

Central Valley Regional Water Quality Control Board  
5-6 December 2013 Board Meeting

**Prosecution Team's Rebuttal Evidence**

Hearing Regarding Administrative Civil Liability  
for the  
City of Sacramento and the Sylvia Dellar Survivor's Trust  
Dellar Landfill, Sacramento County

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The following are Central Valley Regional Water Quality Control Board (Central Valley Water Board) Prosecution Team responses to the Evidence and Policy statements submitted in regard to the proposed Administrative Civil Liability (ACL) for the Dellar Landfill. Timely statements were received from the two Designated Parties, the City of Sacramento and the Sylvia Dellar Survivor's Trust. No comments were received from interested parties.

**Background**

The Sylvia Dellar Survivor's Trust (Dellar Trust) owns the land upon which the City of Sacramento (City) operated an unlined landfill from 1959 to 1963. The property covers 29 acres near the American River, and is next to the City's closed 28<sup>th</sup> Street Landfill.

In 2003, a Phase I Site Assessment<sup>1</sup> was conducted; this document states that storm water is not draining off the surface and recommends that the landfill be closed to protect water quality. Beginning in 2003, Water Board staff requested that the Dellar Trust submit a corrective action plan to address water quality impacts which had been observed in nearby groundwater monitoring wells. Subsequent meetings and discussions were held with both the Dellar Trust and the City, and in a 29 January 2007 letter, the two parties jointly proposed a plan to install a soil cover to close the landfill. Water Board staff memorialized this plan in a Cleanup and Abatement Order (CAO) which was reviewed and commented upon by the two parties prior to issuance.

Cleanup and Abatement Order

On 4 June 2008, the Executive Officer issued CAO R5-2008-0705. The Order is issued to the City of Sacramento and the Sylvia Dellar Survivor's Trust; these two parties are jointly referred to as "Discharger." The Order does not differentiate the responsibilities of either party – they can work together or they can work separately, as long as the requirements of the Order are met. Neither Discharger appealed or contested the Order.

The CAO incorporates the City's request for an extended, three-year timeline to close the landfill, and does not require that construction begin until 1 June 2010. The Order requires that construction be completed by 30 October 2010, and then requires post-closure monitoring of the landfill.

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<sup>1</sup> Dellar Trust Evidence Item 1.

### Work Completed in 2008

Even though the CAO incorporated the Discharger's timelines, the Dischargers began requesting extensions to the Order almost as soon as it was issued. A status report dated 1 August 2008 was submitted by the City of Sacramento requesting a two-week extension to submit the 30% engineering drawings for the closure cover. The 30% cover design was an element of the Final Closure Plan that was due on 15 August 2008. However, the Plan was not submitted, and in an email dated 12 September 2008, the City stated that it had not be granted access to the Dellar Property to conduct the survey work necessary to complete the Plan.

During 2008, the Dischargers imported and stockpiled approximately 60,000 cubic yards of soil to be used for the cap, installed storm water controls, and submitted quarterly status reports. As required by the CAO, the Dischargers obtained a construction storm water permit, submitted a storm water pollution prevention plan, and submitted the 2008 erosion control plan. However, the Final Closure Plan was not submitted.

### Work Completed in 2009

In a status report dated 30 January 2009, the City stated that the Dischargers were working to complete the engineered drawings describing the closure plan and would submit the drawings with the next quarterly status report. In a letter dated 23 January 2009, Board staff requested that the Dischargers submit the overdue Final Closure Plan by 1 April 2009.

In a letter dated 19 March 2009, Board staff stated that it was understood from the City that additional funds to complete the Final Closure Plan were being requested from the City Council, and that Board staff would not recommend enforcement if the Final Closure Plan was submitted by 12 May 2009. The City submitted the Final Closure Plan<sup>2</sup> on 13 May 2009, nine months beyond the date of the CAO. In a letter dated 19 August 2009, staff asked for additional information. The City responded and submitted the required information in a letter dated 1 November 2009. The Final Closure was approved by Board staff in an email dated 9 December 2009. Although the Closure Plan was submitted nine months late, it was still possible for the Dischargers to comply with the remainder of the CAO, as they were not required to begin construction until 1 June 2010.

The CAO required submittal of the 2009 erosion control plan by 15 September 2009. Even though soil was stockpiled onsite and subject to erosion from the winter rains, the Dischargers did not submit this document.

### Work Completed in 2010

The CAO required the Discharger to begin closure construction by 1 June 2010. However, the City of Sacramento did not award a contract to conduct the work until 10 June 2010<sup>3</sup>,

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<sup>2</sup> The Dellar Trust submitted a letter stating that it did not agree with the Final Closure Plan, and would submit an addendum to delineate each party's responsibilities. An addendum was never received by the Board.

<sup>3</sup> Rebuttal Evidence Item 1.

continuing to violate the timelines of the CAO.

In an email dated 8 June 2010, the City notified Board staff that elderberry bushes (the habitat for the federally threatened Valley Elderberry Longhorn Beetle) had been identified on-site during a biological survey conducted during February and March 2010, and would require mitigation before construction work was performed. City staff verbally requested an extension to the final closure date in the CAO; Board staff did not agree that an extension was appropriate. In a letter dated 16 June 2010, the City requested a four year extension for the final closure of the Dellar Property based on the need to prepare a habitat conservation plan. However, the Dischargers did not know how long the preparation and review process would take, and Board staff did not agree to extend the due dates based on unknown assumptions.

The CAO required that construction begin on 1 June 2010. The Dischargers did not comply. In addition, the Dischargers did not submit the erosion control plan that was due on 15 September 2010 or the closure certification report that was due on 15 December 2010. Also, the Dischargers did not submit the first, second, or third quarter progress reports as required by the CAO.

#### Work Completed in 2011

On 6 January 2011, Board staff met with the Dischargers to discuss an alternative closure plan to work around the elderberry bushes. During the meeting, it was agreed that the Dischargers would provide an updated schedule to complete the final closure of the landfill by end of the 2011 construction season. On 13 January 2011, the Dellar Trust submitted a letter containing a schedule which showed that the Final Closure Plan would be resubmitted by 25 April 2011, that construction would begin by 18 August 2011, and construction would be completed by 5 October 2011. Board staff approved the document, but reserved the right to initiate enforcement based on the initial compliance dates in the CAO. The Dischargers did not follow this schedule, and did not close the landfill in 2011.

In a 13 May 2011 letter submitted to Board staff, the City requested another one year extension (through 2012) to complete closure. The extension request was based on the City's intention to submit a request to CalRecycle for a \$720,000 grant to cover a portion of the \$2.8 million closure cost. The letter states "*It is the City's intention to continue moving forward with the Dellar Trust and complete closure tasks over this summer that can be completed prior to receiving the grant.*"

In a response letter dated 25 May 2011, Board staff stated that they could not recommend another extension to the CAO unless and until "*the Dischargers show that they will make every effort to proceed with as much of the construction as possible this year...the tasks performed must include submitting the [revised] Final Closure Plan and must show that the Dischargers are spending approximately \$500,000 to \$750,000.*" Board staff requested the Dischargers submit another proposed schedule to describe the work that would be performed during 2011 construction season.

On 22 July 2011, the Dischargers submitted a Closure and Post Closure Maintenance Plan. This plan proposed a grade-to-drain cover that would avoid the incidental take of the Valley Elderberry Longhorn Beetle. The Dischargers provided the following schedule of tasks to be completed during construction season 2011:

- Abandon well by 16 September 2011
- Construct detention basin by 23 September 2011
- Reset power poles at new grade by 23 September 2011
- Conduct work around radio tower by 30 September 2011
- Submit interim CQA report by 21 October 2011

The Dischargers also proposed to complete the cover construction during the 2012 construction season. In a letter dated 7 September 2011, Board staff approved the Closure and Post Closure Maintenance Plan and the schedules for the 2011 tasks, and again verbally informed the Dischargers that any enforcement actions would be based on the initial compliance dates in the Cleanup and Abatement Order. Staff's letter also states that the final CQA Report shall be submitted by 26 October 2012.

Although the Dischargers committed to completing the preliminary site construction work in the fall of 2011, they did not do any work. Of the five items listed above, the only one completed was the submission of a document on 21 October 2011. While the document was titled "CQA Interim Report", it is not a CQA report and it only discussed contract complexities and the intent of the Dellar Trust to complete some elements of the closure construction during fall 2011. As such, the report does not meet the intent of the approved Plan, and therefore the Dischargers did not submit an Interim CQA Plan. The Dischargers utterly failed to follow their commitment to complete preliminary site work in 2011.

To summarize the 2011 activities, the Dischargers initially promised to complete construction by the end of the year. If successful, they would have been one year over the timeline required by the CAO. However, the Dischargers then requested another extension so that they could obtain a \$720,000 CalRecycle grant, and complete the construction in 2012, which would be two years beyond the timeline in the CAO. Water Board staff negotiated with the Dischargers to complete some preliminary field work in 2011, but again the Dischargers failed to follow their commitment.

#### Work Completed in 2012

In a 13 January 2012 letter, Board staff expressed strong concern that the Dischargers had not completed any work in the 2011. The Dischargers responded separately, with multiple excuses as to why either party was unable to complete any work during the fall of 2011.

Based on the lack of progress and the multiple violations of the CAO, on 9 March 2012, the Executive Officer issued ACL Complaint R5-2012-0516 to the Dellar Trust and the City. The Complaint proposed \$164,796 in civil liability for failure to comply with the CAO. The Dischargers waived their right to a hearing within 90 days, and asked to enter into settlement

discussions. The discussions were unsuccessful, and the Prosecution Team has brought this matter to the Board.

The landfill cover was completed in October 2012. However, the Dischargers continue to violate the CAO, because they have not submitted semi-annual post closure monitoring reports required by the Order.

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### **Rebuttal to the Dellar comments**

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**Comment No. 1:** The delays (elderberry bushes, CalRecycle grant, economic downturn, contractor dispute, homeless encampment) were beyond the parties' ability to control, and the City and Trust made good-faith efforts to comply with the CAO.

**Prosecution Team Response:** We strongly disagree. One of the delays was due to the 2010 "discovery" that elderberry bushes were growing on the landfill. However, the Dischargers knew that the landfill provided habitat for the Valley Elderberry Longhorn Beetle since at least 2003 (page 8 of the 2003 Phase I Environmental Site Assessment). The Dischargers should have taken this into consideration when they submitted their first proposal for closure in 2007. In addition, the CAO allowed for two years of planning prior to the start of construction in 2010, and the Dischargers should have completed their site assessments, and addressed this issue, as soon as the Order was adopted.

The delay to obtain CalRecycle funds was conditionally approved by staff, contingent upon the Dischargers completing certain pre-construction work during the fall of 2011. Despite the Dischargers' commitment to completing the work, nothing was done.

Board staff also disagree that the economic downturn was directly responsible for the Discharger's noncompliance with the CAO. The CAO contains a three year schedule to complete the closure, based in part on the City's 1 February 2008 letter stating that the City was projecting a \$55 million shortfall in 2008, and requesting a three year schedule to complete closure as "this will allow the City to set aside funds needed to complete the project". The Board agreed with the City's request, and the CAO allows a three year schedule. The City should have then set aside the funds. In addition, Board staff understood that it would be financially advantageous for the City to obtain \$720,000 in CalRecycle grant funds, and agreed not to take enforcement action during the delay as long as the Dischargers completed pre-construction work. However, they did not do so. This failure to act cannot be blamed on the economic downturn.

The Board does not get involved between disputes between a contractor and a Discharger. A Discharger should consider the Board's enforcement schedules carefully, and build in time to react to unforeseen circumstances. The need to comply with the City's requirement to pay prevailing union wages is not a new requirement for City projects, and the Dischargers should have been well aware of the need to do so.

The Dellar Trust also states that the need to remove homeless people from the landfill property prevented compliance with the CAO. While the Prosecution Team might question why the Discharger did not adequately fence its property to prevent public access (as is required at landfills), instead we point to the fact that the timelines in the CAO were based on the Discharger's January 2007 proposal, and extended by one year based on the City's February 2008 request. The CAO was not contested by either Discharger. The three year period to complete the project should have provided ample time for the Dischargers to remove the homeless people camping on the landfill.

The Prosecution Team strongly disagrees that "good faith efforts" were made to comply with the CAO. As described in the Background section of this document and shown in the Prosecution Team Evidence List, this project was filled with a litany of excuses and disagreements between the two Dischargers.

**Comment No. 2:** Upon completion of the cap, the Trust requested that the site be considered closed and the Board prepare a No Further Action letter. However, the Board has not responded.

**Prosecution Team Response:** A No Further Action letter is not appropriate for this facility. Once a landfill is closed, the cap must be maintained. This typically includes inspections and maintenance (for example, ensuring that soil doesn't erode, cracks are filled in, inappropriate vegetation is removed, and public access is precluded). The CAO requires that the Dischargers submit semi-annual post closure monitoring reports. The landfill was closed in October 2012, and the Dischargers should have submitted the first report on 31 January 2013, and the second report of 31 July 2013. Neither has been submitted, and the Dischargers continue to violate the CAO.

After discussions between the Board's Permitting and Compliance/Enforcement sections, it was determined that the best manner to continue to regulate this site would be through Post Closure Maintenance Waste Discharge Requirements. Once adopted, the CAO would be rescinded. On 13 June 2013, the Board's Permitting unit sent the Dischargers a letter that requesting that a Report of Waste Discharge (RWD) be submitted by 10 September 2013. However, the Dischargers have continued their pattern of ignoring Board directives, and have not submitted the document. The Board's Compliance and Enforcement unit will shortly require that the RWD be submitted pursuant to California Water Code section 13267. Failure to comply with this request may lead to another administrative civil liability.

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## Response to the City of Sacramento comments

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**Comment No. 1:** The ACL Complaint fails to distinguish between the City and the Trust, and assesses the fine collectively. The Board is penalizing a public entity for actions outside of its

control and for inaction on a property which it does not own. The cleanup plan was not designed by the City, and the engineers working on it did not work for the City.

**Prosecution Team Response:** The Cleanup and Abatement Order was issued jointly to the City and the Trust, and therefore the ACL is issued to both parties. It is not the Board's responsibility to apportion the liability between the two parties. The record shows that the City and the Dellar Trust were involved in a lawsuit prior to issuance of the CAO, and Board staff understands that legal issues continue.

The CAO was based on a January 2007 letter from the City in which it proposed to work with the Dellar Trust to close the landfill. Board staff consulted with the City and the Dellar Trust as the CAO was drafted; if the City had wished that the CAO be specific as to the actions required of each party, it should have discussed that with staff.

**Comment No. 2:** The City did not find out about the presence of elderberry bushes and the Valley Elderberry Longhorn Beetle (VELB) until the spring of 2010. The City asked for an extension to the CAO because of this, but the Board denied it.

**Prosecution Team Response:** The Dischargers knew that the landfill provided habitat for the VELB since at least 2003 (page 8 of the 2003 Phase I Environmental Site Assessment). The Dischargers should have taken this into consideration when they submitted their first proposal for closure in 2007. In addition, the CAO allowed for two years of planning prior to the start of construction in 2010, and the Dischargers should have completed their site assessments, and addressed this issue, as soon as the Order was adopted.

In a letter dated 16 June 2010, the City requested a four year extension for the final closure of the Dellar Property based on the need to prepare a habitat conservation plan for the VELB. However, the Dischargers did not know how long the preparation and review process would take, and Board staff did not agree to extend the due dates based on unknown assumptions.

**Comment No. 3:** The City's alternative closure plan, for closure in the fall of 2012, was "approved" by Board staff.

**Prosecution Team Response:** The City's statement is partially correct, and requires clarification. On 22 July 2011, the Dischargers submitted a Closure and Post Closure Maintenance Plan. This plan proposed a grade-to-drain cover that would avoid the incidental take of the Valley Elderberry Longhorn Beetle. The Dischargers provided the following schedule of tasks to be completed during construction season 2011:

- Abandon well by 16 September 2011
- Construct detention basin by 23 September 2011
- Reset power poles at new grade by 23 September 2011

- Conduct work around radio tower by 30 September 2011
- Submit interim CQA report by 21 October 2011

The Dischargers also proposed to complete the cover construction during the 2012 construction season. In a letter dated 7 September 2011, Board staff approved the Closure and Post Closure Maintenance Plan and the schedules for the 2011 tasks, and again verbally informed the Dischargers that any enforcement actions would be based on the initial compliance dates in the Cleanup and Abatement Order. Staff's letter also states that the final CQA Report shall be submitted by 26 October 2012.

Although the Dischargers committed to completing the preliminary site construction work in the fall of 2011, they did not do any work. Of the five items listed above, the only one completed was the submission of a document on 21 October 2011. While the document was titled "CQA Interim Report", it is not a CQA report and it only discussed contract complexities and the intent of the Dellar Trust to complete some elements of the closure construction during fall 2011. As such, the report does not meet the intent of the approved Plan, and therefore the Dischargers did not submit an Interim CQA Plan. The Dischargers utterly failed to follow their commitment to complete preliminary site work in 2011, which led to the issuance of the ACL Complaint.

**Comment No. 4:** The City did not submit the erosion control report because it was based on the original closure plan, which was superseded by the modified plan submitted by the Dellar Trust in 2011.

**Prosecution Team Response:** The City stockpiled 60,000 cubic yards of soil at the landfill in 2008. This soil is subject to erosion during rain events, and the CAO required the City or the Dellar Trust to submit the 2009 and 2010 erosion control plans. These plans should have addressed the soil stockpile; the fact that the original closure plan was superseded by another plan has no bearing on the failure to file these two reports.

**Comment No. 5:** The City disagrees with a culpability factor of 1.2 in the penalty calculation.

**Prosecution Team Response:** The Prosecution Team disagrees with the statement that the City "never capriciously ignored a deadline". The evidence shows that multiple deadlines were ignored, including the failure to submit the 2009 and 2010 erosion control plans, the failure to submit the first, second, and third quarter 2010 progress reports, and the failure to complete pre-closure site work in the fall of 2011,. A factor of 1.2 is appropriate for this case.

**Comment No. 6:** The City disagrees with a cleanup and cooperation factor of 1.1

**Prosecution Team Response:** The City states that there are limitations on what it can do, and implies that the failure to comply with the CAO was due to the Dellar Trust. As stated

above, the ACL does not apportion responsibility between the two parties. Many facts, including the fact that the parties did not complete the pre-construction field work in the fall of 2011, justify a cleanup and cooperation factor of 1.1.

**Comment No. 7:** The City states that the Board's "ability to pay" analysis is flawed because the City cannot raise taxes to cover the cost of the penalty.

**Prosecution Team Response:** The Water Code requires that when issuing an administrative civil liability, the Board consider a discharger's ability to pay and remain in business. The ACL Complaint includes a discussion of this factor. While the City claims it cannot raise taxes to cover the penalty, the fact remains that neither the City nor the Dellar Trust has presented sufficient evidence to show that paying a portion of a \$164,000 penalty will impact either parties' ability to remain in business.

**Comment No. 8:** There was no economic benefit to the City from the failure to submit reports.

**Prosecution Team Response:** State Water Board's Enforcement Policy requires 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. Gerald Horner, a Senior Economist at the State Water Board, used the US EPA's BEN computer model to calculate the economic benefit. The BEN model and the calculation is described in detail in Exhibit 77, the 14 March 2012 memorandum from Gerald Horner to David Boyers. The economic benefit is calculated to be \$135,367. The economic benefit plus 10% is \$143,429.

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### **Rebuttal Evidence List**

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Rebuttal Evidence #1: Letter dated 29 January 2007 from the City of Sacramento to Steve Rosenbaum. Subject: Proposed Plan for Resolution of Dellar Property Issues.

Rebuttal Evidence #2: Letter dated 11 February 2008 from the City of Sacramento to John Moody. Subject: Dellar Property and Pending Corrective Action Order Schedule.

Rebuttal Evidence #3: Memorandum dated 12 May 2009 from Jeff Scharff (Dellar Trust) to Steve Rosenbaum and Todd DeFrate. Subject: Sylvia Dellar Survivor's Trust v. City of Sacramento.