

1 JULIE MACEDO, Senior Staff Counsel (SBN 211375)
2 State Water Resources Control Board
3 1001 I Street, 16th Floor
4 Sacramento, California 95814
5 Telephone: 916-323-6847
6 Fax: 916-341-5896
7 E-mail: jmacedo@waterboards.ca.gov

8 Attorneys for the Prosecution Team

9 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

10 CENTRAL VALLEY REGION

11 In the Matter of:)
12)
13 **Administrative Civil Liability Order**)
14 **No. R5-2012-XXXX**)
15 **Riviera West Mutual Water Company,**)
16 **Domestic Water Treatment Plant, Lake**)
17 **County**)
18 _____)

19 **PROSECUTION TEAM EVIDENTIARY**
20 **BRIEF**

21 December 19, 2011

22 **I. INTRODUCTION**

23 The Prosecution Team submits this initial Evidentiary Brief in support of
24 Administrative Civil Liability Order R5-2012-XXXX. The Prosecution Team seeks an
25 order for \$2,586,000 for effluent and monitoring penalties under the mandatory minimum
26 penalty ("MMP") structure set forth in Water Code section 13385.1. Furthermore, despite
27 anticipated arguments to the contrary and raised in Riviera West's Objections to the
28 Hearing Procedures, limited exceptions to MMPs are not applicable here. The MMP
penalty structure has been challenged by parties since its inception, and it has been
found fair, targeted to meet its goal of improved reporting, and not preempted by federal
law. The limited exceptions passed by the California Legislature, embodied in Water
Code section 13385.1¹, and effective January 1, 2011 do not apply to Riviera West's

¹ The amendments are also commonly referred to as "SB 1284," referring to the California

[Footnote continued on next page.]

1 discharges or failure to submit monthly monitoring reports.

2 The "SB 1284" revisions were targeted to give Dischargers written notice prior to
3 the assessment of a penalty. Riviera West was given repeated written notices of
4 violation, and instead of coming into compliance, remains non-compliant to this day. The
5 amendments to Section 13385.1 are clear and unambiguous and so the Advisory Team
6 does not need to resort to the legislative history as a matter of statutory interpretation.
7 However, an examination of the legislative history reveals that the amendments were a
8 limited exception and the legislature was not creating an exception that would give all
9 dischargers one "free pass" and swallow the entire MMP structure.

10 **II. FACTUAL BACKGROUND**

11 Riviera West owns and operates a domestic water treatment plant, which provides
12 potable water for the Riviera West area of Lake County. The history of Riviera West's
13 permit history and non-compliance is briefly summarized below:

- 14 1. On **May 3, 1996**, the Regional Water Quality Control Board, Central Valley Region,
15 issued Waste Discharge Requirements ("WDRs") Order 96-099 (NPDES No.
16 CA0083925) to regulate wastewater discharges from Riviera West's water
17 treatment plant to Clear Lake.
- 18 2. On **November 21, 2001**, the Board issued a Notice of Violation for failure to submit
19 a complete Report of Waste Discharge (RWD) to allow the NPDES permit to be
20 updated.
- 21 3. On **July 19, 2002**, the Board issued WDRs Order R5-2002-0130, which contained
22 new regulations and rescinded Order 96-099.
- 23 4. Also on **July 19, 2002**, the Board issued Cease and Desist Order R5-2002-0131
24 requiring Riviera West to stop discharging contrary to WDRs Order R5-2002-0130.
25 The CDO contained findings that Riviera West had failed to submit any of its
26

27 Senate Bill number.
28

1 quarterly monitoring reports and failed to submit the results of any of the daily or
2 weekly samples required by the June 1996 WDRs.

- 3 5. On **June 29, 2007**, the Regional Board issued a written Notice of Violation to
4 Riviera West, reminding Riviera West that the CDO required the submission of
5 monitoring results, and informing Riviera West that MMP violations were accruing.
- 6 6. WDRs Order R5-2002-0130 expired on **June 30, 2007** because Riviera West
7 failed to provide a report of waste discharge to renew the permit.²
- 8 7. On **July 29, 2008**, the Regional Board again provided written notice to Riviera
9 West that its failure to provide monitoring reports would result in MMP violations,
10 and included a draft record of violations for almost \$4 million.
- 11 8. On **October 14, 2008**, the Regional Board issued a Notice of Violation to Riviera
12 West for failure to comply with monitoring and reporting requirements and for the
13 continued discharge of wastewater after the expiration of Riviera West's permit.
- 14 9. On **November 21, 2008**, the Regional Board issued an Administrative Civil Liability
15 Complaint against Riviera West for \$3,945,000 in MMPs related to monitoring and
16 effluent violations.
- 17 10. From **November 2008 through April 2011**, the parties engaged in settlement
18 negotiations related to the complaint.
- 19 11. From **August 2008 to present**, Board staff has continued to request that Riviera
20 West submit a complete Report of Waste Discharge (RWD) for the unauthorized
21 discharge of water treatment filter backwash to a sprayfield instead of Clear Lake.
22 Per staff's inspection, waste runs off the sprayfield and into surface waters leading
23 to Clear Lake.
- 24 12. On **March 2, 2011**, the Regional Board issued a Notice of Violation to Riviera West

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26 ² The Order at issue calculates MMPs through the date of the last monitoring report
27 required by the expired permit (i.e., 1 August 2007). Once the permit expired, Riviera
28 West's discharges would be subject to discretionary penalties pursuant to Water Code
section 13385.

1 for discharging water treatment plant filter backwash water to land and/or surface
2 water without a permit.

3 13. On **April 15, 2011**, the Regional Board requested information from Riviera West to
4 determine which violations remain subject to Water Code section 13385.1,
5 considering the clarifications made by the State Water Board's 2009 Enforcement
6 Policy and the modifications to the Water Code. A response was required in 30
7 days. None was received.

8 14. On **April 25, 2011**, Riviera West responded to the March 2, 2011 Notice of
9 Violation, and stated that it would submit a complete RWD for the discharge of
10 backwash water to land.

11 15. Riviera West has not submitted a complete RWD for a land-discharge permit.
12 Riviera West's backwash water continues to be discharged to land and/or Clear
13 Lake. Regional Board staff is requesting the Board to adopt land-discharge WDRs
14 for Riviera West based on a partial RWD and staff data since the Riviera West has
15 not provided the necessary information to write the new permit.

16 In short, for the past **15 years**, Riviera West has consistently ignored its obligation
17 to provide monitoring and effluent data to the Regional Board. Since the effective date of
18 Water Code section 13385.1 on January 1, 2004, this failure is subject to MMPs. The
19 Order now before the Board for consideration seeks penalties only through August 1,
20 2007, the date of the last monitoring report required by the expired WDRs. The Order
21 before the Board is for a lesser penalty amount than the Complaint issued in 2008
22 because staff removed the penalties for failure to submit annual monitoring reports, as
23 these reports do not include the type of information that would allow the Board to
24 determine compliance with effluent limitations.

25 Riviera West's failure to provide monitoring reports only tells part of the story. On
26 the few occasions when Riviera West provided sampling information, effluent
27 exceedances were found. Riviera West's discharges go directly to Clear Lake. Beneficial
28 uses of Clear Lake include municipal, industrial, and agricultural supply; water contact

1 and non-water contact recreation; cold and warm freshwater habitat; warm water
2 spawning habitat; and wildlife habitat. The discharge contains salts, chlorine,
3 bromodichloromethane, aluminum, mercury, pH, temperature, and dissolved oxygen which
4 has the potential to impact these beneficial uses **The MMP structure was designed to**
5 **deter precisely the conduct at issue:** without the type of reporting required under
6 Riviera West's WDRs, the Regional Board cannot determine if water quality objectives
7 are being met. Reliance on the limited available data would indicate that there are
8 effluent violations, including for pH, bromodichloromethane, and the WDRs also require
9 compliance with chlorine, turbidity and temperature effluent limitations.

10 III. THE MMP PROVISIONS AND 2011 AMENDMENTS

11 California Water Code section 13385.1 subdivision (a)(1) requires the Regional
12 Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for a
13 "serious violation" defined by that section as "a failure to file a discharge monitoring report
14 required pursuant to Section 13323 for each complete period of 30 days following the
15 deadline for submitting the report, if the report is designed to ensure compliance
16 limitations contained in waste discharge requirements that contain effluent limitations." A
17 "serious violation" under § 13385(h) is also defined in part as, "a failure to file a discharge
18 monitoring report required pursuant to Section 13323 for each complete period of 30 days
19 following the deadline for submitting the report." The use of the mandatory language
20 "shall" indicates a legislative intent to impose a mandatory duty; no discretion is granted.
21 (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.) Since its effective date of January 1,
22 2004, § 13385.1(a)(1) has been the rule applied to dischargers who fail to submit their
23 discharge monitoring reports by the required deadline.

24 Newly added language in Water Code section 13385.1(a)(2)(A) provides:

25
26 Notwithstanding paragraph (1), a failure to file a discharge monitoring report
27 is not a serious violation for purposes of subdivision (h) of Section 13385 at
28 **any time prior to the date a discharge monitoring report is required to be
filed or within 30 days after receiving written notice from the state
board or a regional board of the need to file a discharge monitoring
report**, if the discharger submits a written statement to the state board or

1 the regional board that includes both of the following:

2 (i) A statement that there were no discharges to waters of the United States
3 reportable under the applicable waste discharge requirements during the
4 relevant monitoring period.

5 (ii) The reason or reasons the required report was not submitted to the
6 regional board by the deadline for filing that report. (Emphasis added.)

7 13385.1(a)(2)(A) therefore does not undermine the general MMP scheme, or create an
8 exception so large that it swallows the general rule of mandatory penalties pursuant to
9 13385.1(a)(1). Nor does it give one "free pass" to all dischargers who fail to submit
10 reports. Instead, it gives a discharger who has not submitted timely reports a grace
11 period until after the Regional Board provides notice to the discharger of the late report.
12 Imposition of MMPs, especially given their mandatory nature, might be unfair in certain
13 circumstances where the discharger had not been provided notice.

14 To recap: the WDRs require that self-monitoring reports (SMRs) be submitted by
15 the dischargers. Dischargers run the risk of being assessed MMPs every 30 days
16 following the deadline for the report if they do not timely file SMRs. 13385.1(a)(2)(A)
17 allows certain late reports to not be penalized if:

18 (1) a statement of no discharge,

19 (2) with a credible explanation for the failure to submit the
20 reports by the applicable deadline, and

21 (3) is provided within 30 days after the Regional Board
22 provides notice to the discharger of delinquent reports.

23 Though not specifically identified in 13385.1(a)(2)(A), such notice could be through
24 an NOV or by a notice of obligation to file a discharge monitoring report, or by a previous
25 ACLC for MMPs for late reports.³

26 **IV. FACTUAL AND LEGAL ARGUMENTS BASED ON RIVIERA WEST'S FACILITY**

27 ³ See 13385.1(b)(1)(A).
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1 Riviera West has a long history of ignoring its obligations under the WDRs, since
2 at least 1996. It now complains that the MMPs sought by the Prosecution Team are
3 unfair and excessive. As a general statement, since Riviera West's facility discharges
4 wastewater, it is regulated by the Regional Board. If Riviera West is subject to WDRs, it
5 must submit monitoring reports. If its discharges are not covered under WDRs, then its
6 discharges are unpermitted and subject to discretionary penalties under Water Code
7 section 13385(c).

8 A. 13385.1(a)(2)(A) Does Not Apply to Riviera West

9 The terms of 13385.1(a)(2)(A) do not apply to Riviera West. MMPs were first
10 assessed beginning on January 1, 2004, the effective date of Water Code section
11 13385.1. Obviously, Riviera West's non-compliance with its requirement to submit
12 monitoring reports had been an issue long before 2004, resulting in this Board issuing a
13 Cease and Desist Order in 2002 which stated in part:

- 14 a. No quarterly monitoring results or reports were ever submitted. The
15 Discharger failed to submit **23** quarterly monitoring reports (out of 23).
16 b. Weekly monitoring of effluent Turbidity was required. The Discharger
17 failed to submit the results of **308** weekly effluent Turbidity samples (out
18 of 308). ...

19 The CDO also states that Riviera West failed to submit the results of all 308 pH samples,
20 all 308 effluent residual chlorine samples, all 308 raw water turbidity samples, all 308 raw
21 water pH samples, all 308 raw water temperature samples, and all 2,160 results for daily
22 flow monitoring. Riviera West's non-compliance did not improve after 2004 and the
23 looming threat of mandatory penalties. Regional Board staff issued a written Notice of
24 Violation on June 29, 2007, and several additional Notices of Violation as described
25 above. In November 2008, the Regional Board issued an Administrative Civil Liability
26 Complaint for MMP violations.

27 Section 13385.1(e) provides:

- 28 (e) The amendments made to this section by Senate Bill 1284 of the 2009-

1 10 Regular Session of the Legislature shall apply to violations for which an
2 administrative civil liability complaint or a judicial complaint has not been
3 filed before July 1, 2010, without regard to the date on which the violations
4 occurred.

5 Therefore, **by the express language of the statute**, the amendments do not
6 apply to penalties already addressed by an administrative civil liability complaint. The
7 Regional Board issued a complaint to Riviera West prior to July 1, 2010.

8 Counsel for Riviera West argued in Objections to the Hearing Procedures that the
9 ACL complaint must be rescinded. It is unclear if the basis for this argument is the
10 passage of time, the modification of penalties sought, or the hope that by rescinding, the
11 SB 1284 amendments might apply to Riviera West. None of those are proper bases for
12 rescinding the complaint, nor in any event would rescinding the complaint bring the
13 penalties at issue under the SB 1284 amendments.

14 First, the passage of time since the 2008 complaint is due to the parties engaging
15 in settlement negotiations.⁴ Parties who engage in settlement discussions that ultimately
16 are unable to resolve the dispute should not be able to use to turn around and claim
17 delay. Secondly, the penalties in the current Order before the Board have been
18 recalculated and reduced, due to the cutoff date being the last date that a monitoring
19 report was required by the expired permit rather than the filing of the ACL complaint, and
20 the removal of penalties for failure to submit annual reports. None of the underlying facts,
21 such as the basis for the remaining penalties or Riviera West's failure to submit reports,
22 were changed. Similar amendments to a civil complaint would not require the complaint
23 to be rescinded. Nor would amendments affect the original filing date of the complaint.

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25 ⁴ The April 15, 2011 correspondence from the Regional Board staff refers to settlement
26 negotiations and the waiver of the 90-day hearing requirement from Riviera West's
27 counsel on December 12, 2008 states the hearing requirement is being waived "to allow
28 time for us to gather information ..., as well as to engage in discussions with you on this
pending matter...."

1 Finally, the language of Section 13385.1(e) would not provide relief to Riviera West even
2 in the event the ACL complaint was rescinded. Section 13385.1(e) plainly states that the
3 amendments apply to violations for which an ACL complaint has not been filed before
4 July 1, 2010, without regard to the date on which the violations occurred. An ACL
5 complaint was issued to Riviera West before July 1, 2010. Even if the complaint were
6 rescinded, the filing of the complaint, along with the written Notices of Violation, provide
7 the relief that the Legislature was addressing by the SB 1284 amendments: written notice
8 before the imposition of a penalty. Riviera West had repeated notice that its failure to
9 submit monitoring reports would subject it to penalty.

10 Furthermore, Riviera West has never provided a statement that would qualify for
11 SB 1284 relief. It had written notice of its violations in 2007 by a Notice of Violation and in
12 2008 by the ACL Complaint. There is no date by which Riviera West submitted a proper
13 statement, which must include a statement that there were no discharges to waters of the
14 United States during the relevant monitoring period, the reason why the required
15 monitoring reports were not submitted, and must be provided **prior to the date a**
16 **discharge monitoring report is required to be filed or within 30 days after receiving**
17 **written notice.** For much of the past fifteen years, Riviera West has simply been a
18 passive regulated entity, failing to comply with regulations or provide required information
19 to the Regional Board. The April 25, 2011 letter from Riviera West does not fall within the
20 provisions of Water Code section 13385.1(a)(2)(A): it is clearly responding to the NOV
21 issued by the Regional Board on March 2, 2011, which was the Regional Board's staff
22 final attempt to get a land discharge RWD, not with the discharges to Clear Lake that are
23 the subject of the MMPs. It goes without saying that the April 25, 2011 letter is not within
24 thirty days of the June 29, 2007 NOV, the July 30, 2008 notice, the October 14, 2008
25 NOV, or the November 21, 2008 ACLC.

26 B. The Legislative History Does Not Provide Unlimited Relief From MMPs
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1 The intent of SB 1284⁵ was to give parties who had not previously been provided
2 written notice an opportunity to avoid penalties if the late reports were promptly submitted
3 to the Regional Board once such written notice was given. However, Riviera West does
4 not fall within the express terms of the statutory language, as enforcement came only
5 after repeated written notices: multiple NOVs, and finally an ACLC. Riviera West does
6 not fall within the limited class of dischargers described in 13385(a)(2)(A).

7 The Legislature intended for a statutory reduction in MMPs through application of
8 either 13385.1 (a)(2)(A) or 13385.1(b)(1) to be construed narrowly, and set specific
9 requirements which must be met in order for a discharger to receive the benefit of either
10 exception.⁶ The Legislature intended the exception in § 13385.1(a)(2)(A) to apply to
11 dischargers who had not been provided written notice regarding late reports, promptly
12 submitted the reports in response to that written notice or promptly submitted a statement
13 that was verifiable and accurate about the lack of discharges to water and a credible
14 reason for failure to submit SMRs. If the discharger fails to fall within the statutory
15 requirements of this limited exception, then it will be subject to the general rule for
16 assessing mandatory minimum penalties under § 13385.1(a)(1). There is no evidence
17 that the Legislature intended to have Regional Boards across the state re-notice MMP
18 violations beginning on January 1, 2011, or intended for the exceptions in
19 13385.1(a)(2)(A) and (b)(1) to undermine the MMP structure in its entirety, by creating
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21 ⁵ Legislative intent is an improper source of argument when the statute is clear and
22 unambiguous on its face, and legislative intent can therefore be determined by an
23 application of the plain meaning rule. *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.
24 However, if the statute is subject to two different interpretations, legislative intent is a
25 proper extrinsic aid. While the Prosecution Team is certain that the plain language of the
26 SB 1284 amendments does not apply to Riviera West, an examination of the legislative
27 history does not compel a different outcome.

28 ⁶ Two Senate Bill analyses have been identified on the Prosecution Team Evidence List.
One indicates the amendments came about because of the Pico Water District case, in
which the discharger was unaware of the need to submit reports prior to the imposition of
penalties. The amendments to 13385.1(b) further provide that the reduction in penalties
operates on a one-time basis only and sunsets as of 2014.

1 exceptions so large that MMPs would very rarely be imposed.

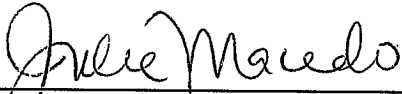
2 The Prosecution Team's interpretation of the SB 1284 amendments are consistent
3 with both the MMP structure, the plain language of the amendments and the purpose of
4 getting dischargers to submit reports so that the Regional Boards can fully address water
5 quality issues. Riviera West can provide no argument or evidence that compels the
6 conclusion that there was no harm by its failure to submit reports, despite repeated
7 written notices. The self-monitoring nature of the permit and entire regulatory structure
8 depend on timely and accurate reporting. When dischargers disregard permit terms, it
9 harms the regulatory system and risks harm to water quality. Finally, the enactment of
10 SB 1284 can be viewed as itself an ameliorative measure – the terms of 13385.1(a)(2)(A)
11 provide some relief in certain circumstances where the Legislature has determined MMPs
12 should not apply. When 13385.1(a)(2)(A) does not apply, the Legislature has confirmed
13 that penalties are proper, reasonably related to the state's goal of protecting water quality
14 and are not constitutionally excessive.

15 **V. CONCLUSION**

16 While the penalty sought is unfortunately high, it was entirely within the control of
17 Riviera West to avoid it. Riviera West has made the Regional Board staff's mission
18 exponentially harder, requiring proactive enforcement at almost every step: a Cease and
19 Desist Order after six years of failing to submit reports, followed by repeated written
20 notices of violation and an Administrative Civil Liability Complaint. Still, Riviera West
21 remains out of compliance and the Regional Board staff have another matter on calendar
22 to issue Waste Discharge Requirements to Riviera West's, notwithstanding the failure to
23 submit a complete RWD. Riviera West has been discharging waste for over three years
24 without a permit, in violation of the California Water Code and the Federal Clean Water
25 Act. Therefore, the Prosecution Team recommends the Regional Board assess
26 \$2,586,000 in mandatory minimum penalties against Riviera West as recommended in
27 Order No. R5-2012-XXXX.

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Respectfully submitted,



Julie Macedo
Attorney for the Prosecution Team

Date: December 19, 2011