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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TWC STORAGE, LLC, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents.	H033228 (Santa Clara County Super. Ct. No. CV078148)

Appellant TWC Storage, LLC (TWC) challenges the superior court's denial of its petition for a writ of administrative mandate. TWC's petition challenged the imposition of a $25,000 fine on it by respondent Regional Water Quality Control Board for the San Francisco Bay Region (the Regional Board). The fine was based on a chemical spill on TWC's property that infiltrated the groundwater. TWC claims that the Regional Board abused its discretion in imposing the fine because neither the law nor the facts supported the imposition of the fine. TWC also contends that it was deprived of due process and a fair hearing at the administrative hearing before the Regional Board. In the published portion of our opinion, we conclude that the Regional Board properly applied the relevant statutes. In the remainder of our opinion, we reject TWC's challenges to the conduct of the administrative hearing.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of sections IIIB and IIIC.

I. Factual Background

In 2004, TWC purchased real property (the property) which had been used in the 1970s and 1980s for semiconductor manufacturing. In 1987, the 3.28-acre property was identified as a "Superfund" site due to the presence of volatile organic chemicals (VOCs) in the soil and groundwater. The property has been unoccupied since 1991. A two-story building on the property was next to a play yard at a daycare center for children which was operated on an adjacent property.

TWC wished to demolish the two-story building on the property. Two transformers were attached to that building. The transformers were not hidden. TWC hired a general contractor, Qualogy Construction, Inc. (QCI), to handle the demolition. TWC told QCI that all known hazardous materials had been removed from the site.[1] QCI hired a demolition subcontractor, Campanella Corporation (Campanella), to demolish the building.

On the morning of Friday, July 15, 2005, a Campanella equipment operator was demolishing the "utility area" where the transformers were attached to the building on the property. The transformers were located approximately 30 feet from the daycare center's play yard. It is a "standard and common practice to check for and drain liquids out of transformers prior to demolition or dismantling." The transformers had not been checked or drained. Using an excavator, the equipment operator removed and damaged one of the transformers. A liquid began spilling out of the damaged transformer.

The exterior of the damaged transformer was clearly labeled "PERCLENE FILLED" in large stenciled letters. Perclene is the "commercial name" for perchloroethylene (PCE). PCE is a "highly toxic contaminant." The equipment operator placed the damaged transformer on top of a "soils pile" to drain. He subsequently moved

[1] TWC did notify QCI of asbestos materials, which QCI then removed.

the damaged transformer to another area to "fully drain out/dry out." QCI was informed of the spill within an hour or two of its occurrence. QCI immediately monitored the area, detected high levels of VOCs, and instructed its crews to vacate the area.

TWC was notified of the spill at 11:05 a.m. on July 15, about an hour or two after the spill. By that afternoon, TWC was aware that at least 50 gallons of PCE had spilled from the damaged transformer, and TWC had been advised to notify "the US EPA" (the United States Environmental Protection Agency) immediately. TWC did not immediately notify any governmental agency. TWC did contact an environmental clean-up company, and some clean-up commenced two days later on July 17.

Sunnyvale Public Safety Officer Ron Staricha visited the property on the morning of July 19 as part of his routine monitoring of the demolition to ensure that it was in compliance with the demolition permit's dust control measure. Staricha noticed drums on the property labeled as "hazardous waste" that had not been present five days earlier when Staricha had last visited the property. QCI's president, who was present on the property, informed Staricha of the PCE spill. When Staricha asked why the City of Sunnyvale had not been notified of the spill, QCI's president asserted that TWC had notified "OES [Office of Emergency Services] and USEPA" on July 18. Staricha subsequently discovered that TWC's telephone notifications were made after Staricha arrived on the property on July 19. No governmental agency had been notified of the spill prior to Staricha's July 19 visit to the property.[2]

TWC thereafter engaged in investigation and clean-up efforts to address the effects of the spill. Nevertheless, an October 2005 sampling of the groundwater at the property detected a very high level of PCE close to the location of the transformer spill.

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[2] TWC claimed that it had notified these agencies on July 18, but it could provide no verification of that claim.

The PCE level detected at that time was 12,000 micrograms per liter. In contrast, the PCE level had not exceeded 24 micrograms per liter over the previous decade.[3]

II. Procedural Background

In January 2006, the Regional Board issued a complaint for administrative civil liability against TWC for violations of Water Code sections 13264, 13265, subdivision (c), and 13350, subdivision (b)(1). The complaint alleged that TWC had violated the Water Code by discharging PCE "into waters of the State" beginning on July 15, 2005 without filing a report of waste discharge (ROWD). The complaint sought imposition of a $40,000 fine on TWC.

At the hearing before the Regional Board, TWC presented a witness who testified that it was "virtually unheard of" for a transformer to contain PCE. This witness also asserted that "Perclene" is "not readily recognized by anybody" as referring to PCE, and he claimed that the "PERCLENE FILLED" marking on the transformer was "faint."

In May 2006, the Regional Board issued an order imposing a $25,000 fine on TWC. The Regional Board found that TWC had violated both Water Code section 13264 and Water Code section 13350, subdivision (b)(1). The Regional Board made factual findings that TWC had damaged the transformer, initiating a PCE spill that infiltrated a groundwater aquifer, and left the transformer leaking PCE for four days before notifying OES of the spill. The Regional Board's order incorporated the staff report by reference.

In June 2006, TWC petitioned the State Water Resources Control Board (the State Board) for review of the Regional Board's order. The State Board dismissed this petition in December 2006. In January 2007, TWC filed a petition for a writ of administrative mandate in the superior court. TWC argued to the superior court that the Regional

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[3] The maximum contaminant level in California for PCE in drinking water is 5 micrograms per liter.

Board's decision was an abuse of discretion because the Regional Board had (1) improperly applied the relevant statutes, (2) violated TWC's right to due process at the hearing, and (3) failed to provide TWC with a fair hearing because the "legal instructions" to the Board were erroneous. TWC's petition was tried to the court. In June 2008, the court issued a judgment denying the petition.[4] TWC filed a timely notice of appeal.

III. Discussion

TWC raises three categories of issues on appeal. It claims that (1) the Regional Board improperly applied the relevant statutes, (2) the conduct of the hearing before the Regional Board violated due process, and (3) the "instructions" given to the Regional Board by its legal advisor were prejudicially erroneous.

The first question is what standard of review we apply to the superior court's decision. Judicial review of the Regional Board's decision by the superior court "extend[ed] to the questions whether the respondent ha[d] proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the [superior] court determines that the findings are not supported by the weight of the evidence." (Code Civ.

[4] In July 2008, TWC filed a request for a statement of decision. This request was denied as untimely.

Proc., § 1094.5, subd. (c).) In this case, the superior court was authorized by law to exercise its independent judgment on the evidence. (Wat. Code, § 13330, subd. (d).)

On appeal, we review the superior court's decision that the Regional Board's findings are supported by the weight of the evidence under the substantial evidence standard of review. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058.) We exercise independent review on the question of whether the Regional Board provided TWC with a fair hearing. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442.)

A. Regional Board's Application of Statutes

The Regional Board found that TWC had violated both Water Code section 13264 and Water Code section 13350, subdivision (b). TWC claims that the record lacks substantial evidence to support the Regional Board's findings.

1. Water Code Section 13350, Subdivision (b) Violation

TWC argues that there is no evidence that TWC "caused or permitted" the PCE discharge into the groundwater in violation of Water Code section 13350, subdivision (b). "Any person who, *without regard to intent or negligence, causes or permits* any hazardous substance to be discharged in or on any of the waters of the state, except in accordance with waste discharge requirements or other provisions of this division, shall be strictly liable civilly . . . [¶] . . . ."[5] (Wat. Code, § 13350, subd. (b), italics added.)

TWC relies heavily on *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28 (*Modesto*) to support its claim that Water Code section 13350

[5] "The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both. [¶] (1) The civil liability on a daily basis may not exceed five thousand dollars ($5,000) for each day the violation occurs." (Wat. Code, § 13350, subd. (e).)

does not apply to a party who "take[s] no active role in the activities leading up to the discharge." *Modesto* does not support this proposition.

The issue in *Modesto* was whether the defendants, none of whom were landowners, were "responsible parties" under Water Code section 13304, subdivision (a). (*Modesto, supra*, 119 Cal.App.4th at p. 35.) Water Code section 13304, subdivision (a) provides that a person is responsible for cleanup and abatement if the person "causes or permits" a discharge that "creates, or threatens to create, a condition of pollution or nuisance." (Wat. Code, § 13304, subd. (a); *Modesto*, at p. 35.) In *Modesto*, the First District Court of Appeal's interpretation of this statutory language was guided by its prior decision in *Leslie Salt Co. v. San Francisco Bay Conservation Etc. Com.* (1984) 153 Cal.App.3d 605 (*Leslie Salt*).

In *Leslie Salt*, the court construed a statute which allowed a cease and desist order to be issued to any person who had " 'undertaken' " to " 'place[] fill' " without the requisite permit. (*Leslie Salt, supra*, 153 Cal.App.3d at p. 612.) In *Leslie Salt*, the defendant, who was the landowner, focused on the word " 'undertaken' " and contended that the statute did not apply to anyone "other than the one who actually placed the fill." (*Leslie Salt*, at p. 612.) The First District held in *Leslie Salt* that the statute applied to "landowners regardless whether they actually placed the fill or know its origin." (*Leslie Salt*, at p. 617.) "[L]iability and the duty to take affirmative action flow not from the landowner's active responsibility for a condition of his land that causes widespread harm to others or his knowledge of or intent to cause such harm but rather, and quite simply, from his very possession and control of the land in question." (*Leslie Salt*, at p. 622.)

In *Modesto*, the First District's analysis focused on whether the defendants could be held liable for creation of a "nuisance" within the meaning of the statutory language. (*Modesto, supra*, 119 Cal.App.4th at p. 37.) The First District rejected the defendants' contention that "only those who are physically engaged in a discharge or have the ability

to control waste disposal activities" can be held liable for the nuisance that discharge creates. (*Modesto*, at p. 41.) The First District held that those of the non-landowner defendants "who took affirmative steps directed toward the improper discharge . . . may be liable under that statute, but those who merely placed solvents in the stream of commerce without warning adequately of the dangers of improper disposal" could not be held liable under the statute. (*Modesto*, at p. 43.)

We can find nothing in *Modesto* that supports TWC's claim that a *landowner* cannot be held liable for a discharge unless it took an "active role" in the creation of the discharge. *Modesto* itself did not involve the issue of a landowner's liability, and *Leslie Salt*, upon which *Modesto* was based, explicitly held that a landowner could be held liable based solely on the landowner's possession and control of the land.

Here, there was substantial evidence that TWC "cause[d] or permit[ted]" the discharge to occur by engaging contractors to perform the demolition activity that resulted in the discharge. Although TWC contends that it could not be liable because it did not "actively participate in the demolition activities" or "fail[] to take reasonable care," Water Code section 13350, subdivision (b) plainly provides that any person who "causes or permits" a discharge is "strictly liable" "without regard to intent or negligence."

TWC claims that it may not be held liable under Water Code section 13350 because the discharge occurred as a result of its *independent contractors'* negligent acts, and it suggests that a property owner cannot be held liable for the acts of an independent contractor. The question here is not whether TWC may be held liable in tort for acts of an independent contractor, but whether the specific statutes under which the Regional Board imposed administrative fines extended to TWC. TWC cites no statutory or case authority to support its claim that a property owner who causes or permits a discharge may not be fined if the discharge was actually perpetrated by an independent contractor.

TWC asserts: "The law in California is that fines are not imputed to persons who contract with independent contractors." However, it provides no support for that proposition. TWC's reliance on *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785 (*McDonald*) is inapt. The issue in *McDonald* was whether the employee of an independent contractor could recover tort damages from the hirer of the independent contractor. (*McDonald*, at p. 787.) *McDonald* did not concern the issue before us, whether a fine may be imposed on a landowner who "causes or permits" a prohibited discharge. Since, under Water Code section 13350, TWC was *strictly liable* for the discharge, it cannot be absolved simply because its contractors were negligent or also could be held liable for the discharge.

2. Water Code Section 13264, Subdivision (a) Violation

TWC also attacks the Regional Board's finding that TWC violated Water Code section 13264. "No person shall *initiate* any new discharge of waste . . . prior to the filing of the report required by Section 13260 . . . ."[6] (Wat. Code, § 13264, subd. (a), italics added.)

TWC seems to suggest that it could not be found to have violated Water Code section 13264 because it was not negligent. Lack of negligence is a defense to a Water Code section 13264 violation only "if the discharger is not negligent *and* immediately files a report of the discharge with the board." (Wat. Code, § 13265, subd. (c).) TWC did *not* immediately file a report of the discharge with the Regional Board, so it could not avail itself of this defense.

TWC argues that it could not be fined for the discharge under Water Code section 13264, subdivision (a) because it did not *know* that the PCE had *reached the groundwater*

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[6] "Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (c) in an amount which shall not exceed five thousand dollars ($5,000) for each day in which the violation occurs." (Wat. Code, § 13265, subd. (d)(1).)

at any time during the four-day period upon which the fine was based. TWC claims that the Regional Board lacked jurisdiction over the discharge because the discharge was "not to the waters of the state." We note that the Regional Board has jurisdiction over "waters of the state," and "waters of the state" is not limited to groundwater but includes "any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code, § 13050, subd. (e).) In any case, TWC's contention does not raise a jurisdictional issue, but an issue about the sufficiency of the evidence. The evidence before the Regional Board and the superior court established that TWC knew that a large volume of PCE had been discharged onto its property, and the Regional Board and the superior court could have drawn a reasonable inference from this evidence that TWC was aware that the PCE would quickly infiltrate the groundwater, especially since the water table was very shallow under TWC's property.

TWC complains that the Regional Board was improperly punishing it for failing to report the discharge to the OES rather than for failing to file the report that was required prior to the discharge under Water Code section 13264. This complaint lacks substance. TWC admits that it *never* filed the report required by Water Code section 13264. If anything, the Regional Board treated TWC leniently by penalizing it for only the four-day period that preceded TWC's OES report.

TWC asserts that it was not required to file a report because Water Code section 13264 requires a report to be filed for only a "planned discharge" rather than an "accidental" discharge. Nothing in the statutory language supports this assertion. Water Code section 13264 bars any discharge that occurs before a report is filed. (Wat. Code, § 13264, subd. (a).) While it is true that it would not be possible to report an accidental discharge in advance, the statute clearly was intended to provide a safe harbor only for those planned discharges that are reported in advance so that the Regional Board can

ensure that precautions are taken. An unplanned discharge precludes precautions and falls plainly within the scope of Water Code section 13264.

B. Due Process

TWC contends that it was deprived of due process at the hearing before the Regional Board.

1. Background

In a May 2, 2006 letter to the Regional Board, TWC's attorney stated that his "[e]stimated . . . hearing presentation time" was "1 hour." On May 5, TWC's attorney sent an inquiry to Jorge Leon, the Regional Board's legal advisor, inquiring about the procedure at the hearing. He inquired: "I do not make an opening statement after Ms. Won [the prosecutor] but rather during TWC's 45 minutes. Is that correct? Then after our presentation there is a public comment period and then closing statements by the attorneys. Again is that correct?" Leon promptly responded: "1. Staff will have 30 minutes. [¶] 2. The Board Chair would like to see you complete your case in 30 minutes as well, however, he is willing to allow up to 45 minutes. Staff does not support allowing your client more than 30 minutes. [¶] . . . [¶] 4. Your opening would be part of your total presentation . . . . [¶] . . . [¶] 6. We won't expect 'closing statements' from either Staff or your client, but will permit Staff and your client to reserve time from your allowance (see #1, above) for the purpose of rebuttal to both Staff and public comments."

At the commencement of the May 10, 2006 hearing before the Regional Board, Leon explained that he would be acting as the Regional Board's legal counsel because he "had nothing to do with bringing this case forward." Yuri Won would be "advising the prosecutorial staff in this matter." Leon also detailed how the matter would proceed. "The parties are permitted to reserve rebuttal time out of their time allotment. Now, we've targeted 30 minutes for each side to complete their presentation. However,

Mr. Muller [the chairman of the Regional Board] and I have spoken, and I think there's been some other consultations with the parties, and the Chair is willing to consider some additional time if it becomes necessary, and if it appears to be useful."

Only one prosecution witness testified, and his direct testimony was very brief. His direct testimony was followed by Won's argument regarding the legal issues. At the commencement of TWC's presentation, TWC's counsel made the following statement: "I've had some preliminary discussions about the rules that we'll be following on this hearing with the legal advisor, Mr. Leon. And it is our understanding, based on those communications, that examination of Board staff does not count against our time. And we had originally asked for one hour, and I didn't want to bring this up when you mentioned it earlier, but we had compromised at 45 minutes for the presentation of our case. And we have -- and we will try to meet that time. So that's our understanding of the ground rules." The Regional Board's chairman responded: "Right. And the ground rules are I have the gavel, so go ahead and start."

TWC's counsel proceeded to cross-examine the prosecution's witness. After some questions, Leon interrupted TWC's counsel to make "a quick suggestion." Leon suggested that "it would be more productive if you argue the point that you're making now, so your own witness's testimony, through your own statements, as opposed to asking question of [the prosecution's witness], who apparently doesn't know very much about that." TWC's counsel then continued his questioning of the prosecution witness about the investigation that he had done. After he had asked a series of questions, the Regional Board's Executive Director intervened and said "I'm not finding this discussion useful."[7] "I would find it much more useful if we heard your presentation first. Perhaps

[7] The Executive Director is a voting member of the Regional Board.

we can reserve time for you to return to cross-examination later. But I'd like to hear your presentation as opposed to [the prosecution witness's] opinions."

TWC's counsel responded with this statement: "I appreciate your point. And I don't want to be obstructionist, obviously, because I want to convince you to vote in our favor. On the other hand, I also want to make sure that the record is clear for anyone that reviews, to know exactly what evidence supported this decision. And I think there is not -- still has not been an answer to the question of what the standard of care is, and how TWC breached that standard of care. And I think everybody is entitled to know what the Regional Board's staff says the standard of care is, and what TWC did or did not do." Won responded by noting that the alleged violations have "nothing to do with the standard of care" because the statutes at issue are "strict liability provision[s]." "[T]he only question . . . is did they cause or permit the discharge." "The standard of care is really relevant to culpability, which is one of the factors you consider in assessing and determining how much to assess."

The Regional Board's chairman then told TWC's counsel to "[g]o ahead," and TWC's counsel resumed his questioning of the prosecution's witness about the standard of care. After a couple of additional questions, a member of the Regional Board asked: "Can I get some clarification on a timing thing? Because we're already 25 minutes into a 30-minute --" The chairman of the Regional Board responded: "The ground rules were that during the cross-examination of staff, it wouldn't be counted towards his time, their time of presentation. But again, as I say, we have to try to summarize and get as specific as we can to get this thing settled as quickly as possible. But we will give him a fair hearing. And I think we've been more than fair to start with. So if you have any other questions of Staff, I'll ask you to conclude with that, and then move on with your presentation, please."

TWC's counsel said "[w]ell, let me try and move on" and continued his questioning of the prosecution's witness about his investigation. After several more questions, Leon interrupted. "Mr. Chair, hold on, please. You know, this is an area that clearly the discharger has a full opportunity to present any kind of evidence that it wants to with respect to ability, Mr. Chair. We're going to waste an awful lot of time if we get into issues about what the staff did to figure out what their ability to pay is. Why don't we just move on from there, from here and go to allowing Mr. Lawson [TWC's counsel] to present evidence with respect to ability to pay, whenever he is ready to do that?" TWC's counsel asked one more question of the prosecution's witness, and then made this statement: "Okay, at this point what we'll do is we'll move on -- although I had pages of cross-examination. We will move on to try and not bore the Board. And if we need to, maybe we'll come back at the end of this. But hopefully that won't be necessary. So at this point we'll present our case."

A discussion then ensued about how much time TWC had to present its case. "[Regional Board's Executive Director]: In 30 minutes, I assume? I believe you were granted 30 minutes. Now, if we're going to extend the time, if the Chair is, the decision should be made with that regard. But the Staff was granted 30, my understanding is that you've had 30. We should decide that before you begin. [¶] CHAIRMAN MULLER: Right. He started at 10:30.[8] As Kristina mentioned, they used up 15 minutes there, so we're back to 30 minutes. I think they can conclude in 30 minutes. [¶] [TWC's Counsel]: Well, again, I'm just going to object, that that's not my understanding of the ground rules. And that we would have 45 minutes in cross-examination, it would not be counted against our time. And quite frankly, I have probably -- well, I have exactly nine pages of cross-examination. I have not gone through it, as a courtesy to the Board, in

[8] The prosecution case had begun at 9:45 a.m.

trying to take direction from the Board. So let me just state that for the record, that that's -- that we will try to move our presentation along as fast as possible, but we prepared based on what we understood the ground rules to be. [¶] CHAIRMAN MULLER: Okay, go forward, Mr. Lawson. Then we will try to keep it within 30 to 40 minutes, and we'll go from there."

Leon followed up the chairman's statement by explaining that the Regional Board simply wanted the time to be used productively and "[n]ot to prevent your client from presenting its case." Leon suggested to the chairman "that you set the target at 30 minutes. But if it appears to be productive and useful to the Board to its determination, then more time ought to be allowed within reasonable limits." TWC's counsel then began his presentation without further comment. He introduced his presentation by stating that he would be presenting three witnesses who would each speak for about 10 minutes. TWC's counsel would then speak for an additional 10 minutes.

TWC's first witness testified that TWC had "met the standard of care" in investigating the condition of the property by relying on the representations of others that the property was free of hazardous materials. TWC's second witness testified about the chronology of events after the spill. He asserted that the transformer had spilled its entire contents within an hour or two. He testified that TWC had taken "prompt and appropriate" steps to remediate the spill and "expended significant resources to move as fast as possible to clean this up."

The final witness was Jack May, TWC's primary owner. He testified that he had relied on assurances from Advanced Micro Devices, Inc. (AMD), the semiconductor company that had previously utilized the property, and Pacific Gas and Electric (PG&E) that there were no hazards on the property, but he had also personally walked through the property four times and had not seen the transformers "because the transformers are turned a little sideways, so you don't see these signs." May admitted that he had been

advised on the day of the spill to report it. However, he was in his car and unable to do so. He claimed that he "faxed the form to the EPA" on "[t]he next business day," which was Monday, July 18. May did nothing over the weekend because he "was gone all weekend and didn't have access to the Internet." "[I]n hindsight, I was dumb." May thought that his contractors should have reported the spill, but he admitted "I am guilty of not calling 9-1-1." May noted that TWC had spent $1.5 million cleaning up the spill.

None of TWC's witnesses were asked to cut short their testimony. After the three witnesses had testified, the chairman told TWC's counsel: "We'll give you a few minutes to kind of wrap it up here." It was only after TWC's counsel had argued for a significant period of time that the chairman interrupted him. "CHAIRMAN MULLER: Yeah, I'm going to need you to conclude. I've been generous with the time, so please." TWC's counsel did not quickly wrap up but instead continued his argument for quite some time before concluding.

After all of the testimony had been received, Leon and the chairman discussed the Regional Board's role and procedures. One of the Regional Board's members asked "the prosecution team" to "address the defenses," and Won did so. The Regional Board's Executive Director asked Leon if he agreed with the "prosecutorial team['s]" "understanding of the law." Leon said he did agree with the prosecution's understanding of the law and explained his understanding of the law. The public hearing was then closed, and the Regional Board began its deliberations.

During deliberations, a member of the Regional Board inquired about who would "give us the Staff recommendation." Leon explained that he was "not an advocate, I'm a neutral legal advisor," so it was "clearly up to the prosecutorial staff to respond to that." Won and another member of the prosecutorial team then explained the prosecutorial staff's recommendation. After a couple of questions "for Staff" were answered by Won, the chairman stated that the "public hearing is closed at this time." Leon pointed out that

the hearing had already been closed. "However, you've asked some questions of this side, and if you want to ask questions of the other side, I think that'd be fair." The chairman then allowed May to "make a brief comment."

The chairman asked the Executive Director for "Staff's recommendation," and the Executive Director recommended adoption of the tentative order "as is." One of the members of the Regional Board said she was "uncomfortable with the full $40,000 penalty" but was supportive of imposing a fine. The chairman said "I'm personally not in favor of lowering the fee." A member made a motion to adopt the staff recommendation. Another member seconded the motion. The Executive Director asked if there was anyone else besides him and the one member who was "interested in discussing the possibility of a lower fee." Two other members expressed interest. The member who had first expressed discomfort with the full penalty moved to amend the motion to propose a $25,000 fine instead of a $40,000 fine.

After this motion was made, Won interjected a comment about the proposed motion. Leon agreed with her and proposed how the amended recommendation would read. After some discussion, the Executive Director suggested that there be a substitute motion instead of a motion to amend. The chairman, apparently concerned about the procedural propriety of a substitute motion, said: "You got the book there, Yuri? Are we all right? Or we're back to -" Won interrupted the chairman and said "I'm not your counsel on this, sorry." The chairman responded "Oh, that's right," and Leon responded to the chairman's inquiry. A substitute motion was then made and seconded to impose a $25,000 fine.

A discussion ensued about what factors favored reducing the fine. A member expressed her feeling that TWC's prompt voluntary cleanup efforts were a mitigating factor. She also felt that, although TWC was "ultimately culpable," the "degree of culpability is in some question." During the discussion of how to allot the fine between

the two violations, one of the members said: "I just have a quick question of Yuri." Leon answered the question. Eventually, the substitute motion was voted upon. Five members voted for the motion, and two voted against it. The two members who opposed the motion favored imposing the full $40,000 fine that had been proposed by staff. The Regional Board imposed a $5,000 fine under Water Code section 13264 and a $20,000 fine under Water Code section 13350.

2. Burden of Proof

TWC claims that the hearing violated due process because the evidence presented by the prosecution did not satisfy its burden of proof. We do not understand how this contention differs from TWC's earlier contention that the Regional Board erred in finding that TWC had violated Water Code sections 13264 and 13350. The evidence presented at the hearing was sufficient to support a finding that TWC initiated and caused or permitted the discharge in violation of these statutes. Hence, the prosecution met its burden of proof.

3. Restrictions on TWC's Presentation of Its Case

TWC claims that its right to due process was violated by the Regional Board's "refus[al] to abide by the time agreements" to which the Regional Board had assented, which prevented TWC from fully presenting its case. The facts simply do not support TWC's claim.

The Regional Board never *agreed* to allow TWC 45 minutes to present its case, nor did it *agree* that TWC's time for cross-examination would be *unlimited*. TWC was notified in advance of the hearing by Leon that "[t]he Board Chair would like to see you complete your case in 30 minutes as well, however, he is willing to allow up to 45 minutes." Nothing was said at that time about cross-examination time. At the commencement of the hearing, Leon explained that the Regional Board had "targeted 30 minutes for each side to complete their presentation," but "the Chair is willing to consider

some additional time if it becomes necessary, and if it appears to be useful." Again, nothing was said about cross-examination time, and TWC's counsel did not challenge this description of the time limitations.

It was only after the prosecution's witness had testified that TWC's counsel first mentioned his "understanding . . . that examination of Board staff does not count against our time. And we had originally asked for one hour, and I didn't want to bring this up when you mentioned it earlier, but we had compromised at 45 minutes for the presentation of our case. And we have -- and we will try to meet that time. So that's our understanding of the ground rules." The Regional Board's chairman responded: "Right. And the ground rules are I have the gavel, so go ahead and start." The chairman subsequently stated that "[t]he ground rules were that during the cross-examination of staff, it wouldn't be counted towards his time, their time of presentation."

TWC's counsel proceeded to extensively cross-examine the prosecution's witness. Though this cross-examination was interrupted a few times, it was never cut off. Instead, TWC's counsel eventually decided to "move on" to its own presentation "to try and not bore the Board." At this point, there was a discussion of how much time TWC would have for its presentation. While there were suggestions that TWC's presentation should be kept to 30 minutes, after TWC's counsel protested, the chairman relented and asked him to "try to keep it within 30 to 40 minutes, and we'll go from there."

At the outset of his presentation, TWC's counsel explained that each of his three witnesses would speak for 10 minutes and then he would speak for 10 minutes, a total of 40 minutes. There was no challenge to this plan. None of TWC's witnesses was asked to cut short his testimony. After the testimony was concluded, the chairman told TWC's counsel: "We'll give you a few minutes to kind of wrap it up here." TWC's counsel then argued extensively. Although he was interrupted once and asked to conclude, his argument continued and was never cut short.

The record does not support TWC's claim that the Regional Board violated its "agreements" that cross-examination time would be unlimited and that TWC would have 45 minutes to present its case. The Regional Board allowed TWC to extensively cross-examine the prosecution's witness and simply encouraged, but did not mandate, TWC to move on to its own presentation after that cross-examination ceased to be productive. With regard to TWC's own presentation, the Regional Board never agreed to allow TWC 45 minutes to make its own presentation, but it nevertheless allowed all of TWC's witnesses to testify without limitation and, although it prompted TWC's counsel to wrap up his argument, it permitted TWC's counsel to make an extensive argument that was not terminated by the Regional Board. Thus, the Regional Board violated no "agreements."

"The procedural requirements that are necessary to satisfy due process necessarily vary according to the competing interests of the government and the citizen. [Citation.] 'Although "due process" encompasses a broad range of safeguards, in essence the concept guarantees a fundamentally fair decision-making process.' [Citation.] Thus, at a minimum, due process requires notice and an opportunity for a hearing." (*Menefee & Son v. Department of Food & Agriculture* (1988) 199 Cal.App.3d 774, 781.) Due process generally includes "the right to appear personally before an impartial official, to confront and cross-examine adverse witnesses, to present favorable evidence and to be represented by counsel." (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 208.)

Here, TWC was indisputably provided with adequate notice and a hearing at which it could be represented by counsel, present favorable evidence, and confront and cross-examine adverse witnesses. The Regional Board's attempts to encourage TWC to streamline its presentation did not deprive TWC of the opportunity to confront and cross-examine the prosecution's sole witness. TWC extensively cross-examined this witness, and its cross-examination was never terminated by the Regional Board. Nor did the Regional Board ever preclude TWC from presenting any favorable evidence. While the

Regional Board did, eventually, encourage TWC's counsel to wrap up his lengthy argument, it never terminated his argument but allowed him to conclude it on his own terms. Under these circumstances, we reject TWC's claim that it was deprived of due process because the Regional Board did not allow it to fully present its case.

4. Prosecutor's Role

TWC claims that its right to due process was violated because the attorney who served as the prosecutor in this matter served as the Regional Board's legal advisor in other unrelated matters that were heard on the same day as this matter.

The California Supreme Court addressed a similar contention in *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731 (*Morongo*). In *Morongo,* the attorney prosecuting the administrative matter was serving as a legal advisor to the State Board in a separate matter. (*Morongo,* at p. 734.) The Morongo Band of Mission Indians asserted "that when the agency attorney who is prosecuting an administrative license revocation proceeding has concurrently advised the adjudicator in a separate albeit unrelated matter, the risk that the agency adjudicator will be biased in favor of the prosecuting agency attorney is of a magnitude sufficient to overcome the presumption of impartiality." (*Morongo,* at p. 737.) The California Supreme Court disagreed. (*Morongo,* at p. 737.)

"[A]ny tendency for the agency adjudicator to favor an agency attorney acting as prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance." (*Morongo, supra,* 45 Cal.4th at p. 737.) Due process was not violated because the State Board complied with the California Administrative Procedures Act (APA) (Gov. Code, § 11340 et seq.), which "requires the internal separation of prosecutorial and advisory functions on a case-by-case basis only." (*Morongo,* at p. 738.) "'Virtually the only contact [between the agency decision maker and the prosecutor] that is forbidden [by the APA] is [that] a prosecutor

cannot communicate *off the record* with the agency decision maker or the decision maker's advisers about the substance of the case.'" (*Morongo*, at p. 738, italics added and original italics omitted.) "In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions." (*Morongo*, at pp. 741-742.)

TWC claims that *Morongo* is distinguishable because (1) Won was the Regional Board's "regular legal advisor and was advising the Board on the matters on calendar before and after the TWC hearing," and (2) the Regional Board in fact relied on Won's advice at the hearing where she was serving as the prosecutor rather than relying on the advice of the Regional Board's legal advisor.

First, although TWC repeatedly states that Won was the Regional Board's "regular legal advisor and was advising the Board on the matters on calendar before and after the TWC hearing," TWC provides no citation to the record to support this contention. "An appellant must affirmatively demonstrate error through reasoned argument, *citation to the appellate record*, and discussion of legal authority." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685, italics added.) "'It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations.' [Citations.] If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived. [Citation.]" (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Although the record suggests that Won had

served as the Regional Board's legal advisor, TWC has waived its assertion that she was the Regional Board's "regular" legal advisor and was advising the Regional Board on other matters that day by failing to support this assertion with a citation to the record.

Second, the California Supreme Court explicitly held in *Morongo* that there is no due process violation where an attorney is serving as the prosecutor in one matter before the Board and concurrently serving as the Board's legal advisor in an unrelated matter before the Board. (*Morongo*, *supra*, 45 Cal.4th at p. 737.) Thus, even if Won was the Regional Board's "regular" legal advisor and was serving in that role on other unrelated matters on the same day as the TWC hearing, *Morongo* requires the conclusion that these facts alone do *not* establish a due process violation.

Third, TWC has failed to overcome the "presumption of impartiality," which the California Supreme Court said in *Morongo* "can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." (*Morongo*, *supra*, 45 Cal.4th at p. 741.) Nothing in the record reflects that the Regional Board was biased in favor of the prosecution simply because Won was serving as the prosecutor in this matter. TWC's identification of two points in the hearing where Regional Board members asked questions of Won that were redirected to Leon does not indicate the appearance of actual bias or an unacceptable risk of bias. Once, the chairman asked Won if she had the "book," apparently referring to a document that set forth the Regional Board's procedural rules. At another point, a Regional Board member posed a question to Won about how to allot the fine between the two violations, but Won did not respond and Leon answered the question. We can see nothing in either of these brief events to indicate that the Regional Board was infected with or at risk for any bias as a result of the fact that Won was serving as the prosecutor in this matter.

Since TWC has failed to rebut the presumption of impartiality, it has not established that it was deprived of due process as a result of Won's service as the prosecutor in this matter.

C. Other Issues

TWC contends that it was denied a fair hearing before the Regional Board because Leon, the Regional Board's legal advisor, "erroneously advised the Board on the law regarding the burden of proof, the elements and applicability of the violations, and elements and applicability of TWC's defenses."

TWC's argument regarding the "burden of proof" and the "elements" of the violations is essentially a reiteration of contentions we have already addressed. TWC claims that Leon erroneously advised the Regional Board that TWC could be fined "without any showing of actual negligent directives by TWC . . . ." Since, as we have explained, the applicable statutes do not require negligence, but instead describe strict liability offenses, such advice was not erroneous.[9]

TWC contends that Leon erroneously advised the Regional Board on the affirmative defenses under Water Code section 13350, subdivision (c) by telling the Regional Board that an "intervening cause" can only occur "after" a discharge.[10]

Water Code section 13350, subdivision (c) provides: "There shall be no liability under [Water Code section 13350,] subdivision (b) if the discharge is caused solely by any one or combination of the following: [¶] (1) An act of war. [¶] (2) An unanticipated grave natural disaster or other natural phenomenon of an exceptional,

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[9] In a separately headed argument, TWC claims that the Regional Board abused its discretion in imposing liability on TWC because the prosecution failed to carry its burden of proof. This argument is just another reiteration of TWC's claim that it could not properly be held liable for the discharge.

[10] Most of the pages of the record to which TWC cites in support of this contention do not contain any advice offered by Leon to the Regional Board at the hearing on the subject of the affirmative defenses.

inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. [¶] (3) Negligence on the part of the state, the United States, or any department or agency thereof; provided, that this paragraph shall not be interpreted to provide the state, the United States, or any department or agency thereof a defense to liability for any discharge caused by its own negligence. [¶] (4) *An intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight*. [¶] (5) Any other circumstance or event which causes the discharge *despite the exercise of every reasonable precaution* to prevent or mitigate the discharge." (Wat. Code, § 13350, subd. (c), italics added.)

Leon provided the following advice to the Regional Board: "[I]f you buy the argument that it was [TWC's] fault, because they're the ones who owned the property, because they're the ones who initiated the construction projects, they're the ones who hired QCI, I believe the name of it is, those responsibilities are imputed to the party that took those actions. [¶] If you agree with that, then I do agree completely with [the prosecution's] argument that it's a strict liability violation. And that the liability is imposed simply because the accident happened. . . . I'm not at all convinced that the defenses apply in this case, because TWC has argued that it's an intervening act that occurred by AMD. However, AMD's acts occurred way before, apparently, TWC even took possession of the property. So under the doctrines of law, those would not be considered intervening acts. Somebody didn't come in, in the middle of whatever it is they were doing, and commit an act that caused this spill." "I believe from my experience that the Staff would have named AMD, QCI, anybody else that they could pull in to more evenly distribute the penalty if that had been legally possible, but I don't think it is, as Ms. Won indicated."

Water Code section 13350, subdivision (c) does not refer to "intervening cause." Instead, the defenses described in subdivisions (c)(4) and (c)(5) provide that there is no liability if the discharge is "*caused solely*" by (1) a third party's intentional act where the result of that act could not have been prevented by the exercise of "due care or foresight," (2) an event that could not have been prevented by "every reasonable precaution," or (3) a combination of the two.[11] Leon's advice was not inconsistent with Water Code section 13350, subdivision (c). Leon never advised the Regional Board that conduct by AMD, QCI, or Campanella could not qualify as an intentional act by a third party simply because of the *timing* of the acts of these third parties. Instead, the essence of Leon's advice was that the conduct of these third parties could not establish a defense under subdivision (c) because the acts of the third parties were not the *sole* cause of the discharge. He premised his remarks with the comment that his advice applied only "if you buy the argument that it was [TWC's] fault . . . ." If the discharge was TWC's fault, it naturally follows that the acts of the third parties were not the sole cause of the discharge, and the subdivision (c) defenses were inapplicable.

TWC argues that Leon incorrectly advised the Regional Board that Water Code section 13350, subdivision (b) is a strict liability statute. Subdivision (b) of Water Code section 13350, the subdivision that was applied here, provides: "Any person who, without regard to intent or negligence, causes or permits any hazardous substance to be discharged in or on any of the waters of the state, . . . shall be *strictly liable* . . . ." (Italics added.) Thus, this statute is clearly a strict liability statute. TWC's reliance on *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30 (*Younger*) is entirely misplaced. In *Younger*, the California Supreme Court was construing Water Code section 13350,

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[11] Although TWC repeatedly suggests that Water Code section 13350, subdivision (c)(3) was at issue here, there was no evidence that state or federal negligence was the *sole cause* of the discharge, and no evidence that any of the other subdivisions of subdivision (c) applied here.

subdivision ***(a)***, which does not include the phrases "without regard to intent or negligence" or "shall be strictly liable" that appear in subdivision ***(b)***. (*Younger*, at p. 34 and fn. 1; Wat. Code, § 13350, subds. (a), (b).)

TWC maintains that Leon erroneously advised the Regional Board "on legal causation and the law of 'intervening causes.'" One of TWC's record citations is to the prosecutor's argument to the Regional Board, not Leon's advice to the Regional Board. TWC's only other record citation in support of this contention is to the same portion of Leon's advice that we have analyzed above and found to be correct.

TWC contends that the Regional Board was "incorrectly instructed" that the Regional Board could not hold AMD, QCI, or Campanella liable for the discharge. As support for this contention, TWC relies on the prosecutor's arguments to the Regional Board. Since the prosecutor was not *advising* the Regional Board but simply *arguing* her case, her arguments, to which TWC did not object, whether valid or invalid, do not establish that the Regional Board was "incorrectly instructed."[12]

IV. Disposition

The judgment is affirmed.

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[12] TWC also cites a portion of the hearing during which the members of the Regional Board were discussing whether to impose a $40,000 fine or a lower fine. The Regional Board's views on TWC's *level of culpability*, which was relevant to the amount of the fine, did not suggest that it had any questions about TWC's *liability*.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

_____
McAdams, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Marcel Poche
Attorney for Plaintiff and Appellant:	Silicon Valley Law Group Jeffrey S. Lawson
Attorneys for Defendants and Respondents:	Edmund G. Brown, Jr. Attorney General of California Mary Hackenbracht Senior Assistant Attorney General John Davidson Supervising Deputy Attorney General Anita E. Ruud Deputy Attorney General