

State of California
Regional Water Quality Control Board
San Diego Region

EXECUTIVE OFFICER SUMMARY REPORT
September 10, 2008

ITEM: 9

SUBJECT: Proposed settlement of Administrative Civil Liability Complaint against the Cities of Vista and Carlsbad for the discharge of 7.3 million gallons of untreated sewage from March 31 to April 3, 2007, from a 24-inch dia. sewer main at the Buena Vista Pump Station to Buena Vista Lagoon, San Diego County. (Tentative Order No. R9-2008-0072) (*Frank Melbourn*)

PURPOSE: The Regional Board will consider adoption of Proposed Order No. R9-2008-0072 (Supporting Document No. 2), implementing the Settlement Agreement [Attachment No. 1 to the Proposed Order]. The Proposed Order would resolve violations alleged in ACL Complaint No. R9-2007-0099 (Complaint) [Exhibit A to the Settlement Agreement]. The settlement includes: (1) payment of \$595,000 to the State Water Resources Control Board; and (2) payment of \$500,000 to fund a Supplemental Environmental Project in Buena Vista Lagoon. If the Regional Water Board rejects the proposed settlement, the matter will be scheduled for a public hearing at a subsequent Regional Board meeting.

PUBLIC NOTICE: Notice of the Regional Board's consideration of the Proposed Order, the Settlement Agreement, and the opportunity for public comment was posted on the Regional Board's website and e-mailed to interested parties on August 4, 2008. Notice was also published in the North County Times on August 8, 2008.

DISCUSSION: On September 28, 2007, the Complaint was issued recommending that the Regional Board impose a civil liability of \$1,095,000 for the discharge of 7.3 million gallons of untreated sewage into Buena Vista Lagoon, a State Ecological Reserve. The Complaint recommended assessment of liability at a rate of \$0.15 per gallon. The maximum liability pursuant to Water Code Section 13350 is \$5,000 per day of violation or up to \$10 per gallon discharged. A chronology of events and background of the

spill are attached as Supporting Document No. 3. An analysis of the alleged violation, including an evaluation of the Water Code Section 13327 liability factors is contained in the Regional Board Staff Report to the Complaint (Supporting Document No. 4).

On March 12, 2008, the Regional Board rejected an initial settlement offer on the Complaint. Representatives of the Cities of Carlsbad and Vista (Dischargers) reinitiated settlement discussions with the Regional Board Prosecution Team (Compliance Assurance Unit) and counsel from the State Board's Office of Enforcement that resulted in the current settlement agreement. The Proposed Order formalizes the latest Settlement Agreement which increases the payment to the State Board by \$395,000. The Settlement Agreement has been noticed to interested parties via e-mail and the public via the Regional Board website, for at least 30 days prior to today's meeting, and the public has been provided the opportunity to submit written comments. Written comments were due by August 27, 2008.

The Settlement Agreement includes the following:

- (1) Payment of \$595,000 to the State Water Resources Control Board's Waste Discharge Permit Fund Abatement Account within 30 days of adoption by the Regional Board; and
- (2) Payment of \$500,000 to the National Fish and Wildlife Foundation (NFWF) for deposit into the Buena Vista Lagoon Restoration Project Incident Specific Subaccount of the Environmental Fund for Habitat and Incident Specific Restoration Projects (Habitat Restoration Fund) as a Supplemental Environmental Project (SEP) entitled "Buena Vista Lagoon Restoration—Engineering Studies and Analyses." A description of the SEP can be found as Exhibit B to the Settlement Agreement. The California Department of Fish and Game (DFG) and the United States Fish and Wildlife Service (USFWS) are the SEP proponents and are natural resource co-trustees of Buena Vista Lagoon (Supporting Document No. 5).

The NFWF is a private, nonprofit, tax-exempt organization created by Congress in 1984. In April 2003, DFG entered into a Memorandum of

Agreement (MOA) with the NFWF to establish the Habitat Restoration Fund. The MOA was amended in August 2006 to allow the Habitat Restoration Fund to receive natural resource damages and/or monies earmarked for restoration projects or mitigation projects. (Supporting Document No. 6)

The \$500,000 payment is to be made by the Cities within 30 days of adoption by the Regional Board. Failure of the Cities to pay the full amount within 30 days from the date of adoption will result in the full amount being due and payable to the State Board for deposit into the Waste Discharge Permit Fund Abatement Account.

The Regional Board received a joint letter from DFG and USFWS transmitting SEP applications worth \$395,000, \$500,000, and combined together as \$895,000 (Supporting Document No. 7). On August 27, 2008, the Regional Board received a letter from Preserve Calavera requesting that the Regional Board fund the two DFG/USFWS SEPs totaling \$895,000 (Supporting Document No. 8). The Regional Board also received letters from the Buena Vista Lagoon Joint Powers Coordinating Committee, Buena Vista Lagoon Foundation, and California State Coastal Conservancy urging funding of the DFG /USFWS \$500,000 SEP (Supporting Document Nos. 9-11).

The Regional Board received 45 letters and e-mails (Supporting Document No. 12) from members of the public urging the Regional Board to allocate the maximum amount of the liability to a SEP for Buena Vista Lagoon. Finally, the Regional Board on August 25, 2008, received a letter criticizing the current Settlement Agreement for failing to require the Cities to upgrade the sewer line responsible for the spill (Supporting Document No. 13). The Regional Board Prosecution Team responded by e-mail informing the commenter of the Cities actions to upgrade the sewer line and it's monitoring of the sewer line (Supporting Document No. 14).

The Regional Board Prosecution Team in a memorandum to the Executive Officer recommended adoption of the Proposed Order. See Supporting Document No. 15.

LEGAL CONCERNS: None.

SUPPORTING
DOCUMENTS:

1. Location Map
2. Proposed Order No. R9-2008-0072
3. Chronology of Events/Background
4. Staff Report for ACL Complaint No. R9-2007-0099
without attachments
5. DFG/USFWS Letter
6. Memorandum of Agreement
7. DFG/USFWS Letter with SEPs
8. Preserve Calavera Letter
9. Buena Vista Lagoon Joint Powers Coordinating
Committee Letter
10. Buena Vista Lagoon Foundation Letter
11. Coastal Conservancy Letter
12. Letters from the Public
13. Steven R. Walder Letter
14. Prosecution Team Response to Walder Letter
15. Prosecution Team Memorandum

RECOMMENDATION: A recommendation will be made at the conclusion of the presentations.