

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ACL COMPLAINT NO. R5-2008-0538

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
IN THE MATTER OF

RWHS DIABLO GRANDE, LEGENDS, LLC
STANISLAUS COUNTY

This Complaint is issued to RWHS Diablo Grande, Legends, LLC (hereafter Discharger) pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability, CWC section 13323, which authorizes the Executive Officer to issue this Complaint, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Complaint is based on findings that the Discharger violated the Federal Water Pollution Control Act (Clean Water Act) section 301 (33 U.S.C. § 1311), CWC section 13376, and National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002 Order No. 99-08-DWQ.

The Assistant Executive Officer of the Regional Water Quality Control Board, Central Valley Region, (Regional Water Board) finds, with respect to the Discharger's acts, or failure to act, the following:

1. The Discharger is the owner of an 86-acre residential construction project within the Diablo Grande development in Stanislaus County. Runoff from the site discharges to nearby wetland preserve, which is tributary to Solado Creek.
2. Solado Creek is a tributary to the San Joaquin River. According to the 1998 *Water Quality Control Plan for the Sacramento River Basin and San Joaquin River Basin* the existing and potential beneficial uses of the San Joaquin River are municipal and domestic supply; agricultural supply (both irrigation and stock watering); process industrial supply; water contact recreation, non-contact water recreation; warm freshwater habitat; warm and cold migration; warm water spawning; wildlife habitat.
3. On 19 August 1999, the State Water Resources Control Board adopted NPDES General Permit No. CAS000002, Order No. 99-08-DWQ (General Permit), implementing the Waste Discharge Requirements for storm water discharges associated with construction activity.
4. The General Permit requires that dischargers of storm water to surface waters associated with construction activity file a Notice of Intent to obtain coverage under the General Permit and to use best available technology economically achievable (BAT) and best conventional control technology (BCT) to reduce storm water pollution.

5. The Clean Water Act and CWC require that dischargers obtain coverage under the General Permit prior to commencement of construction activities. The Discharger obtained coverage under the General Permit and was assigned WDID number 5S50C336830 on 22 September 2005.

6. General Order No. 99-08-DWQ states, in part, the following:

A. DISCHARGE PROHIBITIONS:

3. Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.

C. SPECIAL PROVISIONS FOR CONSTRUCTION ACTIVITY:

2. All dischargers shall develop and implement a 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 BAT/BCT performance standard.

Section A STORM WATER POLLUTION PREVENTION PLAN

6. Erosion Control
... At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the wet season.

Section A STORM WATER POLLUTION PREVENTION PLAN

11. Inspections will be performed before and after storm events and once each 24-hour period during extended storm events to identify BMP effectiveness and implement repairs or design changes.

Section 301 of the Clean Water Act and CWC section 13376 prohibits the discharge of pollutants to surface waters except in compliance with an NPDES permit.

7. The Discharger violated Discharge Prohibition A.3, Special Provision C.2, Section A.6 and Section A.11 of the General Permit. These violations were caused by the Discharger's failure to implement an effective combination of sediment and erosion control Best Management Practices (BMPs), which resulted in the discharge of sediment-laden storm water into a wetland preserve. In addition, the Discharger failed to perform mandatory inspections as required in the General Permit.

8. Pursuant to CWC section 13385 (a)(2), civil liability may be imposed for the following violations:
- a. On 23 January 2008, Regional Water Board staff inspected the site and noted significant storm water management problems. The problems included an extensive graded area without an effective combination of erosion and sediment BMPs, ineffective maintenance of existing BMPs and a sediment-laden discharge of storm water to a nearby wetland preserve caused by an open trench and broken culvert. Regional Water Board staff discussed the observed problems with the Discharger's representatives and storm water consultant.

Regional Water Board staff determined that the Storm Water Pollution Prevention Plan (SWPPP) was generic and incomplete and that only a few inspection reports had been completed for the project. The General Permit requires inspections before and after storm events, as well as during extended storm events. The monitoring program is an important component of the General Permit since inspections are critical for assessing compliance. Without inspections, the Discharger cannot determine BMP effectiveness and the need for additional BMPs or maintenance of existing BMPs.

- b. On 25 January 2008, Regional Water Board staff conducted a follow-up inspection and again noted the lack of erosion and sediment control BMPs as well as the inadequate maintenance of the BMPs that had been installed. Staff also observed significant erosion throughout the site and a very turbid storm water discharges into the nearby wetland preserves. The discharges to the wetlands were caused by inadequate BMPs and the broken culvert noted in the 23 January 2008 inspection. The broken culvert and the discharge were significant storm water management issues, which should have addressed by the Discharger in a timely manner.
- c. On 28 January 2008, Regional Water Board staff inspected the site and again observed significant erosion occurring throughout the project due to the lack of erosion and sediment control BMPs. Staff also observed a very turbid discharge of storm water and significant erosion due to run-on from an adjacent parcel. Section A.5.b.1 of the General Permit requires that the SWPPP shall show "drainage patterns and slopes anticipated after major grading activities are completed. Runoff from off-site areas should be prevented from flowing through areas that have been disturbed by construction unless appropriate conveyance systems are in place. The amount of anticipated storm water run-on must be considered to determine the appropriateness of the BMPs chosen. Show all calculations for anticipated storm water run-on, and all BMPs implemented to divert off-site drainage..." The Discharger did not adequately address the significant volume of run-on to the site as required by the General Permit.
- d. On 30 January 2008, Regional Water Board staff issued the Discharger a Notice of Violation for violating the General Permit. The NOV required the Discharger to immediately install an effective combination of erosion and sediment control BMPs

throughout the project, update the current SWPPP, and clearly delineate all on-site and adjacent preserve areas with orange fencing. The NOV also required the submittal of an updated SWPPP map showing all BMPs installed on the project, all site inspection reports conducted for the project, and a written plan on how the entire site will be stabilized with an effective combination of erosion and sediment control BMPs and how storm water runoff from the site will be collected and discharged in a manner that meets water quality standards.

- e. On 4 February 2008, Regional Water Board staff inspected the site and observed significant erosion on the slopes and noted the continued lack of an effective combination of erosion and sediment control BMPs as required by the General Permit.
 - f. On 11 February 2008, Regional Water Board staff issued the Discharger a second Notice of Violation for violating the General Permit. The second NOV was similar to the first and additionally requested the submittal of all current Section 404 Army Corps permit(s), 401 Water Quality Certification(s), Department of Fish and Game Streambed Alteration Agreements and a verified wetland delineation map for the Legends project.
 - g. On 15 February 2008, Regional Water Board staff inspected the site and observed that additional sediment control BMPs had been added to the project; however, much of the project was still not protected with both erosion and sediment control BMPs. The Discharger also provided a response to the Notice of Violation with a copy of their inspection reports. The first inspection report submitted by the Discharger was conducted on 12 January 2008, although construction had begun prior to Fall 2007.
 - h. On 26 February 2008, Regional Water Board staff conducted a follow-up inspection and observed that the Discharger had installed additional BMPs along the perimeter of the project; however, much of the interior of the project was unprotected, in violation of the General Permit's requirement for an effective combination of erosion and sediment control BMPs.
 - i. On 13 May 2008, Regional Water Board staff conducted a site inspection and observed no significant storm water problems. Additional BMPs had been installed, and most existing BMPs were being maintained.
9. As discussed above, the Discharger failed to implement an effective combination of erosion and sediment control BMPs to reduce pollutants in storm water discharges from the construction sites to the BAT/BCT performance standard, resulting in the discharge of sediment-laden storm water into nearby wetlands. In addition, the Discharger failed to perform mandatory inspections as required in the General Permit. The monitoring program is an important component of the General Permit since inspections are critical for assessing compliance. Without inspections, the Discharger cannot determine BMP effectiveness or the need for additional BMPs and maintenance of existing BMPs.

10. Section 13385 of the CWC states, in part:

"(a) Any person who violates any of the following shall be liable civilly in accordance with this section:

(1) Section 13375 or 13376

(2) Any waste discharge requirements or dredged and fill material permit.

(5) Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act as amended."

"(c) Civil liability may be imposed administratively by the State Board or a Regional Board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the... following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

(2) Where there is discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

"(e) In determining the amount of liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation, or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefits or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

11. **Maximum Civil Liability.** Pursuant to CWC section 13385(c), the Discharger has a maximum civil liability of \$1,810,000. The maximum liability is based on the number of gallons of sediment-laden storm water discharged from the site and at least 23 days of violation of the General Permit. There were seven days of violation due to inadequate BMPs as noted during Regional Water Board inspections, from 23 to 28 January and on 4 February. In addition, there were 16 days of violation based on failure to inspect the site before and after rain events as required by the General Permit. Based on rainfall data from Diablo Grande, there was rain at the site on 13 October 2007, 29 October 2007, 7 December 2007, 18 December 2007, 19 December 2007; 4 to 7 January 2008, and 9 January 2008. At \$10,000 for each day of violation, the maximum penalty for the 23 days is \$230,000 (23 x \$10,000).

Regional Water Board staff also calculated that the site discharged over 162,000 gallons of sediment-laden storm water from 25 to 28 January 2008. The gallons discharged from the site were conservatively estimated taking into account the size of the

disturbed area, rainfall data, and application of a runoff coefficient. At \$10 a gallon for each gallon over 1,000 gallons per storm event not susceptible to cleanup, the maximum penalty for the discharges from 25 to 28 January 2008 is \$1,580,000 (158,000 x \$10).

12. **Minimum Civil Liability.** Pursuant to CWC section 13385(c), at a minimum, liability shall be assessed at a level that recovers the economic benefits derived from the acts that constitute the violation. The Discharger gained an economic benefit estimated at \$1,500 per acre by not implementing appropriate BMPs at the site, resulting in a cost savings of \$33,000. The assessed penalty is higher than these economic benefits.
13. Issuance of this Administrative Civil Liability Complaint to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et. seq.), in accordance with Title 14 California Code of Regulations, Enforcement Actions by Regulatory Agencies, section 15321(a)(2).

RWHS DIABLO GRANDE LLC IS HEREBY GIVEN NOTICE THAT:

1. The Assistant Executive Officer of the Regional Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of two hundred fifty thousand dollars (**\$250,000**).
2. A hearing on this matter will be scheduled for the **11/12 September 2008** Regional Water Board meeting unless the Discharger agrees to complete the following by **25 July 2008**:
 - a. Waive the hearing by completing the attached form and returning it to the Regional Water Board; and
 - b. Pay the proposed civil liability of two hundred fifty thousand dollars (\$250,000) in full.
3. If a hearing in this matter is held, the Regional Water Board will consider whether to affirm, reject or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.



JACK DEL CONTE, Assistant Executive Officer

25 June 2008
Date

**WAIVER OF HEARING FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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

1. I am duly authorized to represent RWHS Diablo Grande, Legends, LLC (hereafter "Discharger") in connection with Administrative Civil Liability Complaint No. R5-2008-0538 (hereafter the "Complaint");
2. I am informed of the right provided by California Water Code section 13323, subdivision (b), to a hearing within ninety (90) days of service of the Complaint;
3. I hereby waive the Discharger's right to a hearing before the California Regional Water Quality Control Board, Central Valley Region (Regional Water Board), within ninety (90) days of the date of service of the Complaint; and
4. I certify that the Discharger will remit payment for the civil liability imposed in the amount of two hundred fifty thousand dollars (**\$250,000**) by check, which contains a reference to "ACL Complaint No. R5-2008-0538" and is made payable to the "*State Water Pollution Cleanup and Abatement Account*."
5. I understand the payment of the above amount constitutes a settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period mandated by Federal regulations (40 CFR 123.27) expires. Should the Regional Water Board receive new information during this comment period, the Regional Water Board may withdraw the complaint, return payment, and issue a new complaint.
6. 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.

(Print Name and Title)

(Signature)

(Date)

**Attachment to 25 June 2008 letter
ACL Complaint R5-2008-0538
RWHS Diablo Grande, Legends, LLC
Factors Considered in Assessing Liability**

Nature and Circumstances

The Discharger is the owner of an 86-acre residential construction project within the Diablo Grande development in Stanislaus County. Runoff from the site discharges to nearby wetland preserves, which are tributary to Solado Creek.

From 23 January to 15 February 2008, Regional Board staff inspected the site and found storm water management problems and violations of the Storm Water Construction General Permit. The Discharger violated Discharge Prohibitions A.3, Special Provision C.2, Section A.6 and Section A.11 of the General Permit by not having adequate Best Management Practices (BMPs) and discharging over 162,000 gallons of very turbid storm water into wetlands during the 2007/2008 wet season. In addition, the Discharger failed to perform mandatory inspections as required in the General Permit. The monitoring program is an important component of the General Permit since inspections are critical for assessing compliance. Without inspections, the Discharger cannot determine BMP effectiveness or the need for additional BMPs and maintenance of existing BMPs. Notices of Violation were issued to the Discharger on 30 January 2008 and 11 February 2008.

Gravity

The Discharger failed to comply with the General Construction Permit for a total of 23 days. There were seven days of violation due to inadequate BMPs as noted during Regional Board inspections, from 23 to 28 January and on 4 February. In addition, there were 16 days of violation based on failure to inspect the site before and after rain events as required by the General Permit. Based on rainfall data from Diablo Grande, there was rain at the site on 13 October 2007, 29 October 2007, 7 December 2007, 18 December 2007, 19 December 2007; 4 to 7 January 2008, and 9 January 2008. This non-compliance resulted in significant discharges of turbid storm water into the adjacent wetlands. Wetlands support a unique group of plants and animals that are specially adapted to the unusual conditions wetlands.

Toxicity

The highly turbid runoff contained suspended sediments, which could have reduced habitat for aquatic life as well as caused deleterious effects due to physical impacts.

Susceptibility of the Discharge to Cleanup

Once the turbid runoff entered the wetlands, there was no practical way to clean up the sediment to avoid impacts to water quality or beneficial uses.

Ability of the Discharger to Pay

The Discharger has not demonstrated an inability to pay the liability.

Voluntary Cleanup Efforts

This does not apply in this action.

Prior History of Violations

Water Board staff has no record of non-compliance by the Discharger.

Degree of Culpability

The Discharger obtained coverage under the General Permit and was assigned WDID No. 5S50C336830 on 22 September 2005. The Discharger was aware of the General Construction Permit requirements.

As discussed above, the Discharger failed to adequately implement BMPs or conduct the required inspections in compliance with the General Permit, resulting in the discharge of sediment-laden storm water into nearby wetlands.

Economic Benefit

The Discharger saved approximately \$33,000 by not implementing adequate erosion and sediment control BMPs. Based on a survey of consultants, approximately \$2,000 to \$6,000 per acre is needed to provide the necessary erosion and sediment control measures for construction sites depending on the slope and soil type. The Discharger's construction site within Diablo Grande has significant slopes; therefore, an effective combination of both erosion and sediment control BMPs is critical to protect the site. Since the perimeter control BMPs installed at the site were somewhat effective, the economic benefit received by the Discharger by not installing and maintaining an effective combination of erosion and sediment control BMPs at the site was estimated to be \$1,500 per acre. The Discharger's consultant confirmed that 26 acres were disturbed during the 2007-2008 wet season. Staff conservatively estimated that only 22 of the 26 acres disturbed required stabilization. The economic benefit was estimated by multiplying 22 acres by \$1,500 per acre for a total of \$33,000.