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BEFORE THE CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD FOR THE CENTRAL VALLEY REGION

IN THE MATTER OF:

CONSIDERATION OF ADMINISTRATIVE
CIVIL LIABILITY,

BREITBURN OPERATING, LP.

**BRIEF REGARDING CONSIDERATION
OF ADMINISTRATIVE CIVIL LIABILITY**

Clifford & Brown is counsel for BREITBURN OPERATING, L.P. (“Breitburn”), and on its behalf are submitting the following comments on the noticed hearing to consider the issuance of an Administrative Civil Liability (“ACL”).

I.

INTRODUCTION

The primary issues at hand relate to the number of alleged unpermitted discharges to land in violation of California Water Code (“Water Code”) § 13350¹ and the application of Water Code § 133050(e)(2)². As set forth in greater detail, below, Breitburn contends that there is no direct

¹ Unpermitted discharges to land.

² “The state board or regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with §13323) of Chapter 5 either on a daily basis or a per gallon basis, but not on both. (2) The civil

1 evidence of any inappropriate discharge and that it could have discharged no more than 40 barrels of
2 fluids (consisting primarily of produced and fresh water) to earthen sumps at two of its wells. Based
3 upon the indirect calculated methodology contemplated, Breitburn has determined that the amount of
4 the discharge at the two wells would have been less than 20 barrels of fluids. Utilizing the per
5 number of gallons discharged methodology set forth in Water Code § 133050(e)(2), and assuming the
6 maximum penalty of 10.00 per gallon [this is generous under the circumstances] is applied,
7 Breitburn's maximum penalty should be no more than \$12,600.00 [31.5 gallons per barrel x 40
8 barrels x \$10.00 = \$12,600.00]. Breitburn asserts that the "per day" calculation should not be utilized
9 inasmuch it has already been determined that there is an absence of protected water in the area of
10 Breitburn's Dow Chanslor Lease.

11 The Settlement Agreement, although rejected by the Advisory Team in order to seek the
12 Board's Guidance, contained a penalty amount far in excess of the maximum penalty outlined above,
13 to wit, \$67,700.00. The Enforcement Team applied the Enforcement Policy and the recommended
14 penalty assessment as applied to Breitburn represents an amount that is much greater than warranted.
15 Breitburn accepted the penalty in an effort to cooperate with the Board and reduce the secondary
16 costs associated with challenging the original penalty amount.

17 II.

18 FACTUAL BACKGROUND

19 Breitburn operates the lease known as the Dow Chanslor lease located in the north and south
20 Belridge Oil Fields in Kern County, California. Breitburn submitted a request to the Water Board in
21 April 2014 seeking an exemption from ground water monitoring requirements described in California
22 Senate Bill SB4. Breitburn sought to stimulate 32 wells located on the Dow Chanslor lease.
23 Breitburn received approval of the exemption in written correspondence dated May 2, 2014.

24 Breitburn received a §13267 order seeking information concerning discharges of drilling
25 fluids and completion/work over fluids issued by the Board in late 2013. Breitburn responded the
26 Order by providing information responsive to the Order. Breitburn initially determined that it had
27

28 liability on a per gallon basis shall not exceed ten dollars (\$10.00) for each gallon of waste discharged.

1 potentially discharged fluids into unlined sumps. The Water Board issued a notice of violation on
2 May 21, 2014 seeking to clarify information about the reported discharged from 24 wells. Breitburn
3 responded to the second order. Breitburn conducted a further analysis of the records for the 24 wells
4 and determined that the calculated discharges could have occurred at six wells. Breitburn further
5 determined that the discharges could not have exceeded 20 barrels at each well. For purposes of
6 resolution, and even though there is no direct evidence of actual discharge, Breitburn was prepared to
7 stipulate to the 20 barrels multiplied by six wells.

8 Breitburn has continued to refine its analysis of the alleged discharges by reviewing the well
9 reports for each well. Breitburn has concluded, based upon its in depth analysis of its documentation
10 that the true number of wells where discharges may have occurred is two and that no more than 20
11 barrels of fluid was discharged at both sites for a maximum possible discharge of 1,680 barrels. The
12 reason the figure has been refined is based upon Breitburn determining that references in the records
13 to discharges to the “pit” meant discharging to a steel tank – not to unlined sumps.

14 The Advisory Team rejected the Settlement Agreement and instructed the Prosecution Team
15 to schedule the matter for Board consideration.

16 III.

17 LEGAL ANALYSIS

18 The State Water Resources Control Board adopted the Water Quality Enforcement Policy
19 (“Enforcement Policy”) to provide guidance in determining penalty assessments pursuant to Water
20 Code § 13327 and 13385(e). The Enforcement Policy in Section VI, Monetary Assessments in
21 Administrative Civil Liability (ACL) Actions provides a penalty calculation methodology.

22 The Penalty Calculation Methodology (“Methodology”) contains a complex array of factors to
23 consider when determining the appropriate penalty amount. In a discharge situation, the penalty is set
24 forth in §13323 which gives the board the option of calculating the penalty based upon a per gallon
25 (\$10.00) or number of days (\$5,000.00) calculation.

26 The Methodology utilizes a ten step process to determine the final liability amount.

27 A. Enforcement Policy Penalty Calculation Methodology Analysis

1 **a. Factor 1 – Harm or Potential Harm to Beneficial Use**

2 The violation and proposed penalty assume a discharge to six unlined sumps. As noted above,
3 Breitburn has performed an in-depth analysis of its well files and records and has determined that the
4 discharge was at most only possible at two wells and amounted to no more than 20 barrels at each
5 site. As noted in the Analysis of Enforcement Policy Penalty Methodology prepared by the
6 Enforcement Team, the area where the discharge took place is subject to an exemption for ground
7 water monitoring because the ground water is poor. When the small discharge (just 1,680 gallons)
8 and the quality of the ground water (poor) are considered, the conclusion that the harm and potential
9 for harm is insignificant and remote is the only one that can be reached.

10 A factor of 2 was assigned by the enforcement team. Breitburn believes that a factor of *one*
11 should be assigned because of the relatively insignificant discharge and remote potential for harm.

12 **b. Factor 2 – Physical, Chemical, Biological or Thermal Characteristics of the**
13 **Discharge**

14 Breitburn believes that based upon when the discharges occurred in the work-over process,
15 that the discharges consisted primarily of fresh and produced water and that other chemicals within
16 the discharged fluids, if any, would have been at non-detectible levels. The prosecution team
17 assigned a score of 2 because the material posed a “moderate” risk to groundwater. Breitburn
18 contends that the score should have been *zero* because (1) the poor ground water quality and (2) the
19 discharges were primarily water.

20 **c. Factor 3 – Susceptibility to Cleanup or Abatement**

21 The enforcement team concluded that this factor should be given a score of 1. Here, the
22 discharges were removed from the earthen sumps via vacuum truck prior to the sumps being
23 reclaimed. Breitburn would concede that a score of 1 is appropriate.

24 Breitburn asserts that the factors should not exceed 2 [1+0+1 = 2].

25 The Prosecution Team considered the discharge of well stimulation treatment to be major;
26 however, this determination ignores the fact that the discharges, if they occurred, were primarily fresh
27 and produced water. Moreover, Breitburn has determined that the discharges would have contained
28 insignificant amounts of well drilling fluids. Because of the small potential amount of the discharge

1 as well as the content of the fluids, Breitburn believes that the deviation is at best minor. "Minor" is
2 to be assigned where the intended effectiveness of the requirement remains generally intact. Here,
3 the small amount of the possible discharge does not rise to the level of moderate or major.

4 Using the table in the Enforcement Policy, the Initial Liability (when based upon a per gallon
5 calculation) is $.007 \times 10.00 \times 1,680$ gallons = \$117.60

6 **d. Step 4 – Adjustment Factor**

7 i. **Culpability:** Breitburn concurs with the neutral multiplier assigned by the
8 Prosecution Team.

9 ii. **Cleanup and Cooperation:** a multiplier of .75 to 1.5 is to be utilized
10 concerning this factor. A 1.5 is to be used where there is a lack of
11 cooperation. Here, Breitburn cooperated with all of the Prosecution
12 Team's requests for information. Indeed, Breitburn over-reported in an
13 effort to be as transparent as possible. Breitburn believes that a multiplier
14 of .75 should be used in this case.

15 iii. **History of Violations:** Breitburn concurs with this recommendation.

16 **e. Step 5 – Determination of Total Base Liability Amount**

17 Breitburn contends that its total base liability amount should be 88.20.

18 **f. Step 6 – Ability to Pay**

19 Breitburn will not challenge this factor

20 **g. Step 7 – Other Factors As Justice May Require**

21 Uncertainty of the amount of the discharge governed Breitburn's decision making process
22 when it agreed to settle the dispute. Breitburn has since determined that the potential discharges were
23 far lower than previously thought. Breitburn has asked its staff to perform an in depth analysis of its
24 drilling and crew records in an effort to further define the amount of fluids actually discharged into
25 earthen pits. The analysis performed by Breitburn has determined that discharges potentially could
26 have occurred at two rather than six wells and that the amount of fluids could have been no greater
27 than forty barrels (20 barrels at 2 wells).

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