

Prosecution Team's Legal and Technical Arguments

In the matter of

Cruiser Haven, Inc.
Delta Waterways, LLC
Holland Riverside Marina

Introduction

The Prosecution Team has issued Administrative Civil Liability Complaint R5-2016-0501 to Cruiser Haven, Inc., Delta Waterways, LLC (collectively known as Discharger) for the failure to submit monitoring reports as required by Waste Discharge Requirements R5-01-093. The Complaint alleges that a total of 42 monitoring reports, covering the period from April 2013 through November 2015¹, have not been submitted. The Complaint also alleges that a technical report was not submitted. The monitoring reports and technical were required pursuant to Water Code section 13267. The maximum penalty is \$20,909,000. The minimum penalty is the economic benefit plus 10%, and is estimated to be \$26,963. The Prosecution Team is recommending a penalty of \$100,000.

Background

The Discharger owns a marina in Contra Costa County. The WDRs allow a maximum of 7,500 gallons per day of wastewater to enter a wastewater treatment system consisting of two lined treatment ponds followed by two percolation basins. Groundwater is shallow, about 5-6 feet below ground surface, and there is a groundwater monitoring well on either side of the percolation basins.

The WDRs contain a Monitoring and Reporting Program (MRP) which requires that the Discharger monitor the influent, effluent, and ponds, and submit monthly monitoring reports. Groundwater is to be monitored on a quarterly basis, and reports submitted quarterly. In addition, the MRP requires that an annual report be submitted.

The Discharger has a history of failing to submit monitoring reports. Between June 2012 and January 2015, the Discharger has been issued six Notices of Violation (NOVs) for failure to submit monitoring reports and for other violations of the WDRs. While the Complaint only assesses civil liability for the failure to submit technical and monitoring reports, other violations regarding improper management of the wastewater system are described in the Findings to provide context.

Failure to Submit Monitoring Reports

The Discharger assumed ownership of the marina in May 2010, and submitted monitoring reports in 2010 and 2011, although some were incomplete. However, beginning in 2012, the Discharger's submittal of monitoring reports became erratic, and submittal ceased as of April 2013. Board staff sent numerous NOVs and had several meetings with the Discharger to try and gain voluntary compliance, as described below.

¹ It is noted that after the ACL Complaint was issued, the Discharger submitted the September-November 2015 monthly monitoring reports.

- On 15 June 2012, the Discharger was issued an NOV for failure to submit the Annual 2011 and First Quarter 2012 reports. The NOV stated that the maximum liability was \$178,000. Although the Discharger later submitted these two reports, they did not contain all of the information required by the MRP and were therefore materially deficient.
- On 3 August 2012, the Discharger was issued two NOVs: one NOV for failure to maintain the wastewater ponds (as documented during an inspection), and the second NOV for submitting incomplete monthly and quarterly monitoring reports for the period of January 2010 through May 2012, as well as exceedances of the ammonia daily maximum limit on seven occasions. The NOVs required the Discharger to submit a report describing how the violations would be corrected, and the name of the qualified professional that would prepare the reports. The Discharger subsequently stated that he had removed the vegetation in the ponds, that he had increased the aeration time to reduce the ammonia concentrations, and that he was trying to obtain the services of a professional geologist to help with future monitoring reports.
- On 24 September 2013, an NOV was issued to the Discharger for the non-submittal of the April 2013 through July 2013 monthly reports, and Third Quarter 2013 report. The NOV also addressed the late submittal of four other reports. The NOV informed the Discharger that the maximum liability was \$620,000, and that staff would propose an ACL Complaint if he did not begin submitting monitoring reports. The NOV requested that the Discharger contact Board staff to discuss how he would return to compliance. The Discharger did not respond.
- On 15 August 2014, Board staff scheduled a meeting with the Discharger to discuss the history of non-compliance. The Discharger was informed that the following monitoring reports had not been received: April 2013 through June 2014 monthly reports, Second Quarter through Annual 2013/Fourth Quarter 2013, and First Quarter 2014. The Discharger indicated that the monitoring and reporting had not been conducted since August 2013 because of financial problems, and stated that monitoring reports would be submitted in the future. Board staff reminded the Discharger that continued failure to submit monitoring reports would result in the issuance of an ACL Complaint.
- In follow-up to the meeting, Board staff issued an NOV on 27 August 2014, stating that that the Discharger was subject to a maximum liability of \$3,779,000, but that Board staff would not recommend the issuance of an ACL Complaint if a report was submitted by 30 September 2014 explaining (a) why the monitoring and reporting was not performed and (b) the actions that would be taken to assure future monitoring reports would be submitted on time and complete. In addition, the NOV informed the Discharger that he must immediately begin submitting monitoring reports, beginning with the September 2014 monthly monitoring report and the Third Quarter 2014 groundwater monitoring report.
- On 24 August 2014, Board staff received an e-mail from the Discharger which stated:
“From January 2013 through August 2014, medical and financial difficulties combined with divorce proceedings affected my ability to adhere to the permit regulating the testing requirements of the pond system at the Holland Riverside Marina... We are currently back on track with Robbie Phillips at Alpha Analytical Labs Dublin Ca for the required testing. A detailed accounting of the events from January 2013 through August 2014 are available upon your request. Thank you for seeing me regarding this matter and for your patience

with resolving this matter.”

- However, the Discharger continued to fail to submit reports, and therefore on 14 January 2015, Board staff issued an NOV for the non-submittal of the September 2014 through November 2014 monthly reports and the Third Quarter 2014 report. The NOV informed the Discharger that the maximum liability for non-submittal of these four reports was \$205,000, with liability continuing to accrue on a daily basis. The NOV also informed the Discharger that Board staff would be preparing an ACL Complaint for up to \$1,000 per day for late or inadequate reports. The NOV also suggested that the Discharger immediately submit the delinquent monitoring reports to minimize the accrual of liability penalties, and to submit monitoring reports in accordance with the WDRs and MRP. The Discharger did not receive a response to the NOV.
- On 1 September 2015, Board staff sent the Discharger a letter containing an offer to enter into settlement negotiations prior to issuance of an administrative civil liability complaint. On 18 September 2015, Board's Prosecution Team met with the Discharger to discuss the prolonged non-compliance with the WDRs and the accruing administrative civil liabilities. During the meeting, the parties discussed options to the change the wastewater treatment system and therefore reduce or minimize the need for monitoring reports.

Water Code Section 13267 Order for Technical Reports

In follow-up to the meeting, on 24 September 2015 a Water Code Section 13267 Order was issued to the Discharger for submittal of a technical report committing to one of three options which would result in compliance with Water Board requirements. The options were: (a) complying with the existing WDRs and submitting monitoring reports, (b) tanking and hauling the wastewater to a permitted facility while keeping WDRs in place to allow for future expansion of the marina, or (c) tanking and hauling the wastewater, decommissioning the ponds and monitoring wells, and requesting rescission of the WDRs. The Discharger was also informed that unless the WDRs were rescinded, he was responsible for complying with the WDRs and submitting monitoring reports.

In a 15 October 2015 email, Board staff reminded the Discharger that the technical report required by the Water Code section 13267 Order was due on 16 October 2015. Board staff sent additional email reminders on 23 and 28 October 2015; however, as of date of issuance of the ACL Complaint, Board staff has not received any monitoring reports or the Water Code section 13267 technical report.

Administrative Civil Liability Complaint

The ACL Complaint was issued on 25 January 2016. On 24 February 2016 the Discharger submitted the September 2015 through January 2016 monitoring reports, and on 8 April 2016, he submitted the February and March 2016 monitoring reports. In February 2016, the Discharger hired an engineer to assist with preparation of the groundwater monitoring reports through December 2016; however, the Discharger has not yet submitted a complete groundwater monitoring report.

Considerations when Calculating the Proposed Penalty

WDRs Order 5-01-093, issued by the Central Valley Water Board on 27 April 2001, requires the Discharger to submit monitoring reports on a monthly, quarterly, and annual basis. Our records show that the Discharger has a long history of (a) submitting inadequate monitoring reports and (b) failing to submit monitoring reports. These monitoring reports were due pursuant to Water Code section 13267. The Discharger also failed to submit a technical report required by Water Code section 13267.

The lack of monitoring prevents Board staff from evaluating compliance with the WDRs. The violation represents a “substantial threat to beneficial uses” because the Water Board is deprived of the essential technical evaluations, monitoring, and data reporting to determine whether the discharge of waste is impacting surface water or groundwater.

Board staff has expended considerable time trying to help the Discharger return to voluntary compliance with the WDRs. However, the Discharger’s repeated failure to conduct monitoring and reporting as required by the WDRs shows a complete disregard for compliance with regulatory requirements.

The monitoring reports were a total of 20,808 days late; however, the Prosecution Team finds that the failure to submit monitoring reports results in no economic benefit that can be measured on a daily basis. Therefore, the Prosecution Team followed the procedure in the Enforcement Policy and compressed the days of violation to 961 days. The technical report was 101 days late, which compressed to 9 days.

The Discharger is culpable for the failure to submit reports. As described above, Board staff have sent the Discharger multiple NOVs and had several meetings to discuss the need for monitoring. Despite the warnings, the Discharger chose not to submit monitoring reports until after the ACL Complaint was issued.

The Discharger incurred an economic benefit by not conducting the monitoring and reporting requirements as required by the MRP, and not submitting the technical report. The State Water Board’s Economist used the BEN model and the estimates provided by staff for the costs to monitor the wastewater ponds and groundwater, and to compile and submit the reports. These estimated costs are based on actual billed work, bid proposals, and/or estimated costs provided by other dischargers for completing similar type work and/or consulting firms that complete similar work at other treatment facilities. The economic benefit for not completing the required monitoring and submitting the required monitoring and technical reports is estimated to be \$24,512. Per the Enforcement Policy, the minimum liability is the economic benefit plus 10%, or \$26,963. Exhibit 1 of the ACL Complaint is a table showing the calculations used to determine the economic benefit.

Conclusion

The Enforcement Policy’s Penalty Calculation method resulted in a liability of \$897,616. However, the Prosecution Team asserts that this penalty is disproportionate to the volume of the permitted discharge (i.e, 7,500 gallons per day), and that that the goals of the Water Code and Enforcement Policy can be met with a smaller, though still substantial, final liability in the amount of \$100,000.