



EDMUND G. BROWN JR.
GOVERNOR



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ENVIRONMENTAL PROTECTION

State Water Resources Control Board

June 24, 2013

Stephen J. Miller, Vice President
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State Water Resources Control Board
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CONSIDERATION OF A PROPOSED ORDER IMPOSING A MANDATORY MINIMUM PENALTY AGAINST LUBRICATING SPECIALTIES COMPANY FOR VIOLATIONS OF LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD ORDER NOS. 97-052 AND R4-2006-0065: PROPOSED ORDER AND BOARD MEETING NOTIFICATION

Enclosed is a copy of the proposed order in the above-entitled matter. The State Water Resources Control Board (State Water Board) will consider adoption of the proposed order at a public meeting **Tuesday, July 23, 2013**, commencing at **9:00 a.m.** in the Coastal Hearing Room, second floor of the Cal/EPA Building, 1001 I Street, Sacramento, California.

On November 18, 2010, this matter was heard in Los Angeles, California before a Hearing Officer of the State Water Board, Vice Chair Frances Spivy-Weber. Consequently, the State Water Board will not accept additional evidence at the July 23, 2013 meeting. Additionally, oral comments will be limited to ten minutes each for the above-named parties and five minutes per interested person.

Written comments on the proposed order and any other materials to be presented at the meeting, including power point and other visual displays, must be received by **12:00 noon, Tuesday, July 16, 2013.**

Please indicate in the subject line, "Comments to LSC proposed order – July 23 Board Meeting." Written comments and presentations must be addressed to:

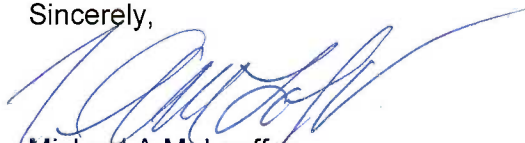
FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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If you have any questions regarding this letter, please contact Tim Regan, Senior Staff Counsel, in the Office of Chief Counsel, at (916) 341-5172 or at tregan@waterboards.ca.gov.

Sincerely,



Michael A.M. Lauffer
Chief Counsel

Enclosure

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2013-XXXX

In the Matter of Administrative Civil Liability Complaint No. OE-2010-0006
against
Lubricating Specialties Company

Order imposing mandatory minimum penalty for
Violations of Los Angeles Regional Water Quality Control Board
Order Nos. 97-052 and R4-2006-0065

BY THE BOARD:

I. INTRODUCTION

In this Order, the State Water Resources Control Board (State Water Board) imposes administrative civil liability against Lubricating Specialties Company (LSC) in the amount of \$93,000 as a mandatory minimum penalty for violations of waste discharge requirements Order No. 97-052 and R4-2006-0065 (NPDES No. CA0059013, CI No. 6521) issued by the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board).

On August 11, 2010, the Director of the Office of Enforcement issued Complaint No. OE-2010-0006 (complaint) to LSC for a mandatory minimum penalty in the amount of \$93,000. The complaint alleged violations identified in Exhibit "A" attached hereto and incorporated herein by reference.

On November 18, 2010, this matter was heard in Los Angeles, California before a Hearing Officer of the State Water Board, Vice Chair Frances Spivy-Weber. Mr. Stephan Miller appeared on behalf of LSC. Mr. Jarrod Ramsey-Lewis and Ms. Ann Carroll appeared for the Prosecution Team.

II. FACTUAL BACKGROUND

LSC operates the Pico Rivera facility for blending and packaging of lubricating oils (facility) located at 8015 Paramount Boulevard in Pico Rivera. The facility receives refined base stocks by rail and tanker truck and mixes the stocks with a variety of petroleum chemical

additives to blend lubricating oils and manufacture grease. The facility also acts as a terminal for petroleum chemical additives and plasticizers. LSC discharges storm water from a tank farm and storage yard to an unnamed drainage course, then to the Rio Hondo Channel, a navigable water of the United States. The storm water discharged from the tank farm and storage yard is susceptible to containing pollutants, such as oil and grease, pH, biological oxygen demand (five-day incubation at 20° C), total suspended solids, turbidity, nitrate, and nitrite, which can degrade water quality and impact beneficial uses of water.

LSC's wastewater discharges from the facility are subject to the requirements and limitations set forth in Water Code section 13376 and Los Angeles Water Board Order Nos. 97-052 and R4-2006-0065. 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.

The Los Angeles Water Board adopted Order No. 97-052 (NPDES No. CA0059013) on May 17, 1997. The Los Angeles Water Board adopted Order No. R4-2006-0065 (NPDES No. CA0059013, CI No. 6521) on August 3, 2006 and it became effective and superseded Order No. 97-052 on September 2, 2006. Order Nos. 97-052 and R4-2006-0065 set forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time. Order Nos. 97-052 and R4-2006-0065 serve as NPDES permits.

III. LEGAL AND PROCEDURAL BACKGROUND

A. Applicable NPDES Permit Effluent Limitations

Order No. 97-052 includes the following effluent limitations:

<u>Constituent</u>	<u>Units</u>	<u>Effluent Limitation</u>
pH	pH Units	In the range of 6.0 to 9.0
Oil and Grease	mg/l	15

Order No. R4-2006-0065 includes the following effluent limitations:

<u>Constituent</u>	<u>Units</u>	<u>Effluent Limitation</u>
Biological Oxygen Demand (BOD)	mg/l	30
pH	pH units	In the range of 6.5 to 8.5
Oil and Grease	mg/l	15

<u>Constituent</u>	<u>Units</u>	<u>Effluent Limitation</u>
Total Suspended Solids (TSS)	mg/l	75
Turbidity	NTU	75
Nitrate-N	mg/l	8.0
Nitrite-N	mg/l	1.0
Nitrate-N + Nitrite-N	mg/l	8.0

Additionally, Order Nos. 97-052 and R4-2006-0065 require LSC to submit quarterly monitoring reports.

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.¹ We have previously discussed the Porter-Cologne Water Quality Control Act's (Porter-Cologne Act) 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."² 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)).

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.³ The discharger bears the burden of proving affirmative defenses.⁴ 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

¹ 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.

² 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.

³ Wat. Code, § 13385, subd. (j)(1).

⁴ *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).

a serious violation has occurred, a discharger may avoid the mandatory minimum penalty only by proving one of the available affirmative defenses.⁵

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. Oil and grease, BOD, total suspended solids, Nitrate-N, Nitrite-N, and Nitrate-N + Nitrite-N are Group I 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.

As set forth in Exhibit "A", LSC reported thirty (30) effluent limit violations of Order Nos. 97-052 and R4-2006-0065 in its self-monitoring reports during the period from January 2000 through December 2009. These violations include effluent limit exceedances for oil and grease, pH, biochemical oxygen demand, total suspended solids, turbidity, Nitrate-N, Nitrite-N, and Nitrate-N + Nitrite-N.

As specified in Exhibit "A", sixteen (16) of these effluent limit violations are defined as serious because measured concentrations of Group I pollutants exceeded the applicable effluent limitations listed in section III.A of this Order by more than 40 percent. An additional eight (8) effluent limit violations are subject to mandatory minimum penalties because they occurred four or more times in any period of six consecutive months. All of the effluent limitation violations that would result in the imposition of mandatory minimum penalties occurred in a 27-month period between February 2005 and April 2007.

In addition to effluent limitation violations, the Porter-Cologne Act compels mandatory minimum penalties for certain reporting violations. Water Code section 13385.1, subdivision (a) provides that:

⁵ 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).)

For the purposes of subdivision (h) of Section 13385, a “serious violation” also means a failure to file a discharge monitoring report required pursuant to Section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations. This paragraph applies only to violations that occur on or after January 1, 2004.

LSC submitted its quarterly discharge monitoring reports for the fourth quarter of 2003 and the first quarter of 2004 more than 30 days after the required deadline specified in its monitoring and reporting program contained in Order No. 97-052. These late reports constitute seven (7) serious violations as the fourth quarter of 2003 report was submitted 175 days after its due date of January 15, 2004 and the first quarter 2004 report was submitted 84 days after its due date of April 15, 2004.

The Los Angeles Water Board sent LSC a Notice of Violation requesting these late reports on May 18, 2004.⁶ This Notice of Violation reminded LSC that failure to file the monitoring reports could result in a mandatory minimum penalty of \$3,000 for each complete period of 30 days following the deadline for submitting the reports. LSC submitted the reports on July 8, 2004.⁷

The mandatory minimum penalty for LSC’s twenty-four (24) effluent limit violations and seven (7) reporting violations is \$93,000.

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.⁸ Courts evaluating the issue have consistently found that general statutes of limitations do not apply to administrative proceedings, including administrative enforcement proceedings.⁹

⁶ Letter from Mr. Dennis A. Dickerson, Executive Officer of the Los Angeles Regional Water Quality Control Board to Mr. Greg Hovanesian, Lubricating Specialties Co. (May 18, 2004).

⁷ LSC cannot avail itself of the penalty reduction provisions of 13385.1, subdivision (b) because it did not submit the late reports within 30 days after receiving written notice from the Regional Water Board concerning the failure to timely file the reports. (See Wat. Code, § 13385.1, subd. (b)(2)(A)).

⁸ 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.

⁹ 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; *Bemd v. Eu* (1979) 100 Cal.App.3d 511,

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.

IV. CONTESTED ISSUES

A. Laches Defense

LSC asserts that the equitable defense of laches precludes its liability for violations that occurred more than three years prior to the time formal enforcement action was taken.¹⁰ Given the express statutory mandate imposed by the Porter-Cologne Act, we conclude that the water boards do not have the authority to invoke laches to override the legislative mandate. Further, even if laches was available as a defense to the mandatory minimum penalties, LSC has not carried the burden of proving the defense is available to override an important public policy or that it would be manifestly unjust to follow the statutory mandate.

1. Availability of Laches Defense

Laches is an equitable doctrine related to the concept of statute of limitations. 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

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).

¹⁰ Opposition Brief, p. 4.

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.

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, LSC would fail to carry the burden of proof required by courts. First, 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 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 LSC has suffered anything remotely approaching a manifest injustice as a result of the delay in prosecuting the mandatory minimum penalty.

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.

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.”).

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

Finally, LSC 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. LSC does assert that it was prejudiced because, if the Los Angeles Water Board promptly commenced an enforcement action, it could have taken action to prevent further violations. This argument would have some appeal if the violations had stretched over many years. Instead, all the effluent limitation violations subject to mandatory minimum penalties occurred within a relatively narrow 27-month period. That period is shorter than the three-year statute of limitations LSC encourages us to borrow.²² In other words, even if the Los Angeles Water Board had commenced enforcement promptly after the last effluent limitation violation, the results would have been no different. It would have had to impose the same mandatory minimum penalties, and the amount would be no different. In fact, because the payment of the mandatory penalty is not due until after final, administrative decisions, LSC has benefited from the delayed assessment of the mandatory minimum penalty. We find that even if laches was available, LSC has not satisfied its burden to support a laches defense.

2. Borrowing a Statute of Limitations

In certain limited circumstances, courts have held that it might be appropriate to "borrow" an analogous civil statute of limitations and apply it against an administrative agency.²³ LSC argues that Code of Civil Procedure section 338, subdivision (i) should be applied in this fashion.²⁴ We agree with LSC that if it were appropriate to borrow a statute of limitations, the most analogous statute of limitations would be the three-year limitation provided by Code of Civil Procedure section 338, subdivision (i). Section 338, subdivision (i) states that there is a three-year statute of limitations for bringing a civil action commenced under the Porter-Cologne Act. However, as discussed above, even if we could invoke the doctrine of laches by borrowing from the Code of Civil Procedure's limitations periods, LSC has failed to carry the burden of proof required by courts to invoke the doctrine of laches.

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

²² See discussion, *post*, p. 10.

²³ *Fountain Valley Regional Hospital and Medical Center v. Bonta* (1999) 75 Cal.App.4th 316.

²⁴ Opposition Br., p.5.

3. Laboratory Results as Sufficient Notice of Violations

LSC argues that it was prejudiced by the delay in enforcing the violations alleged in the complaint because of a lack of “notice” and the fact that the laboratory employed to conduct sample analyses between 2005 and 2007 is no longer in business.²⁵ Both contentions lack merit. The nature of the NPDES self-reporting program negates LSC’s argument that any enforcement delay was prejudicial due to lack of notice. The requirement to have a certified laboratory perform sample analyses increases the reliability of the data from LSC’s laboratory and lessens the possibility of prejudice. In order to determine compliance with effluent limits established in Order Nos. 97-052 and R4-2006-0065, LSC is required to conduct monitoring and self-report the results of that monitoring as specified in Monitoring and Reporting Program No. CI-6521. LSC submits self-monitoring reports to the Los Angeles Water Board, and its compliance manager signs a transmittal letter, certified “under penalty of law” that the letter and all attachments were prepared under the signatory’s direction or supervision “in accordance with a system designed to assure that qualified personnel properly gather[ed] and evaluate[d] the information submitted.”²⁶

The contents of the self-monitoring reports that indicate that effluent limit violations occurred during the monitoring period are immediately known or immediately discoverable to LSC or its representatives. Based on this self-monitoring system, it is difficult to discern how LSC is prejudiced by lack of notice from the water boards when LSC knew or should have known that it violated the terms of its permit prior to notifying the water boards of such violations.

LSC received additional notice of these violations from the Offer to Participate in Expedited Payment Program (EPP) No. SWB-2008-0004, which was issued by the Director of the State Water Board Office of Enforcement on September 26, 2008. The EPP letter was accompanied by a Notice of Violation that informed LSC of effluent limit violations and reporting violations, known to the water boards at the time the EPP letter was issued, that are subject to mandatory minimum penalties. Additional alleged effluent limit violations were discovered in August 2010, and were subsequently alleged in the complaint. LSC had also previously received a Notice of Violation, dated May 18, 2004, for the non-submittal of discharger monitoring reports. LSC had sufficient notice to have made business judgments to investigate and remediate any potential problems at the facility.

²⁵ *Id.*, p. 11.

²⁶ Order No. R4-2006-065, p. C-6.

LSC is not prejudiced by the fact that RCH Research and Environmental Laboratories, Inc., the laboratory that performed analytical work for LSC between 2005 and 2007, no longer exists. Pursuant to Order Nos. 97-052 and R4-2006-0065, Monitoring and Reporting Program No. CI-6521, the analyses of effluent sampled must include quality assurance/quality control, method of analyses and detection limits, copy of laboratory certification, and a perjury statement executed by the person responsible for the laboratory.²⁷ Order No. R4-2006-0065 states that the monitoring information shall include, but is not limited to, date, exact place, and time of sampling or measurements, date(s) analyses were performed, individual(s) who performed the analyses, the analytical techniques or methods used, and the results of such analyses.²⁸ Order No. R4-2006-0065 also requires that the laboratory used to analyze effluent samples be certified by the California Department of Public Health Environmental Laboratory Accreditation Program (ELAP) or approved by the Executive Officer of the Los Angeles Water Board, and that each monitoring report affirm that such analyses were performed by a certified laboratory.²⁹

ELAP provides evaluation and accreditation of environmental testing laboratories to ensure the quality of analytical data used for regulatory purposes to meet the requirements of the State's drinking water, wastewater, shellfish, food, and hazardous waste programs.³⁰ The self-monitoring reports submitted by LSC constitute conclusive evidence of the violations alleged, and constitute an admission by LSC.³¹ For the foregoing reasons, LSC's arguments lack merit and fail to meet the burden of proof to show that any delay was prejudicial. LSC had immediate notice or ability to discover the effluent limit and reporting violations subject to mandatory minimum penalties. Accordingly, the defense of laches cannot be raised.

²⁷ Monitoring and Reporting Program, p. T-1 and Attach. E, Monitoring and Reporting Program p. D-3.

²⁸ *Id.*

²⁹ Monitoring and Reporting Program, p. D-2.

³⁰ Cal. Dept. of Public Health, Environmental Laboratory Accreditation Program <<http://www.cdph.ca.gov/certlic/labs/Pages/ELAP.aspx>> [as of Jun. 13, 2013].

³¹ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 723; See also, *Sierra Club v. Union Oil Co.* (9th Cir. 1987) 813 F.2d 1480, 1491-92 (holding that required self-monitoring reports constitute conclusive evidence of an exceedance of an NPDES permit limitation), *judg. vacated on other grounds and cause remanded* 485 U.S. 931 (1988), and judgment reinstated 853 F.2d 667 (9th Cir. 1988); *United States v. CPS Chemical Co., Inc.* 779 F.Supp. 437, 442 (E.D.Ark. 1991) (stating that "[f]or enforcement purposes, a permittee's [Discharge Monitoring Reports] constitute admissions regarding the levels of effluent that the permittee has discharged."). Even those courts, all of which are outside the Ninth Circuit, that have allowed a discharger to challenge a self-monitoring report "have held that the [Discharge Monitoring Reports] filed by a permittee are 'virtually unassailable' as admissions that the violations reflected in the reports occurred." (*U.S. v. Aluminum Co. of America* (E.D.Tex. 1993) 824 F.Supp. 640, 648 [surveying caselaw from various federal districts].)

B. Intentional Act of a Third Party Defense

LSC asserts that the “intentional act of a third party” affirmative defense can be applied to avoid liability for effluent limitation violations for oil and grease, total suspended solids, biological oxygen demand, Nitrite-N, Nitrate-N, and Nitrate-N+Nitrite-N.³²

As discussed in section III.B of this Order, the Water Code establishes four affirmative defenses to the imposition of mandatory minimum penalties and the discharger bears the burden of proving affirmative defenses. One of these affirmative defenses applies to the “intentional act of a third party.” Water Code section 13385, subdivision (j)(1)(C) states, “[s]ubdivisions (h) and (i) do not apply to ... [a] violation caused by ... [a]n intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.”

A plain reading of the statute indicates that there are three elements that LSC must prove for the defense to be valid: (1) an intentional act of a third party occurred; (2) that act caused the “effect” (i.e., effluent limitation violation); and (3) LSC could not have prevented or avoided the “effect” by the exercise of due care or foresight. LSC bears the burden of proof with respect to each of the three elements.

We find that LSC has failed to prove at least two of the three elements of the intentional act of a third party affirmative defense. Initially, LSC claims that the violations of effluent limitations for oil and grease, total suspended solids, and BOD resulted from the intentional installation of asphalt with a latent defect by an unknown third party. LSC fails to provide any evidence as to the identity of the third party, when the installation of the asphalt occurred, or LSC’s relationship to that third party. It is unclear this would even satisfy LSC’s burden with respect to the first element of the defense.

More importantly, LSC has not proven that the third party’s act caused the effluent limitation violation. LSC recognizes that it is known that asphalt “tends to release ... oil and grease.”³³ However, this recognition does not prove that the specific effluent limitation violations arose from the installation of allegedly defective asphalt. The facility handles compounds that similarly could cause oil and grease violations. Additionally, the self-monitoring reports submitted by LSC do not support their contention that the installation of the asphalt caused the effluent limitation violations. The monitoring reports do not illustrate that the effluent limitations violations occurred with a distribution frequency that would be expected from the one-

³² Opposition Br., p. 13.

³³ Letter from Mr. Stephen J. Miller, Vice President of Manufacturing, Lubricating Specialties Co. to Mr. Mr. Jarrod Ramsey-Lewis, State Water Board, Office of Enforcement (Sep. 9, 2010).

time installation of allegedly faulty asphalt. LSC's generalized allegations are not sufficient to carry its burden to prove that defectively installed asphalt caused the effluent limitation violations.

Further, LSC has not proven it could not have prevented or avoided the effluent limitation violation by the exercise of due care or foresight. LSC has operated the facility under an NPDES permit issued by the Los Angeles Water Board for approximately 30 years.³⁴ LSC indicates that "over the past several years" improvements have been made to the asphalt at the facility.³⁵ Thus, it is logical to presume that the asphalt was installed and improved with LSC's knowledge, if not at LSC's direction. Knowledge of the installation of the asphalt and the properties of asphalt indicates that LSC could have prevented or avoided the violations by the "exercise of due care or foresight." LSC's contention that it could not have prevented or avoided the violations is also insufficient if LSC contracted with the third party that installed the asphalt or even made repairs to the asphalt, as those actions would have been done at LSC's direction.

LSC could have taken effective actions to prevent or avoid the violations. For example, LSC could have investigated the effects of the asphalt at the time the violations were first noted. It could have removed and replaced or modified the asphalt. Alternatively, LSC could have redirected runoff from the asphalt and provided additional treatment.

Separately, LSC also claims that three serious violations of effluent limitations for Nitrite-N, Nitrate-N, and Nitrate-N+Nitrite-N resulted from fertilizer application by its landscape contractors. LSC contends this constitutes an "intentional act of a third party", which resulted in violations of effluent limitations. LSC employs landscape contractors who, as part of their contractual services, apply fertilizers at the Pico Rivera Facility.³⁶ As the employer of the landscape contractors, LSC cannot avoid liability as it cannot prove that the effects of the acts of the third parties could not have been prevented or avoided by the exercise of due care or foresight. Even if the landscape contractors are independent contractors, LSC still possesses the authority and ability to control the activities of the landscape contractors at its facility. Moreover, LSC has not proven that a fertilizer application caused the nitrogen-related effluent limitation violations.

Consequently, we find that LSC has failed to carry its burden to prove the required elements to assert the "intentional act of a third party" affirmative defense.

³⁴ See Los Angeles Water Board Order No. 80-026.

³⁵ Opposition Br., p. 15.

³⁶ *Id.*

V. CONCLUSION

Upon consideration of the record for this matter, the State Water Board concludes that the amount of \$93,000 must be imposed on LSC as a mandatory minimum penalty for the violations identified in this Order.

VI. ORDER

IT IS HEREBY ORDERED that, pursuant to section 13323 of the Water Code, LSC shall make a payment by check of \$93,000 (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. LSC 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 DATE.

AYE:

NAY:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board

Effluent Limitation Violations Requiring Mandatory Minimum Penalties

#	Violation Number	Violation Date*	Constituent	Pollutant Group	Limitation	Limit	Result/Average	Units	% Over	Date 180 Days Prior ¹	Effluent Violations in 180 Days	Serious** Violation?	Exempted from MMP?	Mandatory Fine?	Penalty
1	876353	1/25/00	Oil & Grease DM	I	Daily	15	20.6	mg/L	37	7/29/1999	1	No	No	No	\$0
2	876355	3/8/00	Oil & Grease DM	I	Daily	15	18	mg/L	20	9/10/1999	2	No	No	No	\$0
3	876356	3/19/02	pH, DM	OEV	Daily	9	9.02	pH units	N/A	9/20/2001	1	No	No	No	\$0
4	264509	2/7/05	Oil & Grease DM	I	Daily	15	75	mg/L	400	8/11/2004	n/a	Yes	No	Yes	\$3,000
5	405016	4/28/05	Oil & Grease DM	I	Daily	15	22	mg/L	47	10/30/2004	n/a	Yes	No	Yes	\$3,000
6	405019	5/6/05	Oil & Grease DM	I	Daily	15	18	mg/L	20	1/17/2004	3	No	No	No	\$0
7	360794	9/20/05	Oil & Grease DM	I	Daily	15	34	mg/L	127	3/24/2005	n/a	Yes	No	Yes	\$3,000
8	878418	10/18/05	Oil & Grease DM	I	Daily	15	54.4	mg/L	263	4/21/2005	n/a	Yes	No	Yes	\$3,000
9	878592	2/18/06	pH, DM	OEV	Daily	6.5	6.14	pH units	N/A	8/22/2005	3	No	No	No	\$0
10	878585	2/18/06	Oil & Grease DM	I	Daily	15	46	mg/L	207	8/22/2005	n/a	Yes	No	Yes	\$3,000
11	878583	3/6/06	pH, DM	OEV	Daily	6.5	6.44	pH units	N/A	9/7/2005	5	No	No	Yes	\$3,000
12	878584	3/7/06	pH, DM	OEV	Daily	6.5	6.32	pH units	N/A	9/21/2005	6	No	No	Yes	\$3,000
13	878586	3/20/06	Oil & Grease DM	I	Daily	15	89	mg/L	493	9/21/2005	n/a	Yes	No	Yes	\$3,000
14	878587	4/6/06	Oil & Grease DM	I	Daily	15	22	mg/L	47	10/8/2005	n/a	Yes	No	Yes	\$3,000
15	878588	4/17/06	Oil & Grease DM	I	Daily	15	19	mg/L	27	10/19/2005	7	No	No	Yes	\$3,000
16	773088	12/27/06	Biochemical Oxygen Demand DM	I	Daily	30	95	mg/L	217	6/30/2006	n/a	Yes	No	Yes	\$3,000
17	773095	12/27/06	Total Suspended Solids DM	I	Daily	75	116	mg/L	55	6/30/2006	n/a	Yes	No	Yes	\$3,000
18	773078	12/27/06	Turbidity DM	OEV	Daily	75	118	NTU	N/A	6/30/2006	3	No	No	No	\$0
19	570657	2/11/07	pH, DM	OEV	Daily	6.5	6.36	pH units	N/A	8/15/2006	4	No	No	Yes	\$3,000
20	570658	2/11/07	Biochemical Oxygen Demand DM	I	Daily	30	40.2	mg/L	34	8/15/2006	5	No	No	Yes	\$3,000
21	570659	2/18/07	pH, DM	OEV	Daily	6.5	6.27	pH units	N/A	8/22/2006	6	No	No	Yes	\$3,000
22	570661	2/18/07	Biochemical Oxygen Demand DM	I	Daily	30	51.7	mg/L	72	8/22/2006	n/a	Yes	No	Yes	\$3,000
23	570665	2/23/07	Oil & Grease DM	I	Daily	15	22	mg/L	47	8/27/2006	n/a	Yes	No	Yes	\$3,000
24	570662	2/23/07	Biochemical Oxygen Demand DM	I	Daily	15	54.6	mg/L	82	8/27/2006	n/a	Yes	No	Yes	\$3,000
25	570660	2/23/07	pH, DM	OEV	Daily	6.5	6.37	pH units	N/A	8/27/2006	10	No	No	Yes	\$3,000
26	570666	3/21/07	Oil & Grease DM	I	Daily	15	38	mg/L	153	9/22/2006	n/a	Yes	No	Yes	\$3,000
27	570663	3/21/07	Biochemical Oxygen Demand DM	I	Daily	30	41.4	mg/L	38	9/22/2006	12	No	No	Yes	\$3,000
28	773174	4/23/07	Nitrate -N, DM	I	Daily	8	164	mg/L	1950	10/25/2006	n/a	Yes	No	Yes	\$3,000
29	773177	4/23/07	Nitrite -N, DM	I	Daily	1	1.45	mg/L	45	10/25/2006	n/a	Yes	No	Yes	\$3,000
30	773178	4/23/07	Nitrate -N + Nitrite -N, DM	I	Daily	8	165	mg/L	1963	10/25/2006	n/a	Yes	No	Yes	\$3,000

Total Penalty: \$72,000

Violation occurs on sample date or last date of averaging period
 For Group I pollutants, a violation is serious when the limitation for the parameter of concern is exceeded by more than 40%.
 For Group II pollutants, a violation is serious when the limitation for the parameter of concern is exceeded by more than 20%.

Violation period ending the last day of April 2007	
Group I Violations Subject to MMPs:	22
Group II Violations Subject to MMPs:	0
Other Effluent Violations Subject to MMPs:	8
Total Violations Subject to MMPs:	30
Violations Exempt from MMPs:	0
Total Effluent Violations:	30
Group I Violations Assessed MMP:	19
Group II Violations Assessed MMP:	0
Other Effluent Violations Assessed MMP:	5
Total Violations Assessed MMP:	24

Report Violations Requiring Mandatory Minimum Penalties

#	Violation Number(s)	Report Description	Report Due Date	Received/Current Date	Days Late	30-Day Periods Late	Mandatory Penalty
1	259118, 259119, 259120, 259121, 259122	4Q2003 SMR	1/15/04	7/8/04	175	5	\$15,000
2	259127, 259156	1Q2004 SMR	4/15/04	7/8/04	84	2	\$6,000

Total Penalty: \$21,000