

PROSECUTION STAFF REPORT

ADMINISTRATIVE CIVIL LIABILITY ORDER
FOR
NEVADA COUNTY SANITATION DISTRICT NO. 1
LAKE OF THE PINES WASTEWATER TREATMENT PLANT
NEVADA COUNTY

INTRODUCTION

The Nevada County Sanitation District No. 1 (hereafter Discharger) is the owner and operator of the Lake of the Pines Wastewater Treatment Plant, which provides sewerage service to the community of Lake of the Pines in Nevada County. Treated wastewater is discharged to Magnolia Creek, tributary to the Bear River, a water of the United States.

On 26 May 1995, the Regional Water Board adopted WDRs Order 95-114 to regulate discharges of waste from the wastewater treatment plant. On 7 June 2002, the Regional Water Board adopted WDRs Order R5-2002-0095, which contained new requirements and rescinded WDRs Order 95-114. The Administrative Civil Liability addresses effluent limit violations of both Orders.

OVERVIEW OF MANDATORY MINIMUM PENALTY PROVISIONS

Because the Discharger is regulated under a NPDES permit, it is subject to mandatory minimum penalties (MMPs). The State Water Board's 19 February 2002 Enforcement Policy describes the main aspects of MMPs; staff have summarized the information and included it below.

As of 1 January 2000, mandatory penalty provisions have been required by California Water Code (CWC) section 13385(h) and (i) for specified violations of NPDES permits. For violations that are subject to those mandatory minimum penalties, the Regional Water Board must either assess the minimum penalty of \$3,000 per violation or may include a discretionary liability in addition to the minimum penalty.

Serious Violations

CWC section 13385(h) requires that a mandatory minimum penalty (MMP) of \$3,000 be assessed by the Regional Water Board for each serious violation. A serious violation is any waste discharge that exceeds the effluent limitation for a Group I pollutant by 40 percent or more, or a Group II pollutant by 20 percent or more. The listings for Group I and II pollutants are found in the State Water Board's Enforcement Policy, but generally Group I pollutants are conventional pollutants, and Group II pollutants are toxic pollutants.

As of 1 January 2004, the CWC was amended to add another category of serious violation. As of that date, serious violations include a failure to submit required discharge monitoring reports, if the reports are designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations.

Non-Serious Violations

CWC section 13385(i) requires that a MMP of \$3,000 be assessed by the Regional Water Board for each non-serious violation. However, the first three non-serious violations are not counted in the penalty assessment. A non-serious violation occurs if the discharger does any of the following four or more times in any period of six consecutive months:

- (a) Exceeds WDR effluent limitations;
- (b) Fails to file a report of waste discharge pursuant to California Water Code section 13260;
- (c) Files an incomplete report of waste discharge pursuant to California Water Code section 13260; or
- (d) Exceeds a toxicity discharge limitation where the WDRs do not contain pollutant-specific effluent limitations for toxic pollutants.

The six-month time period is calculated as a “rolling” 180 days.

Exceptions

Exceptions to the imposition of mandatory minimum penalties are provided for violations that are caused by acts of war or by an unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character or by an intentional act of a third party. Such exceptions do not apply if the violation could have been prevented or avoided by the exercise of due care or foresight by the discharger. Such exceptions are fact specific and are evaluated on a case-by-case basis.

For the purpose of issuing MMPs, a single operational upset which leads to simultaneous violations of one or more pollutant parameters are treated as a single violation. EPA defines a “single operational upset” as “an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one effluent discharge pollutant parameter. Single operational upset does not include... noncompliance to the extent caused by improperly designed or inadequate treatment facilities.” The EPA Guidance further defines an “exceptional” incident as a “non-routine malfunctioning of an otherwise generally compliant facility.” Single operational upsets include such things as upset caused by a sudden violent storm, a bursting tank, or other exceptional event and may result in violations of multiple pollutant parameters. The Discharger has the burden of demonstrating that a single operational upset occurred.

There are also several limited exceptions to MMPs, mainly for discharges that are in compliance with a cease and desist order or time schedule order under narrowly specified conditions.

Small Communities with Financial Hardship

In lieu of assessing all or a portion of the MMPs against a publicly owned treatment works serving a small community with a financial hardship, a Regional Water Board may elect to require the publicly owned treatment works to spend an equivalent amount towards the

completion of a compliance project, if the State Water Board or a Regional Water Board finds all of the following:

- (a) The compliance project is designed to correct the violations within five years;
- (b) The compliance project is in accordance with the enforcement policy of the State Water Board, excluding any provision in the policy that is inconsistent with this section; and
- (c) The publicly owned treatment works has prepared a financing plan to complete the compliance project.

Regional Water Board staff relies on the economists at the State Water Board to determine whether a Discharger meets the definition of small community with a financial hardship. In general, a “publicly owned treatment works serving a small community” means a publicly owned treatment works serving a population of 10,000 persons or fewer, or a facility located in a rural county. “Financial hardship” is determined by considering such factors as median income of the residents, rate of unemployment, or low population density in the service area of the publicly owned treatment works. If Regional Water Board staff believes that a Discharger might qualify as a small community with a financial hardship, or if a Discharger requests that such a determination be made, then we must follow the procedure recently developed by the State Water Board’s Office of Enforcement. In general, Regional Water Board staff transmits a request to the State Water Board to review the matter, and provide any information the Discharger has given us. State Water Board staff review all pertinent information, determine whether a Discharger qualifies, and then transmits a formal determination back to the Regional Water Board. It must be emphasized that the Regional Water Board does not have the in-house expertise to determine whether a Discharger qualifies as a small community with a financial hardship. We rely exclusively on State Water Board staff to do this, as required by the Office of Enforcement.

Supplemental Environmental Projects (SEPs)

In lieu of assessing all of the penalties, the Central Valley Regional Board may direct a portion of the penalty amount to be expended on a supplemental environmental project (SEP). A SEP is an environmentally beneficial project that would not be undertaken in the absence of an enforcement action, and is not used to fix the problems that resulted in the enforcement action. In general, no more than 50% of the penalty may be applied toward a SEP. The remainder of the penalty is paid to the State’s Cleanup and Abatement Account. The Enforcement Policy contains a listing of the numerous criteria a SEP must meet in order to be considered appropriate. A Discharger has the option of proposing an appropriate SEP to Central Valley Water Board staff.

ADMINISTRATIVE CIVIL LIABILITY

Mandatory Minimum Penalty

On 28 July 2008, the Assistant Executive Officer issued Administrative Civil Liability (ACL) Complaint R5-2008-0553 to the Discharger violations of Waste Discharge Requirements Order 95-114 and R5-2002-0095. The Complaint charged the Discharger with an administrative civil liability in the amount of \$129,000, which represented the sum of the statutory Mandatory Minimum Penalties for effluent limitation violations that occurred at the Lake of the Pines Wastewater Treatment Plant from 1 January 2000 through 31 March 2008. The penalties are for 53 violations of the effluent limitations, and include violations of limits for aluminum, ammonia, BOD, settleable solids, total coliform organisms, and total suspended solids. A copy of the ACL Complaint is included in this agenda package. Attachment A to the ACL Complaint lists the actual penalties.

The Discharger recently completed a \$22 million upgrade of its Lake of the Pines wastewater treatment plant, which is designed to bring the facility into compliance with its NPDES permit. The project included demolition of existing buildings and structures; influent pump station improvements; new screening and grit removal system; biological nutrient removal basins; submerged membrane bioreactors; onsite pump stations; ultraviolet disinfection system; membrane sludge thickening; aerobic digestion basins; centrifuge dewatering system; administration building; site work; yard piping; and emergency generator, electrical, instrumentation, and controls. The construction of this project is nearly completed with most items operational.

The Discharger has requested that the treatment plant upgrade be considered a compliance project, and that it be used to satisfy the financial penalty assessed in the Complaint. As described earlier, the CWC allows such a request if a small community with a financial hardship to complete a compliance project in lieu of paying mandatory minimum penalties.

During preparation of the ACL Complaint, Central Valley Water Board staff requested that the State Water Board's economist determine whether or not Lake of the Pines meets the definition of a "publicly owned treatment works serving a small community" pursuant to CWC section 13385(k)(2). The economist reviewed the five census blocks for Lake of the Pines community for the year 2000. The population of the five census blocks was 5,550, so the Discharger does meet the definition of a small community. However, the economist informed Central Valley Water Board staff that the Discharger does not meet the definition of "financial hardship" because the median household income exceeded 80% of the California median household income. The economist arrived at this decision as follows: for the year 2000, the Discharger's median household income (MHI) ranged from \$42,386 to \$56,750. The California MHI was \$47,492 for the same period, which means that 80% of the MHI is \$37,994. Therefore, the MHI for all of the census blocks within Lake of the Pines exceeds 80% of the California MHI. Therefore, This means the community does not have a financial hardship pursuant to the CWC, and the money expended on the compliance project cannot be used to offset the MMPs.

The Discharger's 26 August 2008 letter states that they understand that Lake of the Pines does not meet the definition of a small community with a financial hardship. However, the Discharger asks that there be some alternative to paying the mandatory minimum penalties. The specific requests, and staff's responses, are contained in the "Response to Comments" section below.

Statutory Maximum Penalty

The ACL Complaint was issued for the minimum penalties (\$3,000 per violation) that are required under statute. However, the CWC sections 13385(c) and (e) also allow for higher penalties to be considered and assessed. In summary, these two sections allow for a penalty of \$10,000 per day of violation, and a penalty of \$10 per gallon discharged above the first 1,000 gallons.

Central Valley Water Board staff has estimated the potential maximum civil liability pursuant to CWC section 13385(c)(1), by applying the \$10,000/day penalty for each of the 43 days that violations were reported. The maximum penalty pursuant to this code section is \$430,000. In addition, as discussed above, a second penalty of \$10 per gallon discharged over 1,000 gallons could be assessed for each day of violation. This penalty was not calculated, but would cause the maximum penalty to significantly exceed \$430,000. However, staff does not propose to assess a discretionary penalty (above the mandatory minimum) because the Discharger reasonably pursued funding and is constructing its new wastewater treatment plant.

RESPONSE TO COMMENTS

The Discharger submitted written comments in two separate letters, one from the Sanitation District and one from the District Board of Directors. The comment letters are found as Attachment A to this staff report. The comments are summarized below, and are followed by Central Valley Water Board staff's responses.

Nevada County Sanitation District No. 1 Comments:

1. *Nevada County requests "examination of the ...violations in light of the statute of limitations under the Federal Clean Water Act (five years- United States Code 28 USC 2464) and under the California Water Code (three years-California Code of Civil Procedure section 338(i)."*

The 5-year statute of limitations under the Clean Water Act applies to actions by the federal government.

The 3-year statute of limitations contained in the California Code of Civil Procedure, § 338 does not apply to this type of administrative proceeding. The Code section of which §338 is a part makes it clear that §338 applies only to time limits on the commencement of civil suits in the courts. §338 is a part of Chapter 1 of Title 2 of the Code of Civil Procedure, entitled "Of the Time of Commencing Civil Actions." The first section in Chapter 1 of Title 2 reads, in pertinent part, as follows: "**§312. General Limitations; Special Cases: Civil**

actions, without exception, can only be commenced within the periods prescribed in this title..."

It is clear from a mere reading of this language that Title 2 is intended to prescribe time periods for the bringing of civil law suits. This administrative complaint falls outside the scope of this section, and therefore it is appropriate that MMPs have been assessed from 1 January 2000 through 31 March 2008 for this particular Discharger. (See also *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 161 Cal.Rptr. 58; *Rudolph v. Athletic Commission* (1960) 177 Cal.App.2d 1, 22, 1 Cal.Rptr. 898).

2. *Nevada County would like to discuss "a proposal for a Supplemental Environmental Project (SEP) in lieu of paying a portion of the... penalty, since the Lake of the Pines facility did not qualify for the financial hardship that would allow the MMPs to be applied to the compliance project recently completed". Five possible SEP proposals were suggested including:*
 - *Biosolids/green waste composting facility*
 - *Infiltration/inflow reduction in wastewater collection system*
 - *Replacement of sewer main creek crossing*
 - *Flow monitoring system for Magnolia Creek*
 - *Monitoring/sampling equipment for use on Magnolia Creek*

As described in the State Water Board's Enforcement Policy, "SEPs are projects that enhance the beneficial uses of the waters of the State, provide a benefit to the public at large, and that, at the time they are included in an ACL action, are not otherwise required of the discharger". SEPs must comply with the qualification and nexus criteria listed in the State Water Board's Enforcement Policy. One of these criteria is that a SEP may only consist of measures that go above and beyond any obligations of a discharger. For example, "sewage pump stations should have appropriate reliability features to minimize the occurrence of sewage spills in that particular collection system. The installation of these reliability features following a pump station spill would not qualify as an SEP." Although the Discharger did not submit detailed SEP proposals, Central Valley Water Board staff does not believe that the above listed SEP ideas adequately comply with the criteria. In addition, Central Valley Water Board staff was recently informed that the Discharger is no longer actively considering any SEP proposals for this ACL Order.

Nevada County Sanitation District No 1, Board of Directors Comments:

1. *"The proposed penalty of \$129,000, going back seven years would seem punitive. In fact, over the last seven years the District has shown a dedicated good faith effort to ensure that the Lake of the Pines plant reaches compliance with the State's effluent requirements... The most recent deadline to comply was extended to 30 April 2008. It would make more sense to change the time period for the violations to begin 1 May 2008."*

CWC sections 13385(h) and (i) clearly require the assessment of mandatory minimum penalties, and do not provide an alternative for staff to make a discretionary determination. While staff recognizes that the District has worked to comply with deadlines to upgrade the facility to meet new effluent limitations, nevertheless, certain effluent limit violations did occur. The Central Valley Water Board adopted both a Cease and Desist Order and a Time Schedule Order to extend the timelines to comply with certain effluent limitations, and the ACL Complaint incorporates the protection from mandatory minimum penalties provided by these two Orders.

2. *“Paying penalties diverts valuable and dwindling resources from making required improvements and threatens our ability to reach our shared goal of meeting clean water standards. In addition, the expense of the new plant, now at \$22 million, has forced the ratepayers to bear an increase in annual sewer charges from \$315 in 2003 to \$1185 or more per unit of sewer capacity. This is because the cost must be spread among only 1922 households in this small rural community. Although Lake of the Pines does not qualify as a “small community with a financial hardship” the increase in sewage fees of 276% in five years poses a significant financial impact on the ratepayers.*

Therefore, we request you reconsider the current penalties in favor of the following suggestions:

- *Allow the fines to be applied to the cost of the plant construction.*
- *Consider the proposals outlined in the attached letter from Nevada County Wastewater Operations Manager, Gordon Plantenga (discussed above).*
- *Change the time period of the violations to begin 1 May 2008.*
- *Work with our staff to reach an alternative solution.”*

In response to the first bullet asking that the fines to be applied to the cost of plant construction, staff has consulted with the State Water Board economist, who has determined that the Lake of the Pines service area does not meet the definition of a small community with a financial hardship because the median household income is too high. Therefore, this option cannot be allowed. The second bullet point refers to the proposal for a SEP, which has already been discussed. The third bullet point has also been discussed. In response to the fourth bullet point, Central Valley Water Board staff understand that sewage rates have increased significantly due to the construction of the new plant, but are bound under the California Water Code to move forward with an Administrative Civil Liability Order to recover the mandated mandatory minimum penalties. We are not aware of any “alternative solution” that would comply with the Water Code.

Recommendation

State Water Board staff has determined that the Lake of the Pines wastewater treatment plant does not meet the definition of a small community with a financial hardship. The Discharger does not dispute this fact. Therefore, the Discharger may not apply the mandatory minimum penalties towards its compliance project.

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ADMINISTRATIVE CIVIL LIABILITY FOR ASSESSMENT OF MANDATORY MINIMUM PENALTIES

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Prosecution staff recommends that the Central Valley Water Board adopt the ACL Order requiring the Nevada County Sanitation District No. 1, Lake of the Pines Wastewater Treatment Plant pay \$129,000 in mandatory minimum penalties. Consistent with the CWC, this amount would be due within 30 days of adoption of the Order.

Attachment A: 25 August 2008 comment letter from Nevada County Sanitation District No. 1 staff and 26 August 2008 comment letter from the Nevada County Sanitation District No. 1 Board of Directors

BLH/PHL/WSW: 2-Oct-08
23/24 October 2008 Regional Water Board meeting