

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of Administrative Civil Liability
Complaint No. R5-2016-0512 (Complaint)
(Malaga County Water District)

Prosecution Team Rebuttal Brief

**PROSECUTION TEAM REBUTTAL BRIEF; ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT NO. R5-2016-0512**

The Prosecution Team for the California Regional Water Quality Control Board, Central Valley Region (Prosecution Team) hereby submits a rebuttal brief in response to the Malaga County Water District's (Discharger) 11 March 2016 evidence submittal. The Prosecution Team continues to recommend a discretionary penalty in the amount of \$1,036,728 for the Discharger's violations.

I. Evidence on Discharger's Compliance Status in 2015 and 2016 is Only Relevant to Application of Enforcement Policy's Cleanup and Cooperation Factor

While not explicitly argued, the Prosecution Team presumes much of the Discharger's 11 March 2016 evidence submittal is intended to show it recently came into compliance. The Discharger's submission included a number of documents that purport to show whether, and to what extent, the Discharger has come into compliance with respect to implementing its pretreatment program in 2015 and 2016. (See 11 March 2016 Discharger Evidence Submittal Items: MCWD 2015 Annual Pretreatment Report; MCWD response to NOV; MCWD Slug Evaluation Report.) That evidence is only relevant to the application of the State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) cleanup and cooperation factor since the Complaint proposes ending the violation period for failure to implement the pretreatment program on 31 January 2015 (the 2008 Permit rescission date), which is prior to the Discharger undertaking many of the corrective actions to which it intimates in its evidence submission.

The Complaint alleges that the Discharger failed to implement key components of its pretreatment program from the adoption of the 2008 Permit on 14 March 2008 through the rescission of the 2008 Permit on 31 January 2015 (Violation 1). (Complaint, p. 11.) Therefore, corrective actions on the part of the Discharger that may have occurred after rescission of the 2008 Permit are irrelevant to the calculation of the violation period. Furthermore, the Complaint proposes collapsing the violation period to a total of 89 days of violation for Violation 1. (Id.; see also Attachment A to ACLC R5-2016-0512, p. 7.)

The Complaint proposes a cleanup and cooperation factor of "1.2" based on the Discharger's efforts in coming into compliance. (See Attachment A, p. 10.) That recommendation reflects the Prosecution Team's acknowledgement that the Discharger has made recent improvements

in implementing its pretreatment program.¹ (Id. at 9.) However, the recommendation also reflects the fact that the Discharger did not undertake the majority of those improvements for years despite being requested to do so by Central Valley Water Board staff on many occasions prior to January 2015. (Id.)

II. Issue of Which Sewer Use Ordinance is Operational Does not Effect Proposed Liability Amount; Discharger's 2004 Sewer Use Ordinance is Operational

The Discharger's arguments that iterations of its Sewer Use Ordinance following the 2004 Sewer Use Ordinance made non-significant modifications, and that those changes were permitted by the Central Valley Water Board are both false. (See 11 March 2016 Discharger Evidence Submittal Item: MCWD response to NOV.) The 2004 Sewer Use Ordinance established a local limit for oil and grease at 100 mg/l. (Sewer Use Ordinance no. 01-13-20014, PT Evid. Item 63.) The 2013-1 Ordinance relaxed that local limit to 200 mg/l. (Ordinance No. 2013-1, pg. 79., Rebuttal Evid.) Modifications that relax local limits, with limited exceptions, constitute a per se substantial modification pursuant to Title 40 Code of Federal Regulations section 403.18(b). (See Title 40 CFR § 403.18(b).) The Code of Federal Regulations mandates specific approval procedures for substantial modifications. (Title 40 CFR § 403.18(c).) The Discharger did not comply with the required process for having substantial modifications approved. (See 21 January 2016 CVRB response to MCWD; see Title 40 CFR § 403.18(c).) Therefore, the 2004 Sewer Use Ordinance is the most recent valid ordinance and is operational.

Regardless, the issue of which Sewer Use Ordinance is operational is only probative to a limited allegation in Violation 1 and does not inform the violation date range or application of the Enforcement Policy factors. Which Sewer Use Ordinance is operational is probative only to whether the Discharger set effluent limits based on local limits for oil and grease in applicable SIU permits. (See Attachment A to ACLC R5-2016-0512, p. 2.) However, the Discharger's failure to control the contribution to the POTW by each SIU through individual permits is based also on the failure to include in its SIU permits sampling location, sampling type, and a statement of applicable civil and criminal penalties, none of which are affected by which Sewer Use Ordinance was in effect at the time.

Furthermore, in addition to basing the Discharger's failure to implement its pretreatment program (Violation 1) on its failure to control the contribution to the POTW by each significant industrial user (SIU) through individual permits, Violation 1 is also based on the Discharger's failure to inspect and sample its SIUs once a year, failure to publish a list of users in significant non-compliance, failure to evaluate whether a slug control plan is necessary for each SIU, failure to file materially sufficient annual pretreatment reports, failure to file adequate quarterly pretreatment reports, and failure to implement key components of its pretreatment program. (See Attachment A to ACLC R5-2016-0512, pp. 2-4.)

¹ Table 1, attached hereto, depicts the extent to which the Discharger had come into compliance with the pretreatment program requirements as of the 2015 PCI, which took place on 25-26 March 2015, months after the rescission of the 2008 Permit and the close of the violation period.

While the Prosecution Team asserts that 2004 Sewer Use Ordinance was the last ordinance approved in accordance with the Code of Federal Regulations, the probative value of which Sewer Use Ordinance is controlling is low and serves as a distraction from the many ways in which the Discharger failed to implement its pretreatment program.

IX. Conclusion

The Discharger's compliance efforts that occurred after the violation period are only probative to the Enforcement Policy's cleanup and cooperation factor. The Prosecution Team continues to recommend a "1.2." The issue of which Sewer Use Ordinance is operational is only probative to one of the many allegations in the Complaint and has no effect on the application of the Enforcement Policy methodology. The Prosecution Team, therefore, continues to recommend to the Central Valley Water Board the imposition of an administrative civil liability penalty of \$1,036,728, as proposed.

Dated: 30 March 2016

Respectfully submitted,

CALIFORNIA REGIONAL WATER QUALITY
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