STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – OFFICE OF CHIEF COUNSEL
JULY 23, 2013

ITEM 7

SUBJECT

CONSIDERATION OF A PROPOSED ORDER IMPOSING A MANDATORY MINIMUM PENALTY AGAINST LINCOLN AVENUE WATER COMPANY FOR VIOLATIONS OF LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R4-2003-0120.

DISCUSSION

In this proposed Order, the State Water Resources Control Board (State Water Board) imposes administrative civil liability against Lincoln Avenue Water Company (Lincoln) in the amount of $15,000 as a mandatory minimum penalty for violations of waste discharge requirements Order No. R4-2003-0120 (NPDES No. CAG0064068, CI No. 7752) issued by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board).

Lincoln owns and operates the South Coulter Surface Water Treatment Plant located at 3939 Chaney Trail in Altadena. Lincoln discharges backwash water and settling basin drainage water to an unnamed tributary to the Arroyo Seco, a navigable water of the United States. In California, certain violations of waste discharge requirements that serve as an NPDES permit are subject to mandatory minimum penalties.

On August 23, 2010, the State Water Board's Director of the Office of Enforcement issued Complaint No. OE-2010-0016 against Lincoln for a mandatory minimum penalty in the amount of $15,000. This matter was heard on November 18, 2010, in Los Angeles, California before a Hearing Officer of the State Water Board, Vice Chair Frances Spivy-Weber. Mr. Andrew Turner appeared on behalf of Lincoln. Ms. Erin Mustain and Ms. Yvonne West appeared for the Prosecution Team.

POLICY ISSUE

Should the State Water Board adopt the proposed Order imposing a mandatory minimum penalty against Lincoln?

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

Adoption of the proposed Order will help the Los Angeles Water Board meet its enforcement obligations.

STAFF RECOMMENDATION

Adopt the proposed Order.

State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012 to enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures. In particular, approval of this item will assist in fulfilling Objective 6.1 to target consistency improvements in process and policy for Water Board enforcement activities to promote compliance.

D R A F T June 24, 2013

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2013-XXXX

In the Matter of Administrative Civil Liability Complaint No. OE-2010-0016
against
Lincoln Avenue Water Company

Order imposing mandatory minimum penalty for
Violation of Los Angeles Regional Water Quality Control Board
Order No. R4-2003-0120

BY THE BOARD:

I. INTRODUCTION

In this Order, the State Water Resources Control Board (State Water Board) imposes administrative civil liability against Lincoln Avenue Water Company (Lincoln) in the amount of $15,000 as a mandatory minimum penalty for violations of waste discharge requirements Order No. R4-2003-0120 (NPDES No. CAG0064068, CI No. 7752).

On August 23, 2010, the State Water Board's Director of the Office of Enforcement issued Complaint No. OE-2010-0016 (complaint) against Lincoln for a mandatory minimum penalty in the amount of $15,000. The complaint alleged violations identified in Exhibit "A" attached hereto and incorporated herein by reference.

This matter was heard on November 18, 2010, in Los Angeles, California before a Hearing Officer of the State Water Board, Vice Chair Frances Spivy-Weber. Mr. Andrew Turner appeared on behalf of Lincoln. Ms. Erin Mustain and Ms. Yvonne West appeared for the Prosecution Team.

II. FACTUAL BACKGROUND

Lincoln owns and operates the South Coulter Surface Water Treatment Plant (facility) located at 3939 Chaney Trail in Altadena. Lincoln discharges backwash water and settling basin drainage water to an unnamed tributary to the Arroyo Seco, a navigable water of the United States. The backwash water and settling basin drainage water are susceptible to containing pollutants such as total dissolved solids and biological oxygen demand (five-day incubation at 20° C), which can degrade water quality and impact beneficial uses of water.

Lincoln's wastewater discharges from the facility are subject to the requirements and limitations set forth in Water Code section 13376 and Los Angeles Regional Water Quality Control Board Order No. R4-2003-0120. Water Code section 13376 prohibits the discharge of pollutants to surface waters, except as authorized by waste discharge requirements that implement applicable provisions of the federal Clean Water Act. Water Code section 13377 authorizes the issuance of waste discharge requirements that serve as a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act. Order No. R4-2003-0120 sets forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time. Order R4-2003-0120 serves as an NPDES permit.

Lincoln installed an ascorbic acid-based dechlorination system known as the Vita-D-Chlor system in May 2004 and began operating the system at the start of the rain season later that year. Shortly thereafter, Lincoln reported five (5) effluent limit violations of Order No. R4-2003-0120 in its self-monitoring report for the fourth quarter of 2004. These violations include effluent limit exceedances for total dissolved solids and biological oxygen demand (five-day incubation at 20° C). The violations are identified in Exhibit "A."

III. LEGAL AND PROCEDURAL BACKGROUND

A. Applicable NPDES Permit Effluent Limitations

Order No. R4-2003-0120 includes the following effluent limitations:

Constituent	Units	Monthly Average	Daily Maximum
Total Dissolved Solids (TDS)	mg/l	---	950
Biological Oxygen Demand (BOD)	mg/l	20	30
Biological Oxygen Demand (BOD)	lbs/day	3.09	4.62

B. Requirement to Impose Mandatory Minimum Penalties

In California, certain violations of waste discharge requirements that serve as an NPDES permit are subject to mandatory minimum penalties.[1] Water Code section 13385, subdivision (h)(1) requires assessment of a mandatory minimum penalty of three thousand dollars ($3,000) for each serious violation.[2] Pursuant to Water Code section 13385, subdivision (h)(2), a "serious violation" is defined as any waste discharge that violates the effluent limitations

[1] Throughout the remainder of this Order, a reference to waste discharge requirements means waste discharge requirements adopted pursuant to Water Code section 13377 that serve as an NPDES permit.

[2] Water Code section 13385, subdivision (i)(1), similarly requires assessment of a mandatory minimum penalty of three thousand dollars ($3,000) for an additional class of violations, none of which are at issue here.

contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or for a Group I pollutant by 40 percent or more. Appendix A of part 123.45 of title 40 of the Code of Federal Regulations specifies the Group I and II pollutants. Total dissolved solids and biological oxygen demand (five-day incubation at 20° C) are Group I pollutants.

We have previously discussed the Porter-Cologne Water Quality Control Act's mandatory minimum penalty provisions. As we observed in our *Escondido Creek Conservancy* order, "the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred."[3] Water Code section 13385 provides for administrative civil liability that *may* be assessed by discretionary action (subdivisions (c) – (g)), but also identifies certain violations where any civil liability *must* recover minimum penalties of $3,000 for each violation (subdivisions (h) – (*l*)).

The Water Code establishes four affirmative defenses to the imposition of mandatory minimum penalties. The mandatory minimum penalty provisions do not apply when a violation is caused by (1) an act of war, (2) an unanticipated, grave natural disaster, (3) an intentional act of a third party, or (4) the startup period for certain new or reconstructed wastewater treatment units relying on biological treatment.[4] The discharger bears the burden of proving affirmative defenses.[5] Proof of any of the four defenses with respect to a violation suspends the mandatory minimum penalty provisions of section 13385 for that violation. When a serious violation has occurred, a discharger may avoid the mandatory minimum penalty only by proving one of the available affirmative defenses.[6]

As set forth in Exhibit "A," Lincoln reported five serious violations. These violations are defined as serious because measured concentrations of Group I pollutants exceeded the applicable effluent limitations listed in section III.A of this Order by more than 40 percent. The mandatory minimum penalty for these violations is $15,000.

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[3] State Water Board Order WQ 2007-0010 (*Escondido Creek Conservancy et al.*), p. 4. See also State Water Board, Water Quality Enforcement Policy (2010), p. 23, § VII.

[4] Wat. Code, § 13385, subd. (j)(1).

[5] *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 726 (discussing the first three affirmative defenses available under subdivision (j)(1), but leaving open the question with respect to the fourth).

[6] State Water Board Order WQ 2007-0010 (*Escondido Creek Conservancy, et al.*), p. 4. While not relevant to the facts of this case, there are additional conditions under which a discharge that is in compliance with a Cease and Desist Order or Time Schedule Order is exempt from mandatory minimum penalties. Wat. Code, § 13385, subd. (j)(2).

C. Statute of Limitations

General statutes of limitations do not apply to this administrative proceeding. The statutes of limitations that refer to "actions" and "special proceedings" and that are contained in the California Code of Civil Procedure apply to judicial proceedings, not administrative proceedings.[7] Courts evaluating the issue have consistently found that general statutes of limitations do not apply to administrative proceedings, including administrative enforcement proceedings.[8]

Related to the concept of statute of limitations is an equitable principle of laches. Laches is a court-made, equitable doctrine based on the "principle that those who neglect their rights may be barred from obtaining relief in equity."[9] It is a defense by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when that delay or negligence has prejudiced the party against whom relief is sought.[10] The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.[11] "[L]aches is not available where it would nullify an important policy adopted for the benefit of the public."[12] Further, it is well-settled that the burden to establish laches lies with the party raising it.[13]

Initially, we are not convinced that the doctrine of laches is applicable to a mandatory minimum penalty. As noted above, laches is a court-made, equitable doctrine. We have previously recognized our authority to import equitable principles into our adjudicative decisions.[14] Where the Legislature has spoken, however, equitable and court-made remedies give way to statutory mandates.[15] "Principles of equity cannot be used to avoid a statutory

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[7] Code of Civ. Proc., § 22 (defining action as a judicial proceeding in a court). See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 47-48; 3 Witkin, Cal. Proc. (5th ed. 2008) Actions, § 430, p. 546.

[8] See, e.g., *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361-1362; *Little Co. of Mary Hosp. v. Belshé* (1997) 53 Cal.App.4th 325, 329; *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 515; cf. *BP America Production Co. v. Burton* (2006) 127 S.Ct. 638, 644 (reaching similar result that statutes of limitation do not apply to administrative proceedings under federal law absent express statutory provision).

[9] *Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1381.

[10] Black's Law Dict. (7th ed. 1999) p. 879, col. 1.

[11] *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.

[12] *Feduniak v. California Coastal Com'n*, *supra*, 148 Cal.App.4th at p. 1381.

[13] *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628.

[14] See, e.g., State Water Board Order WQ 96-04-UST (*Champion/LBS Associates Development Company*), p. 6 (adopting equitable "common fund" doctrine for Underground Storage Tank Cleanup Fund reimbursements).

[15] See *Modern Barber Colleges v. California Employ. St. Com'n* (1948) 31 Cal.2d 720, 727-728 (recognizing the Legislature's ability to define and limit equitable rights and remedies that are not in conflict with the Constitution).

mandate."[16] Here, where there has been a violation subject to statutory mandatory penalties and unless an affirmative defense is proven, the Legislature has imposed an affirmative duty to impose the penalties, thereby depriving the water boards of their discretion to reduce the mandatory minimum penalty.[17] When the Legislature has spoken so clearly, we do not believe the water boards may invoke equitable principles to avoid that result.

Even if we could invoke the doctrine of laches to reduce the penalty, Lincoln would fail to carry the burden of proof required by courts. First, as discussed above, the doctrine of laches is not available against a governmental agency where it would nullify an important policy adopted for the benefit of the public. Some courts have considered the possibility that a party might be able to assert laches against a governmental agency despite the existence of a public policy if the party could demonstrate that "manifest injustice" would otherwise result.[18] The Legislature adopted mandatory minimum penalties to promote streamlined, cost-effective enforcement and facilitate water quality protection.[19] The mandatory penalty statute itself evidences a strong legislative policy that certain types of permit violations always result in minimum penalties. There is nothing in the record that would suggest that Lincoln has suffered anything remotely approaching a manifest injustice as a result of the delay in prosecuting the mandatory minimum penalty.

Second, Lincoln has not proved that the delay in prosecuting the mandatory minimum penalty was either unreasonable or that the water boards acquiesced to Lincoln's violations. Lincoln received a notice of violation and was on notice that it could be subject to further enforcement actions.

Finally, Lincoln has been on notice of the violations since it received its monitoring data, and has not proven any prejudice to it by delayed prosecution of the action. In fact, because the payment of the mandatory penalty is not due until after final, administrative decisions, Lincoln has benefited from the delayed assessment of the mandatory minimum penalty. We find that even if laches was available, Lincoln has not satisfied its burden to support a laches defense.

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[16] *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 1492; see also 13 Witkin, Summary (10th ed. 2005) Equity, § 3, p. 284; *Lass v. Eliassen* (1928) 94 Cal.App. 175, 179 ("Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly.").

[17] Wat. Code, § 13385, subd. (h)(1); *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 720.

[18] See *Morrison v. California Horse Racing Bd.* (1988) 205 Cal.App.3d 211, 219 ("Where there is no showing of manifest injustice to the party asserting laches, and where application of the doctrine would nullify a policy adopted for the public protection, laches may not be raised against a governmental agency.").

[19] *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 725.

D. CEQA

Issuance of this administrative civil liability order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 et seq.) pursuant to section 15321, subdivision (a)(2), title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061, subdivision (b)(3) of title 14 of the California Code of Regulations because there is no possibility that the activity in question may have a significant effect on the environment.

IV. CONTESTED ISSUES

A. Request to Waive Violations

Lincoln acknowledged that the violations occurred and requested a "one time waiver" of the mandatory minimum penalties. Lincoln asserts that (1) the cause of the violations was a change in the treatment process; (2) the violations were a one-time occurrence; (3) Lincoln took corrective actions to prevent further violations; and (4) liability would cause a financial hardship.[20]

Lincoln's assertions are not proper grounds upon which the State Water Board can exempt Lincoln from mandatory minimum penalties. Consideration of factors raised by Lincoln, such as culpability, history of violations, and ability to pay are only appropriate considerations when the penalty involves discretionary liability.[21] As the First District Court of Appeal has observed, the legislative history for the mandatory minimum penalty statute reflects an intent to streamline enforcement by removing the need to consider "mitigating factors."[22] The complaint only seeks to impose the minimum penalties mandated by Water Code section 13385, subdivision (h), so the mitigating factors set forth in Water Code section 13385, subdivision (e) cannot be considered.

B. Single Operational Upset

At the hearing, Lincoln raised a new defense, citing the Water Code section 13385, subdivision (f) provisions concerning a "single operational upset." Water Code section

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[20] Letter from Robert J. Hayward, General Manager of Lincoln Avenue Water Company to Erin Mustain, Office of Information Management and Analysis, State Water Resources Control Board (Oct. 20, 2010).

[21] Compare Wat. Code, § 13385, subds. (e) (identifying equitable factors to be considered when exercising discretion to set the amount of liability) with (h)(1) (establishing mandatory minimum penalties, "[n]otwithstanding any other provision of this division…).

[22] *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 725.

13385 includes two variations of "single operational upset" to mitigate, but not excuse, penalties. One variant, codified in subdivision (f)(1), governs both discretionary liabilities and mandatory penalties. The other variant, codified in subdivision (f)(2), governs mandatory minimum penalties only. As discussed below, neither variant applies to the facts of this case.

Paragraph (1) of subdivision (f) specifies that:

> *Except as provided in paragraph (2)*, for the purposes of this section, a single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. (Emphasis added.)

Paragraph (2) of subdivision (f), in turn, provides that:

> (2) (A) *For the purposes of subdivisions (h) and (i)*, a single operational upset *in a wastewater treatment unit that treats wastewater using a biological treatment process* shall be treated as a single violation, even if the operational upset results in violations of more than one effluent limitation. (Emphasis added.)

Paragraph (1) applies to all of Water Code section 13385: both discretionary liabilities and mandatory minimum penalties. If multiple violations on a single day are found to be the result of a single operational upset, then the amount of the liability or penalty is treated as though only a single violation occurred on that day.[23] As explained below, Lincoln does not qualify for this single operational upset provision.

On the other hand, because subdivisions (h) and (i) address mandatory minimum penalties only, paragraph (2) applies only to mandatory minimum penalties. If the additional conditions specified in paragraph (2) are found to exist, the amount of the penalty for multiple violations over multiple days is treated as though only a single violation occurred over the entire period of upset, not to exceed 30 days.[24] As identified above, one of the additional conditions for applying paragraph (2)'s variant of the single operational upset is that it is only available for a wastewater treatment unit using biological treatment.

Lincoln uses chemical and physical treatment processes and does not use biological treatment processes.[25] Consequently, the single operational upset provision of subdivision (f)(2) does not apply to its violations.

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[23] State Water Board, Water Quality Enforcement Policy (2010), p. 17.

[24] Wat. Code, § 13385, subd. (f)(2)(B).

[25] Hearing Transcript at p. 78.

Lincoln also does not qualify for a reduced penalty under subdivision (f)(1) because its violations were the result of improperly designed or inadequate treatment facilities and not an exceptional incident. Our Water Quality Enforcement Policy provides that:

> US EPA defines "single operational upset" as "an exceptional incident which causes simultaneous, unintentional . . . noncompliance with more than one CWA effluent discharge pollutant parameter. *Single operational upset does not include… noncompliance to the extent caused by improperly designed or inadequate treatment facilities.*[26]

Lincoln's correspondence with the State Water Board demonstrates that its Vita-D-Chlor dechlorination system was improperly designed and inadequate to ensure compliance with its effluent limitations. For example, in a 2010 letter from its General Manager to the State Water Board, Lincoln notes that it installed the Vita-D-Chlor system in May 2004 and began operating the system at the start of the rain season later that year. On December 23, 2004, Lincoln collected samples that indicated violations of the BOD and TDS limits in its NPDES permit. Lincoln then consulted with a chemist and concluded that organic matter in the Vita-D-Chlor tablets would significantly increase BOD and that the type of tablets used would also increase TDS in the discharge. Lincoln then corrected this problem by modifying the dechlorination system by switching from tablets to a granular form of dechlorinating agent and increasing contact time before discharge.[27]

These facts illustrate that Lincoln's system was improperly designed and inadequate to dechlorinate its waste without violating the BOD and TDS effluent limitations in its permit. Even assuming that the single operational upset provisions of Water Code section 13385, subdivision (f)(1) were available to Lincoln, it could not avail itself of the provision because Lincoln's noncompliance was caused by an improperly designed or inadequate treatment system.

V. CONCLUSION

Upon consideration of the record for this matter, the State Water Board concludes that the amount of $15,000 must be imposed on Lincoln as a mandatory minimum penalty for the violations identified in this Order.

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[26] State Water Board, Water Quality Enforcement Policy (2010), p. 22. Emphasis added.

[27] Letter from Robert J. Hayward, General Manager of Lincoln Avenue Water Company to Erin Mustain, Office of Information Management and Analysis, State Water Board (Oct. 20, 2010).

VI. ORDER

IT IS HEREBY ORDERED that, pursuant to Water Code section 13323, Lincoln shall make a payment by check of $15,000 (payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days after the date of issuance of this Order. The check shall reference the number of this Order. Lincoln shall send the original signed check to State Water Resources Control Board, Department of Administrative Services, P.O. Box 1888, Sacramento, CA 95812-1888.

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 July 23, 2013.

AYE:

NAY:

ABSENT:

ABSTAIN:

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Jeanine Townsend
Clerk to the Board

Effluent Limitation Violations Requiring Manadatory Minimum Penalties

#	Violation Number	Violation Date[1]	Constituent	Pollutant Group	Limitation Period	Limitation Type[2]	Limit	Result/ Average	Units	% Over Limit	Date 180 Days Prior	Serious[3] Violation?	Chronic?	Mandatory Fine?	Water Code	Penalty
1	264210	12/23/2004	Total Dissolved Solids	Group I	Daily Maximum	Concentration	950	2200	mg/L	132%	6/26/2004	Y	N	Y	13385(h)	$3,000
2	879238	12/23/2004	BOD_5	Group I	Daily Maximum - Mass[4]	Mass	4.62	56.33	lbs/day	1119%	6/26/2004	Y	N	Y	13385(h)	$3,000
3	264208	12/23/2004	BOD_5	Group I	Daily Maximum - Conc.	Concentration	30	1000	mg/L	3233%	6/26/2004	Y	N	Y	13385(h)	$3,000
4	879237	12/31/2004	BOD_5	Group I	Monthly Average - Mass[4]	Mass	3.09	56.33	lbs/day	1723%	7/4/2004	Y	N	Y	13385(h)	$3,000
5	264209	12/31/2004	BOD_5	Group I	Monthly Average - Conc.	Concentration	20	1000	mg/L	4900%	7/4/2004	Y	N	Y	13385(h)	$3,000
															Total Penalty:	$15,000

BOD_5 = Biochemical oxygen demand (5-day incubation at 20° C)

1 - Violation occurs on sample date or last date of averaging period.
2 - This permit contains both concentration limits and mass limits.
The mass-based effluent limitations contained in this Order are based on a maximum discharge flow rate of 18,500 gpd.
3 - For Group I pollutants, a violation is serious when the limit is exceeded by more than 40%
- For Group II pollutants, a violation is serious when the limit is exceeded by more than 20%
4 - Based on a reported flow of 6750 gal/day.

Violation period ending the last day of December 2004

Group I Violations Assessed MMP:	5
Group II Violations Assessed MMP:	0
Other Effluent Violations Assessed MMP:	0
Total Violations Assessed MMP:	5

Mandatory Minimum Penalty = (5 Serious[3] Violations + 0 Non-Serious Violations) x $3,000 = $15,000