

State of California
Regional Water Quality Control Board
San Diego Region

ENFORCEMENT SUMMARY REPORT
February 11, 2009

ITEM: 7

SUBJECT: **CONSIDERATION OF SETTLEMENT:** City of Escondido, Hale Avenue Resource Recovery Facility: Administrative Assessment of Civil Liability against the City of Escondido for Violations of Order No. 99-72, NPDES No. CA0107981, Waste Discharge Requirements for the City of Escondido, Hale Avenue Resource Recovery Facility, Discharge to the Pacific Ocean Via the Escondido Land Outfall and the San Elijo Ocean Outfall and Order No. R9-2003-0394, NPDES No. CA0108944, Waste Discharge Requirements for the City of Escondido, Hale Avenue Resource Recovery Facility, Intermittent Wet Weather Discharge to Escondido Creek, San Diego County. The Regional Board will consider a proposed settlement in response to Administrative Civil Liability Complaint No. R9-2005-0265. If the Regional Board rejects the settlement, the matter will be rescheduled to a future public hearing at which time the Regional Board will consider assessment of civil liability. (Tentative Order No. R9-2009-0003) (Rebecca Stewart)

PURPOSE: The Regional Board will consider whether to adopt an Order to accept the City of Escondido's payment of \$1,335,000 in mandatory minimum penalties in settlement of Complaint No. R9-2005-0265. If the Regional Board accepts the settlement, the Regional Board will then decide if a portion of the City's payment should fund a Supplemental Environmental Project (SEP) proposed by the City.

PUBLIC NOTICE: On January 6, 2009 a notice was published on the Regional Board website soliciting public input on the settlement offer and proposed Supplemental Environmental Project. A notice was also published in the San Diego Union Tribune. The written public comment period ends on February 4, 2009.

DISCUSSION:

On December 30, 2005, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R9-2005-0265 against the City of Escondido for numerous violations resulting from the treatment, transport, and disposal of sewage from the Hale Avenue Resource Recovery Facility (HARRF) (Supporting Document No.2). The Complaint includes both mandatory minimum penalties and discretionary liability as authorized by the California Water Code.

A settlement was adopted by the Regional Board in October 2006 (Supporting Document No. 3). The Regional Board's action was reviewed by the State Water Resources Control Board (State Board) at the request of The Escondido Creek Conservancy and San Diego Coastkeeper. In October 2007 the State Board negated the settlement and remanded the matter back to the Regional Board (Supporting Document No. 4, Attachment A). In the remand, the State Board ruled that the amount of liability must be no less than the mandatory minimum liability required by Water Code section 13385, based on the factual determinations of the Regional Board.

New Settlement Agreement

On January 5, 2009 a settlement agreement was executed by the City of Escondido and the Regional Board's Prosecution Team to resolve Complaint No. R9-2005-0265 (Supporting Document No. 4). The agreement includes payment of \$1,335,000 in mandatory minimum penalties recommended in the Complaint and suspension of \$462,150 in discretionary liability. Suspension of the discretionary liability is consistent with the Regional Board's 2006 settlement and was contingent on the City submitting two technical reports regarding the treatment and disposal capacity at the HARRF and future flow projections.

The following background information has been provided to assist in evaluating the appropriateness of the proposed settlement:

1. Technical Analysis for Complaint No. R9-2005-0265 Supporting Administrative Civil Liability Against the City of Escondido Hale Avenue Resource Recovery Facility for Failure to Comply With Order No. 99-72, NPDES No. CA0107981; Order No. R9-2003-0394, NPDES No. CA0108944; Cease and Desist Order No. 96-31; and Order No. 93-70, December 30, 2005 (Supporting Document No. 5).¹
2. Evaluation of Treatment Plant Operation and Potential Causes of Treatment Plant Effluent Limitation Violations (April to June 2008) for the City of Escondido, Hale Avenue Resource Recovery Facility, April 7, 2005 (Supporting Document No. 6).¹
3. Required Technical Report February 25, 2008, City of Escondido, Hale Avenue Resource Recovery Facility, Wet Weather Discharge to Escondido Creek January 9-13, 2005, Order No. R9-2003-0394 (Supporting Document No. 7).
4. Required Technical Report April 5, 2005, City of Escondido, Hale Avenue Resource Recovery Facility, Order No. R9-2005-0077 (Supporting Document No. 8).

Supplemental Environmental Project (SEP)

In accordance with Water Code Section 13385(i)(1) the Regional Board, with the concurrence of the discharger, may direct up to \$675,000 of the mandatory minimum penalty on a SEP. The City has proposed a SEP as part of the settlement (Supporting Document No. 4, Attachment B). The SEP includes purchase of two land parcels. After numerous requests by the Prosecution Team the City and the SEP proponents, The Escondido Creek Conservancy and the San Diego Coastkeeper, could not provide documentation required by the State Water Board Enforcement Policy in order for the Prosecution Team

¹ The appendices for these items have not been included in the agenda package at this time. If the Regional Board rejects the settlement the matter will be rescheduled to a future public hearing and the appendices will be provided in hard copy at that time. They are currently available for viewing on the Regional Board's web site at www.waterboards.ca.gov/sandiego.

to support the SEP (Supporting Document Nos. 9, 10, 11, 12,13 and 14). Information the Prosecution Team requested from the proponents included:

1. Documentation to support that the purchase price for the two parcels is appropriate;
2. A method for holding of the SEP funds pending close of proposed property purchase;
3. A mechanism to preserve permanent protection through conservation easement or other means;
4. A review of the existing easement on the parcels;
5. A review of any possible water rights on the Barnett Property;
6. Adequate justification as to why the Lish Property would improve water quality in Escondido Creek when it is only within the 500 year flood plain;
7. A mechanism to provide a third party audit to ensure compliance.

Due to the lack of progress with regards to the SEP, the Prosecution Team and the City decided to execute a settlement setting the dollar amount equal to the mandatory minimum penalty (\$1,335,000) and allow the City, The Escondido Creek Conservancy and San Diego Coastkeeper to propose the SEP directly to the Regional Board. In exchange, the City has agreed that it will not contest an Order that does not contain a SEP if the Regional Board does not accept the proposal. As a result, the proposed Settlement Agreement contains tentative Order No. R9-2009-0003 for approval of the Settlement Agreement with no SEP (Supporting Document No. 4, Attachment D) and tentative Order No. R9-2009-0003 for approval of the Settlement Agreement with the proposed SEP (Supporting Document No. 4, Attachment E).

The Regional Board has received letters of support for the SEP from the San Elijo Lagoon Foundation (Supporting Document No. 15), The Escondido Creek

Conservancy (Supporting Document No. 16), Olivenhain Municipal Water District (Supporting Document No. 17), and San Elijo Joint Powers Authority (Supporting Document No. 18).

LEGAL CONCERNS: None.

SUPPORTING DOCUMENTS:

1. Location Map
2. ACL Complaint No. R9-2005-0265
3. Regional Board Order No. R9-2006-0095
4. Settlement Agreement and Mutual Release, Administrative Civil Liability Complaint No. R9-2005-0265
5. Technical Analysis for Complaint No. R9-2005-0265 Supporting Administrative Civil Liability Against the City of Escondido Hale Avenue Resource Recovery Facility for Failure to Comply With Order No. 99-72, NPDES No. CA0107981; Order No. R9-2003-0394, NPDES No. CA0108944; Cease and Desist Order No. 96-31; and Order No. 93-70, December 30, 2005
6. Evaluation of Treatment Plant Operation and Potential Causes of Treatment Plant Effluent Limitation Violations (April to June 2008) for the City of Escondido, Hale Avenue Resource Recovery Facility, April 7, 2005
7. Required Technical Report February 25, 2008, City of Escondido, Hale Avenue Resource Recovery Facility, Wet Weather Discharge to Escondido Creek January 9-13, 2005, Order No. R9-2003-0394
8. Required Technical Report April 5, 2005, City of Escondido, Hale Avenue Resource Recovery Facility, Order No. R9-2005-0077
9. August 15, 2008 e-mail regarding concerns with SEP proposal

10. October 2, 2008 letter regarding concerns with SEP proposal
11. October 7, 2008 letter regarding concerns with SEP proposal
12. November 3, 2008 e-mail regarding concerns with SEP proposal
13. November 26, 2008 e-mail regarding status of revised SEP proposal
14. December 5, 2008 e-mail regarding status of revised SEP proposal
15. November 4, 2008, San Elijo Lagoon Conservancy, Letter of Support of SEP
16. December 9, 2008, The Escondido Creek Conservancy, Letter of Support of SEP
17. January 8, 2009, Olivenhain Municipal Water District, Letter of Support of SEP
18. January 20, 2009, San Elijo Joint Powers Authority, Letter of Support of SEP

RECOMMENDATION: The Prosecution Team recommends adoption of the proposed Order with no SEP. The Advisory Team will make a recommendation to the Board on how to proceed after the parties' presentations on February 11.