

## Region 2 “Lessons Learned”

### Industrial Stormwater Annual Report Non-filers batch NOV and ACLs

#### ***Process we followed***

1. We used the CIWQS Stormwater Database to know which facilities had not yet sent in Annual Report:
  - Our students logged in paper reports.<sup>1</sup>
  - Some facilities reported online.
  - Students followed a two-step process. First, they checked each report into CIWQS—a very quick step, and one that was key to generating letters to facilities that had not submitted. Second, they did the more detailed data entry of sampling results, etc., for each report.
2. We sent out the first notice NOV letter to 275 facilities that had not yet submitted. This generated responses that allowed us to whittle down the list:
  - Some facilities had reported (and we misplaced or had not received the report); others had tried unsuccessfully to report online.
  - Some facilities submitted their reports.
3. We sent out the second notice NOV letter via regular mail to about 100 facilities,<sup>2</sup> which further allowed us to whittle down the list:
  - We asked local agencies to help us figure out whether some of the non-respondent facilities were still in business.
  - We called the facilities still on our list.
  - We did “drive-by” inspections to verify that facilities were still in business.<sup>3</sup>
  - We tracked responses to this second letter and our own staff actions (e.g., telephone calls, drivebys, or other contacts) using a simple color-coded Excel spreadsheet.
  - We sent the second notice via Certified Mail, return receipt requested.

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<sup>1</sup> It took 3 students working about 0.75 time each for 2.5 months to log in the reports and assist those electronic submitters who had problems, for a total of about 1,600 facilities. In addition, four staff spent about 0.2 time each for 4 months helping the students, responding to telephone calls, etc.

<sup>2</sup> We prepared letters to 135 facilities, but during that process, received calls or reports from a number of facilities. Thus, we actually sent out a smaller number of letters. This was a good decision, as it reduced calls from dischargers who had just submitted their Report, but then received another warning letter.

<sup>3</sup> Some form of personal contact (i.e., beyond our letters), was key at this point to avoid wasting time preparing enforcement actions for facilities that were no longer in business or that had submitted an NOT, but were somehow still showing up in CIWQS as having an Annual Report due. For those facilities for which telephone calls were not conclusive, it was important to visit the facility in person or otherwise ensure they were really still there and in business. We also found that personal contact at this point was effective at getting reports submitted from the majority of remaining “non-submitter” facilities.

4. We sent out 17 ACL Complaints to facilities that had not submitted reports 8 months past the deadline. (The ACLs were streamlined and fairly boiler-plate—we did not individually evaluate the ACL factors).<sup>4</sup>
  - The Complaints each had one of two levels of fines:
    - i. If we got the Report only after calling or visiting the facility after our second warning letter (i.e., it was about 8 months late), there was a proposed fine of about \$9,000 – 11,000. This was based on per-facility staff costs of \$2,500, economic benefit recovery of about \$1,000, and a penalty of about \$25 per day late.
    - ii. If we had not received the Report by the time we prepared the Complaint, there was a proposed fine of \$24,200. This was based on per-facility staff costs of \$2,500, economic benefit recovery of \$1,000, and a penalty of about \$50 per day late.
  - Ordinarily, we would go through the progressive process more quickly, resulting in lower penalties for facilities that did not submit their reports at all (due to fewer days late). However, our Industrial Stormwater staff were also responding to the Cosco Busan oil spill, which delayed Complaint issuance. Our Board was generally supportive of the higher penalties.

### ***The importance of tracking report receipt***

It was really important, when we took these ACLs before our Board, that we had made absolutely sure that we had not received the report and that the facility had not made a good faith effort to submit the report. As we were required to do, we kept copies of each letter we sent to each facility, records of the dates we sent each letter, and the actions we took to track reports down. This helped our management and our Board feel confident that our enforcement actions were progressive, warranted, and appropriate.

### ***Benefits of this streamlined administrative group enforcement effort***

The industrial stormwater program, with its large number of enrollees, doesn't get the same level of compliance oversight that we can afford to individually-permitted sites. Region 2 implements the vast majority of its compliance efforts through stormwater staff at our municipalities covered under NPDES MS4 permits—so most covered facilities see a municipal, not a state, inspector. Our concern about this grows as permit fees go up without any increase in Board staff ability to provide customer service. It was very effective to take enforcement for non-submittal of annual reports for this sector. The press took notice. Our Board took notice. We were able to get a big message out to the regulated community. Although it was not an insignificant effort, we achieved an economy of scale by approaching a category of facilities at once.

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<sup>4</sup> That is, we sent out ACL Complaints to about 1% of our total number of industrial stormwater permittees. The 2-letter warning process was effective in getting submittals from 99% of permittees.

At the Board hearings for the ACLs, our lead prosecutor (AEO) made two important points to our Board that they picked up on and which influenced their support of our enforcement efforts:

- The integrity of our Water Quality regulatory programs is founded on Discharger compliance self-evaluation and self-reporting. Therefore, timely annual report submittal is critically important. We do not have an army of inspectors. Our regulation of these facilities—which are only required to submit a self monitoring report once a year—is dependent on timely receipt of reports.
- The permit requires high-level corporate or public official to sign off on reports. A common excuse we encountered for failure to submit the report was, “the guy that used to take care of it no longer works here,” or, “we had personnel problems.” This is not a valid excuse; the purpose of the permit signatory requirements is to ensure compliance responsibility is born by an official at a high enough level to preclude/prevent this problem.

As a result, our Board was highly supportive of our actions, and, in the hearings, they reemphasized these points to our Dischargers. Some Board members even wanted to raise the penalty amounts.

### ***How we dealt with ability-to-pay issues***

In our ACL complaints, we explicitly gave Dischargers notice that they could submit ability-to-pay information and described examples of what such information could be. Only one of our Dischargers attempted to use that argument. Ability to pay fines of \$9,000 – 24,200 was clearly not an issue for the majority of our Dischargers, but we are working to develop a process that raises the question a bit earlier and more clearly. It may be helpful to obtain clearer guidance from Office of Enforcement attorneys (although we will also work to make our own determination) on the expected level of effort to obtain ability-to-pay information during the progressive enforcement process.

### ***What we would do differently next time***

Next year, we want to get as many of our enrollees as possible submitting reports online. That will help us eliminate the excuse we heard this year, “but I sent it in...to State Board...to Region 1...” To that end, we need to find out why people tried to use the online reporting system but were unsuccessful. It may be necessary to complete appropriate CIWQS modifications prior to next year’s reporting. Also, we request that State Board train our staff and students on the online reporting process, challenges dischargers are likely to encounter, etc., so that we can provide effective customer assistance. We will be incorporating outreach into our inspections and seeing if there are other ways to get the word out and train our enrollees on how to report online.

We also need to be able to run a report that shows us the facilities with incomplete electronic reports and perhaps those that submitted reports for the coming (instead of current) year.

We would ensure that we make personal contact with all non-submitter facilities prior to issuing ACL Complaints. Not only did this prove effective to get facilities to finally submit their reports, it was also sometimes the only way to figure out if a facility was still

in business. It is a good up-front investment of time that saves time down the road. We missed a few facilities this year and had to dismiss Complaints for a couple simply because they were closed and permit coverage terminated, but we had not identified them as such. We were effective in having both staff and interns make these kinds of contact, although we used students primarily for telephone contacts, and staff for the field portion.

We will request that State Board modify the Annual Report form's first page to include the Regional Board's mailing address (this style was used in the late 1990s), or, alternatively, provide even clearer step-by-step instructions on how to read the facility WDID number and figure out where to send the Report. In addition, if a memo on electronic submittal is again included with the blank Report form, the memo should not be on State Board letterhead, or it should include clear instructions on where to send hard copies. The memo was confusing to some dischargers, who submitted their hard copy Report to the Sacramento letterhead address.

Another challenge we faced was obtaining legal advice while honoring separation of functions as we moved through this process. (It was not always easy to remember which attorney of our two would be the prosecuting attorney versus the advising attorney when we had questions about the roll-out of the process.) In the future, we would want to assign one attorney to the mass effort (rather than sticking with our old system of assigning attorneys to specific staff, since it is likely to be a team of staff working on such an effort).

### ***Further thoughts***

This effort was the first tier in a three-tier compliance evaluation process:

1. Annual report submitted? Yes or No
2. Annual report not complete or otherwise indicates permit noncompliance? Yes or No
3. Site inspections determined violations? Yes or No

We recognize the interrelationship of the above three questions and the challenge of getting the first completed and enforced while considering and proceeding with the second and third.