

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2012-0029

IN THE MATTER OF
*ANTONIO P AND MARY R BETTENCOURT, TRUSTEES OF THE 1993 ANTONIO P
AND MARY R BETTENCOURT LIVING TRUST, OWNER, TOM BLOOMFIELD,
LESSEE, AND F.A. MAGGIORE & SONS, LLC, SUBLESSEE, OF 25771 MARSH
CREEK ROAD, BRENTWOOD, CALIFORNIA*

CONTRA COSTA COUNTY

This Order is issued to Antonio P and Mary R Bettencourt, as Trustees of the 1993 Antonio P and Mary R Bettencourt Living Trust, owner, Tom Bloomfield, lessee, and F.A. Maggiore & Sons, LLC, sub-lessee, of 25771 Marsh Creek Road, Brentwood, California (hereinafter collectively referred to as "Discharger") pursuant to California Water Code (CWC) section 13350, which authorizes the imposition of Administrative Civil Liability. This Order is based on findings that indicate the Discharger failed to comply with the conditions of the Coalition Group Conditional Waiver of Waste Discharge Requirements from Irrigated Lands (the "Conditional Waiver").

The California Regional Water Quality Control Board, Central Valley Region, (hereafter Central Valley Water Board or Board), finds that:

BACKGROUND

1. The Discharger owns a 57-acre parcel identified as Contra Costa County Assessor's parcel number 011-110-026 (hereinafter "parcel"), located at 25771 Marsh Creek Road, Brentwood, California, which is used to grow tomatoes. Irrigation return flows from this parcel discharge into a roadside canal that discharges into Kellogg Creek. Subsequently, Kellogg Creek discharges into Discovery Bay. Kellogg Creek and Discovery Bay are waters of the Sacramento/San Joaquin Delta.
2. The Discharger has obtained regulatory coverage for their discharges under Order No. R5-2006-0053 [the Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Conditional Waiver)] by enrolling in the San Joaquin County & Delta Water Quality Coalition (Coalition). The discharges of waste from the Dischargers' irrigated lands to surface waters of the State during the 2010 and 2011 irrigation seasons (through 30 June 2011) were governed by the Conditional Waiver. The Conditional Waiver has since been renewed to 30 June 2013 under Resolution No. R5-2011-0032. The Discharger must comply with the conditions set forth in the Conditional Waiver.

3. The Conditional Waiver requires dischargers to implement management practices, as necessary, to improve and protect water quality and to achieve compliance with applicable water quality standards. The applicable water quality standards are outlined in the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition*, (the "Basin Plan"). These water quality objectives give narrative limits to the suspended sediment load of discharges, as well as quantitative limits to increases in turbidity.

CHRONOLOGY OF EVENTS

4. On 1 July 2010, staff of the Central Valley Water Board investigated a complaint of waste discharge to waters of the state in Contra Costa County. During the investigation, staff observed sediment-laden water discharging from the Discharger's parcel into a roadside canal. This canal discharges to Kellogg Creek, a tributary to waters of the Sacramento/San Joaquin Delta. The discharge had a turbidity reading of 260 nephelometric units (ntus) compared to the likely irrigation supply water, which had a turbidity of 11ntu (an increase of over 2,000 %). The source water for the aforementioned supply originated from the Clifton Court Forebay, also waters of the Sacramento/San Joaquin Delta.
5. On 31 August 2010, the Discharger was issued a Water Code section 13267 Order requiring the submission of a technical report describing actions that will be taken to prevent future pollution discharges.
6. On 18 October 2010, the Discharger submitted a technical report stating that they plan to reduce discharge flows, install a double sump drain system, and monitor discharge flows for excessive turbidity.
7. On 29 November 2010, staff of the Central Valley Water Board mailed the Discharger a comment letter concluding that the technical report was incomplete. The letter also specified the technical report's deficiencies.
8. On 31 January 2011, staff of the Central Valley Water Board received an updated technical report from the operator, who signed the technical report on the Discharger's behalf. The updated technical report explained that discharges will be monitored for excessive sediment. It also explained that if excessive sediment discharges are observed, the length of irrigation sets would be reduced and water would be held on site longer before being released.
9. On 15 June 2011, Board staff conducted a follow-up inspection of the Discovery Bay area to identify source properties discharging sediment-laden irrigation return flows to waters of the state. During the inspection, staff observed sediment-laden water with a turbidity reading of 571 ntu discharging from the Discharger's parcel into the

aforementioned water conveyance system. The closest accessible supply water had a turbidity of 60 ntu. This discharge contributed to a sediment discharge of 74 ntu into Kellogg Creek; compared to the upstream creek turbidity measured at 24 ntu (an increase of about three fold).

10. On January 20, 2012, the Executive Officer, acting as head of the Board's Prosecution Team, issued Administrative Civil Liability (ACL) Complaint R5-2011-0599 to the Discharger. This Complaint proposed that the Board assess a total of \$10,000 in administrative civil liability, \$5,000 each for the 1 July 2010 and 15 June 2011 discharges.

REGULATORY CONSIDERATIONS

11. California Water Code (Water Code) Section 13260(a) requires that any person discharging waste or proposing to discharge waste within any region that could affect the quality of the waters of the State, other than into a community sewer system, shall file with the appropriate Regional Board a report of waste discharge (RWD) containing such information and data as may be required by the Central Valley Water Board, unless the Central Valley Water Board waives such requirement.
12. Water Code Section 13263 requires the Central Valley Water Board to prescribe Waste Discharge Requirements (WDRs), or waive WDRs, for the discharge. The WDRs must implement relevant water quality control plans and the Water Code.
13. Pursuant to CWC section 13269, subdivision (a)(1), on and after 1 January 2000, the provisions of subdivisions (a) and (c) of Section 13260, subdivision (a) of Section 13263, or subdivision (a) of Section 13264 may be waived by the state board or a regional board as to a specific discharge or type of discharge if the state board or a regional board determines, after any necessary state board or regional board meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest. The state board or a regional board shall give notice of any necessary meeting by publication pursuant to Section 11125 of the Government Code.
14. Order No. R5-2006-0053, Coalition Group Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (the "Conditional Waiver") was adopted pursuant to CWC section 13269, and sets forth conditions which Coalition Group enrollees must follow to remain in compliance. The Conditional Waiver was in effect during the period in which the violations here took place. The Conditional Waiver has since been renewed to 30 June 2013 under Resolution No. R5-2011-0032.

15. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition*, (the “Basin Plan”) establishes water quality objectives designed to protect the beneficial uses delineated in the Basin Plan. In regard to suspended sediment and turbidity the Basin Plan states at III-7.00 and III-9.00, respectively:

The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.

Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases in turbidity attributable to controllable water quality factors shall not exceed the following limits:

- *Where natural turbidity is less than 1 Nephelometric Turbidity Unit (NTU), controllable factors shall not cause downstream turbidity to exceed 2*
- *Where natural turbidity is between 1 and 5 NTUs, increases shall not exceed 1 NTU.*
- *Where natural turbidity is between 5 and 50 NTUs, increases shall not exceed 20 percent.*
- *Where natural turbidity is between 50 and 100 NTUs, increases shall not exceed 10 NTUs.*
- *Where natural turbidity is greater than 100 NTUs, increases shall not exceed 10 percent.*

16. The Conditional Waiver states at Item 3:

“Dischargers who are participants in a Coalition Group shall implement management practices, as necessary, to improve and protect water quality and to achieve compliance with applicable water quality standards.”

17. The Conditional Waiver states at Item 6:

“Coalition Groups and the Dischargers who are participants in Coalition Groups shall comply with the terms and conditions of the Conditional Waiver and take action to improve and protect waters of the State.”

18. The Conditional Waiver states, at Attachment B, Part C:

1. "Dischargers must comply with applicable water quality standards... Dischargers shall not cause or contribute to an exceedance of any applicable water quality standard."
2. "Dischargers shall implement management practices to achieve best practicable treatment or control of the discharge that will reduce wastes in the discharges to the extent feasible and that will achieve compliance with applicable water quality standards, protect the beneficial uses of waters of the State, and prevent nuisance."

19. CWC section 13350 states: (a) A person who (1) violates a cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of a waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other actions or provisions of this division, shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

VIOLATIONS

20. The 1 July 2010 discharge described in Finding 4 above created a condition of pollution or nuisance and raised the turbidity concentration by over 20 percent, thus violating the water quality objectives in the Basin Plan. This is a violation of the conditions in the Conditional Waiver.

21. The 15 June 2011 discharge described in Finding 9 above created a condition of pollution or nuisance and raised the turbidity concentration by over 20 percent, thus violating the water quality objectives in the Basin Plan. This is a violation of the conditions in the Conditional Waiver.

CALCULATION OF CIVIL LIABILITIES UNDER CWC SECTION 13350

22. CWC section 13350 states at section (e): The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not on both.

23. CWC section 13350 states at section (e)(1): The civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.
24. 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.
- 25. Maximum Civil Liability for Discharge to Surface Waters:**
Per CWC section 13350, civil liability can be imposed administratively by the Central Valley Water Board on a daily or per gallon basis, but not both. Accurate flow data are not available for the violations that occurred on both 1 July 2010 and 15 June 2011; however, Board staff did observe a significant waste discharge from the Discharger's field. Therefore the civil liability will be imposed on a per day basis. This liability may not exceed \$5,000 for each day in which the violation occurs. The maximum administrative civil liability that may be assessed pursuant to section 13350 is **\$10,000**.
- 26. Minimum Civil Liability for Discharge to Surface Waters:**
On 17 November 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 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability that addresses the factors that must be considered when imposing an administrative civil liability. The entire Enforcement Policy can be found at: http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf. The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent.

In general, the discharge was due to excessive sediments being carried off the field during irrigation. In a technical report submitted on 31 January 2011, signed by the operator on the Discharger's behalf, the Discharger claimed that discharges would be monitored for excessive sediments. In the event that excessive sediment was observed in the discharges, the technical report read that the length of irrigation sets would be reduced and water would be held on site longer before being released. The discharges were not monitored and/or the sediment laden tail waters were not kept on site.

The economic benefit was estimated based on the Discharger neglecting to check the tail water discharges. Board staff estimated that if the Discharger irrigated approximately every 10 days during irrigation season (April through June) and

checked the tail water discharges twice per irrigation session, the Discharger would have spent a total of 3 hours through the entire irrigation season checking their tail water discharges for excessive sediment (9 irrigation sessions X .33hrs/session to check the ponds). This equals an avoided cost of \$150 (3hrs X \$50 per hr).

Per the Enforcement Policy, the minimum administrative civil liability that may be imposed by the Central Valley Water Board must be 10 percent greater than the economic benefit. This amount is equal to **\$165**.

ADMINISTRATIVE CIVIL LIABILITY

27. Pursuant to CWC section 13327, in determining the amount of any civil liability imposed, the 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 the violator's ability to continue 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.
28. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in Attachment H to ACL Complaint R5-2011-0599 (incorporated here by reference). The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
29. As described in Finding 25, the maximum administrative civil liability for the above violations is **\$10,000**. After consideration of the above facts and after applying the penalty methodology, the Central Valley Water Board finds that civil liability should be imposed administratively on the Discharger in the amount of **\$10,000**, which represents the economic benefit derived from the violations, as detailed in Finding 26, the recovery of enforcement staff costs, and the minimum 10 percent economic benefit penalty required by the Enforcement Policy. The specific factors considered in this administrative civil liability are detailed in Attachment H to ACL Complaint R5-2011-0599, which is incorporated by reference here.

DISCHARGER COMMENTS

30. On 5 March 2012, and again on 12 April 2012, the Discharger submitted a letter requesting that the Central Valley Water Board waive all violations and fines associated with ACL Complaint R5-2011-0599. The Prosecution Team responded in a memorandum dated 17 May 2012. The Central Valley Water Board finds that

the Prosecution Team's responses adequately respond to the Discharger's comments, and incorporates and adopts those responses by references here.

GENERAL

31. Issuance of this Administrative Civil Liability Order to enforce CWC Division 7 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).
32. Notwithstanding the issuance of this Order, the Central Valley Water Board retains the authority to assess additional civil liabilities for violations of the conditions of the Discharger's conditional waiver of waste discharge requirements and/or applicable orders for which civil liabilities have not yet been assessed, or for violations that may subsequently occur.
33. On 7 June 2012, in Rancho Cordova, California, after notice to the Discharger and all other affected persons, the Central Valley Water Board conducted a public hearing at which evidence was received to consider this Order.

IT IS HEREBY ORDERED THAT:

1. ANTONIO P AND MARY R BETTENCOURT, TRUSTEES OF THE 1993 ANTONIO P AND MARY R BETTENCOURT LIVING TRUST, OWNER, TOM BLOOMFIELD, LESSEE, AND F.A. MAGGIORE & SONS, LLC, SUBLESSEE, OF 25771 MARSH CREEK ROAD, BRENTWOOD shall be assessed an Administrative Civil Liability in the amount of **ten thousand dollars (\$10,000)**.
2. Payment shall be made no later than 30 days from the date on which this order is adopted. Payment shall be made in the form of a check made payable to the *State Water Pollution Cleanup and Abatement Account*, and shall have the number of this order written upon it.

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 Water Code section 13320 and California Code of Regulations, title 23, section 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order 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 filling petitions may be found on the Internet at:

http://www.waterboards.ca.gov/public_notices/petitions/water_quality/
or will be provided upon request.

ACL Order R5-2012-0029
Antonio P and Mary R Bettencourt,
Trustees of the 1993 Antonio P and Mary R Bettencourt Living Trust
Tom Bloomfield and F.A. Maggiore & Sons, LLC
Contra Costa County

15 June 2012
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I, PAMELA C. CREEDON, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 7 June 2012.

Original signed by:

PAMELA C. CREEDON, Executive Officer

15 June 2012