

## Attachment C – ACL Complaint No. R5-2011-0589

### Specific Factors Considered for Civil Liability City of Angels Wastewater Treatment Facility

The State Water Board's *Water Quality Enforcement Policy* establishes a methodology for assessing administrative civil liability, addressing the factors that are required to be considered when imposing a civil liability as outlined in CWC section 13327 and 13385(e). Each factor of the nine-step approach is discussed below, as is the corresponding score.

#### Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

##### Factor 1: Harm or Potential Harm to Beneficial Uses.

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm is negligible (0) to major (5). In this case the potential harm to beneficial uses was determined to be minor (i.e., a score of 1) because the wastewater was treated to tertiary levels before it spilled into surface waters. A negligible score is not appropriate because the Discharger's NPDES permit does not allow wastewater to enter surface waters at the locations at which the spills occurred, and because the spilled wastewater may have picked up contaminants as it flowed across the sprayfield.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. In this case a score of 1 was assigned. A score of 1 means that there is a minor risk to potential receptors, and is appropriate for the reasons cited in Factor 1.

##### Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, cleanup or abatement was not possible and therefore, a factor of 1 is assigned.

##### Final Score – “Potential for Harm”

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, **a final score of 3** was calculated. The total score is then used in Step 2, below.

## **Step 2 – Assessment for Discharge Violations**

This step addresses penalties for the spills based on both a per-gallon and a per-day basis.

### **1. Per Gallon Assessments for Discharge Violations**

When there is a discharge, the Board is to determine an initial liability amount on a per gallon basis using on the Potential for Harm score and the Extent of Deviation from Requirement of the violation.

The Potential for Harm Score was determined in Step 1, and is 3. The Extent of Deviation is considered “major” because the discharge of wastewater to surface waters is expressly prohibited in the permit, as is the bypass of wastewater. Therefore, the spills rendered the prohibitions ineffective. Table 1 of the Enforcement Policy is used to determine a “per gallon factor” based on the two above scores. For this particular case, the factor is 0.02. This value is multiple by the volume of discharge and the per gallon penalty, as described below.

The total discharge volume is 3,544,600 as found in the spill reports submitted by the Discharger. Because the volume of the discharge is so great, it is considered a “high volume discharge”. In this case, a per-gallon value of either \$2/gallon or \$1/gallon may be used instead of the maximum penalties allowed under the California Water Code (CWC). In this case, it is appropriate to use the \$1/gallon penalty amount because the wastewater was treated to tertiary standards before it flowed off of the sprayfields.

For the discharge to land only (on 30 December 2008), CWC section 13350 is used to determine the per-gallon penalty. CWC section 13350 states that the penalty is \$10 per gallon. A total of 7,000 gallons spilled. Therefore, the Per Gallon Assessment is calculated as (0.02 factor from Table 1) x (7,000 gallons) x (\$1 per gallon), and the value for this one spill is \$140.

For the six discharges to surface water, CWC section 13385(c)(2) states that the penalty amount is based on the number of gallons discharged but not cleaned up, over 1,000 gallons for each spill event. As shown on Attachment C to the ACL, the total volume discharged in excess of 1,000 gallons per spill event is 3,556,600 gallons. Therefore, the Per Gallon Assessment is calculated as (0.02 factor from Table 1) x (3,556,600 gallons) x (\$1 per gallon), and the value for these six spills is \$71,132.

The total Per Gallon Assessment is  $\$140 + \$71,132 = \$71,272$ .

### **2. Per Day Assessments for Discharge Volumes**

When there is a discharge, the Board is to determine an initial liability amount on a per day basis using on the same Potential for Harm score and the Extent of Deviation that were used in the per-gallon analysis. As described above, this factor is 0.02. The spills occurred over a period of 26 days.

The Per Day Assessment is calculated as (0.02 factor from Table 2) x (26 days) x (\$10,000 per day). The value is \$5,200.

**Initial Liability Amount:** The value is determined by adding together the per gallon assessment and the per day assessment. For this case, the total is \$71,272 + \$5,200 for a total initial liability amount of \$76,472 . For ease of calculation in future steps, this value has been rounded to **\$76,000**.

### **Step 3 – Per Day Assessment for Non-Discharge Violation**

The Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violations are related to the discharge of wastewater, and the liability was determined in Step 2.

### **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 cleanup or cooperate with regulatory authority, and the violator's compliance history.

#### **Culpability**

Higher liabilities should result from intentional or negligent violations as opposed to accidental or intentional violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier of 1.2, due to the three year duration of spills and failure to maintain the deteriorated irrigation system. While the Discharger was inspecting the sprayfield at the WDRs-required frequency of once per day, the Discharger should have taken steps to inspect the sprayfield more frequently and/or to better maintain the irrigation system to prevent the spills documented in this Order. In a 29 July 2011 letter, the Discharger stated that beginning on 13 July 2011, the sprayfields are inspected twice per day and the sprayfield pumps are turned off at night.

#### **Cleanup and Cooperation**

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Although the Discharger reported the spills, the majority of the spill reports did not describe the cause of the spill or the actions to prevent future spills. Therefore, the Discharger was given a multiplier value of 1.1.

#### **History of Violation**

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. The City of Angels has a history of problems at its sprayfield, as evidenced by the Cleanup and Abatement Order that was issued in 2001. However, the City did not take steps to adequately maintain its sprayfield and has continued to experience significant spills. The City is now planning on making upgrades to the sprayfield distribution system. A multiplier of 1.1 is used.

### **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 2.

**Total Base Liability Amount:** This value is calculated as the Initial Liability Amount (\$76,000) x Adjustment Factors (1.2) (1.1) (1.1) and is equal to \$110,352. However, for ease of use, this value has been rounded to **\$110,000**.

#### **Step 6 - Ability to Pay and Ability to Continue in Business**

According to its website, the City of Angels has a population of 3,441. It is currently searching for loans or grants for its proposed \$1.1 million upgrade to the sprayfield. The City's 2010-2011 adopted budget<sup>1</sup> shows that its sewer fund contained \$1.8 million at the beginning of the fiscal year and is estimated to have only \$338,000 on 30 June 2011. It appears that the City has been using money in its sewer fund to replace certain sewer collection lines. The City also received a CRSWF grant in the amount of \$1.495 million for improvements to its wastewater treatment plant. Unfortunately, this grant did not include money to address the deferred maintenance at the sprayfield. According to the Interim City Administrator, the residential sewage fee is currently \$71.92 per month and the connection fee is \$92.77.

It appears that the Discharger has the ability to pay the liability and remain in business.

#### **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 to justify this. Initially, the Discharger proposed to complete sprayfield improvements by April 2013. Recently, the Discharger submitted an expedited schedule. In a 19 August 2011 letter, the Discharger stated that the City Council has adopted a budget for the current fiscal year which includes funds for the design and construction of the Phase I Sprayfield Improvement Project and the Sprayfield System Evaluation Project. In addition, the City staff has been authorized to begin preparation of plans and specifications for the Phase I Sprayfield Project. If the City continues with the expedited schedule, then Water Board staff estimates that the improvements may be completed by November 2012, rather than April 2013 as originally planned. However, because the City has not submitted a formal updated schedule, Water Board staff has used the April 2013 completion date for the economic benefit calculation.

#### **Costs of Investigation and Enforcement Adjustment**

The costs of investigation and enforcement are "other factors as justice may require", and should be added to the liability amount. Over the last two years, staff of the Central Valley Water Board has spent over 100 hours associated with the investigation of the discharges and preparation of the enforcement action. The State Water Board Office of Enforcement has directed that all regions are to use a value of \$150 per hour for staff costs. For this case, staff time through preparation of the Complaint is \$15,000.

The Enforcement Policy states that staff costs are to be added to the liability amount. **The adjusted liability is (\$110,000 + \$15,000), or \$125,000.**

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<sup>1</sup> <http://www.angelscamp.gov/docs/fy-10-11-adopted-budget.pdf>

### **Step 8 – Economic Benefit**

Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The discharges are due to a variety of factors which can generally be described as a lack of maintenance and/or a lack of redundant features. The Discharger has estimated that it will cost approximately \$1.1 million to repair and upgrade the sprayfield to prevent the spills. Any economic benefit gained by non-compliance would be the interest on a loan to complete the work. Water Board staff used a time-value-of-money calculator<sup>2</sup> to estimate the economic benefit. The City of Angels has stated that it will spend approximately \$1.1 million to repair and upgrade the irrigation distribution system. If a \$1.1 million loan had been acquired in September 2008 (the first spill subject to this Order), and had a 3.5% interest rate compounded annually, then through April 2013 (the date by which the irrigation system upgrade will be completed), the City has achieved an economic benefit of approximately \$109,000. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the economic benefit so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. In this case, the economic benefit amount, plus 10%, is \$120,450.

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

The maximum and minimum amounts for the violations are shown below. The proposed liability falls within the maximum and minimum amounts and therefore, no adjustment is necessary.

Maximum Liability Amount: \$35,573,000

Minimum Liability Amount: \$120,450

### **Step 10 – Final liability Amount**

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Without further investigation of the discharge, calculation of economic benefits, and additional staff time, the proposed Administrative Civil Liability is **\$125,000**.

For ease of reference, the Enforcement Policy adjustment factors used in this penalty calculation are tabulated below:

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<sup>2</sup> <http://www.zenwealth.com/BusinessFinanceOnline/TVM/TVMCalculator.html>

**Adjustment Factors**

<b>Adjustment Factors</b>	<b>Range</b>	<b>Factors Used</b>
Harm or Potential Harm to Beneficial Uses	0 to 5	1
Physical, Chemical, Biological or Thermal Characteristics of the Discharge	0 to 4	1
Susceptibility to Cleanup or Abatement	0 or 1	1
Final Score	0 to 10	3
Per Gallon Assessment	Minor, Moderate, Major	Major
Per Day Assessment	Minor, Moderate, Major	Major
Culpability	0.5 to 1.5	1.2
Cleanup and Cooperation	0.75 to 1.5	1.1
History of Violations	Subjective, based on history	1.1
Ability to Pay	Based on financial information	1
Other Factors as Justice May Require	Subjective, based on investigation	1
Economic Benefit	\$109,000	
Staff costs	\$15,000	