



California Regional Water Quality Control Board San Diego Region

Supporting Document No. 8

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DATE: October 27, 2008

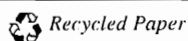
SUBJECT: KEY ISSUES PERTAINING TO MANDATORY MINIMUM PENALTIES
ALLEGED AGAINST PROMENADE MALL DEVELOPMENT
CORPORATION, PROMENADE MALL PERMANENT DEWATERING
DISCHARGE

The Regional Board is scheduled to consider imposition of a mandatory minimum penalties (MMP) against Promenade Mall Development Corporation (Promenade) at the November 12, 2008 Regional Board meeting. The following are key points that pertain to the case:

California Water Code section 13385(j) allows the following defenses by which MMP do not apply: (1) An act of war; (2) An unanticipated, grave natural disaster; (3) An intentional act of a third party; and (4) The operation of a new or reconstructed wastewater treatment unit.

Promenade argues that the effluent limitation violations reported in its discharge into the City of San Diego's (City) municipal storm water conveyance system are not subject to MMP except for those days when the Regional Board documents the City has not diverted the discharge from the storm drain to the Point Loma Wastewater Treatment Plant. The Regional Board's prosecution team disagrees with this argument. The point source discharge of pollutants to waters of the United States must be regulated by an NPDES permit and NPDES permits are subject to civil liability, including MMP. Because Promenade does not have control of its discharge once it enters the storm water conveyance system and the storm drain flow periodically enters Mission Bay, all discharges from the dewatering system must be subject to the effluent limitations established for discharges into Mission Bay at all times.

California Environmental Protection Agency



A. Discharge Facility: Promenade at Pacific Beach

Promenade operates a permanent groundwater extraction system at a commercial property known as the Promenade at Pacific Beach. The facility is located at 4110 to 4170 Mission Blvd., San Diego, California 92109. A subterranean dewatering system beneath the parking garage collects groundwater to prevent flooding within the parking area. Every day, the system pumps collected groundwater to the City's storm drain system at Santa Clara Point on the western shore of Mission Bay. From October through December 2007, the average flow from the facility was 24,215 gallons per day.

The City's Santa Clara Point storm water facility contains low-flow interceptor equipment that discharges either to Mission Bay or to the sanitary sewer for treatment and discharge to the Pacific Ocean. Promenade's monitoring reports do not provide information regarding how often its dewatering system's effluent is discharged to Mission Bay or diverted to the sanitary sewer. Promenade's quarterly monitoring reports state that a portion of the discharge is reportedly pumped to the sanitary sewer.

B. Regulatory History

The site was originally regulated in 1985 as a dewatering project during construction of the property. At that time the discharge went to Mission Bay via two City storm drains. In 1989 the Regional Board was notified by the developer that construction was complete and responsibility for a permanent dewatering system should be transferred to the property owner. Responsibility for the discharge was transferred to the property owner in May 1993 through enrollment in a general dewatering NPDES permit. The discharger's enrollment application dated November 24, 1992 indicated that all of the storm drain discharge enters Mission Bay. Responsibility for the discharge was transferred to the current owner, Promenade Mall Development Corporation (Promenade) on October 11, 1994. Promenade has submitted self-monitoring reports and paid the annual fees associated the applicable general dewatering NPDES permit since its enrollment.

All point source discharges to waters of the United States must be regulated by an NPDES permit. Given that the stormwater conveyance system leads to surface waters, and given the intermittent nature of the City's pumping from the conveyance system, all discharges must be presumed to be to a surface water. Violations of effluent limitations contained in these NPDES permits are subject to MMP. Accordingly, all discharges from the discharger's dewatering system to the storm water conveyance system are appropriately subject to MMPs.

C. Discharge to Waters of the United States

Promenade's discharge enters a portion of the City's storm drain system that was equipped with a low flow interceptor in the late 1990's. The low flow interceptor, when operational, diverts dry weather flow entering the storm drain away from Mission Bay to the Point Loma Wastewater Treatment Plant for disposal in the Pacific Ocean. The low flow interceptor does not have the capacity to divert all of the wet weather flows entering the storm drain to the treatment plant causing flows to Mission Bay during storm events. According to the City, discharges to Mission Bay still occur during dry weather periods because of pump malfunctions, power outages and preventive maintenance operations. Once wastewater is discharged from the Promenade collection site into the City's storm water conveyance system, Promenade is no longer in control of the flow.

D. History of Previous Enforcement Action

In January 2000 the California Water Code was amended to require mandatory minimum penalties (MMP) for violations of effluent limitations prescribed in NPDES permits. A complaint was issued to Promenade on February 11, 2002, citing 26 reported effluent limitation violations which totaled \$78,000 in MMP. The Regional Board reduced the number of violations subject to MMP several times after meetings with the discharger. Ultimately, the proposed MMP was reduced to \$48,000 prior to the public hearing scheduled before the Regional Board in May 2002.

At the hearing the Regional Board attempted to agree to Promenade's assertion that three separate operational upsets¹ occurred during the period of alleged violations based on the argument that numerous copper and zinc violations were caused by the effects of saltwater on the wearable parts of the pump that moves collected groundwater from the parking structure to the storm drain system.

In addition, the Regional Board attempted to agree to Promenade's assertion that violations are subject to MMP only on days the City could provide documentation that discharges to Mission Bay occurred. The final MMP totaled \$33,000. The MMP was not actually adopted by the Regional Board, as after initially instructing staff to review three Pollution Prevention Plans proposed by the discharger that would have allowed a portion of the final penalty to be diverted to the discharger to perform necessary repairs to the system, the Board withdrew its motion to assess MMP and instructed staff to bring the matter back at a future date.

¹ The Water Code allows for all violation occurring in a 30-day period that was due to an operational upset, to be collapsed into one violation for the purposes of calculating MMP.

E. Revisions to California Water Code Pertaining to Mandatory Minimum Penalties

Prior to bringing the matter back to the Regional Board, the State Board's Office of Chief Counsel notified the Regional Boards that because the statutory definition of the term "effluent limitation" pertains to discharges from locations specified in waste discharge requirements in an NPDES permit, violations from sites covered by general permits where discharge locations were not specified in the permit should not be assessed MMP.

In January 2006 the statutory definition of "effluent limitation" was amended removing much of the language that had limited the types of permits subject to MMP, therefore the Regional Board's have been instructed to pursue the collection of MMP for general permittees for violations occurring from January 2006 forward.

In January 2003 modifications to Water Code section 13385(f) clarified that single operational upsets are limited to the treatment of wastewater using a biological treatment process. As a result, an operational upset defense (which reduces the number of violations occurring in a 30 day period to one violation) is not applicable for the Promenade discharge.

F. Settlement of Mandatory Minimum Penalties

The State Board has re-affirmed that a Regional Board cannot settle MMP for less than the statutory requirements outlined in Water Code sections 13385(h) and (i) unless the Regional Board makes findings that one of the exemptions in Water Code section 13385(j) applies. These exemptions are very specific and include: an act of war; an unanticipated, grave natural disaster; an intentional act of a third party; or the operation of a new or reconstructed wastewater treatment unit. None of the exemptions has been alleged or apply to this matter.

G. Recommendation

The imposition of MMP in the amount of \$9,000 is recommended.