



Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board San Diego Region

Supporting Document No. 4

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October 2, 2008

CERTIFIED-RETURN RECEIPT REQUESTED
7007 3020 0001 0040 6877

Ms. Elizabeth Cason
Foley Lardner LLP
402 W. Broadway, Suite 2100
San Diego, CA 92101

In reply refer to:
CAU:14-0588:rstewart
Place ID: 249321

Dear Ms. Cason:

RESCHEDULING OF PUBLIC HEARING FOR CONSIDERATION OF AMENDED COMPLAINT NO. R9-2008-0056; PROMENADE MALL DEVELOPMENT CORPORATION

Regional Board staff has reviewed your correspondence dated August 15, 2008 regarding the violations alleged in Amended Complaint No. R9-2008-0056.

You argue that effluent limitation violations reported in Promenade's discharge into the municipal stormwater conveyance system that discharges to Mission Bay are not subject to mandatory minimum penalties except for those days when the Regional Board documents the City of San Diego has not diverted the discharge from the storm drain to the Point Loma Wastewater Treatment Plant. I strongly disagree with that argument.

This argument is inconsistent with our regulatory perspective pertaining to NPDES permitting and mandatory minimum penalties (MMPs). All point source discharges to waters of the United States must be regulated by an NPDES permit. The discharger's willing enrollment in this Region's NPDES Groundwater Extraction Dewatering Order No. 2001-96, payment of annual permit fees, and submission of self-monitoring reports is considered concurrence with the terms and conditions of the permit requirements. The permit by which this discharge of waste is regulated clearly places the burden to comply with its requirements on the discharger. Specifically, this burden to comply includes the burden to demonstrate compliance. Contrary to your arguments, if the discharger asserts that a reported exceedance did not reach surface water, it must provide factual and technical information to support this assertion. Given that the stormwater conveyance system leads to surface waters, and given the intermittent nature of the City of San Diego's pumping from the conveyance system, all discharges must be presumed to be to a surface water. Discharges of pollutants regulated by NPDES permits are subject to civil liability and MMPs. Section 13385(j) provides certain specific defenses to an MMP, but none of those specific defenses is alleged nor apply to this matter.

California Environmental Protection Agency

Regarding the discharger's assertions regarding pumping during the days of documented violation, the City of San Diego has informed the Regional Board that Pump Station N does not consistently divert flows from the conveyance system. There are times when the flows in the conveyance system are allowed to flow to Mission Bay, even during dry weather periods. These instances can be a result of pump failure, interruption of power, and preventive maintenance operations. Accordingly, all discharges from the discharger's dewatering system to the stormwater conveyance system are appropriately subject to MMPs.


During our preparation of this response it has been shown that that the three effluent limitation violations reported by Promenade in December 2005, while still violations subject to discretionary penalties, are no longer subject to MMPs. The law in effect at that time does not require that the Regional Board issue MMPs for those violations. Water Code Section 13385.1(c) did not become effective until January 1, 2006 imposing the requirement to issue MMPs in the subject instances. As a result, Regional Board staff will not pursue MMPs for these three violations as indicated in the attached Amended Violation Table. A.

The current recommended MMP is \$9,000. Please inform me no later than October 13, 2008 if you wish to not contest this revised penalty and instead sign a waiver of hearing and pay the \$9,000 penalty, If not, we are scheduling this revised \$9,000 MMP for a public hearing at the Regional Board's November 12, 2008 meeting. Our agenda materials will be sent to you as soon as they are available.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence to the Regional Board pertaining to this matter.

If you have any questions please contact Rebecca Stewart at (858) 467-2966 or via e-mail at rstewart@waterboards.ca.gov.

Respectfully,


MICHAEL P. McCANN
Assistant Executive Officer

MPM:mja:rls

Enclosure: Amended Violation Table for Complaint No. R9-2008-0056

Ms. Elizabeth Cason
Foley Lardner LLP

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October 2, 2008

cc: Mr. Michael Katz, Promenade Mall Development Company, 4150 Mission Blvd.,
Suite 211, San Diego, CA 92109

Via e-mail only:

Ken Greenberg, USEPA, Region 9, greenberg.ken@epa.gov

Kris McFadden, City of San Diego, kmcfadden@sandiego.gov

Daniel Lottermoser, City of San Diego, dlottermoser@sandiego.gov

S. Wayne Rosenbaum, Foley Lardner LLP, SRosenbaum@foleylaw.com

Jorge Leon, Office of Enforcement, SWRCB, jleon@waterboards.ca.gov



Attachment 1. Revised Summary of Reported Effluent Violations September 2008

Complaint No. R9-2008-0056
Promenade at Pacific Beach
 4150 Mission Boulevard, San Diego, California

Violation Date	Violation ID	Constituent	Effluent Violation	Unit	Permitted Limit	Reported Value	Serious Violation ^a	Mandatory Minimum Penalty (MMP)
January 2006	774926	Nickel	CTR Chronic Concentration	µg/L	8.2	12.20	Yes	\$3,000
12/13/2006	473050	Tributyltin	Average Monthly Effluent Limitation	µg/L	0.005	0.02	Yes	\$3,000
12/13/2006	473049	Nickel	CTR Chronic Concentration	µg/L	8.2	10.21	Yes	\$3,000
TOTAL MMP PENALTY								\$9,000

^a CWC Section 13385(h)(1) requires that an MMP of \$3,000 be imposed for each serious violation. Serious violations are based on:

1. Nickel and Tributyltin are Group II pollutants. A serious violation occurs when the discharge exceeds Group II effluent limitations by 20 percent or more.