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In reply refer to: CA:01-0743 & 01-0764:fmelbourn
Reg. Mes. 330267 & 330235

Item No. 9 Doc. No. 19

Marco A. Gonzalez, Esq.
Coast Law Group LLP
169 Saxony Road, Suite 204
Encinitas, California 92024

Dear Mr. Gonzalez:

Settlement of Administrative Civil Liability Complaint for Buena Vista Lagoon Sewage Spill

Thank you for your comment letter on the proposed settlement of Administrative Civil Liability (ACL) Complaint No. R9-2007-0099. From your letter, I understand that you are in agreement with the total liability amount of \$1,095,000 to be assessed against the Cities of Carlsbad and Vista (Cities), and the funding of the \$500,000 California Department of Fish and Game (DFG) and U.S. Fish and Wildlife Service (FWS) Supplemental Environmental Project (SEP) referred to as "Buena Vista Lagoon Restoration – Engineering Studies and Analyses."

Your disagreement with the settlement appears primarily with the percentage of the liability to be paid to the California State Water Resources Control Board's (State Board's) Waste Discharge Permit Fund. You would prefer to reduce the proposed \$595,000 payment to the State Board by \$395,000, and direct it to a second SEP referred to as the DFG/FWS Buena Vista Creek Ecological Reserve Habitat Restoration. This SEP is for removal of exotic species within Buena Vista Creek, upgradient of the Buena Vista Lagoon spill site.

From your letter, we understand that you and others negotiated a settlement with the Cities; namely that the Cities would pay \$200,000 to the State Board and fund the two DFG/FWS SEPs discussed above for \$500,000 and \$395,000.

The Prosecution Staff does not support diverting \$395,000 from the State Board to fund the second SEP. This determination is based on a thorough review of the proposed SEPs and consultations with the DFG. Regional Board staff does support the \$500,000 DFG/FWS SEP because it will complete the needed engineering studies and analyses that will shape the long term restoration of Buena Vista Lagoon. This long term and comprehensive restoration approach was developed with input by representatives of a wide range of local, state and federal agencies, as well as local Non-Government Organizations, including the following: California Coastal Conservancy, California Coastal Commission, DFG, Buena Vista Lagoon Foundation, Cities of Carlsbad and

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Oceanside, FWS, California Coastal Commission, National Marine Fisheries Service, U.S. Army Corps of Engineers and the Regional Board.

The Prosecution Staff determined that although your preferred Buena Vista Creek SEP is commendable, it would not have the significant impact that the long term restoration SEP will have on the overall health of the lagoon. Nevertheless, if after the Regional Board's discussion on the Settlement on September 10, 2008, the Regional Board, in its wisdom, ultimately directs more of the liability towards additional SEPs, the Prosecution Staff will recommend directing the increase into the National Fish and Wildlife Foundation's Buena Vista Lagoon Restoration Project Incident Specific Subaccount of the Environmental Fund for Habitat and Incident Specific Restoration Projects, rather than your recommended SEP for Buena Vista Creek. These funds would then be available to fund projects developed by the \$500,000 DFG/FWS SEP.

Furthermore, the Prosecution Staff is not recommending a change to the current settlement being proposed to the Regional Board because it would not comport with the State's policy to limit the amount of liability available to fund SEPs. The following is our reasoning to limit the diversion of penalty money to SEPs to 50% of the liability in greater detail:

1. The purpose of an enforcement action such as an ACL Complaint is to deter violations of the law and encourage practices that prevent discharges of waste to waters of the state. Allowing a greater proportion of an assessment to be directed to a local SEP inherently weakens that deterrent effect. Perhaps recognizing these premises, the Cal-EPA's penalty policy notably sets a cap of 25% on SEP funding from ACL assessments.
2. As meritorious as environmental or community projects may be, the purpose of environmental enforcement is not to fund them directly. Rather, communities are encouraged to apply to the State Board's Cleanup and Abatement Account and the Waste Discharge Permit Funds for assistance with cleanup and environmental projects.
3. The State Water Resources Control Board's Water Quality Enforcement Policy (2002) suggests, and the current proposed revised policy sets a cap of 50%.
4. A recent Legislative Analyst's Office audit criticized the Water Boards' past SEP practices and recommended legislation to set a statutory limit of 50%. In order to avoid further legislative constraints on the Water Boards' exercise of authority, it is preferable to follow the State Board's Enforcement Policy recommendation to limit diversions to SEPs to 50%.

For these reasons, the Prosecution Staff will recommend that the Regional Board adopt the proposed settlement without modification.

Please contact Mr. Frank Melbourn of my staff at (858) 467-2973 or by e-mail at fmelbourn@waterboards.ca.gov if you have any questions concerning this matter. The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

Respectfully,



MARK ALPERT
Acting Chief, Water Quality Restoration and Standards Branch

MJA:ftm