

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

ITEM: 25

SUBJECT: City of Sacramento and Sylvia Dellar Survivor's Trust, Dellar Landfill, Sacramento County

BOARD ACTION: *Consideration of Administrative Civil Liability Order*

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. In 2003, Water Board staff first began requesting that the Dellar Trust submit a corrective action plan to address the water quality impacts which had been observed in nearby groundwater monitoring wells. Subsequent meetings and discussions were held with the two parties, and in a 29 January 2007 letter, the City and the Dellar Trust proposed a plan to install a soil cover to close the landfill.

On 4 June 2008, the Executive Officer issued Cleanup and Abatement Order R5-2008-0705 to both the City and the Dellar Trust (hereafter jointly referred to as Dischargers). The CAO incorporates the City's request for an extended, three-year timeline to close the landfill, and provides the Dischargers three construction seasons (2008, 2009, and 2010) to complete the closure. The Order requires that construction be finished by 30 October 2010, and then requires post-closure monitoring of the landfill.

Even though the CAO incorporated the Dischargers' timelines, the two parties began requesting time extensions almost as soon as the Order was issued. Staff had numerous meetings with the two parties, and based on the Dischargers' commitment to complete specific work, twice agreed to unofficial extensions of the Order's due dates. These extensions were conditioned upon completion of the agreed upon work, and staff reserved the right to initiate enforcement based on the original compliance dates in the CAO.

The CAO required that the landfill be closed by October 2010. However, by early 2012, the Dischargers had made only minimal progress toward closure, and had not completed any of the work that they had committed to undertake in 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. 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.

ISSUES: Each Discharger submitted an "Evidence and Policy Statement" regarding their issues and concerns with the ACL Complaint. There appear to be five main issues: the delays to complete the project, the failure to distinguish between the City (a public entity) and the Trust (a private entity), the economic benefit accrued by failure to close by the date in the CAO, the Board's failure to rescind the CAO, and the ACLC's revised penalty amount. Each of these items is discussed below.

Issue 1: Delays to complete the closure of the landfill.

The Dischargers state that there were multiple reasons that they were unable to close the landfill per the schedule in the Cleanup and Abatement Order. These delays included the discovery of elderberry bushes on the landfill, the desire to obtain a CalRecycle grant to pay for a portion of the closure, the economic downturn, and a homeless encampment on the landfill property.

The Prosecution Team strongly disagrees with the Dischargers' contention that they made a good faith effort to comply the CAO, and that the delays were beyond their control. 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. The Dischargers should have taken this into consideration when they submitted their first proposal for closure in 2007, prior to issuance of the CAO. In addition, the Order allowed for two years of planning prior to the start of construction in 2010, and the Dischargers could have completed their site assessments, and addressed the elderberry issue, as soon as the Order was adopted.

In a 13 May 2011 letter, the City requested a second one year extension (through 2012) to complete closure because the City intended 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.*" The delay in closure in order to obtain CalRecycle funds was conditionally approved by staff, contingent upon the Dischargers completing certain pre-construction work during the fall of 2011. However, despite the Dischargers' written commitment to complete the work, nothing was done. This failure to act cannot be blamed on the time needed to obtain CalRecycle funds.

Board staff also disagree that the economic downturn was directly responsible for the Dischargers' 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 a \$720,000 CalRecycle grant, 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 Dellar Trust has stated 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 Dischargers' 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.

Issue #2: The City is a public entity, while the Trust is a private entity

The City states that the ACL Complaint fails to distinguish between the City and the Trust, and therefore penalizes a public entity for actions outside of its control and for inaction on a property which it does not own.

The Prosecution Team responds that the Cleanup and Abatement Order was issued jointly to the City and the Trust, and therefore the ACL was 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 record also shows that the two parties have struggled to work together to complete the closure. However, 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 Order was drafted, and edited the document per those discussions. Neither party contested the CAO. Therefore, it was the Board's expectation that the two parties would jointly comply with the Order.

Issue #3: Economic benefit

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. The City states that there was no economic benefit to the City for the failure to submit reports or close the landfill within the timelines of the CAO.

The Prosecution Team disagrees. 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 calculation are described in detail in Exhibit 77. The economic benefit is calculated to be \$135,367. The economic benefit plus 10% is \$143,429. The City has not provided any expert testimony to contradict Dr. Horner's determination of economic benefit.

Issue #4: Failure to rescind the CAO

Once the landfill was closed in late 2012, the Dellar Trust requested that the Board issue a No Further Action letter for the facility. The Trust states that the Board has not responded. This is not correct; the Board responded by requesting a Report of Waste Discharge (RWD).

Once a landfill is closed, the cap must be maintained. 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.

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 the WDRs are adopted, the CAO will be rescinded. On 13 June 2013, the Board's Permitting unit sent the Dischargers a letter that requesting that a RWD be submitted by 10 September 2013. However, the Dischargers have continued their pattern of ignoring Board directives, and have not submitted the document.

Issue #5: Revised penalty amount

The ACLC was issued in the amount of \$164,796. This includes \$22,500 in staff

costs. However, the State Water Board has recently directed that staff costs not be included in administrative civil liabilities. Removing the staff costs reduces the liability to less than the economic benefit plus 10%. The State Water Board's 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. Therefore, proposed Administrative Civil Liability is set at the economic benefit plus 10%, or \$143,429.

Prosecution's  
Recommendation:

The Dischargers failed to comply with the timelines of Cleanup and Abatement Order R5- 2008-0705 to close the Dellar Landfill. Board staff agreed to several unofficial extensions, but reserved the right to initiate enforcement based on the compliance dates in the CAO. The landfill was to have been closed by October 2010. When minimal progress had been made by March 2012, the Executive Officer issued an administrative civil liability. The Prosecution Team recommends that the Board adopt the proposed ACL Order in the amount of \$143,429.

Mgmt. Review WSW  
Legal Review DB

**5/6 December 2013 Meeting**

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