State Water Resources Control Board

Linda S. Adams
Secretary for
Environmental Protection

Office of Chief Counsel
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Arnold Schwarzenegger
Governor

December 3, 2007

CERTIFIED MAIL

Melissa A. Thorme, Esq.
mthorme@downeybrand.com
Downey Brand LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814

Dear Ms. Thorme:

PETITION OF CITY OF ARCATA (ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R1-2006-0054 FOR ARCATA WASTEWATER TREATMENT FACILITY [NPDES NO. CA0022713), NORTH COAST WATER BOARD: BOARD MEETING NOTIFICATION
SWRCB/OCC FILE A-1754

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, January 15, 2008* commencing at *10:00 a.m.* in the Byron Sher 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 petitioner, City of Arcata, and the North Coast 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 **12:00 p.m., January 3, 2008.** Please indicate in the subject line, comments to A-1754—January 15, 2008 Board Meeting. Those comments must be addressed to:

Ms. Jeanine Townsend
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 Alex P. Mayer Staff Counsel, in the Office of Chief Counsel, at (916) 341-5051 or email amayer@waterboards.ca.gov.

Sincerely,

Michael A.M. Lauffer
Chief Counsel

Enclosure

cc: Ms. Nancy Diamond **[via U.S. mail & email]**
Attorney at Law
ndiamond@humboldt1.com
822 G Street, Suite 3
Arcata, CA 95521

Mr. Ken Greenberg, Chief **[via email only]**
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Clean Water Act Compliance (NPDES)
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

(Continued on next page)

Ms. Karen Diemer **[via U.S. mail & email]**
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City of Arcata Environmental Services
736 F Street
Arcata, CA 95521

Mr. Robert Klamt **[via email only]**
Interim Executive Officer
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5550 Skylane Boulevard, Suite A
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cc: Mr. Tom Dunbar **[via email only]**
Senior Water Resource Control Engineer
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Samantha Olson, Esq. **[via email only]**
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Interested Persons

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

DRAFT

December 3, 2007

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2008-

In the Matter of Own Motion Review of

CITY OF ARCATA

Administrative Civil Liability Order No. R1-2006-0054
Issued by the
California Regional Water Quality Control Board,
North Coast Region

SWRCB/OCC FILE A-1754

BY THE BOARD:

On May 17, 2006, the North Coast Regional Water Quality Control Board (North Coast Water Board) issued Administrative Civil Liability Order No. R1-2006-0054 (MMP Order), which assessed mandatory minimum penalties against the City of Arcata (Petitioner). Petitioner filed a timely petition with the State Water Resources Control Board (State Water Board) challenging the MMP Order. In its response to the petition, the North Coast Water Board identified three errors in the MMP Order and expressed its desire to revise it accordingly. In this non-precedential Order, the State Water Board reviews and revises the MMP Order on its own motion.[1]

I. BACKGROUND

Petitioner operates a publicly owned treatment works (POTW) that discharges effluent to Humboldt Bay. Discharge occurs after the effluent has received secondary treatment via oxidation ponds, followed by additional treatment through a series of marshes and dikes. From 1998 until 2004, the North Coast Water Board regulated Petitioner's discharges pursuant to waste discharge requirements established in Order No. 98-13 [NPDES No. CA0022713] (the 1998 permit).

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[1] See Wat. Code, § 13320, subd. (a); Cal. Code Regs., tit. 23, § 2050.5, subd. (c).

In May 2006, the North Coast Water Board imposed mandatory minimum penalties (MMPs) of $297,000 for self-reported violations of the 1998 permit that occurred between January 1, 2000 and June 21, 2004. The North Coast Water Board assessed the statutory minimum amount of $3,000 for each violation it deemed subject to MMPs. Petitioner submitted a timely petition challenging many aspects of the MMP Order, although the petition was initially held in abeyance at the Petitioner's request.

II. ISSUES AND FINDINGS

The Petitioner raises a number of issues in its petition. These issues are not substantial or appropriate for State Water Board review, and the petitions are hereby dismissed in their entirety.[2] However, the North Coast Water Board, in its response to the petition, identified three calculation errors in the MMP Order and expressed its desire to correct them. Those three errors are not disputed by either party. In addition, State Water Board has identified a fourth calculation error in the MMP Order. We consider these issues on our own motion.

Issue: Should the State Water Board amend the MMP Order to remove liability for four discharge events that were incorrectly classified as violations subject to MMPs?

Finding: Yes. The North Coast Water Board identified three instances where the MMP Order incorrectly assesses penalties. In its petition response, the North Coast Water Board expressed a desire to revise the total penalty assessment to remove the following three violations:

- March 3, 2001 violation of 7-day average total suspended solids (TSS) effluent limitation of 863 pounds per day;
- March 31, 2001 violation of 7-day average TSS effluent limitation of 45 milligrams per liter; and
- March 31, 2001 violation of 30-day average TSS removal effluent limitation of 85% removal.

We have reviewed these three assessments, and agree with the North Coast Water Board that they were incorrectly characterized as violations and assessed as MMPs. The discharge levels, as reported,[3] were within the authorized levels set forth in the 1998 permit.

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[2] *People v. Barry* (1987) 194 Cal.App.3d 158, 175-177 [239 Cal.Rptr. 349]; *Johnson v. State Water Resources Control Board* (2004) 123 Cal.App.4th 1107 [20 Cal.Rptr.3d 441]; Cal. Code Regs., tit. 23, § 2052, subd. (a)(1).

[3] The reported March 3, 2001, 7-day average TSS value was *656 pounds/day*; the reported March 31, 2001, 7-day average TSS value was *39 milligrams per liter*; and the reported March 31, 2001, 30-day average TSS removal rate was *87%*. (North Coast Water Board, Response to Petition, at p. 23.)

Because the North Coast Water Board does not have the authority to amend final administrative civil liability orders on its own,[4] we will revise the MMP Order to eliminate the three alleged violations. The revisions reduce the penalty amount by $9,000.

In reviewing the MMP Order, the State Water Board discovered one additional error, in which a discharge violation was mistakenly found to be subject to MMPs. The MMP Order found that, on November 22, 2003, a 7-day average TSS discharge of 912 pounds per day exceeded the applicable effluent limitation of 863 pounds per day. The MMP Order found that this was not a "serious" violation as defined by the Water Code,[5] but that it was subject to MMPs due to its chronic nature. In fact, the violation was only the third violation in a six-month period and, while still a chronic violation, the violation does not result in a $3,000 MMP for the November 22 violation.

The Water Code requires the imposition of an MMP whenever a discharger violates an effluent limitation "four or more times in any period of six consecutive months."[6] Violations are counted on a "rolling" basis, so that a violation is subject to MMPs if it is preceded by three or more violations within the previous six months.[7] The November 22, 2003 violation was preceded by only two violations in the previous six months and therefore constituted only the third violation in "any period of six consecutive months." Thus, it was not subject to MMPs. We will amend the MMP Order to correct that error,[8] reducing the penalty amount by an additional $3,000.

In total, this Order reduces the penalty amount in the MMP Order by $12,000. In all other respects, the MMP Order is affirmed.

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[4] Wat. Code, § 13323, subd. (d).

[5] See Wat. Code, § 13385, subd. (j). A mandatory minimum penalty is required for each serious violation. *Id.*

[6] Wat. Code, § 13385, subd. (i).

[7] Water Quality Enforcement Policy (2002); *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 732, [20 Cal.Rptr.3d 322, 336].

[8] This Order does not prohibit or prevent the North Coast Water Board from assessing discretionary civil liability for the November 22, 2003 violation.

ORDER

IT IS HEREBY ORDERED that Administrative Civil Liability Order No. R1-2006-0054 is amended as follows:

- The March 3, 2001 violation of 7-day average TSS effluent limitation of 863 pounds per day and the March 31, 2001 violations of the 7-day average TSS effluent limitation of 45 milligrams per liter and 30-day average TSS removal effluent limitation of 85% removal are hereby stricken;
- The $3,000 "Mandatory Penalty" is removed from the November 22, 2003 violation; and
- All references to mandatory minimum penalties in the total amount of $297,000 are replaced with mandatory minimum penalties in the total amount of $285,000.[9]

This Order is not precedential.

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 January 15, 2008.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Acting Clerk to the Board

[9] The North Coast Water Board may, in its discretion, issue a corrected order to conform the original MMP Order to the directed changes to the MMP Order to correct the errors identified by this Order.