

ATTACHMENT E

Calculation for Penalty per SWRCB Water Quality Enforcement Policy

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The proposed administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy). The proposed administrative civil liability takes into account such factors as the Dischargers' culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

Calculation of Penalty for Violation

Step 1. Potential for Harm for Discharge Violations

This step is not applicable.

Step 2. Assessment for Discharge Violations

This step is not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations

The "per day" factor is calculated for each non-discharge violation considering the potential for harm and the extent of the deviation from the applicable requirement.

Potential for Harm

The Enforcement Policy requires a determination of whether the characteristics of the violations resulted in a minor, moderate, or major potential for harm or threat to beneficial uses.

Staff determined that the potential for harm is moderate, because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm.

The Dischargers failed to submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order for discharges from irrigated cropland despite evidence that the Discharger owns such cropland. Irrigated cropland can be a source of sediment, pesticide residue, nitrate, and other waste discharged to the waters of the state. Unregulated discharges of such wastes can present a substantial threat to beneficial uses and/or indicate a substantial potential for harm to beneficial uses.

By failing to file a RoWD or to enroll under an applicable General Order, the Dischargers undermined the regulatory program. Dischargers regulated under an applicable General Order either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with their operations. In addition, dischargers report on the practices in which they engage to protect water quality. By failing to provide that information, the Dischargers impaired the Central

Valley Water Board's efforts to assess potential impacts and risks to water quality, and circumvented the Central Valley Water Board's ability to take necessary enforcement actions to address problems.

The greater the size of the operation, the greater the potential risk, since any practices being implemented by the Dischargers that are detrimental to water quality may impact a much greater area. Additionally, the regulatory program is compromised when staff resources are directed to bringing dischargers into compliance rather than being available for outreach and assistance with regulatory compliance. Since the violation thwarts the Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

Deviation from Requirement

The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements.

The deviation from the requirement is major. The Dischargers have disregarded the regulatory requirements and rendered those requirements ineffective. The Dischargers undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for their waste discharges. A discharger's regulatory coverage is foundational to the Board's efforts to protect water quality. The Orders adopted by the Board specify the expectations and requirements for water quality protection, which do not apply until a discharger is covered by an appropriate Order. The requirements in the applicable Orders are rendered ineffective when a discharger has not gone through the process of becoming subject to the Order.

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from the requirement is major. Based on the above factors, a per day factor of 0.7 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

Multiple Day Violations: On 20 March 2015, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Dischargers, which required the Dischargers to obtain regulatory coverage within 15 calendar days or face a potential administrative civil liability. The Directive was received by the Dischargers on 24 March 2015. Thus, regulatory coverage was required by 8 April 2015. The Dischargers enrolled in the Kings River Water Quality Coalition (Coalition) on 25 July 2016. At the time of enrollment, the Dischargers were 473 days late in meeting that requirement.

Violations under Water Code section 13260 are assessed on a per day basis. However, the violations at issue qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 18). Under that approach, for

violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Dischargers' failure to submit a RoWD or NOI is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Dischargers' failure to submit a RoWD or NOI has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Dischargers pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Dischargers' failure to submit a RoWD or NOI results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with costs of permit fees, groundwater monitoring, and preparing an Annual Monitoring Report, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The minimum number of days of violation to be assessed in this case under the alternate approach is 22. However, because this amount does not result in a sufficient deterrent, the days of violation are increased to 30.

Initial Liability Amount

The initial liability amount for the violation calculated on a per-day basis is as follows:

$$\text{\$1,000/day} \times 30 \text{ days} \times 0.7 = \text{\$21,000}$$

Step 4. Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's history of violations. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

- a) *Culpability*: 1.3

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Dischargers were given the score of 1.3, which increases the fine. Central Valley Water Board staff sent notices on 7 February 2014 and 28 April 2014 to the Dischargers describing the new water quality regulations and the required actions to comply therewith. The Dischargers also received a Directive and Notice of Violation requiring the Dischargers to obtain coverage. Staff also contacted the dischargers on 17 May 2016, explaining the required steps to address the program. Despite knowledge of the regulatory requirements, the Dischargers failed to come into compliance. The five notices and failure to respond suggest the Dischargers acted intentionally, or at least negligently, in ignoring the requirement to obtain regulatory coverage, resulting in a multiplying factor of 1.3.

b) *Cleanup and Cooperation: 1.3*

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Dischargers were given the score of 1.3. The Central Valley Water Board issued the Dischargers a Notice of Violation in an effort to allow the Dischargers to address the violation prior to the issuance of a complaint, as well as contacting the Dischargers by phone and speaking to Mr. Batth. The Dischargers did not respond and cooperate with the Central Valley Water Board until they enrolled in the Coalition on 25 July 2016, over a month after the phone call received from Central Valley Water Board staff. Cleanup is not applicable in this case.

c) *History of Violations: 1.0*

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Dischargers were given the score of 1.0, as there is no evidence that the Dischargers have a history of violations.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$35,490.* (Initial Liability (\$21,000) x Adjustments (1.3)(1.3)(1.0)).

Step 6. Ability to Pay and Continue in Business

As per the Enforcement Policy, “[t]he ability of a discharger to pay an ACL is determined by its revenues and assets.” The Dischargers have the ability to pay the Base Liability Amount based on the value of the Dischargers’ property and estimated revenues for their crop. According to the Fresno County Assessor’s Office, the ten parcels owned by the Dischargers are a significant asset with a 2014-2015 assessed value of \$4,204,815. Revenue generated from the Dischargers’ ownership of approximately 268 acres of grapes and 21 acres of almonds yielded an estimated \$911,141 in revenue in 2015¹ according to the Fresno Agricultural Commissioner’s 2015 Annual Crop Report. Thus, the Dischargers have the ability to pay the proposed administrative civil liability based on their revenue and assets and there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require” but only if express findings are made.

The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. The Central Valley Water Board Prosecution Team has incurred a significant amount of staff costs associated with the investigation and enforcement of the violations alleged herein. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, is electing not to pursue staff costs in this matter.

There are no factors under this category that warrant an adjustment.

Step 8. Economic Benefit

Economic Benefit: \$11

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. Economic benefit was calculated using the United States Environmental Protection Agency’s (US EPA) Economic Benefit Model (BEN)² penalty and financial modeling program, version 5.6.0. BEN calculates a discharger’s monetary interest earned from delaying or avoiding compliance with environmental statutes.

The BEN model is the appropriate tool for estimating the economic benefit in this case. The benefit is calculated by identifying the regulation at issue, the appropriate compliance action, the date of noncompliance, the compliance date,

¹ Information provided by the 2015 Fresno County Agricultural Crop Report, available at <http://www.co.fresno.ca.us/WorkArea/DownloadAsset.aspx?id=70031>

² US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>.

and the penalty payment date.

Under the Irrigated Lands Regulatory Program, an individual may choose to comply with the program by either filing an NOI to get regulatory coverage as an “individual grower” under General Order R5-2013-0100 *Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers not Participating in a Third-party Group* (Individual General Order), or filing an NOI for regulatory coverage under a third-party group Order and joining a Coalition. The Dischargers have chosen to join a Coalition. Economic benefit was, therefore, calculated based on the *Waste Discharge Requirements for Growers within the Tulare Lake Basin Area that are Members of a Third Party Group*, Order No. R5-2013-0120, as amended by Orders R5-2014-0143, R5-2015-0115 and R5-2016-0015 (Tulare Lake Basin Order).

The economic benefit was calculated based on delayed and avoided costs. Delayed costs are those costs that should have been born earlier, but that a discharger can and still is required to pay. Avoided costs are the costs of those compliance activities, which a discharger can no longer perform, and that a discharger would have conducted had they come into compliance earlier.

The economic benefit in this case has been calculated based on the verifiable costs associated with obtaining regulatory coverage under the Tulare Lake Basin Order, as well as estimates of other costs that were required of the Dischargers to comply with the Tulare Lake Basin Order.

The Coalition charged a filing fee of \$26 plus \$2.15 per acre³ of irrigated agriculture during the 2015 billing year. The Dischargers enrolled 289 acres of land irrigated for a commercial purpose, which results in an annual permit fee of \$621.35 per year. The Dischargers avoided paying this permit fee for one year.

In summary, the estimated economic benefit associated with noncompliance is \$621.35 associated with permit fees and \$26 associated with filing fees. The total estimated economic benefit is therefore \$647.35. Using BEN, the Dischargers gained an economic benefit of \$11 after consideration of delayed and avoided costs.

Step 9. Maximum and Minimum Liability Amounts

a) Minimum Liability Amount: \$13

The Enforcement Policy recommends that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team’s estimate of the Dischargers’

³ See Kings River Water Quality Coalition enrollment form <http://kingsriverwqc.org/wp-content/uploads/2015/10/2015-16-post-deadline-enrollment-form.pdf>

economic benefit obtained from the violation is \$11. This number plus ten percent results in a Minimum Liability of \$13.

b) *Maximum Liability Amount:* **\$473,000**

The maximum administrative liability amount is the maximum amount allowed by Water Code section 13261, which is \$1,000 for each day in which the violation occurs. The Dischargers were in violation for 473 days, which results in a maximum liability of \$473,000.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit a RoWD as required under Water Code section 13260 is **thirty five thousand four hundred ninety dollars (\$35,490)**.