

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2003 - 0004

In the Matter of the Petition of

WEYRICH DEVELOPMENT COMPANY

For Review of Administrative Civil Liability Order
No. R3-2002-0028 for Weyrich Development Company

Issued by the
California Regional Water Quality Control Board,
Central Coast Region

SWRCB/OCC FILE A-1486

BY THE BOARD:

On May 31, 2002, the Central Coast Regional Water Quality Control Board (Regional Water Board) adopted Administrative Civil Liability Order No. R3-2002-0028 (ACL Order). Pursuant to California Water Code section 13385, the Regional Water Board imposed civil liability upon Weyrich Development Company, Inc. (petitioner) in the amount of \$192,375 for 93 days of violations of SWRCB Order No. 99-08-DWQ, the General Permit for Storm Water Discharges Associated with Construction Activity (permit or General Permit). The State Water Resources Control Board (State Water Board) received a timely petition on July 1, 2002.

I. BACKGROUND

Petitioner owns tract 2350, a 90-acre parcel located in Paso Robles. In the summer of 2000, petitioner broke ground on a project to build 175 residential units at the site. Owners of construction projects that will disturb five or more acres of land must obtain National Pollutant Discharge Elimination System (NPDES) permit coverage prior to construction, as required by the Clean Water Act.¹ Petitioner submitted a Notice of Intent (NOI) to comply with

¹ As a result of U.S. Environmental Protection Agency's (USEPA) Phase II storm water regulations, the permitting requirement now extends to any construction project that disturbs more than one acre of land. See permit (as modified on December 2, 2002).

the permit on July 12, 2000. While the date of initial grading is disputed, it appears that grading began approximately one month before submission of the NOI.²

One of the permit's requirements is to develop a detailed Storm Water Pollution Prevention Plan (SWPPP), which must set forth a comprehensive control strategy to prevent and reduce storm water pollution during and after construction. The SWPPP must identify a series of Best Management Practices (BMPs),³ along with time schedules, that will be implemented over the life of the project.

Weyrich mass-graded the entire 90-acre site at once. The permit requires extra precautions for large mass-graded sites because of significant erosion potential. Most sites are graded in incremental phases, and are not required to comply with the more stringent requirements for large mass-graded sites.

The Regional Water Board staff first inspected the site on March 9, 2001, after receiving information that a landslide from the Weyrich property had temporarily closed the bordering Golden Hills Road. After a March 13, 2001, follow-up meeting with project director Dan Lloyd, staff issued a notice of violation (NOV), which included photographs of eroded soil, criticized the existing BMPs, and recommended new BMPs.

Regional Water Board staff conducted site visits during the Spring of 2001 and throughout the 2001-2002 wet season. During that time, staff members either inspected the site, met with petitioner, suggested new BMPs, or requested SWPPP revisions on nine separate occasions. Staff also issued two more NOVs.⁴ On April 12, 2002, the Regional Water Board Executive Officer issued an Administrative Civil Liability (ACL) complaint in the amount of \$99,375 for 93 days of alleged violations of the permit. Attached to the complaint was a worksheet that discussed statutory factors for establishing the fine.⁵ The \$99,375 was broken

² The July 2000 NOI indicates that construction commenced on May 20, 2000. At the Regional Water Board hearing, petitioner's representative indicated that initial grading began in June 2000. See Regional Water Board Hearing Transcript at p. 30. Conversely, the petition claims that the NOI was filed in July 2000 and that initial grading began "shortly thereafter." Weyrich petition, at p. 3.

³ BMPs are schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. 40 C.F.R. § 122.2.

⁴ See Second NOV (dated Apr. 24, 2001) and Third NOV (dated Nov. 1, 2001).

⁵ The worksheet referred to the factors listed in Water Code § 13327 rather than § 13385(e) even though the complaint was based on violations of § 13385. The factors in both sections, however, are similar.

down as follows: \$61,250 for economic savings, \$7,500 for staff costs, and \$30,625 for culpability and the lack of voluntary cleanup efforts. The \$30,625 was set at one-half of the economic savings. At the May 30, 2002, ACL hearing, petitioner claimed that it spent nearly \$300,000 to implement erosion and sediment control BMPs. The Regional Board staff disputed this claim. The Regional Water Board proceeded to unanimously adopt the \$192,375 ACL Order, which increased staff's recommended amount by \$93,000, to reflect an additional fine of \$1,000 per day of violation. The ACL Order stated that it was based on the staff worksheet, but that it modified the staff analysis because the factors of culpability and susceptibility to cleanup justified a higher amount.

II. CONTENTIONS AND FINDINGS⁶

Contention No. 1: The Regional Water Board abused its discretion by miscalculating the economic savings component of the ACL Order.

Response: Water Code section 13385(e) requires that ACL orders be based on a number of factors and, at a minimum, recover any economic benefit that results from the noncompliance.⁷ Approximately half of the fine assessed by the Regional Board was based on factors unrelated to economic savings. For example, the Regional Board's decision to add \$1,000 per day of violations to the fine, based on the "culpability" factor, was not either increased or decreased by the calculation of the economic savings. This is also true of the staff costs of \$7500. The ACL worksheet, however, while it discussed other factors listed in section 13385(e), is based on the assumption that Weyrich had economic savings of \$61,250. \$91,875 of the assessed fine was calculated by multiplying the assumed economic savings by 1.5. The worksheet states that this calculation was meant to address the "culpability" factor.

⁶ This Order does not address all of the issues raised by the petitioner. The State Water Board finds that the issues that are not addressed are insubstantial and not appropriate for State Water Board review. See *People v. Barry* (1987) 194 Cal.App.3d 158, [239 Cal.Rptr. 349], Cal. Code Regs., tit. 23, § 2052.

⁷ "In determining the amount of liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, 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 its ability to continue its 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. 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." Wat. Code § 13385(e).

Petitioner alleges that it enjoyed no economic benefit from the alleged violation because its actual costs were substantially more than the average costs estimated in the ACL complaint. The complaint estimated that a typical operator would have incurred \$61,250 in compliance costs for a similar project.⁸ The ACL Order identifies this entire amount as economic benefit to the petitioner. On the other hand, petitioner detailed nearly \$300,000 in alleged compliance costs for many of the same BMPs included in the estimate,⁹ and none of these costs are credited by the ACL Order. The ACL Order does not explain the relationship between the economic savings calculation and the amount that petitioner allegedly spent.

Because \$91,875 of the fine is based on the finding that the economic savings were \$61,250, we must remand the matter so that the Regional Board can clarify the basis for this finding. We note that the Regional Water Board could have based its ACL Order entirely on the factors listed in Water Code section 13385(e) and included findings in the ACL Order on each factor, and then ensured that the amount was at least as great as the economic savings. We will remand the matter to the Regional Water Board to reconsider the proper amount of liability pursuant to section 13385(e). Upon remand, the Regional Water Board should act consistent with our recently adopted Enforcement Policy (Resolution No. 2002-040).

Contention No. 2: The alleged violations in the ACL Order lack adequate foundation.

Response: The ACL Order enumerates numerous violations. While we will not review most of these, we will comment on two of the alleged types of violations. Upon remand, the Regional Board should reconsider these alleged violations.

The ACL Order alleges that petitioner violated a non-storm water discharge prohibition¹⁰ because it allowed sediment carried in runoff to discharge to a municipal storm sewer system and to surface waters. This prohibition only applies to non-storm water discharges.

⁸ Vendors contacted by Regional Water Board staff considered the site's perimeter, the perimeter of its interior roads, and the acreage of "steep" slopes to estimate the cost of installing silt fences on the perimeter and interior roads, and hydroseeding the steepest slopes.

⁹ *Id.* These BMPs included hydroseeding and silt fencing.

¹⁰ "Discharges of material other than storm water which are not otherwise authorized by an NPDES permit to a separate storm sewer system (MS4) or waters of the nation are prohibited, except as allowed in Special Provisions for Construction, Activity, C.3." Permit, at A.2.

While the discharge of sediment is limited by the permit,¹¹ when sediment is discharged in storm water runoff, it is not considered a non-storm water discharge. Thus, the ACL Order refers to the wrong permit provision as being violated.

Next, the ACL Order charges that petitioner failed to develop and implement a SWPPP concurrent with the commencement of soil-disturbing activities¹². The evidence in the record shows that petitioner did not implement adequate BMPs. The issue of when a SWPPP was actually developed is unclear because, although construction began in the summer of 2000, the Regional Board inspector did not request a copy of the SWPPP until October 2001, when she requested a revised SWPPP by November 15, 2001. Weyrich did not submit a SWPPP until December 14, 2001, and that document was incomplete. Thus, while the Regional Board may not have substantial evidence that Petitioner did not have a SWPPP when it began construction, there is substantial evidence of violations of the permit provisions requiring implementation of adequate BMPs. It can also be inferred that, at a minimum, Petitioner did not have an adequate SWPPP from the commencement of construction.¹³ On remand, the Regional Board should clarify the SWPPP violations.

Contention No. 3: The Regional Water Board violated petitioner's due process rights by denying its request to continue the hearing until the next Regional Water Board meeting.

Response: Because we are remanding the matter, it is not necessary to address this contention.

III. CONCLUSION

While the State Water Board affords a Regional Water Board substantial discretion to impose administrative civil liability, it will review orders when there is an abuse of discretion or misapplication of the law.¹⁴ The Regional Water Board has not justified in the

¹¹ The SWPPP must describe BMPs that will prevent a net increase of sediment load in storm water discharge compared to pre-construction levels. Permit, Section A: SWPPP, item 8.

¹² The ACL Order also refers to numerous other violations, including the failure to employ adequate BMPs. We do not question the basis of these findings.

¹³ In the future, we recommend that inspectors always request a SWPPP, which is required to be kept on-site at construction sites. See, Permit, Section A, Paragraph 3.

¹⁴ *In the Matter of the Petition of the City of Los Angeles*, Order WQ 2001-02, at p. 5.

record its method of determining economic savings, and the Board used its determination of savings as a primary basis for the amount of administrative civil liability. We remand this matter to the Regional Water Board for a new hearing to reconsider the issue in light of the above discussion.

IV. ORDER

IT IS HEREBY ORDERED THAT the matter is remanded to the Regional Water Board for a new hearing and further findings consistent with this Order.

CERTIFICATION

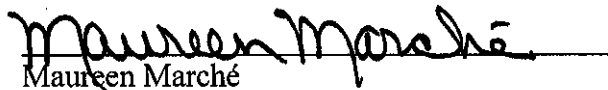
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 30, 2003.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Gary M. Carlton

NO: None

ABSENT: Richard Katz

ABSTAIN: None


Maureen Marché
Clerk to the Board