



301 North Lake Avenue
10th Floor
Pasadena, CA 91101-4108
Phone: 626.793.9400
Fax: 626.793.5900
www.lagerlof.com

Established 1908

July 15, 2013



VIA E-MAIL & FACSIMILE

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P. O. Box 100
Sacramento, CA 95812-0100
Fax: 916-341-5620
commentletters@waterboards.ca.gov

**Re: Response of Lincoln Avenue Water Company to Draft Order Imposing
Mandatory Minimum Penalty for Violation of Order No. R4-2003-0120
[Administrative Civil Liability Complaint No. OE-2010-0016]**

Dear Ms. Townsend:

We are the attorneys for Lincoln Avenue Water Company (the "Company"), which is the subject of the above-referenced Administrative Civil Liability Complaint. The Company has received and reviewed the State Board's draft order, and offers the following comments.

First, the Company does not dispute the draft order's recitation of the background of what transpired and led to the violations. The Company confirms the draft order accurately sets forth that background.

The Company's only substantive comments to the draft order relate to application of the "single operational upset" provisions of the applicable US EPA Guidance (the "Guidance"). The Company strongly disagrees with the draft order's conclusion on that issue, and is disappointed that the draft order completely ignores the extremely pertinent and on-point provisions of the Guidance that were raised in the Company's prior brief in this matter. As discussed in more detail below, the Guidance clearly provides that under the facts that occurred here, the Company's violations must be treated as a single operational upset that gives rise to a single

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
July 15, 2013
Page 2 of 5

monetary penalty of \$3,000 for the effluent violations that all resulted from the single discharge occurrence.

Subdivision (f)(1) of the Water Code section 13385 provides, “a single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.” The application of that “single operational upset” limitation is set forth in section VII(C) of the State Board’s Enforcement Policy. The first paragraph of that section states:

“In accordance with California Water Code section 13385, subdivision (f)(2), for the purposes of MMPs only, a single operational upset that leads to simultaneous violations of one or more pollutant parameters over multiple days shall be treated as a single violation. The Regional Water Board *shall* apply the following US EPA Guidance in determining if a single operational upset occurred: “Issuance of Guidance Interpreting Single Operational Upset” Memorandum from the Associate Enforcement Counsel, Water Division, U.S.EPA, September 27, 1989. [emphasis added]

Thus, just as the State Board is required to impose mandatory minimum penalties pursuant to Water Code section 13385, it **must** apply all of the Guidance in determining if a single operational upset occurred – and, as discussed below, the Guidance expressly includes the type of operational change that occurred here.

All five of the Company’s violations for which MMPs are now being imposed arose from the same instance on December 23, 2004, and that occurrence thus constitutes a “single operational upset” which must be treated under Water Code Section 13385(f)(1) as a single violation. As quoted in the Enforcement Policy, the Guidance provides that a “single operational upset” is “an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one CWA effluent discharge pollutant parameter. Single operational upset does not include . . . noncompliance to the extent caused by improperly designed or inadequate treatment facilities.”¹

Section VII(C) further states:

“The US EPA Guidance further defines an ‘exceptional’ incident as a ‘non-routine malfunctioning of an otherwise generally compliant facility.’ Single

¹ There is no evidence that the Company’s treatment facility was improperly designed or inadequate. Rather, the fact that there has no subsequent violations at that facility since the treatment medium as changed demonstrates that the facility is adequate and was properly designed.

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
July 15, 2013
Page 3 of 5

operational upsets include such things as an upset caused by a sudden violent storm, some other exceptional event, or a bursting tank. A single upset may result in violations of multiple pollutant parameters. The discharger has the burden of demonstrating that the violations were caused by a single operational upset. A finding that a single operational upset has occurred is not a defense to liability, but may affect the number of violations.”

However, the Guidance provides more assistance that the two paragraphs quoted in the Enforcement Policy. The Guidance further provides that a single operational upset includes exceedances caused by *unintentional operator error and for negligent acts or omissions* (see, Paragraph I(4) on page 2 of the Guidance; see also, Paragraph IV(D), page 12 of the Guidance: “SOU [single operational upset], on the other hand, is defined so that it may be claimed where *operational error or careless or improper operation was unknowingly or unintentionally committed.*”) [emphasis added]. The facts of this matter squarely place the Company’s alleged violations within the definition of a single operational upset. Breaking down the required elements that constitute a “single operational upset,” the Company must demonstrate the following in order for the single violation limitation of liability under Water Code Section 13385(f)(1) to apply:

1. The violations resulted from an exceptional incident – a non-routine malfunctioning of an otherwise compliant facility. The Guidance provides that in order to qualify as a single operational upset event, an incident must not be “business as usual,” but must be a non-routine malfunctioning of an otherwise generally compliant facility. The violations that occurred on December 23, 2004 were non-routine. As the Company previously explained in the letter at page 4-069 of the Hearing Record, the Company’s South Coulter Water Treatment Plant operates only seasonally, depending on rainfall. Thus, although the new dechlorination system was installed in May 2004, that system was not used until the rain season began, and it was not until December 23, 2004 that a discharge occurred, and when the Company, for the first time, learned of its effluent limitation exceedances for Total Dissolved Solids and BOD₅ (page 4-070 of the Hearing Record). As soon as the Company learned of that malfunctioning, it promptly took steps to change its dechlorination medium and has not since violated any effluent limitation. Thus, as evidenced by the compliance history for that facility, that facility has been “otherwise compliant” since that single operational upset incident.

2. The exceptional incident caused simultaneous, unknowing (not the result of a knowing act or omission) and unintentional and temporary noncompliance.

A. Simultaneous. Under the Guidance, “violations of more than one pollutant parameter shall be considered to be simultaneous if they occur during a single day, and result from the same operational upset event.” Guidance, Paragraph III(C), page 9. Exhibit A to the

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
July 15, 2013
Page 4 of 5

State Board's initial complaint in this matter demonstrates that all five of the subject violations, including the two monthly average violations, occurred as a result of the same discharge that occurred on December 23, 2004. Thus, pursuant to the Guidance, the violations were simultaneous.

B. Unknowing and Unintentional. The facts underlying the violations also demonstrate that those violations were unknowing and unintentional. The Guidance provides that the single operational upset limitation on liability does not apply to upset events caused by regulatees or their agents who knowingly intend to commit the act that caused the violations. Guidance, Paragraph III(D), page 10. Here, though, there is no evidence the Company knowingly intended to cause the violations. In fact, the prompt change in dechlorination medium demonstrates that the Company's violations resulted from an unintentional act that was quickly remedied once the cause of the violations was determined. Moreover, as discussed above, the Guidance provides that the single operational upset liability limitation applies where operational error or careless or improper operation was unknowingly or unintentionally committed. Based on the Guidance's clear statements, the Company's actions were "unknowing and unintentional."

C. Temporary. The requirement that any non-compliance be temporary means that the permitted entity must correct or mitigate the non-compliance on an expedited basis following the single operational upset event. Guidance, Paragraph III(E), page 10. In the present situation, the Company took such prompt corrective action, as again evidenced by the fact the subject facility has not since had even a single further violation.

3. **More than one effluent pollutant parameter is violated.** "Pollutant parameter" is defined in the Guidance as "all effluent limitations and non-numeric limitations regulating the content or amount of a regulatee's direct or indirect discharge." Guidance, Paragraph I(6), page 2. There is no dispute the Company violated effluent limitations, to wit: Exhibit A to the State Board's original complaint is entitled "Effluent Limit Violations" and its heading states: "Effluent Limitation Violations Requiring Mandatory Minimum Penalties." There also is no dispute that more than one such limitation/parameter was violated, particularly since limitations for both Total Dissolved Solids and BOD₅ were violated.

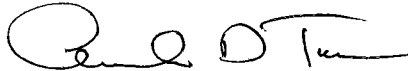
The foregoing discussion, and the undisputed facts of this matter, clearly demonstrates that all elements necessary for the single operational upset liability limitation to apply to the Company's violations have been met. Thus, pursuant to Water Code Section 13385(f)(1), the mandatory minimum penalties to be applied must be limited to one violation, instead of five. The Company therefore respectfully requests that the State Board apply the applicable statute, policy and Guidance in a common sense manner and amend the draft order to reduce the penalty being imposed on the Company to \$3,000, as its own Enforcement Policy and applicable federal guidance require.

*Lagerlof
Senecal
Gosney & Kruse*
LLP

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
July 15, 2013
Page 5 of 5

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew D. Turner". The signature is fluid and cursive, with a large initial "A" and a long horizontal stroke at the end.

Andrew D. Turner

ADT/jc

cc: Robert Hayward, General Manager, Lincoln Avenue Water Company