

PROSECUTION STAFF REPORT

ADMINISTRATIVE CIVIL LIABILITY ORDER
FOR
OAKWOOD LAKE WATER DISTRICT AND BECK PROPERTIES
OAKWOOD LAKE SUBDIVISION MINING RECLAMATION PROJECT
SAN JOAQUIN COUNTY

INTRODUCTION

Waste Discharge Requirements (WDRs) Order 98-123, issued to Brown Sand, Inc. and Vernalis Partners, Ltd., regulated discharges of waste from a mining reclamation project. WDRs Order R5-2005-0153 contained new requirements, rescinded WDRs Order 98-123, and named Oakwood Lake Water District and Beck Properties as the Discharger (hereafter referred to as Discharger). The violations in the proposed Administrative Civil Liability Order occurred during the effective dates of WDRs Order 98-123. With respect to questions of liability for violations of WDRs Order 98-123, on 10 October 2008, Oakwood Lake Water District wrote a letter (found as Attachment A to this staff report) stating that "...is prepared to move forward...as the named party on any necessary actions taken related to the discharge activities in question... [and]...has agreed to assume the responsibility for resolving this matter..."

The Oakwood Lake Subdivision Mining Reclamation Project consists of a residential and commercial development on reclaimed mining land surrounding Oakwood Lake, a man-made lake resulting from past mining excavation pits. Although it is no longer mining, the Discharger has retained the NPDES permit to regulate discharges from the former pits. Oakwood Lake Water District is the governmental entity responsible for providing water and sewer services to the development, while Beck Properties owns the land. Groundwater seepage and stormwater drain to Oakwood Lake. Untreated water from Oakwood Lake may be discharged to the San Joaquin River under conditions set forth in the WDRs. According to the Discharger's self-monitoring reports, there has been no discharge since 24 October 2005.

OVERVIEW OF MANDATORY MINIMUM PENALTY PROVISIONS

Because the Discharger is regulated under an 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, the Regional Water Boards have been required to impose mandatory minimum penalties pursuant to California Water Code (CWC) sections 13385(h) and (i) for specified violations of NPDES permits. For violations that are subject to those mandatory minimum penalties, the Central Valley Water Board must assess a penalty of at least \$3,000.

Serious Violations

CWC section 13385(h) requires that an MMP of \$3,000 be assessed by the Central Valley 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 exceeds the effluent limitations of 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.

Non-Serious Violations

CWC section 13385(i) requires that a MMP of \$3,000 be assessed by the Central Valley 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.

Exceedance of Effluent Limitation Addressing Daily and Monthly Averages based Upon a Single Sampling Event

On 17 April 2001, the State Water Resources Control Board Office of Chief Counsel prepared *SB 709 and SM 2165 Questions and Answers* (Q&A). The Q&A is guidance for all Regional Water Boards. When there is a question regarding assessment of MMPs, staff of the Central Valley Water Board refers to the Q&A for guidance. The Q&A states, in part:

Q. If the waste discharge requirements contain effluent limitations addressing both a daily maximum and a monthly average for the same pollutant, are exceedances of each based on the same monitoring event(s) counted as two separate violations for purposes of section 13385(h) or (i)?

A. Yes.

WDRs, such as those issued for this Discharger, frequently contain daily, weekly, and monthly effluent limitations. Each of these limitations is designed to prevent a distinct type of environmental harm. It is therefore possible for a single sample to result in multiple violations

subject to mandatory minimum penalties. This approach is consistent with Federal caselaw interpreting the scope of the Federal Clean Water Act's penalty provisions.

Single Operational Upset

For the purpose of issuing MMPs, a single operational upset which leads to simultaneous violations of one or more pollutant parameters is 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.

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.

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.

ADMINISTRATIVE CIVIL LIABILITY

Mandatory Minimum Penalty

On 10 November 2008, the Assistant Executive Officer issued Administrative Civil Liability (ACL) Complaint R5-2008-0600 to the Discharger for violations of Waste Discharge Requirements Orders 98-123 and R5-2005-0153. The ACL Complaint charged the Discharger with an administrative civil liability in the amount of \$63,000, which represented the sum of the MMPs for effluent limitation violations that occurred at the Oakwood Lake Subdivision Mining Reclamation Project from 1 January 2000 through 30 April 2008. This proposed Order includes a 30 April 2005 monthly violation not included in the ACL Complaint and extends the period through 31 December 2008. The penalties are for 28 violations of the effluent limitations for pH and turbidity. A copy of the ACL Complaint is included in this agenda package. Attachment A to the ACL Order lists the actual violations subject to MMPs.

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 22 days that violations were reported. The maximum penalty pursuant to this code section is at least \$220,000. This maximum penalty may be increased due to the fact that Federal caselaw states that an exceedance of a monthly average effluent limitation could give rise to a separate violation for every day the facility was in operation over the course of the month in which the limitation was exceeded.

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 significantly to exceed \$220,000. However, staff does not propose to assess a discretionary penalty above the mandatory minimum.

OAKWOOD LAKE WATER DISTRICT COMMENTS

The Discharger submitted written comments to the ACL Complaint in two separate letters, dated 10 December 2008 and 13 February 2009, which are found as Attachments B and C to this staff report. Water Board staff has responded by letter dated 16 January 2009, which is found at Attachment D to this staff report. The comments are summarized below, and are followed by Central Valley Water Board staff's responses. Staff and legal counsel also have discussed the matter with the Discharger.

Discharger Comment: Single Operational Upset

The Discharger claims a "single operational upset defense" for daily, weekly, and monthly effluent limitation violations when the violations resulted from a single sample and for naturally occurring chemical and physical processes. Based upon the single operational upset defense, the Discharger requests that violations 1 and 2, 4 and 5, 18 and 19, 23 and 24, and 25 and 26 each be reclassified as single operation upsets thereby reducing the total number of violations from 27 to 22.

Staff Response

As stated earlier, the *Water Quality Enforcement Policy* defines a single operational upset, in part, as:

“A single operational upset which leads to simultaneous violations of one or more pollutant parameters shall be treated as a single violation. EPA defines ‘single operational upset’ as ‘an exceptional incident...with more than one CWA effluent discharge pollutant parameter.’... 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 a single operational upset occurred.”

The Discharger pumps untreated water from Oakwood Lake directly to the San Joaquin River. Single operational upsets could not have occurred because the violations repeatedly occurred from April 2001 through April 2005, were the result of natural processes, not exceptional events, and did not result in violations of multiple pollutant parameters. Violations of multiple pollutant parameters did not occur because turbidity and pH violations did not occur simultaneously but were separated by several months. The violations were consistent with an inadequately designed or operated facility.

Monitoring and Reporting Program 98-123 only requires monitoring once per week for turbidity. However, the effluent limitations for Waste Discharge Requirements Order 98-123 include three limitations for turbidity: a daily maximum, a weekly average, and monthly average limitation. Violations of the daily and weekly turbidity effluent limitations, based upon a single sample collected once per week, do not constitute a single operational upset; rather, this sample indicates two violations, one of the daily limitation and one of the weekly average limitation (there being no other numbers to average). This is due to the fact that the daily limitation and the weekly average limitation are in place to prevent distinct environmental harms. The daily and weekly turbidity violations do not meet the criteria a single operational upset.

Monitoring and Reporting Program 98-123 requires monitoring once per week for pH. The pH violations were not single operational upsets because the violations occurred on 14 different dates and were the only effluent limitation violation on those dates.

Discharger Comment: Non-serious violations must be based on 180-day rolling basis.

The Discharger claims that non-serious violations must be based upon a rolling day basis. It claims that each of the following pairs of daily and weekly violations should be combined into single violations: 1 and 2, 4 and 5, 18 and 19, 23 and 24, and 25 and 26. The results would be: 4 serious violations, 11 non-serious violations not subject to MMPs, and 8 non-serious violations subject to MMPs. It requests that, staff combine those violations, reduce the number of serious violations, recalculate the number of violations occurring during the previous 180 days, reduce the number of non-serious violations subject to MMPs from 14 to 8, then reduce the MMP from \$63,000 to \$33,000.

Staff Response

As discussed above, violations 1 and 2, 4 and 5, 18 and 19, 23 and 24, and 25 and 26 are valid violations, not subject to the single-operational upset defense, and are both daily and weekly violations as defined in the Q&A. The non-serious violations were calculated based upon a 180-day basis. Therefore, the total MMPs are retained at \$63,000.

Discharger Comment: Alleged pH effluent violations may be technically invalid.

The Discharger claims that natural processes or small inaccuracies caused by testing methodology, equipment limitations, calibration solutions, or outside chemical influence unfairly penalize the discharger. It further claims that the results may have been influenced by improper staff training or errors by the sampling and testing technician. Finally, it claims that had the Central Valley Water Board notified the Discharger of the violations, it would have investigated the pH sampling and testing process and could have prevented many of the violations.

Staff Response

The discharger is presumed to have received timely notification of the violations because it certified and submitted the monitoring results. It is the Discharger's responsibility to maintain instrument calibration and to report the results as measured. The Discharger's District Engineer included the following statement on the self-monitoring reports:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

Standard Provisions and Reporting Requirements C.8, Provisions for Monitoring, requires the Discharger to retain records of all monitoring information, including all calibration, a minimum of five years from the date of the sample, measurement or report. The five year period may be extended during the course of any unresolved litigation. The Discharger reported the July

2003 results in October 2003. Staff sent the Discharger a Notice of Violation on 29 July 2008 within five years of the reporting of ten of the pH violations. Furthermore, the Discharger should have been aware of the violations and how the measurements were obtained because Mike Brown of Brown Sand, and subsequently Oakwood Lake's District Engineer, and Michael Gilton, a California Registered Civil Engineer, submitted the self-monitoring reports and certified the accuracy of those reports. It is the Discharger's responsibility to maintain instrument calibration and to report the results as measured. The District is presumed to have received timely notification of the violations because it certified and submitted the monitoring reports. There is no reason not to retain the MMPs for the reported pH violations.

Discharge Comment: Supplemental Environmental Project (SEP)

In its 10 December 2009 letter, the Discharger stated that it would like to apply as much of the penalty as possible towards a SEP.

Staff Response

On 16 January 2009, Board staff responded, stating that if the Discharger wanted consideration of a SEP, it must submit a proposal meeting the *Water Quality Enforcement Policy* criteria by 16 February 2009. Alternatively, the Discharger could submit a check for \$66,000 to resolve the MMP. In its 13 February 2009 letter, the Discharger reiterated its single operational upset defense, did not submit information for a SEP, and did not submit payment of the MMP.

Additional Violation

On 16 January 2009, Central Valley Water Board staff notified the Discharger that the 30 April 2005 monthly average turbidity violation was omitted in the ACL Complaint. The Discharger did not comment in its 13 February 2009 response. This violation has been added to the tentative Order.

SUMMARY

Staff has written one letter and staff counsel has had several discussions with the Discharger's counsel. Staff's letter of 16 January 2009 stated that if payment was not received by 16 February 2009, the matter would be brought to the Board. As of 2 April 2009, payment has not been received. Prosecution staff has reviewed the MMP violations and the Discharger's comments, and believe that the requirements of CWC 13385(h) and (I) have been appropriately applied to this case.

RECOMMENDATION

Prosecution staff recommends that the Central Valley Water Board adopt the ACL Order requiring the Oakwood Lake Water District and Beck Properties be assessed \$66,000 in

PROSECUTION STAFF REPORT
OAKWOOD LAKE WATER DISTRICT AND BECK PROPERTIES
ADMINISTRATIVE CIVIL LIABILITY FOR ASSESSMENT OF MANDATORY MINIMUM
PENALTIES

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mandatory minimum penalties. Consistent with the CWC, this amount would be due within 30 days of adoption of the Order.

- Attachment A: Discharger's 10 October 2008 Oakwood Lake NOV Response Letter
- Attachment B: Discharger's 10 December 2008 Oakwood Lake Settlement Offer
- Attachment C: Discharger's 13 February 2009 Oakwood Lake Settlement Offer Supplement
- Attachment D: Water Board staff's 16 January 2009 letter to Mr. Douglas Coty

BLH/WSW: 2-Apr-09
23/24 April 2009 Central Valley Water Board Meeting

Attachment A

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BOLD, POLISNER, MADDOW, NELSON & JUDSON

A PROFESSIONAL CORPORATION
500 YGNACIO VALLEY ROAD, SUITE 325
WALNUT CREEK, CALIFORNIA 94596-3840

TELEPHONE: 925 933-7777

FACSIMILE: 925 933-7804

Email: office@bpnnj.com

ROBERT B. MADDOW
CARL P.A. NELSON
CRAIG L. JUDSON

SHARON M. NAGLE
DOUGLAS E. COTY

FREDERICK BOLD, JR.
(1913-2003)

JEFFREY D. POLISNER
(RETIRED)

October 10, 2008

Ms. Patricia Leary, Senior Engineer
NPDES Compliance and Enforcement Unit
Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114

**RE: Response to Draft Record of Violations – Order No. R5-2005-0153
(Permit No. CA0082783), Oakwood Lake Subdivision Mining Reclamation Project**

Dear Ms. Leary,

Thank you for granting in part our request to delay the issuance of a corrected Notice of Violation and draft Administrative Civil Liability Complaint and allowing Oakwood Lake Water District ("District") to review the matter and identify the proper party or parties to assume responsibility for addressing the proposed actions by your office. As we had discussed, the first notification the District received regarding this matter was a phone call on August 28, 2008 - two days after the original deadline set for response.

In your letter dated September 11, 2008, you requested that the District provide you with information including the party or parties owning and/or operating the discharge facilities during the period covered by the Record of Violation (2000 - 2008). The District has begun, but has not yet had time to complete, its review of the many volumes of records, internal files, and submitted self-monitoring reports related to the permit at issue (documents covering the 10-year period of 1999 - 2008), including those records related to Order No. 98-123, which preceded the approval of Order No. R5-2005-0153. In part due to the length of time that has passed since the alleged violations occurred and our preliminary review of the voluminous records, I am unable to state definitively the names of additional parties that may share responsibility in this matter.

Under the circumstances, however, the District is prepared to move forward with this matter in and seek an appropriate resolution as the named party on any necessary actions taken related to the discharge activities in question. The District expects to resolve with the appropriate party or parties any potential financial consequences that may result from the proposed action separate from the Regional Board's administrative process.

Attachment A

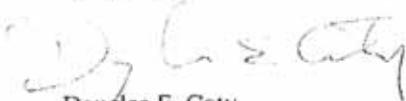
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003/00.

While the District has agreed to assume the responsibility for resolving this matter, this action does not and should not be equated at this time as acceptance of any of the allegations made in the Notice of Violation and draft Administrative Civil Liability Complaint. The District will continue its review of the relevant reports, existing hydrologic data, and all other relevant information available to determine the appropriate actions to take in response to the proposed administrative actions by the Regional Board.

I look forward to working with you to resolve this matter as expeditiously as possible under the circumstances. Should you have any questions, please do not hesitate to contact me directly.

Sincerely,



Douglas E. Coty
Attorney at Law

cc: Board of Directors, Oakwood Lake Water District

Via Email October 10, 2008

Original to follow by U.S. Mail

Attachment B

Waring

**BOLD, POLISNER, MADDOW,
NELSON & JUDSON**

A PROFESSIONAL CORPORATION

500 YGNACIO VALLEY ROAD, SUITE 325
WALNUT CREEK, CALIFORNIA 94596-3840

TELEPHONE: 925 933-7777

FACSIMILE: 925 933-7804

Email: office@bpmnj.com

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DOUGLAS E. COTY

FREDERICK BOLD, JR.
(1913-2003)

JEFFREY D. POLISNER
(RETIRED)

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SACRAMENTO
CALIFORNIA

December 10, 2008

Mr. Jack Del Conte
Assistant Executive Officer –
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

**Re: Settlement Offer No. R5-2008-0600: Administrative Civil Liability
Complaint for Alleged WDR/NPDES Violations**

Dear Mr. Del Conte:

We are responding to your proposed offer to settle the Administrative Civil Liability Complaint to Oakwood Lake Water District, Beck Properties and Oakwood Lake Subdivision Mining Reclamation Project (hereinafter "District") for the alleged NPDES discharge violations at 874 East Woodward Avenue, Manteca, CA 95337 (the "Site") (WDR Order Nos. 98-123 and R5-2005-0153, NPDES Permit No. CA0082783) ("Proposed Settlement Offer"). We believe the alleged violation and related penalties in the Proposed Settlement Offer are mistakenly overstated based on the State Water Resources Control Board Water Quality Enforcement Policy of February 19, 2002 ("Enforcement Policy") that requires the Central Valley Regional Water Quality Control Board ("RWQCB") to: (1) treat multiple turbidity effluent limitation violations resulting from a single operational upset as a single violation and (2) calculate "non-serious" violations based on a "rolling" 180 day basis. In addition, the Proposed Settlement Offer penalties for alleged pH effluent limit violations are overstated because the Proposed Settlement Offer is untimely and may be based on technical inaccuracies.

I. Factual Background

A. History of Operations and Permit.

Oakwood Lake Water District and Beck Properties, Inc. are the joint operators of the Oakwood Lake Subdivision Mining Reclamation Project. Beck Properties, Inc. is also the

Attachment B

The Site discharged groundwater seepage and San Joaquin River underflow to the San Joaquin River, within the boundary of the Sacramento San Joaquin Delta, a water of the United States, under RWQCB Order No. 98-123 which was adopted on June 5, 1998 and was set to expire on June 5, 2003. The terms of Order No. 98-123 automatically continued in effect until October 21, 2005 when the new permit, WDR Order R5-2005-0153, became effective. The alleged violations contained in the Proposed Settlement Offer occurred while Order No. 98-123 was in effect.

Brown Sand, Inc. historically operated an aggregate sand excavation at the facility Site, and Oakwood Lake was formed as a result of mining sand from the Site. The sand excavation began in 1969, and included dewatering of excavation areas, including Oakwood Lake, with subsequent discharge of this water to the San Joaquin River. Mine dewatering of excavation areas was necessary to mine raw sand product for processing. Active mining areas were separated from previously mined areas by berms. Active mining areas were dewatered to elevations averaging - 33 feet mean sea level ("msl") by pumping groundwater to Oakwood Lake. Oakwood Lake was then pumped to the San Joaquin River to maintain a water level of approximately - 15 feet msl. There are no treatment operations at the Site.

Following the issuance of Order No. 98-123, Brown Sand, Inc. submitted plans to modify its mining operation to, among other things, provide for residential and commercial development. As a result of this development, the mining operation is no longer active at the Site.

Oakwood Lake Water District is the governmental entity charged with providing water and sewer services to the new development, and Beck Properties, Inc. is the owner of the land to be developed within Oakwood Lake Water District. The District submitted a revised Report of Waste Discharge and Notice of Change in Ownership and Operation on March 15, 2005.

B. Order No. 98-123 Sampling Requirements.

Order No. 98-123 required the discharger to collect, among other things, daily and weekly grab samples at the discharge point from the Site to the San Joaquin River and monthly grab samples from a location - 50 feet upstream of the discharge point and 100 feet downstream of the discharge point. The weekly grab samples were taken on the same date and near the same time as the corresponding daily grab samples and analyzed for pH and turbidity, the two discharge constituents that are the subject of the Proposed Settlement Offer.

II. Many of the Alleged Violations Are Not Subject to Mandatory Penalties

A. Multiple Violations for the Same Operational Upset Count as One Violation.

As discussed above, the District's weekly grab samples were taken on the same date and near the same time as the corresponding daily grab samples. As a result, an operational upset that caused a monthly grab sample to exceed a monthly permit limitation also caused the daily grab sample to exceed the daily permit limitation. Under the Enforcement Policy (at page 29),

Attachment B

“A single operational upset which leads to simultaneous violations of one or more pollutant parameters shall be treated as a single violation. EPA defines ‘single operational upset’ as ‘an exceptional incident which causes simultaneous, unintentional, unknowing, temporary 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.”

According to Appendix “A” to the Proposed Settlement Offer (hereinafter “Appendix A”), the District allegedly exceeded the turbidity standard on eight different dates over the course of approximately five years. Based on a daily sampling frequency, the District was in compliance with the turbidity standard over 99% of the time, suggesting that the treatment system is not “improperly designed or inadequate.”

Further, it is quite apparent that the daily and weekly grab samples that allegedly exceeded the turbidity standard from the same operational upset on at least five different occasions (see Appendix A - Records 1 and 2, 4 and 5, 18 and 19, 23 and 24, and 25 and 26). On each of the five different dates for which the daily and weekly turbidity standards allegedly were exceeded, the daily and weekly measurements were identical. Thus, the ten alleged turbidity violations cited above should be treated as five alleged turbidity violations under the Enforcement Policy.

B. Non-Serious Violations Must be Based on a “Rolling” Day Basis.

California Water Code § 13385(i) allows the RWQCB to assess mandatory penalties if a discharger exceeds a WDR effluent limitation four or more times in any period of six months, not counting the first three violations toward the penalty calculation. The Enforcement Policy states that “The six-month time period is calculated as a “rolling” 180 days.” Under the Enforcement Policy, the RWQCB must review each alleged effluent limitation violation and determine if three or more alleged effluent limitation violations occurred within the six month period prior to the subject effluent limitation violation. The Proposed Settlement Offer does not appear to follow these guidelines.

For example, the alleged effluent limitation violation listed as Record No. 20 of Appendix A occurred on May 20, 2004, and is preceded by the alleged daily and weekly turbidity effluent limit violations on April 29, 2004 (that counts as one violation as discussed in section II.A above). The next two prior alleged violations occurred on August 7, 2003 and November 25, 2003. The alleged August 2003 violation occurred more than the “rolling” 180 day period before the alleged May 20, 2004 violation. Thus, the alleged May 20, 2004 non-serious violation is not subject to mandatory penalties.

There appear to be several instances in which Appendix A alleged non-serious violations that are not subject to mandatory penalties (in part because several of the alleged turbidity violations were improperly treated as two separate violations, as indicated in section II.A above). We recommend that the RWQCB amend the Proposed Settlement Offer to first eliminate duplicative turbidity violations discussed in section II.A above and then reassess the non-serious mandatory penalty as discussed above in this section.

Attachment B

C. Alleged PH Effluent Violations May Be Technically Invalid.

Of the 14 alleged violations of the 8.5 pH effluent limit in Appendix A, over half of the alleged pH violations had measurements of 8.6 (after rounding of the reported values to two significant digits) – indeed, 12 of the 14 alleged violations had pH measurements of 8.8 or less. The large number of measurements that barely exceeded the 8.5 pH permit limit suggests that small technical inaccuracies could have skewed the pH measurements that allegedly exceeded the effluent limit. The small inaccuracies caused by testing methodology, equipment limitations, calibration solutions, or outside chemical influence unfairly penalize the District.

For example, while pH is a measurement of hydrogen ion concentration in a given aqueous solution, the pH of the solution can also be influenced by the concentration of hardness chemicals (such as calcium and magnesium oxides) present in the groundwater and surface water and the chemicals produced by the plants and animal life that live in Oakwood Lake, which was historically used to settle the sediment from the sand mining operation. These external factors influence the pH of the effluent water and make it difficult to accurately measure and control the effluent pH. These external factors should be considered in assessing penalties for the pH measurements that barely exceed the pH limit.

In addition, many of the measurements that allegedly violated the pH effluent limit occurred in a short time period over five years ago and may have been influenced by the improper training of, or errors by the sampling and testing technician. The District is unfairly prejudiced by the RWQCB delinquent assessment of mandatory penalties because it could not timely investigate and correct any operation or technical errors that resulted in the higher than allowed pH measurements – a timely investigation could have resulted in fewer alleged pH violations. In addition, the District may be unable to fully discover the facts and/or errors that may explain the alleged pH violations because of faded memories and turnover of sampling technicians that had first hand knowledge of potential sampling and testing irregularities. Had the RWQCB followed the Enforcement Policy and provided the District with timely notice of the alleged violations, the District would have had the opportunity to investigate the potential inaccuracies in the pH sampling and testing process at that time and could have prevented many of the alleged violations. The RWQCB should consider the untimely notice of the alleged pH effluent violations in its proposed penalty.

III. Supplemental Environmental Projects

Should the RWQCB and the District settle this matter in accordance with the Enforcement Policy, the District would like to apply the proposed penalty on a mutually agreed upon Supplemental Environmental Project.

Attachment B

IV. Conclusion

The Proposed Settlement Offer greatly overstates the mandatory penalty that should be assessed to the District under the Enforcement Policy. We request a meeting with the RWQCB to discuss the proper application of the Enforcement Policy and to discuss other technical and policy issues to timely settle this matter. The District would also like to apply as much of the agreed upon penalty towards a Supplement Environmental Project as allowed under the California Water Code and the Enforcement Policy.

If you have any further questions on this matter, please contact me at (925) 933-7777.

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas E. Coty". The signature is fluid and cursive, with the first name being the most prominent.

Douglas E. Coty
General Counsel,
Oakwood Lake Water District

Attachment C

**BOLD, POLISNER, MADDOW,
NELSON & JUDSON**

A PROFESSIONAL CORPORATION
500 YGNACIO VALLEY ROAD, SUITE 325
WALNUT CREEK, CALIFORNIA 94596-3840

TELEPHONE: 925 933-7777

FACSIMILE: 925 933-7804

Email: office@bpnmj.com

ROBERT B. MADDOW
CARL P.A. NELSON
CRAIG L. JUDSON

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DOUGLAS E. COTY

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FREDERICK BOLD, JR.
(1913-2003)
JEFFREY D. POLISNER
(RETIRED)

February 13, 2009

**Via Facsimile February 13, 2009
Original to follow via US Mail**

Ms. Patricia Leary
Senior Engineer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

**Re: Supplement to Settlement Offer No. R5-2008-0600: Administrative Civil Liability
Complaint for Alleged WDR/NPDES Violations**

Dear Ms. Leary:

This letter represents a supplemental response to your proposed offer to settle the Administrative Civil Liability Complaint to Oakwood Lake Water District, Beck Properties and Oakwood Lake Subdivision Mining Reclamation Project (hereinafter "District") for the alleged NPDES discharge violations under WDR Order Nos. 98-123 and R5-2005-0153, NPDES Permit No. CA0082783, and your subsequent letter dated January 16, 2009.

We continue to assert, as more fully stated in our response submitted on December 10, 2009, that the alleged violation and related penalties in the proposed settlement offer are overstated based on the Enforcement Policy that requires that the Regional Board: (1) treat multiple turbidity effluent limitation violations resulting from a single operational upset as a single violation and (2) calculate "non-serious" violations based on a "rolling" 180 day basis. In addition, we continue to assert that the proposed settlement offer penalties for alleged pH effluent limit violations are overstated because the proposed settlement offer is untimely and may be based on technical inaccuracies and biological activities beyond the control of the discharger.

The District believes that, contrary to the assertions made in your letter of January 16, 2009, the alleged violations occurring during the period of April 2001 through April 2005 are not "repeated violations...consistent with an inadequately designed or operated facility." The facility was subject to *extensive* review by the Regional Board during the period between January 2001, when Brown Sand, Inc. first notified the Regional Board of the operational change to "idle mine" status, and October 2005 when Order No. R5-2005-0153 was adopted by the RWQCB. Further, the alleged violations occurring between January 2001 and December 2004, encompassing nearly all those violations covered by the proposed settlement offer, were recognized in the Order No. R5-2005-0153, (see Attachment F, Page F-6, "Compliance Summary"). No questions of adequacy in

ATTACHMENT C

design or stated operations of the facility were raised during that time or subsequently until your January 2009 correspondence. In fact, Order No. R5-2005-0153 specifically recognizes that there are no treatment operations at the facility and none were required under the terms of the Order.

In addition to the fact that the alleged exceedances are minimal in nature, the violations of the pH effluent limitations were likely the result of pH imbalances in Oakwood Lake that result from seasonal algal blooms common during the Spring and Summer months. These natural processes were and are outside the control and not the result of any action by the discharger and were not influenced by any intervening municipal or industrial process or discharge.

In conclusion, the proposed settlement offer overstates the mandatory penalty that should be assessed to the District under the Enforcement Policy. We again request a meeting with the RWQCB to discuss the application of the Enforcement Policy and to discuss other technical and policy issues to timely settle this matter.

If you have any further questions on this matter, please contact me at (925) 933-7777.

Sincerely,

A handwritten signature in blue ink that reads "Douglas E. Coty". The signature is written in a cursive, flowing style.

Douglas E. Coty
General Counsel,
Oakwood Lake Water District

cc: Mr. Jim Ferguson, Beck Properties, Inc.
Mr. Larry French, President OLWD
Mr. Patrick Pulupa, Office of Chief Counsel, SWRCB

ATTACHMENT D



Linda S. Adams
Secretary for
Environmental
Protection

California Regional Water Quality Control Board Central Valley Region

Karl E. Longley, ScD, P.E., Chair

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>



Arnold
Schwarzenegger
Governor

16 January 2009

Mr. Douglas Coty
Bold, Polisner, Maddow, Nelson & Judson
500 Ygnacio Valley Road, Suite 325
Walnut Creek, CA 94596

SETTLEMENT OFFER, ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2008-0600, OAKWOOD LAKE WATER DISTRICT, SAN JOAQUIN COUNTY

On 10 November 2008, the Assistant Executive Officer of the Central Valley Water Board issued Administrative Civil Liability Complaint R5-2008-0600 in the amount of \$63,000, for assessment of Mandatory Minimum Penalties (MMPs) to Oakwood Lake Water District and Beck Properties, Oakwood Lake Subdivision Mining Reclamation Project, San Joaquin County. On 10 December 2008, you submitted a waiver for a public hearing within 90 days and submitted objections to many of the cited violations on behalf of the District. The following discussion will address your objections.

Multiple Violations From a Single Test Sample

Your response requests classification of multiple violations for individual constituents resulting from single samples as single operational upsets. You request that violations 1 and 2, 4 and 5, 18 and 19, 23 and 24, and 25 and 26 each be reclassified as single operation upsets thereby reducing the number of violations from 10 to 5. You base your response upon the following excerpt from the Water Quality Enforcement Policy:

"A single operational upset which leads to simultaneous violations of one or more pollutant parameters shall be treated as a single violation. EPA defines 'single operational upset' as 'an exceptional incident...with more than one CWA effluent discharge pollutant parameter.'"

The cited turbidity violations were not exceptional because the violations repeatedly occurred from April 2001 through April 2005. The repeated violations of the daily, weekly, and monthly effluent limitations are consistent with an inadequately designed or operated facility. Violations of the daily and weekly effluent limitations based upon a single weekly sample is not an operational upset; rather it is both a violation of the daily limitation on the day of the sample and a weekly violation based upon the week of the sample. The effluent limitations for Waste Discharge Requirements Order 98-123 include three limitations for turbidity: a daily maximum, a weekly average, and monthly average effluent limitation for turbidity. Monitoring and Reporting Program 98-123 only requires monitoring once per week. Therefore, the daily and weekly turbidity violations are individual violations and do not meet the criteria for single operational upsets.

California Environmental Protection Agency

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ATTACHMENT D

Mr. Douglas Coty

-2-

16 January 2009

weekly turbidity violations are individual violations and do not meet the criteria for single operational upsets.

Non-Serious Violations Based on a "Rolling" 180-Day Basis

Your response states that the non-serious violations subject to MMPs should be reduced because, after several listed penalties are removed based upon the single operational upset defense, some of the non-serious violations would no longer have three or more violations within the preceding 180 days. As stated above, we do not agree that the single operational upset defense is applicable to the listed violations. We believe we properly assessed the penalties for non-serious violations based on a rolling 180-day period.

pH Effluent Violations

WDRs Order 98-123 Effluent Limitations B.2 states: "The discharge shall not have a pH less than 6.5 nor greater than 8.5." Your response claims that there may have been a variety of factors affecting the pH and that the results may or may not have been accurate. Your response indicates that, had we issued the ACL Complaint earlier, you might have been better able to determine if the results were accurate or appropriate to be assessed minimum penalties. However, it is the District's responsibility to maintain instrument calibration and to report the results as measured. The District is presumed to have received timely notification of the violations because it certified and submitted the monitoring results.

Additional Violation

In our review of this matter, we have determined that one violation was omitted in the ACL Complaint, and needs to be added to the Record of Violations. The violation was of the monthly average turbidity limitation for April 2005. Results indicate that the monthly average turbidity exceeded 15 NTU. This addition increases the MMP amount to \$66,000.

Supplemental Environmental Project (SEP)

Your letter states that the Discharger would like to apply the proposed penalty on a mutually agreed upon SEP. As described in California Water Code section 13385(l)(1), a maximum of \$40,500 [$\$15,000 + (0.5)(\$66,000 - \$15,000)$] may be applied to a SEP in this matter. Any proposal for a SEP must include information showing how it meets the criteria of the State Water Board's *Water Quality Enforcement Policy*, and must include a project description, timeline, deliverables, and budget. Approval of a SEP proposal lies within the discretion of the Central Valley Water Board. In the event that a SEP is approved, the Central Valley Water Board will develop an ACL Order memorializing the settlement in accordance with the *Water Quality Enforcement Policy*. This Order will then be subject to a new 30-day comment period, during which time interested parties may comment on the action.

If you would like us to consider a SEP, we require that you provide a specific project that would be funded with the money, how that project meets the qualification criteria in the Enforcement Policy, and identify deliverables and the budget, as described above. Please submit a SEP proposal by **16 February 2009** that addresses the above criteria. Alternatively, you may submit a check for \$66,000 to resolve the MMP.

ATTACHMENT D

Mr. Douglas Coty

-3-

16 January 2009

If you have any questions regarding this matter or wish to schedule a meeting to discuss the issues further, please contact Barry Hilton at (916) 464-4762 or bhilton@waterboards.ca.gov.

PATRICIA LEARY
Senior Engineer
NPDES Compliance and Enforcement Unit

cc: Mr. Larry French, Oakwood Lake Water District, Stockton
Mr. James Ferguson, General Counsel, Beck Properties, Inc., Stockton
Patrick Pulupa, Office of Chief Counsel, SWRCB, Sacramento