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6 Attorney for the Prosecution Staff

7 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

8 CENTRAL VALLEY REGION

9 In the Matter of:)

10 **Administrative Civil Liability for**)
11 **Mandatory Minimum Penalties Against**)
12 **Malaga County Water District**)

13 **Prosecution Staff Rebuttal Brief**
14)

15 **I. INTRODUCTION**

16 On 25/26 July 2013, the Central Valley Regional Water Quality Control Board
17 (Central Valley Water Board) will hold a public hearing to consider Administrative Civil
18 Liability Complaint No. R9-2013-0527 (May 2013 ACLC) issued to Malaga County Water
19 District (Malaga) for mandatory minimum penalties (MMPs). The Prosecution Team has
20 reviewed the evidence in this case, the Memorandum of Points and Authorities submitted
21 by Malaga on 24 June, 2013 and the 6 June 2013 Pre-Hearing Ruling by the Advisory
22 Team. We will incorporate exhibits and citations from these documents into this Brief.

23 Malaga does not raise any material issues of substantive fact in its Memorandum
24 of Points and Authorities that would prevent the Regional Board from issuing the
25 mandatory penalties required by Water Code section 13385. Furthermore, Malaga has
26 not met its burden of proof demonstrating that an affirmative defense applies, exempting
27 the imposition of MMPs. The Prosecution Team contends that the Regional Water Board
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1 *must* impose MMPs for the 24 specific effluent limitation violations identified in the May
2 2013 ACLC and 2 additional violations identified in the Prosecution Team’s 5 June 2013
3 Evidence Submission for a total penalty of \$78,000.

4 **II. LEGAL AUTHORITY**

5 The July 25/26 meeting will provide a hearing for findings of facts by the Central
6 Valley Water Board necessary to formulate a decision on the May 2013 ACLC in
7 accordance with Water Code sections 13323, 13327 and 13385. The Hearing
8 Procedures approved by the Board’s chairman and the Advisory Team will set forth the
9 procedures that the Central Valley Water Board will follow for this proceeding in
10 accordance with all requirements of the California Gov’t Code and the California Code of
11 Regulations.
12

13 The May 2013 ACLC alleges that Malaga committed violations of Water Code
14 sections 13385 (h) and (i) that are subject to MMPs. Water Code section 13385 (h)(1)
15 states, “Notwithstanding any other provision of this division, and except as provided in
16 subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars
17 (\$3,000) shall be assessed for each serious violation.
18

19 Water Code section 13385 (h)(2) defines a “serious violation” as “any waste
20 discharge that violates the effluent limitations contained in the applicable waste discharge
21 requirements for a Group II pollutant, as specified in Appendix A to section 123.45 of
22 Title 40 of the Code of Federal Regulations, by 20 percent or more or for a Group I
23 pollutant, as specified in Appendix A to section 123.45 of Title 40 of the Code of Federal
24 Regulations, by 40 percent or more.”

25 Water Code section 13385 (i)(1) states, “Notwithstanding any other provision of
26 this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum
27 penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever
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1 the person does any of the following four or more times in any period of six consecutive
2 months, except that the requirement to assess the mandatory minimum penalty shall not
3 be applicable to the first three violations:

4 (A) Violates a waste discharge requirement effluent limitation.”

5 III. ARGUMENT

6 A. The Hearing Procedures For This Proceeding Are Valid

7 i. The Advisory Team for This Proceeding Has Already Ruled that 8 the Hearing Procedures Are Valid, and That the 25/26 July 2013 9 Hearing Will Be Conducted in Accordance with the Hearing 10 Procedures

11 Malaga has repeatedly argued that the Hearing Procedures issued with the May
12 2013 ACLC are not valid. This challenge was first raised by Malaga’s counsel in a
13 23 May 2013 letter to the Prosecution Team (Malaga Evidence Exhibit G). The
14 Prosecution Team treated this submission as an Objection to the Hearing Procedures,
15 and submitted a Response to Objections to the Hearing Procedures on 28 May 2013
16 (Malaga Exhibit G). On 6 June 2013, the Advisory Team for this proceeding reviewed
17 Malaga’s 23 May Objection and the Prosecution Team’s 28 May Response to Objection,
18 and denied Malaga’s motion to invalidate the Hearing Procedures (Malaga Exhibit I).

19 Malaga repeats its challenge to the validity of the Hearing Procedures in its
20 Memorandum of Points and Authorities. This challenge is still unsupported by statute or
21 case law. The Hearing Procedures issued with the May 2013 ACLC are requirements for
22 pre-approved hearing procedures adopted by the Board’s Chairman on July 20, 2012
23 (Prosecution Rebuttal Exhibit 1). In order to expedite the issuance of administrative civil
24 liability complaints, the Central Valley Water Board has provided Prosecution Staff and
25 counsel with a formula to determine the timing of submissions for each enforcement case
26 adjudicated before the Regional Board. These pre-approved Hearing Procedures provide
27 no less than 72 days and no more than 90 for all of the various submittals outlined in the
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1 Important Deadlines be submitted to the Board. Furthermore, the pre-approved Hearing
2 Procedures mandate that the Advisory Team must consider objections to the Hearing
3 Procedures, and develop new deadlines when the pre-approved timeline is insufficient to
4 meet the needs of an individual case.

5 Contrary to Malaga's claims, the Board Chair has approved the dates in the
6 "Important Deadlines," contained in the Hearing Procedures because he has approved
7 the timing by which these dates must be set for each hearing (*Id.*). In addition, all
8 Dischargers subject to enforcement, including Malaga, have a right to challenge the dates
9 in the Hearing Procedures and can request an extension of the dates or extension of
10 hearing time limits. This process is clearly explained on pages 1 and 2 of the Hearing
11 Procedures themselves. Malaga has never proposed alternatives to the timing for the
12 Important Deadlines. Instead, Malaga attempts to get a second bite at the apple by re-
13 raising the exact same challenge to the Hearing Procedures already ruled on by the
14 Advisory Team. This challenge should be rejected because it was already ruled on by the
15 Advisory Team on 6 June 2013 (Malaga Exhibit I).
16

17 **ii. The Hearing Procedures Provide Ample Opportunity for Malaga**
18 **to Present and Rebut Evidence and Meet All Regulatory And**
19 **Statutory Requirements**

20 Malaga further argues that the limitations set by the Hearing Procedures are not
21 appropriate to the character of this particular proceeding, and that there has been no
22 separate consideration by the Board of what procedure is required to conform with the
23 Administrative Procedure Act (APA) and the requirements of procedural due process
24 (Malaga Points and Authorities, pgs. 6-11). It argues that California Government Code
25 section 11415.10 requires an agency to either conduct its hearings in accordance with
26 procedures set by regulation, or the APA must govern its proceedings (Malaga Points and
27 Authorities, pg. 8).
28

1 Malaga correctly cites the general requirements of the APA, but it has not
2 successfully demonstrated how the Hearing Procedures issued for this proceeding fail to
3 meet the requirements of the procedures for the Regional Board set by regulation in 23
4 California Code of Regulations (CCR) section 648 et.seq. Section 648 of Title 23 of the
5 CCR (Section 648) outlines the laws governing adjudicative proceedings before the State
6 and Regional Water Boards. The Water Boards have specifically promulgated these
7 regulations to govern the procedures for its administrative hearings (*see Niles Freeman*
8 *Equipment v. Joseph*, (2008) 161 Cal.App.4th 765 at 789). If, as Malaga points out, the
9 Hearing Procedures did not meet the requirements of Section 648, then the APA would
10 govern the proceedings by default (*see Cal. Gov't Code section 11415.10*). However,
11 Malaga has not provided any concrete examples as to why the Hearing Procedures
12 violate any of the rules or requirements set forth in Section 648, or the procedures
13 outlined in the APA. As such, the Hearing Procedures and Section 648 should continue
14 to govern the process for this proceeding.
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16 Furthermore, counsel has not demonstrated how the cases cited in his Points and
17 Authorities are in any way analogous to the proceedings at hand. Instead, he loosely
18 relies on the general principal that agencies are required to provide procedural due
19 process in cases where there may be a deprivation of life, liberty, or property (*Petrillo v.*
20 *Bay Area Rapid Transit District*, (1988) 197 Cal.App.3d 798 at 807). The Prosecution
21 Team does not disagree with this conclusion, but notes that Malaga has not shown how
22 the Hearing Procedures fail to provide adequate procedural due process in this
23 proceeding. In fact, the Advisory Team has already determined that “Malaga has ample
24 opportunity under the Hearing Procedure and under applicable statutes and regulations
25 governing adjudicatory proceedings before the Central Valley Water Board to adequately
26 and sufficiently defend its interests against the Prosecution Team’s allegations in their
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1 Complaint (Malaga Exhibit I).” Malaga’s repetitive and empty challenges to the Hearing
2 Procedures should again be rejected.

3 **B. Laches Does Not Apply To The Violations At Issue In the Complaint**

4 Malaga claims that the violations at issue in the 2013 ACLC are not valid, because
5 there has been a delay in prosecuting the violations and the time period identified in the
6 Complaint (1 February 2004 through 31 December 2012) does not directly relate to the
7 dates of the violations themselves. The Central Valley Water Board has a policy of
8 bringing forward MMPs that occur between a range of dates as a matter of standard
9 practice. It provides clarity to the public and the regulated community because it specifies
10 the range of dates under which all possible violations were reviewed. The policy of
11 bringing forward all MMPs that occurred between two defined dates does not invalidate
12 the Board’s authority to bring forward MMPs.

13 Furthermore, the defense of laches may only operate as a bar to a claim by a
14 public administrative agency if there was an unreasonable delay in prosecuting the
15 violations, and a resulting prejudice from the unreasonable delay is shown. (*Robert F.*
16 *Kennedy Medical Center v. Belsh* (1996) 13 Cal.4th 748, 760, fn. 9; *Conti v. Board of Civil*
17 *Service Commissioners* (1969) 1 Cal.3d 351, 342 (“The defense of laches requires
18 unreasonable delay plus either acquiescence in the act about which plaintiff complains or
19 prejudice to the defendant resulting from the delay.”) The Prosecution Team asserts that,
20 as a matter of law, the equitable defense of laches does not apply to this administrative
21 proceeding for statutorily mandated penalties, because the MMP statutes were adopted
22 to protect the public’s interest in water quality. However, even if Malaga is correct and the
23 equitable defense of laches is “borrowed” from the analogous statute, which in this case
24 would be California Code of Civil Procedure section 338(i), the delay in prosecuting this
25 case was not unreasonable, and Malaga has not suffered prejudice due to delay in
26 prosecution of these violations.

27 **i. Laches Is Not Available When It would Nullify Public Policy.**

28 The Legislature adopted the MMP statutes in order to protect the public’s interest

1 in protecting water quality. Laches is not available when it would nullify an important
2 policy adopted for the benefit of the public. (see *Feduniak v. California Coastal*
3 *Commission*, 148 Cal.App.4th 1346 at 1381). A rejection of laches in environmental suits
4 is consistent with the general principle that equitable defenses will rarely be invoked to
5 defeat a policy adopted for the public's protection. (see *City of Long Beach v. Mansell*
6 (1970) 3 Cal.3d 462, 493-494 ("estoppel will not be applied against the government if to
7 do so would nullify a "strong rule of policy, adopted for the benefit of the public."); *Wells*
8 *Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628.)
9

10 **ii. Any Delay on the Part of the Regional Board Prosecution Team**
11 **In Taking Enforcement Against Malaga can be Justified due to**
12 **Limited Staff Resources**

13 Even if the defense of laches is applied in this case, Malaga cannot show that the
14 delay in bringing forward the violations in the May 2013 ACLC was unreasonable. The
15 Central Valley Water Board has limited resources to bring enforcement cases for violation
16 of permit conditions. Like most government agencies, it must prioritize its workload and
17 focus staff resources (see *Feduniak, supra* at 1356). For years, Board staff has dealt
18 with resolving a large backlog of violations subject to MMPs, including Malaga's violations.
19 There have been repeated attempts to work with Malaga to resolve the backlog of
20 violations subject to MMPs, but none of these attempts have been successful (see
21 Prosecution Team Evidence Exhibits 3, 6, 7, 9, and 11). The Central Valley Water Board
22 has made reasonable efforts toward resolving these violations, but has been met with
23 obstinance at every turn. The Prosecution Team's efforts have been reasonable given
24 the circumstances surrounding this case and the limited resources available to prosecute
25 the violations at issue.

26 **iii. Malaga Did Not Suffer Any Prejudice Due to The Delay**

27 For a successful assertion of the laches defense, Malaga, as the party raising the
28 defense, must also show that it was prejudiced by the delay. In the present case, the
nature of the self-reporting program negates Malaga's argument that the Regional

1 Board's delay was prejudicial.

2 In order to determine compliance with effluent limits established in Order No. 99-
3 100 and R5-2008-0033, Malaga is required to conduct monitoring and self-report the
4 results of that monitoring as specified in Monitoring and Reporting Program (MRP) (see
5 Prosecution Team Evidence Exhibits 1 and 2). The contents of these self-monitoring
6 reports contain the effluent limit violations that have occurred throughout the reporting
7 period. These self-monitoring reports are generated by Malaga, and violations contained
8 within them are immediately known or are immediately discoverable to Malaga or to its
9 representatives.

10 Furthermore, Malaga had notice of the types of violations that were subject to
11 MMPs in 2006 when the Regional Board adopted the 2006 ACLO. (Prosecution Team
12 Evidence Exhibit 38). The 2006 ACLO contains violations that are similar to the May
13 2013 ACLC. Malaga was aware of the types of violations that could subject it to liability
14 for mandatory minimum penalties and, in light of that information, it had the ability to
15 evaluate whether it was more beneficial for the City to continue to operate the wastewater
16 treatment plant under the status quo, or make improvements to the facility.

17 Furthermore, Malaga was not prejudiced by the Regional Board Prosecution
18 Team's failure to bring forward the penalties sooner, because the penalty amount for
19 each violation is mandated by the legislature. Malaga would owe the same amount if the
20 penalties whether the penalties had been brought in 2010 or in 2013. Furthermore,
21 Malaga was on notice of the Regional Board requirement to impose mandatory minimum
22 penalties, as evidenced by the 2006 ACLO.

23 In fact, Malaga is experiencing somewhat of a windfall by potentially paying the
24 mandatory minimum penalty amount in present day dollars rather than when the
25 violations occurred. The mandatory minimum penalty amount has never been adjusted to
26 account for inflation since the provisions were enacted in the 1999 – 2000 Legislative
27 session. Three thousand dollars (\$3,000) in yesterday's money is more valuable than
28 today, and certainly, that amount was more valuable to the City when the violations

1 occurred than it is today. Contrary to being prejudiced by the delay, Malaga actually
2 experienced a benefit in deferring payment of these mandatory minimum penalties during
3 the interim period when the violations occurred and when the Prosecution Team sought to
4 enforce those violations. For these reasons, Malaga did not suffer any prejudice due to
5 delay in prosecuting the violations.

6
7 **C. Serious and Chronic Violations of Water Code 13385 Listed In the May 2013
Complaint Are Subject to Mandatory Minimum Penalties**

8 **i. A Plain Meaning Reading of Water Code Sections 13385 (h) & (i)
9 Leave the State and Regional Boards Without Discretion to Issue
10 Mandatory Minimum Penalties for Certain Violations**

11 The Central Valley Water Board should apply the Plain Meaning Rule when
12 determining when mandatory minimum penalties should apply. “The cardinal rule of
13 statutory construction is to pursue the intention of the Legislature and effectuate the
14 purpose of the law.” (*S.D. Myers, Inc. v. City and County of San Francisco* (2003) 336
15 F.3d 1174, 1179.) In construing a statutory provision, “we presume the Legislature meant
16 what it said” and the plain meaning governs. (*People v. Snook* (1997) 16 Cal.4th 1210,
17 1215.) The language of section 13385(h) is clear. A MMP of three-thousand dollars
18 “shall be assessed for each serious violation.” (emphasis added.) Additionally, the
19 language of section 13385(i) is similarly clear, stating that a MMP of three-thousand
20 dollars “shall be assessed for each violation whenever the person does any of the
21 following four or more times in any period of six consecutive months...” (emphasis
22 added.) The use of the mandatory language “shall” indicates a legislative intent to
23 impose a mandatory duty; no discretion is granted. (*In re Luis B.* (2006) 142 Cal.App.4th
24 1117, 1123.)
25

26 The State Water Resources Control Board has supported this Plain Meaning
27 interpretation, finding that, “The Legislature removed discretion from the water boards
28 when it enacted MMPs in 1999...If violations occur that are subject to MMPs and an

1 administrative civil liability complaint is issued, any administrative action that results in a
2 fine lower than the minimum statutory requirement must be accompanied by a
3 determination either that the MMP was not correctly assessed or that the discharger
4 proved an appropriate affirmative defense.” (In the Matter of the Petition of Escondido
5 Creek Conservancy and San Diego Coast Keeper, Order WQ 2007-0010 at 5-6.) This
6 means that a Regional Board must issue MMPs unless there was an error in assessing
7 the violation as one that is subject to a MMP, or a discharger has met its burden of proof
8 demonstrating an affirmative defense.

9
10 **ii. For Effluent Limitation Violations Reported in Malaga’s Self-**
11 **Monitoring Reports as “Serious Violations” or “Chronic**
12 **Violations,” the Regional Board Must Impose a MMP of \$3,000**

13 The May 2013 ACLC includes a calculation of MMPs based on reported monitoring
14 results from 1 February 2004 Through 31 December 2012 as shown in excerpted self-
15 monitoring report pages from July 2007 through March 2011. (See Prosecution Team
16 Evidence Exhibits 19 through 37.) The excerpted reports indicate that effluent limitation
17 violations for electrical conductivity, pH, bromoform, biochemical oxygen demand,
18 settleable solids, ammonia, turbidity, and total coliform organisms occurred during the
19 relevant monitoring period. (See Attachment A to the May 2013 Complaint.) Malaga
20 submitted self-monitoring reports in accordance with its NPDES permit Monitoring and
21 Reporting Program (MRP) and the Standard Provisions. (See Prosecution Team Exhibits
22 1 and 2.) Specifically, Malaga submitted these reports pursuant to Title 40 sections
23 122.41(k) and 122.22 of the Code of Federal Regulations certifying under penalty of
24 perjury that the information submitted is true, accurate, and complete. .

25 **a. Serious Violations**

26 Attachment A to the May 2013 ACLC consolidates the violations noted in Malaga’s
27 self-monitoring reports into a chart that identifies the type of the effluent limitation
28

1 violation, and whether the violation is a “serious” or “chronic” violation subject to MMPs
2 under section 13385(h) and (i), respectively. Attachment A alleges that 8 “serious
3 violations” occurred between 1 February 2004 and 31 December 2012. Six of these
4 violations were exceedances of ammonia as nitrogen and settleable solids effluent
5 limitations. Because ammonia as nitrogen and settleable solids are considered Group I
6 pollutants, section 13385(h) defines a “serious violation” as any waste discharge that
7 violates the effluent limitations contained in the applicable waste discharge requirements
8 for a Group I pollutant by 40 percent or more. Two of the violations are exceedances of
9 bromoform effluent limitations. Because bromoform is considered a Group II pollutant,
10 section 13385(h) defines a “serious violation” as any waste discharge that violates the
11 effluent limitations contained in the applicable waste discharge requirements for a Group I
12 pollutant by 20 percent or more. The eight effluent limit violations that exceeded the
13 adopted effluent limit for Group I or Group II pollutants by the percentages specified
14 above must be assessed a MMP of \$3,000.

15
16 **b. Chronic Violations**

17 Attachment A also indicates there are 16 “chronic violations.” As stated above, a
18 MMP shall be imposed when a person violates a waste discharge effluent limitation four
19 or more times in any period of six consecutive months. The first three non-serious effluent
20 limitations violations within a 6 month period are not subject to MMPs. Accordingly,
21 Attachment A also lists at least six “exempt violations” that provide support for other
22 “chronic violations.”
23

24 Malaga has argued in its 23 May 2013 letter to the Prosecution Team that it
25 disagrees with the interpretation that “there must be a six month period without any
26 violation in order for a violation to be exempt under Water Code section 13385(i)(2)(A).”
27 Its argument is unclear, but counsel may be attempting to refer to the Central Valley
28

1 Water Board's long standing interpretation that a person who violates a waste discharge
2 requirement effluent limitation four or more times in any period of six consecutive months
3 has committed a "chronic violation" in accordance with Water Code section 13385(i). The
4 Central Valley Water Board does not interpret section 13385(i)(2)(A) to apply only when
5 waste discharge requirements are exceeded for same constituent, or to find that the six-
6 month period in which violations are judged is fixed and not rolling. This interpretation is
7 consistent with the court's interpretation of section 13385(i) in *City of Brentwood v.*
8 *Central Valley Regional Water Quality Control Board*, (2004) 123 Cal.App.4th 714 at 727-
9 733.

10
11 **iii. The Number of Violations Subject to Mandatory Minimum**
12 **Penalties Alleged In The Complaint is Erroneous and Should Be**
13 **Adjusted Upward to 26 for a Total Penalty of \$78,000**

14 The Prosecution Team noted that two violations in Attachment A were erroneously
15 listed as "exempt violations" when they should have been "chronic violations." These
16 include a pH exceedance on 25 November 2007 (CIWQS identification number 771679)
17 and a total coliform organism violation of 9 July 2010 (CIWQS identification number
18 878012). Evidence of these violations was included in Prosecution Team Evidence
19 Submission Exhibits 22 and 35.

20 The Prosecution Team fully admits its own error in not identifying these violations
21 correctly in the Complaint. However, Malaga has been put on notice of these violations in
22 both Attachment A to the ACLC and the Prosecution Team's evidence submission.
23 Malaga has never argued the validity of these violations or disputed that they occurred.
24 In the interest of judicial efficiency, the Prosecution Team asks that the Board consider
25 these additional violations in issuing its Administrative Civil Liability Order.

26 **D. Malaga Has Not Asserted any Valid Affirmative Defenses or Completed A**
27 **Compliance Project To Address The Violations And is Therefore Subject to**
28 **Mandatory Minimum Penalties**

1 **i. Violations At Issue In the 2013 ACLC Were Not Previously**
2 **Addressed by the 2006 ACLO and Associated Compliance**
3 **Projects**

4 Malaga also argues in its 23 June 2013 letter and its Points and Authorities that
5 “many of the alleged violations contained in Attachment A to the Complaint are the
6 subject of a Compliance Project and/or a pollution prevention plan that your agency
7 expressly agreed could be performed in lieu of any MMP.” There is no basis for this claim
8 in the evidence submitted for this proceeding or the regulatory history between Malaga
9 and the Central Valley Water Board.

10 Water Code section 13385(k) allows a Regional Board to allow a publically owned
11 treatment works serving a small community to complete a Compliance Project in lieu of
12 assessing all or a portion of the MMPs. Water Code section 13385(k)(1) demands that a
13 Regional Board may only allow the MMPs to be addressed by a Compliance Project if the
14 it makes findings demonstrating all of the following:

- 15 (a) The compliance project is designed to correct the violations within five
16 years.
17
18 (b) The compliance project is in accordance with the Enforcement Policy of
19 the State Water Board, excluding any provision that is inconsistent with
20 this section.
21
22 (c) The publically owned treatment works has prepared a financing plan to
complete the compliance project.

23 Before MMPs may be resolved through a Compliance Project, a Regional Board must
24 make the findings required by Water Code Section 133385(k)(1)(A)-(C) and memorialize
25 the resolution of the MMPs in an Order of the Board. A discharger cannot simply refer to
26 an old Compliance Project adopted by a Regional Board and argue that all subsequent
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1 MMPs are resolved through the old Order. That is exactly what Malaga is attempting to
2 do.

3 In 2006 the Central Valley Water Board adopted ACLO R5-2006-0003
4 (Prosecution Team Evidence Exhibit 38). The 2006 ACLO allowed Malaga to complete a
5 Compliance Project in lieu of paying any of the \$1,107,000 in MMPs due for 376
6 violations of effluent limitations. Attachment A to the 2006 ACLO shows that only
7 violations that occurred between that occurred between 1 February 2000 and 1 February
8 2004 were addressed by that Order. Malaga now argues that these same Compliance
9 Projects and the 2006 Order address the violations at issue in the May 2013 Complaint,
10 which covers violations that occurred from 1 February 2004 until 31 December 2012, a
11 different time period altogether. Malaga cannot ask the Central Valley Water Board to
12 retroactively include the new violations as part of the 2006 Order. The Central Valley
13 Water Board can only approve a Compliance Project for MMPs if it makes all of the
14 findings required by Water Board section 13385(k) and specifically identifies the new
15 violations in a new order.
16

17 **ii. The Central Valley Water Board Should Consider Recent**
18 **Memoranda on Small Community Status Issued By Regional**
19 **Board and State Water Board Staff When Determining if Malaga**
20 **is a Small Community**

21 In 2010 the State Water Board adopted the Water Quality Enforcement Policy.
22 Pages 23-25 of the Enforcement Policy set new standards for the State and Regional
23 Boards to consider when determining whether a community meets the statutory definition
24 of a “small community” under Water Code section 13385(k)(2). On 13 September 2012
25 the Central Valley Water Board requested a formal consultation from the State Water
26 Board to determine if Malaga met the statutory requirements (Prosecution Team
27 Evidence Exhibit 13) because most of its revenue came from industrial sewer users. In
28 its response, the State Water Board notes that “Water Code Section 13385(k)(2) and the

1 Enforcement Policy provide the Regional Boards with the discretion to authorize
2 Compliance Projects in lieu of MMPs, but this approach is not mandatory. Given the
3 data...which shows that approximately 92% of [Malaga's] revenue comes from non-
4 residential sources, it would not be unreasonable for the Regional Board to pursue a
5 MMP in this case (Prosecution Team Evidence Exhibit 14, p. 4)." The Prosecution Team
6 urges the Central Valley Water Board to review these memoranda when determining
7 whether or not it is equitable to allow Malaga to complete a Compliance Project in lieu of
8 paying MMPs.

9
10 **E. Malaga Failed To Assert Any Affirmative Defenses to Violations At
Issue in the Complaint**

11 Counsel further argues that the "Prosecution Team's own evidence establishes its
12 implied admission of truth of various declarations and assertions made by Malaga in
13 response to the series of NOVs issued that no violation has occurred. Malaga makes
14 several discursive arguments that the Regional Board has somehow previously agreed
15 with its argument that the violations at issue in the May 2013 Complaint did not occur
16 because it either failed to address arguments made in response to a Notice of Violation
17 (NOV), or because the Regional Board made adjustments to some of the violations in
18 prior NOVs as a result of his response (Prosecution Team Evidence Exhibit 9). The
19 Central Valley Water Board issues NOVs in order to provide regulated parties with a list of
20 specific violations that are subject to penalties, a description of the potential enforcement
21 actions available to address non-compliance, and an opportunity for dischargers to
22 correct the violations cited in the NOV as well as prevent future similar violations. The
23 Central Valley Water Board issued NOVs to Malaga on 10 July 2008, 8 July 2010, 5
24 November 2010, and 9 December 2011 (Prosecution Team Evidence Exhibits 3, 7, 9,
25 and 11). These NOVs were issued in order for Malaga to be given an opportunity to
26 respond to the numerous violations subject to MMPs, correct any errors in the list of
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1 violations, and make necessary changes to their operation that would protect water
2 quality.

3 Contrary to counsel's claim, a NOV does not open Water Board staff up to a
4 requirement that it must formally respond to obtuse arguments written in response to an
5 NOV or forever waive its right to prosecute those violations. Malaga has repeatedly
6 submitted several condescending, abusive, and ill-defined responses to the various NOVs
7 issued by the Central Valley Water Board staff. In all of these responses it has never put
8 forth one iota of evidence that it did not pollute the waters of the state of California in
9 excess of its permit limits. The Prosecution Team did not capitulate to validity of Malaga's
10 arguments; it simply chose not to engage Malaga's counsel in name-calling (Malaga
11 Exhibits E and F).
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CONCLUSION

Malaga has not presented any factual challenges toward the alleged violations at issue in the May 2013 Complaint. Malaga has not satisfied this burden of proof demonstrating that an appropriate affirmative defense or exemption to the violations in the ACLC applies. Instead, it relies on procedural challenges aimed at attacking the Board's Hearing Procedures and equitable challenges that are not supported by statute or case law. In fact, Malaga has committed 26 violations of the effluent limitations contained in Orders 99-100 and R5-2008-0033 that are subject to MMPs. The Regional Water Board must abide by its legislative mandate and impose administrative civil liability of \$78,000 in mandatory minimum penalties against Malaga for its violations of water quality protection law.

Respectfully submitted,

____electronically signed by_____

Date: July 2, 2013

Ellen Howard
Counsel for the Prosecution Team