

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION**

STAFF REPORT FOR REGULAR MEETING MARCH 13, 2010

Prepared on February 16, 2010

ITEM NUMBER: 14

SUBJECT: Enforcement Report

DISCUSSION

Violations Listing

Staff uses the California Integrated Water Quality System (CIWQS) to track Water Board data, including violations and enforcement actions. The following pages contain a list of violations generated from CIWQS that occurred between December 1, 2009, and December 31, 2009. CIWQS has a sewer system overflow (SSO) module which provides better tracking and reporting of such spills.

Summary of Enforcement Activities

The following information summarizes significant enforcement action taken by the Water Board during the period between January 1, 2010, and January 31, 2010.

Notices of Violation

None

Staff Enforcement Letters

4855 Righetti Road, San Luis Obispo County

13267 Orders

Main Street Farms, North of the City of Lompoc, Santa Barbara County

Cleanup and Abatement Orders

None

Administrative Civil Liability Complaints

None

Presentation by Reed Sato, Director of the State Board's Office of Enforcement

Reed Sato is planning to attend the Board meeting to discuss the new Enforcement Policy, which has been adopted by the State Board and is awaiting approval of the Office of Administrative Law, and the new policy regarding supplemental environmental projects (SEPs). Mr. Sato will address some issues that should be of interest to the Board, including:

1. A summary of the SEP staff oversight cost provisions and what the track record is statewide as of March. That is, are we still getting good SEPs statewide with the new policy?

2. Regional Board flexibility in deciding penalty amounts for the unique circumstances of each case, in light of the penalty methodology in the new Enforcement Policy.

The policies can be found on the State Board's website:

SEP Policy:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/rs2009_0013_sep_finalpolicy.pdf

Enforcement Policy:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

Calculation of ACL Penalty Amounts Recommended for Violations of the Agricultural Waiver Program

At the December 2009 board meeting, the Board raised questions about how staff calculated the recommended penalty amount in the ACL complaint and proposed order against Pacifico Azul. The following describes how staff arrived at the three different recommended amounts: complaint, settlement, and penalty.

In December 2007, Enforcement Unit staff issued ACL complaints to five agricultural operations that failed to submit a notice of intent to comply with Central Coast Water Board Order No. R3-2004-0117, Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Ag Order). Each complaint had a separate recommended penalty amount. In determining the recommended amounts, staff considered the following factors: the amount of back enrollment and monitoring fees owed, size of the operation (also reflected in the amount owed), deferred costs of compliance with the Ag Order (including education and farm plan development), the number of years of violation, and staff costs. In the case of Pacifico Azul, this calculation resulted in staff recommending a penalty of \$9,136 in the complaint.

All five violators accepted staff's offer to discuss settlement and submitted hearing waivers. Terms of settlement included enrollment in the Ag Order, payment of all back fees due, and completion of farm management plans and education requirements imposed by the Ag Order. In addition, each violator agreed to a penalty. The amount of this penalty again varied, primarily according to farm size. Pacifico Azul agreed to a penalty of \$3,000. Had Ms. Bozarth paid this amount, no hearing would have been held. The other parties' penalties ranged from \$3,000 to \$14,000, which each violator paid in addition to fees and costs of complying with the Ag Order.

After Pacifico Azul failed to comply with the settlement, enforcement staff scheduled a board hearing and prepared a recommended liability order. Staff started with the original complaint amount, but because approximately \$3,750 in additional staff costs had been incurred, staff increased the recommended liability from \$9,136 to \$13,000.

There seemed to be some confusion at the board hearing about whether Pacifico Azul had paid Ag Order fees and whether unpaid fees should be included in the penalty. Pacifico Azul had paid all back fees by the time of the hearing. Enforcement staff was well aware of this. Staff did not recommend reducing the recommended penalty by a commensurate amount for several reasons.

First, Pacifico Azul did not pay the fees until after staff issued the complaint and disclosed the settlement terms which included payment of all unpaid fees. Accordingly, staff considered the unpaid fees an avoided cost and an economic benefit of non-compliance. Second, Pacifico Azul did

not abide by the terms of the mutually agreed-upon settlement further avoiding payment of liability and retaining some benefits of non-compliance for a longer period. Third, the back fees were used as a mechanism for fairly scaling the proposed liability in proportion to the size of the agricultural operation. The back fees were not being collected to pay the actual fees. Regardless, of whether the fees were subsequently paid, the amount of fees required to comply with the Ag Order remain an accurate indicator of the size of the farming operation, its respective compliance obligations, and the potential for adverse water quality impacts from the operations non-compliance. Accordingly, basing the amount of liability proposed on the Ag Order fees is a means of capturing the gravity of those factors in the amount of liability imposed. Lastly, we believe that the ACL liability amounts imposed as a result of enforcement should be sufficient to deter future non-compliance by not only the violator in question but other potential violators in similar situations.

In order to be an effective deterrent the liability amount imposed should reflect the economic benefits that a discharger could reasonable expect to gain from choosing not to comply, assuming that the non-compliance goes unnoticed. The board's action to reduce the recommended penalty based on compliance costs incurred after the complaint is issued could send the wrong message to other farming operations. Specifically, if you do not comply and get caught, you will still get credit for making the expenditures that are necessary to come into compliance even though those expenditures are overdue.

As a matter of policy, we discourage adjusting a violator's liability to account for expenditures made to come into compliance after an ACL complaint is issued. The State Board adopted a new Enforcement Policy in November 2009. The new Policy will not be in effect until approved by the Office of Administrative Law, but staff is preparing to implement it now.

The new Policy's direction on the calculation of economic benefit states that, "[t]he Water Boards should not adjust the economic benefit for expenditures by the discharger to abate the effect of the unauthorized conduct or discharge, or the costs to come into or return to compliance." Instead the Policy allows for consideration of such expenditures under "cleanup and cooperation" liability factor, but presumably not on a dollar-for-dollar basis. Furthermore, the new Policy does not allow the suspension of liability for the completion of projects that bring a violator back into compliance (Compliance Projects) except for the limited statutorily authorized use of such project in connection with Mandatory Minimum Penalties for small communities with a financial hardship.

Calculating Penalty Amounts Using the New Enforcement Policy

The new Policy also includes a methodology for calculating administrative penalty amounts. The main goal of the methodology is promote statewide consistency. The new Policy states:

While it is a goal of this Policy to establish broad consistency in the Water Boards' approach to enforcement, the Policy recognizes that, with respect to liability determinations, each Regional Water Board, and each specific case, is somewhat unique. The goal of this section is to provide a consistent approach and analysis of factors to determine administrative civil liability. Where violations are standard and routine, a consistent outcome can be reasonably expected using this Policy. In more complex matters, however, the need to assess all of the applicable factors in liability determinations may yield different outcomes in cases that may have many similar facts.

Further, the new Policy sets out the following objectives that each civil liability should reflect:

- Be assessed in a fair and consistent manner

- Fully eliminate any economic advantage obtained from noncompliance
- Fully eliminate any unfair competitive advantage obtained from noncompliance
- Bear a reasonable relationship to the gravity of the violation and the harm to beneficial uses or regulatory program resulting from the violation
- Deter the specific person(s) identified in the ACL from committing further violations
- Deter similarly situated person(s) in the regulated community from committing the same or similar violations

The methodology guides users through a series of detailed steps to arrive at a recommended penalty amount. Staff anticipates that we will use a computer spreadsheet in this process. We envision sharing the spreadsheet with the violator, the Board, and interested parties. Rather than go into further detail now, staff will plan on providing a detailed explanation of the steps the first time we bring a draft order to the Board using the methodology. The Policy anticipates that the Board in its deliberations will follow and abide by the methodology as adopted.

Reimbursement of ACL Staff Costs

Administrative civil liability assessments are penalties, not fines or fees. A majority of penalties imposed by regional boards through the administrative civil liability process are paid into the State Board's Cleanup and Abatement Account (CAA). Fees, on the other hand, are imposed in proportion to a service provided by the state to a particular regulated community, are designed to reimburse the state for its costs to perform such services or administer specific regulatory programs, and are deposited in accounts other than the CAA that are generally earmarked to support the program for which the fees are imposed.

For the past several years, the State Board has distributed ACL staff costs back to the regions upon request. Regions were eligible to receive 100% of their costs up to 50% of the total penalty amount deposited in the CAA. For example, if a violator paid a penalty of \$200,000, and staff costs were \$75,000, all \$75,000 could be recovered. If, however, the violator used \$100,000 of the penalty for an SEP, only \$50,000 of the staff costs would be reimbursable (50% of the funds deposited in the CAA). To recover funds from the CAA, staff had to submit a request documenting enforcement costs.

After reviewing this process, the State Board has decided to simplify the reimbursement process by automatically distributing annual payments to the regions equal to 15% of the total penalty amount deposited by that region into the CAA the previous year. Staff has used the CAA reimbursed funds in various ways, including funding the student contract, purchasing equipment, and the direct payment of staff salaries (personal services).

RECOMMENDATION

This report is for Board information. The Board may provide direction to staff.

ATTACHMENTS

Violation List

s/enforcement/Reports/Board Meeting Reports/Enforcement Report 3-18-10