

## CAEU PRELIMINARY ANALYSIS OF SB 709 (AKA THE MIGDEN BILL)

*This is a preliminary analysis of SB 709. A more detailed treatment will be needed for certain parts of this bill, and the actual language of the bill should be consulted for better clarification.*

Primarily this bill affects enforcement of NPDES permits, and to a lesser degree the permits themselves. There are five distinct parts of this bill: (1) pollution prevention plans; (2) requirement of effluent limits; (3) recovery of economic benefit; (4) mandatory minimum penalties; and (5) reporting to the legislature.

### 1. POLLUTION PREVENTION PLANS

This legislation provides that the State Board, a Regional Board or a POTW (hereinafter collectively called the implementing agency) may require a discharger to complete and implement a pollution prevention plan (PPP). This authority is discretionary. The legislation defines what constitutes pollution prevention. The implementing agency may require a PPP if any of the following apply:

- A. The State Board determines the discharger to be a chronic violator, and the implementing agency determines that a PPP would assist in achieving compliance. There is no definition of "chronic violator" in this legislation. State Board staff will provide guidance on an appropriate definition of "chronic violator".
- B. The discharger significantly contributes, or has the potential to significantly contribute, to the creation of a toxic hot spot as defined in Section 13391.5. A "toxic hot spot" generally means a location in an enclosed bay, estuary, the ocean, or adjacent waters where the pollution or contamination affects the interests of the state, and where hazardous substances have accumulated in the water or sediment to levels which (1) may pose a substantial present or potential hazard to aquatic life, wildlife, fisheries, or human health, or (2) may adversely affect the beneficial uses of the bay, estuary, or ocean waters as defined in water quality control plans, or (3) **exceeds** adopted water quality or sediment quality objectives.
- C. The implementing agency determines pollution prevention is necessary to achieve a water quality objective.

If a PPP is required of a discharger other than a POTW, it must contain all the following elements:

- A. An analysis of the pollutants discharged, a description of the sources of the pollutants, and a comprehensive review of the processes used by the discharger that result in the generation and discharge of the pollutants.
- B. An analysis of the potential for pollution prevention to reduce the generation of the pollutants, including the application of innovative and alternative technologies and any adverse environmental impacts resulting from the use of those methods.
- C. A detailed description of the tasks and time schedules required to investigate and implement various elements of pollution prevention techniques.
- D. A statement of the discharger's pollution prevention goals and strategies, including priorities for short-term and long-term action.
- E. A description of the discharger's existing pollution prevention methods.
- F. A statement that the discharger's existing and planned pollution prevention strategies do not constitute cross media pollution transfers unless clear environmental benefits of such an approach are identified to the satisfaction of the state board, the regional board, or the POTW, and information that supports that statement.
- G. Proof of compliance with the Hazardous Waste Source Reduction and Management Review Act of 1989 (Article 11.9 (commencing with Section 25244.12) of Chapter 6.5 of Division 20 of the Health and Safety Code) if the discharger is also subject to that act.
- H. An analysis, to the extent feasible, of the relative costs and benefits of the possible pollution prevention activities.
- I. A specification of, and rationale for, the technically feasible and economically practicable pollution prevention measures selected by the discharger for implementation.

POTWs are treated a little differently. A PPP for a POTW must contain all the following elements:

- A. An estimate of all of the sources of a pollutant contributing, or potentially contributing, to the loading of that pollutant in the treatment plant influent.
- B. An analysis of the methods that could be used to prevent the discharge of the pollutants into the POTW, including application of local limits to industrial or commercial dischargers regarding pollution prevention techniques, public education and outreach, or other innovative and alternative approaches to reduce discharges of the pollutant to the POTW. The analysis also shall identify sources, or potential sources, not within the ability or authority of the POTW to control, such as pollutants in the potable water supply, airborne pollutants, pharmaceuticals, or pesticides, and estimate the magnitude of those sources, to the extent feasible.
- C. An estimate of load reductions that may be attained through the methods identified in subparagraph (B).
- D. A plan for monitoring the results of the pollution prevention program.
- E. A description of the tasks, cost, and time required to investigate and implement various elements in the pollution prevention plan.
- F. A statement of the POTW's pollution prevention goals and strategies, including priorities for short-term and long-term action, and a description of the POTW's intended pollution prevention activities for the immediate future.
- G. A description of the POTW's existing pollution prevention programs.
- H. An analysis, to the extent feasible, of any adverse environmental impacts, including cross media impacts or substitute chemicals, that may result from the implementation of the pollution prevention program.
- I. An analysis, to the extent feasible, of the costs and benefits that may be incurred to implement the pollution prevention program.

The state board, regional boards, and POTWs shall make the pollution prevention plans available for public review, except for trade secret information. The implementing agency may require a discharger to comply with the pollution prevention plan developed by the discharger after providing an opportunity for comment at a public proceeding (either at a board meeting or by providing an opportunity for written comments) with regard to that plan. The implementing agency may assess penalties for failure to properly develop or implement a PPP. The measures specified in a PPP may be changed or deleted only under certain conditions.

The State Board is required to adopt a sample format for dischargers to use in completing a PPP, and the State Board may include elements in addition to those listed above. This format does not require OAL approval.

PPPs cannot be included as part of an NPDES permit. This means the PPP cannot be made part of the permit - it must remain a separate document. This should not be taken to mean that development of a PPP would preclude certain terms being placed in a permit, assuming such terms would have been appropriate if the PPP were not required. The Regional Board may include in a permit a requirement to prepare and implement a PPP.

## 2. REQUIREMENT OF EFFLUENT LIMITS

This part requires the Regional Board to prescribe effluent limitations as part of the WDRs of a POTW for all substances that the most recent toxic chemical release data reported to the state emergency response commission pursuant to Section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. Sec. 11023) indicate as discharged into the POTW, for which the state board or the regional board has:

- A. Established' numeric water quality objectives, and

- B. Has determined that the discharge is or may be discharged at a level which will cause, ' have the reasonable potential to cause, or contribute to, an excursion above any numeric water quality objective.

The actual impact of this part of the legislation is unclear, and we are working with OCC to clarify.

### 3. RECOVERY OF ECONOMIC BENEFIT

Language was added to 13385 (e) requiring 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 that was considered in determining the amount of an ACL. The Economics Unit is preparing guidance on how to determine the amount of an ACL, and such guidance will include determination of economic benefit.

### 4. MANDATORY MINIMUM PENALTIES

This is the part of the legislation that will probably have the most substantial and direct impact to the discharger. It provides for minimum mandatory penalties (MMP) of \$3,000 per violation as described below. The degree of impact of this requirement is not known, since it would assess penalties for some violations that we have not always tracked.

The legislation first defines serious violations as follows:

- A. exceeding the effluent limit for a Group I pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 40 percent or more,  
or
- B. exceeding the effluent limitations for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations.

These categories are also used in the State Enforcement Policy.

There are two levels of the MMP, first time serious violations and ongoing violations.

- A. First Time Serious Violations - A MMP of \$3,000 shall be assessed for the first serious violations in any six-month period. In lieu of assessing this penalty, the State or Regional Board may allow
- B. On-going Violations - A MMP of \$3,000 per violation shall be assessed if either of the following occurs in a six-month period:
  - (1) The person commits two or more serious violations. Penalty assessment does not count the first violation, and begins with the second violation.

- (2) The person commits four or more of the following violations. Penalty assessment does not count the first three violations, and begins with the fourth violation. These violations are:
- a. Exceedence of a WDR effluent limitation.
  - b. Failure to file a report pursuant to Section 13260.
  - c. Filing an incomplete report pursuant to Section 13260.
  - d. Exceedence of a toxicity discharge limitation where the discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

Just like an ACL, funds collected pursuant to these penalties shall be deposited in the State Water Pollution Cleanup and Abatement Account. OCC is determining what expedited procedures may be used for assessment and collection of these MMPs.

## 5. REPORTING TO THE LEGISLATURE

Beginning March 1, 2001, we will be required to report annually to the legislature:

- A. A compilation of the number of violations of waste discharge requirements in the previous year.
- B. A record of the formal and informal compliance and enforcement actions taken for each violation.
- C. An analysis of the effectiveness of current enforcement policies, including minimum mandatory penalties.
- D. Recommendations, if any, necessary for improvements to the enforcement program in the following year.

The starting and ending dates for the annual reporting have not been defined. Since it is unlikely we could have all the data collected and a report for the legislature prepared within two months, it is probable that we would choose the state fiscal year.