

Office of Statewide Initiatives

State Water Resources Control Board

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November 21, 2005

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Central Valley Region
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**PROPOSED SETTLEMENT, ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
NO. R5-2005-0501, HILMAR CHEESE FACTORY, MERCED COUNTY**

This letter presents comments on behalf of the Office of Statewide Initiatives (OSI), in particular the Compliance Assurance and Enforcement Unit.¹ This letter is also being transmitted via e-mail and fax.

We have reviewed the proposed settlement of Administrative Civil Liability (ACL) Complaint R5-2005-0501 issued to the Hilmar Cheese Company (HCC). We are concerned with several elements of the agreement, and we urge the Central Valley Regional Water Quality Control Board (Regional Water Board) not to approve it as proposed.

There are several reasons we advocate against the proposed settlement agreement. The proposed agreement bypasses the normal administrative process for addressing issues at the facility, and obstructs the Board's ability to address future violations. The interim limits in the proposed agreement allow for more than a two-fold increase in the discharge rate and a four-fold increase the discharge limits without adequate analysis or justification. The proposed agreement significantly expands the scope of the original ACL Complaint by granting immunity from liability for past and future violations. Finally, the amount of liability in the agreement is less than the estimated economic benefit, particularly in light of the expanded scope of the proposed settlement agreement. These concerns are discussed in more detail below.

¹ As reflected by the modified letterhead, this letter was prepared solely by OSI staff members. No other members of the State Water Resources Control Board (State Water Board) staff, management, or Board Members were consulted concerning either the substance of this letter or the Hilmar Cheese Company matter in general. As such, the views and opinions contained in this letter are solely those of OSI and do not necessarily represent those of other State Water Board staff, management, or Board Members. In addition to preparing this letter, OSI staff members have previously assisted, and prepared investigative reports for the Attorney General's Office and the Central Valley Regional Water Quality Control Board (Regional Water Board) in connection with the prosecution of this matter. As a result, in the event a petition for review is filed, no OSI staff member who worked on the underlying enforcement efforts will advise the State Water Board concerning this matter.

Administrative Process

The proposed settlement agreement requires unconditional approval of all elements of the agreement, thereby limiting consideration of specific elements of the agreement by the Regional Water Board. This approach does not make use of the existing administrative process for resolving an ACL Complaint via a hearing and issuance of an ACL Order, which would allow for full Regional Water Board consideration and participation in the final decision. This case has been a matter of public concern, and should be resolved through the regular public process established in the California Water Code.

Also, the method of enforcing the proposed settlement agreement is unclear. On page 10 of the Settlement Agreement it states that, although the order approving the settlement agreement is not a formal ACL Order under California Water Code Section 13350, it may be "enforced in the manner provided in Water Code section 13328." The agreement should clarify how the provisions of the settlement agreement may be enforced should HCC not comply with them.

We recommend rejection of the proposed settlement agreement and that the Regional Water Board instead proceed with a hearing on ACL Complaint R5-2005-0501. The resulting ACL Order could establish the terms and schedule for the completion of a supplemental environmental project, should the Regional Water Board choose to authorize one. Other issues in the proposed settlement agreement could be addressed through issuance of another enforcement order (e.g., Cleanup and Abatement Order, Cease and Desist Order, Time Schedule Order) containing a compliance schedule designed to return the discharger to compliance.

Interim Limits

The settlement agreement proposes to institute relaxed interim effluent limitations for flow rate and electrical conductivity. The recommended secondary drinking water maximum contaminant level (MCL) for electrical conductivity is 900 micromhos per centimeter (umhos/cm), with an upper limit of 1600 umhos/cm, and a short-term maximum of 2200 umhos/cm. The agricultural goal is 700 umhos/cm. The existing WDRs include a flow limitation of 0.75 million gallons per day (mgd) and an electrical conductivity limit of 900 umhos/cm to the primary fields.

The proposed settlement agreement would increase these limitations to 1.2 mgd and 3700 umhos/cm respectively.

Page 7 of the staff report states that "HCC projects full compliance with the EC limit for discharge to both Secondary and Primary Lands by June 2005." The Regional Water Board's files indicate HCC has frequently told the Regional Water Board it would take actions necessary to comply with existing WDRs. Given these prior assertions by HCC and expectations by Regional Water Board staff, it is not clear why the settlement proposes a two-fold increase in the

flow rate, and a four-fold increase in the electrical conductivity limit. There is no discussion or justification presented for this increase. Included in this letter are graphs of flow and electrical conductivity violations at the facility.

The relaxed effluent limitations are proposed without any reference to any supporting legal authority allowing their use. Without such authority, they appear to amount to a de-facto amendment of the WDRs. Such an amendment of the WDRs should be adopted via the process in Water Code section 13263 accompanied by compliance with the California Environmental Quality Act and State Water Board Resolution 68-16, "Statement of Policy with Respect to Maintaining High Quality Waters in California." How the settlement agreement complies with these requirements (and also the Regional Water Board's Basin Plan and applicable water quality objectives) is unclear.

Appropriate requirements could be implemented via a compliance order (e.g., Cease and Desist Order) instead of via the settlement agreement. Such an order could establish interim effluent limitations in excess of those in the WDRs as part of a time schedule designed to reestablish compliance with the WDRs. If so, the Regional Water Board should request that such a compliance order be placed before it for consideration instead of accepting similar provisions in an agreement with dubious enforceability.

As mentioned above, we recommend that the proposed settlement agreement be rejected, and that an Order be issued containing a schedule designed to return the discharger to compliance. This would allow for a full consideration of the issues in setting any appropriate interim limits.

Scope of Violations Covered

When the original ACL Complaint was issued, the scope of the violations was limited to certain violations that occurred from January 2002 through November 2004.

Page 6 of the proposed settlement agreement states:

"Upon unconditional approval of this Settlement Agreement by the Regional Board, and provided Hilmar thereafter makes the monetary payments specified...the Regional Board Staff and the Regional Board shall and do release and agree and covenant not to sue or take administrative or other enforcement action against Hilmar...for civil liability with respect to all 'Matters Covered' by this Settlement Agreement. The Matters Covered by this Settlement Agreement are (1) all past and present violations...of which Regional Board Staff had actual knowledge of the alleged facts...and (2) any continuation or recurrence of the same known alleged violations after the date of this settlement Agreement is made...conditioned upon Hilmar's compliance with the 'Interim Operating Limits' as set forth below..."

The document "Additional Information Related to Settlement of ACL Complaint No. R5-2005-0501..." clarifies that the 'Matters Covered' also includes all alleged violations associated with the Attorney General's criminal investigation.

The proposed settlement agreement would cover virtually all past violations, including alleged violations associated with the Attorney General's criminal investigations. It would preclude action by the Regional Water Board even if new evidence is discovered with respect to the criminal investigation, and would prohibit the Regional Water Board from assessing liability for virtually all future violations until such time as the Board adopts new waste discharge requirements. We are deeply concerned with the precedent of granting immunity from civil liability for all such past and future violations.

Economic Benefit

The State Water Board's Water Quality Enforcement Policy states, "It is the policy of the SWRCB that all ACLs that are not Mandatory Minimum Penalties should be assessed at a level that at a minimum recovers the economic benefit." While recovery of the economic benefit is not mandatory in this case, the amount in the proposed settlement agreement is substantially less than the economic benefit conservatively estimated by Regional Water Board staff, estimated to be between \$3.54 million and \$22.2 million. A cursory analysis by State Water Board staff indicates that the actual economic benefit that Hilmar enjoyed as a result of the violations covered by the ACL Complaint could be as high as \$40 million. Since the Regional Board has not revised the estimated economic benefit based on the expanded scope of the proposed agreement, it cannot fully consider the economic benefit as required. Approval of the proposed settlement agreement would not recover even the original estimated economic benefit. Unless the economic benefit the discharger has reaped from noncompliance is recovered, the incentive remains to incur future violations as a "cost of doing business."

Thank you for the opportunity to address the above issues.

Should you have any questions about the concerns mentioned in this letter, please contact me at (916) 341-5889. You may also contact Mark Bradley of my staff at (916) 341-5891.

Sincerely,

John Norton, Chief
Office of Statewide Initiatives

Enclosures

cc: Robert Schneider, Board Chair (CVRWQCB)
Karl E. Longley, Vice-Chair (CVRWQCB)
Paul Betancourt, Board Member (CVRWQCB)
Alson Brizard, Board Member (CVRWQCB)
Christopher Cabaldon, Board Member (CVRWQCB)
Dan Odenweller, Board Member (CVRWQCB)
Kate Hart, Board Member (CVRWQCB)
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