

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2004-0006

In the Matter of the Petition of

CARL AND CAROLE BOYETT/BOYETT PETROLEUM

For Review of Assessment of Administrative Civil Liability,
Order No. R1-2003-0075

Issued by the
California Regional Water Quality Control Board,
North Coast Region

SWRCB/OCC FILE A-1583

BY THE BOARD:

On June 26, 2003, the North Coast Regional Water Quality Control Board (Regional Board) adopted Administrative Civil Liability Order No. R1-2003-0075 (the ACL Order). Pursuant to Water Code section 13308¹, the Regional Board imposed civil liability upon Carl and Carole Boyett/Boyett Petroleum (the Boyetts or Petitioners) in the amount of \$1,305,000 for violations of Time Schedule Order No. 98-114 (TSO). All but \$50,000 of this was to be permanently suspended upon the later submittal and implementation of an adequate corrective action plan (CAP). The Boyetts submitted a timely petition to the State Water Resources Control Board (State Board) on July 25, 2003.² In this order the State Board addresses the significant issues raised in the petition and remands the ACL Order to the Regional Board for reconsideration. The remaining issues are dismissed.³

¹ Unless otherwise noted, all further statutory references are to the Water Code.

² On August 28, 2003, the State Board notified Boyett that the stay request would not be considered by the State Board because section 13323 automatically suspends any obligation to pay ACL during the period of State Board review.

³ See *People v. Barry* (1987) 194 Cal.App.3d 158; Cal. Code Regs. (CCR), tit. 23, § 2052(a)(1). Dismissed issues have either been addressed in previous State Board orders, or are not sufficiently substantial to warrant review.

I. BACKGROUND

The Boyetts own property at 171 Santa Rosa Avenue in Santa Rosa (Site). The Site is adjacent to Santa Rosa Creek. The Boyetts operated a retail gasoline station at the Site from 1976 to 1987. The Site has been operated as a gas station since 1954. The Regional Board issued a Cleanup and Abatement Order to the Boyetts in 1985, when a police officer discovered gasoline discharging into Santa Rosa Creek.⁴ The creek is channelized and gasoline was seeping up through cracks in the concrete lining. Since that time the Boyetts have performed significant on-site work including investigation, tank removal, soil excavation, groundwater extraction, soil vapor extraction, injection of oxygenating agent to accelerate the bioremediation process, and monitoring, at a total cost of \$1,862,517. Despite these efforts, soil and groundwater under the concrete lining in the creek still shows evidence of gasoline contamination. Until 1998, the Regional Board was generally satisfied with the remedial efforts.

In 1998, the City of Santa Rosa (City) notified the Regional Board that the contamination under the concrete lined channel would interfere with its Prince Memorial Greenway Project (Greenway Project). As part of the Greenway Project the City will remove the concrete lining in the creek, which is approximately 20 feet deep and 50 feet across, restoring it to its natural state. The Boyetts had planned to coordinate the excavation of contaminated soil under the concrete floor and sloped walls of the channel with the City's Greenway Project. The Regional Board encouraged this, since it was the most efficient remedial option. The City had not opposed this plan, but in 1998 decided a coordinated effort could put it at risk of violating its own waste discharge requirements (WDRs) for the Greenway Project. The Greenway WDRs require the City to ensure that removal of the concrete lining will not harm the beneficial uses of the creek by releasing gasoline contaminated soil and groundwater trapped beneath the concrete.

In January 1998, in response to the City's concerns, the Regional Board rescinded the Boyett's existing Cleanup Order, which allowed time to coordinate with the City, and issued Cleanup and Abatement Order No. 98-75 directing the Boyetts to proceed independently. Later that year, finding that the Boyetts had not complied with Order No. 98-75, the Regional Board adopted Time Schedule Order No. 98-114 (TSO). The TSO required various on-site and off-site

⁴ CAO No. 85-86.

work by specified dates. The Boyetts offered not to contest the TSO if the Regional Board accepted their proposed compliance schedule. The TSO provided for civil liability of up to \$10,000 per day for failure to meet various deadlines.

Between October 1998 and the summer of 2001, the Boyetts met many of the TSO deadlines, including requirements to submit an on-site CAP and to perform on-site soil removal, groundwater extraction, and injection of an oxygenating agent. On August 3, 2001, the Regional Board Executive Officer extended the compliance date for submittal of an acceptable off-site CAP to October 15, 2001. Similarly extended were related deadlines to implement the off-site CAP and to submit a report describing the completed work. The Boyetts submitted a document entitled *Revised Off-site Corrective Action Plan*, dated October 12, 2001, on the due date. Regional Board staff telephoned the Boyetts' attorney on January 8, 2002 to tell him this CAP revision did not comply with the State Board's regulations.⁵ On February 26, 2002, Regional Board staff followed up with a letter to the Boyetts outlining the deficiencies in the October 12, 2001 off-site CAP. The Boyetts then submitted a revised off-site CAP on March 25, 2002.

On September 30, 2002, Regional Board staff observed the continued presence of gasoline odors, stained soil, and petroleum sheen on water under a section of the concrete lining that had been removed from the creek floor for inspection. At an October 16, 2002 meeting with Mr. Boyett, Regional Board staff described their observations and told him an adequate CAP was overdue. On January 31, 2003, the Regional Board Executive Officer issued a \$1,305,000 Administrative Civil Liability (ACL) Complaint (Complaint) for missing the TSO deadline to submit an adequate off-site CAP and failing to meet the associated CAP implementation and reporting deadlines during a 467 day period from October 2001 to January 2003. The Complaint proposed immediate payment of \$100,000 with the remaining \$1,205,000 to be permanently suspended upon the submittal and implementation of an adequate CAP.

In response to the Complaint, the Boyetts submitted a document entitled *Draft 2003 Corrective Action Plan* on February 28, 2003, which Regional Board staff found to be a good faith effort at compliance. The Boyetts requested a hearing on the ACL Complaint and at a June 26, 2003 hearing, the Regional Board affirmed the Complaint in ACL Order

No. R1-2003-0075 but reduced the \$100,000 to \$50,000. The Regional Board also established five deadlines, at which \$251,000 increments of the remaining liability would be permanently suspended if the Boyetts met the prescribed schedule to submit a final CAP and then implement it. The Boyetts then filed a petition with the State Board challenging the ACL Order.

The Boyett cleanup is complicated somewhat by an up-gradient gasoline release from Clark's Auto Parts, across the street from the Boyett Site. The Clark's Auto plume has migrated onto the Boyett Site and, to a lesser extent, to the creek. However, plume maps prepared by the Boyetts' consultants show that the Boyett Site is the source of most of the gasoline seeping into the creek.

II. CONTENTIONS AND FINDINGS

Contention: The Boyetts argue that they submitted an adequate off-site CAP by the October 15, 2001 TSO deadline and therefore no liability should be assessed.

Findings: Regardless of whether or not the Boyetts have complied with the TSO or ACL Order deadlines, the \$1,305,000 assessment is greatly disproportionate to the alleged violations. Water Code section 13308 provides that a regional board may lower the accrued liability in a TSO if the regional board makes findings based on an analysis of various factors set forth in section 13327. In this case, the Regional Board did not reduce the \$1,305,000 amount. However, the Regional Board ordered that all but \$50,000 of the ACL should be suspended if the Boyetts met various deadlines in the ACL Order to submit and implement an off-site CAP.

Although the State Board Enforcement Policy allows suspended liability tied to compliance projects in ACL Orders as a way of encouraging compliance, excessive suspended liability is unduly coercive and in the extreme could implicate due process concerns – particularly where a discharger has a good faith, but incorrect, belief that it has complied with time schedule deadlines.

The Enforcement Policy provides that similar violations should result in similar liability so that dischargers have some idea of their potential liability.⁶ Based on our review of similar ACL Orders that have been adopted by the regional boards we find that the \$1,305,000

⁵ CCR, tit. 23, § 2725.

⁶ See Enforcement Policy, 2002, section I.C.

penalty here is far too high. In this case, by suspending liability, the Regional Board found that \$50,000 was an appropriate amount for violations up to the date of the ACL hearing. Assuming that the Boyetts violated the TSO, we would agree. However, it is not clear from the record that the Boyetts even violated the TSO.

Regional Board staff testified that on January 8, 2002 they called the Boyett's attorney to tell him they did not think the oxygenating agent process recommended in the October 12, 2001 CAP would work for the off-site discharge.⁷ However, the Regional Board's February 26, 2002 comment letter on the October 12, 2001 CAP did not include this objection. The letter included only the following comments: 1) the Boyetts must specify the number of oxygenating agent injections needed to protect the creek and estimate both the time needed to complete the project and the project costs; 2) the Boyetts should not compare free product removal methods with final cleanup alternatives in a feasibility study; 3) the Boyetts should begin the plan/design and regulatory review process immediately if they planned to coordinate with the City on the Greenway Project; and 4) that PG&E was willing to provide access to its property downgradient of the Boyett Site.

Given these comments, the Boyetts could have reasonably assumed the Regional Board staff had withdrawn whatever objection they had expressed on the phone to use of the oxygenating agent for off-site corrective action. To address the deficiencies outlined in the February 26, 2002 Regional Board comment letter, the Boyetts submitted a revised CAP on March 25, 2002. According to the Regional Board staff report accompanying the ACL Order, staff notified the Boyetts' attorney by phone that the March 25, 2002 CAP was not acceptable because it did not address the deficiencies discussed in the February 26, 2002 Regional Board comment letter. Regional Board staff testified at the ACL hearing that the March 25, 2002 CAP was also deficient for proposing the same method of cleanup-oxygenating agent injection--that staff felt would not result in prompt abatement of the creek discharge.⁸

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⁷ See Regional Board transcript, p. 21.

⁸ *Id.*

Apparently in response to this phone call, on July 1, 2002, the Boyetts submitted a document entitled “*Ultimate Remedial Alternatives*.” The Regional Board ACL staff report notes that this plan was deficient because it only considered alternatives that could reach water quality objectives within one year. This criticism is hard to reconcile with earlier oral statements from Regional Board staff that oxygenating agent injection was unacceptable because it would take too long.

Although Regional Board staff may have clearly indicated their concerns orally to the Boyetts, there is not sufficient written evidence of this and even the Regional Board staff account of meeting and phone discussions is unclear. Consequently, we find that any violations during this period are at worst technical in nature, such as failure to perform the alternatives analysis properly in the CAP feasibility study. If this is the only violation supported by the record, no more than \$25,000 should be assessed for violations occurring before the Regional Board adopted the ACL Order on June 26, 2003. On remand, if the Regional Board can provide further proof that the Boyetts violated the TSO, it may consider imposition of increased liability for the period before June 26, 2003.

This Order does not require that all communications be in writing before taking enforcement action, especially in emergency situations. However, where, as here, the Regional Board sends written comments, a discharger may reasonably rely on those comments and assume that they represent all current objections.

The fundamental objection of the Regional Board, and a proper one, appears to be that the various off-site CAPs, by recommending oxygenating agent injection as the remedy, did not appear to propose action that would promptly abate the discharge of gasoline or gasoline contaminated water to the creek. However, this objection was not conveyed to the Boyetts in the Regional Board comment letter on the October 12, 2001 CAP that was submitted by the TSO deadline. Once this concern was clearly set forth, over a year later in the January 26, 2003 letter, the Boyetts quickly responded with a CAP that addressed this concern. Regional Board staff found this CAP to be acceptable in concept.

Although a significant penalty was not appropriate at the time of ACL Order, if the Boyetts have not yet fully complied with the still outstanding TSO, the Regional Board may take further enforcement action for any violations occurring after the date of the ACL Order. As

of the date of the ACL Order, which affirmed the January 31, 2003 ACL Complaint, the Boyetts had clear direction of what is expected for an off-site CAP.

III. CONCLUSION

A significant penalty was not appropriate at the time of the ACL Order, but if the Boyetts have not complied with the still outstanding TSO, the Regional Board may take further enforcement action for any violations occurring after the date of the ACL Order.

IV. ORDER

IT IS HEREBY ORDERED THAT ACL Order No. R1-2003-0075 is remanded to the Regional Board for reconsideration.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 20, 2004.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.


Debbie Irvin
Clerk to the Board