



Lahontan Regional Water Quality Control Board

October 23, 2020

WDID 6B360812001

Terry Jackson
Statewide Hatchery NPDES Coordinator
California Department of Fish and Wildlife
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Terry.Jackson@wildlife.ca.gov

SETTLEMENT OFFER NO. R6V-2020-0056: OFFER TO PARTICIPATE IN EXPEDITED PAYMENT PROGRAM RELATING TO ADMINISTRATIVE CIVIL LIABILITY FOR ASSESSMENT OF MANDATORY MINIMUM PENALTIES AT THE MOJAVE RIVER FISH HATCHERY, VICTORVILLE, SAN BERNADINO COUNTY

The California Department of Fish and Wildlife (Discharger) discharges treated wastewater from the Mojave River Fish Hatchery (Hatchery). The Hatchery is currently regulated by Waste Discharge Requirements (WDRs) Order No. R6V-2017-0025 and was previously regulated by WDRs Order No. R6V-2011-0081 (NPDES CA0102814).

This Settlement Offer provides the Discharger with an opportunity to resolve mandatory minimum penalties for alleged NPDES permit violations without a formal administrative civil liability complaint. The alleged mandatory minimum penalty, in the amount of **six thousand dollars (\$6,000)**, represents the sum of accrued mandatory minimum penalties for effluent limitation violations and late submittal of monitoring reports, specifically identified in the Record of Violations (Attachment A), attached hereto and incorporated herein by reference, that occurred between October 1, 2011 and June 30, 2020.

NOTICE OF VIOLATION AND RECORD OF VIOLATIONS

On August 6, 2020, the Lahontan Water Board Prosecution Team sent the Discharger a Notice of Violation and Record of Violations (ROV) for the Mojave River Fish Hatchery. The ROV was based on a review of the Discharger's self-monitoring reports for the period of October 1, 2011 through June 30, 2020, notified the Discharger of effluent limit violations and reporting violations, and provided the Discharger with an opportunity to review and contest the violations.

The Discharger responded in writing on September 4, 2020 and discussed each of the ten violations listed in the ROV. On October 15, 2020, Water Board staff discussed the response with the Discharger. With respect to ROV violations #1-7, the Discharger stated that it was assumed that these violations had been "resolved" because they were

discussed in the Compliance Summary section of the Fact Sheet of WDR Order No. R6V-2017-0025. However, a review of the Fact Sheet finds that the violations were simply listed and there is no discussion of a resolution of mandatory penalties. The Discharger also points out that ROV violations #1-8 were not included in the Lahontan Water Board's June 30, 2016 Settlement Offer (R6V-2016-0041) and that inclusion at this time appears to be "double jeopardy". A review of the 2016 Settlement Offer finds that it was clearly issued for a single effluent violation that was self-identified by the Discharger. In addition, the document contains the statement that the Settlement Offer "does not address or resolve liability for any violation other than the violation specifically identified, above, regardless of the date that the violation occurred."

With regard to pH violations #1-6, the Discharger states that the pH limitation of 6.5 to 8.5 found in WDR Order No. R6V-2011-0081 was increased to 6.5 to 9.0 in WDR Order No. R6V-2017-0025, and that if the 6.5 to 9.0 pH limitation had been in effect prior to 2017, then Violations #1-6 would not be violations. Lahontan Water Board staff understands the Discharger's position; however, staff must assess violations based on the effluent limitation in effect at the time the effluent was sampled. It is not possible to go back in time to revise effluent limitations in a previous Order.

The Discharger provided information to support its contention that ROV violation #7, for hydrogen peroxide, should be dismissed. In reviewing the information, Lahontan Water Board staff found a second hydrogen peroxide effluent violation that took place on February 20, 2016. This additional violation has been added to Attachment A (violation #9), but it does not result in an additional penalty. The laboratory analytical reports for the two hydrogen peroxide violations do not show any anomalies or reason to dismiss the violations. It is also noted that these two violations are "chronic" and do not result in a monetary penalty.

The Discharger agreed that ROV violations #8 and #10, for total suspended solids, are chronic violations. With respect to ROV violation #11, the late reporting violation, the Discharger states that the report was submitted late due to an audit of the Hatchery and asks that the violation be "reduced to a non-MMP" because there were no water quality violations during this period. However, Water Code section 13385.1(a)(1) requires that a serious violation be assessed for each 30-day period following the deadline to submit a monitoring report, if that report is designed to show compliance with effluent limitations. The Discharger's late monitoring report was designed to show compliance with effluent limitations in Order No. R6V-2017-0025, and therefore Lahontan Water Board staff does not have the ability to dismiss this violation.

Following the above review of the Discharger's response to the ROV, the Lahontan Water Board Prosecution Team has confirmed that the violations listed in Attachment A are subject to mandatory minimum penalties.

STATUTORY LIABILITY

Water Code sections 13385(h) and (i) require the assessment of a mandatory minimum penalty of \$3,000 for each specified serious and chronic effluent limit violation. In addition, Water Code section 13385.1(a) requires the assessment of a mandatory minimum penalty of \$3,000 for the failure to file a discharge monitoring report required pursuant to section 13383 for each complete period of thirty (30) days following the deadline for submitting the report. The Discharger may also be subject to discretionary administrative civil liabilities pursuant to Water Code section 13385(c) of up to \$10,000 for each day in which the violation occurs, and \$10 for each gallon discharged but not cleaned up in excess of 1,000 gallons.

There are no statutes of limitation that apply to administrative proceedings to assess mandatory minimum penalties. See *City of Oakland v. Public Employees' Retirement System*, (2002) 95 Cal.App.4th 29, 48; 3 Witken, Cal. Procedure (4th ed. 1996) Actions, §405(2). p.510). Additionally, the State Water Resources Control Board has determined that the equitable doctrine of laches does not apply to mandatory minimum penalties. (State Water Board Order Nos. 2013-0053, 2013-0054, 2031-0055, 2013-0099).

The formal enforcement action that the Lahontan Water Board uses to assess mandatory minimum penalties is an administrative civil liability complaint, although the Lahontan Water Board may instead refer such matters to the Attorney General's Office for prosecution. If referred to the Attorney General for prosecution, the Superior Court may assess up to \$25,000 for each day in which the violation occurs, and \$25 for each gallon discharged but not cleaned up in excess of 1,000 gallons.

SETTLEMENT OFFER

The Discharger can avoid the issuance of a formal enforcement action and settle the alleged violations identified in Attachment A by participating in the Lahontan Water Board's Expedited Payment Program. Details of the proposed settlement are described below and addressed in the enclosed documents.

To promote resolution of the alleged violations which occurred between October 1, 2011 and June 30, 2020, the Lahontan Water Board Prosecution Team makes this conditional offer:

The Lahontan Water Board's Prosecution Team proposes to resolve the violations listed in Attachment A without the issuance of a formal enforcement action through this Conditional Offer assessing **six thousand dollars (\$6,000)** in mandatory minimum penalties.

The Discharger may accept this offer, waive its right to a hearing, and pay the mandatory minimum penalty of six thousand dollars (\$6,000) for the violations listed in Attachment A. If the Discharger accepts this proposal, subject to the conditions below, the Lahontan Water Board Prosecution Team will accept that payment in settlement of

any enforcement action that would otherwise arise out of the violations identified in Attachment A. Accordingly, the Lahontan Water Board Prosecution Team will forego issuance of a formal administrative civil liability complaint, will not refer the violations to the Attorney General, and will waive its right to seek additional discretionary civil liabilities for the violations identified in Attachment A. The Conditional Offer does not address or resolve liability for any violation that is not specifically identified in Attachment A, regardless of the date that the violation occurred.

DISCHARGER'S OPTIONS FOR RESPONSE TO THIS OFFER:

If the Discharger accepts this Conditional Offer, please complete and return the enclosed "Acceptance of Conditional Resolution and Waiver of Right to Hearing" (proposed) Order" (Acceptance and Waiver) on or before **December 1, 2020**. The Acceptance and Waiver constitutes a settlement of the violations specifically identified in Attachment A.

If the Discharger chooses not to accept this Conditional Offer or make payment in response to this Conditional Offer, then the Discharger should expect to be contacted regarding a formal enforcement action that will be initiated with regard to the contested violations. In a formal enforcement action, the liability amount sought and/or imposed may exceed the liability amount set forth in this Conditional Offer.

CONDITIONS FOR LAHONTAN WATER BOARD ACCEPTANCE OF RESOLUTION

Federal regulations and the State Water Resources Control Board's Enforcement Policy require the Lahontan Water Board to publish and allow the public thirty (30) days to comment on any settlement of an enforcement action addressing NPDES permit violations (40 C.F.R. section 123.27(d)(2)(iii)). Upon receipt of the Discharger's Acceptance and Waiver, Water Board staff will publish a notice of the proposed resolution of the violations at <https://www.waterboards.ca.gov/lahontan/>.

If no comments are received within the 30-day comment period, and unless there are new material facts that become available to the Lahontan Water Board, the Executive Officer or his designee will execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty amount pursuant to Water Code section 13385.

However, if significant comments are received in opposition to the settlement, this Conditional Offer may be withdrawn. In that case, the Discharger's waiver pursuant to the Acceptance and Waiver will be void and the violations will be addressed in an administrative civil liability hearing. At the hearing, the Discharger will be free to make arguments to any of the alleged violations, and the Discharger's prior agreement to accept this Conditional Offer will be treated as a settlement communication and will not in any way be binding or used as evidence against the Discharger. If this matter proceeds to hearing, the Discharger will be provided with further information on the administrative civil liability hearing process.

Full payment of the assessed amount shall be due no later than thirty (30) calendar days after the date the Acceptance and Waiver is executed by the Executive Officer. In accordance with California Water Code section 13385(n)(1) and California Water Code section 13385.1(c)(1), funds collected for violations of effluent limitations and reporting requirements pursuant to section 13385 and 13385.1 shall be deposited in the State Water Pollution Cleanup and Abatement Account. Accordingly, the \$6,000 liability shall be paid by cashiers or certified check made out to the "*State Water Pollution Cleanup and Abatement Account*". Failure to pay the full penalty within the required time period may subject the Discharger to further liability.

Please respond to this Conditional Offer by December 1, 2020. All responses shall be submitted via email, under penalty of perjury, to Lahontan@waterboards.ca.gov. Please include "Mojave River Fish Hatchery EPL" and the WDID number (6B360812001) in the transmittal email's subject line.

If you have any questions or comments regarding this Conditional Offer, please contact Robert Tucker at (530) 464-4606 or Robert.Tucker@waterboards.ca.gov.

Scott C. Ferguson, P.E.
Supervising Water Resource Control Engineer
Manager, Cleanup and Enforcement Division

Enclosures (2): Attachment A Record of Violations
Acceptance of Conditional Resolution and Waiver of Right to Hearing

cc w/enc (via email):

David Boyers, Assistant Chief Counsel, State Water Board Office of Enforcement
Wendy Wyels, Environmental Program Mgr, State Water Board Office of Enforcement
Mike Plaziak, Acting Executive Officer, Lahontan Water Board Advisory Team
Robert Tucker, Senior WRCE, Lahontan Water Board Prosecution Team
Gary Williams, Senior Hatchery Supervisor, Dept Fish and Wildlife
Paco Cabral, Mojave River Fish Hatchery, Dept Fish and Wildlife
Heidi Calvert, Environmental Program Manager, Dept Fish and Wildlife
Jay Rowan, Environmental Program Manager, Dept Fish and Wildlife
Kevin Shaffer, Chief, Fisheries Branch, Dept Fish and Wildlife

**ATTACHMENT A: RECORD OF VIOLATIONS
FOR ASSESSING MANDATORY MINIMUM PENALTIES**

**CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
MOJAVE RIVER FISH HATCHERY, SAN BERNADINO COUNTY**

Record of Violations from October 1, 2011 to June 30, 2020
Data reported under Monitoring and Reporting Programs R6V-20011-0081 and R6V-2017-0025

Table A. Effluent Violations Subject to Mandatory Penalties

Item	Date	Parameter	Units	Permit Limit	Measured	Period	CIWQS	Remark/ Penalty	Monitoring Report
October 12, 2011: Order R6V-2011-0081 is in effect									
1	10/10/2013	pH	S.U.	8.5	8.97	Instantaneous maximum	1075296	3	Q4 2013
2	11/19/2013	pH	S.U.	8.5	8.89	Instantaneous maximum	1075297	3	Q4 2013
3	2/13/2014	pH	S.U.	8.5	8.82	Instantaneous maximum	1075298	3	Q1 2014
4	3/5/2014	pH	S.U.	8.5	8.86	Instantaneous maximum	1075299	4/\$3,000	Q1 2014
5	6/9/2014	PH	S.U.	8.5	8.95	Instantaneous maximum	1075300	3	Q2 2014
6	1/23/2015	pH	S.U.	8.5	8.57	Instantaneous maximum	991724	3	Q1 2015
**	6/30/3015	Total suspended solids	mg/L	6.0	9	Monthly average	993605	1 **	Q2 2015
7	12/15/2015	Hydrogen peroxide	mg/L	1.3	1.4	Maximum daily	1075293	3	Q4 2015
8	1/31/2016	Total suspended solids	mg/L	6.0	7	Monthly average	1075294	3	Q1 2016
9	2/20/2016	Hydrogen peroxide	mg/L	1.3	1.4	Maximum Daily	1079334	3	Q1 2016
10	2/28/2017	Total suspended solids	mg/L	6.0	6.8	Monthly average	1075295	3	Q1 2017
July 1, 2017: Order R6V-2017-0025 is in effect. No effluent violations of this Order through June 30, 2020.									

** \$3,000 penalty already assessed in Settlement Offer No. R6V-2016-0041

Table B. Reporting Violations Subject to Mandatory Penalties

Item	Report	Due Date	Date Submitted	# of 30-day periods after due date	# of serious violations	Penalty	CIWQS
10	4 th Quarter 2014	2/1/2015	3/12/2015	1	1	\$3,000	1075307

Remarks:

1. Serious violation: Category 1 pollutant that exceed the effluent limitation by 40% or more.
3. Chronic violation not subject to MMPs: the violation falls within the first three violations within a 180-day period.
4. Chronic violation subject to MMP: Four or more violations within a 180-day period.

Summary

Late report violations: 1
 Category 1 violations: 0
 Chronic violations subject to MMPs: 1
 Chronic violations not subject to MMPs: 9
Total of 2 MMP violations x \$3,000 = \$6,000 penalty

Updated 11Sept20

Lahontan Regional Water Quality Control Board

ACCEPTANCE OF CONDITIONAL OFFER AND WAIVER OF RIGHT TO HEARING; (proposed) ORDER

California Department of Fish and Wildlife
Mojave River Fish Hatchery
Settlement Offer No. R6V-2020-0056
WDID 6B360812001

By signing below and returning this Acceptance of Conditional Offer and Waiver of Right to Hearing (Acceptance and Waiver) to the California Regional Water Quality Control Board, Lahontan Region, (Lahontan Water Board), the California Department of Fish and Wildlife (Discharger) hereby accepts the “Offer to Participate in Expedited Payment Program” (Conditional Offer), incorporated herein by reference, and waives the right to a hearing before the Lahontan Water Board to dispute the allegations of violations described in the Record of Violations (ROV), which is included as Attachment A to the Conditional Offer.

The Discharger agrees that the Conditional Offer shall serve as a complaint pursuant to Article 2.5 of the California Water Code and that no separate complaint is required for the Lahontan Water Board to assert jurisdiction over the alleged violations through its Chief Prosecutor. The Discharger agrees to pay the penalties required by California Water Code section 13385, in the sum of **six thousand dollars (\$6,000)** (Expedited Payment Amount), which shall be deemed payment in full of any civil liability pursuant to Water Code section 13385 that otherwise might be assessed for the violations described in the ROV. The Discharger understands that by signing this Acceptance and Waiver, it waives its right to contest the allegations in the ROV and the amount of civil liability assessed for the violations.

The Discharger understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the ROV.

Upon execution by the Discharger, the completed Acceptance and Waiver shall be returned via email to: Lahontan@waterboards.ca.gov. Please include “Mojave River Fish Hatchery EPL Acceptance” and the WDID number (6B360812001) in the transmittal email’s subject line.

The Discharger understands that federal regulations set forth at title 40, Code of Federal Regulations, section 123.27(d)(2)(iii) and the State Water Resources Control Board’s Enforcement Policy require the Lahontan Water Board to publish notice of and provide at least thirty (30) days for public comment on any proposed resolution of an

enforcement action addressing NPDES permit violations. Accordingly, this Acceptance and Waiver, prior to execution by the Lahontan Water Board Executive Officer, will be published as required by law for public comment.

If no comments are received within the notice period that causes the Lahontan Water Board Executive Officer to question the Expedited Payment Amount, the Lahontan Water Board Executive Officer will execute this Acceptance and Waiver.

The Discharger understands that if significant comments are received in opposition to the Expedited Payment Amount, the offer on behalf of the Lahontan Water Board to resolve the violations set forth in the ROV may be withdrawn. In that circumstance, the Discharger will be advised of the withdrawal and an administrative civil liability complaint may be issued and the matter may be set for a hearing before the Lahontan Water Board. For such a liability hearing, the Discharger understands that this Acceptance and Waiver executed by the Discharger will be treated as a settlement communication and will not be used as evidence in that hearing.

The Discharger further understands that once the Acceptance and Waiver is executed by the Lahontan Water Board Executive Officer or designee, the full payment required by the deadline set forth below is a condition of this Acceptance and Waiver. In accordance with California Water Code section 13385(n)(1) and California Water Code section 13385.1(c)(1), funds collected for violations of effluent limitations and reporting requirements pursuant to sections 13385 and 13385.1 shall be deposited in the State Water Pollution Cleanup and Abatement Account. Accordingly, the \$6,000 liability shall be paid by a cashiers or certified check made out to the "*State Water Pollution Cleanup and Abatement Account*".

The payment must be submitted to the State Water Resources Control Board no later than thirty (30) calendar days after the date the Acceptance and Waiver is executed by the Lahontan Water Board Executive Officer or his designee. The check shall be mailed to:

State Water Resources Control Board
Division of Administrative Services, Accounting Office
Attn: Settlement Offer R6V-2020-0056 Payment
PO Box 1888
Sacramento, California 95812-1888

The Discharger shall also provide a copy of the check via email to the Lahontan Water Board at Lahontan@waterboards.ca.gov. Please include "Mojave River Fish Hatchery EPL Payment" and the WDID number (6B360812001) in the transmittal email's subject line.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Discharger in the making and giving of this Acceptance and Waiver.

California Department of Fish and Wildlife

BY: _____
Signed Name Date

Printed or Typed Name Date

IT IS SO ORDERED PURSUANT TO CALIFORNIA WATER CODE SECTION 13385.

By: _____
Mike Plaziak Date
Acting Executive Officer