

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION**

In the matter of:)	Complaint No. R4-2010-0106
)	
Port of Los Angeles)	Violation of California
)	Water Code § 13385(a)(5)
)	

The Interim Executive Officer of the Regional Water Quality Control Board, Los Angeles Region (Regional Board) hereby gives notice that:

1. This Complaint is issued to PORT OF LOS ANGELES (Discharger), under authority of California Water Code (CWC) section 13323 to assess administrative civil liability pursuant to CWC section 13385. This Complaint proposes administrative civil liability in the amount of \$28,050 for the Discharger's failure to comply with the federal Water Pollution Control Act (33 U.S.C. § 1351 et seq.) (Clean Water Act). The Discharger failed to obtain a CWA §401 water quality certification prior to retrofitting an existing berthing and mooring system.
2. The Discharger owns berths 167-169 at Los Angeles Harbor, Mormon Island, San Pedro, City of Los Angeles, Los Angeles County, California (the Site). The project in this matter is named Berthing Dolphin Improvements-Berths 167-169 in the Port of Los Angeles and has also been referred to as Berths 167-169 Shell Oil Terminal Mooring and Berthing System Rehabilitation Project (the Project). The Project replaced an existing timber berthing and mooring system with new fenders and quick release hooks to comply with the Marine Oil Terminal Engineering and Maintenance Standards by the California State Lands Division. Activities included pile driving; removing and disposing of timber decking, support piles and fender piles; and installing steel piles, concrete dolphin caps, rubber fenders, and quick release hooks. The total project size was 0.1 acre.
3. The Project started July 27, 2009, and was completed in its entirety on April 27, 2010. From July 27, 2009, through September 1, 2009, the Discharger was demolishing, driving piles, and reconstructing Berth 168. Best management practices (BMPs) were necessary for the entire duration of the Project; however, the greatest potential for impacts to water quality was during the pile driving that took place in the water itself. This Complaint alleges that the Discharger failed to have a § 401 certification from July 27, 2009, through September 1, 2009, when water quality was most threatened.
4. The Discharger is alleged to have violated provisions of the law for which the Regional Board may impose civil liability pursuant to CWC section 13385(c) from the period from

July 27, 2009, through September 1, 2009. This Complaint proposes to assess \$28,050 in penalties for the violation cited based on the considerations described herein. The deadline for public comments on this Complaint is 5:00 p.m. on **August 30, 2010**.

5. Unless waived, a hearing before a Regional Board Hearing Panel will be held on October 27, 2010, at 10:00 a.m. at 320 W. 4th Street, Los Angeles, CA 90013 (room to be determined). The Discharger or its 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 Board. An agenda will be mailed to the Discharger approximately ten days before the hearing date.
6. The Discharger must submit any written evidence and/or information concerning this Complaint to the Regional Board no later than 5:00 p.m. on **September 28, 2010**, for the Hearing Panel's consideration. Any written evidence submitted to the Regional Board after this date and time may not be accepted or responded to in writing.
7. At the hearing, the Hearing Panel will consider whether to affirm, reject, or modify the proposed administrative civil liability, or to refer the matter to the Attorney General, or take other enforcement action.
8. United States Environmental Protection Agency regulations require public notice of any proposed settlement for administrative civil liability assessed for Clean Water Act violations. Accordingly, interested persons will be given 30 days to comment on any proposed settlement of this Complaint.
9. This issuance of this Complaint is an enforcement action and is, therefore, exempt from the California Environmental Quality Act, pursuant to Title 14, California Code of Regulations, Section 15321.

ALLEGATIONS

10. **Site Location and Project Description:** The Site is 0.1 acres at berths 167-169 in the Shell Marine Oil Terminal on Mormon Island in the Port of Los Angeles. The Project removed part of the existing timber wharf, and added a new structure at the face of the existing wharf. Approximately 4,600 square feet of timber desk, 27 piles, 120 fender piles, eight camels, and hardware were removed and disposed. For the new berthing structure, the Discharger installed eight 54 inch diameter steel piles that each supports a fendering system using a large derrick barge with a hammer to drive the piles. Each steel pile is approximately 124 feet in length, of which 68 feet have been driven into the seabed below ground underwater, 40 feet are in the water, and the remaining 16 feet are above water with concrete caps and rubber fenders. The old timber piles were pulled out by crane, offloaded on a barge and transported onshore for disposal. Containment booms were placed around the construction area. (*Shell Marine Oil Terminal Berths 167-169 Berthing Dolphin Improvements*, pages 1-3.)

11. **Regulatory Status:** Starting on April 27, 2009, and throughout May and June, 2009, Regional Water Board continually informed staff at the Port of Los Angeles that the Project required a § 401 certification.

- a. In response to Regional Water Board staff's inquiries about certification, on June 2, 2009, the Discharger represented it was preparing an application for a § 401 certification
- b. On July 1, 2009, the United States Army Corps of Engineers granted coverage under their Nationwide Permit No. 3. to impact navigable waters of the United States.
- c. On October 20, 2009, via an email from Army Corps of Engineers Staff Spencer MacNeil, Regional Water Board staff was informed that the Project had begun without § 401 Certification.
- d. On November 12, 2009, the Regional Water Board Executive Officer issued a Notice of Violation to the Discharger for conducting activities related to the Project without first obtaining a § 401 certification.
- e. On December 7, 2009 the Regional Water Board received an application for a CWA § 401 Certification for the Project. Regional Board staff did not act on the application; it was incomplete and the Regional Board does not prepare after-the-fact § 401 certifications.
- f. On December 21, 2009, the Executive Officer issued a CWC § 13267 Investigative Order requiring the Discharger to submit technical reports describing the Project.
- g. On February 4, 2010 the Regional Water Board received a response to the §13267 Investigative Order from the Discharger.

VIOLATION

12. On or about and between July 27, 2009, through September 1, 2009, the Discharger violated Clean Water Act § 401 by failing to obtain certification from the Regional Water Board for construction activities, including pile driving, that may result in any discharge in the navigable waters of the United States.

13. Pursuant to CWC section 13385(a)(5) and (c)(1), any person who violated any requirements of § 401 of the Clean Water Act may be civilly liable in an amount not to exceed \$10,000 for each day of violation.

14. If this matter proceeds to hearing, the Interim Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including, but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this Complaint through completion of the hearing.

PROPOSED LIABILITY

15. The State Water Resources Control Board's Water Quality Enforcement Policy (amended November, 2009)¹ establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in CWC section 13385(e). (Attachment A) incorporated herein and made a part of this Complaint by this reference, presents the administrative civil liability derived from the use of the penalty methodology in the Enforcement Policy.
16. **Initial Liability Determination:** The per day factor is 0.3. This factor is determined by a matrix analysis using the potential for harm and the deviation from applicable requirements. The deviation from the requirement to submit an application and obtain § 401 certification is major. The Discharger completely disregarded the requirement after having Regional Water Board staff inform the Discharger several times that they needed the § 401 certification prior to construction activities, and the Discharger's representation it was preparing an application.
- a. There are 37 days of violation starting and including July 27, 2009, through September 1, 2009. Regional Board staff has determined that the Enforcement Policy's alternative approach to penalty calculation is appropriate. A multiple-day approach is appropriate since the violations result in no economic benefit from the illegal conduct that can be measured on a daily basis.
 - b. Following the Enforcement Policy, for violations that last more than 30 days, the liability shall not be less than an amount that is calculated based on a an assessment of the initial liability amount for the first day of violation, plus an assessment for each five day period of violations until the 30th day, plus an assessment for each 30 days of violation thereafter. Since the Discharger failed to comply with § 401 for 37 days, only 7 days' worth of violations are accrued based on a per day assessment for day 1, 5, 10, 15, 20, 25, 30, 60, 90, etc.
 - c. Applying the per day factor to the number of days of violation yields an initial liability of \$21,000. This is the collapsed number of days of violation (7) multiplied by the per day factor (0.3), multiplied by the statutory maximum penalty per day (\$10,000).
17. **Adjustments to Initial Liability Determination:** Based on the following adjustments, the amount revised from the initial liability is \$23,625.
- a. The Discharger's culpability factor is 1.5 based on the Discharger's intentional failure to obtain § 401 certification. The Discharger was given sufficient notice with multiple communications with staff.
 - b. The Discharger's cleanup and cooperation factor is 1.0. Cleanup is not a factor in this matter because the violation is failure to apply for a § 401. The Discharger submitted a § 401 certification application on December 7, 2009, five months after the Discharger started construction.

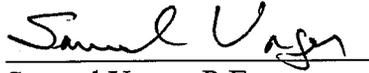
¹ The Enforcement Policy may be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

- c. The discharger's history of violations factor is 0.75. The Discharger has a history of applying for § 401 certifications for other projects and enforcement staff is not aware of any prior violations.
- d. Based on these adjustments, the amount revised from the initial liability is \$23,625. This is the initial liability (\$21,000) multiplied by the culpability factor (1.5), multiplied by the cleanup and cooperation factor (1.0), multiplied by the history of violations factor (0.75).
18. **Total Base Liability Amount:** After considering the adjustment factors, the total base liability amount is calculated at \$23,625.
19. **Ability to Pay and to Continue in Business:** The Port of Los Angeles is a revenue-generating department of the City of Los Angeles and had a net income of \$125.0 million in fiscal year 2008 and \$41.9 million in fiscal year 2009². Therefore, Staff selected 1, which is a neutral multiplier. Accordingly, the Total Base Liability Amount was not adjusted.
20. **Other Factors as Justice May Require:** As of the date of the issuance of this Complaint, enforcement staff has incurred costs of investigation and enforcement in the amount of \$4,425. This represents approximately 29.5 hours staff time devoted to investigating and drafting the Complaint at \$150 per hour. This amount is added to the total base liability amount, equaling \$28,050. There are no additional factors as justice may require.
21. **Economic Benefit:** The economic benefit estimated for the violation(s) at issue is approximately \$915, which is the amount of the § 401 certification base fee of \$640, plus \$275 assessed for the size of the area of impact, approximately 0.1 acres. The adjusted total base liability amount of \$28,050 is more than at least 10% higher than the economic benefit amount as required in the Enforcement Policy. Therefore, the liability amount is not adjusted for this factor.
22. **Maximum and Minimum Liability:** The statutory minimum liability is recovering the economic benefit of \$915 pursuant to CWC § 13385(e). The maximum liability amount for 37 days of violation is \$370,000. The Enforcement Policy requires that the discretionary administrative civil liability must not exceed the maximum liability amount nor be less than the minimum liability amount. There is no need to adjust the proposed liability for this factor.

² http://www.portoflosangeles.org/newsroom/press_kit/facts.asp

23. **Final Proposed Liability Amount:** Based on the foregoing analysis, and consistent with the Enforcement Policy, the proposed administrative civil liability is \$28,050. Attachment A is a spreadsheet that demonstrates the use of the liability calculation methodology.



Samuel Unger, P.E.
Interim Executive Officer
Los Angeles Regional Water Quality Control Board

July 29, 2010

Attachment A: Calculation Methodology and Liability Methodology Spreadsheet

WAIVER FORM

FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R4-2008-0069-M

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent the Port of Los Angeles (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R4-2010-0106 (hereinafter the "Complaint"). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served [with the complaint]. The person who has been issued a complaint may waive the right to a hearing."

(*OPTION 1: Check here if the Discharger waives the hearing requirement and will pay the recommended liability.*)

a. I hereby waive any right the Discharger may have to a hearing before the Regional Water Board.

b. I certify that the Discharger will remit payment for the civil liability imposed in the amount of **\$28,050** by check that references "ACL Complaint No. R4-2010-0106" made payable to the "*Cleanup and Abatement Account*". Payment must be received by the Regional Water Board by **August 30, 2010** or this matter will be placed on the Regional Board's agenda for a hearing as initially proposed in the Complaint.

c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period expires. Should the Regional Water Board receive significant new information or comments from any source (excluding the Water Board's Prosecution Team) during this comment period, the Regional Water Board's Interim Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I understand that this proposed settlement is subject to approval by the Regional Water Board, and that the Regional Water Board may consider this proposed settlement in a public meeting or hearing. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.

d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

- ***(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.)*** I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Regional Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the Regional Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Regional Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(Print Name and Title)

(Signature)

(Date)

ACL No. R4-2010-0106

Instructions

1. Select Harm/Potential Harm for Discharge Violations
2. Select Degree of Toxicity
3. Select Susceptibility to Cleanup or Abatement
4. Select Deviation from Standard
5. Click "Determine Harm & per Gallon/Day..."
6. Enter Values into the Yellow highlighted fields

Select Item	Harm/Potential Harm for Discharge Violations
Select Item	Degree of Toxicity
Select Item	Susceptibility of Cleanup or Abatement
Select Item	Deviation from Standard

Discharger Name/ID: 09-114 Port of Los Angeles

		Violation 1	
Discharge Violations	Step 1	Potential Harm Factor (Generated from Button)	
	Step 2	Per Gallon Factor (Generated from Button)	
		Gallons	
		Statutory / Adjusted Max per Gallon (\$)	
		Total	\$ -
Discharge Violations	Step 2	Per Day Factor (Generated from Button)	0
		Days	
		Statutory Max per Day	
		Total	\$ -
	Non-Discharge Violations	Step 3	Per Day Factor
Days			7
Statutory Max per Day			\$ 10,000
Total		\$ 21,000.00	
Initial Amount of the ACL		\$	21,000.00
Additional Factors	Step 4	Culpability	1.5
		Cleanup and Cooperation	1
		History of Violations	0.75
	Step 5 Total Base Liability Amount	\$	23,625.00
Step 6	Ability to Pay & to Continue in Business	1	\$ 23,625.00
Step 7	Other Factors as Justice May Require	1	\$ 23,625.00
	Staff Costs	\$ 4,425	\$ 28,050.00
Step 8	Economic Benefit	\$ 915	\$ 28,050.00
Step 9	Minimum Liability Amount	\$ 915	
	Maximum Liability Amount	\$ 370,000	
Step 10	Final Liability Amount	\$	28,050.00

Penalty Day Range Generator

Start Date of Violation= 7/27/09
 End Date of Violation= 9/1/09

Maximum Days Fined (Steps 2 & 3) = 37 Days
 Minimum Days Fined (Steps 2 & 3) = 7 Days