
North Coast Regional Water Quality Control Board

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SUBJECT: PROSECUTION TEAM'S RESPONSE TO PUBLIC COMMENTS RECEIVED DURING THE PUBLIC REVIEW PERIOD FOR SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R1-2015-0066 WITH OCCIDENTAL COUNTY SANITATION DISTRICT (CSD)/SONOMA COUNTY WATER AGENCY (SCWA), RESOLVING MANDATORY MINIMUM PENALTIES (MMPs) DURING THE PERIOD FROM FEBRUARY 1, 2013, THROUGH APRIL 30, 2015

On October 28, 2015, the prosecution team staff of the Regional Water Board (Prosecution Team) posted a public notice seeking comments on proposed Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R1-2015-0066 (proposed Order). The proposed Order is a tentative settlement agreement with Occidental CSD/SCWA (Discharger) for the violations alleged in Administrative Civil Liability Complaint No. R1-2014-0045 (the ACLC), and additional violations that occurred after the ACLC was issued. This memo summarizes and responds to the comments and questions received during the public review period that began October 28, 2015 and ended December 1, 2015.

Summaries of and Responses to Comments and Questions

The following four interested persons provided comments during the public review period:

- Pauline and John Loades (PL&JL)
Emails dated 11/18/15, 11/24/15, and 11/30/15
- Albert Woicicki – Citizens for Trees and Wells (AW)
Email dated 11/30/15
- Ann Maurice – Ad Hoc Committee for Clean Water (AM)
Email dated 12/1/15

The above correspondence includes comments and questions on the proposed Order and general comments and questions on Occidental CSD's wastewater treatment facility (WWTF), other facilities operated by SCWA, water quality concerns for Graham's Pond, and past Regional

Water Board enforcement actions. The commenters also proposed long-term solutions to upgrade the WWTF to tertiary treatment. This memo only addresses comments relevant to the proposed Order. The three categories of relevant comments are: 1) comments regarding the nature and location of the proposed Supplemental Environment Project (SEP); 2) comments regarding the public review period and notification of interested persons; and 3) other general comments.

I. Comments and responses regarding the nature and location of the proposed SEP

Public Comments:

1. According to David Leland (former Regional Water Board Assistant Executive Officer), a compliance project would be chosen to “. . . improve the performance of the facility.” The facility that is malfunctioning is on Dutch Bill Creek. What is the connection between a cleanup of the Laguna and the treatment plant’s performance on Dutch Bill Creek? (AM)
2. Based on an August 22, 2014, email from David Leland, commenters understood that implementation of a compliance project could improve facility performance and compliance. The Laguna de Santa Rosa Debris Removal Project (Laguna de Santa Rosa project) does not improve the Occidental Wastewater Treatment Plant or Dutch Bill Creek Watershed. (AM)
3. Staff and Board should review alternative ideas for improvements and rehabilitation in the Dutch Bill Creek Watershed. (PL&JL)(AW)(AM)
4. The monies should be used for the benefit of the Dutch Bill Creek Watershed. (PL&JL)(AW)(AM)
5. The violations occurred in the Dutch Bill Creek Watershed; the fines should be used to the benefit and restoration of the Dutch Bill Watershed. (PL&JL)
6. Commenters heard that SCWA submitted two options to use the fines in the Dutch Bill Creek Watershed. What were those and why were they rejected? (PL&JL)(AW)(AM)
7. Did the Regional Board make the decision as to where the fines should be spent or did SCWA submit the idea? (PL&JL)
8. Commenters request that community generated ideas be evaluated and presented to the Regional Board before a final decision is made as to the use of the fines. (PL&JL)(AM)
9. What is the SEP completion date? (PL&JL)
10. Have the fines actually been set aside for the Laguna de Santa Rosa project? (PL&JL)

11. Is there a possibility the fines could be used elsewhere at this point? (PL&JL)
12. The Regional Water Board should void the Laguna de Santa Rosa project. (AM)

Staff Response:

The Discharger does not qualify for a Compliance Project

During preliminary discussions with the Discharger following issuance of the ACLC, staff expected that the Discharger would meet the criteria to be considered a Publicly Owned Treatment Works (POTW) serving a small community with a financial hardship as defined in Water Code section 13385(k). Such designation would have allowed the Discharger to apply up to 100% of the assessed penalty amount toward an approved Compliance Project (CP); a project that directly addresses deficiencies or problems with the facility that contributed to the conditions leading to the effluent violations for which Mandatory Minimum Penalties (MMPs) were assessed in the ACLC. During this period, interested persons occasionally contacted staff to inquire about the ACLC and the resolution process. Staff advised interested persons that the outcome of the settlement discussions would likely be a CP.

Based on the expectation that it would qualify for a CP, the Discharger suggested various maintenance or improvement projects it might implement at the facility, while continuing a greater ongoing effort to pursue a more permanent solution to facility and system deficiencies. Staff understand that these latter efforts are progressing, albeit slowly, towards a satisfactory solution that will ensure improved compliance in the future. Staff encourage the Discharger to continue making diligent efforts to complete this process.

After potential CP ideas were proposed, staff analyzed current census data for the community and determined that the Discharger does not, in fact, qualify to perform a CP. (See proposed Order Attachment B.) Because the Discharger does not qualify for a CP, its options to resolve the MMPs are: 1) pay the entire penalty to the State Water Pollution Cleanup and Abatement Account (CAA); or 2) apply a percentage of the penalty towards a Supplemental Environmental Project (SEP) as authorized by the Water Code and/or the State Water Resources Control Board's (State Water Board) SEP Policy (SEP Policy). The SEP option is dependent on the Discharger's willingness and the Board's approval. Unlike CPs, SEPs may not involve improvements needed to assure compliance with permit requirements. SEPs must meet criteria specified in the SEP Policy. The SEP Policy is available at: http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/rs2009_0013_sep_finalpolicy.pdf

The proposed Order was posted for public review on October 28, 2015. Finding 5 of the proposed Order states that the Discharger is not eligible to pursue a CP and that the parties agree the Discharger would apply a portion of the total assessed penalty to a SEP as further described in Attachment C to the proposed Order. Upon review of the public comments, staff recognizes that interested persons may have expected a CP at the facility. The proposed Order and/or its notice for public comment could have provided a more detailed explanation as to why the proposed Order included a SEP and not a CP.

SEPs are a product of settlement negotiations between parties

Staff recognize that the commenters (or interested persons) expected the proposed Order to include a CP. The public only learned of the Discharger's proposed SEP after settlement negotiations and after the proposed Order was posted for public comment. As explained below, the decision to propose the Laguna de Santa Rosa project as a SEP was made between the parties and did not involve interested persons.

The above commenters are interested persons and are not parties to the ACLC or the proposed Order. There are important differences between a "party" and an "interested person". A "party" or "designated party" has the right to present evidence, testimony, and to cross-examine witnesses at a hearing. Other persons who are interested in a case, but are not named in an ACLC-or named a "designated party" by the Advisory Team-do not have the same rights. An "interested person" is only allowed to submit policy statements and does not participate in settlement negotiations.

In accordance with the hearing procedures issued with the ACLC (attached), a person wishing to be considered a designated party was required to submit a request to the Advisory Team by July 25, 2014, demonstrating how the person would be affected by the potential Board action, the person's need to present evidence and/or cross examine witnesses, and why an already designated party would not adequately represent the person's interest. Because the commenters did not request designated party status, only the Prosecution Team and Discharger were involved in negotiating the proposed Order, including the decision to pursue a SEP instead of a CP.

The parties support adoption of the proposed Order

As explained above, the Discharger has limited options in resolving the MMPs; pay the entire penalty amount to the CAA or, as in this case, propose a SEP per the criteria in the SEP Policy and pay a portion of the penalty amount to the CAA. Parties to a proposed settlement agreement must agree to the proposal's terms before submitting a proposed Order for the Board's consideration. The Board may accept or reject a proposed Order containing a SEP, but it may not require the Discharger to perform a SEP. The Prosecution Team can encourage and/or recommend that a discharger propose a SEP, but like the Board, cannot require the Discharger to fund a project that it does not agree to perform.

Following determination of the Discharger's ineligibility to perform a CP, the Discharger requested, and Prosecution Team agreed, to allow the Discharger to propose and complete a SEP in lieu of paying a portion of the civil liability, the SEP amount, to the CAA. Subsequently, the Discharger suggested three possible SEPs, all potentially meeting the SEP Policy criteria:

- 1) Laguna de Santa Rosa Debris Removal Project*
- 2) Paulin Creek Restoration Project at Hidden Valley Park*
- 3) Pollution Prevention Outreach and Water Conservation Program*

Following discussion with the Prosecution Team about all three potential projects, the Discharger selected the Laguna de Santa Rosa project as its final proposed SEP. The Prosecution Team reviewed the complete project proposal, found it to meet the SEP Policy criteria, and recommended acceptance in the proposed Order.

Merits of the proposed SEP

The Prosecution Team considers the Laguna de Santa Rosa project to have the most merit of the three projects proposed for a number of reasons, including:

- *Out of the three SEPs considered, it would provide the most improvement to surface water quality;*
- *The project is located upstream of the confluence of Dutch Bill Creek with the Lower Russian River, thus providing the most benefit to the Lower Russian River watershed, including that portion affected by flows from Dutch Bill Creek;*
- *The project is supported by a number of watershed stakeholders and partners in TMDL development for the Russian River and Laguna de Santa Rosa watershed; and*
- *The project had already gone through the CEQA and 401 permitting processes and was ready to be implemented (“shovel ready”).*

The other two projects have merits and drawbacks in comparison to the Laguna de Santa Rosa project. The Prosecution Team identified the following positive elements for the Paulin Creek Restoration Project at Hidden Valley Park:

- *Project involves students, teachers, volunteers, the conservation corps and restoration professionals (Prunuske Chatham);*
- *The project is along Paulin Creek tributary to Piner Creek, Santa Rosa Creek, the Laguna de Santa Rosa, and the Russian River;*
- *Removes non-native vegetation and replaces these with native plant seeds along 300 feet of creek bank; and*
- *The project goal is to enhance the riparian area, improve habitat and reduce sediment input along this reach of Paulin Creek.*

The Prosecution Team decided against the Paulin Creek Restoration Project at Hidden Valley Park because it is farthest from the area where the violations occurred.

With respect to the Pollution Prevention Outreach and Water Conservation Program, the Prosecution Team noted the following positive elements:

- *The outreach includes gathering educational materials and tools for handing out at events and three workshops for the community of Occidental;*
- *The workshops would focus on what can and cannot go into the collection system and effects of such pollution; and*
- *The water conservation would also be a part of this project including a home water use audit.*

The Prosecution Team decided against the Pollution Prevention Outreach and Water Conservation Program because the Discharger currently has an outreach program regarding water use and pollution prevention and previous program efforts regarding water efficiency were marginally successful with low community participation. Accordingly, though farther removed from the area where the violations occurred, the Laguna de Santa Rosa project will likely provide more water quality benefits to the immediate project area and to the watershed in general.

Both parties agree with the proposed SEP and the proposed Order requirements. The Prosecution Team believes the proposed Order is fair and reasonable and fulfills its enforcement objectives, and that the proposed Order is in the best interest of the public.

Process upon approval by the Board

If the Board or its delegee, the Board's Executive Officer, adopts the proposed Order, then the Discharger will be obligated to comply with the milestone requirements and deadlines specified within the Order. In this case, the Discharger has completed the proposed SEP, but recognizes the risk of funding and implementing the project prior to Board approval. The Discharger completed the work for this SEP project over summer 2015 during dry weather and while the labor force (Sonoma County Youth Ecology Corps) was available. The Discharger has signed the proposed Order and has agreed to spend \$49,500 towards completing the approved SEP. The Discharger has completed the project and provided a final report verifying project completion. Adoption of the proposed Order by the Executive Officer or the Board will allow suspension of \$49,500 of the total \$84,000 penalty amount. The Discharger will be required to pay the remaining \$34,500 to the CAA, within 30 days of adoption of the Order.

II. Comments regarding the public review period and notification of interested persons

Public Comments:

1. As an "interested party," commenter was surprised to learn that a settlement was proposed and negotiated without commenter being notified. (AM)
2. Commenter was supposed to be notified as an "interested party," but did not receive notification of R1-2015-0066. (AW)
3. Please note commenters' names as interested parties so they will be informed about new developments and outcomes of ACL Complaint No. R1-2014-0045. (PL&JL)
4. Commenter believes staff need to revise or adjust the date for the people to give comment on this. (AW)
5. Once the Laguna proposal is rejected, please give adequate time for the concerned public to develop further ideas for Graham's Pond and the Dutch Bill watershed for Regional Board and SCWA consideration. (AM)

Staff Response:

As discussed above, the parties agreed to the proposed Order following settlement discussions. The Prosecution Team posted a Public Notice and copy of the proposed Order on the Board's website for 30 days. Staff did not specifically notify or contact interested persons.

Known interested persons have provided timely comments. However, the Prosecution Team acknowledges that the Public Notice provided minimal discussion on why the Discharger is not eligible to perform a CP and why the parties agreed to the proposed SEP. Accordingly, the Prosecution Team believes it is appropriate to provide a brief additional public review period to allow for comments on the Prosecution Team's responses to comments as presented in this memo, and to notify known interested persons of the additional opportunity to comment.

III. Other general comments and questions**Public Comments:**

1. As an "interested party" to the violation, fine and proposed settlement, commenter was surprised to learn that additional fines were imposed by the Regional Board for additional interim permit violations not cited in and attached to the original 2014 complaint. (AM)
2. What is SCWA going to do the next time it is fined? (AW)
3. Will SCWA's violations continue to be used to solve problems elsewhere in the county? (AW)
4. As interested parties we are requesting that the Regional Water Board Assistant Executive Officer declare this Stipulation and Order void and decide not to present the Order to the Regional Water Board. (PL&JL)
5. Kindly void the current settlement proposal to spend funds in the Laguna de Santa Rosa for this violation and consider the possibilities suggested.(AM)

Staff Response:***Additional violations included in this matter***

Resolution of larger ACLCs typically takes several months or longer. As time passes, additional effluent limit violations may accrue. As settlement discussions progress, staff may incorporate violations that have accrued in the interim. Facility compliance information is available to the public, and may be viewed online by accessing this link:

http://www.waterboards.ca.gov/water_issues/programs/ciwqs/publicreports.shtml

and following subsequent links to view reports showing different types of violations and compliance information. The current proposed Order covers MMP violations through April 30, 2015. The effort to address system deficiencies is underway. The Discharger is required by Cease and Desist Order (CDO) No. R1-2012-0102 to achieve compliance with waste discharge

requirements Order No. R1-2012-0101 (NPDES permit) by January 31, 2018. The CDO includes interim limits based on existing treatment plant performance. As such, the Discharger is expected to be able to comply with the interim limits.

Expectations for future enforcement cases

The intent of the Water Code's MMP provisions is to encourage facilities within the State to comply with National Pollutant Discharge Elimination System (NPDES) permits. The Water Code requires the Water Boards to assess MMPs for specifically defined NPDES permit violations. The Water Boards, however, have the ability to assess discretionary penalties above the minimum amount; for example, if a facility with chronic effluent violations historically fails to make satisfactory efforts to improve facility compliance. In such cases, a discharger would have the option to apply a portion of the discretionary penalties towards an Enhanced Compliance Action (ECA), a project involving capital or operational improvements beyond those required by law, and separate from projects designed to merely bring a discharger into compliance.

The process to arrive at an acceptable project or projects to incorporate into a proposed settlement agreement will typically occur during settlement discussions involving the Prosecution Team and the Discharger, and may include designated parties if they are approved by the Advisory Team.

Staff cannot predict the outcome of future enforcement cases against this Discharger concerning this facility, but note that in most cases, dischargers subject to penalties propose to apply all or a portion of their penalties to projects, as allowed or eligible, and subject to approval by the Executive Officer or the Regional Water Board.

Recommendation to void the agreement and to consider projects proposed by Commenters and/or the Dutch Bill Creek watershed community

The Regional Water Board's goal is to develop a settlement agreement with the Discharger in a manner that is fair and reasonable. The Prosecution Team believes the proposed SEP meets the required criteria as contained in the SEP Policy and that it is an acceptable and desirable project that improves water quality and the beneficial uses of the Lower Russian River.

Attachments:

- A. July 11, 2014 Public Notice Accompanying ACLC No. R1-2014-0045
- B. October 28, 2015 Public Notice Accompanying Proposed Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R1-2015-0066