



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

Public Comment  
A-2092 Hot Creek Fish Hatch.  
Deadline: 12/1/10 by 12 noon



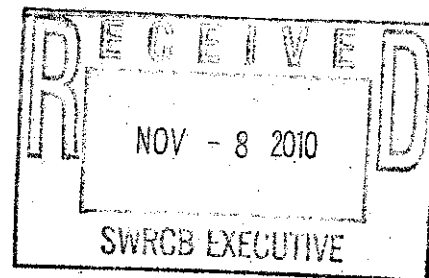
Arnold Schwarzenegger  
Governor

## Office of Enforcement

1001 I Street, 16th Floor, Sacramento, California 95814  
P.O. Box 100, Sacramento, California 95812-0100  
(916) 341-5272 • FAX (916) 341-5896 • <http://www.waterboards.ca.gov>

November 8, 2010

Mr. Charles Hoppin, Chairman  
State Water Resources Control Board  
1001 I Street, Floor 25  
Sacramento, California 95814



### RE: A-2092 - RESCHEDULED NOVEMBER 16TH BOARD MEETING

The Office of Enforcement supports Administrative Civil Liability Order No. R6V-2010-0016 adopted by the Lahontan Regional Water Quality Control Board (Regional Board) which assessed mandatory minimum penalties of \$225,000 against the California Department of Fish and Game (Discharger) and the Draft Order of the State Water Resources Control Board (State Water Board) affirming the Regional Board's Order. The imposition of penalties for effluent limit violations of the Discharger's permit is consistent with the approach taken by enforcement staff throughout the nine regional boards and the State Water Board.

In this case, putting aside the Discharger's legal argument under Water Code section 13885(j)(1)(B), the only possible means mandatory minimum penalties might be avoided is if the State Water Board reconsiders the effluent limitations in the Discharger's permit. However, there is no legal basis for such reconsideration at this stage of an enforcement proceeding. The administrative record clearly indicates that the Discharger had ample opportunity to challenge the effluent limitations at issue, either at the permit adoption stage or via a petition to the State Water Board. The Discharger, for whatever reason, did not avail itself of its legal opportunities to address the effluent limitations that are the basis of the mandatory minimum penalty action. For the purposes of a mandatory minimum penalty enforcement action, the effluent limits were valid.<sup>1</sup> As James Charlton, the Regional Board member who made the motion to impose the penalty, observed: "we just have to say the permit is the permit; and to what extent our staff might have made a mistake also, I don't want to hear that from the next permittee held before us or the following one. They've [the discharger] got to negotiate it right the first time and live with it." [Hearing Transcript, Item 10, "Consideration of An Administrative Civil Liability Order for the Department of Fish and Game for Mandatory Minimum Penalty - Hot Creek Fish Hatchery, Mono County," p. 90, line 21 to p. 91, line 2]

<sup>1</sup> It is important to note that the Regional Board did address the effluent limitation issues that caused the mandatory minimum penalty assessment by adopting a time schedule order that effectively suspended the effluent limitations at issue and, thereby, relieved the Discharger from additional penalties. The penalties at issue accrued prior to the adoption of the time schedule order.

The Office of Enforcement has been working with regional board enforcement staff to address violations that subject the dischargers to mandatory minimum penalties pursuant to Water Code section 13385. This effort has been referred to the Mandatory Minimum Penalty Enforcement Initiative. Through this statewide initiative, the enforcement staff has reduced the backlog (violations occurring prior to December 31, 2007) of unresolved MMP violations from over 12,000 to just a few thousand.

Critical to the success of the Initiative has been the overarching principal that the Water Boards have no discretion in assessing mandatory minimum penalties when the evidence demonstrates a violation of an effluent limitation. The enforcement staff throughout the Water Boards has resolved hundreds of cases prior to a formal administrative civil liability hearing because of this uniformly articulated position. As new effluent limit violations present themselves for enforcement, the Water Board staff – both prosecution and advisory – will be guided by the same rationale – there is no discretion to assess mandatory minimum penalties for specified effluent limit violations.

In our representation of regional enforcement staff in administrative civil liability hearings for mandatory minimum penalties, the enforcement actions are characterized as straight-forward proceedings based on the effluent limitations in the discharge permit. The enforcement staff is guided by the effluent limitations established in the permit as the benchmark for determining compliance. In an enforcement action, the sufficiency of that permit is not questioned and the logic and reasoning behind the establishment of the effluent limitations are not at issue. The time for raising such challenges presented itself during the tentative permit stage, the permit adoption hearing, and the petition period after permit adoption. A discharger should not be allowed to challenge the underlying permit in an enforcement proceeding as the proper time for such a challenge has lapsed.

If the State Board determines that an enforcement action is an appropriate vehicle to revisit the substantive requirements of a permit, it will have an adverse impact on future dischargers' desires to resolve mandatory minimum penalty enforcement actions without hearing. Why? Because some dischargers will now feel that the chance of getting their mandatory minimum penalties reduced on an equitable basis or having unfavorable effluent limitations reconsidered will be enough of an incentive to proceed to hearing. If the State Water Board revisits permit conditions at the enforcement stage, this may embolden other permit holders to seek review of their permit conditions in their mandatory penalty proceedings or provide a perceived excuse for noncompliance.

The mandatory minimum penalty statutes were imposed on the Water Boards because the Legislature felt that too many water quality violations were going unaddressed. The Legislature intentionally restricted the Water Boards discretion and commanded that penalties be assessed if specified violations occurred. This case falls squarely within the mandatory minimum penalty structure. While the impacts of the Mandatory Minimum Penalty statute can be harsh and uncomfortable for an adjudicatory body to impose on the discharger, there is no basis for the State Water Board to fashion a special or novel interpretation of the law to provide relief to this Discharger.

**CONCLUSION**

In imposing mandatory minimum penalties, Board Member Charlton noted "rules is rules" [Hearing Transcript, p.90, line 5]. The Discharger in this case accepted the effluent limitations in its permit. It should be expected to comply with those effluent limitations and be accountable for the legal consequences of failing to do so.

Administrative Civil Liability Order No. R6V-2010-0016 should be affirmed and the Discharger's petition denied.

If you have any questions please contact me at (916) 341-5889.

Sincerely,



Reed Sato, Director  
Office of Enforcement