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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SACRAMENTO

15 CALIFORNIA SPORTFISHING
16 PROTECTION ALLIANCE, a non-profit
17 corporation;

18 Petitioner,

19 vs.

20 CALIFORNIA REGIONAL WATER
21 QUALITY CONTROL BOARD,
22 CENTRAL VALLEY REGION, a
23 California State Agency,

24 Respondent,

25 EL DORADO IRRIGATION DISTRICT,
26 a public agency,

Real Party In Interest.

Case No. 34-2009-80000309

PETITIONER'S MEMORANDUM IN
SUPPORT OF MOTION TO STRIKE THE
RETURN OF RESPONDENT REGIONAL
WATER QUALITY CONTROL BOARD
AND FOR ORDER DIRECTING
COMPLIANCE WITH WRIT

Date: December 2, 2011

Time: 9:00 a.m.

Dept.: Courtroom No. 29

Judge: Hon. Timothy M. Frawley

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1 **I. REQUESTED RELIEF**

2 Petitioner California Sportfishing Protection Alliance’s (“Petitioner”) moves to strike
3 the return of Respondent Central Valley Regional Water Quality Control Board (“Respondent”)
4 and for an order directing compliance with the writ issued in this case.

5 On March 28, 2011, this Court entered its Judgment Granting In Part And Denying In
6 Part Petition For Writ Of Mandamus (“Judgment”) in this case. (A true and correct copy of the
7 Judgment is attached as Exhibit A to the Declaration of Erik M. Roper In Support Of
8 Petitioner’s Motion To Strike Return (“Roper Decl.”).) On July 25, 2011, Respondent filed its
9 Return On Petition For Writ Of Mandate (“Return”). Respondent asserts that its Return and the
10 revised National Pollution Discharge Elimination System (“NPDES”) permit Waste Discharge
11 Requirements Order No. R5-2011-0038 (the “Revised Permit”) are “in accord with the
12 principles announced in this Court’s prior ruling.” (Return, at 2:4-5.) However, as discussed
13 below, the Revised Permit attached and incorporated by reference to Respondent’s Return
14 amply demonstrates that Respondent has chosen to willfully disobey the express commands
15 issued to it by this Court.

16 The Judgment orders Respondent to, *inter alia*, develop an effluent limitation for
17 aluminum and then incorporate that effluent limitation for aluminum into Waste Discharge
18 Requirements Order No. R5-2008-0173 (the “2008 Permit”). Specifically, with respect to
19 developing an effluent limitation for aluminum, the Court ordered Respondent to either use the
20 EPA chronic criterion for aluminum, or develop a site-specific standard for aluminum sufficient
21 to protect freshwater aquatic life. (See Roper Decl., Exh. A, at 18:24-26.) Respondent has
22 disobeyed this command.

23 Additionally, with respect to Petitioner’s fourth cause of action related to the alleged
24 violation of 40 Code of Federal Regulations (“C.F.R.”) § 131.38(c)(4), disputing Respondent’s
25

1 interpretation of the phrase “actual ambient hardness of the surface water”, the Court ordered
2 Respondent to “reconsider the calculation of the effluent limitations for the hardness-dependent
3 metals in light of this Court’s ruling.” (See Roper Decl, Exh. A, at 19:3-4.) Specifically, the
4 Court’s ruling instructed Respondent that in reconsidering the hardness value used in this
5 calculation, Respondent “may use the hardness of the receiving water before or after it is mixed
6 with the effluent, **but cannot use the hardness of the effluent alone.**” (emphasis added) (*Id.*, at
7 16:16-17.) Respondent has disobeyed this command by using the hardness of the effluent alone
8 to develop effluent limitations for the hardness-dependent metals in the Revised Permit.

9 Finally, with respect to Petitioner’s sixth cause of action related to the alleged violation
10 of California Water Code (“Water Code”) ¹ § 13176 (failure to require that monitoring for pH
11 and temperature be conducted by a certified laboratory), the Court ordered Respondent to
12 “consider whether it is legally and factually possible for the District to comply with the
13 requirements of Water Code section 13176 either (i) by having its on-site laboratory re-certified
14 or (ii) by having certified laboratory personnel travel to the District’s facility and conduct the
15 testing on site.” (*Id.*, at 19:7-10.) As explained further below, the Revised Permit’s discussion
16 of Respondent’s analysis of whether it is legally and factually possible for the District to
17 comply with the requirements of Water Code § 13176 plainly demonstrates Respondent’s lack
18 of any good faith consideration of any evidence or arguments contrary to its desire to illegally
19 exempt the District from the clear requirement imposed by § 13176. Respondent has therefore
20 also disobeyed the Court’s order to undertake a good faith legal and factual compliance analysis
21 concerning the Water Code.

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23 //

24
25 _____
26 ¹ All references to California statutory authority in this memorandum shall be references to the California Water Code, unless otherwise noted.

1 Based on the foregoing, Petitioner requests that the Court strike Respondent's Return
2 and order Respondent to void and set aside those portions of the Revised Permit that contravene
3 the Judgment and Peremptory Writ of Mandate issued by this Court on March 28, 2011.

4 **II. FACTUAL BACKGROUND**

5 On July 25, 2011, Respondent filed its Return, which attached and incorporated by
6 reference the Revised Permit. (A true and correct copy of Respondent's Return and the Revised
7 Permit attached thereto are attached as Exhibit B to the Roper Decl.)

8 **III. ARGUMENT**

9 **A. RESPONDENT DID NOT COMPLY WITH THE JUDGMENT AND**
10 **WRIT OF MANDATE REGARDING THE DEVELOPMENT OF THE**
11 **REVISED PERMIT'S EFFLUENT LIMITATION FOR ALUMINUM**

12 With respect to developing an effluent limitation for aluminum, the Court ordered
13 Respondent to either use the EPA chronic criterion for aluminum, or develop a site-specific
14 standard for aluminum sufficient to protect freshwater aquatic life. (Roper Decl., Exh. A, at
15 18:24-26.) Respondent disobeyed this command and did neither of these things.

16 Respondent did not use the EPA chronic criterion for aluminum of 87 µg/L; rather, it
17 used the Secondary Maximum Contaminant Level Consumer Acceptance Limit for aluminum,
18 of 200 µg/L ("Secondary MCL"). (Roper Decl., Exh. B, at F-37 through F-38.) Respondent's
19 application of the Secondary MCL in the Revised Permit is particularly shocking given that in
20 its Judgment this Court unequivocally stated, in relevant part:

21 The Secondary MCL is a drinking water standard promulgated by the
22 State Department of Public Health. There is no evidence that achieving a
23 human drinking water standard is sufficient to meet the State narrative
24 criterion that waters be maintained free of toxic substances in
25 concentrations that produce detrimental physiological responses in
26 *aquatic life*. (emphasis in original)

(Roper Decl., Exh. A, at 10:4-7.)

1 As Respondent did not use the EPA chronic criterion for aluminum, the Court must
2 determine whether Respondent fulfilled its obligation to develop a site-specific standard for
3 aluminum sufficient to protect freshwater aquatic life. Given what the Judgment expressly
4 notes about the obvious impropriety of using the Secondary MCL in protecting aquatic life,
5 Respondent's use of the Secondary MCL in the Revised Permit, in itself constitutes plain
6 evidence that Respondent has disobeyed the Court. However, assuming *arguendo* that the
7 Court is not fully persuaded, there are myriad other reasons why the Court should find that
8 Respondent has disobeyed the commands of this Court with respect to development of an
9 effluent limitation for aluminum and issue an order mandating compliance.

10 For example, notwithstanding Respondent's misleading assertion that "[s]ite-specific
11 data and other relevant information for aluminum...were used..." (see Roper Decl., Exh, B at
12 2, Finding No. 5, of order prefacing Revised Permit), in fact, Respondent did not use *any*²
13 relevant site specific data. (*Id.*, at F-36 through F-37.) While the Revised Permit enumerates a
14 list of sites where site-specific studies have been conducted, and further references literature
15 recommended for guiding the development of site-specific criteria, in actuality the Revised
16 Permit lacks any site-specific data for aluminum toxicity within Deer Creek. (*Id.*, at F-35
17 through F-37.) How can Respondent develop a site-specific objective without any site specific
18 data?

19 **1. RESPONDENT FAILED TO COMPLY WITH FEDERAL**
20 **REGULATIONS AND STATE POLICIES GOVERNING**
21 **DEVELOPMENT OF SITE-SPECIFIC STANDARDS**

22 In short, Respondent cannot, because doing so is both factually and legally impossible.
23 Both federal regulations and State policies specify the minimum requirements for developing
24

25 ² Specifically, see Table F-13, entitled, Central Valley Regional Site Specific Toxicity Data.
26 Notably absent from Table F-13 is *any* toxicity data from Deer Creek. (Exh. B to the Roper
Decl., at F-36.)

1 site-specific standards and objectives -- minimum requirements that Respondent continues to
2 ignore, despite the Judgment’s clear mandate.

3 For example, the Water Quality Control Plan for the California Regional Water Quality
4 Control Board, Central Valley Region (“the Basin Plan”) provides, in relevant part, that:

5 All waters shall be maintained free of toxic substances in concentrations
6 that produce detrimental physiological responses in human, plant, animal,
7 or aquatic life. ... Compliance with this objective will be determined by
8 analyses of indicator organisms, species diversity, population density,
9 growth anomalies, and biotoxicity tests....

10 (Basin Plan, III-8.01, AR004491.)

11 Nowhere in the Revised Permit is there any evidence that Respondent studied Deer
12 Creek, *both upstream and downstream* of the wastewater treatment facility, to gather
13 meaningful data on indicator organisms, species diversity, population density, growth
14 anomalies, or, most importantly with respect to establishing an effluent limit for aluminum,
15 biotoxicity tests. Ergo, the Revised Permit violates the Basin Plan.

16 The Revised Permit also violates the State’s Policy for Implementation of Toxics
17 Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, 2005, (“SIP”
18 or “State Implementation Plan”). The SIP imposes requirements Respondent must follow in the
19 development of site-specific objectives. (SIP, at § 5.2, AR004305-004307.) SIP § 5.2 states, in
20 relevant part, that “[w]ater quality objectives shall be developed in a manner consistent with
21 State and federal law and regulations.” (*Id.*, at AR004307.) Respondent did not develop the
22 water quality objective for aluminum in the Revised Permit in a manner consistent with State
23 and federal law and regulations. For example, Water Code § 13241 provides, in relevant part,
24 that:

25 Factors to be considered by a regional board in establishing water quality
26 objectives shall include, but not necessarily be limited to, all of the
following:

....

1 (b) *Environmental characteristics of the hydrographic unit*
2 *under consideration*, including the quality of water available
3 thereto.

4

5 (emphasis added). Respondent failed to conduct *any* studies on, *inter alia*, how aluminum
6 *actually* impacts aquatic life currently residing in Deer Creek. Thus, Respondent violated State
7 law by failing to consider the environmental characteristics of the hydrographic unit under
8 consideration.

9 Respondent also failed to comply with myriad federal regulations governing the proper
10 development of site-specific objectives. 40 C.F.R. § 131.1 “describes the requirements and
11 procedures for developing, reviewing, revising, and approving water quality standards by the
12 States as authorized by section 303(c) of the Clean Water Act.” Here, 40 C.F.R. § 131.5
13 requires Respondent to have submitted its proposed site-specific water quality standard for
14 aluminum to the United States Environmental Protection Agency (“USEPA”) for USEPA’s
15 review and approval. Moreover, § 131.5 provides, in relevant part, that USEPA’s “review
16 involves a determination of:

- 17 (1) Whether the State has adopted water uses which are consistent with
18 the requirements of the Clean Water Act;
19 (2) Whether the State has adopted criteria that protect the designated
20 water uses;
21 (3) Whether the State has followed its legal procedures for revising or
22 adopting standards;
23 (4) Whether the State standards which do not include the uses specified in
24 section 101(a)(2) of the Act are based upon appropriate technical and
25 scientific data and analyses....”

26 (40 C.F.R. § 131.5.) Respondent has violated federal regulations by failing to submit its
proposed site-specific water quality standard for aluminum to the USEPA for review and
approval.

1 Additionally, 40 C.F.R. § 131.6 sets forth the minimum requirements for such water
2 quality standards submissions by state entities to the USEPA:

3 The following elements must be included in each State's water quality
4 standards submitted to EPA for review:

5 (a) Use designations consistent with the provisions of sections 101(a)(2)
6 and 303(c)(2) of the Act.

7 (b) Methods used and analyses conducted to support water quality
8 standards revisions.

9 (c) *Water quality criteria sufficient to protect the designated uses.*

10 (d) An antidegradation policy consistent with §131.12.

11 (e) Certification by the State Attorney General or other appropriate legal
12 authority within the State that the water quality standards were duly
13 adopted pursuant to State law.

14 (f) General information which will aid the Agency in determining the
15 adequacy of the scientific basis of the standards which do not include the
16 uses specified in section 101(a)(2) of the Act as well as information on
17 general policies applicable to State standards which may affect their
18 application and implementation.

19 (40 C.F.R. § 131.6.) Respondent is in violation of 40 C.F.R. § 131.6 for the same reason it is in
20 violation of 40 C.F.R. § 131.5, i.e., failure to submit its proposed site-specific standard for
21 aluminum to the USEPA. Even if Respondent had submitted its proposed site-specific water
22 quality standard for aluminum to the USEPA, in all likelihood it would never have been
23 approved, given that Respondent erroneously applies the Secondary MCL in the Revised
24 Permit's site-specific water quality standard for aluminum. This conclusion is compelled by the
25 Court's own earlier findings:

26 The Secondary MCL is a drinking water standard promulgated by the
State Department of Public Health. There is no evidence that achieving a
human drinking water standard is sufficient to meet the State narrative
criterion that waters be maintained free of toxic substances in
concentrations that produce detrimental physiological responses in
aquatic life.

1 (emphasis in original) (Roper Decl., Exh. A at 10:4-7.)

2 Finally, Respondent is also in violation of 40 C.F.R. § 131.11(a)(1), which states:

3 States must adopt those water quality criteria that protect the designated
4 use. Such criteria must be based on sound scientific rationale and must
5 contain sufficient parameters or constituents to protect the designated use.
6 For waters with multiple use designations, *the criteria shall support the
7 most sensitive use.*

8 (emphasis added) Recall that the Basin Plan requires that “waters shall be maintained free of
9 toxic substances in concentrations that produce detrimental physiological responses in human,
10 plant, animal, or aquatic life.” (Basin Plan, III-8.01, AR004491.) Here, the most sensitive
11 designated use of Deer Creek is its use as habitat for aquatic life. However, as the Court has
12 already explained, Respondent’s use of a drinking water standard to develop an effluent
13 limitation for aluminum fails to comply with both State and federal legal requirements.

14 **2. RESPONDENT FAILED TO COMPLY WITH THE JUDGMENT
15 AND 40 C.F.R. § 131.11(a)(1) BY AGAIN IMPROPERLY
16 RELYING ON THE MANIFESTLY INAPPLICABLE ARID WEST
17 STUDIES IN ITS DEVELOPMENT OF AN ALUMINUM LIMIT**

18 Moreover, as set forth in 40 C.F.R. 131.11(a)(1), any site-specific water quality criteria
19 “must be based on sound scientific rationale....” However, the Revised Permit amply shows
20 that Respondent failed to overcome that legal hurdle as well. In failing to base the limit for
21 aluminum on any Deer Creek-specific data regarding the toxicological impact that aluminum
22 would impose upon aquatic species in Deer Creek, Respondent failed to base the Revised
23 Permit’s site-specific water quality standard for aluminum on *sound* scientific rationale.
24 Respondent’s continuing heavy reliance on the Arid West Water Quality Research Project and
25 its supporting studies (“Arid West Studies”) is further inconsistent with the Judgment.³ As the

26 ³ For example, with respect to Respondent’s use of the Arid West Project’s studies in the
development of a site-specific effluent standard for aluminum, the Revised Permit states,
“...since Deer Creek has the same characteristics as the Arid West surface waters, Central
Valley Water Board staff compared the ambient water quality characteristics of Deer Creek to

1 Court has already explained to Respondent, its “reliance on the Arid West Report appears to be
2 misplaced...because the geographic region to which its findings apply excludes the area at issue
3 here.” (Roper Decl., Exh. A, at 9:22-24.) Accordingly, Respondent’s reliance on the Arid
4 West Studies in its development of a site-specific water quality for aluminum in the Revised
5 Permit violates 40 C.F.R. § 131.11(a)(1) because such use was neither sound nor scientific
6 enough to constitute a rationale.

7 **3. THE EPA CHRONIC CRITERION FOR ALUMINUM IS**
8 **APPLICABLE BECAUSE RESPONDENT HAS**
9 **ACKNOWLEDGED THAT TROUT RESIDE IN DEER CREEK**

10 Respondent also compares the fish populations in Arid West Studies water bodies vis-à-
11 vis fish in Deer Creek in an effort to justify its reliance on the Arid West Studies. As an initial
12 matter, Respondent explains in the Revised Permit that the USEPA chronic criterion for
13 aluminum was derived from studies of water bodies populated by brook trout and striped bass,
14 *species not found in Deer Creek.* (Roper Decl., Exh. B at F-30.) As a further justification of its
15 use of the Arid West Studies instead of the USEPA chronic criterion for aluminum, Respondent
16 asserts that “Deer Creek does not support a resident, self-sustaining population of rainbow trout,
17 *which exhibits similar sensitivities as brook trout.*” (emphasis added) (*Id.*, at F-34.) It is worth
18 noting that Respondent based its conclusion that Deer Creek does not support a resident, self-
19 sustaining population of rainbow trout *on only one study*, conducted some unknown distance
20 “downstream of the discharge....” (*Id.*, at F-32.) However, much more evidence in the record
21 supports a contrary conclusion.

22 //

23
24 those studied in the Arid West Project. ... Therefore, the [Arid West Project] Technical
25 Report’s NAWQC [read: National Recommended Ambient Water Quality Criteria] may be
26 appropriate criteria to protect the aquatic life in Deer Creek.” (Roper Decl., Exh. B, at F-31
through F-32.)

1 For example, the permit that was in place prior to the 2008 Permit was Waste Discharge
2 Requirements, Order No. R5-2002-0210 (the “2002 Permit”). The 2002 Permit adopted by
3 Respondent states that:

4 **Preservation and Enhancement of Fish, Wildlife and Other Aquatic**
5 **Resources.** Deer Creek flows to the Cosumnes River. *The California*
6 *Department of Fish and Game (DFG) has verified* that the fish species
7 present in Deer Creek and downstream waters are consistent with both
8 cold and warm water fisheries, that there is a potential for anadromous
9 fish migration necessitating a cold water designation and *that trout, a*
10 *cold water species, have been found both upstream and downstream of*
11 *the wastewater treatment plant.* The Basin Plan (Table II-1) designates
12 the Cosumnes River as being both a cold and warm freshwater habitat.
13 Therefore, pursuant to the Basin Plan (Table II-1, Footnote (2)), the cold
14 designation applies to Deer Creek.

15 (emphasis added) (See Waste Discharge Requirements, Order No. R5-2002-0210, at
16 AR001252, a true and correct copy of the relevant portions of which is attached as Exhibit C to
17 the Roper Declaration, filed and served herewith) It is worth noting that the 2002 Permit was
18 amended and re-adopted by Respondent on January 25, 2007. (Roper Decl., at ¶ 5.) Thus, in
19 2007, Respondent acknowledged that trout reside in Deer Creek “both upstream and
20 downstream” of the wastewater treatment plant.

21 Apparently, Respondent now believes the contrary to be true -- although it lacks any
22 evidence to support its belief. However, Respondent fails to provide any explanation in the
23 Revised Permit as to why the biological diversity in Deer Creek has supposedly changed so
24 dramatically in such a short time span. The conclusion that Respondent arbitrarily and
25 capriciously based this conclusion on a lack of substantial evidence is further compelled by the
26 fact that, as Respondent acknowledges, the sole study it relied upon in making this
determination only examined Deer Creek biology *downstream* of the treatment plant, whereas
the evidence underlying Respondent’s 2007 position on this issue was based on California
Department of Fish and Game (“DFG”) findings that included observations of Deer Creek *both*

1 upstream and downstream of the wastewater treatment plant. Given that nothing in the record
2 shows Respondent to have considered any recent studies of biological diversity *upstream* from
3 the wastewater treatment plant, Respondent's stubborn reliance on the Arid West Studies is
4 clearly erroneous, arbitrary and capricious, and violates the Judgment.

5 Furthermore, Petitioner's consultant (who was Respondent's Senior Engineer in charge
6 of the NPDES permitting process for the Deer Creek facility when the 2002 Permit was drafted
7 and adopted by Respondent) has personal knowledge of the fact that rainbow trout live in Deer
8 Creek. (See, Declaration of Richard McHenry In Support Of Petitioner's Motion To Strike
9 Return ("McHenry Decl."), at ¶¶ 6-8.)

10 Based on all of the foregoing, this Court should find that Respondent has violated the
11 Judgment with respect to the aluminum issue and order Respondent to amend the Revised
12 Permit to make 87 µg/L (i.e., the USEPA chronic criterion for aluminum) the effluent limit for
13 aluminum. Allowing Respondent another chance to adopt a "site-specific" limitation for
14 aluminum that is (a) actually not site-specific, and (b) not protective of trout, would likely result
15 in the Deer Creek facility discharging effluent with aluminum at a concentration that is toxic
16 enough to kill aquatic life in Deer Creek and thereby fulfill the prophecy that the rainbow trout
17 population currently found therein will not be self-sustaining moving forward.

18
19 **B. RESPONDENT DID NOT COMPLY WITH THE JUDGMENT AND**
20 **WRIT OF MANDATE REGARDING HARDNESS FOR CALCULATING**
21 **HARDNESS-DEPENDENT METALS CRITERIA**

22 The Court's Judgment and Peremptory Writ of Mandate provided Respondent extremely
23 clear marching orders describing exactly which portions of Deer Creek Respondent could use to
24 derive the hardness value used in its calculation of hardness-dependent metals criteria. To wit,
25 the Court's Judgment states:
26

1 For the determination of the CTR hardness-dependent metals
2 criteria, the Board has the discretion to use either the upstream receiving
3 water values or, the hardness values of the downstream mixture of the
4 effluent and the receiving water, whichever is most protective.

5 **The Court does not agree, however, that the Board has**
6 **discretion to calculate the hardness-dependent metals criteria based**
7 **on the hardness values of the effluent alone. The Court finds the**
8 **language of the SIP (“receiving water”) and the CTR (“surface**
9 **water”) preclude the Board from calculating the hardness-dependent**
10 **metals criteria based on the hardness levels of the effluent.**⁴ The
11 Board may use the hardness of the receiving water before or after it is
12 mixed with the effluent, but cannot use the hardness of the effluent alone.

13 The Board argues that using the hardness levels of the discharge
14 will, at least in certain circumstances, be “fully protective” of
15 downstream beneficial uses. **Whether or not this is true, it is**
16 **irrelevant. The plain language of the CTR and the SIP require the**
17 **criteria to be based on the hardness of the surface/receiving water,**
18 **not the effluent discharge.**

19 (emphasis added) (Roper Decl., Exh. A at 16:9-21.)

20 Notwithstanding the Court’s extremely clear order on how Respondent may and may not
21 calculate hardness, Respondent has violated the Court’s Judgment and Peremptory Writ by
22 doing *exactly* what the Court ordered it not to do. To wit, the Revised Permit states:

23 The **effluent hardness ranged from 42 mg/L to 100 mg/L**, based on
24 157 samples from January 2005 to December 2007. The **upstream**
25 **receiving water hardness varied from 71 mg/L to 290 mg/L**, based on
26 156 samples, and the downstream receiving water hardness ranged from
61 mg/L to 230 mg/L, based on 156 samples, during the same period.
Under the effluent dominated condition, the reasonable worst-case
downstream ambient hardness is 42 mg/L. As demonstrated in the
example shown in Table F-4, below, using this hardness to calculate
the ECA for all Concave Down Metals will result in water quality-
based effluent limitations that are protective under all flow
conditions, from the effluent dominated condition to high flow
conditions. As demonstrated in the example shown in Table F-4, below,
using this hardness to calculate the ECA for all Concave Down Metals
will result in water quality-based effluent limitations that are protective

⁴ Footnote 8, from the Court’s Judgment, states: “**Likewise, it cannot use the hardness values of the “receiving water” at the end of the discharge pipe, because this is, for all intents and purposes, the effluent.**” (emphasis added) (*Ibid.*)

1 under all flow conditions, from the effluent dominated condition to high
2 flow conditions.

3 (Roper Decl., Exh. B at F-20.) In short, the Court told Respondent that it may not calculate
4 hardness-dependent metals criteria based solely upon the hardness of the effluent, and yet that is
5 precisely what Respondent did in its development of the Revised Permit. Notwithstanding that
6 Tables F-4 and F-5 in the Revised Permit include a misleading heading proclaiming “Fully
7 Mixed Downstream Ambient Conditions” above various enumerated hardness values, the fact
8 that Respondent used the proscribed hardness value of the effluent alone in its calculation of
9 hardness-dependent metals criteria is evidenced by, *inter alia*, both Footnote No. 1 to Table F-4
10 and Footnote No. 2 to Table F-5. Footnote No. 1 to Table F-4 states: “ECA calculated using
11 Equation 1 (WER = 9.7) for chronic criterion at the reasonable worst-case ambient hardness (42
12 mg/L.” (emphasis added) (*Id.*, at F-21.) Footnote No. 2 to Table F-4 states: “ECA calculated
13 using Equation 1 for chronic criterion at the reasonable worst-case ambient hardness (42
14 mg/L.” (emphasis added) (*Id.*, at F-22.) In other words, Respondent used the hardness value
15 of 42 mg/L that was derived entirely from the effluent, which is *exactly* what this Court told
16 Respondent it could not do.

17 In the Revised Permit, Respondent essentially attempts to re-litigate this issue by
18 explaining all the reasons why it thinks it should be able to use the hardness value of the
19 effluent alone. However, this Court has already very clearly communicated to Respondent that
20 such justifications are “irrelevant.” (Roper Decl., Exh. A, at 16:20.) Accordingly, Respondent
21 has violated the Court’s Judgment and Peremptory Writ of Mandate and should be ordered to
22 amend the Revised Permit by calculating hardness-dependent metals criteria in a manner that is
23 *actually* consistent with the Court’s Judgment and Peremptory Writ of Mandate.

24 //

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1 **C. RESPONDENT DID NOT COMPLY WITH THE JUDGMENT**
2 **AND WRIT OF MANDATE REGARDING ITS ASSESSMENT OF**
3 **LABORATORY CERTIFICATION OPTIONS**

4 The Court ordered Respondent to “consider whether it is legally and factually possible
5 for the District to comply with the requirements of Water Code section 13176 either (i) by
6 having its on-site laboratory re-certified or (ii) by having certified laboratory personnel travel to
7 the District’s facility and conduct the testing on site.” (See Exh. A to the Roper Decl., at 19:7-

8 For the reasons set forth in Section VI.B.2. of the Fact Sheet,
9 [Respondent] finds that the District does not have an on-site laboratory to
10 recertify; and that it is not legally or factually possible for the District to
11 comply with Water Code section 13176 by having its off-site laboratory
12 certified for pH and temperature, by having certified laboratory personnel
13 travel to the Deer Creek wastewater treatment plant (WWTP) and
14 conduct the testing on site, or by any other means.

15 (Roper Decl., Exh. B, at Revised Permit page 2, Finding No. 6.) In Section VI.B.2. of the
16 Revised Permit’s Fact Sheet, Respondent raises several arguments in support of the proposition
17 that it is legally and/or factually impossible for the District to comply with Water Code § 13176.
18 Each of these are addressed in turn below.

19 First, Respondent cites Water Code Section 13360 for the proposition that State law
20 prohibits Respondent from specifying “the District’s manner of compliance with any permit
21 requirement.” In fact, Section 13360 provides, in relevant part:

22 (a) No waste discharge requirement or other order of a regional board or
23 the state board or decree of a court issued under this division shall specify
24 the design, location, type of construction, or particular manner in which
25 compliance may be had with that requirement, order, or decree, and the
26 person so ordered shall be permitted to comply with the order in any
 lawful manner.

 (b) If the court, in an action for an injunction brought under this division,
 finds that the enforcement of an injunction restraining the discharger
 from discharging waste would be impracticable, the court may issue any
 order reasonable under the circumstances requiring specific measures to

1 be undertaken by the discharger to comply with the discharge
2 requirements, order, or decree.

3 Therefore, while Respondent is correct to assert that Section 13360(a) prevents Respondent
4 from prescribing in the Revised Permit exactly how the District should comply with the
5 requirement to have all pH and temperature monitoring conducted by a certified laboratory, the
6 contention is irrelevant. The Court asked Respondent to consider whether it is legally or
7 factually impossible for *the District* to comply with Section 13176, not whether Respondent has
8 the legal authority to order the District to do any number of things it could do to comply with
9 the law. It is the District's ability to comply with the Water Code that is at issue, not the ability
10 of Respondent to specify the means of compliance. This argument in reliance on Section 13360
11 also misses the mark to the extent it fails to account for subsection (b), which provides the Court
12 ample authority to "issue any order reasonable under the circumstances requiring specific
13 measures to be undertaken by the discharger to comply with the discharge requirements, order,
14 or decree." Thus, Section 13360 does not make it legally or factually impossible for the District
15 to comply with Section 13176 at all. Put another way, all Respondent has to do is issue a Waste
16 Discharge Requirements Order that requires the District to have all required sampling
17 conducted by a certified laboratory; how the District chooses to comply with the law is entirely
18 up to the District.

19 Next, Respondent notes that it is the Department of Public Health, not Respondent, that
20 is the state agency responsible for regulating certified laboratories. (Roper Decl., Exh. B at F-
21 66.) Thus, Respondent correctly asserts that it cannot require any laboratory to obtain
22 certification to perform pH or temperature analyses. However, again, that is completely
23 irrelevant given that the Court asked Respondent to consider whether it is legally or factually
24 impossible for *the District* to comply with Section 13176, not whether Respondent has the legal
25 authority to order any laboratory to obtain certification to perform pH or temperature analyses.

1 Thus, Respondent’s lack of legal authority to regulate laboratories does not make it legally or
2 factually impossible for the District to comply with Section 13176.

3 Respondent next acknowledges that there are four private certified laboratories with
4 mobile units located within the vicinity of the Facility, but that none of these mobile units are
5 certified for pH and temperature. (*Id.*, at F-67.) Respondent raises this point to support the
6 erroneous proposition that it is not factually possible for the District to comply with the Water
7 Code through the use of mobile units. In support of this conclusion Respondent asserts that
8 “[e]ven if the mobile units decided to provide this service, they would use the same hand-held
9 field equipment as the District’s personnel,” and that, “ELAP [the Department of Public
10 Health’s Environmental Laboratory Accreditation Program] does not certify personnel or
11 equipment.” (*Ibid.*)

12 These points miss the mark. While it is true that ELAP does not certify personnel or
13 hand-held equipment, it is also true that ELAP certifies mobile laboratories. (McHenry Decl., at
14 ¶¶ 9-10.) As demonstrated by the emails exchanged between Petitioner’s consultant and the
15 California Department of Public Health’s ELAP, depending upon its determination of the work
16 space presented for “laboratory certification,” generally, ELAP can certify any work space as a
17 “laboratory,” so long as it is: (1) clean, with room to perform the analysis; (2) has a controlled
18 environment, e.g., heated or air-conditioned as need be; and, (3) has adequate lighting, power
19 water, etc.. (A true and correct copy of these emails is attached to the McHenry Decl. as Exh.
20 B.) Thus, ELAP can certify, *inter alia*, mobile laboratories.

21 While Respondent acknowledges that there are four private certified laboratories with
22 mobile units located within the vicinity of the Facility, Respondent somehow concludes that it is
23 not factually possible for the District to comply through the use of mobile units. However,
24 Respondent has failed to demonstrate that it is not, in fact, possible for the District to comply
25 through the use of mobile units. In fact, there is nothing in the Revised Permit demonstrating
26

1 that the District or Respondent asked the owners of the four private certified laboratories
2 whether they were willing and able to obtain ELAP certification of their respective mobile units
3 for pH and temperature sampling. Thus, based on the Revised Permit alone, the Court has
4 absolutely no way of knowing that it is not factually possible for the District to comply with the
5 Water Code through the use of mobile units.

6 On the other hand, the Tentative Draft version of the permit issued by Respondent for
7 public comment on April 1, 2011 (“Tentative Draft Permit”), demonstrates that it is factually
8 possible for the District to comply through the use of mobile units. (A true and correct copy of
9 the Tentative Draft Permit is attached as Exhibit A to Petitioner’s Request For Judicial Notice
10 (“RJN”), concurrently filed herewith.) To wit, the Tentative Draft Permit states, in relevant
11 part:

12 Based on conversations with three of the four private labs, it would be
13 possible to acquire certification, and the monitoring fees are
14 approximately \$100 per hour, which includes travel time to and from the
monitoring locations.

15 (emphasis added) (See Exh. A to Petitioner’s RJN, at F-66.) Thus, Respondent acknowledges
16 that it is factually and legally possible for the District to comply with Section 13176 through the
17 use of certified mobile laboratories. Moreover, Respondent even acknowledges that hiring a
18 privately owned, mobile laboratory to conduct certified sampling of pH and temperature at the
19 Facility would only cost the District between 25% and 40% of 1% of its \$20 million dollar plus
20 annual budget, stating:

21 Thus, the cost to the District ranges from \$51,000 to \$81,000 per year for
22 each Facility. ... the District’s current budget is \$19.661 million per year
23 after recent local sewer fee increases, and the 2012 budget is projected at
\$20.362 million per year.....

24 (*Ibid.*)

25 Nevertheless, Respondent concludes in its Revised Permit that it is not factually or legally
26 possible for the District to comply with Section 13176.

1 Respondent's conclusion is incorrect for several reasons. First, as discussed above,
2 Respondent's Tentative Draft Permit openly acknowledges that it *is* factually and legally
3 possible. Second, the Tentative Draft Permit acknowledges that it is factually and legally
4 possible given that, *inter alia*, Respondent acknowledges that the District has the legal authority
5 necessary to raise sewerage fees to cover this expense. (*Ibid.*) Third, utilities like the District
6 that operate wastewater treatment plants generally keep a reserve fund to cover unexpected
7 costs. It would be *highly* unusual for a utility with an annual budget of over \$20 million not to
8 have a reserve fund well in excess of the \$51,000 to \$81,000 needed to achieve compliance with
9 Section 13176 through the use of certified mobile laboratories. Yet, curiously, Respondent
10 never even considered this possibility in the Revised Permit's discussion of this issue.

11 The most important reason that Respondent's conclusion on this issue is legally
12 incorrect is that, just because complying with the law costs money, that alone does not make
13 compliance factually or legally impossible. As set forth by the Court of Appeal in *Habitat Trust*
14 *for Wildlife, Inc. v. City of Rancho Cucamonga* ("*Habitat Trust*"):

15 'A thing is impossible in legal contemplation when it is
16 not practicable; and a thing is impracticable when it can only be done at
17 an excessive and unreasonable cost.' (*Mineral Park Land Co. v. Howard*
18 (1916) 172 Cal. 289, 293.) **This does not mean that a party can avoid**
19 **performance simply because it is more costly than anticipated or**
20 **results in a loss.** (*Ibid.*) Impracticability does not require literal
impossibility but applies when performance would require
excessive and unreasonable expense. (*City of Vernon v. City of Los*
Angeles (1955) 45 Cal.2d 710, 717.)

21 (emphasis added) (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175
22 Cal.App.4th 1306, 1336.) As further explained by the Court of Appeal in *City of Vernon v. City*
23 *of Los Angeles* ("*City of Vernon*"):

24 The controlling principles as to legal impossibility excusing performance
25 have been long recognized in this state and are stated in *Mineral Park*
Land Co. v. Howard (1916) 172 Cal. 289, 293, where defendants
26 contracted to take gravel from plaintiff's land at a certain price, and it was

1 subsequently found that the gravel, although present, could be taken only
2 at prohibitive cost: 'A thing is impossible in legal contemplation when it
3 is not practicable; and a thing is impracticable when it can only be done
4 at an excessive and unreasonable cost.' [citation omitted] We do not
5 mean to intimate that the defendants could excuse themselves by showing
6 the existence of conditions which would make the performance of their
7 obligation more expensive than they had anticipated, or which would
8 entail a loss upon them. **But where the difference in cost is so great as**
9 **here**, and has the effect, as found, of making performance impracticable,
10 the situation is not different from that of a total absence of earth and
11 gravel.'

12 (emphasis added) (*City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710, 719-720,
13 quoting *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289.) In the seminal case of
14 *Mineral Park Land Co. v. Howard*, the difference in cost of the earth and gravel at issue in that
15 contract dispute was "ten or twelve times as much as the usual cost." (*Mineral Park Land Co.*
16 *v. Howard* (1916) 172 Cal. 289, 291.) Here, Respondent has not demonstrated that the cost the
17 District would incur by contracting with a local laboratory to have the Facility's pH and
18 temperature sampling conducted by a certified mobile laboratory (i.e., \$51,000 to \$81,000
19 annually, according to Respondent) is ten to twelve times as much as what any similarly
20 situated utility would have to pay to ensure that the monitoring of pH and temperature at its
21 wastewater treatment plant is conducted by a certified laboratory, mobile or otherwise, in accord
22 with the Water Code.

23 As the foregoing cases demonstrate, before Respondent can conclude correctly, *and in*
24 *good faith*, that it is both factually and legally impossible for the District to comply with Section
25 13176, it must demonstrate that \$51,000 to \$81,000 is an "excessive and unreasonable" annual
26 expense for the District to have to incur to ensure compliance with Section 13176. Given that
such an expense amounts to less than 4/10 of 1% of the District's approximately \$20,362,000
annual budget for 2012, this Court should conclude that it is not factually or legally impossible
for the District to comply with Section 13176 through the use of certified mobile laboratories.

1 Respondent's final justification in the Revised Permit in support of its conclusion that it
2 is not factually or legally possible for the District to comply with Section 13176 is essentially
3 that "[h]aving personnel employed by a certified laboratory travel to the site to conduct testing
4 is legally indistinguishable from having the District's own personnel conduct the testing...."
5 (Roper Decl., Exh. B at F-67.) However, it is legally distinguishable. The obvious
6 distinguishing characteristic being, of course, that a certified laboratory is certified, whereas
7 neither the District's personnel, nor the area they conduct their work in, are certified, as required
8 by law. Accordingly, Petitioner respectfully requests that the Court order Respondent to amend
9 and re-issue the permit in a manner that requires the District to comply with the law.

10 **IV. CONCLUSION**

11 Based on the foregoing, Petitioner requests that the Court strike Respondent's Return
12 and order Respondent to void and set aside those portions of the Revised Permit that contravene
13 the Judgment and Peremptory Writ of Mandate issued by this Court on March 28, 2011.
14 Petitioner further requests that the Court order Respondent to comply with the Judgment and
15 Peremptory Writ within sixty days and to file an additional return within sixty days thereafter.

16
17 Dated: August 19, 2011

Respectfully Submitted,

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19 LAW OFFICES OF ANDREW L. PACKARD

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21
22 _____
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24 Attorneys for Petitioner
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