

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

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ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2016-0536 (COMPLAINT)

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION  
DEUEL VOCATIONAL INSTITUTION  
WASTEWATER TREATMENT FACILITY  
SAN JOAQUIN COUNTY

PROSECUTION TEAM'S REBUTTAL ANALYSIS

**I. Introduction**

In response to the California Department of Corrections and Rehabilitation's (hereafter CDCR or Discharger) *Discharger's Legal and Technical Arguments and Analysis in Opposition to the Administrative Civil Liability Complaint (Legal and Technical Analysis)*, the Central Valley Water Board Prosecution Team submits this rebuttal analysis and continues to recommend that the Central Valley Water Board assess an administrative civil liability in the amount of \$4,037,620 for alleged violations of Waste Discharge Requirements R5-2014-0014 (2014 WDR) and Cleanup and Abatement Order R5-2015-0704 (2015 CAO). The Discharger, in opposition to our proposed administrative civil liability, contends that paying an administrative civil liability penalty without the Legislature's authority would violate Section 7, Article XVI of the California Constitution. The Discharger contends: 1) that it is now in substantial compliance with reporting requirements of the 2015 CAO, 2) that it cannot allocate monies from other appropriations or pay the proposed liability amount where monies have not been allocated for the purpose of paying such a penalty; 3) there is no economic benefit for any of the violations; and 4) that public funds would be better spent on CDCR infrastructure.

The Complaint alleges three violations: the failure to submit technical and progress reports pursuant to the 2015 CAO (Violation 1 for \$946,946), effluent limit exceedances<sup>1</sup> from January 1 through 30 April 2016 (Violation 2 for \$2,709,674), and the failure to operate and maintain its facilities and systems (Violation 3 for \$360,360). The Discharger only challenges the CAO reporting violation.

**II. Response to Technical Arguments**

The Central Valley Water Board has adopted Waste Discharge Requirements for three different types of waste generated at the Deuel Vocational Institution: the dairy, the brine holding ponds associated with the reverse osmosis water treatment plant, and the domestic wastewater treatment plant. In early 2015, CDCR was in substantial noncompliance with each of the WDRs, even though Board staff had made significant attempts to work with CDCR to achieve voluntary compliance. Therefore, in March 2015, the Assistant Executive Officer issued three Cleanup and Abatement Orders, one for each WDR. This ACL Complaint is *only* concerned with violations of WDRs and CAO associated with the domestic wastewater treatment plant.

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<sup>1</sup> These effluent limits exceedances are subject to mandatory minimum penalties; in addition, the Complaint assesses discretionary penalties.

#### A. Reverse Osmosis Plant Constructed in Response to Drinking Water and Effluent Violations

CDCR's *Legal and Technical Analysis* does not include the background as to why the reverse osmosis plant was constructed. Due in part to the high salinity of the groundwater used as the source of drinking water, the Discharger was not able to consistently comply with the effluent limits of its 2003 WDRs. As a result, CDCR paid \$222,000 in mandatory minimum penalties between 2000 and 2010.

In order to comply with its effluent limits, CDCR proposed to construct a reverse osmosis drinking water plant and an upgraded wastewater treatment plant. The reverse osmosis plant was needed for two purposes: first, to provide the inmates with water that met the primary and secondary drinking water standards mandated by the Department of Health Services and second, to discharge less saline water to the wastewater treatment plant. The reverse osmosis plant was completed in February 2010 and the wastewater treatment plant was completed in September 2010.

Since construction, the reverse osmosis plant has had a history of problems, and between April 2010 and October 2014, has only operated 33% of the time. When the RO plant is not operating, the effluent from the wastewater treatment plant causes chronic toxicity in the Deuel Drain and does not meet certain effluent limits. One of the reasons that the CAO was issued is that Board staff believed that CDCR could, and should, take additional steps to meet the wastewater treatment plant's effluent limits even when the RO plant is not operating. It is not acceptable to just continue discharging wastewater which has the potential to harm the receiving water without first taking all reasonable steps to prevent that harm.

#### B. CDCR's Failure to Maintain or Replace the Membrane Bioreactors

CDCR's *Legal and Technical Analysis* states that one reason that the membrane bioreactors were not replaced by the timeline in the CAO was that CDCR was "forced to terminate its contract with the crane supplier...during the fiscal crisis due to the Governor's Executive Order (EO S-09-08) to terminate all non-essential service contracts." This statement is not logical. Executive Order S-09-08 was issued in mid-2008 because a state budget hadn't been adopted, and was no longer in effect at the time CDCR attempted to replace the membranes. The wastewater treatment plant wasn't constructed until September 2010, and the CAO didn't require that the membranes be replaced until 1 May 2016. CDCR's argument that a 2008 Executive Order and lack of a crane prevented it from maintaining or replacing the membrane bioreactors is nonsensical. It was CDCR's lack of planning and poor internal communication that prevented it from hiring the crane needed for both the yearly maintenance and replacement of the membranes, which resulted in continuing violations of its effluent limitations.

#### C. Need for Funding

CDCR's *Legal and Technical Analysis* states that the Legislature appropriates funds for each prison and implies that it could not complete the work required by the CAO nor pay a penalty because funds are not available. However, prior to issuance of the CAO, Board staff met with CDCR multiple times and provided a draft of the Order for CDCR's review and comment. There is nothing in the record to show that CDCR expressed concern about needing funding from the Legislature to complete the work, and nothing in the record to show that CDCR asked the Legislature for additional funds to complete the items required by the CAO. It is the Prosecution Team's experience throughout this process that there was a disconnect between the staff at the Deuel Vocational Institution, CDCR's engineering branch, and top decision makers. Given this disconnect, the work required by the CAO was not completed. It appears to have nothing to do with a lack of funding by the Legislature for this particular project.

CDCR states "the Legislature has not appropriated sufficient funds for DVI either to correct the plant deficiencies or to pay such penalties." As stated above, there is no evidence in the record that CDCR has asked for the funds to correct the plant deficiencies, and now CDCR states that there are not appropriate funds to correct the problems at the wastewater treatment plant. If there aren't available funds, and none have been requested, then how and when will CDCR correct the problems at its wastewater treatment plant such that it complies with its WDRs?

D. Submittal of Outstanding Reports Does Not Mean That CDCR Complied with Intent of CAO

The *Legal and Technical Analysis* puts great emphasis on the fact that CDCR has now submitted all of the outstanding progress reports and most of the outstanding technical reports. However, the purpose of the progress reports was for CDCR to report on an on-going basis its progress with making the improvements required by the CAO. It was also designed to keep CDCR on track; by submitting quarterly updates, CDCR would therefore be required to review the CAO to see what needed to be done. The lack of timely progress reports coupled with the failure to make timely facility improvements meant that CDCR kept discharging wastewater in violation of its permit. The mere submittal of a document titled "progress report" a year after it was due in no way means that CDCR complied with the intent of the CAO, namely, to make improvements such that the wastewater treatment plant would properly operate and would discharge wastewater meeting the effluent limits.

E. CDCR 's Internal Breakdown in Communications Persists

Prior to issuance of the CAO, Board staff identified the lack of coordination between facility staff, CDCR engineers, and top management as one reason that CDCR was not properly operating and maintaining the wastewater treatment plant. In its *Legal and Technical Analysis*, CDCR states that since the ACL Complaint was issued, "CDCR headquarters staff has worked diligently with DVI staff to resolve those issues and put systems in place to ensure timely and complete reporting and better communication with the Board in the future." However, the situation does not appear to be any better now than it was in the past.

For example, since the ACL Complaint was issued, Mr. Gregor Larabee, Chief of Environmental and Regulatory Compliance of CDCR, contacted Regional Board staff on several occasions regarding resubmitting the CAO's technical and progress reports. On numerous occasions, Mr. Larabee indicated to Board staff that he's having challenges communicating and seeking approval from DVI's operations and engineering staff on revising deliverables required by the CAO. Most recently, in regard to the updated operations and maintenance (O&M) manual required by the CAO, Mr. Larabee stated that the O&M manual could have been completed quicker if the communication lines between him, DVI management, and the CDCR engineering team would have been more "open." The O&M manual, due by 1 May 2016, has not been submitted and DVI stated on 22 July 2016 that they would have it completed and to the Regional Board by 15 September 2016. Mr. Larabee stated on Monday, 12 September 2016, that the O&M manual will be received by Regional Board staff closer to 15 October 2016 due to the lack of internal communication.

F. Listing of Funds Spent for Improvements Is Beyond Scope of CAO

The Prosecution Team agrees that CDCR has many problems with its reverse osmosis drinking water plant. However, the intent of the CAO was for CDCR to make improvements at its wastewater treatment plant so that it would produce wastewater that meets effluent limits and is not toxic. CDCR's *Legal and Technical Analysis* lists the money spent since 2011 on various projects. It is noted that the CAO was not issued until 2015, so the money spent, and projects completed, prior to that time are not germane to this argument. In addition, many of the projects listed are not required by the CAO (i.e., the

toxicity reduction evaluation and report of waste discharge are required by the NPDES permit, while the brine pond closure is required by the Title 27 WDRs) or are required by other agencies (i.e., the water plant operation reliability study was required by the Division of Drinking Water). It appears that CDCR is trying to get credit for all funds spent since 2011, and is not grasping the fact that it was not allocating sufficient funds for its wastewater treatment plant.

#### G. Funds Better Spent on Infrastructure

CDCR states that instead of paying a penalty for its failure to comply with the CAO and WDRs, the money would be better spent on infrastructure. In fact, it would be. Funds collected through administrative civil liability complaints are directed to the State Water Board's Cleanup and Abatement Account. The money in this account can then be used for various water quality improvement projects. For the last several years, all money within the Cleanup and Abatement Account has been used to pay for drinking water infrastructure upgrades in communities whose water supplies have been adversely impacted by the drought.

#### H. Request for an Enhanced Compliance Project

Enhanced Compliance Actions (ECAs) are allowed during settlement only. The Prosecution Team is open to discussing the Discharger's proposal during settlement discussions.

### **III. CDCR has the Ability to Pay the Proposed Liability and CDCR is Legally Obligated to Pay an Administrative Civil Liability Imposed by the Central Valley Water Board.**

The Discharger contends that it is not able to pay the proposed administrative civil liability because it cannot legally take money from other appropriations or pay in excess of what the budget provides to cover the proposed liability as doing so would violate Section 7, Article XVI of the California Constitution<sup>2</sup>. The Prosecution Team asserts the payment of penalties for violations of water quality protection laws at a CDCR facility is generally related to an operating expense or general expense budget from CDCR's current budget which can be allocated to pay the proposed liability. If not paid for under the CDCR's budget, CDCR is legally obligated pursuant to relevant Water Code provisions to pay any administrative civil liability by seeking an appropriation from the Legislature to cover the penalty.

The Discharger's interpretation that Section 7, Article XVI of the California Constitution prohibits the allocation of monies towards an environmental fine is dubious. It cannot have been the intent that a state agency could refuse to pay debts owed to the people of the State of California for violating laws that protect our waters. The Discharger cites no legal authority for its interpretation. While it is true that without an appropriation, CDCR cannot pay its bills, it is incomprehensible to so narrowly construe this Constitutional provision to exclude monies used to pay penalties for failing to obey the law. The California Supreme Court has found that an appropriation need not specifically refer to a particular expenditure to be available for payment. (*Mandel v. Myers*, (1981) 29 Cal. 3d 531, 543.) The Court in *Mandel* found that "operating expenses and equipment" as defined in the 1978-1979 Budget Act was broad enough to cover court-awarded attorney fees. *Id.* Similarly here, the proposed penalty, if adopted by the Central Valley Water Board, could potentially be paid from CDCR's operating expense budget. This is consistent with the principle that if in the normal course of business CDCR runs afoul of state law requirements, associated penalties assessed are reasonably related to a general expense

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<sup>2</sup> Section 7, Article XVI of the California Constitution provides, "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant."

and/or operating expenses in the state's General Fund appropriations for CDCR<sup>3</sup> which totals \$6.5 billion dollars for FY 2016-2017. (see *California School Boards Assn. v. State* (2011) 192 Cal.App. 4<sup>th</sup> 770, 801 affirming that a court may compel the Legislature to "appropriate expenditures from already existing funds . . . and the purposes for which those funds were appropriated are generally related to the nature of costs incurred.")

It is expected that when a state agency violates a law, it, much like any other entity, must pay an assessed penalty. The Legislature intended for a state agency to be subject to administrative civil liability when it identified "the state" as a "person" in the Water Code. (Water Code section 13050.) To contend that a state agency is immune from state laws protecting the resources of the people of California is implausible. Where the Discharger contends that its hands are tied by Section 7, Article XVI of the California Constitution, Water Code sections 13323, 13050 and 13385 explicitly require CDCR to pay a penalty for the violations alleged in the Complaint. Where the plain language in the Water Code requires CDCR to pay an administrative civil liability penalty, the Discharger is obligated to the people of the state of California for the liability adopted by this Board. Whether the monies are from CDCR's budget or require a specific appropriation from the Legislature, that is CDCR's prerogative.

The Discharger's impossibility argument is not compelling where it and other state agencies have paid water board penalties in the past. In 2014 Caltrans paid \$2,108,281 when this Board adopted ACLO R5-2014-0568. CDCR has paid a total of \$423,000 for mandatory minimum penalties for effluent limit violations of its NPDES permit for DVI's facility (see Orders R5-2010-0549, R5-2011-0575, R5-2014-0050, R5-2014-0518, R5-2016-0523, R5-2010-0526, R5-2009-0057, R5-2009-0518, R5-2008-0578, R5-2014-0141). As a responsible public agency, the Discharger must fulfill its obligations to the public by either allocating expenditures in its budget or seeking an appropriation from the Legislature to satisfy debts incurred while operating its facilities.

#### **IV. CDCR Accrued an Economic Benefit of Noncompliance of at least \$2,084,774**

The Discharger contends that there was no accrual of economic benefit through noncompliance where it is not a "profit-making" enterprise and that it cannot "pass the penalties on to the inmates served by its water systems." (Discharger's Legal Arguments, p. 3.) The Discharger's explanation and analysis does not support the ultimate assertion that there is no economic benefit. Economic benefit is defined as "any savings or monetary gain derived from the act or omission that constitutes the violation." (State Water Resources Control Board Water Quality Enforcement Policy, May 20, 2010, p.20.) It represents the "financial gains that a violator accrues by delaying and/or avoiding such pollution control expenditures." (BEN User's Manual<sup>4</sup>, pp. 1-2.) By delaying compliance, for instance, a discharger can earn a return on monies that should have been allocated for a capital investment or expenditure for pollution control. Essentially, economic benefit calculates the amount a discharger is better off from not having complied with environmental requirements in a timely manner. A penalty higher than economic benefit can eliminate the economic incentive for a discharger to violate the law again. EPA designed an interactive computer program called BEN which calculates economic benefit for many types of

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<sup>3</sup> To the extent that the Discharger limits its ability to pay analysis to DVI's operations allocation only, an analysis based on this one facility is incomplete where all monies and appropriations for the Department should be evaluated for a complete ability to pay analysis.

<sup>4</sup> BEN User's Manual dated September 1999, Office of Regulatory Enforcement, United States Environmental Protection Agency, available at:

[http://www.waterboards.ca.gov/water\\_issues/programs/ocean/docs/wqplans/benmanual.pdf](http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/wqplans/benmanual.pdf)

organizations including, corporations, partnerships, sole proprietorships, not-for profit organizations, municipalities, etc.<sup>5</sup>.

The Discharger appears to set forth the argument that the economic benefit of noncompliance accrues only for for-profit organizations. This is false. One that delays or avoids spending money on environmental compliance measures receives an economic gain regardless of whether that organization is a for-profit, non-profit, or government agency. EPA's BEN model is specifically designed to calculate the economic benefit of noncompliance for various types of entities regardless of whether the organization functions for a profit. So, it is unnecessary and irrelevant to contemplate assessing a user fee against inmates to cover the proposed liability as put forward by the Discharger.

It is estimated that CDCR would have needed to incur approximately \$5,879 in labor expenses to produce the required reports detailed in the Complaint. At the time of issuance of this complaint, several of these reports (if not all) remained outstanding such as preparation of an adequate Operations and Maintenance Plan, and updates to the facility's standard operating procedures. Preparation of these documents is estimated to be approximately \$5,226 in labor expenses. Procurement of spare parts for the reverse osmosis plant is also an expectation that was to be documented in the RO Plant Spare Parts Status Report. To date, the Discharger has not secured spare parts indicated in communications with the Regional Board. Based on those communications, the spare parts totals approximately \$250,000, and are still vital to ensure continuous operation.

In addition to reporting, proper maintenance practices are essential to prolong plant equipment life and prevent effluent violations. DVI's use of a membrane bioreactor (MBR) unit warranted routine inspection and cleaning of the membranes. This maintenance activity requires the use of a crane to physically remove each membrane module annually at a minimum. Failing to perform this critical maintenance causes damage to the membrane, resulting in reduced efficiency and longevity. The Discharger's failure to adequately perform this activity significantly contributed to effluent violations documented in the Complaint. It is estimated that the Discharger avoided annual maintenance expenses of approximately \$7,656 based on approximate labor and equipment expenses necessary to perform the tasks.

In addition, the lack of maintenance likely decreased the replacement cycle for the membrane modules. The manufacturer provides a 24 month warranty on the modules assuming they are properly cleaned and maintained. A properly maintained membrane is expected to last longer than this period; however, it is assumed that the DVI membrane modules' replacement cycle was significantly reduced due to solids accumulation observed during several inspections from 2011 to 2013. Therefore, a two year replacement cycle was used to estimate avoided replacement expenses. Based on quoted costs provided by GE Water & Process Technologies to DVI in April 2015, each two-year replacement event is estimated at approximately \$860,000. Based on the first observed membrane issues, initial membrane replacement is assumed to have been necessary in September 2012.

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<sup>5</sup> See BEN User's Manual dated December 1993, Office of Regulatory Enforcement, United States Environmental Protection Agency, available at:

<https://nepis.epa.gov/Exe/ZyNET.exe/P100F7TQ.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1991+Thru+1994&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmiQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C91thru94%5Ctxt%5C00000028%5CP100F7TQ.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL>

The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit of noncompliance. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately \$2,084,774. The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides meaningful deterrent to future violations." Therefore the minimum total liability associated with the economic benefit is approximately \$2,293,251. A penalty that recovers at least economic benefit places the Discharger in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness necessitate that the proposed penalty be imposed here to ensure that the Discharger is economically worse off than had CDCR obeyed the law.

## **V. Conclusion**

For the foregoing reasons and those previously discussed in the Complaint, Attachment A, and the Prosecution Team's Legal and Technical Analysis, we continue to support the imposition of the proposed liability.