

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2016-0546

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF

BROOKS AND ARLENE RUSHING,
AS INDIVIDUALS AND IN THEIR REPRESENTATIVE CAPACITY AS TRUSTEES FOR
THE BROOKS J & ARLENE J RUSHING TRUST
STANISLAUS COUNTY

This Administrative Civil Liability (ACL) Complaint is issued pursuant to California Water Code¹ section 13323 to Brooks and Arlene Rushing, as individuals and in their representative capacity as trustees of the Brooks J & Arlene J Rushing Trust (Dischargers) for failing to submit a Report of Waste Discharge required under Water Code section 13260.

The Assistant Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) alleges the following:

BACKGROUND

1. The discharge of irrigation return flows or storm water from irrigated lands in the Central Valley Region may contribute, or have the potential to contribute waste to ground and/or surface waters. The term "waste" is broadly defined in Water Code section 13050, subdivision (d), and includes runoff of sediment or agricultural chemicals. The term "waters of the state" includes all surface water and groundwater within the state. (Wat. Code, § 13050(e).) The Central Valley Water Board is required to regulate discharges to waters of the state. (Wat. Code, § 13263.)
2. Attachment E of the Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers not Participating in a Third-Party Group (Order R5-2013-0100) and Attachment E of the Waste Discharge Requirements General Order for Growers within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group (Order R5-2012-0116-R3) defines "irrigated lands" as "land irrigated to produce crops or pasture for commercial purposes; nurseries; and privately and publicly managed wetlands."
3. Central Valley Water Board staff developed a list of landowners in Stanislaus County, including the Dischargers, which were likely to be discharging wastewater from irrigated lands to waters of the state and did not have regulatory coverage under waste discharge requirements (i.e., permits) or waivers of waste discharge requirements.
4. In developing this list, Central Valley Water Board staff used county assessor data and geographical land use data (i.e., the California Department of Conservation Farmland Mapping and Monitoring Program (FMMP) land use data) to assist in identifying

¹ All references to the Water Code refer to the California Water Code unless otherwise noted.

potential discharges of agricultural wastewater to waters of the state and to identify owners and operators of agricultural lands who may not have complied with the Water Code. Both data sets were used to develop lists of parcels for which Water Code section 13260 Directive Letters were issued requiring landowners to obtain regulatory coverage for lands irrigated for a commercial purpose.

5. Evaluation of county assessor and FMMP data indicates that the Dischargers own approximately 38 acres of land, identified as Stanislaus County Assessor's Parcel Numbers (APNs) 088-009-014, 088-009-024, and 088-009-029. Based on field and aerial inspections, staff estimates the parcels to total about 30 acres of land irrigated for a commercial purpose that require regulatory coverage.
6. On 20 February 2013 and 18 April 2013, the Central Valley Water Board issued notices to the Dischargers describing new water quality regulations and options available to comply with the regulations. Copies of the notices are provided as Attachment A.
7. On 16 September 2013 Board staff conducted field inspections on two of the Dischargers' Stanislaus County parcels from public roadways and found evidence of commercial irrigated agricultural operations based on the type of crop, almonds, and the size of the operation, over 30 acres. Copies of the inspection reports are provided as Attachment B.
8. On 9 May 2014, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Dischargers, sent via certified mail. The Directive was sent based on information that the subject parcels contained commercially irrigated land without regulatory coverage. The Directive required the Dischargers to obtain regulatory coverage for their irrigated agricultural parcels within 15 calendar days of receipt of the Directive. A copy of the Directive is provided as Attachment C.
9. The Dischargers received the Directive on 14 May 2014. The Dischargers were required to obtain regulatory coverage by 29 May 2014. The Dischargers neither obtained regulatory coverage by 29 May 2014 nor contacted the Board. A copy of the mail receipt is included with the Directive in Attachment C.
10. Because the Dischargers failed to respond by the deadline specified in the Directive, a Notice of Violation (NOV) was sent to the Dischargers via certified mail on 30 June 2014. The Dischargers received the NOV on 2 July 2014. A copy of the NOV and the certified mail receipt are provided as Attachment D.
11. Based on Board staff inspection of the parcels, the property does not appear to have a potential to discharge to surface waters.
12. Central Valley Water Board records indicate that as of the date of issuance of this ACL Complaint, the Dischargers have yet to obtain regulatory coverage.

ALLEGED VIOLATIONS

13. The Dischargers failed to obtain coalition membership or submit a Report of Waste Discharge as required by Water Code section 13260. The Directive issued to the Dischargers required either submittal of a RoWD or, in lieu of submitting a RoWD, submittal of a Notice of Intent (NOI) to enroll in and join a coalition. As of 8 August 2016, the Dischargers are 802 days past due in obtaining regulatory coverage.

REGULATORY CONSIDERATIONS

14. The Central Valley Water Board's authority to regulate waste discharges that could affect the quality of the waters of the state, which includes both surface water and groundwater, is found in the Porter-Cologne Water Quality Control Act (Water Code Division 7).
15. Water Code section 13260, subdivision (a), requires that any "person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system," shall file with the appropriate regional board a report of waste discharge containing such information and data as may be required by the regional board. The Central Valley Regional Board implements Water Code section 13260 in the area where the Dischargers' lands are located.
16. Pursuant to Water Code section 13261, subdivision (a), "[a] person who fails to furnish a report or pay a fee under Section 13260 when so requested by a regional board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."
17. Water Code section 13261, subdivision (b)(1), states:

Civil liability may be administratively imposed by a regional board or the state board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount not exceeding one thousand dollars (\$1,000) for each day in which the violation occurs. Civil liability shall not be imposed by the regional board pursuant to this section if the state board has imposed liability against the same person for the same violation.
18. Pursuant to Water Code section 13327, in determining the amount of civil liability, the Central Valley Water Board shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
19. On 17 November 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became

effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing an administrative civil liability as outlined in Water Code section 13327.

20. This proposed administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment E. 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.
21. **Maximum and Minimum Penalties.** As described above, the statutory maximum penalty under Water Code section 13261, subdivision (b)(1) is \$1,000 per day of violation. As of the date of this ACL Complaint, the Dischargers were out of compliance for 802 days, thus resulting in a maximum penalty of \$802,000. The Enforcement Policy recommends that the minimum liability imposed be at least ten percent higher than the economic benefit so that liabilities are not construed as the cost of doing business and so that the assessed liability provides a meaningful deterrent to future violations. The economic benefit to the Dischargers resulting from the failure to enroll under Order R5-2013-0100 is estimated at \$7,395 (see Attachment E for how this estimate was derived). Per the Enforcement Policy, the minimum penalty is the economic benefit plus ten percent (\$8,135).
22. Notwithstanding the issuance of this ACL Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of the Water Code that may subsequently occur.
23. Issuance of this ACL Complaint is an enforcement action, and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321, subdivision (a)(2).

DISCHARGERS ARE HEREBY GIVEN NOTICE THAT:

1. The Assistant Executive Officer of the Central Valley Water Board proposes that the Dischargers be assessed **an administrative civil liability in the amount of thirty four thousand three hundred twenty dollars (\$34,320)**. The amount of the proposed liability is based upon a review of the factors cited in the Enforcement Policy. The calculation of the proposed penalty amount is explained in Attachment E.
2. A hearing on this matter will be conducted before a hearing panel of the Central Valley Water Board on **3/4 November 2016**, unless the Dischargers do any of the following by **24 August 2016**.
 - a) The Dischargers waive the right to a hearing by completing the waiver form provided as Attachment F (checking off the box next to Option 1) and returning it to the Central Valley Water Board, along with full payment of the proposed civil liability of **thirty four thousand three hundred twenty dollars (\$34,320)**. The check must

be payable to the State Water Pollution Cleanup and Abatement Account and sent to State Water Resources Control Board, Division of Administrative Services, Accounting Branch, P.O. Box 1888, Sacramento, CA 95814 with a copy of the check mailed to the Central Valley Water Board at 11020 Sun Center Drive, Suite 200, Rancho Cordova, CA 95670, Attn: Brett Stevens; OR

- b) The hearing panel agrees to postpone any necessary hearing after the Dischargers request to engage in settlement discussions by checking the box next to Option 2 on the attached form, and returns it to the Central Valley Water Board along with a letter describing the issues to be discussed; OR
 - c) The hearing panel agrees to postpone any necessary hearing after the Dischargers request a delay by checking the box next to Option 3 on the attached waiver form, and returns it to the board along with a letter describing the issues to be discussed.
3. The hearing will be governed by the Hearing Procedure, which is provided as Attachment G. During the hearing, the hearing panel may choose to recommend that the Central Valley Water Board affirm, reject, or modify the proposed ACL, which may include raising the monetary value of the ACL, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
 4. The Assistant Executive Officer reserves the right to amend the proposed amount of administrative civil liability to conform to the evidence presented, including but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal, and expert witness costs) incurred after the date of the issuance of this ACL Complaint, and through completion of the hearing.



Andrew Altevoigt, Assistant Executive Officer

8/4/16

(Date)

- Attachment A: February 2013 and April 2013 Outreach Notices
- Attachment B: September 2013 Inspection Report
- Attachment C: May 2014 Water Code section 13260 Directive
- Attachment D: June 2014 Notice of Violation
- Attachment E: Calculation of Penalty per SWRCB Water Quality Enforcement Policy
- Attachment F: Hearing Waiver Form
- Attachment G: Hearing Procedure
- Attachment H: ACL Fact Sheet