



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Office of Enforcement
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Arnold Schwarzenegger
Governor

TO: Charles R. Hoppin, Chairman
State Water Resources Control Board

FROM: Reed Sato, Director *[Signature]*
Office of Enforcement

DATE: October 4, 2010

SUBJECT: Recommendation for Review on Own Motion, Los Angeles Regional
Water Quality Control Board, Order on Complaint No. R4-2008-0120-M



Summary of Recommendation: The Office of Enforcement recommends that the State Water Resources Control Board (State Water Board) review the above-referenced order by the Los Angeles Regional Water Quality Control Board (Los Angeles Board) on its own motion. The order in question is attached hereto as Attachment A. The order was signed on September 16, 2010, and the Office of Enforcement received a copy on September 20, 2010.

The basis for review is that the Los Angeles Board misapplied the affirmative defense to mandatory minimum penalties (MMP) provided by Water Code section 13385(j)(1)(C). That section was clearly intended to apply to acts of sabotage or other unanticipated third-party actions that caused a permit violation. Here, the Los Angeles Board found that the City of Los Angeles (City) denied Mammoth Apartments' (Permittee) application to connect to the City's sewer system, and held that such denial then caused the discharger to violate the effluent limits in Los Angeles Board Order No. R4-2003-0111, *Waste Discharge Requirements for Discharges of Groundwater from Construction and Project Dewatering to Surface Waters in Coastal Watersheds of Los Angeles and Ventura Counties* (General Order for Construction Dewatering).

While the City's decision to deny the Permittee a sewer discharge permit may have been a factor leading to the Permittee's need for coverage under the General Order for Construction Dewatering, it cannot reasonably be held that the denial "caused" the Permittee's effluent limit violations. Those violations resulted from the decision to regularly discharge to surface water and remain subject to the General Order for Construction Dewatering, and its inability to comply with the effluent limit provisions. The violations occurred independently of the City's denial of authorization to discharge to the sewer. Moreover, the logical extension of the Los Angeles Board's reasoning is that the City, based solely its exercise of regulatory action to control discharges to its sanitary sewer system, is responsible for the effluent violations at issue. Such a result would be absurd as a matter of law and illustrates the fundamental flaw in the Los Angeles Board's determination.

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Background: The administrative civil liability complaint proposed the imposition of MMPs in the amount of \$255,000; \$219,000 for effluent limit violations under Water Code section 13385 subdivisions (h) and (i) and \$36,000 for serious late reporting violations under section 13385.1. On May 17, 2010, this matter was heard before a Los Angeles Water Board Hearing Panel (Panel) and the Panel found that Water Code section 13385 subdivision (j)(1)(C) applied because an intentional act of a third party occurred and certain effluent limit violations could not have been prevented or avoided by the exercise of due care. The Panel found that a third party, the City, intentionally denied the Permittee's application to connect and discharge to the sewer system beginning on December 21, 2006 and that denial caused the effluent limit violations to occur. By finding that section 13385 subdivision (j)(1)(C) applied, sixty-three (63) violations were exempted from mandatory minimum penalties and that no liability or penalties were assessed for those violations. On September 2, 2010, the Los Angeles Board approved the Panel's recommendation without modification and adopted an administrative civil liability order that imposed a MMP of \$66,000; \$30,000 for effluent limit violations occurring prior to December 21, 2006, and \$36,000 in serious late reporting violations pursuant to section 13385.1.

Basis for Recommendation: The Office of Enforcement asserts four separate and independent reasons why the intentional act of a third party defense cannot apply to the present case: 1) the Permittee did not assert nor meet its burden of proof to affirmatively demonstrate that the intentional act of a third party defense in Water Code section 13385 subdivision (j)(1)(C) applies; 2) the evidence in the administrative record does not support the findings of fact and conclusions of law in the Hearing Panel Report nor the ACL Order of September 16, 2010; 3) neither the Permittee nor the Los Angeles Board demonstrated that all elements of the defense applied, specifically, that the City's denial of an application to discharge groundwater to the sewer system constituted an intentional act that caused the Permittee's effluent limit violations; and 4) the Los Angeles Board's interpretation of the defense may hinder enforcement of the Los Angeles Board's General Order for Construction Dewatering.

Significantly, the Permittee never submitted any legal argument that Water Code section 13385(j)(1)(C) applied in this case, nor has the Los Angeles Board issued any explanation regarding its interpretation of Water Code section 13385(j)(1)(C).

Conclusion: Water Code section 13385 commands that MMPs be assessed for specified violations. Undoubtedly the statute compels the assessment of MMPs in situations where a regional board or the State Water Board might not otherwise assess penalties if it had the discretion to do so. The Office of Enforcement appreciates the struggles that regional board members go through in addressing violations that require

Mr. Charles R. Hoppin
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the assessment of mandatory minimum penalties. Nevertheless, the application of the 13385(j)(1)(C) exemption to the facts in this case is unwarranted and improper.

The State Water Board should review the matter, clarify the appropriate use of Water Code section 13385(j)(1)(C), and remand the case back to the Los Angeles Board with a directive regarding the applicable minimum penalties for the proven violations.

Enclosures

cc: Mr. Basil Behrman
Mammoth Apartments, LLC
4852 Coldwater Canyon Avenue
Sherman Oaks, California 91423

Mr. Tom Howard
Executive Director
State Water Resources Control Board

(Via email only)

Mr. Stephen O'Neil
Sheppard Mullin Richter & Hampton, LLP
SOneil@sheppardmullin.com

Mr. Samuel Unger
Executive Officer
Los Angeles Regional Water Board
SUnger@waterboards.ca.gov

Mr. Michael A.M. Lauffer
Chief Counsel
State Water Resources Control Board
MLauffer@waterboards.ca.gov



California Regional Water Quality Control Board

Los Angeles Region



Linda S. Adams
Agency Secretary

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: <http://www.swrcb.ca.gov/rwqcb4>

Arnold Schwarzenegger
Governor

September 15, 2010

Mr. Basil Behrman
Mammoth Apartments, LLC
4852 Coldwater Canyon Avenue
Sherman Oaks, CA 91423

Certified Mail
Return Receipt Requested
No. 7005 1820 0001 2684 2345

**DIRECTIVE FOR ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R4-2008-0120-M
AGAINST MAMMOTH APARTMENTS, LLC, 4328 MAMMOTH AVENUE, SHERMAN OAKS,
CALIFORNIA (ORDER NOS. R4-2003-0111, NPDES PERMIT NO. CAG994004, CI-8172)**

Dear Mr. Behrman:

On February 16, 2010, the Executive Officer of the Regional Water Quality Control Board, Los Angeles Region (Regional Board) issued Administrative Civil Liability Complaint No. R4-2008-0120-M (ACLC) against Mammoth Apartments, LLC in the amount of \$255,000 for 74 effluent violations and 12 late reporting violations contained in Regional Board Order No. R4-2003-0111.

On May 17, 2010, the ACLC was heard by a Hearing Panel of Board Members pursuant to California Water Code (CWC) § 13376. The Panel subsequently submitted to the Regional Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended an administrative civil liability of \$66,000.

On September 2, 2010, the Regional Board upheld the imposition of the Panel's proposed administrative civil liability on the Permittee and issued Order on Complaint No. R4-2008-0120-M (ACLO), a copy of which is attached hereto and incorporated herein by reference, which directed payment of a total assessment of \$66,000.

As noted in Finding 12 of the ACLO, the assessment is due and payable thirty (30) days after the date of adoption of the Order. A check in the amount of \$66,000 (payable to the State Water Resources Control Board Cleanup and Abatement Account) must be received by the Regional Board on or before October 4, 2010.

In the event that the Permittee fails to comply with the requirements of this Directive, the Executive Officer will refer this matter to the Office of Attorney General for enforcement.

If you have any questions please contact Mr. Hugh Marley at (213) 620-6375 regarding this matter.

Sincerely,


Samuel Unger, P.E.
Executive Officer

Enclosures
cc: See Attached Mailing List

California Environmental Protection Agency



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Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

Mr. Basil Behrman
Mammoth Apartments, LLC

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September 15, 2010

Mailing List

Mr. Jeff Ogata, Office of Chief Counsel, State Water Resources Control Board
Ms. Jennifer Fordyce, Office of Chief Counsel, State Water Resources Control Board
Ms. Mayumi Okamoto, Office of Enforcement, State Water Resources Control Board
Mr. Stephen J. O'Neil, Sheppard, Mullin, Richter & Hampton, LLP

California Environmental Protection Agency



Recycled Paper

Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION

In the matter of:) Order on Complaint No. R4-2008-0120-M
) Mandatory Minimum Penalty
) for
Mammoth Apartments, LLC) Violation of California Water Code § 13376
Mammoth Apartments) and
4328 Mammoth Avenue) Order No. R4-2003-0111
Sherman Oaks, CA 91423) (NPDES No. CAG994004)

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board) has found and determined that the Mammoth Apartments, LLC (hereinafter Permittee) violated requirements contained in California Water Code (CWC) section 13376 and Order No. R4-2003-0111.
2. The Permittee operates the Mammoth Apartments (facility) located at 4328 Mammoth Avenue, Sherman Oaks, California, which is subject to the waste discharge requirements and limitations set forth in Los Angeles Water Board Order No. R4-2003-0111.
3. In 1999, the Legislature enacted two laws to establish mandatory minimum penalties (MMPs) for certain violations of NPDES permits. Each bill contained a legislative finding that then-current "enforcement efforts of the state board and the regional boards may not be achieving full compliance with waste discharge requirements in a timely manner." The statute states that an MMP "shall be assessed" for each serious violation. The plain language of the statute removes discretion from the water boards regarding the minimum amount that they must assess when a serious violation has occurred. As a result, Water Code section 13385 now provides for administrative civil liability (ACL) that may be assessed by discretionary action (subdivisions (c) - (g)), but identifies certain violations where any civil liability must recover minimum penalties of \$3,000 for each violation (subdivisions (h) - (I)). When a water board has established that a serious violation has occurred, the discharger is liable. There are three affirmative defenses to liability available to the discharger, but the discharger bears the burden of proving that one of these defenses relieves it of liability for MMPs under Water Code section 13385. Proof of any of the three defenses, with respect to a violation suspends the MMP provisions of section 13385 for that violation. The MMP provisions do not apply when a violation is caused by: (1) an act of war; (2) an unanticipated, grave natural disaster; or (3) an 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 (subdivision (j)(1)).
4. 74 violations of Order No. R4-2003-0111 were reported in the Permittee's self-monitoring reports during the period September 2006 through July 2008. Out of these 74 effluent limit violations, 10 are subject to MMPs because of the application of Water Code section 13385, subdivision (j)(1)(C). These violations include effluent limit exceedances for sulfate, selenium, and total dissolved solids (TDS).

5. Furthermore, the Los Angeles Water Board received the Permittee's 4th Quarter 2005 self-monitoring report on October 4, 2006, a total of 231 days after the due date of February 15, 2006. The Los Angeles Water Board also received the Permittee's 1st Quarter 2006 and 2nd Quarter 2006 self-monitoring reports on October 4, 2006, a total of 142 days late and 50 days late, from the due dates of May 15, 2006 and August 15, 2006, respectively. These late reporting violations constitute 12 serious violations subject to MMPs. The violations are identified in Exhibit "A" and attached hereto and incorporated by reference.
6. On February 16, 2010, the Assistant Executive Officer issued Complaint No. R4-2008-0120-M to the Permittee in the amount of \$255,000 for 74 effluent violations and 12 late reporting violations of Order No. R4-2003-0111, as identified in Exhibit "A" to Complaint No. R4-2008-0120-M.
7. On May 17, 2010, this matter was heard in Los Angeles, California before a Los Angeles Water Board Hearing Panel (Panel) consisting of Los Angeles Water Board Members Ms. Madelyn Glickfeld (Vice Chair), Mr. Steve Blois, Ms. Francine Diamond, and Ms. Jeanette Lombardo. Mr. Stephen O'Neil of Sheppard Mullin, LLC, appeared on behalf of Mammoth Apartments, LLC. Mr. Samuel Unger, Mr. Hugh Marley, and Ms. Mayumi Okamoto appeared for the Prosecution Team. The Panel subsequently submitted to the Los Angeles Water Board its report of the hearing consisting of the findings of fact, conclusions of law, and recommended ACL, a copy of which is attached hereto and incorporated herein by reference.
8. The Panel found, based on the specific facts of this case, that Water Code section 13385, subdivision (j)(1)(C) applies, and that the Permittee is not liable for MMPs for effluent limit violations occurring after December 21, 2006.
9. The Panel found, based on the evidence, that the Permittee committed 12 serious reporting violations subject to MMPs.
10. Upon considering the Panel report and making an independent review of the record, the Los Angeles Water Board during its meeting on September 2, 2010, upheld the imposition of the Panel's proposed ACL on the Permittee. The Los Angeles Water Board found that due to the intentional act of a third party, the Permittee's effluent limit violations after December 21, 2006, could not have been prevented or avoided by the exercise of due care. The Los Angeles Water Board directed payment of a total assessment of \$66,000 (\$30,000 for the effluent limit violations and \$36,000 for the late reporting violations) on Complaint No. R4-2008-0120-M.
11. The Panel's report is hereby adopted and the findings and conclusions are incorporated by reference into this order.
12. The assessment is due and payable and must be received by the Los Angeles Water Board no later than 30 days after the date of adoption of this Order on Complaint by the Los Angeles Water Board.
13. In the event that the Permittee fails to comply with the requirements of this Order, the Executive Officer is authorized to refer this matter to the Office of Attorney General for enforcement.
14. Any person aggrieved by this action of the Regional Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with Water Code 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 of this Order, except that if the thirtieth day following the date of this Order 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. 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.

IT IS HEREBY ORDERED that, pursuant to section 13323 of the CWC, the Permittee shall make a cash payment of \$66,000 (payable to the State Water Pollution Cleanup and Abatement Account) no later than 30 days after the date of issuance of this Order.

In the event that the Permittee fails to comply with the requirements of this Order on Complaint No. R4-2008-0120-M, the Executive Officer is authorized to refer this matter to the Office of Attorney General for enforcement.

I, Sam Unger, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the Los Angeles Water Board on September 2, 2010.

Samuel Unger
Sam Unger
Executive Officer

9-16-10
Date

EXHIBIT "A"
Effluent Limit Violations

Mammoth Apartments, LLC
Mammoth Apartments
CI 8172

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/Chronic	Water Code Section 13385	Penalty
09/29/2006	3 rd Quarter 2006	Daily Maximum	TDS	1,320	950	mg/L	1	39%	Chronic	(i)(1)	\$0
09/29/2006	3 rd Quarter 2006	Daily Maximum	Sulfate	529	300	mg/L	1	76%	Serious	(h)(1)	\$3,000
09/29/2006	3 rd Quarter 2006	Monthly Average	Selenium	7.9	4	µg/L	2	96%	Serious	(b)(1)	\$3,000
10/31/2006	4 th Quarter 2006	Monthly Average	Selenium	6.70	4	µg/L	2	68%	Serious	(h)(1)	\$3,000
11/22/2006	4 th Quarter 2006	Daily Maximum	Selenium	10.1	8	µg/L	2	26%	Serious	(h)(1)	\$3,000
11/22/2006	4 th Quarter 2006	Daily Maximum	TDS	1,310	950	mg/L	1	38%	Chronic	(i)(1)	\$3,000
11/22/2006	4 th Quarter 2006	Daily Maximum	Sulfate	528	300	mg/L	1	76%	Serious	(h)(1)	\$3,000
11/22/2006	4 th Quarter 2006	Monthly Average	Selenium	10.1	4	µg/L	2	153%	Serious	(b)(1)	\$3,000
12/01/2006	4 th Quarter 2006	Daily Maximum	TDS	1,240	950	mg/L	1	31%	Chronic	(i)(1)	\$3,000
12/01/2006	4 th Quarter 2006	Daily Maximum	Sulfate	495	300	mg/L	1	65%	Serious	(b)(1)	\$3,000
12/15/2006	4 th Quarter 2006	Daily Maximum	Selenium	11.8	8	µg/L	2	48%	Serious	(b)(1)	\$3,000
										Total	\$30,000

HEARING PANEL REPORT AND PROPOSED ORDER

Mammoth Apartments, LLC, Mammoth Apartments
ACL Complaint No. R4-2008-0120-M

This matter was heard on May 17, 2010 in Los Angeles, California before a panel consisting of Regional Board Vice-Chair Madelyn Glickfeld, and Board members Mr. Steve Blois, Ms. Francine Diamond, and Ms. Jeanette Lombardo. Mr. Stephen O'Neil of Sheppard Mullin LLC appeared on behalf of Mammoth Apartments, LLC (Permittee). Mr. Samuel Unger, Mr. Hugh Marley, Ms. Mayumi Okamoto, and Ms. Jennifer Fordyce appeared for the Prosecution Team.

The Panel members make the following:

FINDINGS OF FACT

1. Mammoth Apartments, LLC ("Permittee") operates the Mammoth Apartments (facility) located at 4328 Mammoth Avenue, Sherman Oaks, California. The Permittee discharged up to 800 gallons per day (gpd) of seepage groundwater into a nearby storm drain. The wastewater flowed through the storm drain system into Los Angeles River (upstream of Sepulveda Flood Control Basin), a navigable water of the United States.
2. The Permittee's wastewater discharges from the facility contain pollutants and are subject to the requirements and limitations set forth in California Water Code (CWC) § 13376 and Regional Board Order No. R4-2003-0111. CWC § 13376 prohibits the discharge of pollutants to surface waters, except as authorized by waste discharge requirements that implement the provisions of 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.
3. CWC § 13385(h)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for each serious violation. Pursuant to CWC § 13385(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. Selenium is a Group II pollutant.
4. CWC § 13385(i) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for each violation whenever the permittee violates a waste discharge requirement effluent limitation 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 within that time period.
5. CWC § 13385.1 (a)(1) requires the Regional Board to assess a mandatory minimum penalty of three thousand dollars (\$3,000) for a "serious violation" defined by that section as "a failure to file a discharge monitoring report required pursuant to Section 13323 for

each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance limitations contained in waste discharge requirements that contain effluent limitations. This section applies to violations occurring on or after January 2004.

6. The Permittee reported seventy-three (73) alleged violations of Order No. R4-2003-0111 in the Permittee's self-monitoring reports during the period September 2006 through July 2008 that would be subject to mandatory minimum penalties. These violations include effluent limit exceedances for sulfate, selenium, and total dissolved solids (TDS).
7. Mr. Stanley Brent and Mr. Basil Behrman testified that they are the shareholders of Mammoth Apartments, LLC, along with their respective wives.
8. Mr. Brent testified that he tried to get a permit from the City of Los Angeles to accept the groundwater discharge into the sewer system three times from 2006 through 2009. Finally, in 2009, the City agreed and Mammoth Apartments was able to discontinue its NPDES permit with the Regional Board. He did not know why the City changed its stance from denying them discharge authorization in 2006 and 2008. Mr. Brent testified that Mr. Behrman's son, Marc, submitted the applications to the City.
9. In the Permittee's submitted evidence, the Hearing Panel found sewer connection applications and other documents from Mammoth Apartments to the City of Los Angeles dated December 21, 2006, January 3, 2007, and January 24, 2008. These documents corroborate the testimony of Mr. Brent that Mammoth Apartments tried to get permission to discharge into the Los Angeles City sewer system. The copies of the applications are found on pages 7-374 through 7-390 of the Panel's materials.
10. Mr. Behrman testified that after being denied the ability to discharge the seepage groundwater into the sewers, the dischargers investigated other means of treating or disposing of the groundwater as suggested by Regional Board staff. They looked at treating the discharge by using skid-mounted equipment but that would have displaced parking spaces for the residents and would cause them to violate local ordinances requiring a minimum number of parking spaces. They looked into using the discharge for irrigation but there is no landscaping on site. In short, they looked at all possible ways to discharge suggested by Regional Board staff and other experts but found no feasible alternatives.
11. Mammoth Apartments tried to avoid discharge violations in a substantial number of ways. In trying to avoid violations by discharging the seepage groundwater to the sewer system, it was prevented due to the intentional act of a third party, i.e. the City of Los Angeles. Mammoth Apartments tried several times. Because Mammoth Apartments also investigated alternatives, the effects of the intentional act could not have been prevented or avoided by the exercise of due care or foresight.
12. The violations identified in Exhibit "A" attached hereto and incorporated herein by reference beginning on September 29, 2006 and ending on December 15, 2006 are the

only violations subject to mandatory minimum penalties. The Panel specifically finds that those violations occurred as reported by the Permittee resulting in mandatory minimum penalties in the amount of \$30,000. The remaining violations are excepted pursuant to Water Code section 13385, subdivision (j)(1)(C), a finding which is specifically based on the facts of this case.

13. Furthermore, the Regional Board received the Permittee's 4th Quarter 2005 self-monitoring report on October 4, 2006, a total of 231 days after the due date of February 15, 2006. The Regional Board also received the Permittee's 1st Quarter 2006 and 2nd Quarter 2006 self-monitoring reports on October 4, 2006, a total of 142 days late and 50 days late, from the due dates of May 15, 2006 and August 15, 2006, respectively. These late reporting violations constitute twelve (12) serious violations subject to mandatory minimum penalties. The violations are identified in Exhibit "A" and attached hereto and incorporated by reference
14. Mr. Behrman testified that the reports were late because Mammoth Apartments changed property management companies and it did not know reports were due to the Regional Board. Once they were informed, Mr. Brent made sure the reports were not late.
15. The twelve serious violations for late reporting are subject to mandatory minimum penalties in the amount \$36,000.
16. The Permittee's representative argued that the Regional Board should be prevented from assessing mandatory minimum penalties because it violated the State Board's 2002 Enforcement Policy which states that the Regional Board should issue mandatory minimum penalties within seven months of the time that the violations qualify as mandatory minimum penalty violations or sooner if the total mandatory minimum penalty is \$30,000 or more.
17. On February 16, 2010, the Assistant Executive Officer issued Complaint No. R4-2008-0120-M against the Permittee for a mandatory minimum penalty in the amount of \$255,000 for those violations of waste discharge identified in Exhibit "A".

CONCLUSIONS OF LAW

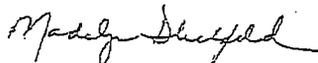
1. Water Code section 13385, subdivision (j), states that mandatory minimum penalties do not apply if a violation is caused by an intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight (subdivision (j)(1)(C)).
2. The action of the City of Los Angeles, in denying a sewer connection discharge permit to the Permittee, constitutes an intentional act of a third party.
3. The Permittee attempted to comply with the permit by looking at other alternatives, such as treatment of the seepage groundwater discharge. The Permittee tried many, if not all,

of the alternatives suggested by Regional Board staff but none of the alternatives proved to be feasible. Therefore, the effects of the denial of the sewer connection permit could not be prevented or avoided by the exercise of due care.

4. As a result of the above findings, the Permittee is found not to be subject to mandatory minimum penalties for violations of its permit after December 21, 2006 with respect to effluent limit exceedances except as noted herein. The discharges of effluent containing sulfate, selenium, and TDS in excess of the effluent limitations of Order No. R4-2003-0111 into navigable waters of the United States, as found in Finding of Fact Nos. 6 and 13 and Exhibit "A", constitute ten (10) violations of effluent limitations contained in Order No. R4-2003-0111 and twelve (12) late reporting violations.
5. There are no statutes of limitations that apply to this administrative proceeding. The statutes of limitations that refer to "actions" and "special proceedings" contained in the California Code of Civil Procedure apply to judicial proceedings, not administrative proceedings. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405(2), p. 510.
6. \$66,000 is the mandatory minimum penalty amount that must be assessed against the Permittee under CWC § 13385 for the violations identified in Exhibit "A" as modified by the Hearing Panel.
7. With respect to the Permittee's argument that the Regional Board violated the State Board Enforcement Policy in not bringing the complaint within 7 months of the time the violations qualify as mandatory minimum penalties, it is clear that the policy uses the word "should," which is instructive, not mandatory. Whether bringing the action more promptly would have led to fewer violations is speculative. Permittees are required to know the permit conditions. Therefore, this argument is not persuasive.
8. The maximum amount of administrative civil liability assessable for the violations alleged in Complaint No. R4-2008-0120-M pursuant to CWC § 13385 is \$10,000 per day of violation plus \$10 times the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

RECOMMENDED MANDATORY MINIMUM PENALTY

The amount of \$66,000 should be imposed on the Permittee as a mandatory minimum penalty for the violations found herein to have been committed by the Permittee. A proposed Order on Complaint No. R4-2008-0120-M is attached.



Madelyn Glickfeld
Vice Chair

Date

July 19, 2010

Attachments:

Exhibit "A"

Proposed Order on Complaint No. R4-2008-0120-M

EXHIBIT "A"
Effluent Limit Violations

Mammoth Apartments, LLC
Mammoth Apartments
CI 8172

Date	Monitoring Period	Violation Type	Parameter	Reported Value	Permit Limit	Units	Pollutant Category	% Exceeded	Serious/Chronic	Water Code Section 13385	Penalty
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										Total	\$30,000

