

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION**

STAFF REPORT FOR SPECIAL MEETING OF AUGUST 23, 2007
Prepared on July 18, 2007

ITEM NUMBER: 5

SUBJECT: Administrative Civil Liability Order No. R3-2007-0076, Natural Selection Foods, San Benito County

KEY INFORMATION

Discharger: Natural Selection Foods LLC
Location: 1721 San Juan Highway, San Juan Bautista, California
Discharge Type: Food processing wastewater
Treatment: Particle removal by gravity fine screen and settling in a lined pond. Up to 100,000 gallons per day may be discharged to the City of San Juan Bautista wastewater treatment plant.
Design Capacity: 100,000 GPD to City of San Juan Bautista wastewater treatment plant, 190,000 to 380,000 GPD to irrigate non-food crops
Total estimated design capacity of 290,000 to 480,000 GPD.
Discharge Volume: 176,000 to 465,000 GPD (range of flow rate for the food processing season from April through September in 2006). Approximately 175,000 GPD is discharged during the off-season (December through March).
Recycling: None currently, but planned for future
Existing Order: General Waste Discharge Requirements Order No. R3-2004-0066 for Discharges of Fruit and Vegetable Processing Waste
This Action: Adopt Administrative Civil Liability Order

SUMMARY

On July 18, 2007, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R3-2007-0076 (Complaint) to Natural Selection Foods (Discharger). The Complaint alleged the Discharger committed multiple excess flow violations, illegal discharges to surface water, and failed to submit required written reports of discharge changes, as required by Waste Discharge Requirements Order No. 99-99, in the period from April 22, 2004, through November 1, 2006. The Complaint proposed that the Discharger be assessed a civil liability in the amount of \$95,000, and provided that the Discharger may propose a Supplemental Environmental Project (SEP). The Discharger had previously proposed an SEP to assist the City of San Juan Bautista with improvements needed to produce and deliver recycled water. The proposed Administrative Civil Liability Order requires the Discharger to pay civil liability of \$25,000 by September 24, 2007, and submit written proof of payment of at least \$70,000 to fund the San Juan Bautista Wastewater Treatment Plant Effluent Reclamation Project by October 24, 2007. The proposed penalty should improve water quality by deterring similar violations at similar facilities. The proposed SEP will improve water quality by decreasing waste loading to San Juan Creek.

DISCUSSION

Discharger. The Discharger owns and operates a vegetable processing facility located at 1721 San Juan Highway in San Juan Bautista, San Benito County (hereafter Facility). The Discharger does business as Earthbound Farm. According to its website (www.ebfarm.com), "Earthbound Farm is the largest grower and shipper of organic produce in North America, offering more than 100 organic salads, fruits, and vegetables. Earthbound Farm produce is available in 74% of all supermarkets and can be found in every major city in the United States."

During the time of the following violations, the Discharger was subject to *Waste Discharge Requirements Order No. 99-99 for Natural Selection Foods, Inc., San Benito County* (Order No. 99-99), which was adopted by Central Coast Water Board and became effective on October 22, 1999. On July 6, 2007, the Water Board rescinded Order No. 99-99 and approved the Discharger's enrollment under the *General Waste Discharge Requirements Order No. R3-2004-0066 for Discharges of Fruit and Vegetable Processing Waste* (General WDRs).

The Discharger generates process wastewater by washing farm produce. According to Order No. 99-99, "Process water will be routed through three 1,500 gallon septic style settling tanks for solids removal, followed by a percolation pond and/or used to irrigate Natural Selections' 36 acres of alfalfa. This system is designed to handle 80,000 gpd [gallons per day] of process water, however flows will not exceed 70,000 gpd."

A creek commonly called San Juan Creek flows north-northeast along the western boundary of the fields where process wastewater is currently discharged. This is the same creek to which the City of San Bautista is permitted to discharge its treated wastewater. The City of San Juan Bautista discharge point is approximately 2 miles upstream of the Facility. The San Benito River is approximately 1.5 miles downstream from the Facility. San Benito River then flows for approximately 0.3 mile before reaching the Pajaro River. According to the Water Quality Control Plan, Central Coast Basin (Basin Plan), the beneficial uses of the San Benito and Pajaro Rivers include domestic and municipal supply, agricultural supply, industrial service supply, groundwater recharge, non-contact water recreation, water-contact recreation, wildlife habitat, warm freshwater habitat, fish spawning, freshwater replenishment, and commercial and sport fishing. The San Benito and Pajaro Rivers support the threatened California red-legged frog and the endangered steelhead trout.

Requirements. Order No. 99-99 includes, in part, the following requirements:

"Prohibition No. 3 – Discharge of any wastes from the process waste treatment system including overflow, bypass, and seepage from transport, treatment, or disposal systems to adjacent drainageways or adjacent properties is prohibited.

"Prohibition No. 1 – Discharge to areas other than those designated in Attachment A, is prohibited." [Attachment A specifies that the location of the 36 acre disposal field as on the east side of San Juan Highway.]

"Discharge Specification No. 1 – Daily flow...shall not exceed 70,000 gallons for process and stormwater discharges to the irrigation fields.

"Provision No. 2 – Discharger shall comply with all items of the attached "Standard Provisions and Reporting Requirements for Waste Discharge Requirements" dated January 1984.

Provision No. 5 – Pursuant to Title 23, Division 3, Chapter 9, of the California Code of Regulations, the Discharger must submit a written report to the Assistant Executive Officer not later than April 22, 2004, addressing: a) Whether there will be any changes in the continuity, character, location or volume of the discharge; and, 2) Whether, in their opinion, there is any portion of the Order that is incorrect, obsolete, or otherwise in need of revision.

Standard Provision E.3 – The discharger and any person who violates waste discharge requirements and/or who intentionally or negligently discharges waste or causes or permits waste to be deposited where it is discharged into surface waters of the state may be liable for civil and/or criminal remedies, as appropriate, pursuant to sections 13350, 13385, and 13387 of the California Water Code.”

Violations. The Discharger committed the following violations in the period from April 22, 2004, through November 1, 2006.

Violation No. 1 – The Discharger failed to submit a written report required by Provision No. 5 of Order No. 99-99 by April 22, 2004. The report required the Discharger to address whether there were any changes to its discharge. The Discharger’s website indicates that the Discharger produced process wastewater at this time, so there is a discharge associated with this violation. The Discharger thereby violated Provision No. 5 and is liable civilly pursuant to California Water Code Section 13350. The requirement of Provision No. 5 was eventually replaced by the requirement to submit a Notice of Intent by January 31, 2006, which is described under Violation No. 2 below. For the purpose of enumerating penalties, the report required by Provision No. 5 was 649 days late, which is the time period from April 22, 2004, to January 31, 2006.

Violation No. 2 – On October 25, 2005, Central Coast Water Board staff sent a letter to the Discharger requiring submittal of a Notice of Intent for enrollment under the General WDRs by January 31, 2006. The requirement was made pursuant to California Water Code Sections 13260 and 13267. The Discharger submitted its Notice of Intent on July 10, 2006, which was 160 days late. The Discharger is therefore liable civilly pursuant to California Water Code Sections 13261 and 13268.

Violation No. 3– The Discharger’s Notice of Intent revealed that the Facility discharges an average of 274,000 gpd and a maximum of 582,000 gpd of process wastewater, well in excess of its permitted flow limitation of 70,000 gpd. The Discharger’s self-monitoring reports submitted on June 5 and October 2, 2006, further revealed that process wastewater flow exceeds its flow limitation nearly every day of the processing season. Reported process wastewater flows and days of violation are summarized as follows:

Month	Average Flow (gpd)	Maximum Flow (gpd)	Days of Violation (Flow > 70,000 gpd)
April 2005	310,634	498,469	27
May 2005	269,561	466,902	31
June 2005	315,727	520,171	30
July 2005	282,875	582,307	31
August 2005	319,353	467,094	31
September 2005	250,138	448,736	27

Month	Average Flow (gpd)	Maximum Flow (gpd)	Days of Violation (Flow > 70,000 gpd)
October 2005	233,920	376,810	29
November 2005	199,290	431,818	22
The Facility generated no wastewater flow from December 2005 through March 2006 because it was shut down for the off-season.			
April 2006	235,978	442,134	28
May 2006	231,966	419,777	30
June 2006	202,420	425,753	29
July 2006	189,712	464,566	29
August 2006	176,348	334,106	29
September 2006	251,959	459,463	28
Total days of violation:			401

Process wastewater flows prior to April 2005 have not been reported by the Discharger; therefore, Water Board staff can not evaluate potential violations prior to this date. The Discharger thereby violated Discharge Specification No. 1 for a minimum of 401 days and is liable civilly pursuant to California Water Code Section 13350. The Discharger's recent enrollment under the General WDRs permits discharge of these higher volumes, so this violation has ended.

Violation No. 4 – The Discharger's Notice of Intent, signed July 7, 2006, indicates that the Facility currently discharges process wastewater to 78 acres, well in excess of the 36 acres permitted by Order No. 99-99. The expanded disposal fields include approximately 42 acres on the west side of San Juan Highway, abutting the previously described creek tributary to San Benito River. The Discharger thereby violated Prohibition No. 1 and is liable civilly pursuant to California Water Code Section 13350. Assuming the Discharger has only discharged to these expanded fields since signing the Notice of Intent (this is a conservative assumption because the Discharger has likely discharged to these expanded spray fields for several years), the Discharger violated Prohibition No. 1 for 118 days (period ending November 1, 2006). The Discharger's recent enrollment under the General WDRs permits use of a larger disposal area, so this violation has ended.

Violation No. 5 – Central Coast Water Board staff inspected the Facility on October 4, 2006, and found it discharging several thousand gallons of process wastewater directly to the creek by runoff from the unauthorized disposal fields. In a letter dated October 9, 2006, the Discharger's consultant reported the discharge as two distinct spills of process wastewater to the creek. The Discharger's consultant estimated the first spill as 18,000 gallons and the second spill as 6,000 gallons. The Discharger thereby violated Prohibition No. 3 and discharged waste to waters of the United States in violation of the Clean Water Act, therefore is liable civilly pursuant to California Water Code Sections 13350 and 13385.

Maximum Civil Liability. The maximum civil liability for the above violations is \$6,240,000. This maximum civil liability is enumerated as follows. Where the violation was ongoing, the number of days of violation is based on the end date of November 1, 2006.

Violation No. (see above)	Water Code Section	Maximum Liability	No. of Days of Violation	Sub-Total
1	13350	\$5,000 per day	649	\$3,245,000
2	13261	\$1,000 per day	160	\$160,000
3	13350	\$5,000 per day	401	\$2,005,000
4	13350	\$5,000 per day	118	\$590,000
5	13385	\$10,000 per day plus \$10 per gallon	1 day and 23,000 gallons	\$240,000
			Total:	\$6,240,000

Minimum Civil Liability. Water Code Section 13385(e) provides that, at a minimum, civil liability shall be assessed at a level that recovers the economic benefit or savings, if any, derived from the acts that constitute Violation No. 5. As discussed below, the Discharger likely realized \$1,000 of economic benefit from Violation No. 5.

Factors to Consider when Assessing Civil Liability. Pursuant to Water Code Section 13327, in determining the amount of liability for waste discharge requirements violations, the Water Board shall:

...take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require.

Also, when determining the amount of liability for Water Code Section 13385 violations (Violation No. 5), at a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

These factors are considered as follows:

a. The Nature, Circumstances, Extent, and Gravity of the Violations

The Discharger's failure to submit and late report violations (Violation Nos. 1 and 2) are significant due to Water Board staff's inability to determine the Discharger's compliance with waste discharge requirements. Staff still has no way of definitively knowing how long the Discharger violated Waste Discharge Requirements Order No. 99-99.

The flow violations described in Violation No. 3 are significant in that the Discharger nearly quadrupled the flow volume of its process wastewater discharge without the Water Board's knowledge, authorization, or consent. In its annual self-monitoring report dated September 30, 2006 (as prepared by compliance consultant Bracewell Engineering, Inc. and signed by Facility Engineer Joe Torquato), the Discharger explains the cause and corrective action of Violation No. 3:

"The permitted flow volumes have been exceeded due to the rapid growth in the company's food packaging business over the last few years...Natural Selection prepared and filed the Notice of Intent for Enrollment under the General Waste Discharge Requirements [for Discharges of Fruit and Vegetable Processing Waste]. With that in mind Natural Selection was waiting for the new permit and only realized earlier this month that since a new permit had not yet been issued by the Regional Board that the old permit was still in effect..."

The 70,000 gpd flow limitation of Order No. 99-99 is based in part on the ability of the Discharger's original 36-acre disposal field to absorb the process wastewater flow without its running off into adjacent drainageways. The Discharger has nearly quadrupled the flow volume of its process wastewater discharge, but has only doubled its disposal area (the total disposal area is now 78 acres). This limited disposal area likely contributed to the spill violations described in Violation No. 5.

The expansion of the disposal area violations described in Violation No. 4 are significant in that the expanded disposal areas abut the creek, whereas the original 36-acre disposal area was far removed from the creek. This greatly increases the likelihood that wastewater runoff will reach the creek. Had the Discharger pursued approval for the expanded spray disposal fields, the Water Board would have required safeguards (e.g., set disposal fields back appropriately from creek, limit wastewater application rates, etc.) and monitoring to ensure that process wastewater did not enter into the creek.

The Discharger's monitoring data indicates the spray disposal fields may be overloaded with nitrogen. The Discharger reported that on May 2, 2006, process wastewater flow was 203,056 gpd, and contained 10.3 mg/L nitrate as N. Assuming this wastewater is distributed throughout the entire 78 acres of disposal fields, this nitrate loading rate is 101 grams (as N) per acre per day. By comparison, this is more than double the Basin Plan standard of 40 grams total nitrogen per acre per day. Data is not available for groundwater around the entire 78-acre spray disposal fields because the Discharger does not currently have such a groundwater monitoring well network. However, the Discharger has provided data for groundwater surrounding its process wastewater storage/percolation pond. This data suggests the discharge has caused a significant increase in groundwater nitrate concentrations. The Discharger reports that on September 26, 2006, the groundwater upgradient of the pond contained 5.9 mg/L nitrate as N, while groundwater downgradient of the pond contained 10.1 mg/L as N. This exceeds the drinking water standard of 10 mg/L as N. The downgradient groundwater nitrate concentration nearly matches the average process wastewater concentration. In order to bring the nitrogen-loading rate down to the Basin Plan standard, the Discharger would either have to treat the process wastewater flow to decrease the effluent nitrogen concentration by more than 50%, or more than double the size of the spray disposal fields. Considering the groundwater impacts caused by the process wastewater surrounding the storage/percolation pond, it is reasonable to assume there are similar nitrate impacts to the groundwater beneath the disposal fields.

The first spill described in Violation No. 5 occurred when Facility operations and management staff failed to properly connect an irrigation pipe section. When the Facility staff began pumping wastewater to the irrigation piping, water pressure caused the irrigation piping to separate and concentrate wastewater in a small area, rather than distribute it to sprinkler heads. After turning on the irrigation system flow, the Facility staff left for a lunch break. In the 1.5 hours before Facility staff discovered the problem was shut off the

irrigation system, 18,000 gallons discharged from the disconnected irrigation piping, flowed across the disposal field and dirt access road, and entered the creek.

The second spill described in Violation No. 5, "originated from over-watering an irrigation field inadvertently with a split irrigation pipe facing the ground." The split irrigation pipe caused a low point in the disposal field to become saturated. Because the area was saturated, subsequent irrigation onto that area ran off the field and into the creek. The saturated field was irrigated for 8 hours, from 12 a.m. to 8 a.m., before the spill was discovered and corrected.

These reported causes are symptoms of greater wastewater management problems. Water Board staff toured the Facility and interviewed Facility Manager Richard Paules on October 4, 2006. According to Mr. Paules, wastewater is normally applied to the spray fields with a water reel irrigation system. Such a system facilitates good wastewater distribution and easy rotation, because the sprinkler gun is mechanically pulled across the field, slowly spreading the wastewater along the way, and then is easily moved to the next disposal field section. Mr. Paules pointed out that the water reel irrigation system was broken, so the Facility staff had to instead lay irrigation piping. This is very labor-intensive and likely contributed to the mistakes that caused these violations. During an inspection on November 15, 2006, Facility Engineer Joe Torquato informed Water Board staff that the disposal field sections immediately adjacent to the creek are always irrigated with piping because those sections are triangular in shape, which does not facilitate use of the water reel system. These triangular sections are smaller than the other rectangular field sections but are loaded with the same wastewater volume. These triangular sections also have clayey soil and high groundwater, which inhibits wastewater percolation. On November 15, 2006, Water Board staff confirmed the poor percolation of these areas when they observed a large volume of process wastewater puddled in the lowest area of one of these triangular sections, immediately adjacent to the creek. Facility staff were building up a soil berm with a tractor to prevent the puddled wastewater from entering the creek. Facility Engineer Joe Torquato suggested that this section has always been a problem area.

Use of these triangular sections would not be necessary if other rectangular sections were available. When asked why the 60 acres of rectangular sections just across San Juan Highway from the Natural Selection Foods building (and further removed from the creek) could not be used for process wastewater disposal, facility staff replied that it could, and that Natural Selection's owner had just authorized them to take it out of crop production to be used for process wastewater disposal. The Discharger has not used those particular rectangular sections for disposal previously because it preferred those fields be used for vegetable production, partly for aesthetic reasons. Had the Discharger been using these large rectangular sections with its water reel irrigation system for disposal, instead of the triangular sections near the creek with piping, the spills described in Violation No. 5 likely would have not occurred.

Further evidence of wastewater management problems is that the existing disposal fields are irrigated all day and night. The second spill described above was caused in part by irrigation occurring from 12 a.m. to 8 a.m. Constant irrigation indicates that process wastewater storage volume and disposal field area may not be sufficient for the volume of process wastewater generated.

The Discharger's consultant reports that the process wastewater, "originated from a settling pond and had a chlorine residual...Coliform samples taken on the wash water pond effluent,

a procedure started in the last few weeks, have all been less than 1.1 MPN/100 mL." The wastewater may not have contained bacteria, but the residual chlorine could kill aquatic life in the creek, especially the sensitive steelhead trout, if discharged in significant concentrations. For comparison, the City of San Juan Bautista wastewater treatment plant is prohibited from discharging any chlorine to this creek. In a November 8, 2006, email, the Discharger's consultant reported that discharged process wastewater typically contains 5 mg/L chlorine. This concentration is great enough to kill aquatic life in the receiving water. However, these spills occurred during warm and dry weather, so it is likely that some of the residual chlorine volatilized before it reached the creek. Nevertheless, since the process wastewater contains residual chlorine, the Discharger should have been taking extra precautions to ensure the process wastewater did not reach the creek.

The Discharger sampled its process wastewater for biochemical oxygen demand (BOD) and total suspended solids (TSS) on the same day its spills occurred. The samples contained 178 mg/L BOD and 56 mg/L TSS. BOD is an important indicator of the wastewater's potential to depress dissolved oxygen and cause eutrophication of the receiving water. The reported BOD concentration is similar in organic strength to partially treated sewage, and is an unacceptable level for discharge to this creek. For comparison, the City of San Juan Bautista's wastewater treatment plant effluent discharge to this creek must not exceed a 30-day average BOD of 20 mg/L and 30-day average TSS of 20 mg/L. Facility process wastewater could adversely affect water quality, and is another reason why the Discharger should have been taking extra precautions to ensure the wastewater did not reach the creek.

b. Degree of Culpability

The Discharger is highly culpable for the failure to submit and late report violations (Violation Nos. 1 and 2).

The Discharger claims its failure to submit reports and late report violations were caused by a change in facility staffing. On May 29, 2006, the self monitoring report submitted by the Discharger states:

"At the time that Natural Selection applied for, and obtained the original discharge permit, Bob Wright was the facility, and plant engineer and he was the individual of record, and Natural Selection's contact for the Water Board. After his departure from Natural Selection in September 2002, there was no transfer of information pertaining to this permit and its monitoring and reporting requirements to his successor or any other engineer at Natural Selection. It was the understanding of the Natural Selection engineers, that the only ongoing monitoring and reporting required, was for the three monitoring wells on their property as required by the County Use Permit. Based on that understanding, the monitoring well data was dutifully submitted to San Benito County annually. This process, as Natural Selection understood, was followed precisely. Data from monitoring wells placed above, and below the retention pond was collected, logged and reported annually, to San Benito County Planning."

Water Board staff contends that it was the Discharger's organizational structure, not Bob Wright's departure, which led to Violations Nos. 1 and 2. Order No. 99-99 is issued to the Discharger, not Bob Wright. It is the Discharger's collective responsibility, not Bob Wright's individual responsibility, to ensure the Discharger complies with Order No. 99-99.

The Discharger is highly culpable for Violation Nos. 3 and 4. Even if Water Board staff assumed the Discharger was unaware of Order No. 99-99 for five years, the Discharger's County of San Benito Use Permit 779-99, dated October 28, 1999, includes several conditions parallel to Order No. 99-99. For example, the conditions include:

"The total amount of wash water used shall be limited to a maximum of 70,000 gallons per day. Any utilization in excess of 70,000 gallons per day shall be subject to an amendment of the use permit and the waste discharge permit approval of the Central Coast Regional Water Quality Control Board.

"In order to avoid adverse affects to adjoining agricultural lands, the release of excess washwater or wastewater onto adjoining property or into the creek bordering the subject property is prohibited."

The Discharger's representative to the Water Board at the time, Facility Manager Bob Wright, acknowledged these requirements in a September 13, 2000, memo to Lloyd Bracewell of Bracewell Engineering. Bracewell Engineering operates the City of San Juan Bautista wastewater treatment plant and recently became the Discharger's compliance consultant. Bob Wright's memo states, in part:

"Our county use permit restricts our process water use to 9 months per year and limits our usage to nominally 75,000 [sic] gallons per day. We would like your consideration in discharging this quantity with a potential increase of 200,000 GPD over the next 6 years to the City [of San Juan Bautista] treatment plant."

The Discharger exhibits prior knowledge of County Use Permit conditions. Yet, the Discharger did not pursue Water Board approval when it increased process wastewater flows beyond 70,000 gpd and expanded the disposal areas onto the west side of San Juan Highway.

The Discharger is highly culpable for Violation No. 5. Process wastewater generation, treatment, and disposal are all within control of the Discharger. The spills were not caused by poor weather conditions or anything beyond the control of the Discharger. The Discharger could have taken a variety of measures to prevent the spills, including decreasing wastewater generation, or rotating disposal to another area.

c. Voluntary Cleanup Efforts Undertaken by the Violator

The Discharger did not voluntarily undertake any cleanup efforts. In its October 9, 2006 report, the Discharger's consultant states:

"The spill consisted of lightly chlorinated processing wash water pumped from a settling pond and contained no domestic wastewater and so no cleanup was necessary as the spill remaining on Earthbound's property and adjacent to the drainage ditch was absorbed into the ground."

In its annual self-monitoring report dated September 30, 2006, the Discharger's consultant highlights several wastewater-related projects the Discharger has recently undertaken, including entering an agreement with the City of San Juan Bautista to discharge up to 100,000 gpd to its wastewater system. These projects are necessary to catch up with major

expansions of the Facility in the last 8 to 10 years¹. The projects should have been completed concurrent with or prior to the Facility expansions.

d. Susceptibility to Cleanup or Abatement

The spills described in Violation No. 5 were not susceptible to cleanup or abatement. The spills entered the creek at a stretch that is heavily vegetated and not easily accessible. The spills were likely flushed downstream by creek flow. Stopping creek flow to contain the spills was not practical.

e. Degree of Toxicity of the Discharge

As discussed previously, the Discharger reports that the process wastewater, "originated from a settling pond and had a chlorine residual." The residual chlorine could be toxic to aquatic life in the creek, especially the sensitive steelhead trout, if discharged in significant concentrations. The Discharger reported that discharged process wastewater typically contains approximately 5 mg/L chlorine, which is great enough to kill aquatic life in the receiving stream. However, these spills occurred during warm and dry weather, so it is likely that some of the residual chlorine volatilized before it reached the creek. Water Board staff therefore concludes the degree of toxicity of the spills was medium.

f. Prior History of Violations

The Water Board has regulated the Discharger since October 1999, when it issued Order No. 99-99. The Discharger did not inform Water Board staff or submit any reports to indicate when it expanded its Facility and increased its process wastewater discharges and disposal fields across San Juan Highway. Due to lack of communication from the Discharger, Water Board staff does not know how long the Discharger has violated Order No. 99-99. The Discharger's website indicates it expanded its facility from 25,000 square feet to 135,000 square feet in 2003, and again to 203,200 square feet in 2004. It is reasonable to infer the process wastewater discharge has likely exceeded 70,000 gpd and the disposal area has exceeded the permitted 36 acres since the Discharger expanded its facility in 2003. The Discharger has conceivably violated Order No 99-99 for the past three years. This is a poor compliance history.

g. Economic Benefit or Savings Resulting from the Violations

The Discharger realized a small economic benefit as a result of its failure to submit and late report violations. The expense of putting together the report addressing whether there were any changes to its discharge (Violation No. 1) would be approximately \$3,000.

¹ According to the Discharger's website (www.ebfarm.com):

"1995 – 1998, The company moves to a new, 25,000-square-foot, state-of -the-art production facility in San Juan Bautista, California.

"2003, The company expands its San Juan Bautista, California, facility, bringing its total production space to 135,000-square-feet. Earthbound Farm is the largest grower and shipper of organic produce in North America.

"2004, The company expands its San Juan Bautista, California, facility, bringing its total production space to 203,200-square-feet."

The economic benefit of preparing and submitting the Notice of Intent (Violation No. 2) is negligible, because the Discharger eventually submitted the Notice of Intent. However, it is important to point out that had the Discharger submitted its Notice of Intent on time – it was 248 days late – it would have had to comply with the terms of the General WDRs that much sooner. Considering the more stringent prohibitions and comprehensive monitoring and reporting requirements of the General WDRs, the Discharger's expense to comply with the General WDRs could be significant. For example, the General WDRs state that the discharge shall not cause nitrate concentrations in groundwater downgradient of the disposal area to exceed 10 mg/L (as N). As mentioned previously, the Discharger's groundwater monitoring data indicates its discharge has caused a significant increase in groundwater nitrate concentrations, and groundwater downgradient of the process wastewater storage/percolation pond exceeds 10 mg/L nitrate as N. In order to come into compliance with this General WDRs' requirement, the Discharger must likely decrease its nitrogen loading rate by half. This means the Discharger must either treat the process wastewater to decrease the effluent nitrogen concentration by more than 50%, or more than double the size of the spray disposal fields. Design and construction of a treatment process to reduce effluent nitrogen concentrations would cost anywhere from \$300,000 to \$1 million. Doubling the size of the spray disposal fields may cost even more. According to a survey of nine active local real estate listings, the average asking price for farm and ranch land in San Benito County is \$14,000 per acre. Using this value, acquiring another 78 acres of farm or ranch land to expand the spray disposal fields would cost the Discharger \$1.1 million. This does not include the cost to install and operate infrastructure needed to spread process wastewater throughout the new disposal fields. Again, the Discharger may not actually realize these economic benefits if it actually implements these improvements to comply with the General WDRs

The economic benefit or savings the Discharger realized by committing Violation Nos. 3 and 4 is essentially the cost of obtaining proper permission from the Water Board to expand its flow rate beyond 70,000 gpd and expand its spray disposal areas beyond its originally permitted 36 acres. Assuming that the Water Board would have granted authorization as the wastewater treatment system is now, the cost would simply be the Discharger's staff or consultant's time required to request and negotiate the permit, which would be only approximately \$10,000. However, if the Water Board were to require nitrogen treatment or further expansion of the spray disposal fields, then the Discharger's expense would be considerable. But again, the Discharger may not actually realize these economic benefits because it will have to comply with the General WDRs.

The economic benefit or savings the Discharger realized by committing Violation No. 5 is the cost of maintaining the equipment and manpower necessary to ensure the Discharger's existing spray disposal fields are not hydraulically overloaded. If the Water Board considers the Discharger's existing manpower sufficient when it used its water reel irrigation system, and that the water reel irrigation system effectively prevented the disposal field from being hydraulically overloaded, then the Discharger's cost savings was simply the cost of repairing its water reel irrigation system. According to the Discharger's Facility Engineer, the water reel system repair has been repaired and it cost \$1,000.

If the Discharger improves its process wastewater management (e.g., adds additional treatment and/or additional disposal fields) in the near future to comply with the General WDRs, the Discharger's economic benefit by committing these violations is only \$14,000 (\$3,000 + \$10,000 + \$1,000). However, if the Discharger does not improve its process

wastewater management to comply with the General WDRs, then it will realize significant economic benefit, ranging from \$314,000 to \$1,114,000.

In an interview on November 15, 2006, Facility Engineer Joe Torquato indicated that the owner of Natural Selections has already committed to \$2 million in improvements to its process wastewater management. Assuming the Discharger commits to completing these improvements, the Discharger's economic benefit resulting from these violations is \$14,000. If the Discharger does not improve its process wastewater management as indicated, then this figure should increase accordingly.

h. Discharger's Ability to Pay Civil Liability and Ability to Stay in Business

The Discharger has not provided any information that would indicate an inability to pay the proposed civil liability. Natural Selections Foods is a privately held company and its financial information is not readily available. A Spring 2006 article in *The Natural Farmer*, a publication of the Northeast Organic Farming Association, reports that the Discharger completed \$261 million in sales in the 52 weeks ending September 10, 2005. According to Dunn and Bradstreet, (www.hoovers.com) the Discharger employs 1,025 people. The Discharger moves its employees and equipment every year to its facility in Yuma, Arizona, for the winter, at a reported cost of \$2 million. The Discharger is capable of paying the proposed civil liability.

i. Other Matters that Justice May Require

The Discharger prides itself for environmental stewardship. Its website states that it was awarded the California Department of Pesticide Regulation's 2004 *Integrated Pest Management Innovator* award and the 2005 *California Governor's Environmental & Economic Leadership Award*. Such awards may justify a reduction in assessed liability. However, Water Board staff contends such awards demonstrate the Discharger's awareness of environmental matters, and that it should have been more aware of its process wastewater management problems.

Also, responding to these violations and preparing the Complaint and this administrative civil liability order required approximately 130 hours of Water Board staff time. Estimated staff costs are \$9,750 (130 hours staff time x \$75/hour).

Original Administrative Civil Liability Complaint. Based on the above violations and factors, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R3-2007-0015 to the Discharger on April 30, 2007. The Complaint proposed that the Discharger be assessed a civil liability in the amount of \$95,000, and provided that the Discharger may direct a portion of the penalty to a Supplemental Environmental Project (SEP).

Waiver of Hearing and Supplemental Environmental Project (SEP) Proposal. In order to settle this matter, the Discharger waived its right to a hearing on May 10, 2007. The Discharger also proposed directing \$50,000 to \$80,000 of the civil liability penalty to the City of San Juan Bautista for its Wastewater Treatment Plant Effluent Reclamation Project, in accordance with the Water Quality Enforcement Policy and Water Code Section 13385(l). The Discharger's proposal is included as **Attachment 1**. The purpose of this SEP is to use recycled water from the city's wastewater treatment facility for irrigation of landscaping in and around the city. The proposed SEP requires upgrading the city's existing tertiary treatment plant to Title 22 disinfection standards, and installing pumps and piping to deliver the recycled water to use

sites. The total cost of the SEP is estimated at \$94,005. The SEP proposal includes a letter of support from the mayor of San Juan Bautista.

The proposed SEP meets the requirements of the state's Water Quality Enforcement Policy. The violations leading to this penalty likely impacted the beneficial uses of San Juan Creek. The SEP has a strong geographic nexus to the violations. It is located within the San Juan Creek watershed. The SEP will improve beneficial uses by decreasing waste loading to the creek. The Discharger represents that no law, permit or enforceable obligation requires it to complete this SEP, other than the proposed Order. The SEP is not proposed as mitigation of the effects of discharges from the Facility.

New Administrative Civil Liability Complaint. According to normal procedures, Water Board staff drafted a settlement agreement with the Discharger to settle the original complaint. However, at its July 6, 2007 meeting in Watsonville, Water Board members requested a hearing of this matter. The California Water Code provides that a Discharger has a right to hearing within 90 days of complaint issuance. The 90 day window for the original complaint ends on July 30, 2007. In order to reset this 90-day period and provide for a hearing, the Assistant Executive Officer withdrew the original complaint and issued Administrative Civil Liability Complaint No. R3-2007-0076 on July 18, 2007. The new complaint is essentially identical to the original complaint, except that it does not give the Discharger the opportunity to waive its right to a hearing. Water Board staff notified the Discharger and all known interested parties of the public hearing of this matter on August 23, 2007, in Salinas. This hearing notice and the new complaint are included as **Attachment 2**.

Proposed Administrative Civil Liability Order. Proposed Administrative Civil Liability Order No. R3-2007-0076 (Order) is included as **Attachment 3**. The Order assesses civil liability in the amount of \$95,000.

The Discharger must pay civil liability of \$25,000 to State Water Resources Control Board by September 24, 2007. The Discharger must also submit written proof of payment of at least \$70,000 to fund the San Juan Bautista Wastewater Treatment Plant Effluent Reclamation Project by October 24, 2007. Written proof will consist of a written receipt from the City of San Juan Bautista, signed by authorized persons, indicating the payment is to be expended entirely on the SEP.

Within 30 days after completion of the San Juan Bautista Wastewater Treatment Plant Effluent Reclamation Project, the Discharger must submit a project completion report. The project completion report will include a detailed description of the facilities completed as part of the project, including the improved disinfection system, lineal feet and volumetric capacity of the distribution system, and acreage that will be served with recycled water. The report should include a figure showing the location of the new recycled water facilities and use areas. The report must include a post-project accounting of expenditures related to the project. If the project is not completed by October 1, 2008, a project status report shall be submitted that specifies when the project will be completed. The project shall be completed by no later than October 1, 2009.

If the final total cost of the successfully completed SEP is less than \$70,000, the Discharger must remit the difference to the State Water Resources Control Board within 30 days after submitting the post-project accounting.

Whenever the Discharger or its agents or subcontractors, or any fiscal agent holding SEP funds, publicize an element of the SEP, they must state in a prominent manner that the project is being undertaken as part of an enforcement action against the Discharger.

The Order provides that the Water Board may extend due dates in the Order. The Water Board or the Executive Officer may extend a deadline if the Water Board or the Executive Officer determines that the delay was beyond the reasonable control of the Discharger or its contractors.

Recent Discharger Efforts to Come into Compliance. The Discharger has made several improvements since discovery of its violations. First, it constructed a berm around the entire lower end of its spray disposal fields to prevent any overflow from the disposal fields from reaching San Juan Creek. The Discharger also took some of the disposal field sections near the creek out of use to establish a 250 feet wide buffer zone between the disposal fields and the creek. These sections were replaced with a new 60 acre section, which brings the current disposal area up to 67 acres. The disposal fields have been re-graded and furrows have been installed parallel to the creek to prevent runoff. The Discharger has increased mowing of the disposal fields to facilitate inspection and improve evaporation. A new grass is being used to increase water uptake.

The Discharger is also pursuing permission for a new 18-acre spray disposal field closer to the San Benito River. The new site's soils drain faster than the existing disposal area and should provide enough total disposal capacity for all of the Discharger's process wastewater. The Discharger has already completed the pipeline and is currently constructing the pump station to deliver process wastewater to this new disposal field. The new disposal field will likely come online in late summer 2007, after the County of San Benito completes its California Environmental Quality Act process.

The Discharger is also close to completing the design for a new sequencing batch reactor treatment plant that will remove approximately 50% of nitrogen from the process wastewater and produce tertiary-quality recycled water. The Discharger plans to eventually provide this water to nearby Stevens Creek Quarry for dust control and to nearby McAlpine Lake (a recreational fishing impoundment) to supplement its supply. This new treatment plant should be completed and operational by October this year.

The Discharger is also in the process of installing new water filters in the Facility to improve water recirculation and minimize wastewater flow. The Discharger has hired additional staff to manage its wastewater facilities and has retained Bracewell Engineering to assist with monitoring and reporting.

California Environmental Quality Act. This enforcement action is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) in accordance with section 15321, Title 14, California Code of Regulations.

RECOMMENDATION

Based on the factors discussed above, the available evidence, and the Discharger's good response since discovery of these violations, Water Board staff believes the proposed \$95,000 penalty is appropriate. The Discharger has corrected the causes of these violations, and is working towards a treatment system that will improve the discharge above and beyond its waste discharge requirements. The penalty amount is sufficient to deter similar violations by similar

facilities. The proposed Order will direct \$70,000 of the penalty to the City of San Juan Bautista for a water recycling project, which will further the goals of state laws and policies. Staff recommends adoption of Administrative Civil Liability Order No. R3-2007-0076

ATTACHMENTS

1. Natural Selection Foods' Supplemental Environmental Project Proposal
2. Hearing Notice and Administrative Civil Liability Complaint No. R3-2007-0076
3. Administrative Civil Liability Order No. R3-2007-0076