

ATTACHMENT F

Calculation of 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:

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 requirements.

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 Dischargers own 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.

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 0.55 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

Multiple Day Violations: On 26 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 Discharger to obtain regulatory coverage within 15 calendar days or face a potential administrative civil liability. The Directive was received by the Dischargers on 7 April 2015. Thus, regulatory coverage was required by 22 April 2015. The Dischargers have yet to obtain regulatory coverage and are 477 days late in meeting the regulatory requirements as of the date of this ACL Complaint.

Violations under Water Code section 13261 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 21. However, because this amount does not result in a sufficient deterrent, the days of violation are increased to 25.

Initial Liability Amount

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

$$\$1,000/\text{day} \times 25 \text{ days} \times 0.55 = \$13,750$$

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 21 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. On 10 December 2015 and 4 August 2016, Board staff spoke with Mr. Alex V. Kobets and gave him information about the Irrigated Land Regulatory Program and how to enroll in the Coalition. Despite knowledge of the regulatory requirements, the Dischargers failed to come into compliance. These facts 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*: 1.5

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 1.5. 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. The Dischargers did not cooperate with the Central Valley Water Board, despite speaking to Board staff on 10 December 2015 and 4 August 2016 and being awarded ample time to obtain regulatory coverage. 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 Discharger 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*: **\$26,813**. (Initial Liability (\$13,750) x Adjustments (1.3)(1.5)(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 two parcels owned by the Dischargers are a significant asset with a combined 2014-2015 assessed value of \$448,955. Revenue generated from the Discharger’s ownership of approximately 79 acres of grapes yielded an estimated \$230,048 in revenue in 2015¹ according to the Fresno Agricultural Commissioner’s 2015 Fresno County Agricultural Crop and Livestock 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

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

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 violation 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 Benefit²

Economic Benefit: \$5,022

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)³ 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, 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 the Coalition. As of the date of this ACL Complaint, the Dischargers have not joined a Coalition. The Central Valley Water Board cannot compel the Discharger to join the Coalition. Economic benefit was, therefore, calculated based on the assumption that General Order R5-2013-0100 (Individual General Order) will apply to the Dischargers.

² Order R5-2013-0100 includes an estimate of average annual costs per acre related to that Order. The average annual costs are not used in this economic benefit analysis, since the costs represent an average cost, if the Order were applied Central Valley-wide. The cost estimates made in this analysis are based on the circumstances and facts related to these Dischargers, rather than a broad class of Dischargers.

³ 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>.

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 is 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 Individual General Order, as well as estimates of other costs that were required of the Dischargers to comply with the Individual General Order.

The State Water Resources Control Board charged a permit fee of \$1,010 plus \$6.70 per acre for farms 11 to 100 acres⁴ during the 2014-15 and 2015-16 billing year. The Dischargers have 79 acres of land irrigated for a commercial purpose, which results in an annual permit fee of \$1,539 per year. The Dischargers avoided paying these permit fees for two years.

Under the Individual General Order, the Dischargers would have been required to prepare and submit a Farm Water Quality Plan at an estimated cost of \$2,500. The Dischargers would also have needed to prepare annual monitoring plans for 2015 and 2016 at a cost of \$2,400 per year. Additionally, the Dischargers would have been required to conduct groundwater monitoring for 2015, at an estimated cost of \$1,122. The groundwater monitoring cost estimate is based on sampling one well⁵ one time for the constituents listed in the Individual Grower Order and includes labor costs and lab fees.

In summary, the estimated economic benefit associated with noncompliance is \$3,078 associated with permit fees, \$1,122 associated with groundwater monitoring, and \$7,300 associated with failure to prepare the Annual Monitoring Plans and the Farm Water Quality Plan. The total estimated economic benefit is therefore \$11,500. Using BEN, the Dischargers gained an economic benefit of \$5,022 after consideration of delayed and avoided costs.

Step 9. Maximum and Minimum Liability Amounts

*a) Minimum Liability Amount: **\$5,524***

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' economic benefit obtained from the violation is \$5,022. This number plus ten percent results in a Minimum Liability of \$5,524.

⁴ See section 2200.6 of the 2014-15 and 2015-16 Fee Schedules at http://www.waterboards.ca.gov/resources/fees/docs/fy1415_fee_schedule.pdf and http://www.waterboards.ca.gov/resources/fees/water_quality/docs/fy1516_ilrp_fees.pdf

⁵ Based on the multiple parcels listed in the ACL Complaint, staff estimates that the Discharger has two irrigation supply wells, which would be sampled once per year.

b) *Maximum Liability Amount:* **\$477,000**

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 477 days, which results in a maximum liability of \$477,000.

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 **twenty six thousand eight hundred thirteen dollars (\$26,813)**.