

# ATTACHMENT K

## WATER QUALITY ENFORCEMENT POLICY METHODOLOGY

Pursuant to CWC section 13385, subdivision (e), and section 13327, in determining the amount of any civil liability, the Regional Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the dischargers are susceptible to cleanup or abatement, the degree of toxicity of the discharges, 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 benefit or savings, if any, resulting from the violations, and other matters that justice may require.

On November 17, 2009, the State Water Resources Control Board adopted Resolution 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385, subdivision (e), and section 13327.

An analysis of the Enforcement Policy methodology for the violations alleged in the ACL complaint is set forth below.

### **Step 1: Potential for Harm for Discharge Violations**

The potential for harm for the discharge violations is 10, the maximum allowed under the Enforcement Policy. This potential for harm score is determined by the sum of Factors 1 through 3 below.

#### **Factor 1: Harm or Potential Harm to Beneficial Uses:**

After review and analysis of the alleged violations, the Prosecution Team has determined that the harm or potential harm to beneficial uses is major, which results in a score of **5.0**. The Water Quality Control Plan for the Colorado River Basin (hereinafter Basin Plan) designates the following beneficial uses of the New River:

- a. Fresh Water Replenishment of the Salton Sea (FRSH)
- b. Water Contact Recreation (REC I)
- c. Non-Contact Water Recreation (REC II)
- d. Warm Water Habitat (WARM)

e. Wildlife Habitat (WILD)

f. Preservation of Rare, Endangered or Threatened Species (RARE)

Section 303(d) of the Clean Water Act (CWA) requires States to develop and submit to the U.S. Environmental Protection Agency (USEPA) for approval a list of polluted waters or water quality limited (or impaired) segments, commonly referred to as the "303(d) List" or the "List of Impaired Waters." The entire stretch of the New River in the U.S. is listed in the State 303(d) List because, among other impairments, the New River is impaired by toxicity. On March 20, 2013, the Colorado River Basin Water Board revised its 2012 303(d) List, in relevant part, so that it also includes ammonia as an impairing pollutant. Based on the city of Brawley self-monitoring data submitted, the discharge from the city of Brawley's Wastewater Treatment Plant (WWTP) has contributed to the ammonia and toxicity impairments directly, downstream from and in the immediate vicinity of, the Brawley WWTP discharge outfall. National Beef California's (NBC's) slaughterhouse has been the major controllable source of ammonia and toxicity into the Brawley WWTP. It has discharged ammonia and toxic pollutants into the Brawley WWTP in concentrations and amounts that caused and/or contributed to the Brawley WWTP's effluent to be acutely toxic and exhibit chronic toxicity, which caused or contributed to violations of the city of Brawley's NPDES permit Effluent Limitations for ammonia and toxicity, and Receiving Water Limitations for toxicity.

In addition, NBC has contributed excessively high concentrations of Biochemical Oxygen Demand (BOD) and Total Suspended Solids (TSS). Monitoring records show that as recently as 2012, the organic loading from the NBC slaughterhouse, based on BOD and TSS data, consumed even as much as 80 percent of the Brawley WWTP's treatment capacity, which caused or contributed to violations of the city of Brawley's NPDES permit Effluent Limitations for BOD, TSS, and bacteria.

Consequently, NBC has been the main source of ammonia, BOD, and TSS into the Brawley WWTP and has discharged these pollutants into the WWTP in concentrations and amounts (lbs/day) that had the reasonable potential to cause Pass Through and/or Interference with the Brawley WWTP that caused or contributed to violations of the city of Brawley's NPDES Permit Effluent Limitations for ammonia, toxicity, BOD, TSS, and bacteria, and Receiving Water Limitations for toxicity. Accordingly, the NBC discharge has contributed to the New River's ammonia and toxicity impairments.

**Factor 2: Physical, Chemical, Biological or Thermal Characteristics of the Discharge:**

As noted in Factor 1, above, NBC's discharge has been characterized by extremely high concentrations of ammonia, BOD and TSS. With respect to ammonia, ammonia can be highly toxic even at low concentrations. In this case, the monitoring data conclusively demonstrate that ammonia has been the main controllable source of chronic and acute toxicity (i.e., the City's bioassays have demonstrated adverse

effect on sensitive receptors, including fish). NBC has also discharged excessively high concentrations of BOD and TSS, including slug loads at times. Consequently, these high concentrations of ammonia, BOD, and TSS, at a minimum, had the reasonable potential to cause Pass Through and/or Interference with the Brawley WWTP, which caused or contributed to violations of the city of Brawley's NPDES Permit Effluent Limitations for ammonia, toxicity, TSS, BOD, and bacteria, and Receiving Water Limitations for toxicity. Consequently a factor of **4.0** is appropriate to use in this case.

**Factor 3: Susceptibility to Cleanup or Abatement:**

Because less than 50 percent of the discharge is susceptible to cleanup or abatement, a score of **1.0** is assigned for this factor.

**Step 2: Assessment for Discharge Violations**

Discharging in violation of the pretreatment requirements set forth in 40 CFR part 403 renders the requirements ineffective. The pretreatment requirements are in place in part to prevent Pass Through and/or Interference with the POTW, and to allow POTWs, like the city of Brawley's WWTP, to effectively treat wastewater that contains pollutants, such as ammonia, to ensure that they meet the POTW's NPDES permit Effluent Limitations and Receiving Water Limitations before they are discharged from the WWTP. In this matter, the Discharger's actions rendered those requirements ineffective in its essential functions. Pass Through and/or Interference occurred on numerous occasions essentially from when the slaughterhouse commenced operations in October 2001 through 2012.

Table 2 on page 15 of the Enforcement Policy contains a "Per Day Factor for Discharges." It is also based on a combination of the "Potential for Harm" and the "Deviation from Requirements." As noted above, the potential for harm here was significant due to the impact NBC's discharge had on the city of Brawley's noncompliance with its NPDES permit requirements. Thus, the Potential for Harm score of 10 remains appropriate to assign, and the deviation from requirements similarly remains "major." Therefore, the appropriate Per Day Factor to assign is **1.0**.

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

This step in the penalty calculator is not applicable to this discharge because it addresses only non-discharge violations.

**Initial Amount of Liability**

For violation of the federal National Pretreatment Standards that prohibit an Industrial

User from introducing into a POTW any pollutants, which cause Pass Through or Interference, the Initial Liability Amounts for the violation calculated on a per day basis (pursuant to CWC section 13385(c)) are as follows:

Per Day Liability:

(Number Violation(s) x (Maximum Per Day Liability of \$10,000) =

375 x \$10,000 = \$3,750,000.00

**Total Initial Liability Amount: \$3,750,000.00**

#### **Step 4: Adjustment Factors**

##### **Culpability:**

The Discharger was aware that it was discharging pollutants to the city of Brawley's wastewater treatment plant (WWTP) that contained high levels of ammonia, which caused and/or contributed to toxicity, and other pollutants (i.e., BOD, TSS, bacteria) that caused and/or contributed to Pass Through and/or Interference with the city of Brawley's WWTP. This resulted in the city of Brawley's violating the requirements of its NPDES permit. The Discharger was informed by the city of Brawley of these violations and continued to operate without timely and effectively addressing these issues. Because these pretreatment issues began as soon as the Discharger's predecessor, Brawley Beef, LLC, commenced operations in October 2001, and continued through 2012 following the Discharger's acquisition of Brawley Beef in June 2006, the Discharger had actual or constructive knowledge for more than 10 years that its inadequately pretreated wastewaters were causing or contributing to Pass Through and/or Interference with the city of Brawley's WWTP. Therefore, the Discharger's failure to address its inadequately pretreated wastewaters to the Brawley WWTP weighs heavily against it.

Given these facts, the Prosecution Team has assigned a multiplier of **1.0**.

##### **Cleanup and Cooperation:**

While the Discharger has been responsive to the Colorado River Basin Water Board and its staff, the Discharger did not voluntarily cooperate in returning to compliance and ceasing discharges that caused and/or contributed to Pass Through and/or Interference with the city of Brawley's WWTP.

The Discharger cooperated with the Board with respect to the 13267 Order issued and met with Board staff regarding planned upgrades and Chapter 15 regulatory matters. It also appears that after 2009 the Discharger was at times responsive to the city of Brawley's citations for effluent violations due to the Discharger's

operations. It is the Prosecution Team's understanding that on several different occasions the plant halted operations to address compliance problems, including those that resulted in the violations set forth in the ACL Complaint. Although the Discharger was not proactive in its dealing with Pass Through and Interference violations, there has not been a complete absence of cooperation.

For these reasons, the Prosecution Team has assigned a multiplier of **1.0**.

**History of Violations:** There is no history of repeat violations by the Discharger. Therefore, a neutral multiplier of **1.0** is applied.

### **Step 5: Determination of Total Base Liability Amount**

The Total Base Liability Amount is determined by multiplying the Total Initial Liability Amount by each of the adjustment factors from Step 4

(Total Initial Liability Amount) x (Culpability Multiplier) x (Cleanup and Cooperation Multiplier) x (History of Violations Multiplier) = Total Base Violation

(\$3,750,000.00) x 1.0 x 1.0 x 1.0 = **\$3,750,000.00**

### **Step 6: Ability to Pay**

The Prosecution Team believes the Discharger has the ability to pay the proposed liability and continue to operate if it desired to do so.

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

The Prosecution Team has concluded that there are no other factors as justice may require that need to be considered at this time. Therefore, the Total Base Liability Amount is unchanged.

### **Step 8: Economic Benefit**

See Attachment M.

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

See Findings 58-60 of the ACL Complaint and Attachment M.

### **Step 10: Final Liability Amount**

See Penalty Calculator, Attachment L.