



California Regional Water Quality Control Board, San Diego Region

In reply refer to / attn:
631631:rstewart

TO: Advisory Staff and Board Members
c/o David Gibson, Executive Officer
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

FROM: 
Prosecutorial Team
c/o James Smith, Assistant Executive Officer
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: April 17, 2013

**SUBJECT: Prosecution Team Response to Comments Received on Tentative Order
No. R9-2013-0032**

The San Diego Regional Water Quality Control Board Prosecution Team ("Prosecution Team") submits responses to the five public comments received prior to the close of the written comment period on the Los Peñasquitos proposed settlement. In summary, the comments received focus on two key issues; the calculated amount of the proposed penalty, and how the suspended penalty should be applied to a SEP.

As a general matter, please note that the Tentative Order was a negotiated resolution between the Prosecution Team and the City of San Diego ("City"); an Administrative Civil Liability Complaint ("ACLC") was not issued. To the extent that the public comments indicate disapproval with the settlement agreement, the Prosecution Team responds that the settlement agreement represents the best agreement that could be reached without proceeding to an adversarial hearing for the reasons summarized below.

- Prosecution Team appropriately applied the Enforcement Policy's penalty calculation to develop a calculated liability of \$2,428,089. Because sanitary sewer overflow (SSO) penalties are discretionary, the Prosecution Team also appropriately applied its discretion to include the Pump Station 1 spill, which shared the same underlying cause, as a "covered matter" in the Stipulated Order.

- Prosecution Team appropriately reduced the calculated civil liability from \$2,428,089 to \$1,245,414 based on guidance in the Enforcement Policy. The specific settlement considerations can be found on page 23 of the Tentative Order. These considerations qualify as equitable factors, mitigating circumstances, evidentiary issues, or other weaknesses, and can be redundant to the variables considered in the penalty calculations.
- The Prosecution Team appropriately suspended 50 percent of the calculated civil liability (\$622,707) for the successful completion of a qualifying Enhanced Compliance Action ("ECA"). The ECA provides backup power at six proposed locations, at a significant expense to the City (\$12,783,000), to prevent spills from not only the receiving waters affected by the SSO, but also to other critical areas that may be compromised under similar circumstances. In considering Supplemental Environmental Projects ("SEPs") and ECAs in enforcement settlements, the Prosecution Team generally prefers proposals that prevent SSOs and/or restore their harmful effects to proposals that focus on monitoring. The Prosecution Team therefore considers the proposed ECA to prevent future spills to have a superior environmental benefit to a SEP for monitoring.

With regards to the appropriateness of the amount of the proposed penalty, ultimately, that is for the Board members to decide. If the proposed settlement agreement is rejected by the Board, the Prosecution Team and the City of San Diego can continue settlement discussions, or the Prosecution Team can consider whether to issue an ACLC. The Prosecution Team maintains that the proposed settlement conforms to the State's Enforcement Policy and applicable statute, is consistent with other penalties assessed region wide and state wide, and is in the best interest of the public and the San Diego Water Board.

No changes to Tentative Order No. R9-2013-0032 are proposed. The City of San Diego has submitted its responses under separate cover. All comments and responses have been posted on the San Diego Water Board's website at http://www.waterboards.ca.gov/sandiego/water_issues/programs/compliance/acl_complaints.shtml.

Attachment: Prosecution Team Responses to Specific Public Comments

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source		Comment	Prosecution Team's Response
Supplemental Environmental Project (SEP)			
Carol A. Martin; 4/8/2013 email		It would be an immediate relief to use some of the funds to help pay to reopen the Lagoon Mouth.	Several commenters inquired about the possibility of requiring the City of San Diego (City) to perform a SEP. The City may wish to respond to these comments independently. The Prosecution Team would support a qualifying SEP. However, neither the Board nor the Prosecution Team can require a discharger to propose and implement a SEP.
Peter Jensen, President Board of Counselors Torrey Pines Association 4/8/2013 email		We are recommending the City implement a monitoring program that would have a number of benefits.	After the violations at issue, the Prosecution Team and the City entered into confidential settlement negotiations and reached the settlement agreement now under consideration. The Enforcement Policy's penalty methodology was used, and the City was given credit for an eligible Enhanced Compliance Action (ECA) that could prevent spills such as this from occurring in the future. It is the Prosecution Team's belief that this settlement agreement is in the best interest of the public. In considering SEPs and ECAs in enforcement settlements, the Prosecution Team generally prefers proposals that prevent SSOs and/or restore their harmful effects to proposals that focus on monitoring. The Prosecution Team therefore considers the ECA to prevent future spills as more beneficial than a SEP to monitor for spills.
Clay Phillips, San Diego Coast District Superintendent, California Department of Parks and Recreation 4/8/2013 letter		In addition to this contingency, it is imperative that a more responsive monitoring system be implemented to provide earlier detection of spills and to provide a better assessment of their effects and the efficacy of any cleanup efforts...California State Parks would strongly encourage that such a system be developed and maintained as a consequence of this and future settlements with dischargers.	The Board's ultimate approval of the settlement agreement should be based upon whether the settlement agreement is consistent with the Enforcement Policy and in the public's best interest.
Mike Hastings, Executive Director Los Peñasquitos Lagoon Foundation 4/10/2013 letter		LPLF believes that a Supplemental Environmental Project should have been included as part of the proposed settlement.	

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Prosecution Team's Response		
Source	Comment	
<p>Penalty Calculation/ Assessment Methodology</p> <p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p>	<p>Comment A: The Proposed Settlement Improperly Ignores the Spill into Sweetwater River and San Diego Bay.</p>	<p>According to the City, the total spill volume at Pump Station 1 was 193,120 gallons. The 870,231 gallons referenced by San Diego Coastkeeper was an early estimate of the SSO volume. The City revised the spill volume, and reported its more accurate estimate of 193,120 gallons in its certified CIWQS report. Based on this reported value, the Prosecution Team elected not to pursue enforcement for the Pump Station 1 spill, but through settlement discussions agreed to include the spill as a "covered matter" because it shared the same underlying cause, and its cause would be addressed through the same underlying solution (i.e. backup generators).</p> <p>Imposition of administrative liabilities for the SSOs that occurred due the power outage are discretionary. No penalties relating to the SSOs are mandatory. Therefore, the Prosecution Team's decision to waive discretionary penalties for the Pump Station 1 SSO as part of the settlement process is procedurally sound and is also consistent with similar Water Board enforcement cases Statewide. For example, in the City of Redding Order (R5-2012-0112, Paragraph 8), the Central Valley Water Board negotiated to resolve additional SSOs since the main cause of the spills were being addressed. It is a common procedure for settlements to resolve additional outstanding liability at the time of an order/settlement agreement, even though prosecution teams may not be seeking to address all violations in negotiations or a particular ACLC.</p>

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
<p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p>	<p>Comment B: The Susceptibility to Cleanup or Abatement Score should have been 1, not 0... This conclusion is not consistent with reasoning in other penalty assessments. For example, in the Oceanside Administrative Civil Liability... In the La Mesa Administrative Civil Liability from March 13, 2013...</p>	<p>Because the Prosecution Team elected not to pursue enforcement for the Pump Station 1 spill, the Prosecution Team did not (and is not required to) calculate the economic benefit from the Pump Station 1 spill in accordance with Step 4 of the Enforcement Policy (Pages 17 and 18). Nevertheless, as a rough calculation, if the economic benefit from Pump Station 64 were doubled to account for Pump Station 1, the resulting value of \$321,544 would still be well below the settled penalty amount of \$1,245,414.</p> <p>With regards to Factor 3: susceptibility to Cleanup and Abatement, the Enforcement Policy states, "A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned for this factor if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the violator (emphasis added)."</p> <p>The City began pumping operations in Los Peñasquitos Creek on September 12, 2011. Between September 12 and September 23, six separate pumping locations removed an estimated 15,183,000 gallons of creek water mixed with sewage. The City estimated that 931,550 gallons of the total volume recovered was sewage. Fifty percent of the SSO could have been cleaned up if an additional 284,225 gallons of sewage had been recovered. This could have been achieved if the City had added additional pumping locations and/or</p>

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
		<p>if it had started pumping operations sooner.</p> <p>Because the Prosecution Team could identify reasonable scenarios where more than 50 percent of the SSO <u>could</u> have been cleaned up, the appropriate score for Factor 3: Susceptibility to Cleanup and abatement is 0.</p> <p>Further, in evaluating susceptibility to cleanup, the Prosecution Team considers the contexts of each SSO. Therefore, it is appropriate to recognize differences between cleanup operations of the SSO into Los Peñasquitos Creek (Los Peñasquitos Lagoon and the Pacific Ocean) during dry weather to those affecting SSO penalties adopted or recommended for the Cities of La Mesa or Oceanside which occurred during a significant rain event with substantial receiving water flows. Moreover, the assignment of a score of 0 is consistent with Complaint No. R9-2011-0023 to the Santa Margarita Water District for partial recovery of a sewage spill during dry weather.</p>
<p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p> <p>Mike Hastings, Executive Director Los Peñasquitos Lagoon Foundation 4/10/2013 letter</p>	<p>Comment C: The Per Gallon Assessment should have been based on a Per Gallon Factor of 0.8, not 0.6.</p> <p>Recalculate the Determination of Total Base Liability Amount.</p>	<p>Based on the Prosecution Team's correct assignment of a score of 0 to Factor 3: Susceptibility to Cleanup and Abatement (see response to Coastkeeper Comment B), the correct Per Gallon Assessment should be 0.6, not 0.8.</p> <p>Therefore, the Prosecution Team believes no recalculations are warranted.</p>

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
<p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p>	<p>Comment D: The City of San Diego should be held liable for all sewage it spilled.</p>	<p>California Water Code (CWC) section 13385(c)(2) states "Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."</p> <p>In this particular instance, no penalty was recommended for the discharge that was cleaned up. This is consistent with the language of section 13385(c)(2). Prosecution teams may calculate the harms differently despite clean up in other circumstances, such as oil spills, which are remediated pursuant to law. However, the City's response led the Prosecution Team to conclude that the discharged material that was cleaned up did not need to be penalized. Any resulting impact from the cleanup to the environment is considered as part of Factor 1 (Harm to Beneficial Uses; see response to Comment H below). After the City's cleanup efforts, the remaining sewage discharged but not cleaned up was 1,500,000 gallons, which is the volume to which the Prosecution Team applied a per gallon penalty.</p>
<p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p> <p>Mike Hastings, Executive Director</p>	<p>Comment E: The \$10 gallon penalty should not have been reduced to \$2 per gallon because the ultimate penalty was inappropriately small.</p> <p>LPLF requests that the fine amount be adjusted to \$10.00/gallon.</p>	<p>The Enforcement Policy (page 14, High Volume Discharges) specifically states that a maximum amount of \$2.00 per gallon should be used for high volume discharges, including sewage spills, when calculating the initial amount of the ACL. Had \$10.00 per gallon been used, the Final Liability Amount, leaving all other factors the same, would have been \$12,004,900, which</p>

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
<p>Los Peñasquitos Lagoon Foundation 4/10/2013 letter</p>		<p>is excessive for these circumstances, and could have a detrimental effect on the City's budget for current and future capital improvement projects that have a direct benefit to water quality.</p> <p>In addition, a \$2.00 per gallon maximum amount is consistent with the SSO ACLs for the Cities of Oceanside (an adopted ACL Order) and La Mesa (a current ACL Complaint), both of which spilled less sewage than the City. Further, a penalty of 25 cents per gallon is in line with the prior San Diego Water Board settlements of 39 and 30 cents per gallon for Santa Margarita Water District's and the City of Oceanside's SSOs, respectively.</p>
<p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p>	<p>Comment F: Staff should not have reduced the City's liability in half from the total calculated civil liability of \$2,428,089.</p>	<p>The Prosecution Team believes that it is in the best interest of the State to reduce the calculated civil liability in half from \$2,428,089 to \$1,245,414 based on the settlement considerations provided in page 23 of the Tentative Order, which are consistent with the Enforcement Policy. These considerations qualify as equitable factors, mitigating circumstances, evidentiary issues, or other weaknesses, and can be redundant to the variables considered in the penalty calculations. The City's efforts towards cleanup response, correcting deficiencies identified in its Sewer Overflow Response Plan, and preventing similar overflows from occurring throughout the City by providing backup generators are noteworthy mitigating circumstances. The fact that dual electrical feeds are considered an acceptable design standard per the U.S. EPA technical bulletin titled "Design Criteria for Mechanical, Electrical, and</p>

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
<p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p>	<p>Comment G: The Regional Board should not effectively reduce San Diego's penalty to \$622,707 just because the City is buying backup generators.</p>	<p>Fluid System and Component Reliability"¹ and that the San Diego Water Board had considered dual electrical feeds to be an acceptable form of redundant power supply during previous enforcement proceedings regarding SSOs from Pump Station 64, can be considered potential weaknesses in the Prosecution Team's enforcement action. Further, it substantiates that providing backup diesel generators is "not otherwise required by law."</p>
		<p>The Enforcement Policy (page 30, Enhanced Compliance Actions [ECA]) allows for the suspension of a portion (up to 50 percent) of the monetary liability of a discretionary ACL for completion of an ECA. The Prosecution Team finds that the City's proposed ECA meets the criteria identified in the Enforcement Policy. Further, the installation of backup power at the six proposed locations, at a significant expense to the City, has substantial preventative benefits to not only the receiving waters affected by the SSO, but to other critical areas that may be compromised under similar circumstances. This environmental benefit, and the associated expense to achieve this benefit, justifies a significant reduction in the calculated civil liability.</p> <p>The Prosecution Team supports a suspension of 50 percent or \$622,707 of the total liability amount of \$1,245,414 if the City spends \$12,783,000 on the procurement and installation of backup emergency power generators at four pump stations, the North City</p>

¹ EPA-430-99-74-001

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
		<p>Water Reclamation Facility, and its Environmental Monitoring and Technical Services Laboratory in accordance with the time schedule in Attachment B of proposed Order No. R9-2013-0032. Backup emergency power generators at not only the two pump stations that spilled during the region wide power outage, but also at Pump Station 65 and the Peñasquitos Pump Station, both upstream of Los Peñasquitos Lagoon, greatly reduces the likelihood of future SSOs due to power outages at these key wastewater pumping facilities.</p> <p>While the San Diego City Council approved the expenditure prior to completion of this settlement, its decision was a voluntary and direct result of the September 2011 SSOs.</p> <p>The Prosecution Team recognizes the amount of funding necessary to complete such an aggressive backup power resolution and does not want to risk the diversion of funds away from a local project that has great water quality protection benefits in order to send more money to the Cleanup and Abatement Account.</p>
<p>Jill M. Witkowski, Waterkeeper San Diego Coastkeeper 4/8/2013 letter</p>	<p>Comment H: Reducing the City's effective penalty to \$622,707 makes the per gallon penalty too low given the spill's environmental impacts.</p>	<p>The Enforcement Policy dictates that the harm or potential for harm to beneficial uses be assessed using a score between 0 and 5, with 0 reflecting a negligible harm or potential for harm and 5 reflecting a major, high threat to beneficial uses, such as significant impacts to aquatic life or human health, long term restrictions on beneficial uses (more than five days), or a high potential for chronic effects to human or</p>

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
		<p>ecological health.</p> <p>The Prosecution Team appropriately addressed the SSO's environmental impacts when assigning a Potential for Harm score of 5.</p> <p>The decision to reduce the calculated penalty by half and then allow half of that amount to be suspended upon the completion of the City's proposed ECA resulted from settlement negotiations. The Prosecution Team believes that the settlement amount is appropriate in this case because of the environmental protection provided by the installation of backup power generators at numerous City facilities and recognizing the significant capital expenditure required to implement the ECA.</p>
<p>Mike Hastings, Executive Director Los Peñasquitos Lagoon Foundation 4/10/2013 letter</p>	<p>LPLF requests that the Adjustment for Culpability be raised to the multiplier of 1.5.</p>	<p>The Enforcement Policy states "Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations" and "Adjustment should result in a higher multiplier for intentional or negligent behavior."</p> <p>The City had backup power at Pump Station 64 that was acceptable per the U.S. EPA technical bulletin titled "Design Criteria for Mechanical, Electrical, and Fluid System and Component Reliability."²</p> <p>The Prosecution Team appropriately raised the City's culpability factor from 0.5 to 1.1 because the City had</p>

² Ibid

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
		<p>been notified by the local utility prior to the power outage that backup power could not be guaranteed in the event of a large power outage.</p> <p>Raising the culpability factor to 1.5, the maximum allowed by the Enforcement Policy, would be appropriate only if the City did not have any backup power at Pump Station 64 which would have been in direct conflict with U.S. EPA's guidance document.</p>
<p>Mike Hastings, Executive Director Los Peñasquitos Lagoon Foundation 4/10/2013 letter</p>	<p>LPLF also requests that Adjustment of Cleanup and Cooperation be raised to the multiplier of 1.5.</p>	<p>The Enforcement Policy describes the Cleanup and Cooperation adjustment factor as the "Extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between 0.75 to 1.5, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent.</p> <p>The Prosecution Team assigned a Cleanup and Cooperation factor of 1.1 because the City failed to adequately implement its Sewer Overflow Response Plan by promptly identifying areas of standing sewage in Los Peñasquitos Creek. However, when notified of the problem, the City adequately responded and completed cleanup activities in an acceptable manner.</p> <p>Raising the Cleanup and Cooperation factor to 1.5, the maximum allowed by the Enforcement Policy, would be appropriate if the City had not performed any cleanup activities and/or had failed to respond when notified</p>

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source	Comment	Prosecution Team's Response
<p>Mike Hastings, Executive Director Los Peñasquitos Lagoon Foundation 4/10/2013 letter</p>	<p>Raise the Adjustment for History of Violations Multiplier to 1.5.</p>	<p>that there was standing sewage within Los Peñasquitos Creek.</p> <p>While the Enforcement Policy does not provide a maximum value for this factor, the overwhelming majority of cases use 1.0, a neutral factor for dischargers without a history of violations, and 1.1 for dischargers with a history of violations. The Prosecution Team used 1.1.</p> <p>Typically, the Prosecution Team uses the CIWQS³ database to review violation data when considering the History of Violation adjustment factor. CIWQS has been tracking spill information since 2007. Although the Prosecution Team recognizes that the City has a history of violations with regards to SSOs from Pump Station 64 dating back to 1986, according to the CIWQS database, there have been no other SSOs reported for this facility since 2007.</p>
<p>Peter Jensen, President Board of Counselors Torrey Pines Association 4/8/2013 email</p>	<p>When we consider the beneficial uses affected by the spill, we estimate that closure of Torrey Pines State Beach for seven days following the spill denied approximately 30,000 visitors recreational access to the ocean.</p>	<p>The settlement agreement resolves the City's liability for CWC violations and discharges any economic benefit the City may have received by virtue of not upgrading its infrastructure.</p> <p>The Prosecution Team selected the most egregious "potential for harm" factor because of the impact on beneficial uses. Also refer to response to Coastkeeper comment H above.</p>
<p>Jill M. Witkowski, Waterkeeper San Diego</p>	<p>Not only did this spill cause a fish kill, but it closed popular swimming and surfing beaches for days. The Del Mar</p>	<p>The Prosecution Team selected the most egregious "potential for harm" factor because of the impact on beneficial uses. Also refer to response to Coastkeeper comment H above.</p>

³ California Integrated Water Quality System Project (CIWQS) http://www.waterboards.ca.gov/water_issues/programs/ciwqs/chc_sso.shtml

Prosecution Team Response to Comments on Tentative Order No. R9-2013-0032

Source		Prosecution Team's Response	
Comment		Monitoring Response	
Coastkeeper 4/8/2013 letter	Surf Dog Surfathon, a charity event to raise money to care for orphaned dogs, had to be rescheduled.		
Mike Hastings, Executive Director Los Peñasquitos Lagoon Foundation 4/10/2013 letter	LPLF also feels that the monitoring of impacts to Los Peñasquitos Lagoon conducted by the City failed to accurately describe water quality within the Lagoon with regard to the sewage spill and perceived recovery of Lagoon's beneficial uses.	<p>The City was advised by the San Diego Water Board on what constituents to monitor within the receiving waters after consultation with its Surface Water Ambient Monitoring Program coordinator. The monitoring parameters chosen were used to identify the acute effects on the receiving waters. The monitoring data demonstrated acute effects (e.g. low dissolved oxygen, fish kills, etc.) that dissipated over time. This is consistent with data collected by Coastkeeper.</p> <p>The required monitoring was not designed to adequately discern any long-term effects of the sewer overflow to Los Peñasquitos Lagoon. This type of study would be costly, complicated, and likely to produce uncertain results due to the difficulty in correlating the pollutant sources to the observed effects.</p> <p>The City satisfactorily completed all monitoring activities required by the San Diego Water Board's request for technical information pursuant to CWC section 13276.</p>	