

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ACL COMPLAINT R5-2011-0590

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF
NAPA BERRYESSA RESORT IMPROVEMENT DISTRICT
WASTEWATER TREATMENT FACILITY

NAPA COUNTY

This Complaint is issued to Napa Berryessa Resort Improvement District (hereafter "Discharger" or "District") pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability, and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on substantial evidence that the Discharger violated provisions of Waste Discharge Requirements Order 95-173 (the 1995 WDRs) and Cease and Desist Order R5-2010-0101 (the 2010 CDO).

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) alleges the following:

Background

1. The Discharger owns and operates a wastewater collection, treatment and disposal system, (referred to as a wastewater treatment facility, WWTF, or Facility) that currently serves homes at the Berryessa Highlands subdivision. Prior to October 2009, the WWTF also accepted wastewater from the Steele Park Resort, which is located on land owned by the United States Bureau of Reclamation (Reclamation).
2. In April 2010 a new concessionaire (Pensus Group) signed an agreement with Reclamation to operate the former Steele Park Resort (now known as Lupine Shores). According to Reclamation, Lupine Shores has been open since 29 May 2010, and portable toilets are the only sanitation facilities currently offered. Wastewater from the resort is currently hauled offsite for disposal and is not discharged to the Discharger's WWTF. Pensus has indicated its intent to discharge into the Discharger's collection system, provided that the Discharger makes capacity-related improvements within a certain time frame, that the cost to connect to the system does not exceed the reasonable "fair share" of doing so, and that the Board removes the connection restriction.
3. Wastewater is conveyed to the WWTF by gravity sewers, lift stations, and force mains. The WWTF is an extended aeration activated sludge plant consisting of two aeration basins, two clarifiers and three effluent holding basins. All of the basins are lined with either concrete or plastic liners. Secondary treated disinfected wastewater is pumped to a 50,000 gallon storage tank located on a hillside at the remote effluent disposal site. The tank is used to gravity feed a spray irrigation system, which consists of four adjacent areas (Zones 1 through 4) totaling approximately 60 acres. The Zone 1 land application

area is located on a hillside above a tailwater pond. The other zones are also located on the hillside above an unpaved road and they drain into the tailwater pond. A pump station recycles tailwater from the pond back up to the storage tank.

4. On 23 June 1995, the Central Valley Water Board issued Waste Discharge Requirements (WDRs) Order 95-173, which prescribed requirements for the discharge of domestic wastewater from the Discharger's WWTF. The WDRs contain, among other items, prohibitions, effluent limitations, and monitoring and reporting requirements with which the Discharger must comply. The Discharger was previously regulated by WDRs Order 95-171, which contained similar requirements.

Chronology of Previous Major Enforcement Items

5. The Discharger has had a long history of sewage spills at this Facility. On 20 September 1996, the Central Valley Water Board issued Cease and Desist Order 96-232 (the 1996 CDO) in response to numerous wastewater spills to surface waters of Lake Berryessa. The 1996 CDO required the Discharger to make certain improvements to the wastewater treatment facility, the most important and relevant of which was to increase its storage and disposal capacity by 15 September 2000. However, the Discharger made no substantive efforts to increase the storage and disposal capacity, and continued to violate the 1995 WDRs and the 1996 CDO.
6. On 26 October 2006, the Board issued CDO R5-2006-0113 (the 2006 CDO), which included a sewer connection restriction for the homes in the Berryessa Highlands subdivision. The Board found the 2006 CDO to be necessary because the Discharger was unable to comply with the WDRs, the revised Monitoring and Reporting Program, and a CWC 13267 Order. Violations listed in the 2006 CDO included surface water overflows to Lake Berryessa, failure to monitor, failure to submit technical reports, and failure to comply with influent flow limits. The 2006 CDO required the Discharger to complete several studies, submit reports and make the necessary improvements to reduce inflow/infiltration (I/I) and increase the Facility's storage and disposal capacity. The Discharger submitted the reports required by the 2006 CDO. However, the Discharger failed to make any of the physical improvements required by the 2006 CDO, including the improvements needed to reduce inflow/infiltration and those needed to increase storage and disposal capacity
7. On 23 September 2010, the Board issued CDO R5-2010-0101 (2010 CDO) to, in part, address substantial and consistent discharges of wastewater to Lake Berryessa, and for the failure to construct the Facility upgrades required by both the 1996 and the 2006 CDOs. The most significant unauthorized discharge between 2006 and 2010 was over 1.4 million gallons, and took place during the first half of 2010. The 2010 CDO requires the Discharger to complete several tasks, to submit technical reports, and to complete the necessary improvements to address the longstanding inflow/infiltration and capacity issues. In addition, the CDO expands the connection restriction to include both the Berryessa Highlands subdivision and the Lupine Shores resort.

Illegal Discharges to Surface Waters since January 2010

8. Discharge Prohibition A.1 of WDRs Order 95-173 states: *“Discharge of wastes to surface waters or surface water drainage courses is prohibited.”*
9. On 10 May 2010, Board staff issued a Notice of Violation (NOV) (see Attachment A of this Complaint) for a series of unauthorized discharges of secondary treated wastewater from the Facility’s tailwater pond to surface waters of Lake Berryessa. The discharges were controlled releases initiated by the Discharger to protect the pond’s earthen berm from structural damage, and were due to its long-documented lack of storage capacity. The intermittent discharges took place between 25 January 2010 and 7 June 2011. According to the Discharger’s weekly spill updates, a total of 1,418,400 gallons of secondary treated wastewater was discharged to surface water over a period of 116 days during the first half of 2010.
10. On 31 December 2010, Board staff issued a second NOV (see Attachment B to this Complaint) for an unauthorized discharge of secondary treated wastewater from the Facility’s sprayfield to the surface waters of Lake Berryessa. The discharge began on 20 December 2010, and as of 29 December 2010, approximately 385,824 gallons of wastewater had flowed from the sprayfield to Lake Berryessa. The Discharger’s need to land apply wastewater without tailwater collection was caused by a combination of excessive I/I and insufficient storage and disposal capacity. According to the Discharger’s weekly spill updates, the discharges documented by the NOV plus subsequent discharges during the spring of 2011 totaled 9,113,329 gallons. These spills took place over a period of 108 days.
11. In summary, during the winters of 2010 and 2011, the District spilled approximately 10.5 million gallons of wastewater into Lake Berryessa over a period of 224 days. These discharges violate Discharge Prohibition A.1 of the 1995 WDRs.

REGULATORY CONSIDERATIONS

12. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Water Resources Control Board.
13. Surface water drainage from the Facility is to Lake Berryessa, which is a water of the United States.
14. The Basin Plan designates the beneficial uses of Lake Berryessa as municipal and domestic supply; agricultural supply; power generation; water contact recreation; noncontact water recreation; warm freshwater habitat; cold freshwater habitat; spawning,

reproduction and/or early development of warm freshwater aquatic organisms; and wildlife habitat.

15. Administrative civil liabilities may be sought and imposed for violations of a discharger's WDR permit and/or applicable Board orders pursuant to the procedures described in CWC section 13323. This Administrative Civil Liability Complaint alleges the Discharger's acts and/or failure to act constitutes violations of the 1995 WDRs, the 2006 CDO, and the 2010 CDO, and seeks administrative civil liabilities under CWC 13385.
16. Issuance of this Administrative Civil Liability Complaint to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, sections 15307, 15308, 15321(a)(2) and all applicable law.

CALCULATION OF CIVIL LIABILITIES UNDER CWC SECTION 13385

17. Section 301 of the Clean Water Act (33 U.S.C. § 1311) and CWC section 13376 prohibit discharge of pollutants to surface waters except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit.

18. CWC section 13376 states, in part:

Any person discharging pollutants or proposing to discharge pollutants to the navigable waters of the United States ... shall file a report of the discharge in compliance with the procedures set forth in Section 13260..." and "The discharge of pollutants...except as authorized by waste discharge requirements [NPDES permit]...is prohibited.

19. WDR Order 95-173 is not an NPDES permit and does not authorize the discharge of wastes to surface waters of the United States. Therefore, by failing to file a report of waste discharge as set forth in CWC section 13260 and failing to obtain an NPDES permit prior to the causing the discharges described in the above allegations, the Discharger has violated CWC section 13376.

20. CWC section 13385 states, in relevant part:

(a) Any person who violates any of the following shall be liable civilly in accordance with this section:

(1) Section 13375 or 13376.

(5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.

...

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

...

(e) ...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.

21. The discharges to surface water described in paragraphs 9 and 10 are violations of Discharge Prohibition. A.1 of the 1995 WDRs. Any discharge of waste to surface waters, except those that are in accordance with an NPDES permit, is a violation of the Clean Water Act, section 301 and a violation of CWC section 13376. CWC sections 13385(a)(1) and (a)(5) authorize the imposition of administrative civil liability for such violations.
22. **Maximum Civil Liability for Discharge to Surface Waters:** Per CWC section 13385, civil liability imposed administratively by the Central Valley Water Board may not exceed \$10,000 for each day in which the violation occurs, plus \$10 per gallon for each gallon of waste discharged over 1,000 gallons. The Discharger spilled 10,531,729 gallons over 224 days beginning on 25 January 2010. Of the 10,531,729 gallons that spilled, a total of 10,525,729 gallons were discharged in excess of 1,000 gallons per spill event over a 224 day period. Therefore, at \$10 per gallon for discharges in excess of 1,000 gallons, and at \$10,000 per day for each day of the discharge, the maximum administrative civil liability that may be assessed pursuant to section 13385 is **\$107,497,290**.
23. **Minimum Civil Liability for Discharge to Surface Waters:** Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. In general, the discharges were due to inflow/infiltration within the collection system and lack of winter storage capacity. The Discharger has estimated that it will cost approximately \$4 million to design and build the infrastructure necessary to come into compliance with its WDRs and CDO. Although the Discharger appears to be on schedule to implement the required components of the 2010 CDO, the illegal discharges would have been avoided had these required improvements been implemented prior to the winter 2009/2010. Accordingly, because the improvements will be implemented, the Discharger has realized an economic benefit in the form of deferred, as opposed to avoided, costs. Staff estimates that the economic benefit to the Discharger derived from the violations, in the form of the time value of money for two years of deferred costs, at 3.5% interest, is \$285,000. Therefore, the minimum administrative civil liability that may be imposed by the Central Valley Water Board under CWC 13385 is **\$285,000**.

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

24. Pursuant to CWC section 13385, subdivision (e), in determining the amount of any civil liability imposed under CWC section 13385(c), the Board is required to take into account

the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, 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 violations, and other matters that justice may require.

25. On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability that addresses the factors that must be considered when imposing an administrative civil liability under CWC section 13385(e). The entire Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11179.pdf
26. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment D. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
27. As described in paragraph 22, the maximum administrative civil liability for the above violations is **\$107,497,290**. However, based on consideration of the above facts and after applying the penalty methodology, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$330,000**, which represents the economic benefit derived from the violations, as detailed in paragraph 23, the recovery of enforcement staff costs, and the minimum 10% economic benefit penalty required by the Enforcement Policy. The specific factors considered in this administrative civil liability are detailed in Attachment D.
28. Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional civil liabilities for violations of the requirements of the Discharger's waste discharge requirements and/or applicable orders for which civil liabilities have not yet been assessed, or for violations that may subsequently occur.

NAPA BERRYESSA RESORT IMPROVEMENT DISTRICT IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of **three hundred thirty thousand dollars (\$330,000)**. The amount of the proposed liability is based upon an analysis of the factors cited in CWC section 13385 and the Enforcement Policy, includes consideration of the economic benefit or savings resulting from the violations, and

accounts for \$15,000 in staff costs.

2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled on **30 November and 1/2 December 2011**, unless one of the following occurs by **6 October 2011**:
 - a) The Discharger waives the hearing by completing the attached form (checking the box next to Option #1) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of **three hundred thirty thousand (\$330,000)**; or
 - b) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking the box next to Option #2 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed; or
 - c) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking the box next to Option #3 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed.
3. If a hearing is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
4. If this matter proceeds to hearing, the Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this Complaint through completion of the hearing.

PAMELA C. CREEDON, Executive Officer

Date

Attachment A: 10 May 2010 Notice of Violation
Attachment B: 31 December 2010 Notice of Violation
Attachment C: Table of Total Maximum Penalty Calculations
Attachment D: Penalty Calculations

gjc/wsw: 31 Aug-11

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent the Napa Berryessa Resort Improvement District (hereafter Discharger) in connection with Administrative Civil Liability Complaint R5-2011-0590 (hereafter Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served. The person who has been issued a complaint may waive the right to a hearing."

(OPTION 1: Check here if the Discharger waives the hearing requirement and will pay in full.)

a. I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board.

b. I certify that the Discharger will remit payment for the proposed civil liability in the full amount of **three hundred thirty thousand dollars (\$330,000)** by check that references "ACL Complaint R5-2011-0590" made payable to the *State Water Pollution Cleanup and Abatement Account*. Payment must be received by the Central Valley Water Board by **6 October 2011**.

c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after a 30-day public notice and comment period. Should the Central Valley Water Board receive significant new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.

d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

(Print Name and Title)

(Signature)

(Date)