

Attachment F

ENFORCEMENT POLICY METHODOLOGY

Specific Factors Considered to Determine Administrative Civil Liability

Each factor in the Enforcement Policy methodology and its corresponding category, adjustment, and/or amount for the non-discharge violation alleged in Administrative Civil Liability (ACL) Complaint No. R1-2013-0035 (Complaint) is presented below:

Violation: Failure to meet time schedules contained in Cleanup and Abatement Order No. R1-2011-0045 and to submit the required monthly progress reports.

Steps 1 and 2 of the Enforcement Policy address discharge violations. Those steps do not apply since the alleged violation of Cleanup and Abatement Order R1-2011-0045 (CAO) is a non-discharge violation (i.e., failure to submit the workplan).

Step 3 – Per Day Factor for Non-Discharge Violations

For non-discharge violations, the Enforcement Policy requires the calculation of a Per Day Factor multiplied by the number of days of violation. (Enforcement Policy, at pp. 15-16.) The Per Day Factor is determined by a matrix considering the potential for harm and the deviation from requirement.

a. Potential for Harm

Category: Major

Discussion: For non-discharge violations, the potential for harm is major when the characteristics of the violation present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm and/or where the violations involve particularly sensitive habitats. (Enforcement Policy, at p. 16.) The potential for harm is major here because the Discharger's failure to comply with the CAO presents the threat of discharge of raw sewage into an intermittent stream that flows to the Trinity River, a water of the State and of the United States. Regional Board staff have observed sewage flowing across the property boundary and onto the neighbor's driveway and/or property, and the Regional Board has received multiple reports from the adjacent property owner that sewage continues to discharge intermittently from the Discharger's property.

b. Deviation from Requirement

Category: Major

Discussion: For non-discharge violations, the deviation from requirement is major where the requirement has been rendered ineffective (e.g., the discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions). The deviation from requirement is major here because the Discharger has not abated the discharge of raw sewage onto neighboring property and into waters of the State. Although the Discharger's consulting engineer submitted a workplan and application for a Report of Waste Discharge on August 29, 2012, those items were incomplete and 456 days late. Moreover, the Discharger has completely failed to submit other technical reports and tasks required in the CAO.

c. Per Day Factor = 0.85

The Enforcement Policy, at page 16, Table 3, provides a table for determining the Per Day Factor based on potential for harm and deviation from requirement. For non-discharge violations involving major potential for harm and major deviation from requirement, the average per day factor is 0.85.

Step 4 – Adjustment Factors

a. Multiple Day Violations

Discussion: Pursuant to Water Code section 13350, the Regional Board may assess a maximum administrative civil liability of **\$5,000** for each day in which the Discharger fails to comply with the requirements of the CAO. The Dischargers have been in violation for **456 days** calculated from the May 31, 2011, due date for the workplan through August 29, 2012, the date on which the Discharger submitted an incomplete workplan.¹

The **initial per day assessment** is the Per Day Factor (0.85) multiplied by the maximum per day amount allowed under the Water Code (\$5,000), which equals **\$4,250**.

The **initial amount of penalty** is the initial per day assessment (\$4,250) multiplied by the number of violation days (456), which equals **\$1,938,000**.

However, the Enforcement Policy (page 18) allows for a reduction in days for violations lasting more than 30 days if the Regional Board can make express findings that the violation:

¹ The Discharger has missed other deadlines set forth in the CAO, including the requirement to immediately cease discharging raw sewage. The Regional Board reserves the right to seek enforcement and/or calculate penalties based on the Discharger's failure to comply with any other deadlines.

- a. Is not causing daily detrimental impacts to the environment or the regulatory program;
- b. Results in no economic benefit from the illegal conduct that can be measured on a daily basis; or
- c. Occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.

Here, the discharge does not result in any economic benefit that can be measured on a daily basis because the requirement to abate the discharges, prepare and submit technical reports, and construct a new disposal system does not require work on a daily basis.

The alternative penalty calculation approach provides that for violations lasting more than 30 days, the liability shall not be less than an amount that is calculated based on an assessment of the initial liability amount for the first day of the violation, plus an assessment for each 5 day period of violation until the 30th day, plus an assess for each 30 days of violation thereafter.

Using the alternative penalty calculation, **21 days** of violation have been accrued, based on a per-day assessment for day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360, 390, 420, 450 out of the 456 day total.

After adjusting the number of days, the Initial Amount of Administrative Civil Liability is **\$89,250**. This amount is determined by multiplying the Per Day Factor (0.85) by the adjusted number of days (21) by the maximum per day amount (\$5,000).

b. Culpability

Adjustment: 1.2

The Enforcement Policy provides that higher liabilities should result from intentional or negligent conduct than for accidental, non-negligent violations. The test is what a reasonable and prudent person would have done under similar circumstances. Adjustment should result in a multiplier between 0.5 and 1.5. The Discharger here owns and operates the mobile home park. The Discharger has negligently or intentionally allowed wastewater generated at the park to discharge across the neighboring property and to surface waters tributary to the Trinity River. The Discharger has taken minimal or no steps to abate the discharge. Therefore, a multiplier of 1.2 is appropriate here.

c. Cleanup and Cooperation

Adjustment: 1.5

The Enforcement Policy provides that the liability should be adjusted by a factor of between 0.75 and 1.5 based on the extent to which the discharger has voluntarily cooperated in returning to compliance and correcting environmental damage, including voluntary cleanup. To date little substantial work has been performed that will mitigate or prevent discharges of waste from continuing to discharge across the neighboring property and enter surface waters tributary to the Trinity River. Therefore, a multiplier of 1.5 is appropriate here.

d. History of Violations

Adjustment: 1

Discussion: The Regional Water Board has not issued other formal enforcement actions against the Discharger for violations similar to the one alleged in the Complaint.

Step 5 – Determination of Total Base Liability Amount

The **Total Base Liability Amount** is **\$160,650** (Per Day Factor (0.85) x Statutory Maximum (\$5,000) x Adjusted Days (21) x Culpability (1.2) x Cleanup and Cooperation (1.5) x History of Violations (1.0)).

Step 6 – Ability to Pay and Ability to Continue in Business

Adjustment: 1

Discussion: The Dischargers own at least two properties. The properties are located in Butte and Trinity counties and, in 2010, had a calculated total assessed value of \$74,844 and \$259,310 respectively. The Dischargers generate income from the Mobile Home Park and a small hardware store located on the Trinity property. The income generated at the Mobile Home Park is primarily from low-income residential units with an average monthly rental of \$300 per unit. Approximately half of the 21-unit park is occupied generating about \$3,000 per month or \$36,000 annually. The annual sales for the hardware store in 2011 were \$80,000. Based on this information, staff believe the Dischargers have the ability to pay the penalty amount and still stay in business, and no adjustment is required.

Step 7 – Other Factors as Justice May Require

Discussion: The Enforcement staff time incurred to prepare this Complaint and supporting information is estimated to be 35 hours. Based on an average cost to the State of \$150 per hour, the total staff cost is estimated to be **\$5,250**. This amount should be added to the total liability amount.

Step 8 – Economic Benefit

Discussion: The Enforcement Policy (pages 20-21) requires that the adjusted Total Base Liability Amount should be at least 10 percent higher than any economic benefit realized by the discharger for failing to comply with the CAO. The Discharger here may have benefited economically by delaying the submittal of the required ROWD and technical reports.

Delay of ROWD and Technical Reports

Professional consulting costs average about \$120 per hour (range \$85-\$150 per hour). The estimated number of hours for preparing and providing a ROWD and other technical reports required in the CAO are 40 hours for the ROWD and Workplan. Based on these numbers, estimated cost for each task is as follows:

Task (Due date)	Estimated Cost	Period Late²
ROWD & Workplan (Due 5/31/11)	\$4800	456 days (Submitted 8/29/12)

Average annual percentage interest rate (APR) for a personal loan from May 2011 to November 2011 (Period 1) is 10.52% and from November 2011 to January 2013 (Period 2) is 8.95%. Based on this APR, the Discharger would have incurred the following interest costs and estimated economic benefit:

Task	ROWD & Workplan
Period 1 at 10.52%	183 days = 0.501 years
Period 2 at 8.95%	273 days = 0.748 years
Total Interest	$\$4800 [(0.501*10.52\%) + (0.748*8.95\%)] = \574.32
Economic Benefit	$\$4800 + \$574.32 = \$5374.32$

Total estimated economic benefit for late reports = \$5,374.32

² As of January 31, 2013

Delay of Implementing Actions to Abate the Discharge

The ROWD and Workplan submitted by the Discharger's consultant describes two possible options to abate the discharge. One option is to connect to the neighboring Lewiston Community Services District's wastewater treatment facility (CSD facility) and the second option is to fix and/or replace the existing wastewater treatment system and continue to use the pond for disposal.

The estimated cost to the Discharger to connect to the CSD facility³:

a. $\$1,000.00 * 35 \text{ connections} = \$35,000.00$; and

The Discharger is also required by the CSD to conduct flow monitoring for one year.

The estimated cost to the Discharger for flow monitoring:

b. 1hr/month for data collection + 5 hrs for data analysis & report = 17 hrs

c. Costs for consulting: $17\text{hrs} * \$120.00/\text{hr} = \$2,040.00$

The total cost to the Discharger to connect to the CSD facility is estimated to be \$37,040.00.

The estimated cost for fixing and/or replacing the existing system and the disposal pond is unknown and requires assessment of the existing facility and pond.

Staff estimates the economic benefit to the Discharger is at least \$37,040.00. The Total Base Liability Amount (\$160,650) is more than ten percent greater than the estimated economic benefit.

Step 9 – Maximum and Minimum Liability Amounts

a. Minimum Liability Amount

Discussion: The minimum liability under Water Code section 13350 is no less than \$100 per day if there is no discharge or \$500 per day if there is a discharge and a CAO is issued. For this case, the minimum liability is \$45,600 ($\$100 * 456 \text{ days}$). Additionally, the Enforcement Policy requires that the adjusted Total Base Liability Amount be, at a minimum, 10 percent higher than the economic benefit received as a result of the alleged violation. The Discharger's estimated economic benefit plus 10 percent is \$40,744. Because the statutory minimum amount is higher than the adjusted economic benefit, the minimum liability here is **\$45,600**.

b. Maximum Liability Amount

Discussion: The maximum liability that may be imposed under Water Code section 13350 is **\$2,280,000**. This is based on the maximum liability of \$5,000 per day for 456 days of violation.

³ Lewiston Community Services District letter to the Discharger's consultant, Youngdahl Consulting Group, Inc., dated September 14, 2012.

Step 10 - Final Proposed Civil Liability

The total final liability amount proposed for the late reporting violation is \$160,650 + staff costs (5,250) = **\$165,900**.

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