



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

June 24, 2013

Corporation Service Company dba
CSC – Lawyers Incorporating Service
Agent for Service of Process for
Rodeo Owner Corporation
2730 Gateway Oaks Drive, Suite 100
Sacramento, CA 95833

Mayumi E. Okamoto, Esq.
State of California, Office of Enforcement
State Water Resources Control Board
1001 "I" Street, 16th Floor
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CONSIDERATION OF A PROPOSED ORDER IMPOSING A MANDATORY MINIMUM PENALTY AGAINST RODEO OWNER CORP. FOR VIOLATIONS OF LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD ORDER NO. R4-2003-0111: 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 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. 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 Rodeo proposed order – July 23 Board Meeting." Written comments and presentations must be addressed to:

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | www.waterboards.ca.gov

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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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

cc:

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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-2011-0038
against
Rodeo Owner Corp.

ORDER IMPOSING MANDATORY MINIMUM PENALTY FOR
VIOLATIONS OF ORDER NO. R4-2003-0111

BY THE BOARD:

I. INTRODUCTION

In this Order, the State Water Resources Control Board (State Water Board) imposes administrative civil liability against Rodeo Owner Corp. (Rodeo) in the amount of \$48,000 as a mandatory minimum penalty for violations of waste discharge requirements Order No. R4-2003-0111 (NPDES No. CAG994004, CI No. 7002).

On July 25, 2011, the State Water Board's Director of the Office of Enforcement issued Complaint No. OE-2011-0038 (complaint) against Rodeo for a mandatory minimum penalty in the amount of \$48,000. 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 before a Hearing Officer of the State Water Board, Vice Chair Frances Spivy-Weber. Mr. Jarrod Ramsey-Lewis and Ms. Mayumi Okamoto appeared for the Prosecution Team. Neither Rodeo nor a representative of Rodeo appeared at the hearing to contest the allegations in the complaint.¹

II. FACTUAL BACKGROUND

Rodeo owned and operated Two Rodeo Drive (facility) located at 9480 Dayton Way, in Beverly Hills, from on or about July 28, 2000 through August 29, 2007. Rodeo discharged groundwater and storm water from a sump located in the parking garage at the facility to Ballona Creek, a navigable water of the United States. The discharged groundwater

¹ See October 19, 2011 Hearing Transcript, p. 21.

and storm water contain pollutants, which can degrade water quality and impact beneficial uses of water.

Rodeo's wastewater discharges from the facility were subject to the requirements and limitations set forth in Water Code section 13376 and Los Angeles Regional Water Quality Control Board Order No. R4-2003-0111. 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 No. R4-2003-0111 sets forth the waste discharge requirements and effluent limitations governing the discharges from the facility during the relevant period of time. Order No. R4-2003-0111 serves as an NPDES permit.

Seventeen (17) effluent limit violations of Order No. R4-2003-0111 were noted in Rodeo's self-monitoring reports for the first, second, third, and fourth quarters of 2006 and the second quarter of 2007. The violations are identified in Exhibit "A."

III. LEGAL AND PROCEDURAL BACKGROUND

A. Applicable NPDES Permit Effluent Limitations

Order No. R4-2003-0111 includes 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

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.² 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

² 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.

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. Biological oxygen demand (five-day incubation at 20° C) is a Group 1 pollutant. Chlorine residual is a Group II pollutant.

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."³ 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.⁴ The discharger bears the burden of proving affirmative defenses.⁵ 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.⁶

³ 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.

⁴ Wat. Code, § 13385, subd. (j)(1).

⁵ *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).

⁶ 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. Water. Code, § 13385, subd. (j)(2).

As set forth in Exhibit "A," Rodeo reported thirteen serious violations and three non-serious violations. 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 \$39,000. The three non-serious effluent limitation violations are subject to a mandatory minimum penalty of \$9,000 because they were the fourth violation or more 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.⁷ Courts evaluating the issue have consistently found that general statutes of limitations do not apply to administrative proceedings, including administrative enforcement proceedings.⁸

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."⁹ 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.¹⁰ 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.¹¹ "[L]aches is not available where it would nullify an important policy adopted for the benefit of the public."¹² Further, it is well-settled that the burden to establish laches lies with the party raising it.¹³

⁷ 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.

⁸ 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).

⁹ *Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1381.

¹⁰ Black's Law Dict. (7th ed. 1999) p. 879, col. 1.

¹¹ *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.

¹² *Feduniak v. California Coastal Com'n*, *supra*, 148 Cal.App.4th at p. 1381.

¹³ *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628.

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.¹⁴ Where the Legislature has spoken, however, equitable and court-made remedies give way to statutory mandates.¹⁵ “Principles of equity cannot be used to avoid a statutory mandate.”¹⁶ 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.¹⁷ 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, Rodeo 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 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.¹⁸ The Legislature adopted mandatory minimum penalties to promote streamlined, cost-effective enforcement and facilitate water quality protection.¹⁹ 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 Rodeo has suffered anything remotely approaching a manifest injustice as a result of the delay in prosecuting the mandatory minimum penalty.

Second, Rodeo has not proved that the delay in prosecuting the mandatory minimum penalty was either unreasonable or that the water boards acquiesced to Rodeo’s

¹⁴ 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).

¹⁵ 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).

¹⁶ *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.”).

¹⁷ 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.

¹⁸ 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.”).

¹⁹ *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, *supra*, 123 Cal.App.4th at p. 725.

violations. Rodeo received a notice of violation and was on notice that it could be subject to further enforcement actions.

Finally, Rodeo 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, Rodeo has benefited from the delayed assessment of the mandatory minimum penalty. We find that even if laches was available, Rodeo 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.

IV. CONTESTED ISSUES

Rodeo did not submit any written evidence or arguments contesting any issue raised in the complaint. Rodeo did not appear at the hearing to offer oral argument contesting any issue raised in the complaint.

A. CONCLUSION

Upon consideration of the record for this matter, the State Water Board concludes that the amount of \$48,000 must be imposed on Rodeo as a mandatory minimum penalty for the violations identified in this Order.

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ORDER

IT IS HEREBY ORDERED that, pursuant to Water Code section 13323, Rodeo shall make a payment by check of \$48,000 (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. Rodeo 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 Period	Limit	Result Average	Units	% Over Limit	Date 180 Days Prior	Serious ² Violation?	Chronic?	No. of Violations within the 180 days ³	Mandatory Fine?	Water Code	Penalty
1	431867	3/31/2006	BOD ₅	Group I	Monthly Average	20	30.4	mg/L	52%	10/2/2005	Y	N	N/A	Y	13385(h)	\$3,000
2	768496	4/24/2006	BOD ₅	Group I	Daily Maximum	30	39.8	mg/L	33%	10/26/2005	N	N	N/A	N	N/A	\$0
3	655150	4/30/2006	BOD ₅	Group I	Monthly Average	20	39.8	mg/L	99%	11/1/2005	Y	N	N/A	Y	13385(h)	\$3,000
4	869150	5/16/2006	BOD ₅	Group I	Daily Maximum	30	37.8	mg/L	26%	11/17/2005	N	Y	4	Y	13385(i)	\$3,000
5	655151	5/31/2006	BOD ₅	Group I	Monthly Average	20	31.2	mg/L	56%	12/2/2005	Y	N	N/A	Y	13385(h)	\$3,000
7	768502	6/22/2006	BOD ₅	Group I	Daily Maximum	30	31.6	mg/L	5%	12/24/2005	N	Y	6	Y	13385(i)	\$3,000
6	655152	6/30/2006	BOD ₅	Group I	Monthly Average	20	31.6	mg/L	58%	1/1/2006	Y	N	N/A	Y	13385(h)	\$3,000
8	768528	9/20/2006	BOD ₅	Group I	Daily Maximum	30	52.8	mg/L	76%	3/24/2006	Y	N	N/A	Y	13385(h)	\$3,000
9	655149	9/30/2006	BOD ₅	Group I	Monthly Average	20	52.8	mg/L	164%	4/3/2006	Y	N	N/A	Y	13385(h)	\$3,000
10	655147	11/30/2006	Residual Chlorine	Group II	Daily Maximum	0.1	23.9	mg/L	23800%	6/3/2006	Y	N	N/A	Y	13385(h)	\$3,000
11	655146	11/30/2006	BOD ₅	Group I	Monthly Average	20	60.8	mg/L	204%	6/3/2006	Y	N	N/A	Y	13385(h)	\$3,000
12	768589	11/30/2006	BOD ₅	Group I	Daily Maximum	30	60.8	mg/L	103%	6/3/2006	Y	N	N/A	Y	13385(h)	\$3,000
13	655148	12/31/2006	BOD ₅	Group I	Monthly Average	20	21.3	mg/L	7%	7/4/2006	N	Y	6	Y	13385(i)	\$3,000
14	768606	4/30/2007	BOD ₅	Group I	Monthly Average	20	45.4	mg/L	127%	11/1/2006	Y	N	N/A	Y	13385(h)	\$3,000
15	708460	4/30/2007	BOD ₅	Group I	Daily Maximum	30	45.4	mg/L	51%	11/1/2006	Y	N	N/A	Y	13385(h)	\$3,000
16	708461	5/16/2007	BOD ₅	Group I	Daily Maximum	30	60.2	mg/L	101%	11/17/2006	Y	N	N/A	Y	13385(h)	\$3,000
17	768611	5/31/2007	BOD ₅	Group I	Monthly Average	20	60.2	mg/L	201%	12/2/2006	Y	N	N/A	Y	13385(h)	\$3,000
BOD ₅ = Biochemical oxygen demand (5-day incubation at 20° C)													Total Penalty: \$48,000			
1 - Violation occurs on sample date or last date of averaging period. 2 - For Group I pollutants, a violation is serious when the limit is exceeded by more than 40% - For Group II pollutants, a violation is serious when the limit is exceeded by more than 20% 3 - When a serious violation occurs on the same day as a chronic, the serious violation is only assessed an MMP once and is counted last in determining the order in which multiple violations on the same day occurred.																
Violation period ending the last day of October 2008																
Group I Violations Assessed MMP: 15																
Group II Violations Assessed MMP: 1																
Other Effluent Violations Assessed MMP: 0																
Total Violations Assessed MMP: 16																
Mandatory Minimum Penalty = (13 Serious ³ Violations + 3 Non-Serious Violations) x \$3,000 = \$48,000																