
San Francisco Bay Regional Water Quality Control Board

VIA EMAIL ONLY

September 13, 2016

Lawrence S. Bazel
Briscoe Ivester & Bazel LLP
155 Sansome Street, 7th Floor
San Francisco, CA 94104

Subject: Advisory Team Response to Dischargers' August 26 Correspondence Regarding Cost Recovery and Other Issues Relating to Order No. R2-2016-0038

Dear Mr. Bazel:

The Advisory Team has received your letter dated August 26, 2016. In your letter, you suggest that your client interprets the obligation, memorialized in Cleanup and Abatement Order No. R2-2016-0038, to reimburse the Regional Board for oversight costs to be voluntary. You also express concern about the possibility of double billing for current oversight costs and future costs associated with the potential future imposition of administrative civil liability. You request to discuss reimbursement issues with the Regional Board. In addition, you object to the Executive Officer's role in approving plans required pursuant to Order No. R2-2016-0038. Below, the Advisory Team explains in more detail your client's cost-recovery obligations and clarifies that they are not optional. In addition, the Advisory Team describes the role of the Executive Officer in approving plans required under cleanup and abatement Orders.

A. Your Clients' Cost-Recovery Obligations Are Not Voluntary.

You posit that section 13304 of the Water Code only requires dischargers to reimburse the Regional Water Board for cleanup costs following a civil action, and that because the August 10, 2016 hearing at which the Order No. R2-2016-0038 was adopted was not a civil action, your clients' reimbursement of the Regional Board's cleanup expenses is voluntary. This conclusion is based on a flawed interpretation of section 13304. Contrary to your assertions, your clients' liability for cleanup costs is not optional, but mandatory. (Water Code § 13304, subd. (c)(1) ["the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), *are liable* to [the Regional Board] to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, *supervising cleanup or abatement activities, or taking other remedial action.*"]*[emphasis added]*.) The Regional Board takes the position that each named discharger on a cleanup and abatement order is jointly and severally liable for *all* costs enumerated under section 13304, subdivision (c)(1).

Here, the Regional Water Board has found that your clients "caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and United States and created or threatens to create a condition of pollution." (Order No. R2-2016-0038, p.

13.) Accordingly, your clients are liable for the agency's costs in supervising cleanup, abatement, or other remedial action under section 13304, subdivision (c)(1). Additional requirements governing the agency's billing process may be found in Water Code section 13365.

That the Regional Board may *recover* oversight costs in a civil action does not mean that your clients only *owe* the costs as a result of a civil action. That is akin to positing that taxpayers only owe income taxes if the IRS sues them for tax evasion. Rather, the provision that the costs are recoverable in a civil action is merely an assurance that the agency has a means of enforcing and recouping costs that have not been paid.

Similarly, the Advisory Team emphasizes that the "Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter" (Acknowledgement) referenced in Order No. R2-2016-0038 is not a consent form. Instead, the Acknowledgement and other cost-recovery materials describe the cost-recovery program, establish a cost-recovery account number, and confirm your clients' billing address and understanding of the cost-recovery process. In other words, your clients cannot decline participation in the cost-recovery program by refusing to sign the Acknowledgement. To the contrary, your clients remain liable for oversight costs, provided they are billed in accordance with the provisions of section 13365.

B. The Costs Recoverable Pursuant to Section 13304 and Administrative Civil Liability Complaint No. R2-2016-1008 Are Distinct.

The costs recoverable pursuant to section 13304, subdivision (c)(1) are not the same as the costs potentially recoverable in the administrative civil liability (ACL) matter if an ACL order is subsequently adopted by the Regional Board. As described above, the costs for which your clients are liable under section 13304, subdivision (c)(1) include any costs the Regional Board itself incurs in performing cleanup activities, as well as oversight costs incurred in supervising cleanup activities performed by your client. By contrast, the costs potentially recoverable in the ACL proceeding are costs relating to enforcement and development of the Complaint. (Complaint No. R2-2016-1008, p. 2.) Questions regarding "what will be included in the future reimbursement bills, and how the Regional Board's past costs should be reimbursed" should be discussed with the Prosecution Team.

C. The Executive Officer's Role in Approving Submissions Required by Cleanup and Abatement Order No. R2-2016-0038 Does Not Violate the Separation of Functions.

You assert that by having "decision-making authority over submissions required by Order [No. R2-2016-0038]," Executive Officer Bruce Wolfe is violating your clients' due process rights. For the following reasons, the Advisory Team rejects this assertion.

A quorum of the board has already voted to adopt Order No. R2-2016-0038. The approval of plans required by the order is neither a task required to be carried out by the members of the Regional Water Board, nor an adjudicative decision that requires or warrants a hearing before the Board. Instead, the review of plans submitted pursuant to a cleanup and abatement order is a task properly delegated to the Executive Officer. (Wat. Code § 13223; San Francisco Bay Regional Water Board Resos. No. 70-11 and R2-2008-0055; Executive Officer Memorandum, "Delegation of Authority; Signature Requirements" [Nov. 23, 2009].) Such review is limited to determining whether the plans satisfy the order's requirements. Thus, Mr. Wolfe's approval or rejection of submitted plans will neither affect your clients' rights or responsibilities under the order, nor alter its substantive requirements.

Moreover, the Advisory Team agreed to remove Mr. Wolfe from the Advisory Team in June. (See Advisory Team Response [June 8, 2016], p. 8.) Accordingly, Mr. Wolfe is not currently serving an advisory or prosecutorial role in the ACL matter. Therefore, action he may take to approve or reject plans required to be submitted in accordance with Cleanup and Abatement Order R2-2016-0038 would not violate the separation of functions, which continues to be maintained in anticipation of the December hearing on Complaint No. R2-2016-1008.

Please contact me at (916) 327-4439 if you have questions regarding the above.

Sincerely,

cc:

Advisory Team:

Shin-Roei Lee, Assistant Executive Officer, North Coast Regional Water Quality Control Board;
Shin-Roei.Lee@waterboards.ca.gov; (707) 570-3769
David Elias, Section Leader; David.Elias@waterboards.ca.gov; (510) 622-2509
Liz Morrison, Technical Staff; Elizabeth.Morrison@waterboards.ca.gov; (510) 622-2330
Elizabeth Wells, Technical Staff; Elizabeth.Wells@waterboards.ca.gov; (510) 622-2440
David Coupe, Attorney IV; David.Coupe@waterboards.ca.gov; (510) 622-2306
Marnie Ajello, Attorney; Marnie.Ajello@waterboards.ca.gov; (916) 327-4439

Prosecution Team:

Agnes Farres, Technical Staff; Agnes.Farres@waterboards.ca.gov; (510) 622-2401
Benjamin Martin, Technical Staff; Benjamin.Martin@waterboards.ca.gov; (510) 622-2116
Brian Thompson, Section Leader; BThompson@waterboards.ca.gov; (510) 622-2422
Dyan C. Whyte, Assistant Executive Officer, DWhyte@waterboards.ca.gov; (510) 622-2441
Keith Lichten, Division Chief; Keith.Lichten@waterboards.ca.gov; (510) 622-2380
Tamarin Austin, Attorney IV; Tamarin.Austin@waterboards.ca.gov; (510) 622-2490
Julie Macedo, Attorney IV; Julie.Macedo@waterboards.ca.gov; (916) 323-6847
Laura Drabandt, Attorney III; Laura.Drabandt@waterboards.ca.gov; (916) 341-5180

Persons Not Serving on Either the Advisory or Prosecution Teams:

Frances McChesney, Acting Assistant Chief Counsel;
Frances.McChesney@waterboards.ca.gov; (916) 341-5174
Matthew Bullock, Deputy Attorney General; Matthew.Bullock@doj.ca.gov; (415) 703-1678