

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2009-0036

MANDATORY PENALTY
IN THE MATTER OF

OAKWOOD LAKE WATER DISTRICT AND BECK PROPERTIES
OAKWOOD LAKE SUBDIVISION MINING RECLAMATION PROJECT
SAN JOAQUIN COUNTY

This Order is issued to the Oakwood Lake Water District and Beck Properties, Oakwood Lake Subdivision Mining Reclamation Project (hereafter Discharger) pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability. This Order is based on findings that the Discharger violated provisions of Waste Discharge Requirements (WDRs) Order 98-123 and R5-2005-0153 (NPDES No. CA0082783).

The Central Valley Regional Water Quality Control Board (Central Valley Water Board) finds the following:

1. The Discharger operates the Oakwood Lake Subdivision, a mining reclamation project. Groundwater seepage and stormwater is discharged from to the San Joaquin River within the boundary of the Sacramento-San Joaquin Delta, a water of the United States within the San Joaquin Delta Hydrologic Area.
2. On 5 June 1998, the Central Valley Water Board adopted WDRs Order 98-123 to regulate discharges of waste from the mining reclamation project. The Order named Brown Sand, Inc. and Vernalis Partners, Ltd. as the Discharger. On 21 October 2005, the Central Valley Water Board adopted WDRs Order R5-2005-0153, which contained new requirements and rescinded WDRs Order 98-123. This Order names Oakwood Lake Water District and Beck Properties as the Discharger.
3. On 21 October 2005, the Central Valley Water Board adopted Time Schedule Order (TSO) R5-2005-0154, providing a time schedule and establishing interim effluent limits until 1 May 2010 to comply with new effluent limitations for antimony, arsenic, specific conductance, barium, iron, manganese, aluminum, and ammonia. This Order considered the interim effluent limitations and the protection from Mandatory Minimum Penalties provided by TSO R5-2005-0154.
4. On 29 July 2008, the Central Valley Water Board sent the Discharger a draft Record of Violations (ROV). Central Valley Water Board staff had discussed the ROV with both the Discharger's engineer and attorney, and extended the time to review the ROV. On 10 October 2008, the Discharger's attorney responded that:

Under the circumstances, the District is prepared to move forward with this matter in [sic] and seek an appropriate resolution as the named party on any necessary actions taken related to the discharge activities in question. The District expects to resolve with the appropriate party or parties any potential financial consequences

that may results from the proposed action separate from the Regional Board's administrative process.

5. On 10 November 2008, the Assistant Executive Officer of the Central Valley Water Board issued ACLC R5-2008-0600 for violations of effluent limitations set forth in WDRs Orders 98-123 and R5-2005-0153. The ACLC was issued in the amount of \$63,000. On 10 December 2008, the Discharger waived its right to a hearing with 90 days.
6. By letter dated 16 January 2009, Central Valley Water Board staff notified the Discharger that a turbidity violation had been omitted from the ACL Complaint. This Order includes that violation, which occurred on 30 April 2005. This Order also extends the period of review to 31 December 2008.
7. CWC sections 13385(h) and (i) require assessment of mandatory penalties and state, in part, the following:

CWC section 13385(h)(1) states:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation.

CWC section 13385 (h)(2) states:

For the purposes of this section, a "serious violation" means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements 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 or 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.

CWC section 13385(i)(1) states:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations:

- A) Violates a waste discharge requirement effluent limitation.
- B) Fails to file a report pursuant to Section 13260.
- C) Files an incomplete report pursuant to Section 13260.
- D) Violates a toxicity effluent limitation contained in the applicable waste discharge requirements where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

8. CWC section 13323 states, in part

Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

9. WDRs Order 98-123 Effluent Limitations No. B.1., include, in part, the following effluent limitations: *“Effluent shall not exceed the following limits:”*

<u>Constituents</u>	<u>Units</u>	<u>Monthly Average</u>	<u>Weekly Average</u>	<u>Daily Maximum</u>
Turbidity	NTUs	15	20	25

10. WDRs Order 98-123 Effluent Limitations No. B.2., include, the following effluent limitations: *“The discharge shall not have a pH less than 6.5 nor greater than 8.5.”*

11. According to Discharger’s self-monitoring reports, there has been no discharge to the San Joaquin River since 24 October 2005. Because Order No. R5-2005-0153 and TSO R5-2005-0154 were adopted on 21 October 2005, the interim and final effluent limitations contained in those orders are not relevant to this Order.

12. According to the Discharger’s self-monitoring reports, the Discharger committed eight (8) serious Group I violations of the above effluent limitations contained in Orders 98-123 and R5-2005-0153 during the period beginning 1 January 2000 and ending 31 December 2008. The violations are defined as serious because measured concentrations of Group I constituents exceeded maximum prescribed levels by more than 40 percent on these occasions. The mandatory minimum penalty for these serious violations is **twenty-four thousand dollars (\$24,000)**.

13. According to the Discharger’s self-monitoring reports, the Discharger committed twenty (20) non-serious violations of the above effluent limitations contained in Orders 98-123 and R5-2005-0153 during the period beginning 1 January 2000 and ending 31 December 2008. Fourteen (14) of the non-serious violations are subject to mandatory penalties under CWC section 13385(i)(1) because these violations were preceded by three or more similar violations within a six-month period. The mandatory minimum penalty for these non-serious violations is **forty-two thousand dollars (\$42,000)**.

14. The total amount of the mandatory penalties assessed for the cited effluent violations is **sixty-six thousand dollars (\$66,000)**. A detailed list of the cited effluent violations is included in Attachment A, a part of this Order.

15. In lieu of issuing mandatory penalties, CWC sections 13385(c) and (e) provide requirements regarding the maximum penalty that can be issued for the violations. These sections state:

(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”

16. Central Valley Water Board staff has estimated the potential maximum civil liability pursuant to CWC section 13385(c)(1), by applying the \$10,000/day penalty for each of the 22 days that violations were reported, plus additional days for exceedances of monthly or weekly average limitations. The maximum penalty pursuant to this code section is at least \$220,000. In addition, as discussed above, a second penalty of \$10 per gallon discharged over 1,000 gallons could be assessed for each day of violation. This penalty was not calculated, but would cause the maximum penalty to significantly exceed \$220,000. This Order does not propose to assess a discretionary penalty above the minimum required by CWC sections 13385(h) and (i).
17. The Discharger asserts that delay in processing the ACL Complaint unfairly prejudiced the Discharger, because pH violations might have been erroneously reported. However, the Ninth Circuit does not recognize a “laboratory error defense,” and conclusively presumes that self monitoring reports are evidence of a violation. (*Sierra Club v. Union Oil* (9th Cir. 1987) 813 F.2d 1480, *vacated on other grounds* 485 U.S. 931, *reinstated and amended on other grounds*, 853 F.2d 667 (9th Cir. 1988).) Since the Discharger cannot assert a “laboratory error defense” and the monitoring reports admitting the violations are in the record, the delay did not prejudice the Discharger. Even those courts that allow a “laboratory error defense” recognize that a defendant asserting such defense has a heavy burden of proof and that mere speculation is inadequate. (*US v. Allegheny Ludlum* (3d Cir. 2004) 366 F.3d 164.) In this case, the Discharger speculates that pH violations *may have been* erroneously reported because the limits are only slightly above the effluent limitation and are isolated instances of violation. However, even small exceedances are subject to mandatory penalties. The pH violations were not isolated instances, but occurred on ten different days between November 2002 and November 2003, three times in May through June 2004 and again in August 2005. The Discharger does not contend that laboratory documentation is missing; to the contrary, its 10 October 2008 letter seems to suggest records are still available dating back to at least 2001. The Discharger or the predecessor entity that reported the violations knew or should have known that violations of numeric effluent limitations were subject to mandatory penalties, and thus had reason to ensure that any errors were investigated and corrected before the violations were reported. The Oakwood Lake Water District has agreed to resolve all outstanding mandatory penalties on behalf of all entities that might have liability, and then seek recovery from other entities. Thus, the delay in issuing the ACL Complaint did not prejudice the Discharger.

18. Issuance of this Administrative Civil Liability Order to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code section 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).
19. Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED THAT:

1. Oakwood Lake Water District and Beck Properties shall be assessed an Administrative Civil Liability in the amount of **sixty-six thousand dollars (\$66,000)** as follows:

Within 30 days of adoption of this Order, Oakwood Lake Water District and Beck Properties shall pay sixty-six thousand dollars (\$66,000) by check made payable to the *State Water Pollution Cleanup and Abatement Account*. The check shall have written on it the number of this ACL Order.

I, Pamela C. Creedon, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the Central Valley Regional Water Quality Control Board, on 24 April 2009.

PAMELA C. CREEDON, Executive Officer

ATTACHMENT A
ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2009-0036

Oakwood Lake Water District and Beck Properties
Oakwood Lake Subdivision Mining Reclamation Project

RECORD OF VIOLATIONS (1 January 2000 – 31 December 2008) MANDATORY PENALTIES
(Data reported under Monitoring and Reporting Program Nos. 98-123 and R5-2005-0153)

	<u>Date</u>	<u>Violation Type</u>	<u>Units</u>	<u>Limit</u>	<u>Measured</u>	<u>Period Type</u>	<u>Remarks</u>
1	24-Apr-01	Turbidity	NTU	25	60	Daily	1
2	24-Apr-01	Turbidity	NTU	20	60	Weekly	1
3	30-Apr-01	Turbidity	NTU	15	18	Monthly	3
4	19-Jun-01	Turbidity	NTU	25	32	Daily	4
5	19-Jun-01	Turbidity	NTU	20	32	Weekly	1
6	30-Jun-01	Turbidity	NTU	15	16	Monthly	4
7	31-Oct-01	Turbidity	NTU	15	17	Monthly	4
						Instantaneous	
8	27-Nov-02	pH	pH units	8.5	8.7	s	3
						Instantaneous	
9	27-Mar-03	pH	pH units	8.5	8.6	s	3
						Instantaneous	
10	22-May-03	pH	pH units	8.5	8.6	s	3
						Instantaneous	
11	12-Jun-03	pH	pH units	8.5	8.6	s	3
						Instantaneous	
12	3-Jul-03	pH	pH units	8.5	9	s	4
						Instantaneous	
13	10-Jul-03	pH	pH units	8.5	8.8	s	4
						Instantaneous	
14	17-Jul-03	pH	pH units	8.5	8.6	s	4
						Instantaneous	
15	24-Jul-03	pH	pH units	8.5	8.6	s	4
						Instantaneous	
16	7-Aug-03	pH	pH units	8.5	8.6	s	4
						Instantaneous	
17	25-Nov-03	pH	pH units	8.5	8.8	s	4
18	29-Apr-04	Turbidity	NTU	25	41	Daily	1
19	29-Apr-04	Turbidity	NTU	20	41	Weekly	1
						Instantaneous	
20	20-May-04	pH	pH units	8.5	8.7	s	4
						Instantaneous	
21	27-May-04	pH	pH units	8.5	8.6	s	4
						Instantaneous	
22	24-Jun-04	pH	pH units	8.5	8.6	s	4
23	12-Apr-05	Turbidity	NTU	25	44	Daily	1
24	12-Apr-05	Turbidity	NTU	20	44	Weekly	1
25	19-Apr-05	Turbidity	NTU	25	27	Daily	3
26	19-Apr-05	Turbidity	NTU	20	27	Weekly	4
27	30-Apr-05	Turbidity	NTU	15	36	Monthly	1
						Instantaneous	
28	23-Aug-05	pH	pH units	8.5	8.7	s	4

Remarks:

1. Serious Violation: For Group I pollutants that exceed the effluent limitation by 40 percent or more.
2. Serious Violation: For Group II pollutants that exceed the effluent limitation by 20 percent or more.
3. Non-serious violations falls within the first three violations in a six-month period, thus is exempt.
4. Non-serious violation subject to mandatory penalties.

ATTACHMENT A
ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2009-0036

<u>VIOLATIONS AS OF:</u>	<u>12/31/2008</u>
Group I Serious Violations:	8
Group II Serious Violations:	0
Non-Serious Exempt from MPs:	6
Non-serious Violations Subject to MPs:	14
<u>Total Violations Subject to MPs:</u>	<u>22</u>

Mandatory Minimum Penalty = (8 Serious Violations + 14 Non-Serious Violations) x \$3,000 = \$66,000