

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
NORTH COAST REGION**

In the Matter of:)	
)	
DG Fairhaven Power, LLC)	Complaint No. R1-2011-0081
97 Bay Street)	for
Samoa, CA 95564)	Administrative Civil Liability
_____)	

This Administrative Civil Liability Complaint (Complaint) is issued to DG Fairhaven Power, LLC (Discharger) to assess administrative civil liability for discharges from Fairhaven Power Plant (FPP) in violation of provision of law for which the California Regional Water Quality Control Board, North Coast Region (Regional Water Board) may impose civil liability pursuant to California Water Code (CWC) Section 13385. The Complaint alleges: (1) nine effluent limit violations subject to Mandatory Minimum Penalties (MMPs) under CWC section 13385 (h) and (i); (2) twenty-one deficient quarterly and annual self-monitoring reports in violation of Monitoring and Reporting Program Order No. R1-2002-0076; and (3) six unauthorized discharges, totaling approximately 12,000 gallons of washwater, in violation of waste discharge requirements. The violations cited herein occurred from April 1, 2005 to December 31, 2009 (Complaint Period). During the Complaint Period, the Discharger was subject to the waste discharge requirements (WDRs) established in Order No. R1-2002-0076, NPDES Permit No. CA 0024571 (WDR Order No. R1-2002-0076).

The Assistant Executive Officer of the Regional Water Quality Control Board, North Coast Region (Regional Water Board) hereby gives notice that:

1. Discharger is alleged to have violated provisions of law for which the Regional Water Board may impose administrative civil liability under CWC section 13385. The Complaint proposes to assess \$172,950 in administrative civil liability for the violations cited based on considerations described herein.
2. This Complaint is issued under authority of CWC section 13323.
3. A hearing concerning this Complaint may be held before the Regional Water Board within ninety (90) days of the date of issuance of this Complaint, unless, pursuant to CWC section 13323, the Discharger waives its right to a hearing. The waiver procedures are specified in the attached Waiver Form. The hearing in this matter is scheduled for the Regional Water Board's regular meeting on November 3, 2011 at the Regional Water Quality Control Board Office, 5550 Skylane Blvd., Santa Rosa, California. The Discharger or its designated representative will have an opportunity to appear and be heard, and to contest the allegations in this Complaint and the imposition of civil liability by the Regional Water Board. An

agenda for the meeting will be available at http://www.waterboards.ca.gov/northcoast/board_info/board_meetings/ not less than 10 days before the hearing date.

4. If a hearing is held on this matter, the Regional 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. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this Complaint through hearing.
5. Regulations of the United States Environmental Protection Agency require public notification of any proposed settlement of the civil liability occasioned by violation of the Clean Water Act. Accordingly, interested persons will be given thirty days to comment on any proposed settlement of this Complaint.

STATEMENT OF REGULATORY AUTHORITY AND BACKGROUND

6. The Discharger owns and operates the Fairhaven Power Plant (FPP). The facility is located on the Samoa Peninsula in Section 20, T5N, R1W, HB&M at Latitude 40 48'43" North, Longitude 124 12'33" West (as shown on Attachment A of the WDRs). The FPP is a 17 megawatt, woodwaste-fired, steam-electric power generation facility. The Discharger discharges boiler blowdown, cooling tower blowdown, and demineralizer back flushing wastewater to the Pacific Ocean via the ocean outfall for the Freshwater Tissue Company former Samoa Pulp Mill.
7. Fairhaven Power Company, the previous owner of FPP, submitted a Report of Waste Discharge on June 2, 2001, and applied for renewal of its permit to discharge wastewater. On August 22, 2002, the Regional Water Board adopted WDRs Order No. R1-2002-0076 (NPDES Permit No. CA0024571), which also serves as an NPDES Permit under the Federal Clean Water Act, and Monitoring and Reporting Program (MRP) No. R1-2002-0076 for the Discharger. In April 2005, DG Fairhaven Power, LLC, the current Discharger, acquired the Fairhaven Power Company. The Regional Water Board received the Discharger's Application for WDRs on April 1, 2005. Regional Water Board staff informed the Discharger that FPP would continue to be regulated under the existing Permit, and that staff would make the name change when the Permit came up for renewal. The Discharger applied for a Permit renewal on February 22, 2007. The Permit expired August 22, 2007. The Discharger is still regulated, however, under the Permit until it is renewed by the Regional Water Board.
8. The Discharger and the FPP are subject to requirements contained in WDRs Order No. R1-2002-76 which includes effluent limitations and discharge prohibitions, and corresponding MRP Order No. R1-2002-0076 which includes monitoring requirements.

9. On July 28, 2009, the Discharger submitted a Report of Waste Discharge (ROWD) proposing to change its discharge location; Regional Water Board staff have determined the ROWD was inadequate. The Discharger has proposed a Supplemental Environmental Project (SEP) which changes its discharge location from the existing ocean discharge (via the former Samoa Pulp Mill outfall) to a freshwater discharge (an existing wetland area and a new area to create additional wetlands). The Regional Water Board issued a CWC section 13267(b) Order on January 13, 2010 requiring the Discharger to submit additional information by March 17, 2010. Regional Water Board staff is currently reviewing the ROWD for completeness and drafting WDRs for a new permit, and expect to present the draft permit to the Regional Water Board for approval in 2012.

WATER CODE PROVISIONS UPON WHICH LIABILITY IS BEING ASSESSED

10. Section 301 of the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. § 1311) and CWC section 13376 prohibit the discharge of pollutants to surface waters except in compliance with a NPDES permit. From April 1, 2005 to December 31, 2009 the Discharger's activities were regulated under Regional Board Order No. R1-2002-0076, NPDES Permit No. CA 0024571.
11. Pursuant to CWC section 13385(a), any person who violations CWC section 13376, or any requirements of section 301 of the Clean Water Act, or section 13383 is subject to administrative civil liability pursuant to CWC section 13385(c), in an amount not to exceed the sum of both of the following:
 - i. \$10,000 for each day in which the violation occurs, and
 - ii. \$10 for each gallon of discharge that is not susceptible to cleanup or is not cleaned up in excess of 1,000 gallons.
12. An administrative civil liability may be imposed pursuant to the procedures described in CWC section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.
13. CWC section 13385, subdivision (h) requires the Regional Water Board to assess a mandatory minimum penalty (MMP) of three thousand dollars (\$3,000) for each serious violation of an NPDES permit effluent limitation. CWC section 13385, subdivision (h)(2) states that a serious violation occurs if the discharge from a facility regulated by an NPDES permit exceeds the effluent limitations for a Group I pollutant, as specified in Appendix A to Section 123.45 of title 40 of the Code of Federal Regulations, by 40 percent or more, or for a Group II pollutant, as

specified in Appendix A to Section 123.45 of title 40 of the Code of Federal Regulations, by 20 percent or more.

14. CWC section 13385, subdivision (i)(1), requires the Regional Water Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for each violation, not counting the first three violations, if the discharger does any of the following four or more times in any six-month period:
 - i. Violates a waste discharge requirement effluent limitation;
 - ii. Fails to file a report pursuant to Section 13260;
 - iii. Files an incomplete report pursuant to Section 13260; or
 - iv. Violates a toxicity discharge limitation where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

Violations under section 13385, subdivision (i)(1) of the CWC are referred to as chronic violations in this Complaint.

15. On November 17, 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 May 20, 2010. The entire Enforcement Policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

16. CWC section 13385, subdivision (l)(1) provides that a portion of MMPs imposed under section 13385, subdivisions (h) or (i), may be directed to a supplemental environmental project (SEP) or enhanced compliance actions (ECA) in accordance with Section IX of the Enforcement Policy.
17. The Enforcement Policy also provides that the State Water Board supports the inclusion of a SEP/ECA in ACL actions as long as the projects meet the criteria specified in section IX of the Enforcement Policy.

ALLEGED VIOLATIONS

STATEMENT OF PROHIBITIONS, PROVISIONS, AND REQUIREMENTS APPLICABLE TO THE DISCHARGER:

18. During the period from August 22, 2002 to present, the facility has been regulated under WDRs Order No. R1-2002-0076 which includes the following summarized requirements:

- Discharge Prohibitions

- i. The discharge of any waste not specifically regulated by this Permit is prohibited.
- ii. The discharge of waste to Humboldt Bay is prohibited.

- Effluent Limitations

- i. Representative samples of boiler and cooling tower blowdown and demineralizer blackflushing that is discharged into the ocean outfall must not contain constituents in excess of the following limits:

Constituents	Units	Daily Maximum	30-Day Average
Free Available Chlorine	mg/l	0.5	0.2
Total Chromium	mg/l	0.2	0.2
Zinc	mg/l	1.0	1.0
Hydrogen Ion	pH	Within the range of 6.0 to 9.0	

- ii. Representative samples of low volume wastes (waste other than boiler and cooling tower blowdown) shall not contain constituents in excess of the following limits:

Constituents	Units	Daily Maximum	30-Day Average
Total Suspended Solids	mg/l	100	30
Grease and Oil	mg/l	20	15
Hydrogen Ion	Standard units	Within the range of 6.0 to 9.0	

- iii. There shall be no acute toxicity in the effluent. Compliance with this effluent limitation shall be determined in accordance with F. GENERAL PROVISIONS 17. The permittee will be considered in compliance with this limitation when the survival of aquatic organisms in a 96-hour bioassay of undiluted waste complies with the following:

- a. Minimum for any one bioassay: 70% survival
- b. Median for any three or more consecutive bioassays: at least 90% survival

- iv. Toxic Materials Limitations. The discharge of any effluent to the Pacific Ocean through the ocean outfall, prior to commingling with effluent for the Samoa Pacific Cellulose (Samoa Pulp Mill) facility, in excess of the following limits is prohibited:

Objectives for Protection of Marine and Aquatic Life

Parameter	Units	6-Month Median	Daily Maximum	Instantaneous Maximum
Copper	mg/l	0.12	1.2	3.2
Lead	mg/l	0.23	0.93	2.3
Zinc	mg/l	1.4	8.4	22.3
Acute Toxicity	TUa	---	---	---
Chronic Toxicity	TUc	115	---	---

19. Among the provisions in WDRs Order No. R1-2002-0076 are requirements to implement a discharge monitoring program and to prepare and submit quarterly and annual NPDES self-monitoring reports to the Regional Water Board, pursuant to the authority of Water Code section 13383. These reports are designed to ensure compliance with or to clearly identify all violations of effluent limitations contained in waste discharge requirements
20. During the period from August 22, 2002 to present, the Discharger has been regulated under Monitoring and Reporting Program (MRP) Order No. R1-2002-0076, which includes the following summarized requirements:

- Monitoring

The permittee shall continuously monitor and record the flow rates of wastewater discharged to the Samoa Pacific Cellulose, LLC outfall. Grab samples shall be collected and analyzed for the following:

Boiler and Cooling Water Blowdown

Constituents	Units	Frequency
Free Chlorine	mg/l	Quarterly
Total and Hexavalent Chromium	mg/l	Quarterly
Zinc	mg/l	Quarterly
Hydrogen Ion	pH	Quarterly
Copper	mg/l	Quarterly

Low Volume Waste (Non-Blowdown Wastes)

Constituents	Units	Frequency
Total and Suspended Solids	mg/l	Quarterly
Oil and Grease	mg/l	Quarterly
Hydrogen Ion	pH	Quarterly

Gross Effluent Waste Stream

Constituents	Units	Frequency
Total and Hexavalent Chromium	mg/l	Quarterly
Zinc	mg/l	Quarterly
Hydrogen Ion	pH	Quarterly
Copper	mg/l	Quarterly
Lead	mg/l	Quarterly

- Chronic Toxicity

Once per year, a 24-hour composite sample of waste water shall be collected prior to discharging to the Samoa Pacific Cellulose LLC pipeline and shall be analyzed for Toxicity Concentration (TUc). Red Abalone *Haliotis rufescens* shall be used for toxicity measurements. The Procedures Manual for Conducting Toxicity Tests developed by the Marine Bioassay Project SWRCB 1996, 96-1WQ shall be used for conducting toxicity measurements. In those instances when it is difficult or impossible to spawn Red Abalone, the monitoring report shall specifically note the reasons for the failure to run the test(s). The Regional Water Board Executive Officer may direct use of a backup species if use of the Red Abalone becomes problematic.

ALLEGED VIOLATIONS OF PROHIBITIONS, PROVISIONS, AND REQUIREMENTS APPLICABLE TO THE DISCHARGER

21. **Violation Group No. 1:** According to quarterly monitoring reports submitted by the Discharger for the Complaint Period, the Discharger had eight effluent limitation exceedances, detailed in Attachment A, Table 1 that are subject to Minimum Monetary Penalties (MMPs) under CWC section 13385 (h).
22. **Violation Group No. 2:** According to quarterly self-monitoring reports submitted by the Discharger for the Complaint Period, the Discharger submitted 19 quarterly and 2 annual self-monitoring reports that were deficient, as detailed in Attachment A, Table 2 . The deficiencies in these reports constitute violations of WDRs Order No. R1-2002-0076 and MRP Order No. R1-20002-0076, are classified in the Enforcement Policy as Class II violations, and may be subject to discretionary penalties pursuant to CWC section 13385(c).
23. **Violation Group No. 3:** According to a Summary Report Letter dated October 15, 2008 prepared and submitted by SCS Engineers on behalf of the Discharger, two unauthorized discharges of bottom ash processing wastewater (washwater) occurred each year in 2006, 2007, and 2008 during a pilot study and within the Complaint Period. The letter describes the pilot study conducted by the Discharger to determine the feasibility of processing bottom ash to be recycled for fuel. The Discharger estimates the volume of washwater discharged to be 2000 gallons for each incident, or a total of 12,000 gallons. These six unauthorized discharges, as

detailed in the Attachment A, Table 3, are violations of prohibitions contained in the WDRs Order No. R1-2002-0076, classified in the Enforcement Policy as Class II violations and may be subject to discretionary penalties pursuant to CWC section 13385(c).

FACTORS CONSIDERED IN DETERMINING 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 Regional Water 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. CWC section 13385, subdivision (e) also requires that at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation(s). The Regional Water Board is not required to consider these factors prior to the imposition of penalties under CWC section 13385, subsections (h) and (i)
25. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in CWC section 13385(e).
26. The specific factors required by the Enforcement Policy are: the potential harm to beneficial uses; the physical, chemical, biological or thermal characteristics of the discharge; the discharge's susceptibility to cleanup; the violation's deviation from requirements; the discharger's culpability; cleanup and the discharger's cooperation; the history of violations; the discharger's ability to pay; other factors as justice may require; and economic benefit from the avoidance or delay of implementing requirements. These factors address the statute-required factors and also are used to calculate penalties consistent with both the CWC and the Enforcement Policy.

The required factors have been considered for violation groups 2 and 3 using the methodology in the Enforcement Policy, as explained in detail in Attachment B¹ and shown in the methodology table (Attachment C).

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

27. Based on consideration of the above facts and after applying the penalty methodology, the Assistant Executive Officer of the Regional Water Board proposes

¹ The liability being proposed for Violation Group 1 is the mandatory minimum penalties statutorily required and therefore no consideration of the 13385 factors or the Enforcement Policy methodology is required.

that civil liability be imposed administratively on the Discharger in the amount of **\$172,950** for the violations of CWC section 13385. The proposed liability includes \$10,050 for staff costs, \$151,950 in discretionary penalties and \$21,000 in MMPs for effluent limit violations that occurred from April 1, 2005 to December 31, 2009, as detailed above and in the Attachments.

28. There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not an administrative proceeding. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.)
29. Notwithstanding the issuance of this Complaint, the Regional Board retains the authority to assess additional penalties for violations of the requirements of the Discharger's waste discharge requirements for which penalties have not yet been assessed or for violations that may subsequently occur.
30. Issuance of this Complaint is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) pursuant to title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).

Luis G. Rivera
Assistant Executive Officer

August 5, 2011

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