



## Inland Empire Waterkeeper

*Advocacy • Education • Restoration • Enforcement*

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*Sent via Electronic Mail: [madackapara@waterboards.ca.gov](mailto:madackapara@waterboards.ca.gov)*

Michael J. Adackapara  
Division Chief – Regional Board Prosecution Team  
Regional Water Quality Control Board, Santa Ana Region  
3737 Main Street, Suite 500  
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RE: Comments on Proposed Settlement of Administrative Civil Liability –R8-2011-0008

Dear Division Chief Adackapara,

Inland Empire Waterkeeper (Waterkeeper) is an environmental non-profit organization dedicated to advocacy, education, restoration, and enforcement in the Santa Ana River watershed. On September 23rd, 2011, the Regional Water Quality Control Board, Santa Ana Region (Regional Board), issued Administrative Civil Liability Complaint Number R8-2011-0008 (ACL) to Pacific Clay Products, Inc. (Pacific Clay), alleging numerous violations of the State's General Permit for Storm Water Discharges Associated with Industrial Activities, Water Quality Order No. 97-03-DWQ, NPDES CAS000001 (General Permit) at their Lake Elsinore area mine.

Waterkeeper commends Regional Board staff on a well drafted proposed ACL and the significant amount of effort exerted during the investigative and enforcement phases of this action. However, Waterkeeper is concerned the proposed ACL is inadequate to remedy the underlying problem that caused the violations and we strongly encourage the Regional Board to evaluate whether the liability proposed is sufficient to encourage necessary work by the discharger to address pollution related problems.

The State Water Resources Control Board's Water Quality Enforcement Policy dictates assessments of ACLs should, amongst other goals, "[f]ully eliminate any economic advantage obtained from noncompliance," "[d]eter the specific person(s) identified in the ACL from committing further violations", and "[d]eter similarly situated person(s) in the regulated community from committing the same or similar violations."<sup>1</sup> Regional Board staff appropriately recognized Pacific Clay realized at least "\$232,500 in cost savings by failing to implement proper erosion and sediment control measures (from 2006 to 2011)."<sup>2</sup> Had Regional Board staff been able to calculate the financial benefit of nearly 20 years of non-compliance the amount would likely have been significantly higher. Violations alleged in the ACL resulted in a civil liability assessment against Pacific Clay equal to \$40,000. At a minimum, the assessment results in a five-year noncompliance originated financial benefit to Pacific Clay of \$192,500. In order to appropriately deter future noncompliance by Pacific Clay or similarly situated corporations and fully eliminate the economic advantage

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<sup>1</sup> State Water Resources Control Board, *Water Quality Enforcement Policy*, 10 (Cal. Env'tl. Protection Agency Effective May 20, 2010).

<sup>2</sup> Cal. Reg'l. Water Quality Control Bd. Santa Ana Region Complaint No. R-8-2011-0008, at 8 (September 23, 2011) (available at [http://www.swrcb.ca.gov/santaana/public\\_notices/docs/TR8\\_11\\_008.pdf](http://www.swrcb.ca.gov/santaana/public_notices/docs/TR8_11_008.pdf)).

obtained from noncompliance Regional Board staff should modify the proposed ACL to more accurately reflect the guidance contained in the Water Quality Enforcement Policy.

The Regional Board Should Modify the Administrative Civil Liability Action with a Time Schedule Order Demanding Compliance with the General Permit

Waterkeeper recommends the issuance of a California Water Code (CWC) Section 13308 Time Schedule Order prescribing a civil penalty if the detailed time schedule requirements are not achieved by Pacific Clay. Persistently high Total Suspended Solid (TSS) levels and Pacific Clay's practice of deliberately avoiding compliance with water quality regulations and orders threaten the integrity of the Regional Board's regulatory program and necessitates the Regional Board's issuance of Time Schedule Order. For a period of at least 19 years, Pacific Clay has discharged stormwater laden with high levels of TSS to the detriment of the beneficial uses of waters downstream of the Pacific Clay site.<sup>3</sup> During their tenure as the operators of the mine, Pacific Clay has not shown a willingness to comply with the regulatory demands placed upon it by the Regional Board. This can be remedied only by the Regional Board requiring Pacific Clay to submit a detailed time schedule that sets forth the actions the discharger will take to address actual or threatened discharges of waste in violation of requirements and financial penalty based on an amount reasonably necessary to achieve compliance.

According to paragraph 21's table summarizing TSS levels from the Pacific Clay annual report records from 1993-94 through 2009-10, of Pacific Clay's 35 sample results 33 exceed the 100 mg/L USEPA benchmark. The lowest exceedance during that period being 1.3 times benchmark (130 mg/L) and the highest being 410 times benchmark (41,000 mg/L). Paragraph 22 of the proposed ACL recognizes that during this period, "Pacific Clay did not implement BMPs that achieve BAT/BCT" as required under the General Permit.

Similarly, while Pacific Clay was a responsible party during the 2009 Lake Street realignment project, Regional Board staff "observed unprotected slopes, over slope erosion, and channel erosion in the mining stockpile area" and check dams that were "filled with sediment that caused sediment to bypass the check dams, indicating a general lack of maintenance."<sup>4</sup> These poorly maintained erosion control measures could lead to high levels of TSS discharged into waters of the U.S.. In November 2010, Regional Board staff directed Pacific Clay to implement erosion control measures and according to the proposed ACL, "[N]one of the additional erosion control measures that were requested were implemented."<sup>5</sup>

Pacific Clay has demonstrated to the Regional Board and Waterkeeper difficulty in properly maintaining effective erosion control measures designed to reduce the concentration of TSS discharged into waters of the U.S., including Temescal Creek. Regional Board staff suspects as much as 35 separate events with a rainfall intensity sufficient to cause the discharge of sediment laden storm water from the Pacific Clay site during the last five years.<sup>6</sup> However, Regional Board staff limited their assessment in the proposed ACL to only those events where staff directly observed and documented discharges. Even so, according to the administrative record, TSS exceedances appear routine at Pacific Clay and a \$40,000 penalty is unlikely to result in a significant compliance redirection without accompanying increases in responsibilities elsewhere. As such, in order to resolve the underlying problem that caused the violations, the Regional Board should adopt a Time Schedule Order with a reasonable civil penalty attached for noncompliance.

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<sup>3</sup> *Id.* at 4

<sup>4</sup> *Id.* at 4

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 6-7

The Regional Board Should Issue a Cleanup and Abatement Order Demanding the Removal of Bricks and the Restoration of Waters of the United States Degraded by Pacific Clay

The Regional Board should issue a Cleanup and Abatement Order (CAO) pursuant to CWC section 13304 to remedy Pacific Clay's dumping of bricks into waters of the State. According to paragraph 7 of the proposed ACL, numerous creeks and channels flow through the 1,400 acre Pacific Clay site, including portions of Temescal Creek through the northern portions of the site. In paragraph 18, Regional Board staff "noted that numerous loads of faulty bricks had been dumped into a stream channel that runs through the northern portion of the site." Regional Board staff asserted the presence of the bricks in the creek has "caused heavy channel erosion."<sup>7</sup> The discharge of bricks into waters of the state constitutes the discharge of waste creating a condition of pollution or nuisance requiring remediation.

The Regional Board should reject Pacific Clay's claims that site restoration, including creek restoration, is addressed in approved plans before the City of Lake Elsinore. The City of Lake Elsinore is currently under review by the California State Mining and Geology Board (SMGB) regarding the potential revocation of their lead agency status due to concerns over regulatory oversight. Additionally, on April 11, 2011, the Office of Mine Reclamation issued an Order to Comply to Pacific Clay pertaining to violations of the Surface Mining and Reclamation Act (SMARA, Public Resources Code Section 2710 *et seq.*). The Order to Comply originated from Pacific Clay's alleged failure to operate within the boundaries of its approved reclamation plan and the "encroach[ment] into two areas not covered by an approved reclamation plan."<sup>8</sup> Without additional information as to the specific location of the dumped bricks and corresponding reclamation plans, Waterkeeper cannot accept Pacific Clay's claims the abandoned bricks will be remedied in accordance with approved reclamation plans with any degree of confidence.

Therefore, Waterkeeper recommends the issuance of a CAO against Pacific Clay for causing a condition of pollution or nuisance by filling an onsite creek with "faulty bricks" resulting in increased erosion and downstream loading of elevated TSS. The continued presence of defective or faulty bricks as fill in a channel on Pacific Clay's property must be remedied by a modified ACL by the Regional Board so as to comply with the General Permit. Assertions by Pacific Clay as to the appropriateness the channel as waters of the United States should not result in the Regional Board summarily dismissing potential remedies to a significant impairment to water quality due to increased erosion and extraordinarily high TSS levels in stormwater discharge from the site.

The Regional Board Should Order Pacific Clay to Increase Sampling Frequency as a Member of the Building Materials Industry Monitoring Group

Waterkeeper strongly encourages the Regional Board order increased sampling requirements against Pacific Clay as a member of the Building Materials Industry Monitoring Group (Monitoring Group). In 2005, Pacific Clay became a member of the Monitoring Group and immediately benefitted from reduced sampling requirements. The year prior, Pacific Clay submitted their 2004-05 Annual Report having exceeded the US EPA's TSS benchmark for each of their six discharge points for the first time since reporting began in 1993. The highest of these exceedances occurring at discharge point 4 and recording a TSS level 130 times benchmark (13,000 mg/L). Reduced storm water sampling requirements impairs the Regional Board's ability to analyze the effectiveness of Pacific Clay's erosion control BMPs despite the fact the facility is acknowledged to have a "history of high TSS discharges."<sup>9</sup>

Although the Regional Board is unable to order the withdrawal of Pacific Clay from the Monitoring Group, it can order increased water quality sampling above the level otherwise enjoyed by members of group

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<sup>7</sup> *Id.* at 4

<sup>8</sup> State Mining & Geology Board, *Exec. Off. Rpt., Agenda Item No. 1., 2* (September 23, 2011).

<sup>9</sup> Cal. Reg. Water Quality Control Bd. Santa Ana Region Complaint No. R8-2011-0008, *supra* n. 2, at 5.

monitoring plans. Based on Pacific Clay's record of non-compliance with the General Permit and their continuous threat to water quality Waterkeeper strongly supports increasing Pacific Clay's sampling requirements in order to verify whether their BMPs are achieving BAT/BCT as required under the General Permit.

In sum, Waterkeeper strongly encourages the Regional Board to modify the terms of their proposed ACL in order to more accurately reflect the economic advantage Pacific Clay obtained from years of noncompliance, discourage Pacific Clay, and similarly situated members of the regulated community, from engaging or committing the same or similar violations, and provide Pacific Clay with guidance on compliance and an incentive for continued compliance with the terms of the General Permit. Additionally, Waterkeeper supports the Regional Board coordinating this enforcement action with the SMGB, as an agency with concurrent enforcement authority, in order to best manage a continuing threat to water quality in and around Lake Elsinore.

On behalf of Waterkeeper, I look forward to working with you and the Regional Board on this issue. If you require any information to facilitate this request, please do not hesitate to contact me directly at (714) 850-1965 ext. 307.

Regards,

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Staff Attorney  
Inland Empire Waterkeeper

cc: Michael Roth  
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