ATTACHMENT D

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 (the "Enforcement Policy"). The proposed civil liability takes into account such factors as the Discharger's 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

Step1. 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.

The Discharger 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.

Staff has determined that the potential for harm is moderate, because the characteristics of the violation present a subtantial threat to beneficial uses, and the circumstances of the violation indicate a minor potential for harm. This conclusion is, in part, based on the size of the Discharger's irrigated land parcels, which is approximately 74 acres.

By failing to file a RoWD or to enroll under an applicable General Order, the Discharger has 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 Discharger impeded the Central Valley Water Board's efforts to assess potential impacts and risks to water quality, and circumvent 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 Discharger 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 pollutants of concern, increasing the potential of associated risks. 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. To date, the Discharger has disregarded the regulatory requirements and rendered those requirements ineffective. The Discharger has undermined the efforts of the Central Valley Water 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 the 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 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 15 June 2016, the Discharger was issued a Directive Letter pursuant to Water Code section 13260 (Directive), which required it to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Discharger on 20 June 2016. Thus, regulatory coverage was required by 5 July 2016. As of 8 August 2016, the date on which this Complaint was issued, the Discharger was 34 days late in meeting that requirement.

Violations under Water Code section 13261 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore 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 not

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 Discharger's failure to submit a RoWD or join a coalition is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit a RoWD or join a coalition 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 Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's non-compliance 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 a Farm Water Quality Plan, 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 to be assessed in this case under the alternate approach is 7. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation above the Minimum Approach to a total number of 30 days of violation.

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

$1,000/day x 30 days x 0.55 = $16,500

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 Discharger was given the score of 1.3, which increases the fine. In September 2015, the Discharger left a 13260 Directive unclaimed, and then failed to respond to a second Directive received on 20 June 2016. Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance. The Discharger's disregard for the notice suggests that the Discharger acted at least negligently in ignoring the requirement to get 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 Discharger was given the score of 1.5. The Central Valley Water Board issued the Discharger a 13260 Directive in an effort to allow the Discharger to address the violation prior to the issuance of a complaint. The Discharger did not comply with the Directive by joining a coalition or submitting a RoWD, despite informing the Central Valley Water Board staff of its intention to join a coalition. 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 Discharger was given the score of 1.0, as there is no evidence that the Discharger has 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:* **$32,175.** (Initial Liability ($16,500) 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 Discharger has the ability to pay the Base Liability Amount based on the value of property owned by the Discharger, a significant asset and the estimated revenue generated from the vineyard. The Madera County Assessor's Office assessed the 2015-2016 value of the Madera County parcel as

$602,689[1].Further, the Discharger's current ownership of approximately 74 acres of vineyard in Madera County generated an estimated $730,000 in revenue in 2014[2]. Therefore, 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 other factors under this category that warrant an adjustment.

Step 8. Economic Benefit

Economic Benefit: **$14**

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," or filing a NOI for regulatory coverage under a third-party group Order and joining the Coalition. For the purposes of determining the economic benefit, the Prosecution Team assumes that the General Order R5-2013-0100 (Individual General

[1] According to ParcelQuest™.

[2] Information provided by the 2014 Madera County Agricultural Crop Report (see pg. 6), available at http://www.madera-county.com/index.php/publications/crop-reports

[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 .

Order) will apply to the Discharger's operation, as the Central Valley Water Board cannot compel the Discharger to join a coalition.

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 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 date of noncompliance was the Directive Deadline of 5 July 2016. Annual fees are assumed to be payable on the anniversary of enrollment. As a result, the Discharger has failed to pay $1,506 in permit fees for the 2016 enrollment year.

In summary, the Discharger should have spent approximately $1,506 to comply with the Individual General Order. Using BEN, the Discharger gained an economic benefit of $14 after consideration of delayed and avoided costs.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount:* **$14**

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 Discharger's economic benefit obtained from the violations is $14. This number plus ten percent results in a Minimum Liability of $15.40.

b) *Maximum Liability Amount:* **$34,000**

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 Discharger was in violation for 34 days, which results in a maximum liability of $34,000.

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 under Water Code section 13260 is **thirty two thousand one hundred seventy five dollars $(32,175)**.