

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

TENTATIVE ORDER NO. R9-2011-0049

ADMINISTRATIVE ASSESSMENT OF CIVIL LIABILITY  
AGAINST  
JACK EITZEN  
38155 VIA VISTA GRANDE, MURRIETA  
FOR  
VIOLATIONS OF  
STATE BOARD ORDER NO. 99-08-DWQ

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) having held a public hearing on October 12, 2011, to hear evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R9-2010-0104, dated November 15, 2010, and deliberating on the evidence presented at the public hearing and in the record, after determining the allegations contained in the Complaint to be true, having provided public notice thereof and not less than thirty (30) days for public comment and on the recommendation for administrative assessment of Civil Liability in the amount of \$301,950 finds as follows:

1. Jack Eitzen submitted a Notice of Intent to comply with the requirements of State Board Order No. 99-08-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity* on December 21, 2005, for the construction of a single family residence located at 38155 Via Vista Grande in Murrieta, California.
2. Jack Eitzen is required to comply with the requirements of Order No. 99-08-DWQ during construction activities.
3. Special Provision for Construction Activity C.2 states that all dischargers shall develop and implement a Storm Water Pollution Prevention Plan (SWPPP) in accordance with Section a: Storm Water Pollution Prevention Plan. The discharger shall implement controls to reduce pollutants in storm water discharges from their construction sites to the best available technology/best conventional pollutant control technology (BAT/BCT) performance standard.

4. Between January 2, 2008 and March 13, 2008 (72 days), September 24, 2008 and December 23, 2008 (91 days) and February 11, 2010 and March 30, 2010 (48 days) Jack Eitzen failed to have a SWPPP on site during construction activity and failed to implement adequate best management practices (BMPs) to reduce pollutants in storm water discharges. The number of days of violation is 211.
5. Issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (pub. Resources Code, § 21000 et seq.) pursuant to section 15321(a)(2), Chapter 3, Title 14 of the California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.
6. Water Code section 13385 provides that any person who violations any waste discharge requirement issued by a Regional Water Board shall be civilly liable. Water Code section 13385(c)(1) and (2) provides that civil liability on a per day basis may not exceed ten thousand dollars (\$10,000) for each day the violation occurs and/or ten dollars (\$10) per gallon discharged but not cleaned up that exceeds 1,000 gallons.
7. The amount of discretionary assessment proposed is based upon consideration of factors contained in Water Code section 13327. Section 13327 specifies the factors that the San Diego Water Board shall consider in establishing the amount of discretionary liability for the alleged violations, which include: the nature, circumstance, extent, and gravity of the violations, the ability to pay, the effect on the ability to continue in business, prior history of violation, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
8. The penalty calculation methodology within section VI of the Water Quality Enforcement Policy incorporates the factors of Water Code section 13327. An analysis of the penalty calculation methodology for this matter is included in the Technical Analysis for the Complaint, and the Penalty Calculation Methodology is attached to this Order as Exhibit 1. As shown in the penalty calculation methodology, Steps 1 and 2 of the Analysis do not apply to the failure to develop and implement an adequate SWPP because it is a non-discharge violation.
9. In determining Step 3, the San Diego Water Board considered the potential for harm and the deviation from requirements to determine the total per day factor. First, the potential for harm is "moderate" because the failure to

develop and implement a SWPP posed a substantial threat to beneficial uses due to the lack of adequate erosion and sediment control BMPs on disturbed areas of the construction site during consecutive rainy seasons. The impacts to beneficial uses from the discharge and deposition of large amounts of sediment can be substantial.

10. Second, the deviation from requirements is "Major" in this case. Order No. 99-08-DWQ requires all dischargers to develop and implement a SWPP and failure to implement an adequate SWPP is a significant deviation from the requirement.
11. Based on the potential for harm as "moderate" and the deviation from requirements as "major," Table 3 in the Water Quality Enforcement Policy states that the per day factor is 0.55. Using the per day factor of 0.55 multiplied by the total days of violation (211 days), multiplied by the statutory maximum liability of \$10,000 per day of violation, the Initial Base Liability under Step 3 of the Analysis is \$1,160,500.
12. Step 4 involves adjusting the Initial Base Liability based on the discharger's culpability, the discharger's efforts to cleanup or cooperate, and the discharger's compliance history. First, the San Diego Water Board considered an adjustment factor based on the discharger's culpability. Jack Eitzen began mass grading operations at a construction site located on a steep slope at the beginning of the rainy season with inadequate BMPs and failed to comply with repeated directives to implement adequate and effective BMPs. Therefore, the appropriate adjustment for the culpability factor is 1.5.
13. Second, the San Diego Water Board finds the adjustment with regards to cleanup or cooperation is 1.5 because Jack Eitzen failed to comply with repeated directives by the County and San Diego Water Board to install and maintain adequate BMPs for effective sediment and erosion control.
14. Third, the San Diego Water Board considered an adjustment factor for Jack Eitzen's history of violations. Jack Eitzen has no history of any violations, and therefore the appropriate adjustment factor is 1.
15. The San Diego Water Board also finds that an adjustment to the Initial Base Liability for the per-day basis for liability is appropriate for violations lasting more than 30 days because the violation resulted in no economic benefit from the illegal conduct that can be measured on a daily basis. Therefore, it is appropriate to use the alternate approach to penalty calculation recommended by the Prosecution Team in the Technical Analysis to assess penalties for 24 days of violation for failing to develop and implement an adequate SWPP rather than a total of 211 days: 72 days from January 2,

2008 to March 13, 2008, 91 days from September 24, 2008 to December 23, 2008, and 48 days from February 11, 2010 to March 30, 2010.

16. Adjusting the Initial Base Liability as described in Findings 8-15 above, results in a Total Base Liability of \$297,000 for failure to develop and implement an adequate SWPP. Exhibit 1 details the calculations that involve the above-discussed factors in determining the Total Base Liability.
17. The record contains sufficient information that Jack Eitzen has the ability to pay the Total Base Liability amount. Therefore, the Total Base Liability is not reduced to reflect an inability to continue in business.
18. Staff costs associated with investigating the violation and preparing the enforcement action total \$4,950 and as recommended in the Enforcement Policy, this amount is added to the liability amount. This addition is shown in Step 7 of the penalty calculation methodology in Exhibit 1.
19. The Enforcement Policy directs the San Diego Water Board to consider any economic benefit of the violations to the discharger. The total economic benefit to Jack Eitzen is estimated at \$15,000. The Prosecution Team calculated that adequate BMPs on the one-acre site would have been \$5,000 a year, and that the construction site lacked adequate BMPs for two years, bringing the total cost for BMPs to \$10,000. Because of the unusually steep slopes at the site, BMPs would be more extensive and expensive than a typical construction site, and so an adjustment factor of 1.5 is appropriate, making the total economic benefit that Jack Eitzen received by not implementing appropriate and adequate BMPs to control erosion and sediment \$15,000.
20. The Enforcement Policy also directs the San Diego Water Board to consider any maximum or minimum liability amount associated with a violation and recommends the board recover at least ten percent more than the economic benefit. The maximum liability for failure to develop and implement an adequate SWPPP for 211 days is \$2,110,000. The minimum liability is the estimated economic benefit discussed in Finding 19, plus ten percent, which is \$16,500.
21. The penalty calculation methodology analysis described in the Technical Analysis, and discussed in Findings 8-20 above, together with the evidence received, supports an administrative civil liability against Jack Eitzen for failure to develop and implement an adequate SWPP in the amount of \$301,950.

TENTATIVE

ACL Order No. R9-2011-0049

Page 5 of 5

Jack Eitzen

38155 Via Vista Grande, Murrieta

**IT IS HEREBY ORDERED**, pursuant to Water Code section 13385, that civil liability be imposed upon Jack Eitzen in the amount of \$301,950 for failure to develop and implement an adequate SWPPP between January 2, 2008 and March 13, 2008, September 24, 2008 and December 23, 2008, and February 11, 2010 and March 30, 2010.

1. Jack Eitzen shall submit a check to the San Diego Water Board in the amount of three hundred one thousand nine hundred fifty dollars (\$301,950) payable to the "State Water Resources Control Board" for deposit into the Cleanup and Abatement Account within thirty (30) days of adoption of this Order.
2. Fulfillment of Jack Eitzen's obligations under this Order constitutes full and final satisfaction of any and all liability for each allegation in Complaint No. R9-2010-0104.
3. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for collection or other enforcement if Jack Eitzen fails to comply with payment of the liability as detailed in paragraph 1.

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region on October 12, 2011.

TENTATIVE

---

DAVID W. GIBSON  
Executive Officer

Exhibit 1: Penalty Methodology Decisions for ACL Order No. R9-2011-0104

SMARTS App ID: 288215

SMART Enf. ID: 402985

<b>Exhibit No. 1</b>	<b>Penalty Methodology Decisions</b>
<b>Discharger: Mr. Jack Eitzen</b>	<b>Tentative ACL Order No. R9-2011-0049</b>

**Step 1: Potential Harm Factor**

Violations	Harm/Potential Harm to Beneficial Uses [ 0 - 5 ]	Physical, Chemical, Biological or Thermal Characteristics [ 0 - 4 ]	Susceptibility to Cleanup or Abatement [ 0 or 1 ]	Total Potential for Harm [ 0 - 10 ]
------------	---	--	--	--

No Discharge Violations

**Step 2: Assessments for Discharge Violations**

Violations	Per Gallon Factor					Statutory or Policy Max per Gallon [ \$ ]
	Potential for Harm [ 0 - 10 ]	Deviation from Requirement [ minor, moderate, major ]	High Volume Discharges [ yes / no ]	Gallons Discharged	Total Per Gallon Factor	

No Discharge Violations

Violations	Per Day Factor				Statutory Max per Day [ section 13xxx ]
	Potential for Harm [ 0 - 10 ]	Deviation from Requirement [ minor, moderate, major ]	Total Per Day Factor	Days of Violation	

No Discharge Violations

**Step 3: Per Day Assesments for Non-Discharge Violations**

Violations	Per Day Factor				Statutory/ Adjusted Max [ section 13xxx ]
	Potential for Harm [ minor, moderate, major ]	Deviation from Requirement [ minor, moderate, major ]	Total Per Day Factor	Days of Violation	
Violation 1	Moderate	Major	0.55	211	\$10,000

**Initial Liability From Steps 1 - 3**

Violation 1: (.55) x (211) x (\$5,500) = \$638,275

**Step 4: Adjustments**

Violations	Culpability [ 0.5 - 1.5 ]	Cleanup and Cooperation [ 0.75 - 1.5 ]	History of Violations	Multiple Violations (Same Incident)	Adjusted Days of Violation
Violation 1	1.5	1.5	1	n/a	24

**Step 5: Total Base Liability Amount**

(Per day Factor x statutory maximum) x (Step 4 Adjustments)
Violation 1: (0.55) x (\$10,000) x (1.5) x (1.5) x (1) x (24) = \$297,000

**Step 6: Ability to Pay / Continue in Business**

[ Yes, No, Partly, Unknown ]
Yes

**Step 7: Other Factors as Justice May Require**

Costs of Investigation and Enforcement	Other
\$4,950	n/a

**Step 8: Economic Benefit**

\$15,000
----------

**Step 9: Maximum and Minimum Liability Amounts**

	Minimum	Maximum
Violation 1	\$16,500	\$2,110,000

**Step 10: Final Liability Amount**

(total base liability) + (other factors)
(\$297,000) + (\$4,950) = \$301,950