

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2002 - 0013

In the Matter of the Petition of
City Of San Diego
(Waste Discharge Requirements Order No. R9-2002-0025 [NPDES No. CA0107409]
for E.W. Blom Point Loma Wastewater Treatment Plant

Issued by the
California Regional Water Quality Control Board,
San Diego Region

SWRCB/OCC FILE A-1477

BY THE BOARD:

The California Regional Water Quality Control Board, San Diego Region (Regional Board), adopted waste discharge requirements for the E.W. Blom Point Loma Metropolitan Wastewater Treatment Plant (Plant), owned and operated by the City of San Diego (City). Those requirements were adopted in conjunction with the renewal of the NPDES permit issued by the United States Environmental Protection Agency (EPA) for discharge to the Pacific Ocean pursuant to a process set forth in the Clean Water Act, title 33 of the United States Code Annotated Section 1311(h), and generally referred to as Section 301(h). Pursuant to Section 301(h), EPA may issue a permit for discharge to marine waters from a publicly owned treatment works (POTW) that is given less than full secondary treatment.¹ The federal permit may only be issued with the concurrence of the state in which the discharge takes place. In

¹ In 1972, Congress passed the Federal Water Pollution Control Act Amendments, which required publicly owned treatment works to achieve secondary treatment capability by 1977. After passage, some municipalities with POTWs that discharged into marine waters, argued that this requirement might be unnecessary on the grounds that marine POTWs usually discharge into deeper waters with large tides and substantial currents, which allow for greater dilution and dispersion than their freshwater counterparts. As a result, Congress added Section 301(h) to the Clean Water Act in 1977, allowing for a case-by-case review of treatment requirements for marine dischargers that applied by September 13, 1979. Although it was filed after the deadline, the City's application was accepted.

California, that concurrence takes the form of state-issued waste discharge requirements, a separate permit that ensures compliance with state water quality standards.

I. BACKGROUND

The City has operated the Plant for nearly forty years. A waiver pursuant to Section 301(h) was issued in December 1995. An application to renew the waiver was submitted to EPA by the City in April 2001. On March 13, 2002, the Regional Board conducted a joint hearing with a representative of EPA to take testimony concerning the Section 301(h) waiver and the waste discharge requirements. On April 10, 2002, the Regional Board reconvened to discuss the evidence and testimony and to vote on the adoption of the waste discharge requirements. No further public testimony was permitted. After a lengthy discussion, the Regional Board adopted the waste discharge requirements as proposed but made three changes to the order, only one of which is the subject of the City's petition.

The City filed a timely petition objecting to the procedure used by the Regional Board in adopting the order and to the reduction in the mass emission limits for total suspended solids (TSS) in the final order. Those limits were set at 15,000 metric tons per year in the 1995 permit but were reduced to just under 14,000 tons in the final order.

II. CONTENTION AND FINDING²

Contention: The decision of the Regional Board to reduce the mass emission limits for TSS from 15,000 to 13,995 metric tons per year for the first four years of the permit is not supported by evidence in the record.

Finding: While there is no evidence in the record that the City will, under any reasonable set of circumstances, exceed the limits set by the Regional Board, the record does not contain evidence that the reduction from 15,000 metric tons per year to 13,995 is based on actual water quality considerations.

The City has been operating the Plant since the early 1960s and has been subject to regulation by the Regional Board for essentially that entire time. When the first Section 301(h) waiver was issued in 1995, the Regional Board set a discharge limit of 15,000 metric tons per year of TSS in its waste discharge requirements. At the time, the Plant was discharging a

² The City raises numerous procedural issues in its petition. Because of the disposition of this matter, it is unnecessary to address any of those issues. *People v. Barry* (1987) 194 Cal.App.3d 158 (239 Cal.Rptr. 349.)

little less than 11,000 tons per year. Since then, the Plant has succeeded in reducing the amount of TSS discharged almost every year, despite considerable growth in its service area. In 1996, the discharge of TSS was 10,622 metric tons per year; in 1997, it was 10,183; in 1998, the number was 10,469; in 1999, the discharge was down to 9,188; and in 2000, the Plant only discharged 8,888 metric tons of TSS. That represents a 16 percent reduction over five years. Nevertheless, the City, in its application to renew the Section 301(h) waiver, told both EPA and the Regional Board that its discharge of TSS from the Plant would be 14,100 metric tons in 2001 going up steadily to 14,600 tons in 2005. The waste discharge requirements provide, and the City has not challenged the provision, that the discharge must be no more than 13,599 tons in 2006. No explanation has been provided for why the City's discharge from the Plant would increase 59 percent between 2000 and 2001 nor is there any explanation of what the City will do between 2005 and 2006 to reduce its discharge by 7 percent.

The record indicates that the Plant removes more than 85 percent of the TSS in its effluent stream.³ No testimony or evidence was offered to show that this removal rate could not be assumed for the duration of this permit. At that rate of removal, even if the Plant were to operate at its full design capacity of 240 million gallons per day (MGD), the Regional Board has calculated that the mass emissions discharge would be less than 13,900 metric tons. As the City has projected the actual flow for the Plant in the year 2006 to be only 195 MGD, continued operation at the current rate of efficiency ought to result in a discharge of slightly more than 11,000 tons in that year.⁴

Nevertheless, the Regional Board's decision to reduce the limit for TSS mass emissions by 6.7 percent must be supported by evidence in the record. EPA approved the permit with the 15,000 ton limit.⁵ Regional Board staff proposed adoption of the permit with the 15,000 ton limit. No evidence was offered to the Regional Board that a significant water quality impact

³ In its submittal to EPA in support of its Section 301(h) waiver application, the City assumes a mass emission removal rate of "at least 80 percent." Removal of less than 80 percent would be a violation of the permit. The City has not challenged that requirement.

⁴ The discharge resulting from an 80 percent removal rate would be about 6 percent higher. If the Plant operated at an 80 percent removal rate, the figure for 2006 based on the City's projected discharge would be slightly less than 12,000 tons.

⁵ EPA indicated in its February 11, 2002 response to comments that "the proposed discharge would meet the nine 301(h) requirements and is in full compliance with the CWA [Clean Water Act]." EPA also stated that the discharge of mass emissions at the proposed 15,000 metric ton level was "entirely consistent with the language and purpose of the OPRA [Ocean Pollution Reduction Act of 1994]."

would occur with a discharge of 15,000 tons per year that would not occur if the discharge were limited to 13,995 tons.

California law requires that an administrative agency “build a bridge” between the decisions it makes and the record that supports the decision. *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. It is difficult to find such a bridge in this case. The absence of a real-world controversy makes the entire issue seem academic at best. As we pointed out in our discussion above, unless the City fails to comply with its obligation to remove 80 percent or more of the TSS from its effluent, neither the 15,000 ton limit nor the 13,995 ton limit is actually at issue. If it continues to remove TSS at the current 85 percent rate, the Plant will not even approach those limits until it is operating at near design capacity, many years from now. Any concern about the short-term performance of the City in this regard would seem not to be addressed by the reduction and any long-term concerns ought to be resolved by the requirement that the discharge be no greater than 13,599 metric tons per year beginning in 2006. Clearly, the discharge from the Plant in 2006 is more relevant to its performance ten or fifteen years from now than its discharge in 2001.

The Regional Board discussed the reduction at its April 10 meeting. No clear reason was given for reducing the limit from 15,000 to 14,000 metric tons, although most of the Board members indicated on the record that they believed the 15,000 ton figure was not based on any legitimate environmental standards and that the reduction was an important statement of policy for the Regional Board to make. When asked by the Regional Board’s counsel to articulate the findings in support of the reduction, the Chair responded:

“I think the record supports a ratcheting down of the limit, and that this is our effort to ensure that the public health, welfare, and safety is protected beyond that which is proposed by the permit. I also offer the observation that the 15,000 limit was simply selected based on the old permit so that we are entitled to adopt a permit that is more protective of the public health than is proposed.”

At no time does either the Chair or any other member of the Board point to evidence in the record that leaving the mass emission limit at 15,000 tons will cause a water quality or public health consequence that reducing it to 13,995 tons will avoid⁶

⁶ There is little or no evidence in the record that the Regional Board considered reducing the mass emission limit for technology-based reasons, anti-degradation principles, the need to prevent nuisance conditions, or other statutory or regulatory bases.

In its response to the petition, the Regional Board submitted a justification for the decision that is slightly more specific:

There are many facts in the administrative record considered by the Regional Board in reaching its decision. These include, but are not limited to, the disparity between Petitioner's actual TSS emission rates and those proposed in their application, the ability of the PLMWTP [the Plant] to achieve much lower mass emissions than those proposed, the need to encourage water reclamation, the uncertainty of long-term impacts of the discharge, the lack of deep ocean monitoring, and the lack of monitoring for many human pathogens including viruses. [Response, page 9.]

Most of those issues have already been discussed above. The issues involving reclamation and the lack of monitoring are certainly very legitimate concerns. However, the question must be repeated with regard to those issues: how does a reduction from 15,000 tons to 14,000 tons in the order, when the actual discharge cannot exceed 12,000 tons during the life of the permit, improve reclamation prospects or lessen the need for more monitoring?

III. CONCLUSION

For the reasons stated above, the State Board concludes that the Regional Board failed to make findings, either in its order or during its deliberations, that justify reducing the mass emission limits for TSS from 15,000 metric tons per year to 13,995 metric tons per year in the waste discharge requirements. The order should be amended.

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IV. ORDER

It is hereby ordered that waste discharge requirements No. R9-2002-0025 be amended as follows: in paragraph B.1.a.(1), Limits on Total Suspended Solids, the narrative is amended to read:

“The discharge shall achieve a mass emission of TSS of no greater than ~~13,995~~ 15,000 mt/yr; this requirement shall be effective through December 31, 2005. Effective January 1, 2006, the discharger shall achieve a mass emission of TSS of no greater than 13,599 mt/yr.” [The remainder of the paragraph is unchanged.]

CERTIFICATION

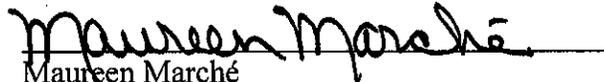
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 15, 2002.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Clerk to the Board