



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board



Arnold Schwarzenegger
Governor

Office of Chief Counsel

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August 2, 2007

VIA CERTIFIED MAIL

Everett DeLano III
Law Offices of Everett DeLano III
220 West Grand Avenue
Escondido, CA 92025

Dear Mr. DeLano:

PETITION OF ESCONDIDO CREEK CONSERVANCY AND SAN DIEGO COASTKEEPER
(ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R9-2006-0095 FOR CITY OF ESCONDIDO
HALE AVENUE RESOURCE RECOVERY FACILITY), SAN DIEGO WATER BOARD: BOARD
MEETING NOTIFICATION
SWRCB/OCC FILE A-1796

Enclosed is a copy of the proposed order in the above-entitled matter. The State Water Resources Control Board (State Water Board) will consider this order at its meeting that will be held on *Tuesday, September 18, 2007* commencing at *10:00 a.m.* in the Coastal Hearing Room, Second Floor of the Cal/EPA Building, 1001 I Street, Sacramento, California. You will separately receive an agenda for this meeting.

At the meeting, interested persons will be allowed to comment orally on the draft order, subject to the following time limits. The petitioners, Escondido Creek Conservancy and San Diego Coastkeeper will jointly be allowed five minutes for oral comment. The discharger, City of Escondido, and the San Diego Regional Water Quality Control Board will each be allowed five minutes for oral comment, with additional time for questions by the State Water Board members. Other interested persons will be allotted a lesser amount of time to address the State Water Board. At the meeting, the State Water Board may adopt the draft order as written or with revisions, it may decide not to adopt the order, or it may continue consideration until a later meeting.

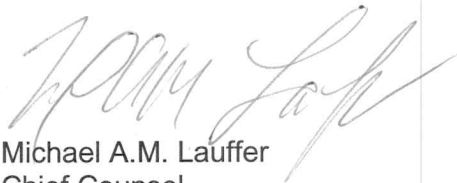
All comments shall be based solely upon evidence contained in the record or upon legal argument. Supplemental evidence will not be permitted except under the limited circumstances described in California Code of Regulations, title 23, section 2050.6. Written comments on the draft order must be received by **September 5, 2007 at 5:00 p.m.** Please indicate in the subject line, comments to A-1796—September 18, 2007 Board Meeting. Those comments must be addressed to:

California Environmental Protection Agency

Ms. Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
(tel) 916-341-5600
(fax) 916-341-5620
(email) commentletters@waterboards.ca.gov

If there are any questions or comments, please contact James Herink, Staff Counsel, in the Office of Chief Counsel, at (916) 341-5150 or email jherink@waterboards.ca.gov.

Sincerely,



Michael A.M. Lauffer
Chief Counsel

Enclosure

cc: **All w/enclosure and w/o IP list**

Escondido Creek Conservancy
P.O. Box 460791
Escondido, CA 92046-0791

San Diego Coastkeeper
2924 Emerson Street, Suite 220
San Diego, CA 92106

Mr. James Dragna
Bingham McCutchen, LLP
355 South Grand Avenue, Suite 4400
Los Angeles, CA 90071

Plant Manager
Hale Avenue Resource Recovery Facility
1521 S. Hale Avenue
Escondido, CA 92029

Inter-Office Service List **[via email only]**

Interested Persons (IP List)

Mr. John Robertus **[via email only]**
Executive Officer
San Diego Regional Water Quality
Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Ms. Rebecca Stewart **[via email only]**
Sanitary Engineering Associate
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Mr. John Richards **[via email only]**
Senior Staff Counsel
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P.O. Box 100
Sacramento, CA 95812-0100

DRAFT

August 2, 2007

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2007-

In the Matter of the Petition of

ESCONDIDO CREEK CONSERVANCY AND SAN DIEGO COASTKEEPER

For Review of Administrative Civil Liability Order No. R9-2006-0095
for the City of Escondido Hale Avenue Resource Recovery Facility
Issued by the
California Regional Water Quality Control Board,
San Diego Region

SWRCB/OCC FILE A-1796

BY THE BOARD:

On October 11, 2006, the San Diego Regional Water Quality Control Board (San Diego Water Board) issued Order No. R9-2006-0095 (Settlement Order). The Settlement Order resolved potential liability by the City of Escondido (City) for violations alleged in Administrative Civil Liability (ACL) Complaint R9-2005-0265. The Escondido Creek Conservancy and the San Diego Coastkeeper filed a timely petition requesting review by the State Water Resources Control Board (State Water Board). In this Order, the State Water Board grants the petition and remands the matter to the San Diego Water Board.

I. BACKGROUND

The City owns and operates the Hale Avenue Resource Recovery Facility (HARRF), an activated sludge wastewater treatment facility. Primarily, the City discharges secondary treated effluent through the Escondido Land Outfall that runs approximately nine miles along Escondido Creek and the San Elijo Lagoon in accordance with Order No. R9-2005-0101, national pollutant discharge elimination system (NPDES) No. CA0108971. During extreme wet weather conditions, the City discharges tertiary-treated effluent to Escondido Creek pursuant to Order No. R9-2003-0394, NPDES No. CA0108944.

On November 30, 2004, the San Diego Water Board Executive Officer issued ACL Complaint R9-2004-0421 to the City in response to self-monitoring reports indicating

393 violations of effluent limitations.¹ These alleged violations occurred between May 3 and August 17, 2004 (2004 violations) and are subject to mandatory minimum penalties (MMPs) in accordance with Water Code section 13385. The San Diego Water Board ordered the City to conduct a technical investigation.² The City's technical report states that the exceedances might have been caused by illegal discharges to the sewer system, which resulted in an upset of the biological processes of the HARRF.

The San Diego Water Board requested the assistance of the State Water Board's Compliance Assurance and Enforcement Unit in reviewing the HARRF's records and the City's technical report to determine the cause of the violations.³ The technical report concluded that elevated levels of chemicals appeared to have entered the HARRF, but that the permit violations were likely caused by a combination of events, most of which could have been controlled by properly trained and equipped HARRF staff. The technical report further concluded that the long duration of the violation is more consistent with operational control problems than with the City's toxic load theory.

On December 30, 2005, the San Diego Water Board Executive Officer issued ACL Complaint R9-2005-0265 (Complaint). The Complaint sought a total of \$1,335,000 in MMPs and \$462,250 in discretionary liability, for a recommended civil liability of \$1,797,150.⁴ The Complaint incorporated the alleged violations from the 2004 complaint, as well as liability for additional alleged violations, some of which were subject to discretionary civil liability and some of which were subject to additional MMPs.⁵ The additional alleged violations subject to MMPs include forty-seven violations of effluent flow limitations prescribed in Order No. 99-72 (NPDES No. CA0107981) and eleven exceedances of nitrate and nitrogen effluent limitations

¹ At the time these violations occurred, the City's waste discharge requirements were set forth in Order No. 99-72, NPDES No. CA0107981.

² San Diego Water Board Order No. R9-2005-0077.

³ The Compliance Assurance and Enforcement Unit's technical investigation occurred on January 5 and 6, 2005, with the report completed on April 7, 2005. The report was prepared on behalf of the San Diego Water Board and a separation of functions has been invoked. State Water Board enforcement staff have not advised or otherwise participated in the review of this petition or preparation of this Order.

⁴ The total sum contained in the Complaint and Settlement Order is incorrect, but all parties have used that figure throughout the settlement process and for purposes of this petition.

⁵ The discretionary liability alleged in the Complaint includes: a 73,500 gallon unpermitted discharge of secondary effluent to Escondido Creek in violation of San Diego Water Board Order No. 99-72 (NPDES No. CA0107981); a 280,000 gallon unpermitted discharge of secondary effluent to Escondido Creek in violation of Order No. R9-2003-0394; sixteen violations of effluent limitations prescribed in waste discharge requirements set forth in San Diego Water Board Order No. 93-70; fifteen reporting violations relating to Cease and Desist Order No. 96-31; and, failure to comply with a compliance due date contained in Cease and Desist Order No. 96-31.

prescribed in Order No. R9-2003-0394 (NPDES No. CA0108944). The City asserts that these violations were caused by high rainfall events occurring between January and March 2005 (2005 violations).

In response to the Complaint, the City requested that the San Diego Water Board staff enter into settlement negotiations. After several negotiation meetings, the City submitted a settlement offer and it was presented to the San Diego Water Board on September 13, 2006. No comments had been made during the comment period, but counsel for the petitioners spoke at the meeting, challenging the settlement. The San Diego Water Board voted to defer its decision so that its staff could provide additional information demonstrating whether the City could raise the affirmative defenses alleged.

Board member agenda packets for the next meeting, on October 11, 2006, contained the technical reports prepared by the City, the Compliance Assurance and Enforcement Unit, and the San Diego Water Board staff. At the October meeting, the San Diego Water Board adopted the Settlement Order. The Settlement Order imposes civil liability in the amount of \$1,162,150. Of that amount, the Settlement Order requires that the City deposit \$690,000 into the State Water Board Cleanup and Abatement Account and provides that \$462,150 shall be suspended and waived if the City submits a final copy of two technical studies.⁶ The total liability specified in the Settlement Order is less than the MMP liability identified in the Complaint. Moreover, it appears that the San Diego Water Board reduced the City's total liability by \$645,000 based solely on the City's assertion of affirmative defenses to the MMPs.

II. ISSUES AND FINDINGS

The petition raises a number of issues. Most of these issues are not substantial or appropriate for review by the State Water Board and will not be discussed in this Order.⁷ The single issue addressed in this Order concerns a regional board's discretion to settle MMPs in an administrative action.

⁶ The studies are entitled "Wastewater Treatment and Disposal Facilities Capacity Study" and "Final Project Report." Both were required to be submitted to the San Diego Water Board by December 29, 2006. These studies were undertaken by the City of its own initiative. The total amount being assessed under the Settlement Order is correctly stated in the introductory paragraph. However, in the first ordering paragraph on page 4 of the Settlement Order, the total amount assessed is incorrectly stated as \$1,162,500.

⁷ See *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177; *Johnson v. State Water Resources Control Bd.* (2004) 123 Cal.App.4th 1107; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

In 1999, the Legislature enacted two laws to establish mandatory minimum penalties for certain violations of NPDES permits.⁸ Each bill contained a legislative finding that then-current “enforcement efforts of the state board and the regional boards may not be achieving full compliance with waste discharge requirements in a timely manner.”⁹ The statute states that an MMP “shall be assessed” for each serious violation.¹⁰ The plain language of the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred.¹¹ As a result, Water Code section 13385 now provides for administrative civil liability that *may* be assessed by discretionary action (subdivisions (c) – (g)), but identifies certain violations where any civil liability *must* recover minimum penalties of \$3,000 for each violation (subdivisions (h) – (l)).

When a water board has established that a serious violation has occurred, the discharger is liable.¹² There are three affirmative defenses to liability available to the discharger, but the discharger bears the burden of proving that one of these defenses relieves it of liability for MMPs under Water Code section 13385.¹³ Proof of any of the three defenses with respect to a violation suspends the MMP provisions of section 13385 for that violation. The MMP provisions do not apply when a violation is caused by (1) an act of war, (2) an unanticipated, grave natural disaster, or (3) an intentional act of a third party.¹⁴

When violations subject to MMPs have been alleged and a complaint issued, the water boards may formulate and issue decisions by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding.¹⁵ The terms of a settlement, however, may not be contrary to statute or regulation, except that the settlement may include

⁸ Stats.1999, ch. 92 (Assem. Bill No. 1104) & Stats. 1999, ch. 93 (Sen. Bill No. 709).

⁹ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 724 (quoting Stats.1999, ch. 92, § 2, subd. (d) [Assem. Bill No. 1104]; ch. 93, § 2, subd. (d) [Sen. Bill No. 709].).

¹⁰ Water Code, § 13385, subd. (h)(1). “Serious violations” are defined in Water Code section 13385, subdivision (h)(2).

¹¹ Discretionary administrative civil liability may be assessed for violations of NPDES permits for which civil liability may be assessed, but for which MMPs are not mandated. The issue discussed herein concerns only the portions of the Complaint and the Settlement Order subject to MMPs.

¹² *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 723-724 (the Clean Water Act is a strict liability statute and section 13385 is part of California’s NPDES program); see also *U.S. v. Allegheny Ludlum Corp.* (3rd Cir. 2004) 366 F.3d 164, 168; *Stoddard v. Western Carolina Regional Sewer Auth.* (4th Cir. 1986) 784 F.2d 1200, 1208; *U.S. v. Earth Sciences, Inc.* (10th Cir. 1979) 599 F.2d 368, 374.

¹³ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 726.

¹⁴ Wat. Code, § 13385, subd. (j).

¹⁵ Gov. Code, § 11415.60, subd. (a).

sanctions the agency would otherwise lack the power to impose.¹⁶ In other words, once MMP violations have been alleged and a complaint issued, any resulting settlement agreement cannot be for an amount lower than the statutory minimum, absent a finding that the allegation was made in error or one of the affirmative defenses applies.¹⁷

The Settlement Order resolved potential civil liability for violations alleged in the Complaint at a level below the statutory minimum. In the Complaint, the total amount proposed for violations subject to MMPs was \$1,335,000.¹⁸ The total amount of the Settlement Order is \$1,162,150, of which \$462,150 was suspended. In the Settlement Order, the San Diego Water Board stated that the City “has asserted” that the 2004 violations were caused by an intentional act of a third party and by a single operational upset.¹⁹ The Settlement Order also states that the City “asserted” that the 2005 violations were caused by severe unanticipated rainfall events.

While the City has the burden to prove an affirmative defense,²⁰ the San Diego Water Board did not make any findings as to the merit of these assertions or as to whether they constituted affirmative defenses.²¹ There was no determination that any of the affirmative defenses were proven or that there was a single operational upset that caused the 2004 violations. The San Diego Water Board explained in its findings that by accepting the City’s settlement offer and avoiding the need for an administrative hearing and possible judicial review, it was conserving valuable staff resources.

The State Water Board is fully aware of limited staff resources, but administrative settlements cannot diminish or avoid the imposition of MMPs for serious violations. If violations occur that are subject to MMPs and an administrative civil liability complaint is issued, any administrative action that results in a fine lower than the minimum statutory requirement must be accompanied by a determination either that the MMP was not

¹⁶ *Id.*, subd. (c).

¹⁷ See State Water Resources Control Board, Water Quality Enforcement Policy (2002), p. 41.

¹⁸ This figure is the minimum amount that may be assessed under Water Code section 13385, based on the San Diego Water Board’s calculation of occurrences of serious violations.

¹⁹ The claim that the 2004 violations resulted from a single operational upset is not an affirmative defense to MMP liability, but instead is relevant to assessing the number of violations. (Wat. Code, § 13385, subd. (f).)

²⁰ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 726.

²¹ In the draft version of the Settlement Order prepared for the San Diego Water Board’s September 13, 2006 meeting, it stated, “[f]or purposes of settlement of this matter, the Regional Board is accepting the City’s defense without a finding of fact.” This language was removed from the version adopted at the October 11, 2006 meeting, but no findings were added.

correctly assessed or that the discharger proved an appropriate affirmative defense. For example, if the San Diego Water Board had determined that the number of violations had been incorrectly stated in the Complaint or that the 2005 violations were caused by a grave and unanticipated natural disaster, there would have been a basis for lowering the MMPs. Otherwise, negotiations can only consider figures between the amount proposed for assessment and the statutory minimum liability.

The Legislature removed discretion from the water boards when it enacted MMPs in 1999. If the discharger asserts one of the permitted defenses, then it bears the burden of proof.²² The discharger must present evidence so that the water board can make a factual determination as to the asserted defense and its determination is supported by substantial evidence.²³ In the case of MMPs, a water board cannot simply accept a discharger's "assertions" of an affirmative defense—the board must weigh those claims and make appropriate findings supported by the record.²⁴

In passing, we observe that on remand the San Diego Water Board must consider the affirmative defenses in justifying its decision to reduce the MMPs by at least \$645,000. The Complaint sought \$1,335,000 in MMPs and an additional \$462,250 in discretionary liability. The Settlement Order imposes civil liability in the amount of \$1,152,150, without characterizing the amount as for MMPs or discretionary liability. Moreover, \$462,150 of the liability shall be suspended and waived if the City submits a final copy of two technical studies. The suspended amount does not appear to be for a supplement environmental project, as contemplated by Water Code section 13385, subdivision (*l*). As a result, the \$462,150 cannot be in lieu of an MMP. The effect of the settlement order was to reduce the Complaint's MMP amount from \$1,335,000 to no more than \$690,000. At the same time, there

²² *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at 726; *City & County of San Francisco v. San Francisco Civil Service Assn.*, *Local 400* (1979) 94 Cal.App.3d 522, 531-532.

²³ See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.

²⁴ We do not address here, or make any determination as to whether a formal hearing is required in every case where a staff person, or even the Executive Officer, asserts that violations have occurred that require an MMP. For example, there could be a Notice of Violation that makes similar statements, but upon receiving the discharger's explanation, he or she may realize that the calculation was in error. In such a case, the Executive Officer may be able to revise his or her opinion based on the explanation. But in this case, a formal complaint was issued, the staff had evaluated and rejected the discharger's claims regarding calculation, and the discharger was relying on affirmative defenses to the MMPs. In adopting the Settlement Order, the San Diego Water Board specifically declined to make its own determination as to whether the MMP alleged in the Complaint must be lowered. A settlement for less than the MMP may well have thwarted the statute, since it was only the discharger who claimed that the reduced amount was justified.

are some indications that the entire settlement amount was being collected as a discretionary civil liability.²⁵ On remand, the San Diego Water Board should resolve the allocation between MMPs, if any, and discretionary liability.

ORDER

IT IS HEREBY ORDERED that Order number R9-2006-0095 for settlement of Administrative Civil Liability Complaint number R9-2005-0265 for the City of Escondido Hale Avenue Resource Recovery Facility is vacated and the matter is remanded to the San Diego Water Board. The San Diego Water Board must either withdraw or revise the Complaint, making specific findings as to the alleged violations, or hold a hearing and make factual determinations as to any affirmative defenses alleged by the City. The amount of liability to be assessed must be no less than the minimum liability required by Water Code section 13385, based on the factual determinations of the San Diego Water Board or, where appropriate, its Executive Officer.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 18, 2007.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Song Her
Clerk to the Board

²⁵ Settlement Order, Finding 15 (noting that the San Diego Water Board considered the factors of Water Code, section 13385, subdivision (e) in establishing the entire \$1,162,150 liability, but that subdivision is inapplicable to MMPs).