and declares:

A. The city of Beverly Hills' storm and surface water drainage system is planned, designed and operated to handle stormwater and urban runoff flowing from public and private properties. In order to function effectively, this system requires all private connections to it to be property constructed, maintained and operated.

B. Storm water and urban runoff flows from individual properties onto streets, then through storm drains to the Santa Monica Bay. It is therefore in the public interest to ensure that both public and private drainage systems are properly constructed, maintained, and operated, in order to facilitate the proper functioning of the city's storm and surface water drainage system, and to prevent pollutants from entering Santa Monica Bay.

C. The city of Beverly Hills is a copermittee under the "waste discharge requirements for municipal storm water and urban runoff discharges within the county of Los Angeles", issued by the California regional water quality control board - Los Angeles region, (order no. 96-054), dated July 15, 1996, which also serves as an NPDES permit under the federal clean water act (NPDES no. CAS614001), as well as waste discharge requirements under California law [the "municipal NPDES permit"], and, as a copermittee under the municipal NPDES permit, the city is required to adopt ordinances and implement procedures with respect to the entry of nonstormwater discharges into the municipal separate storm sewer system. Additionally, the federal clean water act (33 USC section 1251 et seq.) provides for the regulation and reduction of pollutants discharged into the waters of the United States by extending national pollutant discharge elimination system (hereinafter "NPDES") requirements to storm water and urban runoff discharge into municipal storm drain systems.

D. The most significant pollutants in storm water and urban runoff come from particulates and oil and grease.

E. In order to control, in a cost effective manner, the quantity and quality of storm water and urban runoff to the maximum extent practicable, the adoption of reasonable guidelines regulating the use of water, the storage of materials, machinery and equipment, and the removal of debris and residue is essential.

F. In order to reduce the quantity and maintain the quality of storm water and urban runoff volume from private and publicly owned properties which will be newly developed, substantially rehabilitated or redeveloped in the future, a program ensuring that new

developments incorporate design elements which facilitate control of such storm water and urban runoff is required.

G. It is in the best interest of the city to establish guidelines and procedures for control of the quantity and quality of storm water and urban runoff from construction sites within the city.

H. Part 1, section I of the municipal NPDES permit requires the city to effectively prohibit nonstormwater discharges from within its boundaries, into that portion of the municipal separate storm sewer system (the "MS4") which it owns or operates and into watercourses, except where such discharges are: 1) in compliance with a separate individual or general NPDES permit; or 2) identified and in compliance with part 2.II.C (Nonstorm Water Discharges) of the municipal NPDES permit; or 3) discharges originating from federal, state or other facilities which the city is preempted from regulating, and further provides that compliance with the terms of the municipal NPDES permit through the development and implementation of the programs described in the municipal NPDES permit will constitute compliance with the discharge prohibitions therein.

I. Part 2, section I.E of the municipal NPDES permit requires the city to possess the legal authority necessary to control discharges to and from those portions of the MS4 over which it has jurisdiction, so as to comply with the municipal NPDES permit and to specifically prohibit certain discharges identified in the municipal NPDES permit.

J. The municipal NPDES permit contemplates the development of a countywide storm water management plan ("CSWMP") and then a watershed management area plan ("WMAP"), in which the city will participate, which will in turn require the development and the implementation of programs for, among other things, the elimination of illicit connections and illicit discharges, development planning, development construction, and public information and education requirements, and which may require the later adoption of additional authority to implement such programs as they are developed by the permittees and approved by the regional board. (Ord. 94-O-2221, eff. 12-23-1994; amd. Ord. 00-O-2352, eff. 10-20-2000; Ord. 00-O-2354, eff. 10-8-2000; Ord. 01-O-2363, eff. 2-2-2001)

9-4-502: PURPOSE:

A. The purpose of this article is to reduce the level of contamination of storm water and urban runoff from existing residential and nonresidential properties, from construction sites and from future developments, and to thereby protect the health, safety and general welfare of the citizens of the city and the water quality of the Santa Monica Bay. This article shall be construed to assure consistency with the requirements of the federal clean water act and acts amendatory thereof or supplementary thereto, applicable implementing regulations, and the municipal NPDES permit, and any amendment, revision or reissuance thereof.

B. The purpose of this article is also to ensure the future health, safety and general welfare of the citizens of the city and the water quality of the receiving waters of the county of Los Angeles and surrounding coastal areas by:

1. Reducing pollutants in storm water discharges to the maximum extent practicable;

2. Regulating illicit connections and illicit discharges and thereby reducing the level of contamination of storm water and urban runoff into the MS4; and

3. Regulating nonstorm water discharges to the MS4.

C. The intent of this article is also to protect and enhance the quality of watercourses, water bodies, and wetlands within the city in a manner consistent with the federal clean water act, the California Porter-Cologne water quality control act and the municipal NPDES permit.

D. This article is also intended to provide the city with the legal authority necessary to control discharges to and from those portions of the municipal storm water system over which it has jurisdiction as required by the municipal NPDES permit, and while the CSWMP and the WMAP are being developed under the municipal NPDES permit, and in contemplation of the subsequent amendment of this ordinance or adoption by the city of additional provisions of this ordinance to implement the subsequently adopted CSWMP and WMAP, or other programs developed under the municipal NPDES permit.

E. This article also sets forth requirements for the construction and operation of certain "commercial development", "new development" and "redevelopment" projects and other projects (as further defined herein) which are intended to ensure compliance with the storm water mitigation measures prescribed in the current version of the standard urban storm water mitigation plan ("SUSMP") approved by the regional water quality control board-Los Angeles region, and on file in the office of the city clerk of this city.

F. This article authorizes the authorized enforcement officer to define and adopt applicable Best Management Practices (BMPs) and other storm water pollution control measures, to grant waivers from SUSMP requirements, as provided herein, to cite infractions and to impose fines pursuant to this article. Except as otherwise provided herein, the authorized enforcement officer shall administer, implement and enforce the provisions of this article. (Ord. 94-O-2221, eff. 12-23-1994; amd. Ord. 00-O-2352, eff. 10-20-2000; Ord. 00-O-2354, eff. 10-8-2000; Ord. 01-O-2363, eff. 2-2-2001)

9-4-503: DEFINITIONS:

Except as specifically provided herein, any term used in this chapter shall be defined as that term is defined in the current municipal NPDES permit, or in the current version of the standard

EXHIBIT 7

HEARING PANEL REPORT AND PROPOSED ORDER

Casden Properties, LLC
ACL Complaint No. R4-2008-0199-M

This matter was heard on March 17, 2011 in Los Angeles, California before a panel consisting of Regional Board Members Ms. Francine Diamond, Mr. Steve Blois, Ms. Maria Mehranian, and Mr. Charles Stringer. Mr. Peter Duchesneau, Mr. Dana Palmer, Ms. Kay Swikart, Mr. Robert Lofy and Mr. Charles Buckley appeared on behalf of Casden Properties, LLC (Permittee). Ms. Kristie Kao, Mr. Augustine Anijielo, Ms. Julie Macedo and Ms. Mayumi Okamoto appeared for the Prosecution Team.

The Panel members make the following:

FINDINGS OF FACT

1. The Permittee operates the Wilshire Doheny Building located at 9090 Wilshire Boulevard in the City of Beverly Hills, California. The Permittee discharges wastewater from a dewatering system into a nearby storm drain. The Permittee is authorized to discharge up to 7,200 gallons per day of wastewater from the dewatering system. The wastewater is susceptible of containing copper and other pollutants which can degrade water quality and impact beneficial uses of water, defined as wastes under the Porter-Cologne Water Quality Control Act (CWC § 13000 et seq.). The wastewater then flows from the storm drain into Ballona Creek, a navigable water of the United States.

2. The Permittee's wastewater discharges from the facility contain pollutants and are subject to the requirements and limitations set forth in California Water Code (CWC) § 13376 and Regional Board Order Nos. R4-2003-0111 and R4-2008-0032. CWC § 13376 prohibits the discharge of pollutants to surface waters, except as authorized by waste discharge requirements that implement the provisions of the Federal Clean Water Act. Order Nos. R4-2003-0111 and R4-2008-0032 (collectively, the "Permit") set forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time.

3. CWC § 13385(h)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars ($3,000) for each serious violation. Pursuant to CWC § 13385(h)(2), a "serious violation" is defined as any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or for a Group I pollutant by 40 percent or more. Appendix A of Part 123.45 of Title 40 of the Code of Federal Regulations specifies the Group I and II pollutants.

4. CWC § 13385.1(a)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars ($3,000) for a "serious violation" defined by that section as "a failure to file a discharge monitoring report required pursuant to Section 13383 for each complete period of 30 days following the

deadline for submitting the report, if the report is designed to ensure compliance limitations contained in waste discharge requirements that contain effluent limitations. This section applies to violations occurring on or after January 1, 2004.

5. The Prosecution Team identified four (4) copper effluent limit violations of Order No. R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in Exhibit "A" attached hereto and incorporated herein by reference.

6. The Prosecution Team identified two hundred twenty-one (221) late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 in the Permittee's self-monitoring reports that are subject to mandatory minimum penalties. The violations are identified in Exhibit "A" attached hereto and incorporated herein by reference.

7. On December 17, 2010, the Chief Prosecutor issued Complaint No. R4-2008-0199-M to the Permittee in the amount of $675,000 for four (4) effluent limit violations and two hundred twenty-one (221) late reporting violations of Order Nos. R4-2003-0111 and R4-2008-0032 subject to mandatory minimum penalties, as identified in Exhibit "A".

8. On considering the written record and evidence presented at the hearing the Panel finds that there are four (4) effluent limit violations and two hundred twenty-one (221) late reporting violations subject to mandatory minimum penalties in the amount of $675,000. The Panel finds that those violations occurred as reported by the Permittee.

9. The Permittee provided credible written evidence and testimony that it never discharged dewatered groundwater. The Prosecution Team failed to prove the Permittee discharged dewatered groundwater. Rather, the discharge consisted of collected and channelized irrigation water from street-level planters and water from other rinsing, including garage wash-down water. However, it is undisputed that the Permittee sought and obtained coverage under the Permit. The Permit required monitoring of all sampling stations, and reporting of the monitoring results. (*See, e.g.,* AR, p. 6.30, 6.90). Nothing in the Permit allows the Permittee to choose to report only certain types of effluent discharges (groundwater). In fact, Monitoring and Reporting Program No. CI-6733 stated that if there is no discharge, a report must be filed to so state. (Reporting Requirements I.B, AR p. 6.29.) The Permittee's 2009 reports admitted that discharges had occurred, and the Permittee reported them in January 2009.

10. The Permit regulates other types of discharges, including without limitation incidental collected stormwater from basements, which is similar to some of the discharge here, and to other wastewaters. The list of covered discharges is not exclusive. The Permit requires the Permittee to file monitoring reports for all effluent discharged from its sump. The Permit does not exempt irrigation runoff discharged through the sump. By repeatedly seeking NPDES permit coverage,

the Permittee admitted that it was discharging pollutants to a water of the United States. (*See, Brentwood, supra,* at 723 (monitoring reports are admissions of reported effluent violations).) The Permittee did not establish that the discharges were regulated by another permit. Whether or not the permittees under the *Waste Discharge Requirements of Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles* (Order No. 01-182) could have accepted the Permittee's discharges without a NPDES permit (see Finding 10, p. 6.37 and Finding B. 6, pp. 6.110-6.111), the Permittee obtained and was subject to the requirements of the Permit. In addition to copper, for an unknown period of time prior to September 24, 2007 the discharge contained the additive Flo-Zyme. The Permittee is seeking local permits to direct the discharge to the sanitary sewer in the future. However, as of the hearing date the Permittee had not sought to terminate NPDES permit coverage. The Permittee's repeated efforts to seek state and local permits are inconsistent with the Permittee's argument that it does not need a permit for the discharge because the discharges were covered by Order No. 01-182. Similarly, Permittee's counsel conceded at the hearing that a discretionary penalty may be appropriate for the failure to file, just not a mandatory one. Thus, the discharges were reportable under the Permit.

11. The Permittee contends the Legislature intended S.B. 1284 to apply to its situation. In support, the Permittee submitted the Assembly Committee on Environmental Safety and Toxic Materials analysis. This analysis, which relates to the June 2 amendment of the bill, states that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act." (AR, p. 6.352.) However, as described in the following paragraphs, this sentence was based on an earlier version of the bill, and was removed from the final Senate Bill Analysis. Therefore, the Los Angeles Water Board cannot infer any intent to apply the new provision to the Permittee's factual scenario based on that statement.

12. As introduced (February 19, 2010), S.B. 1284's effective date provision read, "The amendments made to this section by this act during the second year of the 2009-10 Regular Session of the Legislature apply to violations without regard to the date on which the violations occurred or occur." The bill would have eliminated mandatory minimum penalties in all three of the following situations:

> (4) A violation for a failure to file a discharge monitoring report for which the state board or a regional board does not inform the discharger of the alleged violation within 90 days of the date on which the discharge monitoring report was required to be filed.
>
> (5) A violation that consists of a failure to file a discharge monitoring report for any period in which no discharge occurred.
>
> (6) A violation that consists of a failure to file a discharge monitoring report for any period in which discharges do not violate effluent limitations

contained in waste discharge requirements that include numeric effluent limitations.

13. The Senate Committee on Environmental Quality's analysis concluded that it was unfair to apply the new exemptions to existing violations. (http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1251-1300/sb_1284_cfa_20100416_174742_sen_comm.html (4/19/10).)

14. The Senate amended the bill on April 26 to delete the effective date provision.

15. The June 2 Senate amendment deleted proposed subdivisions (j)(4)-(6), cited above, and added language similar to what appeared in the final version. The June 2 version created the two exemptions, referred to below as a no-discharge exemption and a first-time-offender exemption. At that point, the bill did not require the discharger to cure the violations within any particular time after receiving notice. The requirements for the no-discharge exemption only required a statement that there were no discharges and an explanation for the failure to file. The first-time-offender exemption only required that the discharger had not received previously notice of a violation (i.e., notices for violations other than the current violation(s)), and that no effluent limit violations were associated with the current failure to file. The June 2 version added a new retroactive effective date provision, which applied the changes to any violations for which penalties had not been imposed before January 1, 2011, regardless of the date of violation. Like the analysis cited by the Permittee, the Senate Floor analysis of this version stated that the bill, "Provides that the amendments made to that section applies to dischargers who currently have notices of violation as of the effective date of the act."

16. The Assembly amended the bill on June 23. This version changed the no-discharge exemption to include the 30-day requirement and added the requirement that there be no "reportable" discharges. The first-time-offender exemption was revised, among other things, to specify that the discharger not "on any occasion" previously receive notice of a failure to file, and to require the discharger to file the missing reports within 90 days after notification. The effective date provision was expanded to include complaints issued on or after July 1, 2010, regardless of the date of violation.

17. The August 20 Senate amendment changed the 90-day compliance requirement for first-time offenders to 30 days. With respect to the effective date, the Senate Floor Analysis states that the bill "applies to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010 without regard to the date on which the violations occurred." This statement of the effective date replaced the prior language stating that the bill applied to dischargers with outstanding notices of violation at the date of the enactment. Although several prior analyses issued after the June 23 amendment continued to include language from prior analyses stating that the bill applied to

dischargers with outstanding notices of violation[1], the final bill analysis did not include any such statement.

CONCLUSIONS OF LAW

1. The discharges of effluent containing copper in excess of the effluent limitations of Order No. R4-2008-0032 into navigable waters of the United States and failure to comply with the monitoring and reporting requirement of Order Nos. R4-2003-0111 and R4-2008-0032, as found in Findings of Fact No. 8 and Exhibit "A", constitute four (4) violations of effluent limitations and two hundred twenty-one (221) late reporting violations.

2. Effluent limitations and water quality criteria must protect all beneficial uses. (Clean Water Act sections 301, 303, 401; 40 CFR §§ 122.44, 131.10, 131.11.) The copper violations are not excused merely because they are based on aquatic life criteria that are more stringent than maximum contaminant levels (MCLs) for human health protection.

3. There are no statutes of limitations that apply to this administrative proceeding. The statutes of limitations in the California Code of Civil Procedure that refer to "actions" and "special proceedings" apply to judicial proceedings, not administrative proceedings. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405(2), p. 510.

4. The equitable doctrine of laches does not apply to mandatory minimum penalties. Laches is an equitable defense. (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1494.) Principles of equity cannot be used to avoid statutory mandates, such as those seen in the mandatory penalty scheme established by Water Code section 13385. (*Ghory v. Al-Lahhan* (1989) 209 Cal.App.3d 1487, 1492; *Jiagbogu v. Mercedes Benz* (2004) 118 Cal.App.4th 1235, 1244.) The mandatory minimum penalty statutes were intended to remove Water Board discretion regarding certain penalties. (State Water Resources Control Board Order WQ 2007-0010 (*Escondido Creek Conservancy*).)

5. Even if laches applied to mandatory minimum penalties, the Permittee has the burden of proving all affirmative defenses. (*City of Brentwood v. Central Valley Regional Water Quality Control Board* (2004) 123 Cal.App.4th 714, 726; State Water Resources Control Board Order WQ 2007-0010 (*Escondido Creek Conservancy*).) The monitoring reports in question were due quarterly from February 15, 2006 through November 15, 2008. Los Angeles Water Board staff issued Notices of Violation on November 7, 2007 and December 22, 2008. Thus, the Permittee was on notice of this matter. No interest accrued pending issuance of the complaint. The Permittee has not identified any prejudice from the delay, or that the delay was unreasonable. The Permittee filed the reports on

[1] Senate analysis of August 20 and June 23 amendments; Assembly Judiciary Analysis of June 23 amendment (June 29, 2010)

January 14 and 23, 2009, which ended further accrual of penalties. The December 22, 2008 letter included a settlement offer. Staff extended the response date numerous times at the Permittee's request. The last requested extension expired on July 1, 2009, which was after the Permittee filed the reports. The Discharger was able to submit monitoring reports in January 2009 that stopped additional penalties from accruing. The prior Chief Building Engineer did not leave the Permittee's employ until after the Permittee received the November 7, 2007 notice of violation. The Permittee was able to locate documents dating back to the 1980's and to provide expert testimony regarding the nature of its discharge. The August 5, 2004 and November 18, 2009 letters regarding continuation of coverage advised the Permittee of the monitoring requirements. The complaint does not seek interest, economic savings or other additional amounts due to the passage of time. Thus, even assuming laches applied to mandatory minimum penalties, the Permittee has not established that it applies here.

6. Water Code section 13385.1, subdivision (a)(2) does not exempt the Permittee from mandatory minimum penalties. Subdivision (a)(2) applies if (i) the Discharger submits a "statement that there were no discharges to waters of the United States reportable under the applicable waste discharge requirements during the relevant monitoring period," supported by additional information or evidence upon request, (ii) the statement states why the reports were late, and (iii) the statement is submitted before the applicable discharge monitoring report is due or within 30 days after the Regional Water Board provides notice of the late report. Subdivision (a)(2) applies "to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, without regard to the date on which the violations occurred." (Water Code § 13385.1, subd. (e).) The Complaint was filed after July 1, 2010, so subdivision (a)(2) potentially applies. However, in order to qualify for the mandatory minimum penalty relief that subdivision (a)(2) provides, a discharger must meet all applicable requirements, including the requirement to file the statement within 30 days of notice.

7. Although subdivision (e) explicitly provides for retroactive application of subdivision (a)(2), nothing in section 13385.1 provides an exception to the 30-day requirement for violations that occurred or notices that were issued before the enactment of subdivision (a)(2). The 30-day requirement is unambiguous, and it is not necessary to resort to legislative history or other rules of statutory analysis. Even if it were ambiguous, nothing in the statute or the legislative history evidences any legislative intent to require the Water Boards to provide a new notice and opportunity to cure, make the 30-day requirement inapplicable to violations outstanding as of January 1, 2011, or provide a grace period to dischargers who filed the delinquent reports before January 1, 2011. Although the Permittee had no reason to file the statement before January 1, 2011, the Legislature could have waived this requirement for dischargers with outstanding violations as of January 1, 2011, or dischargers who cured outstanding violations or received notices of late reports prior to January 1, 2011. No such provisions appear in the statutory language.

8. In addition, the Permittee had reportable discharges during the relevant monitoring periods.

9. The Permittee did not demonstrate that the Prosecution Team treated the Permittee differently than other similarly situated dischargers. The Prosecution Team explained that Glenborough Cahuenga, LLC was treated differently because that case involved a no-discharge situation and was resolved according to the *Water Quality Enforcement Policy* before S.B. 1284 took effect.

10. The NPDES permitting program relies on a system of self-reporting. (*Brentwood, supra,* at 723.) The Legislature recognized this when it subjected reporting violations to mandatory minimum penalties. "In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonable related to a proper legislative goal." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) A statute is presumed to be constitutional and must be upheld unless its unconstitutionality clearly, positively and unmistakably appears." (*Id.* at 404.) A statute may be unconstitutional as applied if the penalties are mandatory and potentially unlimited in duration. (*Id.* at 399; *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352.) *Hale* did not universally condemn penalties that indefinitely accumulate on a daily basis until the violation is corrected. In fact, it expressly declined to do so. (*Hale, supra*, 22 Cal.3d at 404.) Here, the penalties were not potentially unlimited because a discharger can file the late reports and stop penalties from accruing, as the Permittee did in this case. Thus, the statute does not have the potential to be unconstitutional as applied.

11. Even where a statute has the potential to be unconstitutional as applied, constitutionality must be determined on a case-by-case basis (*ibid.*), taking into consideration several factors, including the amount of discretion available to the trier of fact, the potential for the penalties to accumulate indefinitely, the relative sophistication of the plaintiff and defendant, egregious behavior by the defendant, whether a wide range of culpable conduct is subject to a uniform penalty, the range of injuries resulting from conduct subject to a uniform penalty, the relative severity of penalties imposed for similar conduct, and the financial impact of the penalties (*Kinney, supra,* at 352-353; *Hale, supra*, 22 Cal.3d at 404-405; *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373 (upholding fines of over $9.5 million despite lack of environmental damage).) In this case, the Los Angeles Water Board lacks the discretion to avoid mandatory minimum penalties unless a discharger establishes an affirmative defense. The penalties did not accumulate indefinitely, and the Permittee could have avoided penalties by filing the required reports before January 2009. The alleged violations in this case are based on strict liability, not on egregiously culpable behavior. Mandatory minimum penalties were not designed to penalize egregiously culpable behavior, but rather to ensure compliance with self-monitoring requirements that are critical to the permitting program. The Permittee failed to file the missing reports for several years, despite notices of the violations and prior notice that monitoring requirements applied. Later monitoring showed

four violations for copper. The discharge is to Ballona Creek, which is impaired and subject to a total maximum daily load for copper. Thus, the Permittee's violations were culpable, but not as flagrant as those at issue in *Ojavan Investors*. Since mandatory penalties do not allow the board to exercise discretion, the statute results in similar penalties for similar conduct in cases where the discharger does not have an affirmative defense under S.B. 1284, the *Water Quality Enforcement Policy* or otherwise. The penalties apply to a narrow range of conduct: violations of effluent limitations and failure to file reports. The Permittee did not provide specific evidence of the financial impact of the penalties. Given the size of the penalties the board presumes the impact is significant. On balance, the Permittee has not established that the penalty is "clearly, positively and unmistakably" unconstitutional or that it is unconstitutional as applied.

12. $675,000 is the mandatory minimum penalty amount that must be assessed against the Permittee under CWC § 13385 for the violations identified in Exhibit "A".

13. The maximum amount of administrative civil liability assessable for the violations alleged in Complaint No. R4-2008-0199-M pursuant to CWC § 13385 is $10,000 per day of violation plus $10 times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

RECOMMENDED MANDATORY MINIMUM PENALTY

The amount of $675,000 should be imposed on the Permittee as a mandatory minimum penalty for the violations found herein to have been committed by the Permittee. A proposed Order on Complaint No. R4-2008-0199-M is attached.

Francine Diamond

Francine Diamond
Chair

Date APRIL 20, 2011

Attachments:

Exhibit "A"
Proposed Order on Complaint No. R4-2008-0199-M

EXHIBIT 8

Exhibit 8

Partial Chronology of Procedural Violations

The following table details a non-exclusive list of procedural violations that have occurred in this proceeding.

Date	**Event**
January 1, 2011	Effective date of SB 1284.
January 26, 2011	Preliminary Hearing Panel binder served by Prosecution as per Hearing Notice.
January 28, 2011	Prosecution Receives Casden's Statement pursuant to Water Code Section 1885.1(a)(2)(A), indicating no reportable discharges occurred under WDR
February 16, 2011	Prosecution Receives Casden's brief, presentation and evidence, including with regard to Reportability Requirement, as per Hearing Notice deadline.
March 7, 2011	Prosecution serves "Final" Hearing Binder and Presentation; per Hearing Notice. Neither rebuttal brief, nor p*resentation by Prosecution, are included as required. See Hearing Notice (Item 6.2, p. 6.13)* and Executive Order. Per Executive Order and Bagley-Keene Open Meeting Act, this was the deadline by which *all rebuttal evidence* was to have been included in final binder. *No rule or law exempts written evidence contained in a PowerPoint presentation from this deadline.*
March 8, 2011	Prosecution notifies Hearing Panel Advisor and Casden of intent to submit rebuttal brief no later than March 15, 2011, two days before hearing. Casden objects to late submission of rebuttal brief and presentation..
March 9, 2011	Hearing Panel Advisor transmits Chair's ruling to permit Prosecution's filing of rebuttal brief by 9am on March 14. and advises that "[i]f you are seeking to introduce written rebuttal evidence in addition the brief, I suggest you provide that evidence to opposing counsel as soon as possible."
March 10, 2011	Pre-Hearing Conference
March 11, 2011	Prosecution serves 19-Page Rebuttal Brief, but no *Presentation. Rebuttal Brief does not address reportability*

	issue.
March 14, 2011	Casden objects to Prosecution's Rebuttal Brief and failure to submit presentation, including on basis of surprise
March 15, 2011	Hearing Panel Advisor informs Parties of Ruling on Objections: (1) strikes sentence in Section G, (2) finds that the Prosecution's "failure to submit the PowerPoint is unrelated to whether the Prosecution Team may submit a written rebuttal brief," that the ***requirement is based only on the Hearing Notice; there is no independent legal requirement to pre-submit a presentation"*** and rules that "***as long as the Prosecution Team's hearing presentation does not exceed the scope of its direct evidence, the allegation in the Complaint and matters properly considered rebuttal, the failure to submit a PowerPoint does not appear to have prejudiced Casden."*** Despite 19-page rebuttal brief filed by Prosecution, Chair refuses to extend Casden's time allowance.
March 15, 2011	Prosecution confirms that PowerPoint has not been provided to Casden
March 17, 2011, At Hearing	Prosecution argues reportability issue for first time (see, *e.g*, March Transcript at 25:21 to 26:12). Presentation clearly exceeds scope of direct evidence provided in March 7, 2011 materials.
March 17, 2011, At Hearing	Casden objects to introduction of new evidence, moves to strike, and is overruled. March Transcript, 26:13 to 27:8.
March 17, 2011, At Hearing	Casden makes offer of proof for more time, but is never accommodated. March Transcript, 76:4 to 77:1, 97: 7-13.
March 17, 2011, At Hearing	Panel Members inquire with Prosecution concerning additives to sump. Casden is not given the opportunity to respond. March Transcript, p. 137.
March 17, 2011, At Hearing	Hearing Panel issues decision finding that SB 1284 applied to Casden, but that all discharges required to be reported under WDR. March Transcript, p. 138.
April 20, 2011	Hearing Panel Report is served, changing rationale for March 17, 2011 decision. Hearing Panel Advisor gains concurrence on Report only from Chair, and does not confer with three other panel members on final text of report until

	closed session at June 2, 2011 Regional Board meeting.
April 20, 2011	Casden objects to Hearing Panel Report as incorrectly reporting on March 17, 2011 panel decision.
May 19, 2011	Casden files written comments requesting rehearing on reportability and raising several other issues
May 19, 2011	Casden requests one hour to address new issues and its case at the June 2 Regional Board hearing.
May 23, 2011	Casden receives agenda for June 2, 2011 Hearing.
May 27, 2011	Casden is granted 10 minutes to present its case and rehearing request is denied.
May 31, 2011 5:54 pm	Casden receives proposed eleventh-hour changes to Order, Findings of Fact and Conclusions of Law
June 1, 2011 10:26 am	Casden objects to eleventh-hour changes and renews request for rehearing
June 2, 2011	Hearing Panel Advisor submits copy of revised Order/Findings/Conclusions to Regional Board members immediately before the start of hearing. June Transcript, p. 12:13-19
June 2, 2011 9:00am	Regional Board Hearing
June 2, 2011	Hearing Panel Advisor seeks concurrence of panel members over language in Hearing Panel Report for first time, ten weeks after hearing panel.
June 2, 2011	Hearing Panel Advisor claims that reportability issues were brought up before March 17, 2011 panel hearing, but does not (and cannot) cite specifically where. June Transcript, p. 13:10-22.
June 2, 2011	Hearing Panel Advisor fails to directly address Casden objections raised in May 19, 2011 comments. June Transcript, pp. 8:21 to 16:3.
June 2, 2011	Hearing Panel Advisor claims "statute [Water Code §13228.14] does not say anything about who is to prepare the report or any other procedures for preparation of the report." June Transcript, p. 9:10 to 9:24. This is contrary to what is provided for in the statute.

June 2, 2011	Regional Board adopts in an omnibus fashion proposed order, findings, and conclusions, as amended by Hearing Panel Advisor on May 31, 2011 and at hearing, with no opportunity for discussion on each amendment.

300256595.4

EXHIBIT 9

Palmer, Dana

From: Lori Okun [LOkun@waterboards.ca.gov]
Sent: Wednesday, April 20, 2011 10:37 AM
To: Palmer, Dana; Duchesneau, Peter; Julie Macedo
Cc: Jennifer Fordyce; Paula Rasmussen
Subject: RE: Casden Properties LLP MMP Order

Mr. Duchesneau,

The hearing panel has not subsequently met or had any calls on this matter. Consistent with the board's practice, the Hearing Panel chair has approved the written report, which memorializes the Hearing Panel's recommendation.

-Lori Okun

>>> "Duchesneau, Peter" <pduchesneau@manatt.com> 4/20/2011 10:33 AM >>>
Ms. Okun -

I am still in the process of reviewing these items, which came in yesterday evening. However, following up on Ms. Macedo's question, has the full hearing panel reviewed the report yet and have they subsequently met or had any calls on this matter?

Peter R. Duchesneau
Manatt, Phelps & Phillips, LLP
11355 W. Olympic Blvd.
Los Angeles, CA 90064
Telephone: (310) 312-4209
Facsimile: (310) 312-4224

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-----Original Message-----
From: Julie Macedo [mailto:JMacedo@waterboards.ca.gov]
Sent: Wednesday, April 20, 2011 10:28 AM
To: Palmer, Dana; Duchesneau, Peter; Lori Okun
Cc: Jennifer Fordyce; Paula Rasmussen
Subject: Re: Casden Properties LLP MMP Order

Ms. Okun -

Confirming that this Hearing Panel is acceptable to use in the mailing,

even though unsigned? It does appear to be in final form. Thanks! -
Julie

>>> Lori Okun 4/20/2011 10:02 AM >>>

Counsel,

Enclosed please find a corrected Hearing Panel Report for the May 5, 2011 board meeting. This has been corrected to fix incorrect references to Water Code section 13385.1(b) that appeared in Findings of Law 6-7 of the prior version.

-Lori Okun

##
IRS CIRCULAR 230 DISCLOSURE: To comply with requirements imposed by recently issued treasury regulations, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written by us, and cannot be used by you, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another person any transaction or matter addressed herein. For information about this legend, go to http://www.manatt.com/circ230
##

State Water Resources Control Board

Office of Chief Counsel

Linda S. Adams
Acting Secretary for Environmental Protection

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Edmund G. Brown Jr.
Governor

June 13, 2011

Via email and U.S. Mail

Peter R. Duchesneau
Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
pduchesneau@manatt.com

Dear Mr. Duchesneau;

RESPONSE TO PUBLIC RECORDS ACT REQUEST DATED JUNE 1, 2011

This letter responds to the Public Records Act request included in your email of June 1, 2011. You requested all documentation, including electronic, regarding "whether or not the Hearing Panel, the Regional Board, or any respective individual members thereof, have either received the proposed revisions to the Hearing Panel Report or proposed decision, or have met, had telephone calls or have had any other communications among themselves, with the hearing panel advisor, Regional Board or State Board staff, or anyone else with regard to the Hearing Panel Report and proposed order before and after the March 17, 2011 hearing."

The members of the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board, or board) received a copy of the signed Hearing Panel report and proposed order. These documents are responsive to your request, but you have already received a copy of these documents. Therefore, I will only provide a copy at this time if you request an additional one.

The Los Angeles Water Board will not provide copies of any records that are exempt from disclosure, including without limitation documents protected by the attorney-client privilege or attorney work product doctrine (Gov. Code Section 6254, subd. (k)); that are preliminary drafts, notes, or inter-agency or intra-agency memoranda that are not retained in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure (Gov. Code Section 6254, subd. (a), and Section 6255); or that reveal deliberative process (Gov. Code Section 6255). The board has located exempt documents as follows: emails between Francine Diamond and me; drafts attached to or included in such emails; an email from me to all board members regarding your May 19 brief and the Prosecution Team's May 23 response (including copies of such documents); a May 31, 2011 email from me to all board members forwarding proposed revisions to the Hearing Panel's proposed order; an email from Madelyn Glickfeld to me in response; and a June 1, 2011 email from me to Francine Diamond regarding your June 1, 2011 email (including a copy of your email). All of these emails and drafts are subject to the attorney-client privilege and/or work

product doctrine. The persons making decisions about withholding records are Samuel Unger, Executive Officer, and me. Without waiving any objections, if you would like a copy of Ms. Glickfeld's email, I will provide it. Her email states, in its entirety: "Thanks Lori."

If you have further questions, please contact me.

Lori T. Okun

Lori T. Okun
Assistant Chief Counsel

cc: All via email only

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