

REPLACEMENT ENFORCEMENT SUMMARY REPORT
December 12, 2007

- ITEM: 16
- SUBJECT: PUBLIC HEARING: Administrative Assessment of Civil Liability against the Cities of Vista and Carlsbad, for violation of the Statewide General WDR for Sanitary Sewer Systems for the discharge of 7.3 million gallons of untreated sewage to Buena Vista Lagoon. The Regional Board will consider whether to raise, lower, or reject assessment of \$1,095,000 civil liability recommended in Complaint No. R9-2007-0099. If the discharger elects to waive their right to a hearing, the Regional Board will consider comments received during the public review period and decide on an order accepting payment of the proposed liability and waiver of hearing. (Tentative Order No. R9-2007-0215) (Eric Becker)
- PURPOSE: The Regional Board will accept testimony from the public, the City of Vista, the City of Carlsbad (the Dischargers), and the Regional Board staff regarding the allegations of violation and recommendation of civil liability contained in ACL Complaint No. R9-2007-0099 (Supporting Document 3).
- PUBLIC NOTICE: On September 28, 2007, ACL Complaint No. R9-2007-0099 was sent certified mail to the Dischargers, and other interested parties. On September 28, 2007, the ACL Complaint and Staff Report were posted on the Regional Board's website and are available at the Regional Board's office for review.
- DISCUSSION: On September 28, 2007, ACL Complaint No. R9-2007-0099 was issued recommending that the Regional Board impose a civil liability in the amount of \$1,095,000 (based on a rate of \$0.15 per gallon) for the discharge of 7.3 million gallons of untreated sewage into Buena Vista Lagoon.
- Pursuant to California Water Code section 13350, the maximum liability for this sewage discharge is \$10 dollars per gallon for a total of \$73 million. Based on a number of factors, including the dischargers' significant cleanup efforts

in response to the spill, warrants a substantial reduction from the maximum liability to \$1,095,000.

A technical analysis supporting the amount of recommended liability and issuance of the ACL Complaint is provided in the Staff Report (Supporting Document 4).

Water Code section 13327 requires the Regional Board to consider the following factors in determining the amount of liability: "the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require." The following is a condensed list of important facts and their associated factor(s):

1. The discharge of untreated sewage significantly impacted water quality, including the death of fish, frogs, shellfish, and birds, the closure of the lagoon to the public for more than two weeks during Spring Break, and disturbance of nesting birds, the Light-footed Clapper Rail, a State and Federal listed endangered species. (Nature, Circumstance, Extent, and Gravity of the Violation or Violations) (Degree of Toxicity of the Discharge)
2. The Dischargers failed to implement effective monitoring measures and/or inspections of the force sewer main that could have prevented or greatly reduced the volume of the untreated sewage discharge. (Dischargers' Degree of Culpability) (Dischargers' Economic Benefit or Savings)
3. The Dischargers failed to implement preventative measures (i.e., replacing or relining the force sewer main, installing a backup system that could have reduced the volume of sewage discharge, if not eliminated a discharge from occurring). (Dischargers' Degree of Culpability) (Dischargers' Economic Benefit or Savings) (Prevention of Discharge)

4. The failure of the force sewer main was reportedly caused by external corrosion. (Nature, Circumstance, Extent, and Gravity of the Violation or Violations) (Dischargers' Degree of Culpability) (Dischargers' Economic Benefit or Savings)
5. The Dischargers have a history of other significant discharges of untreated sewage from their sewage conveyance system into the Buena Vista Lagoon. (Dischargers' History of Violations)
6. Once notified, the Dischargers made significant efforts to respond to and cleanup the discharge, therefore reducing the impacts to Buena Vista Lagoon. (Whether the Discharge is Susceptible to Cleanup or Abatement) (Dischargers' Voluntary Cleanup Efforts)

On November 2, 2007, the Dischargers provided a written response to the ACL Complaint (Supporting Document 5). The Regional Board staff analyses of the Dischargers' November 2, 2007 comments are provided in Supporting Document 9. Regional Board staff met with the Dischargers to discuss the allegations, clarify facts in the Complaint, and to explore settlement. Regional Board analysis of the submittal and recommendations, if any, for modifying staff recommendation of liability will be included in the second agenda mailing.

The Dischargers raised two key issues. The first is that the Regional Board failed to follow what the dischargers believe to be a rigid step by step procedure outlined in the State Water Resources Control Board's (State Board) Enforcement Policy for setting liability amounts, which relies upon a formulaic approach.

Response: Regional Board staff disagrees with the Dischargers' assertion. The proposed liability contained within the ACL Complaint has satisfied all of the requirements of the Water Code including a consideration of the factors listed in section 13327 and section D.6 of Order No. 2006-0003-DWQ. Furthermore, the Regional Board developed its enforcement action within the framework of the Enforcement Policy, even though it did not use the Policy's formula approach. This Regional Board as well as the other Regional Boards do not rely on or utilize the Policy's formula

in developing recommended liability amounts. Use of the Enforcement Policy formula does not result in intelligent, consistent, or accurate liability amounts and therefore the results do not comply with the intent of the Policy for enforcement actions to be fair, firm and consistent. Furthermore, formulas that allow for highly variable and subjective inputs such as that in the Enforcement Policy ~~are~~ ~~one~~ can be easily manipulated to reach any desired outcome; whereas a sound narrative analysis of a case's facts (nature, circumstance, extent, and gravity) as well as the discharger's actions and/or inactions can be tested and proved.

The State Board is currently revising the Enforcement Policy, in part, due to the lack of reliance with several portions of the Enforcement Policy, including the aforementioned formula approach. To date there have been no State Board decisions requiring the Regional Boards to strictly implement all of the guidance in the existing Policy, instead the decisions have unanimously found that Regional Boards have broad discretion in developing and assessing liabilities within the constraints of the Water Code. The Regional Board has used its own discretion, and is consistent with, in applying the Enforcement Policy and consideration of the factors listed in the Water Code.

The Dischargers' second issue is that the Regional Board failed to consider the seven criteria identified in section D.6 of Order No. 2006-0003-DWQ. These criteria were included in the State Board Order to ensure that each of the Regional Boards considered a consistent set of baseline criteria to develop fair evaluations as part of initiating enforcement against a sewerage agency for a sewage spill.

Response: The Regional Board disagrees with the Dischargers' assertion. The Regional Board considered all seven of the criteria in its Staff Report for the ACL Complaint. A document summarizing the Regional Board's consideration of all seven criteria along with citations to the Staff Report is attached. (Supporting Document 6)

Background

From March 31, 2007, through April 3, 2007, the Dischargers discharged a total of 7.3 million gallons of untreated sewage from a force sewer main into Buena Vista Lagoon, a water of the United States. The Buena Vista Lagoon is located near

the intersection of I-5 and Highway 78, within the City of Carlsbad and City of Oceanside. See Location Maps, Supporting Document 1.

The Buena Vista Lagoon, a fresh water body, is owned and maintained by the California Department of Fish & Game (CDFG). Because of the lagoon's unique and highly valued coastal wildlife habitat, the CDFG has designated the Buena Vista Lagoon as an ecological reserve. Based upon available water quality data, the lagoon is considered impaired for bacteria, nutrients, and sediment and is on the Clean Water Act Section 303(d) list for impaired waterbodies.

The discharge reportedly occurred due to external corrosion of a 24-inch diameter ductile iron pipe, reportedly encased in polyethylene, that conveys sewage from the Buena Vista Pump Station to the Encina Wastewater Authority's outfall. The City of Vista owns 90% of the force sewer main, and the City of Carlsbad owns the remaining 10%.

On April 6, 2007, the Regional Board issued Investigative Order No. R9-2007-0060 (Supporting Document 7). In response to this Order, the Dischargers on April 23, 2007, submitted a technical report entitled *Discharger Response to Investigative Order No. R9-2007-0060, Discharge of Untreated Sewage Into Buena Vista Lagoon Within the City of Carlsbad, San Diego County* (Supporting Document 8). The Dischargers' submitted supplemental information in response to Order R9-2007-0060 on September 19, 2007 (Supporting Document 10).

On November 28, 2009, the Dischargers provided additional information for consideration by the Regional Board (Supporting Document 11).

LEGAL CONCERNS: None.

SUPPORTING
DOCUMENTS:

1. Location Maps
2. Tentative Order No. R9-2007-0215
3. ACL Complaint No. R9-2007-0099
4. Staff Report for ACL Complaint No. R9-2007-0099
5. November 2, 2007 Dischargers' Response to ACL Complaint No. R9-2007-0099
6. Regional Board's Consideration of Permit Criteria

7. Regional Board Investigative Order No. R9-2007-0060
8. Dischargers' Response to Investigative Order No. R9-2007-0060 dated April 23, 2007, with attachments
9. Regional Board response to Dischargers' Comments dated November 2, 2007
10. Additional Information for Investigation Order Investigative Order No. R9-2007-0060 dated September 19, 2007, with attachments.
11. Discharger Submittals from November 28, 2007
12. Tentative Order No. R9-2007-0215
13. Errata for Regional Board Staff Response to Dischargers' Comment (Supp Document 9)
14. Transmittal Email and Joint Letter from California Department of Fish and Game and U.S. Fish and Wildlife Service (Dec 4, 2007)
15. Newspaper articles on City of Vista Infrastructure Improvements
16. Background and History on Sanitary Sewer Overflows in the San Diego Region
17. Compliance through Prompt, Fair & Consistent Formal Enforcement

RECOMMENDATION: Adoption of Tentative Order No. R9-2007-0215 is recommended.

The Executive Officer will provide a recommendation to the Regional Board on the assessment of civil liability at the conclusion of the item.