

PROSECUTION STAFF REPORT
ADMINISTRATIVE CIVIL LIABILITY ORDER
FOR
CITY OF PLACERVILLE
HANGTOWN CREEK WASTEWATER TREATMENT PLANT
EL DORADO COUNTY

INTRODUCTION

The City of Placerville (hereafter Discharger) is the owner and operator of the Hangtown Creek Wastewater Treatment Plant, which provides sewerage service to the City of Placerville and surrounding areas in El Dorado County. Treated domestic, commercial and industrial wastewater is discharged to Hangtown Creek, a water of the United States, tributary to Weber Creek and tributary to the South Fork of the American River.

On 16 March 2001, the Regional Water Board adopted WDRs Order 5-01-045 (NPDES No. CA0078956) to regulate discharges of waste from the facility. The WDRs include effluent limitations and other requirements regarding the wastewater discharges. On 24 April 2008, the Central Valley Water Board adopted WDRs Order R5-2008-0053, which renewed the NPDES permit for the facility, replacing R5-01-045. This hearing only concerns effluent limit violations of WDRs Order 5-01-045.

OVERVIEW OF MANDATORY MINIMUM PENALTY PROVISIONS

Because the Discharger is regulated under a NPDES permit, it is subject to mandatory minimum penalties (MMPs). The State Water Board's 19 February 2002 Enforcement Policy describes the main aspects of MMPs; staff have summarized the information and included it below.

As of 1 January 2000, mandatory penalty provisions have been required by California Water Code (CWC) section 13385(h) and (i) for specified violations of NPDES permits. For violations that are subject to those mandatory minimum penalties, the Regional Water Board must either assess the minimum penalty of \$3,000 per violation or may include a discretionary liability in addition to the minimum penalty.

Serious Violations

CWC section 13385(h) requires that a mandatory minimum penalty (MMP) of \$3,000 be assessed by the Regional Water Board for each serious violation. A serious violation is any waste discharge that exceeds the effluent limitation for a Group I pollutant by 40 percent or more, or a Group II pollutant by 20 percent or more. The listings for Group I and II pollutants are found in the State Water Board's Enforcement Policy, but generally Group I pollutants are conventional pollutants, and Group II pollutants are toxic pollutants.

As of 1 January 2004, the CWC was amended to add another category of serious violation. As of that date, serious violations include a failure to submit required discharge monitoring reports, if the reports are designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations.

Non-Serious Violations

CWC section 13385(i) requires that a MMP of \$3,000 be assessed by the Regional Water Board for each non-serious violation. However, the first three non-serious violations are not counted in the penalty assessment. A non-serious violation occurs if the discharger does any of the following four or more times in any period of six consecutive months:

- (a) Exceeds WDR effluent limitations;
- (b) Fails to file a report of waste discharge pursuant to California Water Code section 13260;
- (c) Files an incomplete report of waste discharge pursuant to California Water Code section 13260; or
- (d) Exceeds a toxicity discharge limitation where the WDRs do not contain pollutant-specific effluent limitations for toxic pollutants.

The six-month time period is calculated as a “rolling” 180 days.

Exceptions

Exceptions to the imposition of mandatory minimum penalties are provided for violations that are caused by acts of war or by an unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character or by an intentional act of a third party. Such exceptions do not apply if the violation could have been prevented or avoided by the exercise of due care or foresight by the discharger. Such exceptions are fact specific and are evaluated on a case-by-case basis.

For the purpose of issuing MMPs, a single operational upset which leads to simultaneous violations of one or more pollutant parameters are treated as a single violation. EPA defines a “single operational upset” as “an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one effluent discharge pollutant parameter. Single operational upset does not include... noncompliance to the extent caused by improperly designed or inadequate treatment facilities.” The EPA Guidance further defines an “exceptional” incident as a “non-routine malfunctioning of an otherwise generally compliant facility.” Single operational upsets include such things as upset caused by a sudden violent storm, a bursting tank, or other exceptional event and may result in violations of multiple pollutant parameters. The Discharger has the burden of demonstrating that a single operational upset occurred.

There are also several limited exceptions to MMPs, mainly for discharges that are in compliance with a cease and desist order or time schedule order under narrowly specified conditions.

Small Communities with Financial Hardship

In lieu of assessing all or a portion of the MMPs against a publicly owned treatment works serving a small community with a financial hardship, a Regional Water Board may elect to require the publicly owned treatment works to spend an equivalent amount towards the completion of a compliance project, if the State Water Board or a Regional Water Board finds all of the following:

- (a) The compliance project is designed to correct the violations within five years;
- (b) The compliance project is in accordance with the enforcement policy of the State Water Board, excluding any provision in the policy that is inconsistent with this section; and
- (c) The publicly owned treatment works has prepared a financing plan to complete the compliance project.

Regional Water Board staff relies on the economists at the State Water Board to determine whether a Discharger meets the definition of small community with a financial hardship. In general, a “publicly owned treatment works serving a small community” means a publicly owned treatment works serving a population of 10,000 persons or fewer, or a facility located in a rural county. “Financial hardship” is determined by considering such factors as median income of the residents, rate of unemployment, or low population density in the service area of the publicly owned treatment works. If Regional Water Board staff believes that a Discharger might qualify as a small community with a financial hardship, or if a Discharger requests that such a determination be made, then we must follow the procedure recently developed by the State Water Board’s Office of Enforcement. In general, Regional Water Board staff transmits a request to the State Water Board to review the matter, and provide any information the Discharger has given us. State Water Board staff review all pertinent information, determine whether a Discharger qualifies, and then transmits a formal determination back to the Regional Water Board. It must be emphasized that the Regional Water Board does not have the in-house expertise to determine whether a Discharger qualifies as a small community with a financial hardship. We rely exclusively on State Water Board staff to do this, as required by the Office of Enforcement.

ADMINISTRATIVE CIVIL LIABILITY

Mandatory Minimum Penalty

On 5 May 2008, the Assistant Executive Officer issued Administrative Civil Liability (ACL) Complaint R5-2008-0522 to the City of Placerville, Hangtown Creek Wastewater Treatment Plant. The Complaint charged Placerville with an administrative civil liability in the amount of two hundred seventy thousand dollars (\$270,000), which represented the sum of the statutory Mandatory Minimum Penalties for effluent limitation violations that occurred from 1 January 2001 through 31 December 2007. The penalties are for one hundred one violations of the effluent limitations contained in Placerville’s NPDES permit, and include violations of limits for nitrate, coliform, turbidity, chlorine residual, and settleable solids. A copy of the ACL Complaint is included in this agenda package. Attachment A to the ACL Complaint lists the actual penalties.

In its response to the draft Hearing Procedures, the City of Placerville asked that the hearing before the Central Valley Regional Board include a determination of whether the City has “violated provisions of Waste Discharge Requirements (WDRs) Order 5-01-045 (NPDES No. CA0078956).” The City has submitted two letters regarding the ACL Complaint. These letters are found as Attachment A to this staff report, and are dated 7 April 2008 and 4 June 2008. Neither letter contains a discussion of whether or not Regional Board staff erred in identifying the 101 violations contained in the ACL Complaint. In fact, Regional Water Board

staff sent the City a draft listing of violations on 26 October 2007, and the City responded on 30 November 2007. The Discharger did not present evidence that the violations were inaccurate, but instead provided an explanation for the construction delays and submitted information in support of a request to be considered a small community with a financial hardship. The City has not submitted any comments during the formal comment period to dispute Regional Board staff's position that the City committed 101 violations of WDRs Order 5-01-045 that are subject to MMPs. Regional Water Board staff stands by our determination of the violations.

Determination of "Small Community"

The City of Placerville is completing a \$45 million upgrade of its Hangtown Creek wastewater treatment plant, which is designed to bring the facility into compliance with its NPDES permit. All liquid and solids process components are being upgraded. The activated sludge plant is being converted to biological nutrient removal, secondary clarifiers are being added, and the tertiary treatment system is being upgraded with new filters and ultraviolet disinfection. The plant upgrades were initiated to comply with a time schedule in the WDRs to meet new coliform, turbidity, and nitrate effluent limitations by March 2006. However, the City experienced a significant delay in starting construction because the State Revolving Fund temporarily suspending funding from November 2003 to late 2005. After funding was restored, the City began construction in the spring of 2006, and completion is anticipated in the spring of 2009.

As described earlier, the CWC allows a small community with a financial hardship to complete a compliance project in lieu of paying mandatory minimum penalties. The City has requested that the treatment plant upgrade be considered a compliance project, and that it be used to satisfy the financial penalty assessed in the Complaint. This request is the main focus of the hearing before the Central Valley Water Board.

In order to evaluate the City's request, Central Valley Water Board staff has consulted several times with the State Water Board's economist to determine whether or not Placerville meets the definition of a "publicly owned treatment works serving a small community" pursuant to CWC section 13385(k)(2). The City has submitted several documents in support of its position, and the State Water Board economist has prepared three documents which explain his analysis in detail. These documents are found in Attachment B to this staff report.

The main issue is the population served by the wastewater treatment plant. Both parties agree that the treatment plant's service district is larger than the City. Therefore, the 2006 Census population for the City (10,086 people) under-reports the number of people being served by the treatment plant. According to the City, the treatment plant's service area includes a number of parcels that utilize septic systems for wastewater disposal, and these people should be removed from the population estimate. However, it does not appear that an accurate number of people served by septic systems has been provided. In addition, the City's population value may not include the over 5,000 people who work within the City, or the people who go to schools within the sewer service area. These people are served by the wastewater treatment plant, and need to be added in to the population estimate.

State Water Board staff has determined that the City of Placerville's wastewater treatment plant serves over 10,000 people, and therefore the City does not meet the criteria of a small community. As stated earlier, Central Valley Water Board staff defer to the State Water Board staff to make such a determination, and given the information presented, agree with this determination. Because the City is not considered a small community, the ACL Complaint did not allow it to apply the mandatory minimum penalty toward its compliance project of upgrading the wastewater treatment plant.

Statutory Maximum Penalty

The ACL Complaint was issued for the minimum penalties (\$3,000 per violation) that are required under statute. However, the CWC sections 13385(c) and (e) also allow for higher penalties to be considered and assessed. In summary, these two sections allow for a penalty of \$10,000 per day of violation, and a penalty of \$10 per gallon discharged above the first 1,000 gallons.

Central Valley Water Board staff has estimated the potential maximum civil liability pursuant to CWC section 13385(c)(1), by applying the \$10,000/day penalty for each of the 91 days that violations were reported. (It is noted that there are a total of 101 violations over a period of 91 days). The maximum penalty pursuant to this code section is \$910,000. In addition, as discussed above, a second penalty of \$10 per gallon discharged over 1,000 gallons could be assessed for each day of violation. This penalty was not calculated, but would cause the maximum penalty to significantly exceed \$910,000. However, staff does not propose to assess a discretionary penalty (above the mandatory minimum) because the Discharger reasonably pursued funding and is constructing its new wastewater treatment plant.

RESPONSE TO COMMENTS

The Discharger and Senator Dave Cox submitted written comments, as found in Attachments A and C. The comments are summarized below, and are followed by Regional Water Board staff's responses.

The City has implied that the Central Valley Water Board cannot assess mandatory minimum penalties for effluent limitation violations more than three years after we learn of the violations, pursuant to the California Code of Civil Procedure, section 338(i). However, this Code provision applies to time limits on the commencement of civil suits in the courts, and not on the issuance of administrative actions by our agency. Therefore, we can legally assess MMPs back to 1 January 2000.

The City has stated that most of the violations "can be attributed in one way or another to plant upset caused as a result of construction activities." Central Valley Water Board staff disagree. The violations listed in the Complaint do not appear to be associated with a plant upset. Many of the violations occurred after plant reconstruction began, however staff does not agree that they were likely caused by plant upset. Most of the violations appear to be due to the fact that the new facility was not operational at the time the final limits for turbidity, coliform, and nitrate came into effect. CWC section 13385(j) provides relief for a single operational upset, if the Discharger demonstrates that a number of conditions were met. The

Discharger has not submitted any information to support an operational upset pursuant to section 13385(j).

The City states that the legislature intended to protect ratepayers in small disadvantaged communities from the harsh impact of MMPs. Central Valley Water Board staff agree that the legislature intended to protect ratepayers in small communities with financial hardships from paying MMPs directly; however, staff do not agree that the City of Placerville meets the definition of a publicly owned treatment works serving a small community.

In regard to the small community issue, the City believes that the “methodology used to calculate the population is not reflective of the actual population served at the time the violations occurred.” State Water Board staff has provided responses to these comments, as found in Attachment B. The responses are summarized here.

- (a) *There are 150 residential parcels in the city that are on septic systems, serving a population of 330.*

The 4 June 2008 letter contains estimates of the number of septic systems; this value is very different than those made in earlier correspondence. The City of Placerville stated in its 7 April 2008 letter that only 6,470 persons within the service area were connected to the sewer system implying that the remaining population, which would be greater than 3,598 persons, was on septic systems. In contrast, the 4 June letter states that only 150 residential parcels in the city use septic systems and that the population served by those systems is only 330. No documentation has been provided to substantiate either number.

- (b) *There are 40 residential parcels outside of the city with a population of 90 people that are on septic systems.*

This is the first estimate of the number of parcels outside the city that are on septic systems. This means that there are 420¹ people in the service area on septic systems. The result is that if the service area population is greater than 10,420, the city does not meet the section requirements for population served. Therefore, the total population of the service area is more than the threshold amount. In addition, customers and employees being served by the city must also be considered in the determination.

- (c) *Population estimates made by the California Department of Finance (DOF), rather than the US Census, should have been used in the SCFH determination.*

DOF population estimates differ from the US Census in methodology and results but one is not necessarily better than the other. State Water Board staff has opted to use the US Census estimates because of consistency, availability, and the estimates are generally more conservative. Although DOF estimates are made for midyear and the Census estimates are for the beginning of the year, the data shows that DOF population

¹ State Water Board staff’s memo has a values of 370 people and a service area of 10,370 people. Central Valley Water Board staff believe that this is a typo, and that the actual numbers should be 420 people (the sum of 330 people within City limits and 90 people outside City limits), and a population of 10,420.

estimates are consistently higher than Census estimates for the years 2000 to 2008. Therefore, using Census estimates benefits the City.

Senator Dave Cox submitted a letter dated 17 July 2008 in which he states that the California legislature recognized that it would be unfair to require taxpayers in small financially disadvantaged communities to pay penalties on top of the significant costs for compliance. He urges the Central Valley Water Board to allow Placerville to apply its penalty to its \$45 million compliance project. The Senator also comments that he was concerned that the State Water Board staff had estimated the population to be 10,058, and therefore he believed it could actually be less than 10,000, taking a one percent margin of error into account. In response, Central Valley Water Board staff refer to the three documents prepared by State Water Board staff, as found in Attachment B. A final estimate of the population of the sewer service area has not been made. However, given that the City's 2000 population was 9,610 people, the 2006 population was 10,068 people, and over 5,000 people work in the City, and a large number of people go to schools with the sewer service area, even with approximately 400 people served by septic system, it is still very reasonable to assume that the population of the sewer service area exceeds 10,000 people whether the 2000 or 2006 population numbers are used.

Recommendation

State Water Board staff has determined that the City of Placerville's wastewater treatment plant serves over 10,000 people, and therefore the City does not meet the criteria of a small community. Central Valley Water Board staff defer to the State Water Board staff to make such a determination, and given the information presented, agree with the determination.

Prosecution staff recommends that the Central Valley Water Board confirm the State Water Board staff's determination that the City of Placerville's Hangtown Creek Wastewater Treatment Plant serves a population of greater than 10,000. Prosecution staff also recommends that the Central Valley Water Board adopt the ACL Order requiring the City of Placerville to pay \$270,000 in mandatory minimum penalties within 30 days of adoption of the Order.

Attachment A: Comment letters from the City of Placerville (7 April 2008 and 4 June 2008)

Attachment B: State Board Economist's documents

Attachment C: Comment letter from Senator Dave Cox (17 July 2008)

BLH/PHL/WSW: 2-Oct-08

23/24 October 2008 Regional Water Board meeting