

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2007-0513  
IN THE MATTER OF

DR HORTON - WESTERN PACIFIC SERIES  
CHEYENNE AT BROWNS VALLEY  
SOLANO COUNTY

This Order is issued to DR Horton - Western Pacific Series (hereafter Discharger) based on violations of Clean Water Act section 301, California Water Code (CWC) section 13376, and the National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002, Order No. 099-08-DWQ, pursuant to the provisions of CWC section 13385, which authorizes the imposition of administrative civil liability. The Executive Officer of the Regional Water Quality Control Board, Central Valley Region (Regional Water Board), finds the following:

1. The Discharger is the owner and developer of the Cheyenne at Browns Valley Subdivision, a 120-acre construction project in Solano County. Runoff from the site discharges to an unnamed tributary to Ulatis Creek.
2. Ulatis Creek is a tributary to the Sacramento River. The existing beneficial uses of Ulatis Creek are municipal and domestic supply; agriculture; industry; recreation; freshwater habitat; warm and cold water migration; spawning; and wildlife habitat.
3. On 19 August 1999, the State Water Resources Control Board adopted NPDES General Permit No. CAS000002, Order No. 99-08-DWQ, implementing the Waste Discharge Requirements (WDR) for storm water discharges associated with construction activity. Order 99-08-DWQ remains effective today.
4. General Order No. 99-08-DWQ requires that dischargers of storm water to surface waters associated with construction activity file a Notice of Intent (NOI) to obtain coverage under the NPDES General Permit and to use best available technology economically achievable (BAT) and best conventional control technology (BCT) to reduce storm water pollution. The Discharger filed an NOI.
5. The Clean Water Act and California Water Code require that dischargers obtain coverage under the NPDES General Permit prior to commencement of construction activities. The Discharger obtained coverage under the General Permit and was assigned WDID No. 5S48C336297 on 29 August 2005.
6. The Discharger is alleged to have violated provisions of law for which the Regional Water Board may impose liability under CWC section 13385(c)(2).

7. General Order No. 99-08-DWQ states, in part, the following:

“A. DISCHARGE PROHIBITIONS:

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3. Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.”

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“B RECEIVING WATER LIMITATIONS

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1. Storm water discharges and authorized nonstorm water discharges to any surface or ground water shall not adversely impact human health or the environment.
2. The SWPPP developed for the construction activity covered by this General Permit shall be designed and implemented such that storm water discharges and authorized nonstorm water discharges shall not cause or contribute to an exceedance of any applicable water quality standards contained in the Statewide Water Quality Control Plan and/or applicable RWQCB Basin Plan.”

“C. SPECIAL PROVISIONS FOR CONSTRUCTION ACTIVITY:

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2. All dischargers shall develop and implement a SWPPP in accordance with Section A: Storm Water Pollution Prevention Plan. The Discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard.”

8. Section 301 of the Clean Water Act and CWC section 13376 prohibit the discharge of pollutants to surface waters except in compliance with an NPDES permit.

9. The Discharger violated Discharge Prohibition A.3, Receiving Water Limitations B.1, B.2, and Special Provisions C.2 of the General Permit. These violations were caused by the Discharger’s failure to either implement or monitor an effective combination of sediment and erosion control Best Management Practices (BMPs) and by the potential discharge of pollutants from an Advanced Treatment System (ATS) to the unnamed tributary to Ulatis Creek.

10. Pursuant to CWC section 13385 (a)(2), civil liability may be imposed for the following violations:

- a. On 27 February 2006, Regional Water Board staff observed significant storm water management problems during a site inspection of the Cheyenne at Browns Valley Subdivision. The large, 120-acre, construction site lacked an

effective combination of sediment and erosion control BMPs, and Regional Water Board staff observed significant discharges of sediment-laden storm water at three locations on the construction site and an advanced treatment system (ATS), which was operational at the time of the site inspection. During the inspection it was determined that an ATS monitoring protocol had not been written for the system, and regular monitoring of the system had not been conducted or recorded. A field-test with a Hach 2100 Turbidimeter found the discharge from the construction site to be 1629 NTUs.

- b. On 10 March 2006, a Notice of Violation (NOV) was issued to the Discharger for violations of the General Permit.

11. Section 13385 of the California Water Code states, in part:

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

*(1) Section 13375 or 13376*

*(2) Any waste discharge requirements or dredged and fill material permit.*

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*(5) Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act as amended.”*

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*“(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... following:*

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

*(2) Where there is 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.”*

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*“(e) In determining the amount of liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation, or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, 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 benefits or savings, if any, resulting from the violation, and other matters that justice may require. 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.”*

12. Pursuant to CWC section 13385(c), the Discharger is subject to a maximum civil liability of \$3,200,590 for violating the General Permit on 27 February 2006. The maximum civil liability is based on calculations for one day of violation (27 February 2006) and the number of gallons discharged from the site on that day. Gallons discharged from the site on 27 February 2006 were estimated taking into account the size of the disturbed area, rainfall data, and application of a runoff coefficient.

## CONSIDERATION OF FACTORS

13. **Enforcement Considerations:** On 18 August 2006, the Executive Officer issued Administrative Civil Liability Complaint No. R5-2006-0520 to the Discharger, proposing a \$200,000 Administrative Civil Liability pursuant to CWC section 13385. The amount of the liability was established based upon a review of the factors cited in CWC section 13385 and the State Water Resources Control Board Water Quality Enforcement Policy, as well as the Discharger's full cooperation with the investigation and the Regional Water Board to prevent any further discharge at this construction site or at any other of Discharger's construction sites. The following factors were used to establish the amount of liability:
14. **Enforcement Considerations:** Because of these violations of the General Permit, the Regional Board may impose an ACL pursuant to section 13385 of the CWC. Under section 13385, the Board may impose up to \$10,000 for each day in which the violation occurs and up to \$10 per gallon for waste discharged in excess of 1,000 gallons, which is not cleaned up.
15. **Nature and Circumstances:** On 27 February 2006, Regional Water Board staff observed significant storm water management problems during a site inspection of the Cheyenne at Browns Valley Subdivision. The large, 120-acre, construction site lacked an effective combination of sediment and erosion control BMPs, and Regional Water Board staff observed significant discharges of sediment-laden storm water at three locations on the construction site. An advanced treatment system (ATS) was operational at the time of the site inspection. During the inspection it was determined that an ATS monitoring protocol had not been written for the system, and regular monitoring of the system had not been conducted or recorded. A field-test with a Hach 2100 Turbidimeter found the discharge from the construction site to be 1629 NTUs. On 10 March 2006, a Notice of Violation (NOV) was issued to the Discharger for violations of the General Permit. Due to the large size of the development, the general lack of effective sediment and erosion control BMPs in place, the high volume of storm water discharge, and the elevated turbidity of the discharge observed during this inspection, staff proceeded with the highest level of enforcement.
16. **Extent and Gravity:** This site was in violation of the General Permit at the time of staff's inspection on 27 February 2006. The violations include inadequate storm water BMPs, which resulted in the discharge of sediment-laden storm

water into nearby surface waters from at least three locations on the construction site.

17. **Susceptibility of the Discharge to Cleanup and Abatement:** The discharge flows into a small, unnamed tributary to Ulatis Creek, which flows through an adjacent property. It then goes into a storm drain under a subdivision and daylights into a wetland area about ½ mile away from the construction site. Due to the complexity of the drainage system and the distance to the wetland area, cleanup of the sediment in the drainage was impracticable.
18. **Degree of Toxicity of the Discharge:** The discharges likely added suspended matter to the creek, which has the ability to impair respiration by organisms that depend on gills to obtain oxygen from the water column. The discharges also likely added silt and sediment to the streambed, which may have changed the benthic condition of the stream. However, no aquatic bio-assessment of the stream has been completed.
19. **Ability to Pay:** The Discharger is an established developer in good financial standing. As such, the monetary penalties associated with this administrative civil liability should pose no financial hardship for the Discharger or reduce its ability to continue in business. The Discharger does not refute its ability to pay.
20. **Prior History of Violations:** The Discharger has numerous construction sites throughout the State. Regional Water Board staff is not aware of any other Notices of Violations issued to DR Horton – Western Pacific Series. Staff is aware of 9 Notice of Violations issued to subsidiary offices of the Discharger's parent company, DR Horton, Inc. within the past 5 years. The Discharger has been fully cooperative with the Regional Water Board with respect to this ACL. Additionally, the Regional Water Board and other governmental entities recently entered into a settlement with another subsidiary office of DR Horton, Inc. for alleged Business & Professions Code and Fish and Game Code violations in Placer County.
21. **Voluntary Cleanup Efforts:** As stated in Finding 17, due to the complexity of the drainage system and the distance to the wetland area, cleanup of the sediment in the drainage in all likelihood was impracticable.
22. **Degree of Culpability:** As the owner and operator of the construction site, the Discharger is responsible for gaining coverage under, and complying with, the General Permit. The Discharger filed a Notice of Intent for coverage under the General Permit on 29 August 2005, and prepared a Storm Water Pollution Prevention Plan, thus demonstrating an awareness on its part of permit requirements and prohibitions.
23. **Economic Benefit or Savings Resulting from the Violation:** The Discharger saved as much as \$120,000 by not implementing adequate erosion and sediment

control BMPs, for not maintaining the BMPs that were implemented, and for not properly training site employees on the requirements of an advanced treatment system (ATS). Based on a survey of consultants, approximately \$2000 to \$6000 per acre is needed to provide the minimum erosion and sediment control measures for construction sites depending on the slope and soil type. The construction site has significant slopes, and the soil erosion potential is moderate to high. Therefore, an effective combination of both erosion and sediment control BMPs is critical to protect the site. The discharger did install an ATS system which appears to have been operational, but the system was not monitored to ensure proper operation. Since there were some BMPs installed at this site, the cost of installing and maintaining an effective combination of erosion and sediment control BMPs at this site is estimated by Regional Water Board staff to be \$1500 per acre. This is a very conservative estimate given the site soil conditions and slopes. To account for undisturbed areas and/ or areas that drain to another portion of the site, Regional Water Board staff conservatively estimated that erosion and sediment control was necessary on 80 of the 120 acres. The estimated economic savings to the Discharger were calculated by multiplying 80 acres by \$1500 per acre.

24. Following issuance of ACL Complaint No. R5-2006-0520, the Discharger was fully cooperative with the Executive Officer for the purpose of settling this matter and the allegations herein without a formal hearing. After arms-length negotiations, the Discharger and the Executive Officer arrived at a mutually acceptable resolution of the proposed administrative civil liability based on information contained in the record of the Regional Water Board. The Discharger and the Executive Officer have agreed to settle the administrative civil liability for \$200,000.
25. In addition to the considerations listed above, the Executive Officer considered the costs of preparing for and prosecuting a public hearing on the allegations in Complaint R5-2006-0520, the possible cost of responding to any request by the Discharger for administrative or judicial review of an order assessing the recommended liability, the current compliance status of the Discharger at the Cheyenne at Browns Valley Subdivision site, assurances regarding implementation of BMPs at future projects of the Discharger, the deterrent effect of the proposed liability and the ability to recover staff costs from the amount tendered.
26. In their negotiations, the parties have agreed to resolve the Complaint, which proposed to assess two hundred thousand dollars (\$200,000) in administrative civil liability, as follows: Fifty thousand dollars (\$50,000) payable to the “State Water Pollution Cleanup and Abatement Account” and the remaining one hundred and fifty thousand dollars (\$150,000) used to fund Supplemental Environmental Projects (SEPs). The Discharger has agreed to pay one hundred and forty thousand dollars (\$140,000) to “Solano Land Trust” to fund the Lindsey Slough Water Monitoring and Restoration Project and invasive weed control at Jepson Prairie Reserve, and further agreed to pay ten thousand dollars

- (\$10,000) to Stormwater Compliance Specialists, Inc. to fund a compliance workshop for builders and subcontractors in the City of Vacaville. This proposed assessment includes \$9600 in staff costs and \$120,000 to recover the economic benefit derived from the acts that constitute the violations. The proposed settlement takes into account the factors cited in CWC section 13385 and the State Water Resources Control Board's Water Quality Enforcement Policy.
27. The Discharger has waived its right to a hearing before the Regional Water Board.
  28. This Order is issued to effectuate the parties' settlement.
  29. On 16 March 2007, the Regional Water Board explicitly delegated to the Executive Officer the authority to issue orders to assess administrative civil liability where the matter is not contested by the discharger. (Resolution R5-2007-0009).
  30. Regional Water Board staff spent a total of 120 hours investigating this incident and preparing this Order. The total cost for staff time is \$9600 based on a rate of \$80 per hour.
  31. Issuance of this Administrative Civil Liability Order to enforce California Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000, et. seq.), in accordance with Title 14 California Code of Regulations, Enforcement Actions by Regulatory Agencies, section 15321(a)(2).
  32. Public Notice of the draft Order was published, initiating a thirty (30)-day period for the public to comment. The Executive Officer considered all public comments before issuing this Order.
  33. Any person affected by this action of the Regional Water Board may petition the State Water Board to review this action. The State Water Board must receive the petition within thirty (30) days of the date of issuance of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

**IT IS HEREBY ORDERED** that:

1. Civil liability is imposed upon the Discharger in the amount of \$200,000 pursuant to the settlement offer of the Discharger.
2. **Within 30 days of issuance of this Order**, the Discharger shall pay two hundred thousand dollars (\$200,000) by check, which contains a reference to "ACL Order No. R52007-0513" and is made payable to the "*State Water Pollution*

*Cleanup and Abatement Account.*” Alternatively, the Discharger may satisfy this Order by paying fifty thousand dollars (\$50,000) **within 30 days of issuance of this Order**, by check made payable to the “*State Water Pollution Cleanup and Abatement Account*,” and satisfy the remaining amount as follows: (a) Written proof of payment of one hundred forty thousand (\$140,000), **within 30 days of issuance of this Order**, to Solano Land Trust to fund the Lindsey Slough Water Monitoring and Restoration Project and Jepson Prairie Preserve Supplemental Environmental Projects (SEP) and (b) written proof of payment of ten thousand dollars (\$10,000), **within 30 days of issuance of this Order**, to Stormwater Compliance Specialists, Inc. to fund a compliance workshop for area builders and subcontractors, in accordance with the specific terms and conditions detailed in Attachments A and B (“the SEPs”), attached hereto. All checks shall have written upon them the number of this Order (ACL No. R5-2007-0513).

3. Whenever the Discharger or its agents or subcontractors, or any fiscal agent holding SEP funds, publicize any element of a SEP project, they shall state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action against the Discharger.

This Order is effective upon the date of signature.

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PAMELA C. CREEDON, Executive Officer

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3 August 2007

Date