

California Regional Water Quality Control Board
Lahontan Region

Staff Report

Proposed Settlement Agreement and Stipulation for Administrative Civil Liability
City of Barstow Wastewater Treatment Plant

by

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08-0023

Introduction

The purpose of this staff report is to provide additional background in support of the proposed Settlement Agreement and Stipulation for Administrative Civil Liability (Proposed Order) that is part of Agenda Item No. 8 in the Lahontan Regional Water Quality Control Board's (Lahontan Water Board) May 12-13, 2010 Board Meeting Agenda. The Proposed Order was developed within the confines of confidential settlement discussions between the Lahontan Water Board's Prosecution Team, the City of Barstow (City), and the City's wastewater treatment plant contract operator, United Water. The Proposed Order is based in large part upon confidential documents that were exchanged as part of those settlement discussions. The Prosecution Team, the City, and United Water understand that the basic details regarding the settlement and resulting Proposed Order must be provided to the Lahontan Water Board and its Advisory Team for these parties to consider the Proposed Order and the Prosecution Team's recommendation for adoption of the Proposed Order and Stipulation.

Discovery of the Violations

An investigation by Lahontan Water Board and State Water Board staff was initiated in March 2007 in response to findings contained in a separate City groundwater investigation report that was published in 2007. The State Water Board–Lahontan Water Board joint investigation focused on the groundwater monitoring element of the City's monitoring and reporting program, as specified by Monitoring and Reporting Program No. 94-26 for the period of March 2003 – July 2007.

On June 16, 2009, the Prosecution Team issued a Notice of Violation (NOV) and a separate Administrative Civil Liability Investigation Letter (Investigation Letter) to the City. Both documents allege violations of the City's Waste Discharge Requirements specified by Board Order No. 6-94-26, monitoring requirements specified by Monitoring and Reporting Program No. 94-26, and Water Code sections 13267 and 13268. The State Water Board–Lahontan Water Board investigation worked to refine two specific categories of violations related to the City's monitoring requirements: 1) instances where the City conducted sample collection, storage, and analysis without a Sampling and Analysis Plan (SAP) or formal chain of custody (COC) procedures (referred to as Category 1 violations), and 2) instances where duplicated groundwater monitoring data was submitted in monitoring reports (referred to as Category 2 violations). The Notice of Violation and Investigation Letter identified approximately 77 Category 1 violations and 14 Category 2 violations that the Prosecution Team was aware of at the close of the State Water Board–Lahontan Water Board investigation in October of 2007. Additionally, the Investigation Letter specified that the Prosecution Team was also in the process of identifying additional Category 1 violations occurring beyond the close of the investigation period, i.e. additional violations occurring after October 2007. The Prosecution Team issued the Notice of Violation and separate Investigation Letter along with a request that the parties meet to discuss the findings of the investigation and to verify the total number of violations and attempt to resolve them.

08-0024

In response to the two above-referenced documents, City and United Water staff further investigated the monitoring program for the entire wastewater treatment plant, which includes influent and effluent monitoring in addition to groundwater monitoring from August 2003 through July 2009. The results of the City's and United Water's investigation, which identified additional potential violations similar to those identified in the June 16, 2009 Notice of Violation and Investigation Letter, were shared during settlement discussions with the Prosecution Team. The City and United Water also identified a number of corrective measures they had implemented and would continue to implement to assure compliance going forward. As examples, these measures include training of City and United Water personnel, COC and field COC training, calibration of equipment, development of Standard Operating Procedures for reviewing reports and managing subcontractors, providing new quality assurance/quality control documents to laboratory personnel, and providing training to staff on the new Water Information Management System. The findings and conclusions from both joint investigations formed the basis of further settlement discussions. The result of those settlement discussions is set forth in the Proposed Order.

Submittal of the SAP in Compliance with the NOV

The June 16, 2009 NOV initially required submittal of the SAP by July 17, 2009. That deadline was extended to July 31, 2009. The City submitted the SAP, which also included COC procedures, in compliance with the revised deadline and in compliance with the NOV on July 31, 2009. The City and United Water are currently addressing comments provided by the Lahontan Water Board staff in correspondence dated April 8, 2010, and the parties expect to have a final, Water Board-approved SAP in place soon.

Nature of the Violations and Potential Maximum Administrative Civil Liability

Based upon the findings of both joint investigations, a total of 266 Category 1 violations were identified. The 266 violations represent the 266 sampling events that took place where wastewater influent, wastewater effluent, and/or groundwater were sampled during the period of March 14, 2003 – July 15, 2009. These sampling events occurred in the absence of an approved Sampling and Analysis Plan (SAP) and without formal COC procedures. Monitoring and Reporting Program No. 94-26 includes "General Provisions for Monitoring and Reporting" that are dated July 1, 1993. The General Provisions, in part, specify,

Subsection 1.d: "The Discharger shall establish Chain of Custody procedures to ensure that specific individuals are responsible for sample integrity from commencement of sample collection through delivery to an approved laboratory. Sample collection, storage and analysis shall be conducted in accordance with an approved Sampling and Analysis Plan (SAP). The most recent version of the approved SAP shall be kept at the facility."

08-0025

The City's failure to develop formal COC procedures and to conduct its groundwater monitoring program in accordance with an approved SAP constitutes a violation of the above-referenced provision, which is part of Monitoring and Reporting Program No. 94-26. Such violations are subject to administrative civil liability of up to \$1,000 per day pursuant to Water Code section 13268. The above-referenced violations are subject to a maximum potential liability of \$266,000.

Based upon the findings of both joint investigations, a total of 20 Category 2 violations were identified. The 20 violations represent instances where duplicated field data was produced, and subsequently submitted in the City's self monitoring reports. State Water Board and Lahontan Water Board staff discovered during their joint investigation that duplicated field data was submitted in the City's self monitoring reports for 14 specific sampling dates. The duplicate field data was assembled by a subcontractor to United Water. This situation was discovered by reviewing the field sampling data sheets that were included in the City's self monitoring reports. The field sampling data sheets provided well purging and sampling data (e.g., pH, conductivity, temperature, sampling and purging times) that were identical to data submitted in previous self monitoring reports, except that the date had been changed. City and United Water staff identified during their joint investigation an additional two sampling events where duplicate field data was produced by the wastewater treatment plant operator's subcontractor and submitted in City self monitoring reports. Finally, Lahontan Water Board staff and the City and United Water during settlement discussions agreed on four additional dates where duplicated field data was produced for a total of 20 dates in which duplicated field data was produced and submitted in self monitoring reports. The 20 dates in which duplicated field data was produced and submitted occurred during the period of May 2005 – January 2007. The General Provisions, in part, specify:

Subsection 4.a: "Any person failing or refusing to furnish technical or monitoring reports or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in an amount of up to one thousand dollars (\$1,000) for each day of violation under Section 13268 of the Water Code."

The City submission of self monitoring reports containing duplicated field data constitutes a violation of the above-referenced General Provision, which is part of Monitoring and Reporting Program No. 94-26. As stated above, such violations are subject to administrative civil liability of up to \$1,000 per day pursuant to Water Code section 13268. The above-referenced violations related to submitting duplicated field data in self monitoring reports are subject to a maximum potential liability of \$20,000.

Total Maximum Administrative Civil Liability

The total maximum potential liability for the above-referenced violations is \$286,000. This liability amount is the sum of \$266,000 for the sampling events that occurred without formal COC procedures and without an approved SAP plus the \$20,000 for the

08-0026

20 days when duplicated field data was produced and subsequently submitted in the City's self monitoring reports.

Impact of Violations

Though both categories of violations are non-discharge violations, they do have serious impacts on the integrity of the self-monitoring and reporting program. Producing and submitting duplicated field data invalidates the analytical results linked to the duplicated field data. Sample collection, storage, and analysis without formal COC procedures and without an approved SAP, at a minimum, calls into question the validity of the analytical results provided in the self monitoring reports.

The Water Boards depend upon valid water quality data being provided in self-monitoring reports to evaluate compliance with a variety of waste discharge requirements that are intended to protect water quality for beneficial uses. The Water Boards also rely on valid water quality data to evaluate the effects of waste discharges upon receiving waters in order to assess if any adverse impacts to beneficial uses of the receiving waters are occurring or will potentially occur if corrective actions are not initiated. The type and extent of violations discussed above significantly jeopardize the Water Boards' ability to conduct the compliance and water quality impacts analysis it needs to complete in order to effectively protect the beneficial uses of the receiving waters within the Lahontan Region.

The City and United Water cooperated and coordinated closely with the Prosecution Team following issuance of the ACL Investigation Letter and NOV. Facility and compliance training and related improvements were identified to the Prosecution Team and instituted by the City and United Water, as well as significant and wide-ranging laboratory improvements, contract operation changes, and related and significant efforts to support the City's operation of its WWTP.

Rationale for Proposed Settlement

The Proposed Order represents seven months of settlement negotiations between the parties including comprehensive audits and investigations conducted by and shared among the parties. The administrative civil liability of \$143,900 is based on a logical framework developed during the negotiation process. The parties agreed early on that the City would not dispute that all 20 Category 2 violations would be assessed at the maximum penalty of \$1,000 per Water Code section 13268 for a total of \$20,000.

It was also agreed the level of egregiousness in relation to the Category 1 SAP/COC violations did not rise to the same level as the instances of duplicating monitoring reports under the Category 2 violations. As such, the parties agreed that something less than the maximum penalty for the Category 1 SAP/COC violations would be appropriate based on an analysis of the factors in Water Code section 13327. The administrative civil liability for the remaining Category 1 violations was determined by breaking up these violations into two discrete time periods; pre-United Water acquisition

period (March 2003 – July 2007) and post-United Water acquisition period (August 2007 – July 2009). These time periods refer to the acquisition by United Water of the City's previous contract operator, Aquarion Operating Services.

Incidents such as duplication of field data, overlapping sampling and well purging times, inaccurate well depths, exceeding holding times, use of incorrect analytical procedures, unacceptable sample and sample container preparation and storage, and missing signatures and times on COCs were documented throughout the period addressed by the Proposed Order (March 14, 2003 – July 31, 2009). In many cases, the City and United Water have documented a decrease in such incidents on an annual basis, especially with wastewater monitoring, when comparing the period prior to United Water being the contract operator (pre-August 2007) to the period since United Water became the contract operator (post-August 2007). In some cases, the City and United Water have documented a slight increase in the number of such incidents, such as deficient COC records, since United Water became the City's contract operator, though this number is still lower than those for the pre-United Water period. Lahontan Water Board staff anticipates permit compliance given that the City now has formal COC procedures and a SAP in use.

Based on this analysis and principled framework for the settlement discussions, a total of \$143,900 in administrative civil liability was agreed upon, with \$26,100 to be suspended based on the completion of the Enhanced Compliance Action (ECA) identified below.

Economic Benefit or Savings Resulting from the Violations

The economic benefit gained from the delayed completion of a SAP, including COC procedures, is \$1,224. This number represents the net present value of the savings accrued over the period the SAP and COC procedure completion was delayed. The City did not gain any economic benefit from the failure to collect and analyze samples for those instances where duplicated monitoring and reporting information were reported. If any economic benefit was gained, it was experienced by the subcontractor RGS and not the City or United Water as RGS did not do the requisite work to produce the required monitoring and reporting information though the City and United Water presumably paid RGS for such services to be rendered. Because the proposed settlement amount of \$143,900 is 112 times greater than the economic benefit of non-compliance, the proposed settlement recovers the economic benefit derived from the acts that constitute the alleged violations.

Enhanced Compliance Action Component

Out of the total \$143,900 in administrative civil liability, \$26,100 will be suspended pending the City's completion of an ECA. An ECA is a project that goes above and beyond bringing the City back into compliance with its waste discharge requirements and with the Water Code. ECAs allow the project proponent to implement a capital or operational improvement project that will go beyond merely bringing it back into

compliance with the terms of its waste discharge requirements. There is nothing in the State Water Board's 2002 Enforcement Policy (2002 Enforcement Policy) that limits or restricts the Water Boards' use of an ECA in the context of settling administrative civil liabilities. ECAs are not contrary to any of the enumerated provisions in the 2002 Enforcement Policy. Government Code section 11415.60 subdivision (c) states in relevant part that "[t]he terms of the settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose." Alternatively, because the ECA is an agreed upon term of the settlement, it can also be viewed as a sanction allowed in the context of settlement, a sanction that the Lahontan Water Board may otherwise lack the power to impose in a contested administrative civil liability proceeding.

Here, the City is in current compliance with its WDRs. The installation of a Water Information Management System (WIMS) is not required by the City's WDRs or Monitoring and Reporting Program, though it will assist in enhancing compliance with those requirements. Through its contract operator, the City will install a WIMS at the Barstow wastewater treatment plant (see Recitals 11 and 12 of the Proposed Order). The cost of the WIMS at the Barstow wastewater treatment plant includes costs to procure the software, install and implement the system, and troubleshoot the system. The total cost of the WIMS at the Barstow wastewater treatment plant is in excess of the \$26,100 suspended penalty amount.

Recommendation

Based on the foregoing information, the Prosecution Team, the City, and United Water collectively recommend that the Lahontan Water Board approve the Proposed Order in the total amount \$143,900 in administrative civil liability with \$117,800 paid to the Cleanup and Abatement Account and \$26,100 of the total amount suspended pending the installation of the ECA.

08-0029