



North Coast Regional Water Quality Control Board

**TO: Prosecution Team (Catherine Hawe, Dan Kippen, Naomi Rubin);
Respondent, Bo Dean Company Inc. (Sean Hungerford, Cassandra Goltz,
Mark Harrison)
[via email]**

**From: Hector Bedolla
Chair
North Coast Regional Water Quality Control Board**

Date: January 24, 2025

**Subject: North Coast Regional Water Quality Control Board Chair Ruling on
Parties Pre-Hearing Motions, Objections, and Hearing Procedure Comments in
the Matter of Administrative Civil Liability Complaint R1-2021-0047-A/Mark West
Quarry**

Introduction:

The Prosecution Team and Respondent Bo Dean Company, Inc. (Bo Dean, or Respondent) (collectively, Parties) have submitted a series of requests, objections, and motions related to pre-hearing submittals for the North Coast Regional Water Quality Control Board's (North Coast Water Board or Board) February 5,6,7, 2025, scheduled hearing on Administrative Civil Liability Complaint R1-2021-0047-A including Attachment A to the Complaint (ACL Complaint or Complaint).

This ruling of the Board Chair addresses the Parties' requests, objections, and motions¹.

I. Evidentiary Objections

Bo Dean submitted evidentiary objections on December 23, 2024, rebuttal evidentiary objections, and Motion to Strike portions of the Prosecution Team's Rebuttal Brief on January 3, 2025. The Prosecution Team submitted evidentiary objections, rebuttal

¹ The Chair rules on Bo Dean's Motion to Strike along with the evidentiary objections as the Motion to Strike was submitted by the due date for rebuttal evidentiary objections and is essentially a series of evidentiary objections.

exhibits, rebuttal witness list, and Rebuttal Brief on December 23, 2024. The exhibits and portions of the Prosecution Team’s Rebuttal Brief that have been objected to can be grouped as follows:

- Receiving water reports submitted late (PT29, PT88, PT89, PT90, PT91, PT92)
- Prosecution Team inspection reports allegedly containing inadmissible hearsay and unauthenticated (PT10, PT11, PT12, PT13, PT14, PT15, PT16, PT17, PT18, PT19, PT20, PT21, PT22, PT23, PT24, PT25, PT26, PT27)
- U.S. EPA witness testimony, inspection reports, and supporting exhibits (PT49, PT84)
- Prosecution Team exhibits that have not been authenticated (PT29, PT77b, PT82, PT84)
- Prosecution Team evidence that is allegedly irrelevant (PT4, PT50, PT56, PT57, PT80, PT86)
- Ryan Thomason Declaration (RT_Exh011)
- Heaven Moore’s Declaration (PT_Rebuttal_1)
- Exhibits submitted late, that have not been authenticated, and that are allegedly irrelevant (PT_Rebuttal_2, PT_Rebuttal_3, PT_Rebuttal_4, PT Rebuttal_7, PT_Rebuttal_8, PT_Rebuttal_9, PT_Rebuttal_11)
- Portions of the Prosecution Team’s Rebuttal Brief that discuss compliance at other Bo Dean facilities, Bo Dean’s Stormwater Pollution Prevention Plan (SWPPP), and Bo Dean’s compliance with County of Sonoma requirements.

II. Evidentiary Rules Applicable to This Proceeding

A. Relevance and Responsible Persons Standard

In this hearing, the key standard in determining admissibility is whether the evidence is relevant and the type that responsible persons are accustomed to rely on in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c); *Malaga County Water District v. State Water Resources Control Board* (2020) 58 Cal.App.5th 447, 479-480; *Miller et al. v. Department of Real Estate et al.* (2002) 84 Cal.App.5th 141, 154.) Relevance and the “responsible persons” (reliability) standard are two separate tests. (See *Mast v. State Bd. of Optometry* (1956) 139 Cal.App.2d 78, 85.)

Relevant evidence means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) (See *also*, Cal. Code Regs., tit.23, § 648.5 (a) [Adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information].)

In this hearing, “any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.” (Gov. Code, § 11513, subd. (c); *Malaga County Water District v. State Water Resources Control Board* (2020) 58 Cal.App.5th 447, 479-480; *Miller et al. v. Department of Real Estate et al.* (2002) 84 Cal.App.5th 141, 154.)

Therefore, the Board may admit all relevant evidence that is reliable, i.e., it is the type that responsible persons may rely upon. The Board’s regulations reflect this standard, and the Board will generally allow all relevant information to be introduced without imposing unnecessary delay and expense to the parties and the Board. (Cal. Code Regs., tit. 23, § 648.5, subd. (a).) The Hearing Procedure that the Board adopted for this matter, which both parties reviewed and commented on, reflects this standard, while also setting deadlines for the timely introduction of exhibits and testimony to promote an efficient hearing and avoid prejudice to any party. (Cal. Code Regs. tit. 23, § 648.4, subds. (a) & (e).)

B. Authentication

In a civil matter, authentication of writings requires the introduction of evidence or establishment of facts to support a finding that the writing is what the proponent of the evidence claims it to be. (Evid. Code § 1400.)² Authentication may be established in any number of ways, including through circumstantial evidence.³ A writing may be authenticated through “the establishment of...facts by any other legal means.” (Evid. Code §1400.) “Writings” include photographs (Evid. Code §250.)

There is not a strict standard for authentication in administrative hearings. Section 11513 does not require that a writing meet the standard for authentication that applies in a civil trial. (*Evans v. Gordon* (2019) 41 Cal.App.5th 1094, 1103-1104.) Under the standards applicable to this hearing, any relevant evidence is admissible as long as it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

The reports, photographs, or any other documents the Parties submit must meet the standard of relevance and reliability and that standard may be met in numerous ways to show that the document is what the proponent of that writing purports it to be.⁴

² Although the technical rules of evidence do not generally apply to this proceeding, the Board may apply Evidence Code provisions for guidance on the admissibility of evidence under the relevant and reliable persons standards.

³ Even where writings must be authenticated, this may be accomplished “in light of the circumstances.” See *McAllister v. George* (1977) 73 Cal.App.3d 258, 263 (“There are innumerable ways in which a document may be authenticated by circumstantial evidence.”)

⁴ See *Desert Turf Club v. Bd. of Supervisors* (1956) 141 Cal.App.2d 446, 455 (“While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial,

C. Hearsay Evidence

Government Code section 11513 subdivision (d) allows the admission of hearsay evidence. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient *in itself* (emphasis added) to support a finding unless it would be admissible over objection in civil actions. (Gov. Code, § 11513, subd. (d).)

Under the standards applicable to this hearing, hearsay evidence is admissible. (*Walker v. City of San Gabriel*, (1942) 20 Cal.2d 879, 881-882.) A timely hearsay objection does not make evidence inadmissible, rather it prevents the board from relying solely on that evidence to support a finding. (*Sunseri v. Board of Medical Examiners* (1964) 224 Cal.App.2d 309,317.)

D. Official or Business Records

A business record is not hearsay if, “(a) The writing was made in the regular course of a business; (b) The writing was made at or near the time of the act, condition, or event [that the document is offered to prove]; (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.” (Evid. Code, § 1271.) Similarly, a document prepared by a public employee is not hearsay if, “(a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event [that the document is offered to prove]. [and] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.” (Evid. Code, § 1280.) Unlike a business record, witness testimony as to a document’s identity and mode of preparation of an official record is not always required if sufficient independent evidence shows that the record or report was prepared in such a manner to assure its trustworthiness. (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929.) Hearsay statements (e.g., a report of what a third party told the public employee) in an official record may supplement or explain other evidence. (*Lake v. Reed* (1997) 16 Cal. 4th 448, 462.)

E. Expert Opinion

Evidentiary rules regarding inadmissibility of non-expert witness opinion are inapplicable to administrative proceedings under the Administrative Procedures Act. (Gov. Code, § 11513, subd. (c); *Miller et al. v. Department of Real Estate et al.* (2002) 84 Cal.App.5th 141, 154). While this proceeding is subject to sections 801-805 of the Evidence Code, there is no authority suggesting that the limitations within California Evidence Code

common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents....”)

section 800 on non-expert testimony in the form of an opinion applies to this proceeding.⁵ A public agency may choose between differing expert opinions and may also properly rely upon the opinion of its staff in reaching decisions. (*Center for Bio. Diversity* (2014) 232 Cal.App.4th 931, 948 citing *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 900.)

III. The Board Applies the Legal Framework Above to the Parties' Evidentiary Objections and Motion to Strike.

1. Receiving water reports the Prosecution Team submitted late (PT29, PT88, PT89, PT90, PT91, PT92)

Bo Dean asserts that these exhibits were submitted beyond the deadline contained in the Hearing Procedure. The Hearing Procedure required the Prosecution to submit all documentary evidence supporting the Complaint by August 9, 2024, except rebuttal evidence. The Prosecution submitted these documents on September 20, 2024.⁶ Bo Dean notes that the Prosecution did not seek leave from the Advisory Team to submit evidence after the deadline and that these submittals are prejudicial because Bo Dean had a shortened amount of time to evaluate and address the new evidence.

To avoid the introduction of surprise testimony and exhibits and to minimize the need for oral argument and testimony at the hearing, the Hearing Procedure that governs the hearing for this Complaint requires the parties to submit documentary evidence, witness information, and legal/technical memoranda to the Advisory Team prior to the hearing. (Hearing Procedure pp.8-10; Cal. Code Regs., tit. 23, § 648.4, subd. (a).) Absent a showing of good cause and lack of prejudice to the parties, the Board Chair may exclude materials that are not submitted in accordance with the Hearing Procedure. (Hearing Procedure p.8; Cal. Code Regs., tit. 23, § 648.4, subd. (e).) Further, the Board Chair may exclude evidence where its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code § 11513 (f).) Excluded materials will not be considered by the Board.

While these receiving water reports were submitted by the Prosecution Team beyond its case-in-chief deadline established in the Hearing Procedure, they were submitted on September 20, 2024, well in advance of the hearing. Additionally, the reports were cited in footnotes to the Prosecution Team's Complaint and Attachment A. Moreover, Bo Dean generated the receiving water reports and was thus on notice of these reports and has

⁵ The regulations establishing the laws governing this proceeding do not include a reference to Evidence Code section 800. (Cal. Code Regs., tit.23 § 648 subd. (b).) In addition, the rules governing competency of a witness in California Evidence Code sections 700-704 do not apply to this proceeding.

⁶ The Prosecution Team notified the Advisory Team to the Board and Bo Dean on September 20, 2024, that it neglected to include these reports in its evidentiary submissions. (September 20, 2024, email from Catherine Hawe.)

had adequate time to review the reports and incorporate those reports into its arguments and in defense of the allegations in the Complaint. Further, no argument has been submitted contesting the relevancy of the reports.

Accordingly, the Board Chair **OVERRULES** Bo Dean's objections to these exhibits as prejudicial. The Board Chair, however, notes that failure to timely abide by hearing deadlines is a basis for excluding evidence if the evidence is unduly prejudicial. The primary mitigating factors in this case are: 1) the reports were generated by Bo Dean and so were in Respondent's possession, 2) the reports were referenced in Attachment A to the Complaint, and 3) the Prosecution Team requested they be included in the record roughly two months before Bo Dean's evidentiary submissions were due. The Board Chair, however, strongly emphasizes the importance of abiding by hearing procedure deadlines and procedures. While the Chair finds that non-compliance did not unduly prejudice Bo Dean in this instance, this ruling should not be read as the Board generally tolerating late submittals of evidentiary documents where those submittals should have been provided in accordance with applicable hearing procedure, especially in a complex hearing such as this matter.

2. Prosecution Team inspection reports allegedly containing inadmissible hearsay and unauthenticated (PT10, PT11, PT12, PT13, PT14, PT15, PT16, PT17, PT18, PT19, PT20, PT21, PT22, PT23, PT24, PT25, PT26, PT27)

Bo Dean asserts that these exhibits are hearsay, contain inadmissible hearsay, cannot be relied upon as the sole documentary evidence of site conditions, contain third-party hearsay statements, and have not been authenticated.

The essence of Bo Dean's argument is that the reports lack reliability and trustworthiness. Among other things, Bo Dean asserts that staff had no established protocols for preparation of the records, records were produced too distant from the time of the inspection, reports were authored by multiple staff, and many reports were prepared from memory. Bo Dean asserts that without this information they cannot be admitted as trustworthy under either the business record, or official record hearsay exemptions.

A review of the reports show that at least some of the reports lack a date indicating when they were prepared and none include identifying information about who reviewed the reports before they were finalized. Some of the reports identify multiple authors but do not assign portions to a particular author. Many of the photographs within the reports are date stamped, but some are not, and some reports do not identify staff that took the photographs. Witness declarations that could provide additional information about report contents or preparation were not submitted as part of the Prosecution Team's evidentiary submittals.

The Prosecution Team has listed 11 witnesses in its witness list that can testify regarding site inspections and observations made during those inspections. The Prosecution Team may call these witnesses to testify on the manner of the reports' preparation. Staff testimony may be provided to address the reliability of the photographic evidence contained within the reports to sufficiently authenticate the photographs. Staff may also provide testimony to support their trustworthiness to the extent the Prosecution Team seeks to qualify them as business or official records.

With respect to Bo Dean's argument that the reports contain third-party hearsay, hearsay contained within an official record or business record may be admitted. (*Evans v. Gordon, supra*, 41 Cal.App.4th at 1102; *Hildebrand v. Dept. of Motor Vehicles* (2007) 152 Cal. App. 4th 1562,1572; *Lake v. Reed, supra*, 16 Cal.4th at 462.) Such statements may be admitted to support a finding either through a hearsay exception, or because they are not the sole support for a finding because other non-hearsay statements or evidence is admitted to support the finding. The Prosecution Team may assert at the hearing that the hearsay contained within the reports is admissible because it either meets an exception to the hearsay rule or is supported by other non-hearsay evidence.

The Board Chair **DEFERS** a ruling on Bo Dean's Objections to the Inspection Reports pending witness testimony that may be introduced at the hearing. The technical reports offered by the Prosecution Team may meet the standard for admissibility in this hearing as a business record or official record and the contents of those reports, including photographs and third-party hearsay may meet the reliability and third-party hearsay standards for inclusion in this proceeding.

3. U.S. EPA witnesses, inspection reports, and supporting exhibits (PT49, PT84)

Bo Dean asserts that documents prepared by United States Environmental Protection Agency (U.S.EPA) should be excluded as well as U.S. EPA witness testimony discussing the evidence. Bo Dean asserts that allowing their admission would be prejudicial given that U.S. EPA blocked Bo Dean's discovery efforts, these documents are largely duplicative of other evidence, contain inadmissible hearsay, and have not been authenticated.

a. U.S. EPA Inspection Witnesses

As noted in Bo Dean's Response Brief, U.S. EPA did not make its inspectors available for depositions. U.S. EPA counsel determined that producing the witnesses would violate EPA regulations because the United States is not a party to this action and the inspectors can only be produced if there is a showing that it is clearly in U.S. EPA's interest to produce the witnesses. U.S. EPA explained that the "purpose of the regulations is to ensure that employees' official time is used only for official purposes to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes, and to establish procedures for approving testimony or

production of documents.”⁷ (Bo Dean Evidentiary Objections, Attachment 3, Memo from U.S. EPA Regional Counsel). U.S. EPA asserted that Bo Dean had not made an adequate showing that it was in U.S. EPA’s interest to produce the inspectors. (Respondent Evidentiary Objections, Attachments 2, 3). Bo Dean provided additional information and argument to U.S. EPA asserting that it was in U.S. EPA’s interest to produce the inspectors, among other reasons because the U.S. EPA staff that produced the inspection report had led the inspection of the quarry on behalf of U.S. EPA on the inspection date and the inspection findings contributed to the Prosecution Team’s Complaint. There is no response in the record from U.S. EPA.

The Prosecution Team has now listed these same inspectors as potential witnesses for the prosecution. It is unclear why U.S. EPA found the witnesses were unavailable for deposition when Bo Dean sought to question them about the report and their site observations, but it is now in U.S. EPA’s interest to make the inspectors available to testify on behalf of the Prosecution Team and discuss their report in this hearing.

The Chair finds that allowing these inspectors as witnesses for the Prosecution Team is prejudicial to Bo Dean. Accordingly, the Chair **GRANTS** Bo Dean’s objection to the inspectors testifying as Prosecution Team’s witnesses at this hearing. Bo Dean, however, may choose to waive the Chair’s determination and consent to their testimony. If Bo Dean consents to their testimony by notice to the Advisory Team and Prosecution Team by January 31, 2025, then Bo Dean may also request that: 1) Bo Dean be allowed to directly call the witnesses, 2) and/or the Chair structure the hearing such that Bo Dean has sufficient time to prepare its examination of the witnesses.

b. Inspection Report (PT49)

Although the witnesses may not testify at this hearing, the inspection report (PT49), may still be allowed as an official record under the standards for admission in this proceeding. The report and cover letter to the report bear EPA’s logo, the report is signed by the inspector, has a supervisor review and date of review stamp, and includes an inspection photograph log with time stamped photographs. The EPA cover letter is signed, establishes the purpose of the report and gives Bo Dean an opportunity to respond to the report. The Board Chair finds that the report has sufficient elements of trustworthiness and meets the criteria for admission as an official record. The Chair **OVERRULES** Bo Dean’s objection to the U.S. EPA inspection report.⁸

c. U.S. EPA Photographs (PT84)

With respect to PT84, which contains a series of photographs apparently taken on the inspection date by U.S. EPA inspectors, the Chair finds they do not meet the standards

⁷ U.S. EPA apparently did fulfill document requests submitted by Bo Dean, under the Freedom of Information Act provisions.

⁸ To be clear, admitting this evidence is not a determination of the weight that the Board will assign to it.

for inclusion in this hearing. The photographs are time-stamped with the February 19, 2019, date; however, there is no additional context or information provided for the photographs and the photographs were not attached to the U.S. EPA inspection report. Therefore, given that the Chair has not allowed testimony by the U.S. EPA inspectors that may have established the reliability standard to authenticate these photographs, the Chair **GRANTS** Bo Dean's objection to admitting the U.S. EPA photographs in PT84.⁹

4. Prosecution Team exhibits that have not been authenticated and/or are irrelevant (PT29, PT77b, PT82, PT84)

Bo Dean asserts that exhibits containing photographs and other site depictions must be excluded because they are not authenticated.

As noted above, Government Code Section 11513 does not require a strict standard for the authentication of a writing. PT29 is a summary of receiving water data on listed dates. It is unknown who prepared this document, but if it is an accurate summary of data on the dates listed, and supported by monitoring records it is likely admissible. Testimony from a witness to establish the source of this monitoring data and affirm the accuracy of the table would be sufficient.

PT77(b) is a site map with polygons overlaid on the quarry footprint. The Prosecution Team did not provide information about what this exhibit depicts and why it was submitted.¹⁰

PT82 is a photo log with photographs, violations that the photographs support, and listed staff that took the photograph. Some of the photographs have arrows added to point out features, some are lacking date stamps.

PT84 consists of a series of folders that contain photographs assertedly taken by the Regional Board staff, CDFW, the County of Sonoma and U.S. EPA. The U.S. EPA photographs are discussed above. With respect to the other photographs in PT84, the Chair agrees that sufficient information, including the relevance of these photographs has not been provided by the Prosecution Team to admit these photographs.

To meet the relevant and reliability standards for inclusion in this hearing, additional supporting evidence is necessary to deem these exhibits admissible. The Prosecution Team may produce witnesses to address these exhibits at the hearing and provide additional argument and testimony to support their inclusion in the record. The Chair **DEFERS** ruling on Bo Dean's objection to these exhibits.

⁹ If Bo Dean consents to the testimony of the U.S. EPA witnesses, they may provide additional information to support the reliability standard to admit these exhibits.

¹⁰ However, in a January 14, 2025, email to the Advisory Team, counsel for the Prosecution Team states this exhibit was discussed in depositions and Bo Dean is aware of its purpose.

Prosecution Team evidence that is allegedly irrelevant (PT4, PT50, PT56, PT57, PT80, PT86)

Bo Dean asserts that the following Prosecution Team exhibits must be excluded as irrelevant: County of Sonoma's 2013 Environmental Impact Report (EIR) (PT4), County inspections and notices (PT50), Surface Mining and Reclamation Act (SMARA) Regulations (PT56), County's 2013 Conditional Use Permit (PT57), California Environmental Protection Agency (CalEPA) Complaint regarding BoDean (PT80), and Prosecution Team's Correspondence Records (PT86).

Bo Dean's objections are **OVERRULED**. As noted above, the standard for admission of evidence is generally permissive in this hearing, any relevant evidence is admissible as long as it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) As discussed in the evidentiary background section above, 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

The above exhibits are included given the liberal standard of relevance under Government Code 11513. The records relate to either actions or a chronology of events that led to the development of this Complaint (PT86)¹¹ or quarry operations and stormwater management at the quarry. (PT4, PT50, PT56, PT57.)

Bo Dean asserts that PT80, the CalEPA complaint, must be excluded because it is a complaint form that has the identity of the complainant redacted and Bo Dean had no opportunity to cross-examine the individual who submitted the complaint. It is unclear how this complaint relates to the alleged violations and penalty. It is a brief summary document that generally describes Bo Dean's quarry practices and that they have a "well thought out drainage system." The Chair finds the Complaint has limited evidentiary value, but will allow it as it is presumably not being offered by the Prosecution Team to support the truth of any of the complainant's allegations. Given the general nature of the complaint contents, and lack of specific information within the complaint, it is difficult to see how Bo Dean is prejudiced by not being able to examine the complainant over these unspecified and general allegations. As with this evidence and the other evidence that Bo Dean asserts is irrelevant, the Parties are free to argue how much weight the Board should afford the submitted evidence and whether the evidence has bearing on the proposed penalty.

5. Ryan Thomason Declaration (RT_Exh011)

¹¹ PT86 does not have an accompanying description or narrative of its purpose, presumably it is to summarize contacts with Bo Dean, the lack of this information, without further discussion at the hearing suggests that while it may be admissible, it has limited relevance.

The Prosecution Team asserts that the Declaration of Ryan Thomason and attachments to the Declaration do not meet the “responsible persons” standard under Government Code section 11513(c), contain inadmissible hearsay, and are unreliable and irrelevant.

The Prosecution Team’s objection is **OVERRULED**. As noted above, the standard for admission of relevant evidence is relatively permissible in this hearing, and even evidence of limited value may be admitted. The Declaration of Mr. Thomason that includes the text messages does not explain for what exact purpose the evidence is offered, only that Mr. Thomason understood that the former staff person was formerly employed by the Regional Water Board, was part of the NPDES unit, and had performed inspections of the Mark West Quarry. Mr. Kippen’s Declaration along with the Prosecution Team’s rebuttal witness list and their proposed testimony confirms that the staff person was a former employee, had contacts with the regulated community and was part of the Regional Board unit that oversees stormwater regulation. Mr. Thomason’s and Mr. Kippen’s Declarations therefore appear to agree that the former staff person was part of the stormwater unit at the Board and had contacts with the regulated community regarding stormwater management both during and after his employment. The staff person’s text messages providing opinion about stormwater management at facilities the Board regulates meets the minimum standard of relevance and reliability for this hearing.

The Prosecution Team asserts that responsible persons would not rely on text messages sent from a former employee. However, it is undeniable that communication via text messages is scarcely different than other types of written communications, particularly when used to express an opinion. Although the exact purpose of the Declaration is unknown, a former staff person’s text message exchange with counsel for Bo Dean, expressing their opinion on stormwater management at the Bo Dean site meets the standard for inclusion in this hearing provided Bo Dean’s affirms the Declaration at the hearing.¹²

While the former staff person is not a listed witness and will not be present at the hearing to affirm the truth of the statements, to the extent that the text messages are hearsay evidence, hearsay is admissible in this hearing. “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (Gov. Code, § 11513, subd. (d).) A timely hearsay objection does not make evidence inadmissible in this proceeding but prevents the board from relying solely on that evidence to support a finding. (*Sunseri v. Board of Medical Examiners, supra*, 224 Cal.App.2d at 309.) The Parties may argue as to the weight the Board should give to the messages, and whether these text messages by

¹² Under the regulations applicable to this hearing any witness providing written testimony such as Mr. Thomason in his declaration must appear at the hearing to affirm that testimony. (Cal. Code Regs., tit. 23 § 648.4 subd.(d).)

themselves could support a finding or whether they may be supported by other non-hearsay evidence.¹³

While the Chair rules that the Thomason Declaration and accompanying exhibit are admitted, in accordance with Government Code section 11513 subdivision (f) the Board Chair sees little probative value in allowing extensive testimony regarding this evidence, including witness character testimony. The Prosecution Team may argue against the reliability and weight of this evidence, but the Board Chair will not allow an undue use of time at this hearing discussing this evidence.

6. Heaven Moore's Declaration (PT_Rebuttal_1)

Bo Dean asserts that the Declaration of Heaven Moore is improper rebuttal evidence, lacks foundation, and is improper expert opinion.

a. Improper Rebuttal

The general rule is that each party to an adjudicative administrative proceeding has the right to rebut the evidence against the party. (Gov. Code, § 11513, subd. (b).)

In accordance with the Hearing Procedure, evidence that responds to evidence presented in connection with another party's case-in-chief is within the scope of rebuttal. The Hearing Procedure also notes that acceptable rebuttal evidence includes: "evidence, analysis, or comments offered to disprove or contradict other Designated Parties' submissions." (Hearing Procedure p.9.) Allowing Ms. Moore's Declaration as rebuttal is consistent with the Hearing Procedure.

Ms. Moore's declaration squarely addresses a point of dispute, and a point raised by Bo Dean extensively in its Response Brief—whether Bo Dean had adequate BMPs at the facility on the days where violations are alleged. Although Ms. Moore's Declaration could have been submitted as part of the Prosecution Team's case-in-chief, the Board has the discretion to allow such evidence and analysis and elects to allow it here. Rebuttal evidence offered as additional evidence on a point put into dispute by the opposing party is proper even though it might have been part of the case-in-chief. (*People v. Avery* (1950) 35 Cal.2d 487, 492.) The Board has considerable discretion in determining what is proper rebuttal evidence and none of the cases cited by Bo Dean in its motion and objections suggest otherwise. While the Board discourages surprise testimony and exhibits, it cannot see how the Declaration is unduly prejudicial to Bo Dean. Bo Dean had the opportunity to depose Ms. Moore, and Bo Dean may call Ms. Moore as a witness. Further, Bo Dean has had the opportunity to submit objections to rebuttal evidence and surrebuttal argument. The Hearing Procedure provided Bo Dean an adequate opportunity to respond to the arguments presented in the Declaration.

¹³ The Parties may also argue that they are hearsay, but admissible under a hearsay exception.

b. Ms. Moore’s non-designation as an expert and Bo Dean’s argument that there is a lack of foundation to allow the testimony

First, the applicable standard to allow Ms. Moore’s testimony is the relevant and responsible persons standard. Arguments that the Declaration and evidence it relies upon lacks foundation are properly viewed as challenges that evidence does not meet the relevance and responsible persons standard. (See, e.g., *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 349–350 [Absent providing an adequate authenticating foundation, evidence may be inadmissible under relevant and responsible persons standard].)

There is no assertion that Ms. Moore’s testimony is irrelevant; therefore, the question is whether it meets the requisite reliability standard to be admitted in this hearing. Evidence Code section 664 provides the presumption that official duties are regularly performed. Reports prepared by a public employee who has a duty to observe and to report are presumed trustworthy. (*People v. Orey* (2021) 63 Cal.App.5th 529, 552 citing *People v. George* (1994) 30 Cal.App.4th 262, 273-274.) This presumption shifts the burden to the party challenging an official record to show that it lacks foundational trustworthiness. (*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 144.)

Ms. Moore is the supervisor for the NPDES Stormwater Unit at the Regional Water Board and is responsible for overseeing regulated sites. Her Declaration lists her qualifications and experience and cites evidence in the record that she relies on in her Declaration. Additionally, Ms. Moore is a listed witness for both the Prosecution and Bo Dean in this matter and can testify to matters contained in her Declaration.

To support its assertion to exclude the Declaration, Bo Dean states that Ms. Moore was not present for many of the site inspections and lacks familiarity with the site. These assertions primarily go to the weight that the Board should give to her Declaration. Even if it were accepted as true that she only had limited personal observations of the site, she may nevertheless provide her opinion on those observations and her review of reports where others provided observations and analysis. There is adequate basis to admit the portions of Ms. Moore’s Declaration and her analysis of site conditions that are based on her personal observations of the site and analysis of evidence that is accepted into the record.¹⁴

As discussed earlier, certain inspection reports to the extent relied on in the Declaration, may qualify as business records/official records and admitted into evidence as such. Where the Declaration relies on the review of reports and photographs that may not meet the standard for inclusion as evidence in this hearing without further support

¹⁴ The Chair notes that the Moore Declaration relies in part on the Respondent’s submitted report (PT7) and the Declaration submitted by Anthony Boyle, Bo Dean’s operator (RT Ex_9) and no objections have been received regarding the admission of this evidence.

provided at the hearing, those portions of her Declaration may lack sufficient reliability. It is impracticable, however, to determine whether relevant and reliable evidence underlie each of the statements and analysis contained in the Declaration prior to the hearing. The Parties may question witnesses, including Ms. Moore, at the hearing, and provide further argument regarding the contents of the Declaration and supporting evidence at the hearing.

Finally, Bo Dean asserts that Ms. Moore has not been identified as an expert and so cannot provide her opinions about compliance at the facility. As discussed in the evidentiary background in section above, Ms. Moore does not need to be formally designated as an expert for her to provide her opinions and assessment of the site and the allegations underlying the Complaint. There is no requirement to designate state agency staff as experts, and staff testimony is not limited to personal observation of the alleged violation or the discharge site. The Board can weigh her opinions and evaluation of the site based on her professional experience and role as the supervisor of the unit responsible for overseeing the facility. The Board can weigh the value of her testimony versus the evidence, including expert testimony submitted by Bo Dean.

Accordingly, the Board **DEFERS** ruling on the admissibility of the Declaration in its entirety pending further argument and witness testimony at the hearing and a determination of the admissibility of any evidence that the Declaration relies upon.

7. Rebuttal exhibits submitted late (PT_Rebuttal_2, Prebuttal_3, PT_Rebuttal_4, PT_Rebuttal_9)

Bo Dean asserts that several exhibits submitted by the Prosecution Team do not constitute proper rebuttal evidence and are thus untimely.

Bo Dean's objections that this evidence should not be allowed because it is untimely are **OVERRULED**. The objections to authentication of exhibits PT_Rebuttal_2 and PT_Rebuttal_3 are further discussed below. Regarding untimeliness, the Hearing Procedure and applicable regulations give latitude on the submission of rebuttal evidence.¹⁵ PT_Rebuttal_2 and PT_Rebuttal_3 are, respectively, additional site investigation photographs, and a site map with notations. PT_Rebuttal_4 and PT_Rebuttal_9 are, respectively, a stormwater fact sheet, and a chain of custody form for monitoring samples. It is unclear why these exhibits were not submitted as part of the Prosecution Team's case-in-chief. However, it is also not clear how inclusion into the record is unduly prejudicial to Bo Dean, and Bo Dean does not assert they are. According to the Prosecution Team, at least some of this evidence, including the photographs in PT_Rebuttal_2 were available to Bo Dean prior to the Prosecution Team submitting them in rebuttal. (Email from Catherine Hawe to Advisory Team, January 13, 2025.)

¹⁵ For example, the Board's regulations allow submission of rebuttal evidence and testimony at the hearing. (Cal. Code Regs. tit. 23 § 648.4 subd. (f).)

As discussed earlier, the Board may admit evidence as rebuttal evidence even if it could have been submitted as part of the case-in-chief. Given the lack of showing of prejudice to Bo Dean, disallowing it on timeliness grounds is not adequately supported. The Board Chair again emphasizes, however, that when a party provides little justification or explanation for why evidence is submitted as rebuttal, the Board may exercise its discretion and exclude the evidence. To support a fair and orderly hearing, parties are expected to submit evidence at the proper time, and the relatively permissive standard applicable to admitting evidence in this hearing is not unlimited.

8. Rebuttal exhibits have not been authenticated (PT_Rebuttal_2, PT_Rebuttal_3, PT_Rebuttal_7)

Bo Dean asserts that several exhibits submitted by the Prosecution Team lack authentication and that the Prosecution Team has not shown that the exhibits are relevant. PT_Rebuttal_2 is a series of site photographs, PT_Rebuttal_3 is a satellite image of the facility with notations, and PT_Rebuttal_7 is an additional set of site photographs.

The Advisory Team, on behalf of the Board Chair, requested that Prosecution Team provide additional explanation for these exhibits. Additional information was provided by email on January 13, 2025.

a. PT_Rebuttal_2

The photographs in PT_Rebuttal_2 are site photographs accompanying a November 26, 2019, site investigation. According to the Prosecution Team, all photographs were provided to Bo Dean in February 2024 as part of its discovery request and some of the photographs were included in the November 26, 2019 inspection memo identified as PT 19. As discussed above, the photographs that are included in the inspection report may be admitted as part of PT 19 if witness testimony at the hearing provides adequate information to overcome Bo Dean's objection to the inspection reports. The additional photographs, not included in the inspection report, were submitted without context. They include time stamps with the November 26, 2019 date, and the supplemental information provided by the Prosecution Team suggests they were taken as part of the same site visit. It is unknown why they were not included as part of PT19, the site inspection report, or what the purpose of their submission is now. The Prosecution Team asserts that the staff person responsible for those photographs will be present at the hearing and available as a witness to provide sufficient identifying information for the photographs. The Board Chair **DEFERS** a ruling on Bo Dean's objections pending witness testimony that may be introduced at the hearing. The Prosecution Team may introduce evidence at the hearing to provide additional authenticating information to support the reliability of these photographs and allow for their introduction into evidence.

b. PT_Rebuttal_3

PT_Rebuttal_3 is also lacking additional identifying information to support its reliability and purpose. The Prosecution Team, in its response to the Chair's request for additional information stated that witnesses will be available to testify to the map and its notations at the hearing. As above, the Chair **DEFERS** a ruling on Bo Dean's objections pending witness testimony that may be introduced at the hearing. The Prosecution Team may provide testimony at the hearing to provide additional authenticating information to support the reliability of the exhibit and allow for its introduction into evidence.

c. PT_Rebuttal_7

The Photographs included as PT_Rebuttal_7 contain no context or other identifying information other than a date stamp. Following the request to provide additional information, the Prosecution Team stated that they are part of a November 24, 2024, inspection to document current site conditions and are responsive to Bo Dean's arguments regarding site improvements. The photographs, if admitted, may be considered proper rebuttal, but they lack sufficient identifying information to indicate their reliability or authenticity. Accordingly, the Board Chair **DEFERS** a ruling on Bo Dean's objections pending witness testimony that may be introduced at the hearing. The Prosecution Team may introduce evidence at the hearing to provide additional authenticating information to support their reliability and allow for their introduction into evidence.

9. Rebuttal exhibits that are allegedly irrelevant (PT_Rebuttal_8, PT_Rebuttal_11)

Bo Dean asserts that the following rebuttal exhibits submitted by the Prosecution Team are irrelevant: Bo Dean's self-reported monitoring data (PT_Rebuttal_8), and a Google Earth Image of the site (PT_Rebuttal_11).

Bo Dean's objection to PT_Rebuttal_8 is **GRANTED**. The Prosecution Team does not point to evidence or argument that Bo Dean has submitted that this evidence properly rebuts, apart from Bo Dean's general statement that Bo Dean has "prioritized environmental sustainability." The screenshots showing data from the other Bo Dean facilities is not relevant to the alleged violations in this matter, nor is the data, by itself, indicative of whether Bo Dean has prioritized environmental sustainability. Finally, whether Bo Dean has "prioritized" environmental values as a general principle of business operations is not relevant to the allegations in the Complaint. The Chair finds the probative value of this evidence is limited and will be substantially outweighed by the probability that its admission will involve an undue consumption of time.

Bo Dean's objection to PT_Rebuttal_11 is **OVERRULED**. PT_Rebuttal_11, the satellite image of the facility is relevant to depict the size, location and scale of the facility. Moreover, the image is similar to images submitted by Bo Dean in its evidence submittals. (See Declaration of Anthony Boyle RT 9.)

IV. Respondent's Motion to Strike Portions of Prosecution's Rebuttal Brief

On January 3, 2025, the date that rebuttal evidentiary objections were due, Bo Dean moved to strike portions of the Prosecution Team's December 23, 2024, Rebuttal Brief. Bo Dean asserts the Rebuttal Brief raises new arguments and theories of liability not set forth in the Complaint or its accompanying Attachment A. In particular, Bo Dean's motion is directed at three arguments made in the Rebuttal brief: (1) claims concerning the compliance status of Bo Dean's other facilities (PT Rebuttal Brief, page 9, line 20, through page 10, line 14), (2) claims asserting Bo Dean has not followed the County's requirements (PT Rebuttal Brief, page 12, line 10 through page 16, line 1), and (3) claims challenging the adequacy of Bo Deans's Stormwater Pollution and Prevention Plan for Mark West Quarry (PT Rebuttal Brief, page 19, lines 7 through 19 and page 20, lines 1 through 12). Bo Dean requests the Prosecution Team be directed to submit a redacted Rebuttal Brief.

The Board Chair **GRANTS, in part, and DENIES, in part**, Bo Dean's Motion to Strike as follows.

1. Compliance Status of Other Facilities

The Board Chair **GRANTS** Bo Dean's request to strike Section III.A of the Prosecution Team's Rebuttal Brief as improper rebuttal evidence. The Prosecution Team asserts that discussion of the other facilities is proper to generally rebut Bo Dean's claims it "has prioritized environmental sustainability." (PT Rebuttal Brief p.9.) The additional argument regarding compliance of other facilities, however, is not directly relevant to alleged violations at the quarry and the penalty sought in this Complaint as discussed above in the ruling on PT_Rebuttal_8.

The Prosecution Team is not required to submit a redacted Rebuttal Brief. Section III.A of the Rebuttal Brief is stricken and will not be considered by the Board.

Although the rebuttal argument in Section III.A and PT_Rebuttal_8 are not admitted, the Prosecution Team will be permitted to present argument at the hearing in support of its proposed "History of Violation" factor discussed in Attachment A to the Complaint, which timely raised Cease and Desist Order No. R1-2021-0027, relating to operations at Bo Dean's Hot Plant. (See Complaint, Attachment A, p. 26.) Allowing discussion of the Cease and Desist Order issued to the Hot Plant, however, is not an indication that the Board has assigned any particular weight to the argument that the issuance of the Cease and Desist Order supports a penalty enhancement for alleged violations at the quarry.

2. Compliance with County Requirements

The Board Chair **DENIES** Bo Dean's request to strike Section III.E of the Prosecution Team's Rebuttal Brief. The Prosecution Team raised Bo Dean's alleged non-compliance with County requirements in its case-in-chief in support of its proposed Degree of

Culpability factor. (See, e.g., Complaint, Attachment A, pp. 22-23.) Bo Dean's Response Brief discusses Bo Dean's compliance with the County's EIR and Use Permit. (See Response Brief, p. 53.) Further, the Prosecution Team has listed County representatives as witnesses and Bo Dean will have the opportunity to cross-examine those witnesses. Compliance with County requirements related to quarry operations and stormwater management is generally relevant to stormwater control at the site. The Board does not anticipate that a discussion of these issues will improperly expand the scope of this hearing as Bo Dean suggests. The Prosecution Team acknowledges the limited purpose of raising the issue of compliance with County requirements and that it is primarily raised to question Bo Dean's credibility. (PT Rebuttal Brief p.15.) Accordingly, the Prosecution Team's rebuttal argument and evidence on these issues will not be stricken. As with all evidence admitted, the Board is not determining how much weight this evidence will be given, only that a discussion of compliance with County requirements meets the relatively permissive standard for inclusion in this hearing.

3. Adequacy of Stormwater Pollution and Prevention Plan (SWPPP)

The Board Chair **DENIES** Bo Dean's request to strike a portion of Section IV.C of the Prosecution Team's Rebuttal Brief. The Prosecution Team's Complaint (see e.g., Complaint, Attachment A, p. 39) and supporting inspection reports raised the issue of the adequacy of Bo Dean's SWPPP, and Bo Dean's Response Brief argues that the facility continuously maintained an adequate SWPPP (Response Brief p. 22-30.). These issues are relevant to Bo Dean's management of stormwater on the site. Accordingly, the Prosecution Team's rebuttal argument and evidence related to the SWPPP will not be stricken.

V. Parties' Requests for Official Notice

Bo Dean submitted a request for official notice of several documents on November 15, 2024. The Prosecution Team submitted requests for official notice of several documents on August 9, 2024, and December 23, 2024. These records are as follows:

- National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges Associated with Industrial Activities, Order 2014-0057-DWQ (Industrial General Permit) (PT1; RT_Exh. 001)
- Mining and Reclamation Plan for the Mark West Quarry Expansion Final Environmental Impact Report (EIR) dated September 2013; Draft EIR & Appendices dated May 2013, & County of Sonoma Adopting Resolution 13-0512 dated December 2013 (PT4)
- Water Quality Control Plan for the North Coast Region (Basin Plan) (PT5)
- Monthly NOAA records from Sonoma County Airport Rain gauge, October 2018 to January 2023 (PT39)
- Excerpt from Clean Water Act Section 303(d) - Final 2018 California Integrated Report Map (Mark West Creek Watershed Listing) (PT40)

- Regional Water Quality Control Board, North Coast Region, Resolution No. R1-2004-0087 adopting the Total Maximum Daily Load Implementation Policy Statement for Sediment-Impaired Receiving Waters in the North Coast Region and Work Plan to Control Excess Sediment in Sediment Impaired Watersheds (PT41)
- 2014 California Water Action Plan (PT42)
- Surface Mining and Reclamation Act (SMARA) Regulations (PT56)
- U.S. EPA Economic Benefit Model (BEN) (PT76)
- Sonoma Resource Conservation District Maacama and Upper Mark West Creek Integrated Watershed Management Plan (PT46)
- National Oceanic and Atmospheric Administration – National Marine Fisheries Service Volume 1: Recovery Plan for the Evolutionarily Significant Unit of Central California Coast Coho Salmon (PT48)
- County of Sonoma 2013 Conditional Use Permit and Reclamation Plan (PT57)
- California State Water Resources Control Board Order WQO 2004-006, In the Matter of the Petition of Carl and Carole Boyett and Boyett Petroleum, Order No. R1-2003-0075 (RT_Exh004)
- Santa Ana Regional Water Quality Control Board Order No. R8-2012-0010 In the Matter of Pacific Clay Products (RT_Exh005)
- San Diego Regional Water Quality Control Board Order No. WQO 2002-0020, In the Matter of the Petition of the County of San Diego, San Marcos Landfill
- Google Earth Image of Site dated September 30, 2018 (PT_Rebuttal_11)

California Code of Regulations, title 23, section 648.2 provides:

“The Board or presiding officer may take official notice of such facts as may be judicially noticed by the courts of this state. Upon notice to the parties, official notice may also be taken of any generally accepted technical or scientific matter within the Board’s field of expertise, provided parties appearing at the hearing shall be informed of the matters to be noticed. The Board or presiding officer shall specify the matters of which official notice is to be taken. Parties shall be given a reasonable opportunity on request to refute officially noticed technical or scientific matters in a manner to be determined by the Board or presiding officer.”

Thus, official notice may be taken of matters that are judicially noticeable; and official notice may be taken of generally accepted technical or scientific matter within the Board’s field of expertise provided the parties are informed of the matters to be noticed and have a reasonable opportunity upon request to refute such matters. California Evidence Code sections 451 and 452 set forth several bases for judicial notice, including as relevant here: regulations, facts that are capable of verification and are not reasonably in dispute, facts of general knowledge that are universally accepted and not

reasonably disputed, and official acts of the state and federal governments. All the above requests fall within the scope of matters that the Board may take official notice.¹⁶

Bo Dean asserts that PT4, PT56, and PT57 are irrelevant. The Board Chair finds they meet the standard for relevance to be admitted in this proceeding. The exhibits relate to stormwater management at the site, the primary issue in this matter.

Based on the above, the Board Chair **GRANTS** all requests for official notice.

VI. Prosecution Team's Request for Virtual Appearance

The Prosecution Team submitted a request for witness Rich Fadness to appear remotely at the February hearing via Zoom. Bo Dean did not object to this request. The Respondent submitted a request for witness Ryan Thomason to appear remotely at the February hearing via Zoom. The Prosecution Team did not object to this request. The Board Chair **GRANTS** these requests and absent objections will grant any additional requests for virtual appearances. Mr. Fadness is permitted to testify at the hearing via Zoom on Thursday, February 6, 2025. The Prosecution Team requests that the Board permit his testimony at 11:45 a.m. The Board will endeavor to accommodate this time request to the extent practicable.

VII. Conclusion

The above rulings are the final rulings of the Chair unless otherwise noted in the ruling or modified at the hearing. In some instances, the rulings are provisional, or issued without prejudice as additional information may be provided at the hearing to address objections. The Parties may allot time from their case presentations to address any matter contained within this ruling.

Valerie Quinto
Executive Officer, North Coast Water Quality Control Board
For
Hector Bedolla
Chair, North Coast Water Quality Control Board

cc. Advisory Team: Nathan Jacobsen, Bayley Toft-Dupuy, Kaete King [via email]

¹⁶ The Prosecution Team objected to Bo Dean's request for official notice of the Santa Ana Regional Water Quality Control Board's Order listed above. While regional water quality control board orders are not precedential and the Board is not bound by the findings or legal conclusions therein, it may take official notice of final administrative civil liability orders pursuant to California Code of Regulations, section 648.2, and Evidence Code section 452(c). The Board is not assigning any particular weight to these orders or their findings and conclusions.