

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2013-0099

In the Matter of Administrative Civil Liability Complaint No. OE-2010-0035
against
Mantini Management, Inc.

Order imposing mandatory minimum penalty for
Violations of Los Angeles Regional Water Quality Control Board
Order Nos. R4-2003-0111 and R4-2008-0032

BY THE BOARD:

I. INTRODUCTION

In this Order, the State Water Resources Control Board (State Water Board) imposes administrative civil liability against Mantini Management, Inc. (Mantini) in the amount of \$72,000 as a mandatory minimum penalty for violations of waste discharge requirements [Order No. R4-2003-0111](#) (NPDES No. CAG994004, CI No. 7001) and [R4-2008-0032](#) (NPDES No. CAG994004, CI No. 7001).

On August 25, 2011, the State Water Board's Director of the Office of Enforcement issued Amended Complaint No. OE-2011-0035 (complaint) to Mantini in the amount of \$72,000. The complaint alleged violations identified in Exhibit "A" attached hereto and incorporated herein by reference.

On October 19, 2011, this matter was heard in Los Angeles, California before a Hearing Officer of the State Water Board, Vice Chair Frances Spivy-Weber. Mr. Edward Mantini appeared on behalf of Mantini. Mr. Jarrod Ramsey-Lewis and Ms. Mayumi Okamoto appeared for the Prosecution Team.

II. FACTUAL BACKGROUND

Mantini is the property manager for the Detroit Apartments (facility) located at 618 South Detroit Street in Los Angeles. Mantini operates the groundwater dewatering system at the facility. The dewatering system discharges collected groundwater seepage from a basement garage sump and other incidental collected stormwater and wastewater. The

dewatering system discharges to a storm water collection system that flows into Ballona Creek, a navigable water of the United States. Discharged effluent contains pollutants, which can degrade water quality and impact beneficial uses of water.

Mantini’s wastewater discharges from the facility are subject to the requirements and limitations set forth in Water Code section 13376 and Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) Order Nos. R4-2003-0111 (applicable before December 16, 2009) and R4-2008-0032 (applicable on or after December 16, 2009).¹ Water Code section 13376 prohibits the discharge of pollutants to surface waters, except as authorized by waste discharge requirements that implement applicable provisions of the federal Clean Water Act. Water Code section 13377 authorizes the issuance of waste discharge requirements that serve as a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act. Order Nos. R4-2003-0111 and R4-2008-0032 set forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time. Order Nos. R4-2003-0111 and R4-2008-0032 serve as NPDES permits.

Mantini’s self-monitoring reports noted twenty four (24) effluent limit violations of Order Nos. R4-2003-0111 and R4-2008-0032. The violations are identified in Exhibit “A.” Unable to isolate the source(s) of the violations, Mantini connected its discharge to the local sanitary sewer system on or about October 5, 2010.²

III. LEGAL AND PROCEDURAL BACKGROUND

A. Applicable NPDES Permit Effluent Limitations

Order Nos. R4-2003-0111 and R4-2008-0032 include the following effluent limitations:

<u>Constituent</u>	<u>Units</u>	<u>Monthly Average</u>	<u>Daily Maximum</u>
Biological Oxygen Demand (BOD)	mg/l	20	30
Chlorine Residual	mg/l	---	0.1

¹ On December 16, 2009, the Executive Officer of the Los Angeles Water Board determined that the waste discharges from Mantini’s facility met the conditions to be enrolled under Order No. R4-2008-0032. As of that date, Order No. R4-2008-0032 supersedes Order No. R4-2003-0111, except for enforcement purposes. (Letter from Tracy Egoscue, Los Angeles Water Board, to Edward Mantini (Dec. 16, 2009).)

² Inspection Report, p. 5, prepared by Jarrod Ramsey-Lewis, State Water Board (October 19, 2010); see also Hearing Transcript, pp. 15 and 18.

<u>Constituent</u>	<u>Units</u>	<u>Monthly Average</u>	<u>Daily Maximum</u>
Copper ³	µg/l	10.4/12.5	20.8/24
Methylene Blue Active Substances (MBAS)	mg/l	---	0.5
Oil and Grease	mg/l	10	15
Total Suspended Solids (TSS)	mg/l	50	150

B. Requirement to Impose Mandatory Minimum Penalties

In California, certain violations of waste discharge requirements that serve as an NPDES permit are subject to mandatory minimum penalties.⁴ Water Code section 13385, subdivision (h)(1) requires assessment of a mandatory minimum penalty of three thousand dollars (\$3,000) for each serious violation. Pursuant to Water Code section 13385, subdivision (h)(2), a “serious violation” is defined as any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or for a Group I pollutant by 40 percent or more. Appendix A of part 123.45 of title 40 of the Code of Federal Regulations specifies the Group I and II pollutants. Total suspended solids, biological oxygen demand (five-day incubation at 20° C), oil & grease, and MBAS are Group 1 pollutants. Copper and chlorine residual are Group II pollutants.

Water Code section 13385, subdivision (i)(1) specifies that a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed whenever a discharger violates a waste discharge requirement effluent limitation, by any amount, 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.

We have previously discussed the Porter-Cologne Water Quality Control Act’s mandatory minimum penalty provisions. As we observed in our *Escondido Creek Conservancy* order, “the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred.”⁵ Water Code section 13385 provides for administrative civil liability that *may* be assessed by discretionary action (subdivisions (c) – (g)), but also identifies certain violations where any civil liability *must* recover minimum penalties of \$3,000 for each violation (subdivisions (h) – (l)).

³ Order No. R4-2003-0111 and R4-2008-0032 contain different effluent limitations for copper. Order No. R4-2003-0111 sets the monthly average and daily maximum at 10.4 µg/l and 20.8 µg/l, respectively. Order No. R4-2008-0032 sets the monthly average and daily maximum at 12.5 µg/l and 24 µg/l, respectively.

⁴ Throughout the remainder of this Order, a reference to waste discharge requirements means waste discharge requirements adopted pursuant to Water Code section 13377 that serve as an NPDES permit.

⁵ State Water Board Order WQ 2007-0010 (*Escondido Creek Conservancy et al.*), p. 4. See also State Water Board, Water Quality Enforcement Policy (2010), p. 23, § VII.

The Water Code establishes four affirmative defenses to the imposition of mandatory minimum penalties. The mandatory minimum penalty provisions do not apply when a violation is caused by (1) an act of war, (2) an unanticipated, grave natural disaster, (3) an intentional act of a third party, or (4) the startup period for certain new or reconstructed wastewater treatment units relying on biological treatment.⁶ The discharger bears the burden of proving affirmative defenses.⁷ Proof of any of the four defenses with respect to a violation suspends the mandatory minimum penalty provisions of section 13385 for that violation. When a serious violation has occurred, a discharger may avoid the mandatory minimum penalty only by proving one of the available affirmative defenses.⁸

As set forth in Exhibit “A,” Mantini reported twenty three (23) serious violations and one (1) non-serious violation. The serious violations are defined as such because measured concentrations of Group I and II pollutants exceeded the applicable effluent limitations listed in Section III.A of this Order by more than 40 percent and 20 percent, respectively. The mandatory minimum penalty for these violations is \$69,000. The one (1) non-serious effluent limitation violation is subject to a mandatory minimum penalty of \$3,000 because it was the fourth violation in a six-month period.

C. Statute of Limitations

General statutes of limitations do not apply to this administrative proceeding. The statutes of limitations that refer to “actions” and “special proceedings” and that are contained in the California Code of Civil Procedure apply to judicial proceedings, not administrative proceedings.⁹ Courts evaluating the issue have consistently found that general statutes of limitations do not apply to administrative proceedings, including administrative enforcement proceedings.¹⁰

⁶ Wat. Code, § 13385, subd. (j)(1).

⁷ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 726 (discussing the first three affirmative defenses available under subdivision (j)(1), but leaving open the question with respect to the fourth).

⁸ State Water Board Order WQ 2007-0010 (*Escondido Creek Conservancy, et al.*), p. 4. While not relevant to the facts of this case, there are additional conditions under which a discharge that is in compliance with a Cease and Desist Order or Time Schedule Order is exempt from mandatory minimum penalties. (Wat. Code, § 13385, subd. (j)(2).)

⁹ Code of Civ. Proc., § 22 (defining action as a judicial proceeding in a court). See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 47-48; 3 Witkin, Cal. Proc. (5th ed. 2008) Actions, § 430, p. 546.

¹⁰ See, e.g., *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361-1362; *Little Co. of Mary Hosp. v. Belshé* (1997) 53 Cal.App.4th 325, 329; *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 515; cf. *BP America Production Co. v. Burton* (2006) 127 S.Ct. 638, 644 (reaching similar result that statutes of limitation do not apply to administrative proceedings under federal law absent express statutory provision).

Related to the concept of statute of limitations is an equitable principle of laches. Laches is a court-made, equitable doctrine based on the “principle that those who neglect their rights may be barred from obtaining relief in equity.”¹¹ It is a defense by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when that delay or negligence has prejudiced the party against whom relief is sought.¹² The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.¹³ “[L]aches is not available where it would nullify an important policy adopted for the benefit of the public.”¹⁴ Further, it is well-settled that the burden to establish laches lies with the party raising it.¹⁵

Initially, we are not convinced that the doctrine of laches is applicable to a mandatory minimum penalty. As noted above, laches is a court-made, equitable doctrine. We have previously recognized our authority to import equitable principles into our adjudicative decisions.¹⁶ Where the Legislature has spoken, however, equitable and court-made remedies give way to statutory mandates.¹⁷ “Principles of equity cannot be used to avoid a statutory mandate.”¹⁸ Here, where there has been a violation subject to statutory mandatory penalties and unless an affirmative defense is proven, the Legislature has imposed an affirmative duty to impose the penalties, thereby depriving the water boards of their discretion to reduce the mandatory minimum penalty.¹⁹ When the Legislature has spoken so clearly, we do not believe the water boards may invoke equitable principles to avoid that result.

Even if we could invoke the doctrine of laches to reduce the penalty, Mantini would fail to carry the burden of proof required by courts. First, as discussed above, the doctrine of laches is not available against a governmental agency where it would nullify an important policy adopted for the benefit of the public. Some courts have considered the

¹¹ *Feduniak v. California Coastal Com’n* (2007) 148 Cal.App.4th 1346, 1381.

¹² Black’s Law Dict. (7th ed. 1999) p. 879, col. 1.

¹³ *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.

¹⁴ *Feduniak v. California Coastal Com’n*, *supra*, 148 Cal.App.4th at p. 1381.

¹⁵ *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628.

¹⁶ See, e.g., State Water Board Order WQ 96-04-UST (*Champion/LBS Associates Development Company*), p. 6 (adopting equitable “common fund” doctrine for Underground Storage Tank Cleanup Fund reimbursements).

¹⁷ See *Modern Barber Colleges v. California Employ. St. Com’n* (1948) 31 Cal.2d 720, 727-728 (recognizing the Legislature’s ability to define and limit equitable rights and remedies that are not in conflict with the Constitution).

¹⁸ *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 1492; see also 13 Witkin, Summary (10th ed. 2005) Equity, § 3, p. 284; *Lass v. Eliassen* (1928) 94 Cal.App. 175, 179 (“Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly.”).

¹⁹ Wat. Code, § 13385, subd. (h)(1); *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 720.

possibility that a party might be able to assert laches against a governmental agency despite the existence of a public policy if the party could demonstrate that “manifest injustice” would otherwise result.²⁰ The Legislature adopted mandatory minimum penalties to promote streamlined, cost-effective enforcement and facilitate water quality protection.²¹ The mandatory penalty statute itself evidences a strong legislative policy that certain types of permit violations always result in minimum penalties. There is nothing in the record that would suggest that Mantini has suffered anything remotely approaching a manifest injustice as a result of the delay in prosecuting the mandatory minimum penalty.

Second, Mantini has not proved that the delay in prosecuting the mandatory minimum penalty was either unreasonable or that the water boards acquiesced to Mantini’s violations. Mantini received a notice of violation and was on notice that it could be subject to further enforcement actions.

Finally, Mantini has been on notice of the violations since it received its monitoring data, and has not proven any prejudice to it by delayed prosecution of the action. In fact, because the payment of the mandatory penalty is not due until after final, administrative decisions, Mantini has benefited from the delayed assessment of the mandatory minimum penalty. We find that even if laches was available, Mantini has not satisfied its burden to support a laches defense.

D. CEQA

Issuance of this administrative civil liability 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, subdivision (a)(2), title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061, subdivision (b)(3) of title 14 of the California Code of Regulations because there is no possibility that the activity in question may have a significant effect on the environment.

²⁰ See *Morrison v. California Horse Racing Bd.* (1988) 205 Cal.App.3d 211, 219 (“Where there is no showing of manifest injustice to the party asserting laches, and where application of the doctrine would nullify a policy adopted for the public protection, laches may not be raised against a governmental agency.”).

²¹ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 725.

IV. CONTESTED ISSUES

A. Owner/Operator Liability

Mantini argues that it should not be liable for compliance with the NPDES permits because it is the property manager at the facility and not the owner. However, the federal NPDES regulations specify that when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.²² Pursuant to our regulations, the federal regulations govern the issuance and administration of California's NPDES program.²³

Accordingly, on January 19, 2005, Mr. Edward Mantini signed an NPDES permit transfer request form requesting that responsibility, including liability, for the NPDES permit (Order No. R4-2003-0111) be transferred from HPG Management, the prior property manager, to Mantini Management, Inc. The owner of the property did not change and was listed on the form as Boonly Investments. This form included a statement that the signatory (Mr. Mantini) to the permit transfer request form understands that he/she will be responsible for compliance with the NPDES permit.²⁴

When the Los Angeles Water Board reissued the NPDES permit (Order No. R4-2008-0032), it sent Mr. Mantini a letter acknowledging receipt of a Notice of Intent Form submitted by Mantini Management Inc. to continue coverage under the general permit. This letter and the first page of the Fact Sheet for the NPDES permit are clear that the permit was issued to Mantini Management Inc.²⁵ There is no evidence in the record that Mantini objected to this. Consequently, Mantini is responsible for compliance with Order Nos. R4-2003-0111 and R4-2008-0032.

V. CONCLUSION

Upon consideration of the record for this matter, the State Water Board concludes that the amount of \$72,000 must be imposed on Mantini as a mandatory minimum penalty for the violations identified in this Order.

²² 40 C.F.R. § 122.21(b).

²³ Cal. Code Regs., tit. 23, § 2235.2; see also Wat. Code, § 13372.

²⁴ See Exhibit "B" and Hearing Transcript p. 17.

²⁵ See Exhibits "C" and "D".

VI. ORDER

IT IS HEREBY ORDERED that, pursuant to Section 13323 of the Water Code, Mantini shall make a payment by check of \$72,000 (payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days after the date of issuance of this Order. The check shall reference the number of this Order. Mantini shall send the original signed check to State Water Resources Control Board, Department of Administrative Services, P.O. Box 1888, Sacramento, CA 95812-1888.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 24, 2013.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board