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OFFICE OF THE
CITY ATTORNEY

INTERIM CITY ATTORNEY
SANDRA G. TALBOTT
ASSISTANT CITY ATTORNEY
MATTHEW D. RUYAK
SUPERVISING DEPUTY CITY ATTORNEYS
GERALD C. HICKS
GUSTAVO L. MARTINEZ
BRETT M. WITTER

CITY OF SACRAMENTO
CALIFORNIA

915 I STREET, FOURTH FLOOR
SACRAMENTO, CA 95814-2604
PH 916-808-5346
FAX 916-808-7455
MAILING ADDRESS:
P.O. BOX 1948
SACRAMENTO, CA 95812-1948

DEPUTY CITY ATTORNEYS
MICHAEL J. BENNER
KOURTNEY BURDICK
JOSEPH P. CERULLO
SHERI M. CHAPMAN
SARI MYERS DIERKING
MICHAEL A. FRY
PAUL A. GALE
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CHANCE L. TRIMM
LAN WANG
DAVID S. WOMACK

May 21, 2012

California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114
Attention: Wendy Wyels, Supervisor
Compliance and Enforcement Section

Re: City's response to Administrative Civil Liability Complaint and Computation of
Penalty

Dear Ms. Wyels:

The City of Sacramento ("City") submits the following letter as requested by the Regional Water Quality Control Board ("Water Board") at the conclusion of the parties' meeting with the Water Board on April 24, 2012. The City strongly disagrees with the grounds for the assessed penalty as well as the computation of the amount of the penalty. The City attempted numerous times to coordinate the preparation of this letter with the Trust. Regrettably, despite repeated requests regarding the status of their letter, nothing was provided.

Introduction

On March 9, 2012, the Central Valley Regional Water Quality Control Board (the "Board"), issued Administrative Civil Liability Complaint R5-2012-0516 (the "Complaint") to the Sylvia Dellar Survivor's Trust (Dellar or the Trust) and the City of Sacramento. That Complaint cited numerous violations and ultimately fined both the Trust and the City \$164,796. While both the City and the Trust are "dischargers" under the Water Code, they are two separate entities, one a municipality, the other a private entity. The Complaint fails to distinguish between the two, unfairly imputes the acts of one to both, treats the City and the Trust as one entity, and assesses the fine collectively.

The newly created Water Quality Enforcement Policy, enacted in May 2010, emphasizes that the Water Boards shall "strive to be fair." The policy reiterates the importance of being "fair" when determining violations and assessing penalties. Instead, the Board has chosen to penalize a public entity for actions wholly outside of its control, for inaction which has occurred on property it does not own, and summarily dismiss as "various excuses" the factual bases for the City's inability to have satisfied some of the deadlines imposed by the Board.¹

This letter will address the fundamental flaws of the Board's history of the events and in the manner in which the penalty was calculated.

It should be noted, and the evidence will support, that while the City has always strived to work in concert with the Trust, on many occasions that cooperation was not reciprocated. It is clear that the Board desires the dischargers to consistently work together. However, when the Trust makes that impossible, it is inequitable to penalize the City for the actions of another entity. The Board has made clear that it prefers the parties to work cooperatively. The fact remains that in many times past, the Trust has made that impossible. While some of the assertions in this letter may irritate the Board, the City's silence would waive its right to appeal on these grounds.

Background

The City has taken the laboring oar to comply with the Order. The Complaint frequently fails to distinguish between actions taken by the City and those taken by the Trust. In 2007, the City submitted a closure plan for the Dellar Landfill. After the Order was issued in 2008, the City obtained a construction storm water permit and submitted a storm water pollution prevention plan as well as a 2008 erosion control plan.

In 2008, as a result of a severe budget deficit and in order to utilize funds over several budget periods, the City requested a three year extension for compliance. The Complaint notes that the Board "understood funding was not available" and extended the deadline for the City to submit the FCP until May 12, 2009.² The City complied with the new deadline and submitted the FCP on May 13, 2009. Board staff asked for more information and the City responded again, timely submitting the requested information on November 1, 2009.

In 2009, the City also stock piled approximately 60,000 cubic yards of soil on the Dellar property to be used in the closure plan. The City saved additional soil on City property. The City also submitted the Final Closure Design in 2009.

In the spring of 2010, the City solicited bids for construction of the closure plan. After receiving several bids; the construction contract was awarded to lowest responsive and responsible bidder, Douglas Veerkamp Engineering. However, after the contract was awarded, Elder Berry bushes

¹ A portion of the evidence establishing the City's efforts to seek cooperation of the Trust and comply with deadlines is set forth and attached to the letter of Gerald C. Hicks of February 1, 2012.

² The Board recognized the City's funding difficulties in 2008. Yet, in the 2012 Complaint, the Board insinuates that the City's deficit is a ploy asserted by the City Attorney's Office.

were identified on the Dellar property in May 2010. The City was forced to cancel the construction contract.

A biological survey documented the presence of Elder Berry bushes and Elder Berry Beetles, a listed endangered species under the Endangered Species Act. Pursuant to the request of the United States Department of Fish & Wildlife, the City began preparation of a Habitat Conservation Plan (HCP). Due to the need to develop an HCP, the City sought an extension to the final closure date of the CAO in order to prepare the HCP as requested by the Department of Fish & Wildlife. Remarkably, the Board denied the City's request for an extension in order to comply with the request of a federal agency.

During a meeting with the Board in January 2011, the Trust presented an alternative design for the HCP. The Trust agreed to take the lead on the closure of the property and presented an alternative schedule showing the work to be completed by the summer of 2011. Due to the City's public bidding requirements, it could not have met the deadlines included in the alternative work schedule had it undertaken to enter a new contract.

In early 2011, the Dellar Trust and City requested an extension to allow the City to apply for a grant from CALRECYCLE to help offset the closure cost. The Board granted the extension with the understanding the Dellar Trust, as owners of the property and the agreed lead on the project, would show progress over the summer.

In December 2011, the City secured the grant in the amount of \$720,000. The City informed the Dellar Trust and requested copies of the construction plans, bid documents and construction agreement. CALRECYCLE required the documents in order for the City to utilize grant funding. The City began requesting these documents on October 6, 2011. The Dellar Trust refused to respond or provide the requested documents. Finally, due to the lack of cooperation by the Dellar Trust, the City was forced to utilize formal discovery through litigation it had initiated against the Trust (i.e., a Demand for Production of Documents). The Dellar Trust failed to respond to the demand and ignored a subsequent written request that they be produced. Ultimately, the City was forced to file a motion to compel in order to obtain copies of the documents. That motion was granted on January 12, 2012. Unfortunately, the Dellar Trust chose not to comply with the court order and failed to deliver the documents by the date specified. The documents were finally produced over a week beyond the court's deadline.

The property is not owned by the City. The operative cleanup plan was not designed by the City and the engineers working at the property are not in contract with the City. In short, there was absolutely nothing the City could have done to force work to occur over the summer on the Dellar landfill. Characterizing the reasons as "excuses" ignores the facts that the City cannot trespass on the land of another and cannot interfere with another's contract.

Penalty Calculation

Water Code section 13327 instructs that when determining the amount of any civil liability to be imposed, the Water Board is "*required*" to consider such factors as the nature, circumstances, extent, gravity of the violations, the degree of toxicity of the discharges, the violator's ability to pay, prior history of violations, economic benefit or savings, if any, resulting from the violations and other matters that justice requires. The Water Quality Enforcement Policy (Enforcement Policy"), adopted by the Water Board in November 2010, repeatedly emphasizes that the Water Boards shall "strive to be fair..." The power given to the Water Boards by the Legislature should be wielded "fairly" and consistently. (p.9)

The Enforcement Policy identifies ten topics for determining the amount of penalty. The City disagrees with many of the positions taken by the Board. The City's response are below.

Step 1 – Potential for Harm for Discharge Violations

Step 2 – Assessment for Discharge Violations

In response to 1-2, the Board asserted that the "alleged violations are non-discharge violations, and therefore this first step is not used in the calculation."

The City does not disagree with numbers 1-2.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Board found two violations, the failure to submit 1) two erosion control reports and 2) the Closure Certification Report. (p.10) It determined the Initial Liability Amount is \$107,800.

The City did not submit the erosion control or Closure Certification Report because both were based on the original Closure Plan. The original Closure Plan is moot. It was superseded by the modified plan submitted by the Dellar Trust in January 2011 which addressed the need for an HCP due to the elderberry bushes on the property. In addition to the modified plan, the Dellar Trust also presented an alternative schedule showing indicating the work to be completed by the summer of 2011. The new plan was approved by the Board.

Penalizing the City for failure to adhere to inapplicable deadlines is not a fair or appropriate use of the penalty. The Board approved each extension requested by the parties. As the Board noted, there is no active discharge occurring from the property and no immediate hazard. The work on the closure is underway and near completion.

Step 4 – Adjustment Factors

The following factors should be considered to modify the amount of initial liability.

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

The Board assessed a multiplier of 1.2 because the "required reports are described in the CAO" and because the Discharger was given three years to complete the closure construction, yet continually requested more time to complete the project.

The Board's assessment of a multiplier which is nearly the maximum allowed, for "violations" of a moot Plan is not appropriate. Extensions were sought due to: lack of finances; the unexpected discovery of a protected species requiring a HCP pursuant to federal law; and the time to apply for a grant which would provide funding to assist the City complete its work on the Plan. The Board *approved* each request. To grant the extensions, yet penalize the parties for failing to meet the *original* deadlines, is a misuse of the Board's discretion. Moreover, *magnifying* those fines because the City sought those extensions is an inappropriate use of the Board's power.

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 to be used, with a higher multiplier when there is a lack of cooperation. "The Discharger" was given a multiplier of 1.1 based on the fact that there has been less cooperation and movement to correct the violations than would otherwise be expected.

As explained in the Introduction, the City has cooperated with the Board since 2007. Every time the Board requested additional information, the City provided it. When the Board requested a status report, the City timely responded. As discussed above, the City does not own the Dellar property. In addition, the plan currently in place is the Trusts's and the Trust is in contract with the engineers - not the City. Consequently, there are limitations on what the City can do. The City cannot trespass on the Dellar property to ensure that work is being done and has no privity with Veerkamp to enforce or adjust the schedule of work.

From the outset and despite difficult budget issues, the City has made every effort to comply with the Water Board's directive. The City has set aside funds to pay for its share of the closure cost and agreed to provide right-of-entry across the 28th Street Landfill during the closure construction period. The City has stock piled the soil needed. The City has offered help with respect to access, insurance issues, use of fire hydrants and addressing the apparent use of the property by the homeless. Only after receiving the Water Board's January 13, 2012 letter has the Dellar Trust started to make efforts to begin the closure - finally issuing a notice to proceed to its contractor on January 27, 2012. Penalizing the City for actions which are beyond its control is patently unfair.

Step 5 - Determination of Total Base Liability Amount: this is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3. This resulted in the Total Base Liability of \$142,296.

Step 6 – Ability to Pay and Ability to Continue in Business: The Board asserts that the two parties have been “litigation over this property and its value for years.” “The City of Sacramento is running a deficit for the last four or five years according to the City Attorney. However, the City and its solid waste program is supported by tax revenue. The City has the ability to raise taxes.”

The Board’s understanding of any litigation between the parties is misguided. No litigation was commenced by either party until the Board issued the Cleanup and Abatement Order. The “value” of the property has never been litigated.

The Board’s assertion that the City can “raise taxes” is not supported by any legal citations and is also inaccurate. Contrary to the Board’s assertion, the City does not have the authority to impose a tax. The City can propose a new tax but a general tax must be approved by a majority of voters and any special tax requires the approval of 2/3 of the voters. (California Constitution, Article 13.) Consequently, the Board’s assertion that the City could unilaterally “raise taxes” to pay this fine is legally incorrect.

The Board may argue that the City could raise utility rates to pay the fine. This assertion is also problematic. The City could attempt to raise rates but Proposition 218 and 213 require that any such raise be reasonable and related to the provision of services. Raising utility users’ rates to pay an administrative fine levied by the Water Board, would likely constitute a violation of Proposition 218. Moreover, the City cannot unilaterally impose the increase, the required procedure would have to be followed. That procedure requires written notice to all ratepayers, a 45 day waiting period, and a hearing in front of the Utilities Rate Advisory Committee. At that hearing, if 50% plus 1 of the customers protest the rate increase, it progresses no further. If the requisite number do *not* protest, then the recommended increase is presented to the City Council for a vote. The council can vote to adopt the recommendation, reject it, or modify the increase and adopt it.

The Board’s comment that the City is running a deficit “according to the City Attorney” insinuates that the City Attorney misrepresented the state of the City’s finances to avoid imposition of the penalty. The comment further suggests that the Board is unaware of the widely published local newspaper articles regarding the million dollar deficits in existence for several years; the hundreds of city employees who have been laid off; the number of years City employees have been furloughing; the recent budget meetings; the reduced services provided by the city due to decreased staff; the closure of public swimming pools; the number of years the City has been unable to give pay raises to its employees; the City Manager’s requests that employees pay their own pension contributions to save the City money.

The existence of the deficit is well documented and widely reported. If the Board is suggesting that it is unaware of the financial state of the City, we will be happy to provide further documentation.

In light of the foregoing, the Board's belief that imposing a fine on the City is a cost that can be easily and readily paid is disturbing and terribly misguided.

Step 7- Other Factors as Justice May Require:

Cost of Investigation and Enforcement Adjustment – over the last four years, Board staff have spent over 150 hours “associated with preparing the CAO, reviewing closure plans, status reports, email correspondence, preparing for and meeting with the Discharger, writing response letters, conducting site inspections, phone calls, and preparing this enforcement action. At a cost of \$150 per hour for staff, the time spent through preparation of the Complaint is \$22,500.

The Board is seeking reimbursement of costs, not just related to the preparation of the Complaint, but for work is required in order for the parties to cleanup the property. The parties could not remediate the property without Board oversight. Such oversight requires the review of closure plans, meetings with the parties, phone calls, as well as site inspections, these are not appropriate acts for recompense. If the Board is entitled to fee in this category, it should be limited the staff hours required for preparation of the Complaint.

Step 8 – Economic Benefit: The Enforcement Policy provides that civil liability, at a minimum, should be assessed at a level that recovers the economic benefit, plus ten percent, derived from the acts that constitute the violation so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrence to future violations.

The Board has determined that the cost to close the landfill is approximately \$2 million, of which approximately \$720,000 would be a grant. The economic benefit in this case is the savings in not completing the 2009 or 2010 erosion control plans and the closure certification report, as well as the delay in expending the funds to complete the closure. Using the U.S. EPA's GEN model, the economic benefit has been calculated at approximately \$130,390.

The Board's calculation is based on the City's failure to submit reports for a Plan that was superseded. There was absolutely no “economic benefit” to the City. A subsequent Plan was approved by the Board and implemented. The efforts to complete the closure plan continue along with the associated costs. This category of penalty determination is arbitrary and capricious.

Conclusion

It is the policy of the State Water Board that every violation result in the “appropriate enforcement response consistent with the priority of the violation.” “The first step in enforcement ranking is determining the relative significance of each violation.” (Policy, p. 4)

The Board has chosen to penalize the parties for alleged “violations” which are over four years old and for missing deadlines which were part of a Plan which is no longer in force. Despite granting each extension sought by the parties, the Board has penalized the parties for failing to

adhere to the original deadlines. The Board acknowledges that there is currently no discharge coming from the Dellar Property. There is no immediate threat to the environment. The gravity of the alleged violations is inconsequential in light of the progress made and the impending completion. The imposition of the fine is arbitrary and fails to accurately assess the City's behavior or the City's ability to pay.

Very truly yours,

SANDRA TALBOTT
Interim City Attorney



KATHLEEN T. ROGAN
Senior Deputy City Attorney