

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R5-2008-0567

STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY ORDER
AND ORDER

IN THE MATTER OF
KEN MAAS ENTERPRISES
ALEXANDRIA ESTATES
PLACER COUNTY

This Administrative Civil Liability Order is issued to Ken Maas Enterprises, Inc. (hereafter Discharger) based on a finding of violations National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002 Order No. 99-08-DWQ, and issued pursuant to CWC section 13385, which authorizes the imposition of an Administrative Civil Liability.

WHEREAS:

1. The Discharger is the owner and developer of Alexandria Estates Subdivision, a 16-acre construction project in Placer County. At the time of Regional Water Board staff inspections of the construction site during the 2006/2007 wet season, approximately 7 disturbed acres were observed by staff and were being used as pads for lots and interior roadways; the remaining acreage was either emergency access roadways or preserve areas. Runoff from the site discharges to an unnamed tributary of Strap Ravine or the adjacent wetlands.
2. Strap Ravine is a tributary to the American River. The existing beneficial uses of the American River are municipal and domestic water supply, agricultural supply, service supply, power, water contact recreation, non-contact water recreation, warm and cold fresh water habitat, warm and cold fish migration, warm and cold spawning, and wildlife habitat.
3. On 19 August 1999, the State Water Resources Control Board adopted NPDES General Permit No. CAS000002, Order No. 99-08-DWQ (General Permit), implementing the Waste Discharge Requirements for storm water discharges associated with construction activity.
4. The General Permit requires that dischargers of storm water to surface waters associated with construction activity file a Notice of Intent (NOI) to obtain coverage under the General Permit and to use best available technology economically achievable (BAT) and best conventional control technology (BCT) to reduce storm water pollution.

5. The Clean Water Act and CWC require that dischargers obtain coverage under the General Permit prior to commencement of construction activities. The Discharger obtained coverage under the General Permit and was assigned WDID No. 5S31C329428 on 17 August 2004.

THE PARTIES HEREBY STIPULATE AS FOLLOWS:

A. Relevant Legal Authority

1. CWC section 13385 states, in part:

“(a) Any person who violates any of the following shall be liable civilly in accordance with this section:

(1) Section 13375 or 13376

(2) Any waste discharge requirements or dredged and fill material permit.

...

(5) Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act as amended.”

...

“(c) Civil liability may be imposed administratively by the State Board or a Regional Board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the... following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.”

...

“(e) In determining the amount of liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances,

extent, and gravity of the violation, or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefits or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”

2. General Order No. 99-08-DWQ states, in part, the following:

“A. *DISCHARGE PROHIBITIONS:*

...

3. *Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.*

...

“C. *SPECIAL PROVISIONS FOR CONSTRUCTION ACTIVITY:*

...

2. *All dischargers shall develop and implement a SWPPP in accordance with Section A: Storm Water Pollution Prevention Plan. The Discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the BAT/BCT performance standard.*

...

Section 301 of the Clean Water Act and section 13376 of the California Water Code prohibit the discharge of pollutants to surface waters except in compliance with an NPDES permit.”

3. On 15 March 2007, the Regional Water Board explicitly delegated to the Executive Officer the authority to issue orders to assess administrative civil liability where the matter is not contested by the discharger (Resolution R5-2007-0009).

B. Statement of the Case

1. The Discharger violated provisions of law for which the Regional Water Board may impose liability under CWC section 13385(c)(2).
2. Civil liability may be imposed for the following chronology, which details violations of General Order No. 99-08-DWQ:
 - a. On 18 October 2006, Placer County Resource Conservation District (RCD) conducted a site inspection and provided the Discharger with recommendations on how best to stabilize the construction site.
 - b. On 3 January 2007, Regional Water Board staff inspected the Alexandria Estates construction site and noted that more sediment and erosion control Best Management Practices (BMPs) were needed throughout the project area. Staff also observed evidence of a discharge of sediment-laden storm water into an unnamed tributary to Strap Ravine as a result of the inadequate BMPs.
 - c. On 8 January 2007, a Notice of Violation (NOV) was issued to the Discharger for violations of the General Permit, which requires an effective combination of sediment and erosion control BMPs.
 - d. On 17 January 2007, Regional Water Board and Placer County Public Works staff met with Mr. Maas at the construction site. During the meeting, staff walked the site with Mr. Maas and outlined the storm water management concerns, including the lack of an effective combination of sediment and erosion control BMPs at the site, the need for better protection of the surrounding wetlands and the additional measures needed to address the highly erodible soil throughout the site. Staff also discussed the 8 January NOV with Mr. Maas and outlined what was needed to address the NOV.
 - e. On 26 February 2007, Regional Water Board staff inspected the Alexandria Estates construction site and again observed significant storm water management problems. These problems included the lack of an effective combination of sediment and erosion control BMPs and a discharge of sediment and sediment-laden storm water into the adjacent wetlands and an unnamed tributary to Strap Ravine.
 - f. On 5 March 2007, a second NOV was issued to the Discharger for violations of the General Permit and specifically for not implementing an effective combination of sediment and erosion

control BMPs at the site and for discharges which caused or threatened to cause pollution, contamination, or nuisance.

- g. On 6 April 2007, the Placer County Public Works Department issued a stop work order for the project for failure to comply local requirements.
 - h. On 12 April 2007, staff with the Regional Water Board, Placer County RCD and Placer County Public Works Department met with the Mr. Maas and his contractor at the Alexandria Estates site. During the inspection, staff pointed out the storm water management problems and RCD staff offered potential solutions.
 - i. On 21 April 2007, Regional Water Board staff inspected the construction site and found that the on-site BMPs had been significantly improved.
 - j. On 1 May 2007, Placer County Public Works Department lifted the stop work order.
3. As discussed above, the Discharger failed to implement BMPs to reduce pollutants in storm water discharges from the Alexandria Estates construction sites to the BAT/BCT performance standard, resulting in the discharge of sediment-laden storm water into nearby surface waters. This failure continued even after the Discharger was contacted by a number of government agencies and provided guidance on BMP implementation.

C. Extent of Liability

Pursuant to CWC section 13385(c), the Discharger has a maximum civil liability of \$2,080,000. The maximum liability is based on 7 days of violation and the number of gallons of sediment-laden storm water discharged from the site. The days of violation were 21, 22, 23, 24, 25, 26, and 27 February 2007. The gallons discharged from the site were estimated taking into account the size of the disturbed area, rainfall data, and application of a runoff coefficient.

D. Consideration of Factors

Pursuant to CWC section 13385(e), the Regional Water Board shall take into account the following factors when issuing an ACL Order:

1. *Nature:* The Discharger violated Discharge Prohibitions A.3 and C.2 of the General Permit by failing to implement controls to the BAT/BCT performance standard and discharging highly turbid storm water into a tributary to Strop Ravine.

2. *Circumstances:* Regional Water Board staff observed discharges of sediment-laden storm water to the adjacent wetlands and an unnamed tributary to Strop Ravine. The discharges occurred due to the Discharger's failure to properly implement and maintain BMPs. Regional Board staff issued two Notices Of Violations to the Discharger, and Placer County issued a Stop Work Order.
3. *Extent and Gravity:* The Discharger failed to comply with the General Permit, which resulted in a discharge of over 46,000 gallons of highly turbid storm water into an unnamed tributary to Strop Ravine. Strop Ravine is a tributary to the American River.
4. *Susceptibility of the Discharge to Cleanup and Abatement:* Once the turbid runoff entered the unnamed tributary to Strop Ravine, there was no practical way to clean up the impacted waterways or to avoid impacts to water quality or beneficial uses.
5. *Degree of Toxicity of the Discharge:* Highly turbid storm water was observed discharging from the construction site during the 26 February 2007 inspection. The highly turbid runoff contained suspended sediments, which could have reduced habitat for aquatic life as well as caused deleterious effects due to physical impacts.
6. *Ability to Pay:* On 17 March 2008, the Discharger submitted written comments and evidence to Regional Water Board staff regarding its financial difficulties. These documents showed that the Discharger is facing significant financial hardship from debt acquired to develop the property. Payment of a penalty larger than that herein specified would significantly jeopardize the discharger's ability to stay in business, and would hamper future efforts to stabilize the site.
7. *Voluntary Cleanup Efforts Undertaken:* As stated earlier, there was no practical way to clean up the impacted waterways once the turbid runoff entered the unnamed tributary to Strop Ravine.
8. *Prior History of Violations:* Regional Water Board staff has no record of non-compliance by the Discharger.
9. *Degree of Culpability:* The Discharger obtained coverage under the General Permit on 17 August 2004. The Discharger was aware of the General Construction Permit requirements.
10. *Economic Benefit or Savings Resulting from the Violation:* The Discharger did not install approximately \$12,000 of adequate erosion and sediment

control BMPs. CWC 13385(e) states that, “*At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.*” The Regional Water Board estimates the deferred costs from failing to install these BMP’s are less than the \$8,000 that will be immediately due. If the Discharger fails to implement adequate erosion and sediment control BMPs, then the full balance of \$80,000 will become due.

11. *Other Matters as Justice May Require*

- a. In addition to the considerations listed above, the Executive Officer considered the costs of preparing for and prosecuting a public hearing on the allegations in ACL Complaint No. R5-2007-0533, the possible cost of responding to any request by the Discharger for administrative judicial review of an order assessing the recommended liability, the current compliance status of the Discharger, the deterrent effect of the proposed liability and the ability to recover staff costs from the amount tendered.
- b. Regional Water Board staff spent a total of 100 hours investigating the violations and preparing this Order. The total cost for staff time is \$12,000 based on a rate of \$120 per hour. Absent a showing of an inability to pay the fine, the Regional Water Board would not consider payment less than this amount. However, the Regional Water Board has taken the discharger’s inability to pay into consideration, resulting in an actual assessment which is lower than the staff costs.

E. *Right to Petition*

Any person aggrieved by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final 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. This Order does not become final until the public review period described in section J expires, at which point it will be signed by the Regional Water Board’s Executive Officer. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

F. Exemption from California Environmental Quality Act

Issuance of this Administrative Civil Liability Complaint 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).

G. Payment of Administrative Civil Liability and Conditions

1. On 11 December 2007, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R5-2007-0533 to Ken Maas Enterprises in the amount of eighty thousand dollars (\$80,000) for violations of the General Permit.
2. On 17 March 2008, the Discharger submitted written comments and evidence to Regional Water Board staff regarding steps taken to comply with the General Permit, compelling personal circumstances, and financial conditions.
3. Following issuance of ACL Complaint No. R5-2007-0533, the Discharger and Regional Water Board staff conferred for the purpose of settling this matter and the allegations herein without a formal hearing. After arms-length negotiations, the Discharger and the Executive Officer arrived at a mutually acceptable resolution of the Complaint based on information contained in the record of the Regional Water Board. The Discharger and the Executive Officer have agreed to settle the administrative civil liability for eight thousand dollars (\$8,000).
4. Civil liability is imposed upon the Discharger in the amount of eighty thousand dollars (\$80,000). Of this amount, \$8,000 is due and payable when this Order becomes final, and \$72,000 is stayed pending compliance with Item No. 6, *infra*.
5. Within 30 days of this Order becoming final, the Discharger shall pay **eight thousand dollars (\$8,000)** by check made payable to the "State Water Pollution Cleanup and Abatement Account." The check shall have written upon it "ACL Order R5-2008-0567".
6. If future Regional Water Board inspections determine that there are turbid storm water discharges resulting from the Discharger's failure to implement and maintain effective BMPs at the Alexandria Estates site, then within 30 days of notification by the Executive Officer, the suspended liability of **seventy two thousand dollars (\$72,000)** shall be due and payable. The check shall be made payable to the *State Water Pollution*

Cleanup and Abatement Account, and shall have written upon it “ACL Order No. R5-2008-0567.

7. The Discharger shall not terminate coverage under the General Permit for Alexandria Estates until (a) the development is built out and stabilized or (b) sold. The Discharger may terminate coverage for individual lots that are sold and/or built on. Since the development has the potential for water quality impacts and because it is part of a larger common plan, the owner of each lot must file for coverage under the General Permit.

H. Scope of Settlement

Upon receipt of the administrative civil liability, as detailed in section G of this Stipulation for Entry of Administrative Civil Liability Order and Order, this Order resolves violations herein alleged. The Discharger waives its right to a hearing on the resolution of the matters herein covered.

I. Public Review and Final Effect of this Order

This Order constitutes a settlement of ACL Complaint No. R5-2007-0533, and **does not become final until after a 30-day public notice and comment period expires**. Should the Regional Water Board receive new information or comments during this comment period, the Regional Water Board’s Executive Officer may withdraw the Order, return payment, and issue a revised Order. New information or comments include those submitted by personnel of the Regional Water Board who are not associated with the enforcement team’s issuance of the Tentative Order.

J. Authority to Enter Into Stipulation

Each person executing this Order in a representative capacity represents and warrants that he or she is authorized to execute this Order on behalf of and to bind the entity on whose behalf he or she executes the Order.

K. Interpretation

This Order shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this Order and any uncertainty and ambiguity shall not be interpreted against any one party.

L. Effect if Portion of Order is Unenforceable

If any portion of this Order is ultimately determined not to be enforceable, the entire Order shall become null and void.

M. Modification of Order

This Order shall not be modified by any of the Parties by oral representation made before or after the execution of this Order. All modifications must be in writing and approved by the Regional Water Board.

IT IS SO STIPULATED

Ken Maas Enterprises

(Date)

Approved as to Form:

16 September 2008

Pamela Creedon

(Date)

Executive Officer

California Regional Water Quality Control Board, Central Valley Region

IT IS SO ORDERED by the Regional Water Quality Control Board, Central Valley Region, that Administrative Civil Liability Complaint No. R5-2007-0533 is rescinded and this Order shall become effective upon signature below:

Pamela Creedon

(Date+30 days of public review)

Executive Officer

California Regional Water Quality Control Board, Central Valley Region