



CALIFORNIA ASSOCIATION of SANITATION AGENCIES

1225 8th Street, Suite 595 • Sacramento, CA 95814 • TEL: (916) 446-0388 • www.casaweb.org

Via Electronic Mail

November 4, 2014

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Dr. Karl Longley, Chair, and Members of the Board
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Pamela Creedon, Executive Officer
Advisory Team
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670 Phone: (916) 464-4839

Electronic Mail: Pamela.Creedon@waterboards.ca.gov

**SUBJECT: POLICY STATEMENT: Administrative Civil Liability
Complaint R5-2014-0561,
in the Matter of California Sprouts, LLC**

Dear Chair Longley, Members of the Board and Ms. Creedon:

The California Association of Sanitation Agencies (CASA) appreciates the opportunity to submit this policy statement regarding the proposed imposition of mandatory minimum penalties (MMPs) on California Sprouts. CASA is a statewide association of local public agencies that provide wastewater collection, treatment and renewable resource services to millions of Californians.

Since its enactment in 2000, CASA has been concerned about the potentially harsh and unjust impact of the MMP law. Along with the League of California Cities, CASA sponsored the first cleanup measure to address some of these unintended consequences in 2002 (AB 2351-Canciamilla). In 2010, CASA actively advocated for passage of SB 1284-Ducheny, which enacted the modifications to the law relating to MMPs for failure to report. SB 1284 was introduced and enacted in direct response to the proposed assessment of millions of dollars in monetary penalties by the Water Boards against local agencies and small businesses for "paper" violations with little or no water quality impact.

CASA was prompted to file this policy statement on behalf of California Sprouts because we believe the imposition of MMPs under the circumstances, as we understand them, runs contrary to both the letter and intent of SB 1284. California Sprouts is facing an assessed fine of \$210,000 because the company failed to file quarterly monitoring reports, starting with reports due on November 1, 2012. California Sprouts was not warned or notified of its failure to file such reports until receipt of an email notification from Regional Board staff on June 4, 2014. Immediately after receiving communication from the Regional Board, California Sprouts filed the missing quarterly monitoring reports. Soon thereafter, California Sprouts received another communication from the Regional Board indicating it be would assessed MMPs for the late reports under Water Code section 13385.1(a)(1).

Many small agencies and small businesses lack the staff to keep abreast of all of the necessary compliance filings, and unfortunately, may on occasion fail to submit all their reports in a timely fashion. CASA recognizes that the discharger is ultimately responsible for the timely submittal of self-monitoring reports, and that failure to do so is an enforceable violation. However, the proposed MMPs would impose a penalty that far exceeds the discharge's culpability-- a penalty that we do not believe the Regional Water Board would contemplate imposing under its discretionary authority in a case where a discharger had been responsive and filed missing reports once notified. It was the unintended consequence of a statute compelling such disproportionate penalties that led the Legislature to pass SB 1284.

SB 1284 modified the statutory method for assessing MMPs for failure to report. As amended, Water Code section 13385.1(b) allows MMPs to be assessed \$3,000 per late report—not, as had previously been the case, \$3,000 for each 30-day period that the report was not submitted. The applicability of this provision was limited to failures to report for periods during which no effluent limitations were exceeded, and for which the discharger had not previously received notice from the Regional Board. The discharger also must have filed the missing discharge monitoring report(s) within 30 days after receiving notice. Thus, the motivating purpose of the statutory change was to prevent unfairly penalizing those that had not filed quarterly reports but clearly were not hiding discharge violations.

This section of the Water Code included a "sunset" provision, and became inoperative on January 1, 2014. The sunset provision was included because the Legislature believed the extraordinary backlog in processing MMP complaints that existed in 2010 to be a temporary situation that would not be repeated in future. *Indeed, the State Water Resources Control Board assured the Legislature that it would address any backlogs prior to this date, and would establish a system for timely notifying dischargers of when quarterly reports were not received.*

Waiting two years, until after the law had sunset, to notify California Sprouts of the fact that it had not properly filed quarterly monitoring reports, has significantly increased the company's liability exposure. This results in unfair treatment of California Sprouts vis-à-vis other dischargers, which may have had similar violations during the same time frame yet did receive timely notification by their regional boards and thus will be spared the exorbitant penalties. To proceed with the MMPs under these circumstances undermines the intent and purpose behind Water Code section 13385.1(b), which was to establish a flat \$3,000 penalty for these types of missing reports for reporting violations that occurred prior to 2014. MMPs assessed for reporting violations that occurred prior to January 1, 2014 should be calculated pursuant to Water Code section 13385.1(b), assuming that all other factors are satisfied.

We urge the Regional Water Board to decline to impose the MMPs proposed by the prosecution team. In its evidentiary statement, California Sprouts has articulated a strong legal argument that the substantive provisions included in Water Code section 13385.1(b) can and should apply to many of the reporting violations at issue here. The clear intent of SB 1284 was to capture reporting failures occurring prior to the sunset date. The prosecution team's reading—that the relevant date is not when the violations occurred but rather when they ultimately notified the discharger-- would place the prosecution team in the sole position of determining which dischargers would be spared otherwise harsh penalties. Under their approach, the Regional Water Board enforcement staff effectively decides, by the timing of its own actions, whether or not a discharger would benefit from the relief provided in SB 1284. Dischargers who received notice from the Board before January 1, 2014 receive reduced penalties; those who receive notice after that date do not.

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(See the discussion of *As You Sow v. Conbraco Industries, Inc.* (2005) 135 Cal. App. 4th 431 in the California Sprouts brief, in which the court determined that a repealed administrative regulation that provided a defendant of the ability to assert an affirmative defense prior to repeal should *not* be retroactively applied, and that defendant could continue to assert the affirmative defense after the repeal of the regulation for actions that occurred prior to repeal of the regulation.)

The Regional Water Board has the opportunity to choose from among two competing legal interpretations the better reading—the construction that supports the just and equitable result. In many areas involving the assessment of MMPs, the Board’s hands have been tied by the Legislature. This is not such a case. We urge the Board to reject the proposed MMPs and assess reduced penalties consistent with the application of the statutory provisions established by SB 1284. I would be happy to answer any questions you may have.

Sincerely,



Roberta L. Larson,
Executive Director, CASA

cc: David P. Coupe, Senior Staff Counsel, dcoupe@waterboards.ca.gov
Kenneth Landau, Klandau@waterboards.ca.gov
Wendy Wyels, wwyels@waterboards.ca.gov
Laura Drabandt, Laura.Drabandt@waterboards.ca.gov
Dan Sholl, dsholl@calsprouts.com
Tess Dunham, tdunham@somachlaw.com