



Calculating Liability

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“Something that says I’m sorry without admitting liability.”

Use of ACL Factors in Determining Liability

- Water Code Section determines factors [§§ 13327 or 13385 (e)]
- Don't forget maximum & minimum liability amounts
- Check with Office of Enforcement counsel

Use of ACL Factors in Determining Liability

- Water Code requires consideration of factors in determining ACL amount
- Include factors analysis in ACL Complaint or staff report
- Include ACL Complaint finding that water code factors were considered
- Individual case by case analysis*

ACL Factors

1. Nature, circumstance(s), extent, and gravity of the violation or violations,
2. Whether the discharge is susceptible to cleanup or abatement,
3. The degree of toxicity of the discharge, and,
4. with respect to the violator,
 1. Ability to pay,
 2. Effect on its ability to continue its business,
 3. Any voluntary cleanup efforts undertaken,
 4. Any prior history of violations,
 5. Degree of culpability,
 6. Economic benefit or savings, if any, resulting from the violation, and
5. Other matters that justice may require.
6. 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 [§ 13385(e)].

Focus No. 1: Violation

- Nature: Type of violation
- Circumstances: Facts surrounding violation
- Extent: Range or limits of the violation
- Gravity: The weight of the violation

Spill Violation Questions

- Overall description of how the spill occurred?
- Type of pollutants
 - Hazardous Waste
 - Potable water
- Volume
 - Millions of gallons
 - One gallon
- Duration
 - One month
 - One hour
- What is the threat?
 - Human or animal?
 - None
- Who reported spill?
 - Citizen
 - Agency
- Receiving water
 - Beneficial uses
 - Size
 - 303(d) listed?

Effluent Violation Questions

- How and why did the exceedance occur?
- Type of limitation
 - Toxic
 - Mass loading
- Volume
 - Millions of gallons
 - One gallon
- Duration
 - One month
 - One hour
- By how much was the limit exceeded?
- What is the threat?
 - Reason for limitation
- Who reported violation?
 - Citizen
 - Agency
- Receiving water
 - Beneficial uses
 - Size
 - 303(d) listed?

Focus No. 2: Discharge

- Can the discharge be cleaned up?
 - Concrete dumped in dry creek bed
 - Sediment discharged two storm events ago
- Degree of toxicity
 - Hazardous chemical spill causes mass fish kill
 - Small sewage spill causes one swimmer to become ill
 - Small potable water spill to fresh water lake

Focus No. 3: Violator

- Ability to pay & continue in business
 - Can no longer assume ability to pay
 - Use info gained from
 - Internet
 - Investigative Order (Water Code § 13267)
 - Input info into
 - US EPA Enforcement Economic Models (BEN, ABEL, etc.)
 - City of Carlsbad
 - Project funded from cash surplus
 - City budget stated that it was in the black
 - Projected surplus for next year

Focus No. 3: Violator

- Voluntary cleanup efforts undertaken
 - Can the violation be cleaned up?
 - Did cleanup occur?
 - How effective was the cleanup?
- Prior history of violations?
 - Similar violations (How long ago?)
 - Other violations in other permits or programs

Focus No. 3: Violator

- Degree of culpability
 - Intentional act
 - Negligent act
 - Is there an industry wide performance standard?
 - Natural disaster
 - Unforeseen?
 - Intentional act of a 3rd party
- Economic benefit or savings
 - Run BEN model

Focus No. 4: Did we forget anything?

- Other matters that justice may require
 - Staff costs
 - must access liability more than twice staff costs to recoup
 - Raise the liability
 - Deterrence to others
 - Environmental justice
 - Lower or raise the liability
 - Statewide consistency

§ 13385 (e) Economic Benefit

- Any savings or monetary gain derived from the acts or failure to act that resulted in the violation.
- Must recover

Questions & Answers

What does your Region do?

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