

Note: This summary has been prepared by the Board's Prosecution Team

ITEM: 18

SUBJECT: Donahue Schriber Asset Management Corporation, Rocklin Crossings, Placer County

BOARD ACTION: *Consideration of Administrative Civil Liability Order*

BACKGROUND: The Rocklin Crossings construction site is at the southeast corner of Interstate-80 and Sierra College Boulevard in Rocklin, Placer County. Secret Ravine creek is immediately south of the site.

Donahue Schriber Asset Management Corporation contracted with S.D. Deacon Corporation to build a 59 acre regional shopping center at Rocklin Crossings. In addition to smaller retail tenants and restaurants, the major tenants will include a Wal-Mart Supercenter and a Home Depot.

In July 2012, Donahue Schriber obtained coverage under the NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ (General Permit). As defined by the General Permit, Donahue Schriber is the "legally responsible party" and must ensure that its contractors comply with the General Permit. Donahue Schriber is referred to as the "Discharger" in this document and in the proposed ACL Order.

The General Permit requires development and implementation of a site-specific Storm Water Pollution Prevention Plan (SWPPP), which lists the best management practices (BMPs) that will be employed to reduce contaminants in storm water discharges from the site. The BMPs are to include both erosion control (to keep soils from being eroded) and sediment control (to keep soils on-site in the event that the erosion control BMPs are not effective). The SWPPP states that the entire 59 acre site will be disturbed by rough grading, and that straw mulch will be applied as an erosion control BMP to all disturbed soils prior to any rain event.

The General Permit also requires that a Rain Event Action Plan (REAP) be prepared each time the weather forecast calls for a 50% or greater chance of precipitation. The REAP is to identify the specific activities taking place on the construction site at that point in time, and describe the BMPs that will be implemented prior to the forecasted rain.

Construction began at the site in August 2012. On 22 October 2012, Water Board staff inspected the site following a light rain event. Staff found that erosion control BMPs were not installed on disturbed soils, in violation of the General Permit. On 31 October 2012, staff met with the Discharger to discuss the requirements of the General Permit, including the requirement to install erosion control BMPs on all active construction areas prior to rain events. In early November 2012, the construction contractor began emailing weekly construction and stabilization updates to staff.

From 28 November 2012 through 5 December 2012, rain fell throughout northern and central California. This storm was forecast by the National Weather Service

at least five days prior to the first rainfall and was well publicized by the media, as significant rainfall was predicted (3.4 to 5.75 inches). The Discharger completed its REAP two days prior to the first rain, and stated that erosion and sediment control BMPs would be in place.

On 30 November 2012, staff inspected the site during heavy rainfall, and observed discharges of turbid storm water from two different locations at the site. Staff also observed that the Discharger had not followed its SWPPP because it had not installed straw mulch as an erosion control BMP on all disturbed areas. Although sediment control BMPs were in place, the Discharger had also not followed its REAP because there were no erosion control BMPs installed on a portion of the site and because the sediment control BMPs were not appropriate for the forecasted event. On 18 December 2012, the Discharger began operating an active treatment system to remove suspended sediment in storm water.

The Prosecution Team, Discharger, and construction contractor met numerous times in “pre-ACL issuance settlement” meetings, but were unable to come to resolution on several issues. On 8 July 2013, the Executive Officer issued ACL Complaint R5-2013-0519 in the amount of \$211,038. The Complaint alleges that the Discharger violated the General Permit by (a) discharging 76,613 gallons of turbid storm water to Secret Ravine on 30 November 2012, (b) failing to implement appropriate erosion control BMPs for a period of 13 days.

ISSUES:

Both the Discharger (Donahue Schriber) and the construction contractor (S.D. Deacon Corporation) are designated parties in this matter. The designated parties are not contesting the volume of the spill, the events leading up to the spill, the culpability, or the ability to pay the penalty. However, the designated parties have two issues with regard to the calculation of the civil liability. These issues involve interpretation of the State Water Board’s Enforcement Policy and the values that the Prosecution Team used in the penalty calculation methodology.

1. The penalty calculation methodology includes a “harm or potential for harm to beneficial uses” factor. The Designated Parties believe that this factor should be “minor” instead of the “moderate” value used by the Prosecution Team.
2. The penalty calculation methodology includes a “per gallon assessment for discharge violations.” The Designated Parties believe that the factor should have been \$2/gallon instead of the \$10/gallon value used by the Prosecution Team.

Harm or Potential for Harm to Beneficial Uses

The Enforcement Policy states that this factor “... considers the harm that may result from exposure to the pollutants or contaminants in the illegal discharge...the score evaluates the direct or indirect harm or potential for harm from the violation.” A value between “negligible” and “major” is assigned.

The Discharger’s expert witness concludes that the potential for harm is “minor” because no acute lethality to fish or benthic macroinvertebrates would have occurred due to water column turbidity levels. In addition, the sand and silt load that was associated with the discharge was not of sufficient volume or duration to (a) cause notable harm to fish eggs that may have been incubating in the creek

substrate, (b) cause any notable population-level effects to adult or juvenile life stages of any fish species, or (c) cause any notable population-level effects to benthic macroinvertebrates.



In addition, both the site-specific EIR and the Discharger's expert witness acknowledge that this stretch of Secret Ravine contains "poor to moderate quality" substrate that is dominated by silt and sand instead of the gravel needed for egg incubation. The turbid storm water discharge added more silt and sand into Secret Ravine and therefore had the potential to increase the harm to beneficial uses.

Per Gallon Assessment

As part of the penalty calculation method, the gallons of discharge is multiplied by several factors, including a "per gallon assessment," to determine the base liability. The Enforcement Policy discusses use of both the statutory maximum of \$10/gallon and a reduced value of \$2/gallon for the per gallon assessment.

The Designated Parties state that the Enforcement Policy mandates that the value of \$2/gallon be used for all storm water discharges, regardless of the volume of discharge. The parties also assert that, on a state-wide basis, storm water ACLs have consistently used \$2/gallon as the starting point for calculating the base liability. And finally, the parties state that if Prosecution Team's interpretation of the "per gallon assessment" is followed, then there will be an incentive for dischargers to continue spilling in order to be allowed a high-volume discount of \$2/gallon.

The Prosecution Team points to the plain language of the Enforcement Policy which states that the default amount of \$10/gallon should be applied for all discharge violations, except if the discharge is determined to be a "high volume", which can include sewage spills and releases of storm water from construction sites. For a high volume discharge, a value of \$2/gallon may be used in the calculation. In this case, the Prosecution Team does not consider the spill of 76,613 gallons to be "high volume", and therefore \$10/gallon was used to calculate the initial base liability. The use of \$10/gallon is consistent with the manner in which the Central Valley Water Board, as well as other regional boards, have applied the Enforcement Policy to ACLs issued for discharges of storm water. The use of \$10/gallon in this case does not create an incentive for a discharger to continue to spill storm water so that it qualifies for a "high volume" reduction because the penalty calculation methodology evaluates multiple factors, including the culpability of the discharger, and allows for values greater than \$2/gallon to be used in the case of high volume discharges.

Penalty Calculation Methodology

The Designated Parties are not contesting any of the other factors used by the Prosecution Team in the penalty calculation methodology. If the "potential for harm" and the "per gallon assessment" changes are made as requested by the Designated Parties, then the calculated penalty amount would decrease from

\$211,038 to \$59,470.

Prosecution Team's
Recommendation:

 Donahue Schriber is a major commercial developer with significant assets. Given the factors in this case, the Prosecution Team recommends that the Board adopt the Administrative Civil Liability Order as proposed, in the amount of \$211,038.

Mgmt. Review WSW
Legal Review DB and MO

3/4 October 2013 Meeting

Central Valley Regional Water Quality Control Board meeting
11020 Sun Center Dr. #200
Rancho Cordova, CA 95670