

February 28, 2014

VIA EMAIL

Mr. Dane Johnson
Senior Engineering Geologist
Central Valley Regional Water Quality Control Board
1685 E Street
Fresno, CA 93706

Re: Comments on the Administrative Draft Cleanup and Abatement Orders
Client-Matter No. 43792.00000

Dear Mr. Johnson:

Our firm has been retained to assist Valley Water Management Company ("VWMC") with threatened enforcement actions, such as the recently proposed draft Cleanup and Abatement Orders ("CAOs") for the Race Track Hill Facility and for the C-Plant, Fee 34 Facility, both in the Edison Oil Field in Kern County. In relation to VWMC's November 2013 responses to Notices of Violation ("NOVs") for these facilities, our understanding is that VWMC requested permit modifications and/or a Time Schedule Order ("TSO") or other approved schedule that would provide VWMC with adequate time to conduct and complete a thorough site investigation to determine the area's background hydrogeology, identify applicable beneficial uses and background quality of ground water within and near the facilities so that updated waste discharge requirements ("WDRs") could be specifically tailored to the local site specific conditions. Permits for these sites have apparently not been modified for decades since 1958 and 1992, respectively. In its NOV responses, VWMC also made the following statement:

VWMC is committed to maintaining facilities that are compliant with state requirements to protect useable groundwater, but since the current WDRs have been acknowledged for decades by the Regional Board to be outdated, VWMC would rather proceed in a cooperative manner to move forward with adopting new more applicable WDRs, than in an adversarial manner fighting through a contentious enforcement action.

To this end, VWMC took the initiative to move forward with a work plan for site investigations to determine what, if any, impacts these facilities have had on the local useable groundwater during the decades of operations at these sites. VWMC met with you and other Regional Water Quality Control Board for the Central Valley Region – Fresno office ("Regional Board") staff last month, on January 14, 2014, to ask the Regional Board for its technical input on the

proposed work plans for each site so that this cooperative approach could move forward. However, instead of a cooperative approach, the Regional Board is now proposing the issuance of two prescriptive CAOs for these facilities.

VWMC believes that CAOs, or even TSOs, are not necessary and may be counterproductive in this case by slowing down the investigation to wait for work plan approvals. Upon notice by the Regional Board, VWMC quickly corrected several of the issues raised in the NOV's for its other sites. With the Regional Board's input during several meetings, VWMC has also voluntarily begun drafting and instituting a work plan for these two sites to determine the nature and extent, if any, of local groundwater degradation. At this point, no evidence exists to support the draft CAOs' allegations that any groundwater degradation has actually occurred. Nevertheless, VWMC has demonstrated its willingness to investigate the situation further, which could be done with a less controversial enforcement vehicle, such as continuing voluntarily with Regional Board oversight or proceeding under a 13267 letter or order. The proposed CAOs will inevitably delay the implementation of the site investigation due to their requirement that a work plan be submitted and approved prior to implementation. An investigation that would have begun in earnest much sooner would be delayed by the CAO or TSO approval process. Further, the CAOs will dramatically increase the costs of the investigation, and may create a situation where VWMC is forced to challenge, appeal and/or request a stay of the terms of the CAOs that contain unsupported and inaccurate allegations.

While VWMC has no issues with Regional Board oversight, VWMC has finite resources and would prefer to focus its limited resources in a step-wise manner as anticipated by the State Water Resources Control Board's Enforcement Policy by first conducting an investigation to determine what if any issues exist and then applying those resources to resolving the issues in the most economical, yet environmentally sound, manner. A voluntary approach is the most economical and retains the full enforcement powers of the Water Board if those voluntary efforts wane or cease, or if substantial groundwater degradation is discovered. To this end, we request that the Regional Board reconsider the issuance of CAOs and we have provided the attached redline versions of the draft orders retooled as 13267 Orders for your convenience.

We understand that there are pressures on the Water Boards to deal with oilfield wastes, but we also understand that the Regional Board has a history of embarking on collaborative approaches to dealing with salinity issues, such as the ones at these facilities. One impetus for the CV-SALTS program was to address salts more globally instead of focusing on enforcement actions against individual entities that are just one piece of a larger salinity puzzle in the Central Valley Region.

As recognized by the Tulare Lake Basin Plan, "[n]o proven means exist at present that will allow ongoing human activity in the Basin and maintain groundwater salinity at current levels throughout the Basin. Accordingly, the water quality objectives for ground water salinity control the rate of increase" and the Salinity objective specifies the maximum average annual increases allowed in different hydrographic units in the Basin. (See Tulare Lake Basin Plan at p. III-8.)

Until we have more information, there is no way of determining whether any discharges to land at the Race Track Hill and Fee 34 facilities have caused exceedances above the allowances set forth in the Basin Plan. All VWMC asks for is a process moving forward that allows these investigations to proceed without contentious enforcement orders being issued stating that all discharges of wastewater that exceed concentrations referenced in the current (yet outdated) WDRs and that “unauthorized” discharges must cease when such discharges may actually be authorized if not adversely affecting the environment and are in compliance with the narrative and numeric salinity objectives in the Basin Plan. (*See accord* Order No. 92-110 at p. 5, Provision B.2.c.)

VWMC is hopeful that it can work cooperatively with the Regional Board staff to focus the attention on the planned site investigation instead of arguing over the language and applicability of CAOs. VWMC understands that a CAO may be needed in the future if the investigation demonstrates adverse impacts to beneficial uses. However, VWMC thinks CAOs are premature at this time. In the event that VWMC’s request is not accepted, VWMC provides the following comments on the draft CAOs and requests that this matter be heard by the Regional Water Board.

Issues Common to Both CAOs:

1. CAOs are premature in this case because there is no evidence of any groundwater, soil, or surface water contamination caused by these facilities. Without evidence of contamination, pollution, or nuisance, there is nothing to cleanup or abate. An order should not be issued to halt these discharges that have been occurring for decades (without any complaints of groundwater contamination from local landowners or water users) until there is evidence that there is a problem.
2. VWMC has acknowledged that what is needed is an investigation to characterize the releases from the site and the effect of those discharges, if any, on groundwater, soil, and/or surface water. As stated previously, that can be done through the currently planned voluntary investigation, or can occur as the result of a Water Code section 13267 letter or order. Since VWMC is already drafting and planning to implement this work plan, it is unclear why any enforcement action is needed at all until the results of that investigation are completed. Therefore, VWMC requests that it be authorized to proceed with its voluntary investigation First Phase Work Plan discussed with the Regional Board staff on January 14th and February 21st. Alternatively, 13267 Orders should be issued instead of CAOs. To facilitate the 13267 alternative, VWMC has provided draft orders for the Regional Board’s use that modify the language from a CAO to a 13267 Order.¹

¹ It should be noted, however, that even if the Regional Board proceeds with the issuance of CAOs, VWMC would still request that many of the editorial changes in the attached redlines be made.

3. The language in the draft CAOs in the “IT IS HEREBY ORDERED” portion appear to indicate that VWMC must immediately cease discharges of high salinity water while the required investigations are undertaken. This portion of the CAOs is not feasible as it would require shutting down not only the facilities, but also the entire portion of the Edison oilfield served by these facilities. We have proposed changes to this language that at the minimum must be made to these orders.
4. Many of the findings in the proposed orders presume degradation when there is no evidence to support these allegations. A decision of a State agency, such as the Regional Board, must be in writing, and include a statement of the factual and legal basis for each decision. (Gov. Code, §11425.10(a)(6); §11425.50(a).) The agency must undertake a detailed analysis of the evidence in the record and the applicable legal factors or standards, and must set forth its determinations in writing to make clear how it undertook its analysis and reached its final conclusions. (*Id.*) Thus, findings in any order must “bridge the analytical gap between the raw evidence and ultimate decision or order.” (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974).)

The Regional Board must adequately consider all relevant factors and evidence, and demonstrate a rational connection between those factors/evidence, the choices made, and the purposes of the enabling statutes. (*See California Hotel & Motel Ass'n v. Industrial Welfare Comm.*, 25 Cal.3d 200, 212 (1979).) The level of detail that must be included in the Regional Board’s consideration of the statutorily mandated factors is governed by a rule of reason. However, it must be reasonably clear that the Regional Board addressed all available evidence and each of the mandatory factors and traveled the “analytical route” contemplated under *Topanga*. (*See Department of Corrections v. State Personnel Board*, 59 Cal.App.4th 131, 151 (1997); *City of Carmel by the Sea v. Bd. of Supervisors*, 71 Cal.App.3d 84, 93 (1977) (held written findings of fact were insufficient as a matter of law because they were merely a recitation of the statutory language).)

Further, specific requirements regarding the factual basis must be followed, including “a concise and explicit statement of the underlying facts of record that support the decision.” (Gov’t Code §11425.50(b); applicable through 23 C.C.R. §648(b).) The Regional Board’s draft CAOs fail to meet these requirements. Without the requisite analysis and a transparent view of the evidence and analytical route followed, the Regional Board violates the requirements needed for a valid final decision.

The level of detail that must be included in the Regional Board’s consideration of the evidence and the factors required by statute and under the Enforcement Policy must clearly demonstrate the “analytical route” traveled in making its ultimate decision. (*See Department of Corrections, supra* at 151.) It is insufficient for the Regional

Board to simply include unsubstantiated findings without supporting evidence. The Regional Board must make findings based on evidence in the record and may not make findings without supporting evidence. (*See City of Carmel-by-the-Sea, supra*, at 93; *see also accord* Cal. Code Civ. Proc. §1094.5(b)(defining “abuse of discretion” where “the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.”).) Until actual evidence of contamination, pollution, or nuisance exists, findings on these topics are premature and unsupported, and should be removed from these orders.

5. The orders must recognize the need for a phased investigation. If the first phase yields no adverse impacts from the discharges at issue, then additional investigation may be unnecessary.
6. Similarly, the orders should not prejudice what needs to be monitored beyond salinity and instead should recognize that VWMC has put together a Sampling and Analysis Plan (“SAP”) to adequately characterize the discharges in relation to salinity, which is the permit violation alleged.
7. Requiring monthly technical reports seems excessive in this instance and VWMC requests that any reporting be done quarterly, if not a longer time increment.
8. The orders should not authorize inspection and entry by anyone other than the Water Boards. There is no need for Kern County or the U.S. EPA to be included in this authorization since there is no county or federal permit implicated in this order. Adding this authorization exceeds the legal jurisdiction of the Regional Board.
9. The paragraphs on “Cost Reimbursement” addressing costs incurred by the Water Boards to investigate or remediate unauthorized discharges of waste are unnecessary as VWMC has committed to conduct the necessary investigations and will undertake necessary remediation if adverse impacts of any previous or on-going discharges are adversely affecting beneficial uses or violating applicable water quality objectives.
10. The requirements related to “Waste Management” are unnecessary as this order should be focused solely on investigation at this time, which will not result in any contaminated soils or groundwater that need to be managed. As with other proposed requirements, this section is premature until there has been a determination made that contamination actually exists that was caused by these facilities.
11. Because VWMC was willing and had already drafted a First Phase Work Plan for implementation prior to these orders, and because there is no unauthorized discharge or no evidence of polluted groundwater in need of clean up at this point, there should

be no need for Regional Board staff “Oversight Reimbursement” under Water Code section 13304. Further, the Water Board’s staff cost recovery methodology and implementation has recently been called into question by the State Auditor. In State Audit Report 2012-120, the Auditor stated that the Water Boards lack a systematic method for tracking the hours that staff spend on enforcement activities and do not maintain sufficient documentary support to justify these staff enforcement cost calculations. Although these findings were made in the context of 401 Certification actions, the conclusions apply with equal force to all staff cost recovery by the Water Boards. Office of Enforcement attorneys have been instructed *not* to seek to recover staff costs in certain water quality enforcement actions until further notice and until additional actions have been taken to institute a clear and consistent methodology to calculate program-specific staff costs and develop a timekeeping system to allow more auditable staff costs for enforcement actions along with specific directions on when and how to account for enforcement costs. (*See accord* Report 2012-120 Recommendation 6 Responses at <http://www.bsa.ca.gov/reports/responses/2012-120/6>.)

12. Table 1 contains excessive analytes, which are not regulated by the WDRs and will substantially increase the costs of the initial investigation without any evidence that monitoring for these other constituents is necessary and will provide additional value. There is currently no need for evaluating a full suite of analytes until we know whether any discharges have reached groundwater or what levels of Electrical Conductivity (EC), Chloride, and Boron are present in groundwater.

Issues on the Race Track Hill Facility Order:

1. Paragraph 3 fails to recognize the role of evaporation in the facility’s disposal process, or that the irrigation at the site beneficially increases the site’s vegetation.
2. Paragraph 5 as currently written misconstrues the language of Resolution 58-349 and is also inconsistent with the interpretation in the facility’s 1996 Inspection Report that noted “[w]ater is also discharged to one of the canyons through sprinkler irrigation” and acknowledged that “wastewater exceeds the numerical limitations.” However, since the discharge did not extend beyond the disposal area in Section 24 authorized for unlined percolation sumps, “no violations of WDRs No. 58-349 were observed.”
3. Paragraph 7 ignores the actual language of the salinity objective in the Basin Plan, which allows for increased groundwater salinity levels over time.
4. Paragraph 9 ignores the express findings in Resolution 58-349 regarding “no freshwater producing wells in this vicinity.”

5. Paragraph 11 fails to recognize that the Basin Plan at page IV-15 recognizes that “Discharges of oil field waste that exceed the above maximum salinity limits may be permitted to unlined sumps, stream channels, or surface waters ...” (Emphasis added.) Further, as set forth in the modifications to Paragraph 5, Resolution 58-349 allows higher salinity discharges so long as they do not leave Section 24, and do not result in the pollution of surface or underlying ground water, or create a public nuisance. Currently, there are no facts to support allegations of pollution or nuisance from discharges at this facility.
6. Paragraph 11 also fails to recognize that the salinity levels in the recent samples cited were less than those initially measured at these facilities.
7. Paragraph 15 uses the phrase “downgradient” that is undefined. It is unclear whether this term is being used to mean downslope, downgradient in relation to groundwater, or refer to surface waters (which would be contrary to Finding 2). We suggest this term be removed.
8. Paragraph 16 assumes facts that have not been demonstrated. There is no evidence that any salinity discharges have left Section 24. Further, in almost all cases, major storms result in an influx of abnormally low salinity water to rivers and streams so this part needs to be removed as unsupported by any evidence.

Issues on the Fee 34 Facility Order:

1. Paragraph 3 needs to reference the fact that the Regional Board has been aware of the salinity levels of the water at this facility since the 1992 WDRs were adopted. VWMC has proposed language to reflect this fact.
2. We understand that the first sentence in Paragraph 6 was added in error and have proposed removal of that sentence. If the Regional Board does have information on water wells in the vicinity of this or the Race Track Hill facility, VWMC requests that this information be provided to Larry Bright at VWMC.
3. Paragraph 8 fails to recognize that the Basin Plan at page IV-15 recognizes that “Discharges of oil field waste that exceed the above maximum salinity limits may be permitted to unlined sumps, stream channels, or surface waters if the discharger successfully demonstrates to the Regional Water Board in a public hearing that the proposed discharge will not substantially affect water quality nor cause a violation of water quality objectives.” (Emphasis added.) Similarly, Order No. 92-110 at Provision B.2.c. allows dischargers to make a similar demonstration to avoid application of the general limitations. VWMC attempted to make this demonstration in 1996 and specifically requested “a public hearing before the Regional Water Quality Control Board” to demonstrate that these facilities did not and do not pose a

threat to groundwater quality. (See Letter from Larry S. Bright to William Pfister, Regional Board (May 24, 1996).) No hearing was ever offered to VWMC to allow it to make the necessary demonstration. These facts should be recognized in the order.

4. VWMC proposes adding new paragraphs 9 and 10 to provide facts related to the previous investigative report submitted to the Regional Board in 1996 which determined that this facility “does not pose a threat to ground water quality and that no further action should be required for continued operation of the site.” (*Id.*) That same transmittal letter stated “[i]f a public hearing is necessary to demonstrate that this facility does not pose a threat to ground water quality,” such a hearing was requested. Additional facts about this report being received by the Regional Board, but never acted upon should also be added and are proposed in the attached redlined order.
5. This order references “sprayfields” that do not exist at this facility. Such references to spray fields must be removed.
6. This order also references “surface waters” when there is no evidence that any discharges from this site reach surface waters.

VWMC urges the Regional Board to accept VWMC’s suggestion to defer the issuance of CAOs until there is actual evidence of environmental degradation in need of clean up and abatement. The State Water Board’s Enforcement Policy sets forth a process for ranking enforcement priorities based on the actual or potential impacts to the beneficial uses and for using progressive levels of enforcement, as necessary, to achieve compliance. (See Enforcement Policy at p. 1 (2010).) The Enforcement Policy also recognizes:

“Tools such as providing assistance, training, guidance, and incentives are commonly used by the Water Boards and work very well in many situations. There is a point, however, at which this cooperative approach should make way for a more forceful approach.” (*Id.*)

VWMC does not believe that the point at which a cooperative approach is not working has been reached. Therefore, a more forceful approach of issuing CAOs is not currently warranted. VWMC urges the Regional Board to continue with a more cooperative approach since VWMC has demonstrated its willingness to conduct any needed investigations to determine any impacts its operations may have had on local groundwater. To this end, VWMC plans to formally submit the First Phase Work Plan, which has already been discussed twice with the Regional Board, by March 10th and hopes that this can be quickly approved for immediate implementation.

Please contact me if you or your counsel have questions or concerns related to these comments or if you would like to have a meeting to discuss VWMC’s legal issues with the draft CAOs. We also hope that Regional Board staff and VWMC’s staff and consultants can continue to discuss

issues related to the First Phase Work Plan to keep implementation moving forward while legal issues are dealt with separately.

Respectfully submitted,



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