

ATTACHMENT I

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

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 timely submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order for discharges from irrigated cropland despite evidence indicating that they irrigate 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 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 Central Valley Water 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 p. 16 of the Enforcement Policy).

**Multiple Day Violations:** On 7 November 2014, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Dischargers, which required them to obtain regulatory coverage within 15 calendar days or face a potential administrative civil liability. The Directive was received by the Dischargers on 8 November 2014. Thus, regulatory coverage was required by 23 November 2014. The Dischargers submitted a Notice of Intent to the Central Valley Water Board 13 January 2015, but did not join the Coalition. The Dischargers joined the Coalition on 28 March 2016 and, therefore, was 491 days late in meeting the regulatory requirements.

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 and join the Coalition 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 complete the NOI process by joining the Coalition results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is the one-time delayed expenditure of joining the Coalition and various costs associated with Coalition membership.

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 under the alternate approach in this case is 22. Due to the nature of the case, including the acreage of the parcel, using the minimum days generated from the Multiple Day approach is appropriate.

#### **Initial Liability Amount**

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

$$\$1,000/\text{day} \times 22 \text{ days} \times 0.55 = \$12,100$$

#### **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 mailed a Directive on 7 November 2014 after the Dischargers failed to pay Coalition fees. The Dischargers did not respond and a Notice of Violation was mailed on 8 January 2015. The Dischargers submitted a Notice of Intent to the Water Board on 13 January 2015 but did not renew their membership with the Coalition.

The multiple notices and prior enrollment with the Coalition indicate that the Dischargers had knowledge of the regulatory requirements and acted intentionally, or at least negligently, in ignoring the requirement to obtain regulatory coverage. Therefore, a culpability factor of 1.3 is warranted.

b) *Cleanup and Cooperation*: 1.4

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 1.4, which increases the fine.

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 respond despite being awarded ample time in which to do so. Despite opportunities to come into compliance, the Discharger did not make any attempt to cooperate with the Central Valley Water Board until after being sent a pre-ACL letter.

Cleanup is not applicable here.

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 because they have no record of a history of violations prior to those described herein.

## 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*: **\$22,022**. (Initial Liability (\$12,100) x Adjustments (1.3)(1.4)(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 Merced County Assessor’s Office, the property owned by the Dischargers has an assessed value of \$239,391. Revenue generated from the Dischargers’ 19.5 acres of almonds in Merced County, was approximately \$154,826 in 2014<sup>1</sup>. 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.

<sup>1</sup> Information provided by the 2014 Merced County Agricultural Crop Report, available at: <http://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/506>.

### **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<sup>2</sup>**

#### *Economic Benefit: \$9*

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)<sup>3</sup> 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.

The Dischargers joined the Coalition. By joining the Coalition instead of filing a RoWD, the Dischargers were required by the Coalition to pay back dues for prior years’ membership. In this case, the Dischargers should have joined the Coalition by 23 November 2014, the deadline set in the Directive.

The economic benefit in this case has been calculated based on the delayed costs associated with joining the Coalition. Delayed costs are those costs that should have

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<sup>2</sup> 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.

<sup>3</sup> 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>.

been born earlier, but that the Dischargers are still required to pay.

The Coalition currently charges members \$50 per member plus \$3.75 per acre. Since the Dischargers were previously a member of the Coalition, they are required to pay back fees from 2014-2016. The economic benefit of this delayed cost for this compliance action is \$9.

### **Step 9. Minimum and Maximum Liability Amounts**

a) *Minimum Liability Amount: \$9.90*

The Enforcement Policy recommends that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Dischargers' economic benefit obtained from the violation is \$9. Therefore, the minimum liability is \$9.90.

b) *Maximum Liability Amount: \$491,000*

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 491 days, which results in a maximum liability of \$491,000.

### **Step 10. Final Liability Amount**

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to timely submit a RoWD as required under Water Code section 13260 is **twenty two thousand twenty two dollars (\$22,022)**.