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Gray Davis
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TO: Edward C. Anton
Acting Executive Director /s/

FROM: Craig M. Wilson
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OFFICE OF CHIEF COUNSEL

DATE: April 17, 2001

SUBJECT: QUESTIONS AND ANSWERS ABOUT THE CLEAN WATER
ENFORCEMENT AND POLLUTION PREVENTION ACT OF 1999 (SB 709)
AND ITS AMENDMENTS (SB 2165)

This memorandum supersedes all previous memoranda on the same subject.¹ In 1999, the Clean Water Enforcement and Pollution Prevention Act of 1999 (Senate Bill 709²) was enacted. The 1999 act added several provisions to Division 7 of the California Water Code that address (1) pollution prevention plans; (2) mandatory minimum penalties; (3) recovery of economic benefit in assessing civil liability; and (4) a requirement to prescribe effluent limitations. In 2000, Senate Bill 2165³ was enacted, which amended some of these new provisions effective January 1, 2001. What follows is a brief summary of the laws. Attached is an in-depth legal analysis in the form of Questions and Answers about SB 709 and SB 2165. For further assistance, please contact Senior Staff Counsel Karen O'Haire at (916) 341-5179, or Assistant Chief Counsel Phil Wyels at (916) 341-5178.

SUMMARY OF SB 709 AND SB 2165

¹ Previous memoranda on this subject, dated December 1, 1999, and March 22, 2000, from William R. Attwater to Walt Pettit, are superseded by this Memorandum. This Memorandum, which addresses additional issues raised by the implementation of SB 709 and new issues raised by the enactment of SB 2165, may be further revised from time to time to address new issues or revisions to the law. It may also be revised as appropriate to reflect revisions to the State Water Resources Control Board's Water Quality Enforcement Policy. The issues that are currently the subject of draft revisions to the Enforcement Policy have been noted as such in the Questions and Answers.

² Stats. 1999, ch. 93.

³ Stats. 2000, ch. 807.

Pollution Prevention Plans. Water Code section 13263.3 authorizes the State Water Resources Control Board (State Board), a Regional Water Quality Control Board (Regional Board), or a Publicly Owned Treatment Works (POTW) to require a discharger to complete and implement a pollution prevention plan (PPP). A POTW may require industrial dischargers to prepare and implement a PPP and the State Board or a Regional Board may require a POTW and industrial users to prepare and implement a PPP. This authority is discretionary. The legislation defines what constitutes pollution prevention and specifies what is required to be included in the PPPs for the purposes of this section. The failure to prepare or implement a PPP may subject the discharger to civil liability and penalties.

Mandatory Minimum Penalties. Water Code section 13385(h) and (i) provide for mandatory minimum penalties of \$3,000 per violation of an NPDES permit as described below. There are two types of mandatory penalties: serious violations and ongoing violations.

- A. *Serious Violations* – The Regional Boards shall assess a mandatory minimum penalty of \$3,000 for each serious violation. A serious violation is an exceedance of an effluent limitation by a specified percentage. In lieu of assessing this penalty for the first serious violation in a period of six months, the Regional Boards may allow the discharger to use the amount to complete a PPP or for a supplemental environmental project.
- B. *Ongoing Violations* – The Regional Boards shall assess a mandatory minimum penalty if a person commits four or more violations of a specified type in a six-month period. There is no mandatory penalty for the first three violations. Assessment of a \$3,000 penalty per violation begins with the fourth violation. The types of violations include the following:
 - a. Exceeding an effluent limitation.
 - b. Failure to file a report pursuant to Water Code section 13260.
 - c. Filing an incomplete report pursuant to Water Code section 13260.
 - d. Exceeding a toxicity discharge limitation where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

SB 2165 added several limited exceptions to the mandatory minimum penalty provisions. The primary exceptions are for discharges that are in compliance with a cease and desist order or time schedule order under narrowly specified conditions. SB 2165 also added an alternative to assessing mandatory minimum penalties against POTWs that serve “small communities.” Under this alternative, the Regional Boards may require the POTW to spend an amount equivalent to the

mandatory minimum penalty toward a compliance project that is designed to correct the violations.

Recovery of Economic Benefit. Water Code section 13385(e), governing the assessment of administrative civil liabilities (ACL), was amended to require that “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.” Previously, economic benefit was just one of several factors to be considered in determining the amount of ACL; now recovery of economic benefit as part of an ACL is mandatory. Recovery of economic benefit is not required when assessing mandatory penalties under Water Code section 13385(h) and (i). The State Board is in the process of revising its Water Quality Enforcement Policy to provide guidance on how to determine the amount of an ACL, including how to determine economic benefit.

Effluent Limitations. Water Code section 13263.6 requires the Regional Board to prescribe effluent limitations as part of the waste discharge requirements (WDRs) for a POTW for all substances that a report required by federal law indicates are discharged into the POTW. This section only applies to substances for which the State or Regional Board has established numeric water quality objectives and has determined that the POTW’s discharge is or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to, an excursion above the numeric water quality objectives. This requirement is largely duplicative of existing federal requirements, but is new for non-NPDES WDRs.

Attachment

cc: RWQCB Executive Officers
John Norton, OSI
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