

**Attachment A – ACL Complaint No. R5-2013-0539**  
**Specific Factors Considered – Civil Liability**  
**Sweeney Dairy (Complaint)**

Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

1. **Violation No. 1 (Failure to submit 2011 Annual Report):** In accordance with the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order) and the accompanying Monitoring and Reporting Program R5-2007-0035, revised 23 February 2011 (MRP), a 2011 Annual Report with appurtenant components must be submitted for regulated facilities by 1 July 2012. To date, James G. and Amelia M. Sweeney (hereinafter Discharger) have not submitted this report for the Sweeney Dairy.

**Calculation of Penalty for Failure to Submit 2011 Annual Report**

**Step1. Potential for Harm for Discharge Violations**

This step is not applicable because the violation is not a discharge violation.

**Step 2. Assessment for Discharge Violations**

This step is not applicable because the violation is not a discharge violation.

**Step 3. Per Day Assessment for Non-Discharge Violations**

The per day factor is 0.30.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2011 Annual Report with appurtenant components did not increase the amount of pollution discharged or threatened to discharge into Waters of the State. The deviation from requirements was determined to be major, as the requirement to submit technical reports has been rendered ineffective. The failure to submit the required technical reports undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the General Order.

**Initial Liability**

A failure to submit annual reports is punishable under Water Code 13268(a)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2011 Annual Report by 1 July 2012 as required by the General Order and the MRP, which is now 312 days late. A pre-filing settlement letter issued to

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the Discharger on 15 February 2013 establishes a total of 208 days in which the Discharger has been out of compliance for failure to submit the 2011 Annual Report, and is the basis for determining the recommended civil liability amount.

However, the alternative approach for calculating liability for multi-day violations in the Enforcement Policy is applicable. The failure to submit required technical reports does not cause a daily detrimental impact to the environment or the regulatory program and it does not result in an economic benefit that can be measured on a daily basis. It is the extended time period of non-compliance that causes the detrimental impact to both the environment and the regulatory program. Furthermore, the Discharger only receives an economic benefit by not submitting the required technical reports, and not a per-day benefit during the entire period of violation.

Applying the per-day factor to the adjusted number of days of violation rounded to the nearest full day equals 12 days of violation. A calculation of initial liability totals \$3,600 (0.3 per day factor X 12 adjusted days of violation X \$1,000 per day penalty).

### Step 4. Adjustment Factors

#### a) *Culpability*: 1

*Discussion:* The Discharger was given the neutral score of 1, which neither increases nor decreases the fine.

The Discharger is fully responsible for failure to submit annual reports alleged in this Complaint. The requirement to submit a 2011 Annual Report and appurtenant components were detailed in the General Order. The Discharger was issued a Notice of Violation on 16 August 2012, which requested that the report be submitted as soon as possible to minimize liability. Since that time, the Discharger has failed to submit the 2011 Annual Report or any of the appurtenant components, and is therefore highly culpable for failure to comply with the program.

#### b) *Cleanup and Cooperation*: 1

*Discussion:* The Discharger was given the neutral score of 1, which neither increases nor decreases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the General Order, the Discharger continues to fail to comply. The violation of Water Code section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

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### c) *History of Violations: 2*

*Discussion:* The Discharger was given the score of 2, which increases the fine. The Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2011-0068 on 13 October 2011 for the Discharger's failure to submit the 2009 Annual Report and the Waste Management Plan by the required deadlines, as required by the General Order and the Monitoring and Reporting Program. In addition, the Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2012-0070 on 2 August 2012 for the Discharger's failure to submit the 2010 Annual Report by the required deadline, as required by the General Order and the Monitoring and Reporting Program. The Enforcement Policy requires that a minimum multiplier of 1.1 be used when there is a history of repeat 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: \$7,200* (Initial Liability (\$3,600) x Adjustments (1)(1)(2)).

**Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.**

2. **Violation No. 2 (Failure to comply with requirements of 13267 Directive):** Under the MRP, the Executive Officer has authority pursuant to Water Code section 13267 to order the installation of monitoring wells based on the threat that an individual dairy or dairies pose to water quality. On 4 May 2012, the Executive Officer issued a California Water Code section 13267 Order (13267 Order) to the Discharger that directed the Discharger to implement groundwater monitoring at the Dairy. Specifically, the 13267 Order directed the Discharger to submit either: 1) written notification, by 25 May 2012, that the Discharger has joined a coalition group that will develop a representative groundwater monitoring program as an alternative to implementing an individual groundwater monitoring program at the Dairy; or, 2) an acceptable groundwater monitoring well installation and sampling plan (MWISP) to the Central Valley Water Board by 29 June 2012. To date, the Discharger has not joined a coalition and has not submitted an MWISP for the Dairy.

### **Calculation of Penalty for Failure to Submit an MWISP**

#### **Step1. Potential for Harm for Discharge Violations**

This step is not applicable because the violation is not a discharge violation.

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### Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is not a discharge violation.

### Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.30.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to develop and submit an MWISP is not in itself a threat to water quality. The deviation from requirements was determined to be major, as the requirement to develop an MWISP for the Dairy facility has been rendered ineffective. The failure to submit the required MWISP undermines the Regional Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the General Order.

### Initial Liability

A failure to submit an MWISP is punishable under Water Code 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit an MWISP by the 29 June 2012 deadline as required by the 13267 Order, which is now 314 days late. A pre-filing settlement letter issued to the Discharger on 15 February 2013 establishes a total of 210 days in which the Discharger has been out of compliance for failure to submit the MWISP, and is the basis for determining the recommended civil liability amount.

However, the alternative approach for calculating liability for multi-day violations in the Enforcement Policy is applicable. The failure to submit an MWISP does not cause a daily detrimental impact to the environment or the regulatory program and it does not result in an economic benefit that can be measured on a daily basis. It is the extended time period of non-compliance that causes the detrimental impact to both the environment and the regulatory program. Furthermore, the Discharger only receives an economic benefit by not submitting the required technical report, and not a per-day benefit during the entire period of violation.

Applying the per day factor to the adjusted number of days of violation rounded to the nearest full day equals 13 days of violation. This yields an initial liability of \$3,900 (0.3 per day factor X 13 adjusted days of violation X \$1,000 per day penalty).

### Step 4. Adjustment Factors

a) *Culpability*: 1

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*Discussion:* The Discharger was given the neutral score of 1, which neither increases nor decreases the fine.

The Discharger is fully responsible for failure to submit the MWISP alleged in this Complaint. The requirement to develop and submit an MWISP was detailed in the 13267 Order issued to the Discharger on 4 May 2012. Further, the Discharger was issued a Notice of Violation on 19 July 2012, which requested that the MWISP be submitted as soon as possible to minimize liability. Since that time, the Discharger has failed to show any progress toward developing an MWISP, and is therefore highly culpable for their failure to comply with the program.

b) *Cleanup and Cooperation: 1*

*Discussion:* The Discharger was given the neutral score of 1, which neither increases nor decreases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the General Order, including notice through the MRP, the 13267 Order, and an NOV, the Discharger continues to fail to comply. The violation of Water Code section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

c) *History of Violations: 2*

*Discussion:* The Discharger was given the score of 2, which increases the fine. The Enforcement Policy requires that a minimum multiplier of 1.1 be used when there is a history of repeat violations. As described in the history of violations for Violation No. 1, the Central Valley Water Board has adopted Administrative Civil Liability Orders for the failure to submit the Waste Management Plan and the 2009, 2010 and 2011 Annual Reports. These past violations are part of the same regulatory program as the failure to submit an MWISP and therefore, a multiplier of 2 is being assessed.

### 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: \$7,800* (Initial Liability (\$3,900) x Adjustments (1)(1)(2)).

### **COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS**

The Combined Total Base Liability Amount for the two Violations is \$15,000 (\$7,200 + \$7,800).

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The following factors apply to the combined Total Base Liability Amounts for all of the violations discussed above.

### Step 6. Ability to Pay and Continue in Business

- a) *Adjusted Combined Total Base Liability Amount: \$15,000*

*Discussion:* The Discharger has the ability to pay the total base liability amount based on 1) the Discharger owns the Dairy, a significant asset, 2) the Discharger operates a dairy, an ongoing business that generates profits.

Based on the reasons discussed above, an ability to pay factor of 1 has been applied to the Combined Total Base Liability Amount.

### Step 7. Other Factors as Justice May Require

- a) *Adjusted Combined Total Base Liability Amount: \$15,000 + \$5,400 (Staff Costs) = \$20,400.*

- b) *Discussion:* The State and Central Valley Water Board has incurred \$5,400 in staff costs associated with the investigation and enforcement of the violations alleged herein. This represents approximately 36 hours of staff time devoted to investigating and drafting the complaint at \$150 an hour. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

### Step 8. Economic Benefit

- a) *Estimated Economic Benefit: \$5,000*

*Discussion:* The Discharger has received an economic benefit from the costs saved in not drafting and preparing the 2011 Annual Report and the MWISP. This is based on the current consulting costs of producing one annual report and an MWISP (\$2,500 each). The adjusted combined total base liability amount of \$20,400 is more than at least 10% higher than the economic benefit amount (\$5,000) as required by the enforcement policy.

### Step 9. Maximum and Minimum Liability Amounts

- a) *Minimum Liability Amount: \$5,500*

*Discussion:* The Enforcement Policy requires 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

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estimate of the Discharger's economic benefit obtained from the violations cited in this Complaint is \$5,000.

b) *Maximum Liability Amount:* **\$418,000**

*Discussion:* The maximum administrative liability amount is the maximum amount allowed by Water Code section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (418 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

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

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2011 Annual Report and the MWISP is **\$20,400**. Attachment B is a spreadsheet that demonstrates the use of the penalty calculation methodology.