



San Diego Regional Water Quality Control Board

January 10, 2019

Sent By Email Only

Mr. Michael A. Katz
President
Promenade Mall Development Corp.
4150 Mission Boulevard
San Diego, CA 92101
skeenan@cfisandiego.com

In reply refer to / attn:
249321:KYaeger

Subject: Settlement Offer No. R9-2019-0024 Offer to Participate in Expedited Payment Program Relating to Violations of Order No. R9-2015-0013, NPDES No. CAG919003

Mr. Katz:

Promenade Mall Development Corporation (Permittee) is hereby notified of alleged violations of Order No. R9-2015-0013, *General Waste Discharge Requirements for Groundwater Extraction Discharges to Surface Waters within the San Diego Region*, and of the opportunity to participate in an Expedited Payment Program to address liability that may be assessed pursuant to California Water Code sections 13385 and/or 13385.1.

ALLEGED VIOLATION(S) SUBJECT TO THIS OFFER

As detailed in Exhibit A, the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) alleges that the Permittee has violated Order No. R9-2015-0013.

STATUTORY LIABILITY

The Permittee is subject to the following statutory liabilities:

1. Water Code section 13385.1 requires the assessment of a \$3,000 mandatory minimum penalty for a failure to file a discharge monitoring report required pursuant to Water Code section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations;
2. Water Code section 13385(c) allows for additional civil liability of up to \$10,000 per day for each violation; and
3. Water Code section 13385(e) allows for the recovery of staff costs.

These mandatory minimum penalties and discretionary administrative civil liabilities may be assessed by the San Diego Water Board beginning with the date that each violation first occurred.

The formal enforcement that the San Diego Water Board uses to assess such liability is an administrative civil liability complaint, although the San Diego Water Board may instead refer such matters to the Attorney General's Office for prosecution. If referred to the Attorney General's Office for prosecution, the Superior Court may assess up to \$25,000 per day for each violation, including staff costs.

SETTLEMENT OFFER

The Permittee can avoid formal enforcement action and settle the alleged violation(s) identified in Exhibit A by participating in the San Diego Water Board's Expedited Payment Program. The Permittee may accept this conditional Settlement Offer, waive its right to a hearing, and pay the mandatory minimum penalty of **\$27,000** for the violation(s) described in Exhibit A. If the Permittee elects to do so, the San Diego Water Board, or its delegate, will execute the Settlement Offer, subject to the conditions below. Accordingly, the San Diego Water Board will forego issuance of a formal administrative liability complaint, will not refer the violation to the Attorney General's Office, will not charge incurred staff costs, and will waive its right to seek additional discretionary civil liabilities for the violation(s) identified in Exhibit A.

The Expedited Payment Program does not address or resolve liability for any violation that is not specifically identified in Exhibit A regardless of the date that the violation occurred.

OPTIONS FOR RESPONSE TO OFFER

1. If the Permittee accepts this offer, the Permittee shall complete and return the enclosed Acceptance of Conditional Resolution and Waiver of Right to Hearing of Settlement Offer No. R9-2019-0024 (Acceptance and Waiver, Exhibit B) on or before 5 p.m. on January 24, 2019.
2. If the Permittee chooses to contest the violation(s) alleged in Exhibit A, the Permittee shall submit in writing the specific violation and the basis for the challenge (factual error, affirmative defense, etc.) to the San Diego Water Board on or before 5 p.m. on January 24, 2019. The San Diego Water Board will evaluate each contested violation and take one of two actions:
 - a. The San Diego Water Board will determine that the violation is not supported, expunge the alleged violation, take no further action against the Permittee for the alleged violation, and notify the Permittee in writing of that determination; or
 - b. The San Diego Water Board will determine that the alleged violation is meritorious and will notify the Permittee of that determination. The Permittee will be given 14 days from the date of receipt of the San Diego Water Board determination to either accept the Settlement Offer by completing and returning the Acceptance and Waiver to the San Diego Water Board, or to reject the Settlement Offer.
3. If the Permittee does not respond to this offer, the San Diego Water Board will initiate a formal enforcement action with regard to the alleged violation(s). In a formal enforcement action, the liability amount sought and/or imposed may exceed the liability amount set forth in this conditional Settlement Offer. Moreover, the staff costs of investigating the violation and proceeding with formal enforcement action are factors that will be considered in assessing the liability amount.

CONDITIONS FOR SAN DIEGO WATER BOARD ACCEPTANCE OF RESOLUTION

Pursuant to title 40 of the Code of Federal Regulations (40 CFR), section 123.27(d)(2)(iii), the San Diego Water Board is required to publish and allow the public 30 days to comment on any settlement of an enforcement action addressing alleged violations of National Pollutant Discharge Elimination System (NPDES) permit conditions. Upon receipt of the Permittee's Acceptance and Waiver, the San Diego Water Board will publish a notice of the proposed resolution of the violation(s).

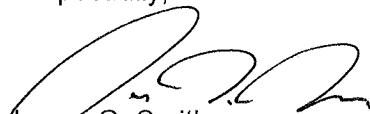
If no comments are received within the 30-day comment period, and unless there are new material facts that become available to the San Diego Water Board, the San Diego Water Board, or its delegate, will execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty amount pursuant to Water Code sections 13385 and/or 13385.1.

If, however, significant comments are received in opposition to the settlement, this conditional offer may be withdrawn. In that case, the Permittee's waiver pursuant to the Acceptance and Waiver will also be treated as withdrawn, and the violation will be addressed in a liability assessment proceeding. At the liability assessment hearing, the Permittee will be free to make arguments as to the alleged violation(s), and the Permittee's agreement to accept this conditional Settlement Offer will not in any way be binding or used as evidence against the Permittee. The Permittee will be provided with further information on the liability assessment proceeding.

In the event the Acceptance and Waiver is executed by the San Diego Water Board, or its delegate, full payment of the assessed amount shall be due within 30 calendar days after the Permittee's receipt of the notice of the San Diego Water Board's, or its delegate's, execution. In accordance with Water Code section 13385.1(c)(1), funds collected for a failure to timely report shall be deposited in the State Water Pollution Cleanup and Abatement Account. Accordingly, the liability shall be paid by cashier's or certified check made out to the "State Water Pollution Cleanup and Abatement Account." Failure to pay the full liability within the required time period may subject the Permittee to further liability.

In the subject line of any response, please include the following: 249321:KYaeger. Should you have any questions about this conditional offer, please contact Mr. Keith Yaeger by phone at 619-521-5899, or by email at Keith.Yaeger@waterboards.ca.gov.

Respectfully,



James G. Smith
Assistant Executive Officer

Enclosures:

Exhibit A: Notice of Violation Subject to Mandatory Minimum Penalty, Promenade Mall Development Corporation

Exhibit B: Acceptance of Conditional Resolution and Waiver of Right to Hearing of the Settlement Offer No. R9-2019-0024

cc by email:

Suzanne R. Varco, Esq., Environmental Law Group LLP, svarco@envirolawyer.com

David Barker, San Diego Water Board, david.barker@waterboards.ca.gov
Chiara Clemente, San Diego Water Board, chiara.clemente@waterboards.ca.gov
Brandi Outwin-Beals, San Diego Water Board, brandi.outwin-Beals@waterboards.ca.gov
Keith Yaeger, San Diego Water Board, keith.yaeger@Waterboards.ca.gov
Paul Ciccarelli, State Water Resources Control Board, paul.ciccarelli@waterboards.ca.gov

Tech Staff Info & Use	
Order No.	R9-2015-0013
NPDES No.	CAG919003
CW Place ID (GW Extraction, Promenade At Pacific Beach)	249321
CW Party/Organization ID (Promenade Mall Development Corporation)	34992
CW Party/Person ID (Michael A. Katz)	75686
CW Regulatory Measure (Enrollee)	406221
CW Regulatory Measure (General Order)	400619
EPL No.	R9-2019-0024
EPL Regulatory Measure	428137
WDID	9 000000588

Exhibit A

NOTICE OF VIOLATION SUBJECT TO MANDATORY MINIMUM PENALTY PROMENADE MALL DEVELOPMENT CORPORATION

The following table lists the alleged violations subject to mandatory minimum penalties (MMPs) pursuant to Water Code section 13385.1.

CIWQS Violation ID	Occurrence Date	Reporting Period	Violation Description	Monitoring Report Due Date	Days Overdue	No. of Complete 30-Day Periods	MMP Amount
1014036	08/31/2016	July 2016	Late Discharge Monitoring Report	08/30/2016	50	1	\$3,000
1045352	12/01/2016	October 2016	Late Discharge Monitoring Report	11/30/2016	56	1	\$3,000
1041857	03/02/2017	January 2017	Late Discharge Monitoring Report	03/01/2017	61	2	\$6,000
1041858	03/31/2017	February 2017	Late Discharge Monitoring Report	03/30/2017	32	1	\$3,000
1041863	05/31/2017	April 2017	Late Discharge Monitoring Report	05/30/2017	59	1	\$3,000
1041862	08/31/2017	July 2017	Late Discharge Monitoring Report	08/30/2017	36	1	\$3,000
1054531	12/01/2017	October 2017	Late Discharge Monitoring Report	11/30/2017	57	1	\$3,000
1054533	03/02/2018	January 2018	Late Discharge Monitoring Report	03/01/2018	41	1	\$3,000
TOTAL							\$27,000

EXPEDITED PAYMENT AMOUNT

Mandatory Minimum Penalty Amount for Late Reporting Violations

9 (complete 30-day periods) × \$3,000 (per 30-day period) = \$27,000 Expedited Payment Amount

DEFINITIONS

CIWQS	California Integrated Water Quality System database used by the Water Boards to manage violation and enforcement activities.
Violation ID	Identification number assigned to a violation in CIWQS.
Occurrence Date	The first day of violation (the day after the monitoring report due date).
Reporting Period	The monitoring period for which a discharge monitoring report required under Water Code section 13383 was submitted late.
Violation Description	Narrative description of the violation.
Notes	Water Code section 13385.1 requires the assessment of a \$3,000 mandatory minimum penalty for a failure to file a discharge monitoring report required pursuant to Water Code section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations.

Exhibit B

ACCEPTANCE OF CONDITIONAL RESOLUTION AND WAIVER OF RIGHT TO HEARING OF THE SETTLEMENT OFFER NO. R9-2019-0024

By signing below and returning this Acceptance of Conditional Resolution and Waiver of Right to Hearing (Acceptance and Waiver) to the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), Promenade Mall Development Corporation (Permittee) hereby accepts the *Offer to Participate in Expedited Payment Program* and waives the right to a hearing before the San Diego Water Board to dispute the allegations of violation described in the Settlement Offer, which is attached hereto as Exhibit A and incorporated herein by reference.

The Permittee agrees that the Settlement Offer shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the San Diego Water Board to assert jurisdiction over the alleged violation(s) through its Chief Prosecutor. The Permittee agrees to pay the penalties required by Water Code sections 13385 and/or 13385.1, in the sum of **\$27,000** (Expedited Payment Amount), which shall be deemed payment in full of any civil liability pursuant to Water Code sections 13385 and/or 13385.1 that otherwise might be assessed for the violation(s) described in the Settlement Offer. The Permittee understands that this Acceptance and Waiver waives the Permittee's right to contest the allegations in the Settlement Offer and the amount of civil liability for such violation(s).

The Permittee understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the Settlement Offer.

Upon execution by the Permittee, the completed Acceptance and Waiver shall be returned to:

California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108-2700
ATTN: 249321:KYaeger

The Permittee understands that federal regulations set forth at title 40 of the Code of Federal Regulations, section 123.27(d)(2)(iii), require the San Diego Water Board to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action addressing National Pollutant Discharge Elimination System (NPDES) permit violations. Accordingly, this Acceptance and Waiver, prior to execution by the San Diego Water Board, or its delegate, will be published as required by law for public comment.

During the public comment period, if no comments are received that cause the San Diego Water Board, or its delegate, to question the Expedited Payment Amount, the San Diego Water Board, or its delegate, will execute the Acceptance and Waiver.

The Permittee understands that if significant comments are received in opposition to the Expedited Payment Amount, the offer on behalf of the San Diego Water Board to resolve the violation(s) set forth in the Settlement Offer may be withdrawn. In that circumstance, the Permittee will be advised of the withdrawal and an administrative civil liability complaint may be issued and the matter may be set for a hearing before the San Diego Water Board. For such a liability hearing, the Permittee understands that this Acceptance and Waiver executed by the Permittee will be treated as a settlement communication and will not be used as evidence in that hearing.

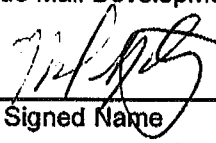
The Permittee further understands that once the Acceptance and Waiver is executed by the San Diego Water Board, or its delegate, the full payment required by the deadline set forth below is

Acceptance of Conditional Resolution and Waiver
of Right to Hearing of the Settlement Offer
No. R9-2019-0024

a condition of this Acceptance and Waiver. In accordance with Water Code section 13385.1(c)(1), funds collected for a failure to timely report shall be deposited in the State Water Pollution Cleanup and Abatement Account. Accordingly, the liability shall be paid by a cashier's or certified check for \$27,000 made out to the "State Water Pollution Cleanup and Abatement Account." Payment must be submitted to the State Water Resources Control Board, Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento, CA 95812-1888, no later than thirty (30) calendar days after the date the Permittee receives written notice that the San Diego Water Board, or its delegate, has executed this Acceptance and Waiver. A copy of the check must also be received by the San Diego Water Board at 2375 Northside Drive, Suite 100, San Diego, CA 92108-2700 within thirty (30) days of approval via U.S. Postal Service or email to SanDiego@waterboards.ca.gov, attention 249321:KYaeger.


I hereby affirm that I am duly authorized to act on behalf of and to bind the Permittee in the making and giving of this Acceptance and Waiver.

Promenade Mall Development Corporation

By: 
Signed Name
Michael Kurtz
Printed or Typed Name

1/14/19
Date
President
Title

IT IS SO ORDERED PURSUANT TO WATER CODE SECTION 13323 AND GOVERNMENT CODE SECTION 11415.60, ON BEHALF OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION

By: 
DAVID W. GIBSON
Executive Officer

20 February 2019
Date