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VIA FEDERAL EXPRESS

Mr. Robert Schneider, Chair
and Members of the
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114

Re: City of Tracy's Comments on Proposed ACL No. R5-2005-0500

Dear Mr. Schneider and Regional Board Members:

On behalf of the City of Tracy, we submit the following comments related to Administrative Civil Liability Complaint R5-2005-0500 and Proposed Order for Administrative Civil Liability No. R5-2005-___ ("Proposed ACL Order").

On May 6, 2005, the City requested that the hearing on the Administrative Civil Liability ("ACL") be set as a formal hearing under 23 Cal. Code of Regulations §648 *et seq.* and that adequate time for opening and closing arguments, presentation of evidence, and cross-examination of Regional Board staff and/or witnesses be set aside. The current agenda allows only ninety (90) minutes for the entire hearing on this matter. The City hereby requests that additional time be granted, as necessary.

1. The City of Tracy Has An Affirmative Defense of Upset Against the Penalty Proposed.

The City of Tracy ("City") believes that any exceedance of the permit's effluent limitation for chlorine residual was the result of a plant "upset" as defined by Standard Provision A.14, which are incorporated as part of the City's Permit No. 96-104 at Provision F.2.

The Standard Provisions define "upset" as "an exceptional incident in which there is unintentional and temporary noncompliance with effluent limitations because of factors beyond the reasonable control of the Discharger." *See* Standard Provision A.14.

In order to prove the existence of an "upset," the City must provide properly signed, contemporaneous operating logs or other evidence that: (a) an upset occurred due to an identifiable cause; (b) the permitted facility was being properly operated at the time of the upset;

(c) notice of upset was submitted as required in paragraph B.1 of the Standard Provisions; and
(d) remedial measures were implemented as required under paragraph A.17.

In addition to a demonstration that the discharge was temporary[1] and unintentional,[2] the City can demonstrate that it meets each of the other required factors, as follows:

a. The Upset Occurred Due to an Identifiable Cause.

The City encountered a failure of the sulfur dioxide feed system in the early evening hours, but after sundown,[3] on October 21, 2003. *See* Memo to Frank Motzkus from Dennis Harper (Sr. WWTP Operator (Oct. 22, 2003) and October 21, 2003 Operator's Log (both attached as Exhibit A); OES Hazardous Materials Spill Report submitted by the City on Oct. 22, 2003 at 1504 hours (indicating spill of chlorinated water of 440,000 gallons. The caused was described as "dechlorination system failed."); Letter from City to Regional Board (October 27, 2003); Letter from City to Regional Board referencing Inspection Report dated 5 April 2004 at pg. 1 (April 27, 2004);

Earlier that day, the chlorination process was off line due to regular maintenance activity. However, at 1745 hours, the plant was operating normally, chlorination operations were operating normally, and the input signal to the sulfonator was normal. *See* CVRWQCB Inspection Report at pg. 2 (5 April 2004).

At 2000 hours, the operator discovered that the SO_2 supply valve was closed due to a fault in the SO_2 leak alarm sensor. The sulfonator did not operate because the supply valve had closed due to the leak sensor fault. *Id.* This failure of the dechlorination system was the identified cause of the upset. *See* Proposed ACL Order at 1, para. 2 ("Plant experienced a failure of the sulfur dioxide (SO_2) feed system, which provides dechlorination of the effluent prior to final discharge to Old River."). Thus, it is uncontested that there was an identifiable cause of the alleged violation.

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[1] Documents submitted by the City, as well as the Proposed ACL Order, confirm the temporary nature of this discharge. *See See* Memo to Frank Motzkus from Dennis Harper (Sr. WWTP Operator (Oct. 22, 2003) and October 21, 2003 Operator's Log (both attached as Exhibit A); *See* Letter from City to M. Kummer, CVRWQCB and Report of Noncompliance (October 27, 2003)(citing incident took place between 6:30 pm and 8:05 pm); *see also* Proposed ACL Order at pg. 3 ("approximately 95 minutes").

[2] There is no evidence that this release was an intentional act. In fact, the Proposed ACL Order at pg. 4 states that this was "an accidental release."

[3] Sunrise and sunset records show that sunset on October 21, 2003 occurred at approximately 6:20 pm and sunrise on October 22, 2003 occurred at 7:22 am. *See* *http://www.timeanddate.com/worldclock/astronomy.html?n=899&obj=sun&month=10&year=2003&day=1*

b. The Permitted Facility was being Properly Operated at the Time of the Upset.

The operating logs and subsequent inspection reports prove that prior to and at the time of the upset incident, the treatment plant was being properly operated. *See* Memo to Frank Motzkus from Dennis Harper (Sr. WWTP Operator (Oct. 22, 2003) and October 21, 2003 Operator's Log (both attached as Exhibit A); CVRWQCB Inspection Report at pg. 2 (5 April 2004). But for the unexpected failure of the dechlorination system, the incident would not have occurred.

The facts of this case demonstrate that, except for the date of upset set forth above, the City's plant was functioning normally and was compliant during every other day. *See* Proposed ACL Order at 5. Although the plant was being operated properly, even well operated plants occasionally exceed effluent limitations. *See Weyerhaeuser Company v. Costle*, 590 F.2d. 1011, 1056 (D.C. Cir. 1978)("Waste treatment facilities occasionally release excess pollutants due to such unusual events as plant start-up and shut-down, equipment failures, human mistakes, and natural disasters."); *Marathon Oil v. EPA*, 564 F.2d 1253, 1273 (9th Cir. 1977)(emphasis added). In the *Marathon Oil* case, the Court concluded that a facility using proper technology operated in an exemplary fashion would not necessarily be able to comply with effluent limitations one hundred percent of the time, and thus an upset defense in the permit was necessary.[4]

c. Notice of the Upset was Submitted as Required in Paragraph B.1 of the Standard Provisions.

Standard Provision B.1. requires that "in the event the Discharger does not comply or will be unable to comply for any reason, with any prohibition, daily maximum effluent limitation, or receiving water limitation of this Order, the Discharger will notify the Board by telephone (916)255-3000 within 24 hours of having knowledge of such noncompliance, and shall confirm this notification in writing within five days, unless the Board waives confirmation." *See* Standard Provision B.1. (emphasis added).

The Regional Board was notified within 24 hours after having knowledge of the alleged noncompliance. *See* City Phone Records to CVRWQCB on October 22, 2003 (calls made to M. Kummer, CVRWQCB at 1320 hours and 1427 hours)(attached as Exhibit B). The City confirmed its original notice with a written report within five days as required by Standard Provision B.1. *See* Letter from City to M. Kummer, CVRWQCB and Report of Noncompliance (October 27, 2003). Thus, the City fully complied with Standard Provision B.1. by timely submitting the required notice.

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[4] *Id.* at 1273; *see also* proposed Secondary Treatment Rules, 38 Fed. Reg. 10642-3 (April 30, 1973) stating at Section 133.103:

> "Secondary treatment may occasionally be upset resulting in a temporary increase in the amounts of pollutants discharged in excess of effluent limitations based on secondary treatment. It is recognized that upsets may occur over which little or no control may be exercised. Such occurrences in well designed and well operated treatment works are recognized as representing the inherent imperfections of secondary treatment." (emphasis added).

In addition, the City sent Hazardous Materials Spill Report to the Office of Emergency Services at 3:04 p.m. on October 22, 2003, less than 24 hours after the incident occurred, and notified the County of San Joaquin's Emergency Services. *See* OES Hazardous Materials Spill Report (Oct. 22, 2003). Thus, despite the allegation in the Proposed ACL Order that the City failed to properly notify state and local officials, the City made timely and proper notifications as required under the Permit, and there was no violation of the permit's requirements or of the applicable regulations. The fact that the Regional Board would have liked to have been notified earlier is not an actionable "violation," or an impediment to a determination of "upset."

d. Remedial Measures were Implemented as Required under Paragraph A.17.

The Standard Provisions attached to the City's permit provide the following:

> "The Discharger shall take all reasonable steps to minimize any adverse effects to waters of the State or users of those waters resulting from any discharge or sludge use or disposal in violation of this Order. Reasonable steps shall include accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge or sludge use or disposal."

Standard Provisions, Paragraph A.17. (emphasis added).

The Regional Board identified no remedial measures that the City could have taken to actually mitigate the discharge, and only raised the point that the City could have had redundant systems or monitored earlier. However, even redundant systems could experience failure and, as discussed elsewhere in this letter, earlier monitoring would have had no environmental effect and would have done nothing to mitigate any possible adverse effects. The fact is that the City did perform *additional* monitoring, the result of which demonstrated that the incident did not have a long-term effect on the environment because there was no evidence of measurable chlorine residual in Old River less than 20 hours after the incident.

The facts also demonstrate that the City took immediate remedial measures to resolve the technical problems, and the Regional Board staff recognized that "the Discharger has made the necessary modifications to the system to correct this problem." *See* Proposed ACL Order at 5. The City immediately corrected the SO_2 problem upon discovery and restarted the dechlorination process by utilizing the automatic shutdown bypass function to open the main sulfur dioxide feed valve and restoring the sulfur dioxide flow to the plant effluent at approximately 8:05 p.m. *See* Memo to Frank Motzkus from Dennis Harper (Sr. WWTP Operator (Oct. 22, 2003); *See* Letter from City to M. Kummer, CVRWQCB and Report of Noncompliance (October 27, 2003). In addition, the City's Instrumentation Technician immediately reconfigured the wiring connections to the plant's audible alarm system to notify the operator on duty if similar occurrences were to happen in the future. *See* Letter from City to M. Kummer, CVRWQCB and Report of Noncompliance (October 27, 2003).

The City also made the following instrumentation changes to the plant wide alarm system in order to alert the duty operator in case of a future sulfur dioxide feed failure:

1) **Low Pressure Sensor** added to monitor the pressure of the sulfur dioxide feed system and trigger an alarm condition when the sulfur dioxide gas pressure in the feed piping falls below the normal operating range.

2) **An Additional Monitoring Loop** was installed by the City that will trigger an alarm anytime the main line valve is in the closed position.

See Letter from City to Patricia Leary, RWQCB at 1 (April 27, 2004). In addition, as part of the City's expansion project, the City will provide in-line monitoring and alarms to the dechlorination system. *Id.*

No remedial measures existed to minimize the potential adverse effects to waters of the State for the chlorinated water released and, as recognized by the Regional Board's staff, it was not safe to inspect the waters until the next day. *See* Proposed ACL Order at 4 ("Due to the remote location of the outfall and the time of the release being at night, it may have been difficult and possibly dangerous for the Discharger to immediately assess the effect of the chlorine release on the local biota.") Based on the fact that the incident occurred more than one and a half (1 ½) hours after dark, it was not unreasonable for the City to consider worker safety and wait until the next day to sample. On October 22, 2003, the sunrise was approximately 7:22 a.m. (see footnote 3 for link to website confirming this information), and the City was conducting visual inspections approximately two hours later and water quality samples followed a few hours after that. This is more than was done in other cases where such chlorine residual releases were merely reported in the next monthly self-monitoring report, and no accelerated visual or water quality monitoring was undertaken at all.[5]

A visual inspection was made and receiving water samples were taken within 24 hours. *See* Receiving Water Monitoring Reports from October 22, 2003 attached at Exhibit B showing water quality monitoring done at approximately 0930-0950 hours, and chlorine residual samples taken between 1537 and 1545 hours at three different receiving water sampling stations, and all registering less than 0.1 mg/L; Proposed ACL Order at 2, para.7. These reports indicated no environmental impacts observed in Old River due to the discharge of plant effluent containing chlorine residual. *See* Letter from City to M. Kummer, CVRWQCB and Report of Noncompliance (October 27, 2003).

Even if the City could have monitored earlier, the chlorine residual level would have dissipated during its journey along the approximately 19,000 feet of pipeline before reaching the discharge point into Old River. *See* Figure 1, Sketch of Tracy WWTP, and Figure 2, showing typical

[5] For many of the similar ACL cases cited below, separate notification to the Regional Board was not provided beyond that contained in the monthly self-monitoring reports. *See e.g.*, ACL Complaints No. R5-2003-0504 at pg. 5, No. 5-01-511 at 2, No. 5-01-520 at 2, No. R5-2002-0515 at 2, and No. R5-2003-0505 at 3.

chlorine residual die-away curves (Metcalf & Eddy, 2003)(both attached at Exhibit C). Therefore, it cannot be assumed that the chlorine residual concentration was maintained at a constant 6.7 mg/L from the sampling point at the WWTP until discharge at Old River.

In addition, even if the chlorine residual level did not dissipate greatly, it would have been rapidly diluted in the receiving waters. *See* City's Permit 96-104 at Finding 16 stating that even "during low flow periods of Old River approximately 1.0% of its flow consists of wastewater from the Discharger." Given this presumed 99:1 dilution, chlorine residual of 6.7 mg/L would be rapidly diluted to 1/99th that amount leaving the discharge pipe, or less than 0.067 mg/L upon mixing. Since the Method Detection Limit ("MDL") for reporting purposes for chlorine residual is 0.10 ppm,[6] this level would have shown up as non-detectable in the receiving water. Therefore, more accelerated or additional monitoring was not "necessary" as this monitoring would have likely yielded the same result as the sampling done later in the day on October 22, 2003 (*e.g.*, nondetectable). Thus, the City met the requirements of Paragraph A.17 of the Standard Provisions as incorporated into Permit 96-104. For these same reasons, the Proposed ACL Order's allegations on page 2, paragraph 7of violations of Standard Provision A.17 are erroneous.

All of the above demonstrates that the incident experienced by the City was an "upset." Therefore, the City has established an **affirmative defense** against liability for this incident, and no penalty can be assessed for this upset condition.

The *Marathon Oil* decision cited above is very instructive in this case. In that case, the Court reviewed the effluent limits and determined that "it would be impossible and impracticable to set a standard that could be met 100 percent of the time" even assuming the treatment technology is "employed in an exemplary fashion." *See Marathon Oil,* 564 F.2d at 1272. The Court therefore required EPA to place an "upset" provision in the permit to deal with this event. *Id.* at 1273; *see accord FMC Corp v. Train*, 539 F.2d 973, 986 (4th Cir. 1976), which stated:

> "This court is of the opinion that EPA should provide an excursion provision .... Plant owners should not be subject to sanctions when they are operating a proper treatment facility. Such excursions are provided for ... under the Clean Air Act, ..., and this Court sees no reason why appropriate excursion provisions should not be incorporated in these water pollution regulations." (emphasis added)

See also Essex Chem. Corp. v. Ruckleshaus, 486 F.2d 427, 432-433 (D.C.Cir. 1973) *cert. denied* 416 U.S. 969 (1974)("variant provisions appear necessary to preserve the reasonableness of the standards as a whole.... The record does not support the 'never to be exceeded' standard currently in force"); *Portland Cement Ass'n v. Ruckleshaus*, 486 F.2d 375, 398-99, n. 91

[6] *See* Letter from City of Tracy to Michael Kummer, CVRWQCB (18 July 2003) specifying detection limits for chlorine.

(D.C.Cir. 1973) *cert. denied* 417 U.S. 921 (1974)(informal treatment of upsets is inadequate; "companies must be on notice as to what will constitute a violation").

Both the Ninth Circuit and the Fourth Circuit Courts of Appeal have held or at least alluded that a permit's "upset" defense should be utilized to offset these expected exceedances. *See Marathon Oil,* 564 F2d. at 1274; *FMC Corp.*, 539 F.2d at 986. The City encourages the Regional Board, if no other flexibility is exercised as requested herein, to recognize this affirmative defense and deem the chlorine residual exceedance to not be a "violation" subject to assessment of penalties. The Regional Board should utilize the "upset" defense to determine that the instances of permit noncompliance related to the treatment plant dechlorination unit's failure do not constitute "violations" for enforcement purposes.

2. The Record for this ACL Contains No Evidence that the Discharge Violated Receiving Water Limitation E.4.

Paragraph E.4 of Permit No. 96-104 states the following:

> "E. Receiving Water Limitations:
>
> Receiving water limitations are based upon water quality objectives contained in the Basin Plan. As such they are a required part of the permit. However, a receiving water condition not in conformance with a limitation is not necessarily a violation of this Order. The Board may require an investigation to determine cause and culpability prior to asserting a violation has occurred.
>
> The discharge shall not cause the following in the receiving water:
>
> 4. The discharge shall not cause concentrations of any materials in the receiving waters which are deleterious to human, animal, aquatic or plant life." (emphasis added)

The Regional Board's files contain no evidence that this receiving water limitation was actually violated in the receiving water,[7] particularly when chlorine dissipation and dilution (as discussed previously) are taken into account. Just because the effluent had a concentration of 6.7 mg/L at the WWTP, this does not mean that the concentration in the receiving water was equivalent to this amount . In fact, given the 99:1 dilution found to be present in the Permit (see Permit No. 96-104 at Finding 16), the actual concentration in the receiving water would be just a fraction of the concentration found at the WWTP. Further, given the MDL of 0.10 mg/L, the receiving

[7] Even if an objective set to protect aquatic life was exceeded in the water, all aquatic life objectives are set with the expectation that these criteria will be exceeded once every three years. *See* USEPA Water Quality Standards Handbook, EPA-823-B-94-005a at pg. 3-3 (August 1994)(USEPA expects the 3-year return interval to provide a very high degree of protection.). Given that there is no evidence in the record to show that the objective deemed by the Regional Board to regulate chlorine residual has been exceeded in Old River more than once in 3 years, this exceedance should not be considered a "violation" of the receiving water limits.

water concentration was likely undetectable and it would be impossible to prove whether or not this non-detectable exceeded the interpreted narrative water quality objective (*e.g.*, USEPA Water Quality Guidance Criteria) or not.[8]

Thus, in order to prove that this receiving water limitation was actually a violation, the Regional Board would have to have evidence of deleterious impacts to human, animal, aquatic or plant life. The non-detectable levels found in the receiving water would likely not be high enough to cause impacts to human, animal, or plant life. If adverse effects, such as fish kills, had occurred, some evidence of this would likely have been seen on the morning of October 22, 2003 when the City did its visual inspection of the discharge site. However, no evidence exists that there was any actual adverse impact on aquatic life.[9] *See* OES Hazardous Materials Spill Report submitted by the City on Oct. 22, 2003 at 1504 hours ("no sign of environmental impact at the outlet into the river"); Letter from City to M. Kummer, CVRWQCB and Report of Noncompliance (October 27, 2003); Proposed ACL Order at pg. 1, para.4 ("the effect of the chlorine release on aquatic life is not known."); RWQCB Inspection Report at pg. 4 (5 April 2004)("The impacts to biota could not be evaluated due to the remoteness of the outfall, the time of release being at night, and the collection of data late on the next day")(emphasis added). Therefore, the Regional Board has not met its burden of providing evidence in the record to prove this alleged violation.

All administrative orders, including enforcement orders, must be supported by the findings and such findings must be based upon the evidence in the record. Orders not supported by the findings or findings not supported by the evidence constitute an abuse of discretion. *See accord* 33 U.S.C. §1319(g)(8)(authorizes setting aside enforcement action if there is not substantial evidence in the record to support a finding of violation or if there has been an abuse of discretion); *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; *California Edison v. SWRCB* (1981) 116 Cal. App.3d 751, 761.

3. The Record for this ACL Contains No Evidence that the Discharge Created a Condition of "Pollution."

The Proposed ACL Order at page 2, paragraph 8 alleges that the "discharge violated Provision F.1 and Standard Provision A.22 of Order No. 96-104, which require that neither the discharge nor its treatment shall create a nuisance or pollution as defined in CWC [California Water Code] section 13050. The discharge of highly chlorinated effluent at levels that exceed the effluent limitations constitutes pollution."

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[8] The Regional Board's use of the USEPA guidance criteria to interpret a narrative criterion violates the Clean Water Act, which requires that the Regional Board adopt numeric objectives for toxic pollutants, such as chlorine. 33 U.S.C. §1313(c)(2)(B).

[9] In other ACL Orders issued by this Regional Board for chlorine violations, the Board actually had evidence of such adverse impacts. *See e.g.*, Stockton ACL (No. R5-2004-0535) for an unpermitted discharge for four (4) hours of 480,000 gallons of chlorinated water with an average chlorine level of 11.4 mg/L, which resulted in actual reported fish kills.

Provision F.1. of the Permit requires: "Neither the discharge nor its treatment shall create a nuisance or pollution as defined in Section 13050 of the California Water Code." Similarly, Standard Provision A.22 provides that: "Neither the treatment nor the discharge shall create a condition of nuisance or pollution as defined by the CWC, Section 13050."

Water Code section 13050(*l*) defines "pollution" as "an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following: (A) the waters for beneficial uses, or (B) facilities which serve these beneficial uses." Further, "pollution" may include "contamination," which is defined as "an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to public health through poisoning or through the spread of disease." Water Code §13050(*l*) and (k).

There is no evidence that the incident in question created a public health hazard or unreasonably affected facilities which serve the beneficial uses. In fact, the evidence shows that the City "did not believe that there would be any impact to the drinking water source down river" because drinking water standards for chlorination exceed those for aquatic life. *See* OES Hazardous Materials Spill Report submitted by the City on Oct. 22, 2003 at 1504 hours.

The record contains no analysis of the factors required to prove "pollution" exists under Water Code section 13050. The only finding is that made in the Proposed ACL Order that "[t]he discharge of highly chlorinated effluent at levels that exceed the effluent limitations constitutes pollution." *See* Proposed ACL Order at page 2, paragraph 8. No evidence supports this finding. Therefore, the Regional Board has not met its burden of providing evidence in the record to prove this finding of alleged violation.

4. <u>The Record for this ACL Contains No Evidence Of Negligence by the City.</u>

For the first time in this Proposed ACL Order, the Regional Board has raised the issue of negligence. There was no such allegation in the ACL Complaint issued by the Executive Officer of the Regional Board on January 5, 2005. *See* ACL Complaint No. R5-2005-0500 (Jan. 5, 2005). There is no evidence in the Regional Board's files and records related to this ACL to support findings of negligence on the part of the City.

The Proposed ACL Order, on the one hand, alleges that the "Discharger was negligent for not maintaining adequate controls or redundancy to prevent this release of chlorinated effluent." Proposed ACL Order at pg. 3. Then, on the other hand, states that this was an "accidental release" and the "operator immediately corrected the problem." *Id.* at pg. 4. The fact that this was an accidental, unintentional, and an exceptional incident that was immediately corrected argues against a finding of negligence.

The Proposed ACL Order also alleges that the City was negligent for "not maintaining adequate standard operating procedures and emergency/contingency plans for responding to the release of highly chlorinated effluent." Proposed ACL Order at 3. However, the City's Permit contains no such requirement.

The only similar requirement of the Permit is that the City submit a written report to the Regional Board annually "certifying whether the current operation and maintenance manual, and contingency plan, reflect the wastewater treatment plant as currently constructed and operated, and the dates when these documents were last revised and last reviewed for adequacy." *See* Order No. 96-104's Monitoring and Reporting Program at pg. 4-5, para. d. The Regional Board has not alleged that the City has violated this provision.

The only other provision is provision contained in the Standard Provisions that requires the filing of a technical report on the City's preventative (failsafe) and contingency (cleanup) plans for controlling accidental discharges, and for minimizing the effect of such events. *See* Standard Provision B.3. However, this provision only applies "upon written request of the Board." *Id.* The Regional Board has provided no evidence that such a written request was made to the City *prior to* the October 21, 2003 event that covered a request to create standard operating procedures and emergency/contingency plans for responding to the release of highly chlorinated effluent. Without such a request, and without review of the technical report and establishment of conditions with which the City must comply being incorporated into the Permit as specified in Standard Provision B.3, the City cannot be deemed in violation of this requirement, or negligent for failure to comply with a requirement that was not made part of its Permit.[10] *See accord* 33 U.S.C. §1342(k)(specifying that compliance with an NPDES permit shall be deemed compliance); *Piney Run Preservation Association v. County Commissioners of Carroll County,* 268 F.3d. 255, 269 (4th Cir. 2001)(further discussing the "permit shield doctrine"). For these reasons, all allegations of negligence should be removed from this Proposed ACL Order.

5. The Proposed ACL Order's Penalty is Substantially Higher than Orders Issued for Similar Incidents and, Thus, Fails to Provide Equal Protection Under the Law.

The United States Constitution requires equal protection under the law. Similarly, the California Constitution at article 1, section 7, subd. (a) states "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." Because the large penalty proposed in the Proposed ACL Order is unreasonably high in comparison to other orders issued for similar alleged violations, adoption of this Proposed ACL Order would result in regulation and enforcement that is fundamentally unfair and denies the City of its right to equal protection under the law, particularly to the extent that substantially less onerous penalties may be and have been imposed on other dischargers in this region and statewide.

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[10] As for City protocols, the City's October 27, 2003 Report of Noncompliance informed the Regional Board that the City had in place an Emergency Response Plan, and that a memo was issued and distributed after the incident informing City treatment plant staff that chlorinated plant effluent should be treated as a hazardous material in the future. Pursuant to the Regional Board's April 5, 2004 inspection report, the City timely sent the Regional Board a letter dated April 27, 2004 outlining the plans and time schedule for tasks to be undertaken to prevent a recurrence of the incident as had been requested. Thus, the City does not believe that the facts demonstrate an actionable violation related to the emergency protocols since the City has attempted to respond to each of the Regional Board's requests and concerns that were not raised until after this event occurred. *See* Inspection Report Cover Letter from RWQCB to Frank Motzkus requesting report by May 7, 2004 (April 5, 2004).

Research on other ACL complaints issued by the Central Valley Regional Water Quality Control Board located incidents similar to the one that happened to the City of Tracy. Interestingly, most of these similar incidents were dealt with as Mandatory Minimum Penalties (MMPs) instead of as discretionary penalties.

The closest situation was the City of West Sacramento ACL (No. 5-01-511) where two violations were incurred because of a single, 20-hour incident that stretched over two days. During this time, chlorine was released and peaked at more than 5 mg/L for two hours. Another separate incident involving chlorine also occurred a few months later due to equipment failure. The total penalty was only **$9000** despite the fact that the first incident was more than 10 times longer than the incident in Tracy, and these violations were only reported via the City's self-monitoring reports, not within 24 hours as required and as done by Tracy.

Another similar incident was the City of Anderson ACL (No. 5-01-506) where chlorine residual exceeding the permitted limit was discharged for an unknown period, but longer than 3 hours. Like Tracy's case, the violation was caused by the malfunction of a sulfonator injector pump used for dechlorination such that dechlorination did not occur. In the Anderson case, the electrical contacts for the sulfonator and chlorinator alarms were *corroded*, so neither alarm was operational. Despite this clear maintenance issue, Anderson was assessed an MMP of just **$3000** even thought the incident lasted longer than the Tracy situation and there was no evidence in the Tracy case of a failure to maintain the equipment.

A third similar incident was the City of Chico ACL (No. R5-2002-0515) where there were three serious violations during a six-month period for chlorine residual in excess of their permitted limits. The first violation, like Tracy, was caused by the malfunction of a sodium bisulfate pump used for dechlorination. The second was caused by a software bug in the control system programming, and the third from operator error. The total amount of the penalty in that case was **$9000**.

In the City of Colusa's ACL (No. R5-2003-0504), the City had 11 serious chlorine violations over the course of two years and was assessed only MMPs for each violation. Similarly, in the Department of Corrections ACL (No. 5-01-520), the Department was assessed only MMPs despite having 26 continual days and 32 total violations in excess of their chlorine effluent limit. Even where 182 chlorine exceedances were reported, only MMPs were issued. See Maxwell Public Utility District ACL (No. R5-2003-0505) at pgs. 3-4.

A more recent example was the Quincy Community Services District ACL (No. R5-2004-0536) which had four separate chlorine violations, all of them defined as "serious," and all resulting from inadequate or malfunctioning sodium bisulfite dosing. This ACL was issued for MMPs in the amount of **$12,000**, which recognized the remedial actions taken by the District to address the violations.

It should be noted that for many of the ACL cases cited above, there did not appear to be separate 24-hour notification to the Regional Board beyond that contained in the monthly self-monitoring reports, and no accelerated monitoring. *See e.g.*, ACL Complaints No. R5-2003-0504 at pg. 5, No. 5-01-511 at 2, No. 5-01-520 at 2, No. R5-2002-0515 at 2, and No. R5-2003-0505 at 3. Nevertheless, these ACLs included only MMPs, not discretionary penalties as is being recommended in the Proposed ACL Order.

The ACL Orders cited in this letter are hereby included in Exhibit D, incorporated by reference into the record on this matter, and set forth as examples should guide the Regional Board toward maintaining consistency and predictability in enforcement. *See* SWRCB Enforcement Policy (emphasizing fairness and consistency in enforcement and stating that "Enforcement actions should be appropriate for each type of violation and should be similar for violations that are similar in nature and have similar water quality impacts."); *see also* Proposed ACL Order at pg 3, para. 10 (allegedly relying upon the SWRCB's Enforcement Policy).

Instead of striving for consistency with other similar cases, the Regional Board appeared to rely on other orders based on cases not as factually similar as the cases cited above. The City believes that the following may have been the basis for the $120,000 ACL Penalty proposed against the City.

First, an ACL (No. 99-503) against Stockton in 1999 involved a six and a half (6 ½) hour and 6.11 million gallon chlorine release with a chlorine residual of 6.3 mg/L, which caused 100% mortality in the flow-through bioassay test. Like the Tracy case, the discharge was caused by a failure of the sulfur dioxide feed system and a failure of the alarm system. However, ***unlike*** the Tracy case, this Stockton case also involved allegations and presumably evidence of operator error and negligence, which make the case more egregious. Even though that case resulted in an incident three times longer in duration and more than twelve (12) times more in volume, the **$100,000** penalty issued was ***less than*** that proposed for Tracy.

A second Stockton ACL (No. R5-2004-0535) was proposed for an unpermitted discharge of 480,000 gallons of chlorinated water (with an average chlorine level of 11.4 mg/L) intentionally released into an irrigation canal from construction of a municipal water well that lasted for four (4) hours. This incident resulted in high chlorine levels maintained in the receiving waters for more than a day and, as stated above, resulted in actual reported fish kills. Notwithstanding that this incident was twice as long in duration, contained nearly twice the initial concentration of chlorine, and resulted in documented visible environmental damage, the proposed penalty of **$125,000** is *just $5000 more* than that proposed for the City of Tracy, which was nowhere near as egregious as this *intentional unpermitted* discharge.

Given all of this, the City of Tracy believes that, with the existence of an "upset" defense and the fact that all other alleged "violations" are only subject to discretionary penalties, no penalty is necessary or warranted in this case since the City promptly and appropriately responded to the event and adequately addressed the cause to ensure this type of incident does not happen again.

The City also believes that no justification exists in the record, or in past precedent of this Regional Board, for the $120,000 penalty proposed. A single memo exists in the record related to the penalty and this memo merely references a potential economic benefit for failure to provide a backup sulfur dioxide feed system. *See* RWQCB Record of Communication by Jim Marshall (11/1/2004 11:15:27 AM).[11] No other justification exists for the penalty amount proposed. As such, the proposed penalty is arbitrary, capricious, and inconsistent with past precedent.

Should the Regional Board adopt the Proposed ACL Order as drafted, notwithstanding the objections raised by the City herein, the City requests that the Regional Board direct two-thirds, or up to $80,000 of any assessed amount, to Supplemental Environmental Projects (SEPs). These SEPs would be overseen by the Water Education Foundation (WEF) and would support:

1) The revision, printing and distribution of 5,000 copies of a new version of the ***Layperson's Guide to Water Pollution*** in the amount of $40,000.

2) The production and distribution of 10,000 copies of a ***California Water Pollution Facts*** booklet, designed as a companion piece to the Guide in the amount of $20,000.

3) Two (2) Project Water Education for Teachers (WET) ***Healthy Water, Healthy People*** workshops and the distribution of water pollution prevention educational materials in the amount of $20,000.

Each of these SEPs could be completed within a year from date of award.

The City plans on presenting a power point presentation at the hearing on June 23rd which will summarize the information contained in this letter, and plans to cross-examine Regional Board staff on the findings, evidence and allegations related to the Proposed ACL Order.

Respectfully submitted,

DOWNEY BRAND LLP

Melissa A. Thorme

Attached: Exhibits A-D

cc: Jim Marshall and Pat Leary, CVRWQCB
Nick Pinhey and Steve Bayley, City of Tracy

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[11] This memo claims, without any supporting evidence, a potential economic benefit of $10,000 to $15,000. The Regional Board cites to no other discharger that has such a redundant system or any evidence that this has been required in other similar cases. *See e.g.,* ACL Nos. R5-2002-0515, No. 5-01-511 and No. 5-01-506. In actuality, the only potential economic savings was the cost of the sulfur dioxide not used during the failure of the feed system, and this cost likely did not exceed $50.