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VIA EMAIL ONLY

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Subject: Board Chair's Rulings on the Parties' Evidentiary Objections and the Dischargers' Request for Additional Time

Dear Mr. Bazel and Ms. Drabandt:

The Advisory Team and Board Chair received both parties' evidentiary objections and the Dischargers' Request for Additional Time on November 14, 2016. The Prosecution Team submitted final evidentiary objections with its rebuttal on November 18, 2016, and the Dischargers submitted a response to the Prosecution Team's evidentiary objections on November 22, 2016. Because the Hearing Procedure governing this proceeding did not extend the date for submission of evidentiary objections and did not provide for responses to evidentiary objections, the Advisory Team and Board Chair have not considered the revised Prosecution Team objections or the Dischargers' response in the rulings that follow.[1] The Board Chair, after consultation with the Advisory Team, first denies the Dischargers' Request for Additional Time and then overrules all the parties' evidentiary objections.

I. The Dischargers' Request for Additional Time

The Dischargers request five additional hours to present testimony, for a total of seven hours, although they maintain that they could likely present their case adequately in as little time as four hours. The Dischargers assert, without elaboration, that the two hours currently allotted by the Hearing Procedure does not afford them a fair opportunity to present their case.

[1] The Advisory Team and Board Chair will address the Dischargers' objections to the Prosecution Team's rebuttal, submitted December 8, 2016, in a separate ruling.

In response to the Dischargers' August 12 request for additional time, the Advisory Team and Board Chair increased the time allotted to each party from one hour to two hours. (See August 22, 2016 Advisory Team Response.) In the face of only a conclusory statement that two hours is still not enough, at this time the Board Chair is disinclined to further increase the parties' time to present evidence. However, the Board Chair has the discretion to allow for additional time at the hearing, if warranted.

II. The Dischargers' Evidentiary Objections

The Dischargers challenge several aspects of the Prosecution Team's ability to pay analysis and jurisdictional evidence and argue that the practice of allowing non-parties to make policy statements at the hearing is improper. The Board Chair, in consultation with the Advisory Team, overrules these objections.

A. Ability to Pay

The Dischargers argue that the Prosecution Team's ability to pay analysis should not be considered by the Regional Board because: (1) the Prosecution Team's financial expert, Bryan Elder, is not qualified as such; (2) the sources of the Prosecution Team's data are unreliable; and (3) the methodology used by the Prosecution Team has not been explained. Each of these arguments is addressed below.

1. Expert's Qualifications

The Advisory Team and Board Chair disagree that Bryan Elder's analysis must be stricken because Mr. Elder is not qualified as an expert or because the Prosecution Team has not yet established his qualifications as an expert. The Prosecution Team identified Mr. Elder as an expert in its initial evidentiary submission, as required by the Hearing Procedure. (See Whyte Transmittal Letter [Sept. 2, 2016], at p. 2; 2d Rev. Hrg. Proc., at p. 4.). Nothing prevents Mr. Elder from testifying to his own qualifications at the hearing or for the Dischargers to cross-examine him on this point. (See Evid. Code § 801, subd. (b) [allowing opinion testimony from experts based on their "special knowledge skill, experience, training, and education"]; Gov. Code § 11513, subd. (b) [permitting party to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination].) Although not directly applicable to Regional Board adjudicative hearings, Evidence Code section 720, which governs the qualifications of experts, permits experts whose qualifications have been challenged to testify about these qualifications. (Evid. Code § 720, subd. (b).) For the foregoing reasons the Board Chair, after consultation with the Advisory Team, overrules the Dischargers' objections to Mr. Elder's qualifications as an expert.

2. Financial Data and its Sources

The Dischargers also object, in conclusory fashion, that the Prosecution Team's "data and sources of data are unreliable and cannot be trusted." (Discharger Objx. at p. 2.) The only example of unreliability Dischargers provide is the Prosecution Team's identification of a property in Marin County as having been sold by Mr. Sweeney: Dischargers apparently agree that this property was in fact sold by Mr. Sweeney, but contend that the sale was "years ago." (Discharger Objx. at p. 2.) The Advisory Team and Board Chair recognize that the age of the information may affect what probative value the Regional Water Board may place on such evidence, but fail to see how age alone makes the information inherently unreliable or untrustworthy. The Dischargers neither identify any other Prosecution Team information as inaccurate, nor indicate why the Prosecution Team's sources, which appear, for the most part, to be local government websites and widely used public records databases, cannot be trusted. Without any specific examples of untrustworthy information, the Board Chair, after consultation with the Advisory Team, overrules the Dischargers' request to exclude Prosecution Team financial information.

3. Prosecution Team's Methodology

The Dischargers object that the Prosecution Team has not adequately explained how it has calculated Mr. Sweeney's net worth or how it has filtered inaccurate data, and request that the financial analysis be excluded on this basis. The Board Chair, after consultation with the Advisory Team, overrules this objection. The Prosecution Team acknowledges that its estimate of Mr. Sweeney's net worth is not complete or definitive. (Prosecution Team, Exh. A., at pp. A10-A11.) However, the amount of Administrative Civil Liability proposed by the Prosecution Team does not depend on this calculation. (See *id*.) To the contrary, the Prosecution Team has put forth this information to support its claim that Mr. Sweeney is able to pay the amount proposed. As explained in the Advisory Team and Board Chair ruling dated November 23, 2016, the Enforcement Policy allows the Regional Water Board to consider ability to pay in deciding whether to reduce a proposed penalty. (Enforcement Policy, pp. 11, 19); see also Wat. Code, §§ 13385, subd. (e); 13327.) Once prosecution staff has conducted a "simple preliminary asset search" and "put some evidence" about ability to pay in the record, the burden shifts to the discharger to "submit additional financial evidence if it chooses." (Enforcement Policy, p. 19; see also *People v. Morse* (1993) 21 Cal. App.4th 259, 272, n. 22 [citing *State v. City of San Francisco* (1979) 94 Cal.App.3d 522, 530-531] [once the evidence establishes a violation of Water Code section 13385, it becomes the defendant's burden to establish that a penalty less than the maximum is appropriate].) Thus, the Dischargers may continue to challenge the reliability of the Prosecution Team's evidence at the hearing, but exclusion of this evidence is not warranted.

B. Jurisdictional Data

The Dischargers claim that the Prosecution Team improperly estimated the high tide line at Point Buckler by using a wetted board and request that, as a result, all of the Prosecution Team's jurisdictional analysis be excluded as a result. The Board Chair, in consultation with the Advisory Team, overrules this objection. In the Experts' Response submitted by the Prosecution Team, Siegel, Baye, and Herbold explain that they used five different methods used to estimate the high tide, any of which would support 404 jurisdiction at the island, but clarify that the wetted board estimate was neither an approved method for determining jurisdiction nor was used to establish it. (Experts' Response at pp. 9-11.) Instead, they argue that the wetted board estimate was used to support the conclusion that tides are slightly higher at Point Buckler than they are at Port Chicago. (*Id.* at p. 9.) Given the limited purpose for introducing the wetted board calculation and the Prosecution Team's alternate estimates of the high tide line, the Advisory Team and Board Chair find that exclusion of the Prosecution Team's jurisdictional evidence is unwarranted.

C. Interested Party Policy Statements

The Advisory Team and Board Chair have already addressed the ability of third parties to present non-evidentiary policy statements at adjudicative proceedings in their August 8, 2016 Ruling and the Advisory Team and Board Chair's analysis is unchanged. As provided by applicable regulations and the Hearing Procedure, any non-party member of the public, or "interested person," may submit oral or written non-evidentiary policy statements pursuant to Regional Board regulations and the Hearing Procedure applicable to this matter. (See Cal. Code Regs. tit. 23, § 648.1, subd. (d); 2d Rev. Hr'g Proc., p. 2.) By definition, such policy statements of non-parties are not considered evidence. Therefore, this limited opportunity for public participation is not tantamount to Mr. Sweeney's "[trial] in the court of public opinion." (See Disch. Objx., p. 2.)

III. The Prosecution Team's Evidentiary Objections

The Prosecution Team does not ask that any of the Dischargers' submissions be stricken or deemed inadmissible. Instead, the Prosecution Team emphasizes that the Regional Water Board may not base its findings entirely on hearsay, and asks the Regional Water Board to specify which reliable, non-hearsay evidence supports its findings. The Prosecution Team also asserts that *res judicata* bars Dischargers from reiterating jurisdictional arguments that the Regional Water Board rejected when it adopted Cleanup and Abatement Order No. R2-2016-0038. The Board Chair and Advisory Team reject both of these contentions, as explained in more detail below.

A. Hearsay

Hearsay evidence "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

(Evid. Code. § 1200.) In California court proceedings, hearsay evidence is inadmissible unless otherwise provided by law. (See Evid. Code § 1200, subd. (b); see also Evid. Code §§ 1220-1390 [exceptions to the hearsay rule].)

Adjudicatory hearings before the Regional Water Board are not bound by the same rules of evidence as court proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (b); Gov. Code § 11513, subd. (c).) Notably, hearsay evidence is admissible in Regional Water Board hearings. (See Government Code § 11513, subd. (d).) However, while hearsay "may be used for the purpose of supplementing or explaining other evidence… [it] shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (*Id.*)

The Prosecution Team identifies four categories of Discharger submissions as hearsay on which it asserts that Regional Board findings may not be made: (1) statements purportedly made to Mr. Sweeney by the island's prior owner at the time Mr. Sweeney purchased the island; (2) Mr. Sweeney's assertions and estimates of his net worth, contained in his Declaration; (3) representations staff of other agencies made to Mr. Sweeney during telephone conversations; (4) Mr. Bucci's declaration, which relies in part on Mr. Sweeney's statements about his own net worth.

The Board Chair and Advisory Team believe that it is premature to identify "the non-hearsay evidence that is reliable and sufficient to support a finding" in advance of the hearing and before the Regional Board is prepared to make findings in the first place. For instance, if Mr. Sweeney testifies at the hearing, he could make substantially the same assertions regarding his financial situation as his declaration does. While the Prosecution Team could attack the sufficiency and reliability of such testimony, it would not be hearsay, and could therefore potentially support an agency finding. (See *Utility Reform Network v. CPUC* (2014) 223 Cal.App.4th 945, 960-961[while hearsay alone may not constitute the substantial evidence necessary to support an agency finding, all agency findings must be supported by substantial evidence].) Similarly, any testimony from Mr. Sweeney about his conversations with the former owner of Point Buckler Island or the staff of regulatory agencies could be relied on for non-hearsay purposes, such as to demonstrate Mr. Sweeney's action in conformity with a belief. (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1162.) To the extent that Mr. Bucci testifies as an expert, his conclusions about Mr. Sweeney's financial situation would not be hearsay. (See *Maatuuk v. Guttman* (2009) 173 Cal.App.4th 1191, 1198 ["an expert may rely on any information of the type reasonably relied on by an expert, even if it is hearsay, and from a non-expert"].) In short, it is simply premature at this time to categorize the reliability and sufficiency of purported hearsay evidence.

B. *Res Judicata*: Claim and Issue Preclusion

Res judicata is an umbrella term that can refer to claim preclusion, which prevents relitigation of an identical cause of action involving the same parties; issue preclusion, which prevents relitigation of issues decided in a prior suit; or both doctrines together.

(*DKN Holdings LLC v. Faerber* (2015) 61 Cal. 4th 813, 823-824.) In its objections, the Prosecution Team did not specify which doctrine it believes applies to the ACL proceeding. As described below, neither doctrine applies because the Regional Water Board's decision to adopt Cleanup and Abatement Order No. R2-2016-0038 is not final.

1. Claim Preclusion

Claim preclusion prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them; in addition, the doctrine prevents litigation of issues that, "by negligence or design," could have been raised in the first proceeding, but were not. (*Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 791 [citations omitted].) In determining whether claim preclusion bars a second suit, courts ask whether the second suit involves (1) the same cause of action as the first suit; (2) is between the same parties; (3) and is brought after a final judgment on the merits in the first suit. (*DKN Holdings, LLC v. Faerber, supra,* 61 Cal.App.4th at p. 824.)

2. Issue Preclusion

Issue preclusion, or collateral estoppel, "prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." (*In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1084 [citations omitted].) The following four factors determine whether or not the prior decision conclusively resolves an issue raised in the second proceeding: (1) the first decision must be a final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. (*In re Donovan L., supra,* 244 Cal.App.4th at p. 1084.)

Both claim and issue preclusion apply to the decisionmaking of administrative agencies acting in a judicial or quasi-judicial capacity. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867 [issue preclusion]; *Niles Freeman Equipment v. Joseph, supra,* 161 Cal.App.4th at p. 791 [claim preclusion].) However, because the adoption of Order No. R2-2016-0038 is not a final adjudication, neither claim preclusion nor issue preclusion bars renewed arguments regarding issues raised in that proceeding.

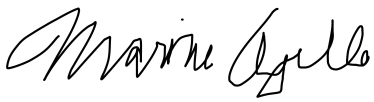
A decision is a final adjudication when it has been administratively and judicially exhausted, or when the time for appealing the decision administratively or judicially has elapsed prior to exhaustion. (See *Johnson v. City of Loma Linda* (2000) 24Cal.4th 61, 70.) Here, administrative and judicial review of Order No. R2-2016-0038 have not yet been exhausted, nor has the time for doing so elapsed. The Dischargers timely petitioned the Regional Water Board's August 10, 2016 decision to the State Water Board, and their petition is currently pending. (See Acknowledgement of Petition No. A-2498, p. 2 (Oct. 19, 2016) [noting that petition was filed Sept. 8, 2016]; Wat. Code, § 13320.) Even if the State Board does not act on the petition, the Dischargers may opt to file a petition for writ of mandate in Superior Court. (Wat. Code, § 13330.) Until such

petition is litigated or dismissed, the Regional Water Board's decision to adopt Order No. R2-2016-0038 will not be final. (See *Murray v. Alaska Airlines, Inc., supra,* 50 Cal.4th at p. 867.) Accordingly, issue preclusion and claim preclusion do not attach.

For practical purposes, this means that the parties may not treat their arguments as having already been conclusively decided, and that the Regional Board members who participated in the August 10, 2016 hearing may not reject arguments in this proceeding strictly on the basis of their findings at the August hearing. At the same time, the parties are advised that the ACL hearing is **not** an opportunity to relitigate the legality or validity of Cleanup and Abatement Order No. R2-2016-0038; rather, to the extent the jurisdictional issues relate to arguments about whether or not the violations occurred, or the weight given to particular factors used in the penalty calculation, such issues may be addressed at the hearing.

In accordance with the foregoing analysis, the Board Chair, after consultation with the Advisory Team, DENIES the Dischargers' Request for Additional Time and OVERRULES all parties' evidentiary objections.

Sincerely,



Marnie Ajello

cc:

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