

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

Tentative ORDER NO. R9-2011-0031

ADMINISTRATIVE ASSESSMENT OF CIVIL LIABILITY
AGAINST

HEALTHY TIMES, INC.
POWAY, CALIFORNIA

FOR
VIOLATIONS OF STATE WATER BOARD ORDER NO. 97-03-DWQ
AND
WATER CODE SECTION 13260

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), having held a public hearing on April 13, 2011, to receive evidence and comments on the allegations contained in Complaint No. R9-2010-0126 (Complaint), dated November 17, 2010, having considered all the evidence and public comment received, and on the recommendation for administrative assessment of Civil Liability in the amount of \$9,492, finds as follows:

1. Healthy Times, Inc. (Healthy Times) located at 13200 Kirkham Way, Building 104, Poway, California, is alleged to have violated provisions of law for which the San Diego Water Board must impose civil liability pursuant to Water Code section 13399.33, and may impose civil liability pursuant to Water Code sections 13261 and 13385.
2. On November 6, 2002, Healthy Times obtained coverage under the California State Water Resources Control Board (State Water Board) Order No. 97-03-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000001, Waste Discharge Requirements (WDRs) for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities* when it submitted a completed and signed Notice of Intent (NOI) with annual fee to the State Water Board.

Failure to Submit Annual Reports (FY 2007/08 and FY 2008/09)

3. Provision No. 3. of Order No. 97-03-DWQ requires facility operators to comply with Section B, Monitoring Program and Reporting Requirements. Paragraph 14 of Section B requires facility operators to submit an Annual Report by July 1 of each year to the Executive Officer of the appropriate Regional Board.

4. The integrity and effectiveness of the NPDES regulatory program relies upon discharger compliance accomplished by self-evaluation and self-reporting. Self-evaluation is accomplished by implementing the programs and provisions of Order No. 97-03-DWQ. Self-reporting is accomplished by the submission of an annual report as outlined in Order No. 97-03-DWQ section B-14. The annual report includes a summary and evaluation of visual observations and sampling results, laboratory reports and an Annual Comprehensive Site Compliance Evaluation Report. Therefore, timely submittal of the required annual report is necessary to evaluate a facility's compliance with water quality standards.
5. Pursuant to Water Code section 13399.31, the San Diego Water Board issued the following Notices of Violation (NOVs) that indicated the penalties associated with the failure to submit the required annual report:
 - a. First NOV, September 8, 2008, for Fiscal Year 2007/08;
 - b. Second NOV, October 17, 2008, for Fiscal Year 2007/08;
 - c. First NOV, December 1, 2009, for the Fiscal Year 2008/09; and
 - d. Second NOV, March 9, 2010, for the Fiscal Year 2008/09.

The Fiscal Year 2007/08 Annual Report was due July 1, 2008, and the Fiscal Year 2008/09 Annual Report was due July 1, 2009.

6. Water Code sections 13399.31(d) and 13399.33 direct the San Diego Water Board to impose administrative civil liability in an amount that is not less than \$1,000 and recover the costs incurred if a discharger fails to submit the required annual report within 60 days after the San Diego Water Board issues the initial Notice of Non-Compliance¹.
7. Pursuant to Water Code section 13385 the maximum administrative civil liability that the San Diego Water Board can impose for failing to submit an annual report is \$10,000 per day of violation.
8. Healthy Times failed to submit the Fiscal Year 2007/08 Annual Report (1,016 days past due), and the 2008/09 Annual Report (651 days past due).
9. San Diego Water Board staff expended \$300 to investigate, prepare enforcement documents, and communicate with Healthy Times concerning the Fiscal Year 2007/08 Annual Report, and \$600 for the Fiscal Year 2008/09 Annual Report.

¹ Use of the term "Notice of Non-Compliance" and "Notice of Violation" are used synonymously in this Order.

10. The maximum administrative civil liability that the San Diego Water Board can assess for these violations are:
- \$10,160,000 failure to submit Fiscal Year 2007/08 Annual Report; and
 - \$6,510,000 failure to submit Fiscal Year 2008/09 Annual Report.

Failure to Pay Annual Fees (FY 2007/08, FY 2008/09, and FY 2009/10)

11. Order No. 97-03-DWQ and Water Code section 13260 require the payment of annual fees by permitted facility operators.
12. Pursuant to Water Code section 13261(b), the maximum administrative civil liability which could be imposed by the San Diego Water Board for failure to pay a required fee is \$1,000 for each day in which the violation occurs.
13. FY 2007/08 Annual Fee
The State Water Board invoiced Healthy Times \$830 for the Fiscal Year 2008/09 Annual Fee on October 12, 2007, with payment due on November 13, 2007. Having not received payment, the State Water Board issued a Demand for Payment letter on November 15, 2007, and a Notice of Violation on December 19, 2007. Both the Demand for Payment letter and the Notice of Violation stated that failure to pay the required annual fee could result in the imposition of administrative civil liability of up to \$1,000 per day of violation. Healthy Times failed to pay the Fiscal Year 2007/08 Annual Fee to the State Water Board; therefore the payment is 1,247 days late.
14. FY 2008/09 Annual Fee
The State Water Board invoiced Healthy Times \$1,008 for the Fiscal Year 2007-2008 Annual Fee on October 31, 2008, with payment due on November 30, 2008. Having not received payment, the State Water Board issued a Demand for Payment letter on December 12, 2008, and a Notice of Violation on January 27, 2009. Both the Demand for Payment letter and the Notice of Violation stated that failure to pay the required annual fee could result in the imposition of administrative civil liability of up to \$1,000 per day of violation. Healthy Times failed to pay the Fiscal Year 2008/09 Annual Fee to the State Water Board; therefore the payment is 864 days late.
15. FY 2009/10 Annual Fee
The State Water Board invoiced Healthy Times \$1,008 for the Fiscal Year 2007-2008 Annual Fee on October 29, 2009, with payment due on November 30, 2009. Having not received payment, the State Water

Board issued a Demand for Payment letter on December 8, 2009, and a Notice of Violation on February 25, 2010. Both the Demand for Payment letter and the Notice of Violation stated that failure to pay the required annual fee could result in the imposition of administrative civil liability of up to \$1,000 per day of violation. Healthy Times failed to pay the Fiscal Year 2009/10 Annual Fee to the State Water Board; therefore the payment is 499 days late.

16. The maximum administrative civil liability that the San Diego Water Board can assess for these violations are:
 - \$1,247,000 for failing to pay Fiscal Year 2007/08 annual fee;
 - \$864,000 for failing to pay Fiscal Year 2008/09 annual fee; and
 - \$499,000 for failing to pay Fiscal Year 2009/10 annual fee.
17. San Diego Water Board staff expended \$300 to investigate, prepare enforcement documents, and communicate with Healthy Times concerning the Fiscal Year 2007/08 annual fee, \$300 for the Fiscal Year 2008/09 annual fee, and \$300 for the Fiscal Year 2009/10 annual fee.

Complaint for Administrative Civil Liability

18. On November 17, 2010, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R9-2010-0126 with attached Technical Analysis to Healthy Times, Inc., recommending the imposition of \$9,492 in liability for the failure to submit annual reports and pay annual fees as described above, in the Complaint, and Technical Analysis.
19. The amount of discretionary assessment proposed for each of the annual fee violations are based upon consideration of factors contained in Water Code section 13327 and detailed in the Technical Analysis of the Complaint. Water Code section 13327 specifies the factors that the San Diego Water Board considered in establishing the amount of discretionary liability for the violations, which included: the nature, circumstance, extent, and gravity of the violations, the ability to pay, the effect on ability to continue in business, prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
20. The penalty calculation methodology within section VI of the Water Quality Enforcement Policy incorporates the factors of Water Code section 13327. An analysis of the penalty calculation methodology for this matter is included in the Technical Analysis for the Complaint and attached to this Order as Exhibit 1. As shown in the Technical Analysis, Steps 1 and 2 of

the Analysis do not apply to the annual fee violations because they are non-discharge violations.

21. In determining Step 3, the evidence supports finding that 0.3 as the per day factor. The potential harm is minor but the extent of deviation from applicable requirements is major. Using the per day factor of 0.3 multiplied by the total days of violation (2,155 days for all three FY), multiplied by the statutory maximum liability of \$1,000 per day of violation, the Initial Base Liability under Step 3 of the Analysis is \$646,000.
22. Step 4 involves adjusting the Initial Base Liability based on the discharger's culpability, the discharger's efforts to cleanup or cooperate, and the discharger's compliance history. First, the San Diego Water Board considered an adjustment factor based on the discharger's culpability. Healthy Times, Inc. verified its understanding of an commitment to the annual fee requirement when it filed its Notice of Intent and received delinquent notices and notices of violations regarding failure to pay the annual fee for each FY 2007-2008, 2008-2009 and 2009-2010. Healthy Times, Inc. demonstrated continued disregard for the obligation to pay the annual fee, evidencing negligent behavior. Therefore, the appropriate adjustment for the culpability factor is 1.5.
23. Second, the San Diego Water Board finds that an adjustment for cleanup and cooperation is inappropriate because the failure to pay annual fees is a non-discharge violation.
24. Third, the San Diego Water Board considered an adjustment factor for Healthy Times, Inc.'s history of violations. Multipliers of 1.0, 1.1, and 1.2 for each FY 2007-2008, 2008-2009, and 2009-2010, respectively, are appropriate and reflect continuing non-compliance.
25. The San Diego Water Board also finds that an adjustment to the Initial Base Liability for the per-day basis for liability is appropriate for violations lasting more than 30 days because the continuance of the violations is not causing daily detrimental impacts. Therefore, it is appropriate to use the alternate approach to penalty calculation recommended by the Prosecution Team in the Technical Analysis to assess penalties for 42 days of violation rather than 1096 for failure to pay the FY 2007-2008 annual fee, 29 days of violation rather than 712 for failure to pay the FY 2008-2009 annual fee and 17 days of violation rather than 347 days of violation for failure to pay the FY 2009-2010 annual fee.
26. Adjusting the Initial Base Liability as described in Findings 21-25 above results in a Total Base Liability of \$42,435 for all three violations for failure

to pay annual fees. Exhibit 1 details the calculations that involve the above-discussed factors in determining the Total Base Liability.

27. The record contains sufficient uncontroverted information that Healthy Times, Inc. has the ability to pay the Total Base Liability amount. Therefore, the Total Base Liability is not reduced to reflect an inability to pay or continue in business.
28. Water Code section 13327 authorizes the San Diego Water Board to reduce or increase a discretionary penalty upon consideration of other factors as justice may require. The Total Base Liability of \$42,435 for all three annual fee violations is more than 14 times greater than the total value of the original fees owed and is therefore disproportionate to the magnitude and effect of the violations. It is appropriate to reduce the Total Base Liability to \$5,692, which represents twice the value of the original fees owed by Healthy Times, Inc. This reduction is shown in Step 7 of the penalty calculation methodology in Exhibit 1.
29. Staff costs associated with the three annual fee violations total \$900, and as recommended in the Enforcement Policy, this amount is added to the liability amount. This addition is shown in Step 7 of the penalty calculation methodology in Exhibit 1.
30. The Enforcement Policy directs the San Diego Water Board to consider any economic benefit of the violations to the discharger and recommends that the total liability should exceed the economic benefit amount regardless of whether the economic benefit represents a statutory minimum amount of liability. The Water Code does not provide a statutory minimum liability for violations for failure to pay annual fees. However, in this case the economic benefit is estimated to be the unpaid fee plus a time value calculated using the USEPA Economic Benefit Calculator, resulting in an estimated economic benefit of \$3,048 for all three violations combined. Therefore the adjusted liability of \$6,592 exceeds and recovers the estimated economic benefit to the discharger.
31. The Enforcement Policy also directs the San Diego Water Board to consider any maximum or minimum liability amount associated with a violation and recommends the board recover at least ten percent more than the economic benefit. The Water Code does not specify a minimum liability amount for violation of the requirement to pay annual fees set forth in Water Code section 13261. The maximum liability associated with the three annual fee violations is \$1,000 per day for 1,096 days. The estimated economic benefit discussed in Finding 9, plus ten percent, is \$3,353, well under the adjusted liability amount of \$6,592.

32. The penalty calculation methodology analysis described in the Technical Analysis, and discussed in Findings 20-31 above, together with the evidence received, supports an administrative civil liability against Healthy Times, Inc., for violations of the requirement to pay annual fees for FY 2007-2008, 2008-2009 and 2009-2010 in the amount of \$6,592.
33. The Complaint and Technical Analysis, as set forth in Findings 3-10 above, together with the evidence received, support an administrative civil liability against Healthy Times, Inc., for failure to file annual reports required by Order No. 97-03 DWQ for FY 2007-2008 and 2008-2009 in the amount of \$2,900.
34. Issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 et seq.) pursuant to section 15321(a)(2), Chapter 3, Title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

IT IS HEREBY ORDERED, that pursuant to Water Code sections 13399.33 and 13261(b)(1) that:

1. Civil liability is imposed on Healthy Times, Inc., in the amount of nine thousand four hundred and ninety-two dollars (\$9,492).
2. Healthy Times, Inc., shall submit a check for \$9,492 to the San Diego Water Board payable to the "State Water Resources Control Board" for deposit into the Waste Discharge Permit Fund within 30 days of the adoption of this Order.
3. Fulfillment of Healthy Times, Inc.'s obligations under this Order constitutes full and final satisfaction of any and all liability for each allegation in Administrative Civil Liability Complaint No. R9-2010-0126.
4. If Healthy Times, Inc., fails to make the specified payment within the time limit specified in this Order, the San Diego Water Board may enforce this Order, including referring the matter to the Attorney General for collection.

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region on April 13, 2011.

Tentative

DAVID W. GIBSON
Executive Officer

Attachment: Exhibit 1: Penalty Calculation Methodology Decisions Summary

SMARTS:

Violation ID: 783259 Failure to submit FY 2007/08 Annual Report
 840410 Failure to submit FY 2008/09 Annual Report
 842759 Failure to submit FY 2009/10 Annual Report
 842760 Failure to pay FY 2008/09 Annual Fee
 842761 Failure to pay FY 2009/10 Annual Fee

Enforcement ID: 402599 ACL

WDID No. 9 371017603

Exhibit 1 - Penalty Methodology Decisions
Healthy Times, Inc. Tentative ACL Order No. R9-2011-0031

Step 1: Potential Harm Factor = n/a for non-discharge violations

Step 2: Assessments for Discharge Violations = n/a for non-discharge violations

Step 3: Per Day Assessments for Non-Discharge Violations

Violations	Per Day Factor				Statutory Maximum Per Day (sec. 1335c)
	Potential for Harm (minor, moderate, major)	Deviation from Requirement (minor, moderate, major)	Total Per Day Factor	Days of Violation	
Failure to pay FY 2007-2008 Annual Fee	minor	major	0.3	1098	\$1,000
Failure to pay FY 2008-2009 Annual Fee	minor	major	0.3	712	\$1,000
Failure to pay FY 2009-2010 Annual Fee	minor	major	0.3	347	\$1,000

(Per Day Factor) x (Total Days of Violation) x (Statutory Maximum) = Initial Liability From Steps 1 - 3
 $(0.3) \times (2,155) \times (\$1,000) = \$646,500$

Step 4: Adjustments

Violations	Culpability [0.5 - 1.5]	Cleanup and Cooperation [0.75 - 1.5]	History of Violations	Multiple Violations (Same Incident)	Adjusted Days of Violation
Failure to pay FY 2007-2008 Annual Fee	1.5	n/a	1	n/a	41
Failure to pay FY 2008-2009 Annual Fee	1.5	n/a	1.1	n/a	28
Failure to pay FY 2009-2010 Annual Fee	1.5	n/a	1.2	n/a	16

Step 5: Total Base Liability Amount
(Statutory Maximum) x (Per Day Factor) x (Culpability Adjustment) x (History of Violations) x Multiple Day Adjustment = (Total Base Liability Amount)

Violations	Statutory Maximum	Per Day Factor	Culpability Adjustment	History of Violations	Multiple Day Adjustment	Total Base Liability Amount
Failure to pay FY 2007-2008 Annual Fee	\$1,000	0.3	1.5	1	42	\$18,900
Failure to pay FY 2008-2009 Annual Fee	\$1,000	0.3	1.5	1.1	29	\$14,355
Failure to pay FY 2009-2010 Annual Fee	\$1,000	0.3	1.5	1.2	17	\$9,180
Total						\$42,435

Step 6: Ability to Pay/Continue in Business
 (Yes, No, Partly, Unknown)
 Yes

Step 8: Economic Benefit
 \$3,048

Step 7: Other Factors as Justice May Require

Costs of Investigation and Enforcement	Other
\$900	-\$36,743

Step 9

Minimum Liability Amount	Maximum Liability Amount
\$3,353	\$1,096,000

Step 10: Final Liability Amount for Annual Fee Violations
 (total base liability) + (other factors)
 $(\$42,435) + (\$900) - (\$36,743) = \$6,592$