

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

**COMPLAINT R2-2014-1024
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF**

**NORTH MARIN WATER DISTRICT
WILD HORSE STORAGE TANK
MARIN COUNTY**

This complaint assesses an administrative civil liability (Complaint) pursuant to California Water Code section 13385 to North Marin Water District (hereinafter Discharger) for an unauthorized discharge of approximately 204,000 gallons of chlorinated potable water from its Wild Horse storage tank to an unnamed dry tributary to Vineyard Creek in Novato. A \$45,500 liability is proposed for the alleged Water Code violation.

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) hereby gives notice that:

1. The North Marin Water District (Discharger) is alleged to have violated provisions of law for which the Regional Water Board may impose civil liability pursuant to California Water Code section 13385. This Complaint is issued under Water Code section 13323 and proposes to assess \$45,500 in penalties for the violations cited based on the considerations described herein.
2. Unless waived, the Regional Water Board will hold a hearing on this matter on December 10, 2014, in the Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, 94612. You or your representative(s) will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of civil liability by the Regional Water Board. You will be mailed an agenda approximately ten days before the hearing date. You must submit all comments and written evidence concerning this Complaint to the Regional Water Board not later than 5 p.m. on November 10, 2014, so that such comments may be considered. Any written evidence submitted to the Regional Water Board after this date and time will not be accepted or responded to in writing.
3. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for judicial civil liability. You can waive your right to a hearing to contest the allegations contained in this Complaint by signing and submitting the waiver and paying the civil liability in full or by taking other actions as described in the waiver form.

ALLEGATIONS

4. On the afternoon of May 22, 2014, the Discharger's electrical and mechanical staff worked on the cathodic protection system of its Wild Horse potable water storage tank in the City of Novato, Marin County, and apparently inadvertently shorted the control wire for the tank level sensor. As a result, potable water began discharging from the Wild Horse tank at approximately

5:55 p.m., and continued until approximately 11:42 p.m., after notification by a concerned resident who observed the effects of the discharge.

5. The discharge totaled approximately 204,000 gallons of potable water containing up to 0.61 milligrams per liter (mg/L) of residual chlorine. The discharge reached Vineyard Creek via an unnamed tributary located near the tank. Vineyard Creek and its tributaries are waters of the State and of the United States.
6. On May 23, 2014, the Discharger inspected Vineyard Creek in response to the discharge and observed no fish kill and noted no erosion along Vineyard Creek and the unnamed tributary.
7. On May 24, 2014, the concerned resident reported to the California Office of Emergency Services (Cal OES) an unauthorized discharge reaching Vineyard Creek resulting in murky water and an accumulation of dead vegetation in a wet ponded pool in Vineyard Creek. In the dry months, stretches of Vineyard Creek and its tributaries dry up except for pools that are groundwater fed. The resident who reported the discharge voluntarily aerates the ponded pool to maintain it as a valuable dry season refuge for fish, including steelhead and rainbow trout. Cal OES forwarded the report to the Regional Water Board. In response, Cheryl Prowell, Regional Water Board spill responder, inspected Vineyard Creek that day. While Ms. Prowell found no dead fish, she did observe turbid water in the ponded pool in Vineyard Creek which likely resulted from the Wild Horse tank discharge and associated erosion of a dirt road at Wild Horse tank and dry creek banks as it flowed to the ponded pool.
8. On May 29, 2014, Regional Water Board staff requested that the Discharger submit a spill report to assess and determine the water quality and environmental impacts associated with the discharge. The Discharger submitted the spill report on June 5, 2014. In addition to the facts described above, the report indicated that the control system failure sent a false low level alarm to the Supervisory Control and Data Acquisition (SCADA) system and was acknowledged by the duty distribution operator at the time of the event. The Discharger's duty distribution operator was in training when he received the SCADA alarm notification and thus did not immediately respond.

ALLEGED VIOLATIONS

9. The Discharger violated Water Code section 13376, Clean Water Act section 301 and the Water Quality Control Plan for the San Francisco Bay Region by discharging approximately 204,000 gallons of potable drinking water containing up to 0.61 mg/L of chlorine into a tributary of Vineyard Creek on May 22, 2014.

LEGAL AUTHORITY

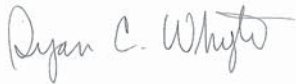
10. Water Code section 13376 requires that a person who proposes to discharge pollutants to navigable waters of the United States shall file a report of waste discharge with the Regional Water Board at least 180 days prior to discharging said pollutants. A person who violates Water Code section 13376 is liable civilly under Water Code section 13385, subdivision (a)(1).

11. The Regional Water Board's Water Quality Control Plan for the San Francisco Bay Region, Chapter 4, Table 4-1, prohibition 1, prohibits discharges with "particular characteristics of concern to beneficial uses ... to any non-tidal water" The Regional Water Board issued the prohibition pursuant to Water Code section 13243. A person who violates prohibitions issued pursuant to Section 13243 is liable civilly under Water Code section 13385, subdivision (a)(4).
12. Section 301 of the Federal Water Pollution Control Act ("Clean Water Act") (33 U.S.C. § 1311) prohibits the discharge of pollutants to waters of the United States except in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit. A person who violates Clean Water Act section 301 is liable civilly under Water Code section 13385, subdivision (a)(5).
13. Water Code section 13385, subdivision (c), authorizes the Regional Water Board to impose administrative civil liability for violations of section 13385, subdivision (a), in an amount not to exceed the sum of both of the following (1) ten thousand dollars (\$10,000) for each day in which each violation occurs; and (2) where there is a 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.
14. Pursuant to Water Code section 13385, subdivision (e), in determining the amount of any civil liability imposed under section 13385, subdivision (c), the Regional Water Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, 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 benefit or savings, if any, resulting from the violations, and other matters that justice may require.
15. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code sections 13327 and 13385(e). The entire Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11179.pdf
16. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, Title 14, section 15321.
17. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to "actions" and "special proceedings" and are contained in the Code of Civil Procedure apply to judicial proceedings, not administrative proceeding. (See *City of*

Oakland v. Public Employees' Retirement System (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, Section 405(2), p. 510.)

PROPOSED CIVIL LIABILITY

18. **Maximum Liability:** The violation occurred on one day, and the volume discharged but not cleaned up is estimated at 204,000 gallons. Therefore, the maximum administrative civil liability the Regional Water Board may impose is \$2,040,000.
19. **Minimum Liability:** According to Water Code section 13385, subdivision (e), at a minimum, liability shall be assessed at a level that recovers the economic benefit or saving, if any, derived from the violations.
20. **Proposed Liability:** Based on consideration of the above facts, after applying the Enforcement Policy penalty methodology as set forth in Exhibit A, the Assistant Executive Officer of the Regional Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$45,500**.
21. Notwithstanding the issuance of this Complaint, the Regional Water Board and/or the State Water Board shall retain the authority to assess additional penalties for further unauthorized discharge for which penalties have not yet been assessed or for violations that may subsequently occur.



Dyan C. Whyte
Assistant Executive Officer

September 19, 2014

Date

Exhibit A –Factors Considered to Determine Administrative Civil Liability

EXHIBIT A

Factors in Determining Administrative Civil Liability for North Marin Water District Unauthorized Discharge of Chlorinated, Potable Water to Unnamed Dry Tributary to Vineyard Creek Novato, Marin County

The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability based on the factors in Water Code sections 13327 and 13385 subdivision (e).

Each factor in the Enforcement Policy and its corresponding category, adjustment, or amount for the alleged violation is presented below.

Violation: – Unauthorized Discharge of 204,000 Gallons of Chlorinated Water to an Unnamed Dry Tributary to Vineyard Creek

On May 22, 2014, North Marin Water District (“District”) discharged approximately 204,000 gallons of potable water that contained up to 0.61 milligrams per liter (mg/L) of residual chlorine to an unnamed dry tributary to Vineyard Creek. The discharge resulted from an overflow from the District’s Wild Horse water storage tank due to a blown fuse to the tank level sensor.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm” factor considers the harm to beneficial uses that resulted, or may result, from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the harm or potential harm to beneficial uses; (2) the degree of toxicity of the discharge, and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5).

For the violation, the potential harm to beneficial uses is minor (i.e., a score of 1). This is because the discharge caused sedimentation and erosion and resulted in dead vegetation and turbid water summer refuge fish pool in Vineyard Creek. Turbid water can impair the feeding ability of fish. The dead vegetation could also elevate oxygen demand in the ponded pool as it decomposes over the summer and fall. The ponded pool contains fish, including rainbow trout and steelhead. The oxygen levels are maintained in the creek at this local by a local resident who operated an aeration system. A higher harm factor is not proposed because no dead fish were observed a day after the discharge occurred.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics for the Discharge

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material.

For the violation, the risk or threat of the discharge is moderate (i.e., a score of 2). The discharge was potable water with free chlorine at concentrations up to 0.61 mg/L. Chlorine exhibits toxicity to aquatic life even at low concentrations, and the U.S. EPA Water Quality Criterion for chlorine to prevent acute (lethal) effects to aquatic life is 0.019 mg/L.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated.

For the violation, the discharge was not susceptible to cleanup or abatement (i.e., factor of 1). The discharged material flowed into and commingled with ambient water in the ponded pool in Vineyard Creek so cleanup or abatement was not possible.

Step 2 – Assessments for Discharge Violations

When there is a discharge, the Water Board determines an initial liability amount on a per-gallon and/or a per-day basis using the sum of the Potential for Harm scores from Step 1 and a determination of degree of Deviation from Requirement.

For the violation, the sum of the three factors from Step 1 is 4. The degree of Deviation for the violation is moderate. The general requirements prohibiting discharges to any non-tidal water and requirements for reports of waste discharge and NPDES permits were only partially compromised, because the District was not permitted and was not under specific order prohibiting the discharge.

For the violation, the prosecution staff used both per-gallon and per-day factors as allowed by statute. The resulting per-gallon and per-day multiplier factor is 0.016, based on a Potential for Harm score of 4 and a “Moderate” Deviation from Requirement.

<p><u>Initial Liability Amount</u></p> <p>The initial liability for the violation is calculated on a per-gallon and per-day basis as follows:</p> <p><u>Per Gallon Liability:</u> (203,000 gallons) x (0.016) x (\$10/gallon) = \$32,480</p> <p><u>Per Day Liability:</u> \$10,000/day x (0.016) x (1 day) = \$160</p> <p>Total Initial Liability = \$32,640</p>

Step 3 – Per Day Assessment for Non-Discharge Violations

This assessment is for a discharge violation. Step 3 applies to non-discharge violations.

Step 4 – Adjustments to Determine Initial Liability for Violation

There are three additional factors to be considered for modification of the amount of the initial liability: the violator's culpability, efforts to clean up the discharge or cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used, with a higher multiplier for negligent behavior.

For the violation, the culpability multiplier is 1.2. This multiplier is warranted because the District's duty operator did not promptly respond to the SCADA alert notification as a reasonable person would have done under similar circumstances in his/her exercise of ordinary care. The discharge continued for about 6 hours (i.e., from 5:55 p.m. to 11:42 p.m.), and the volume of the discharge would have been substantially reduced had the duty operator promptly responded to the SCADA warning notification.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is used, with a higher multiplier when there is a lack of cooperation.

For the violation, the cleanup and cooperation factor multiplier is 1. Cleanup was not possible once the discharge reached the water way. The District staff was responsive to Regional Water Board staff requests. Since the incident, the District upgraded the level sensors for 16 storage tanks, and will upgrade tank level sensors for the remaining 24 tanks over the next two fiscal years. These will decrease the likelihood of tank overflows. Also, the District will develop a best management practices plan to prevent future water quality impacts associated with planned and unplanned chlorinated potable water discharges.

History of Violations

This factor is used to increase the liability when there is a history of repeat violations using a minimum multiplier of 1.

For the violation, the history factor multiplier is 1 because there is no record of the District having a similar violation in the past.

Step 5 – Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

Total Base Liability Amount

$\$32,640$ (Initial Liability) \times 1.2 (Culpability Multiplier) \times 1 (Cleanup and Cooperation Multiplier) \times 1 (History of Violations Multiplier) = Total Base Liability

Total Base Liability = **$\$39,168$ (rounded to $\$39,200$)**

Step 6 – Ability to Pay and to Continue in Business

The Enforcement Policy provides that if the Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's to continue in business, then the Total Base Liability amount may be adjusted downward if warranted.

In this case, the Regional Water Board prosecution staff has sufficient information to suggest that the District has the ability to pay the proposed liability. The District provides service to about 62,000 residents, primarily in Novato. In its 2013 Comprehensive Annual Financial Report for the fiscal years ended June 30, 2013, the District reported \$18.6 million in total revenues and \$96.2 million in total capital assets (net).¹ The proposed liability is about 0.3 percent of the 2013 total revenues.

Step 7 – Other Factors as Justice May Require

Regional Water Board prosecution staff incurred \$6,300 (rounded) in staff costs to prepare this analysis and supporting information. This consists of 80 hours of an engineer at \$55 per hour, 4 hours of a senior engineer at \$97 per hour, 10 hours of supervisory engineer at \$106 per hour, and 4 hours of the Assistant Executive Officer at \$114 per hour. These staff costs include standard overhead costs to the State and are based on the low end of the salary range for each class. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing. Although the final amount for such costs cannot be determined until completion of the matter, such costs could be quite substantial when additional investigation and analysis is required or if there is a hearing on this matter before the Regional Water Board.

Step 8 – Economic Benefit

The Enforcement Policy directs the Water Boards to determine any economic benefit associated with the violations and to recover the economic benefit gained plus 10 percent in the liability assessment.

Regional Water Board prosecution staff did not find a significant economic benefit associated with the violation. The alleged violation was an accident due to failure to respond to the SCADA alert that has no direct association with economic benefit.

Step 9 – Maximum and Minimum Liability Amounts

¹ <http://www.nmwd.com/financials/NMWDFinancials2013.pdf>

a) ***Minimum Liability Amount***

The Enforcement Policy requires that the minimum liability amount imposed not be below a Discharger's economic benefit plus 10 percent. Based on the Regional Water Board Prosecution Staff's estimate, the proposed liability is above this amount. Mandatory minimum penalties do not apply to the violation because the discharge is unauthorized.

b) ***Maximum Liability Amount***

The maximum administrative civil liability amount is the maximum amount allowed by Water Code Section 13385: (1) \$10,000 for each day in which the violation occurs; and (2) \$10 for each gallons exceeding 1,000 gallons that is discharged and not cleanup. The maximum liability for the violation is \$2,040,000.

Step 10 – Final Liability Amount

The total final liability amount proposed is **\$45,500** for the unauthorized discharge to the unnamed dry creek tributary to Vineyard Creek. The total proposed liability is based on consideration of penalty factors discussed above. It includes the Total Base Liability plus staff costs, and it is within the maximum and minimum liability amounts.