

Central Valley Regional Water Quality Control Board
3/4 October 2013 Board Meeting

**Prosecution Team's
Response to Comments**

In the Matter of
Donahue Schriber Asset Management Corporation
Rocklin Crossings Construction Site
Placer County

The following are the Central Valley Regional Water Quality Control Board (Central Valley Water Board) Prosecution Team responses to comments submitted by Interested Persons regarding the Administrative Civil Liability Complaint No, R5-2013-0519 issued to for Donahue Schriber Asset Management Corporation (Donahue Schriber). All Interested Person comments regarding the Administrative Civil Liability Complaint were due on 4 September 2013.

Timely comments were received from the following Interested Persons:

- Andrew R. Henderson, on behalf of Building Industry Legal Defense Foundation
- Thomas Holsman, on behalf of Associated General Contractors of America
- Richard Boon, Chair, California Stormwater Quality Association (CASQA)

All written comments are included in the agenda package provided to each Board member. All comments are also available for public review on the Water Board's website.

Comment from Andrew Henderson, Building Industry Legal Defense Fund (BILD)

Summary of Comment: Assessing a penalty of \$10.00 per gallon for the discharge violation alleged in ACL Complaint No. R5-2013-0519 would be a travesty of justice and an abuse of discretion by the Central Valley Water Board. The Enforcement Policy sets a maximum liability amount of \$2.00 per gallon for high volume discharges, including those of stormwater and the Central Valley Water Board may impose a higher amount, up to \$10.00 per gallon, only if the use of \$2.00 per gallon liability amount results in an inappropriately small penalty, such as dry weather discharges of small volume discharges that impact beneficial uses. The discharge that occurred was a typical high volume stormwater discharge and there is no unusual culpability that would justify departing from the maximum penalty of \$2.00 per gallon. If the Central Valley Water Board adhered to the \$2.00 per gallon maximum, the penalty would still be extremely large: \$153,226.

Prosecution Team Response: See Below.

Comment from Thomas Holsman, Associated General Contractors of America (AGC)

Summary of Comment: The State Water Board's Enforcement Policy clearly states that a maximum amount of \$2.00 per gallon should be used to determine the per gallon amount for stormwater, except in cases where explicit findings demonstrate that "where reducing these maximum amounts results in

an inappropriately small penalty, such as dry weather discharges or ***small volume discharges that impact beneficial uses***” and in those instances a higher amount, up to the maximum of \$10.00 per gallon, may be used. Since the discharge at issue was not a dry weather discharge and there is no evidence that beneficial uses were actually impacted, the use of \$10.00 per gallon is inconsistent with the express language in the Enforcement Policy.

The Central Valley Water Board cannot allege that the amount released is not a high volume discharge because other relevant ACL Complaints with lower volumes used \$2.00 per gallon; the Cascade Crossing ACL Complaint No. R5-2013-0520 used \$2.00 per gallon for a discharge of 37,500 gallons that occurred during the same storm event as the discharged violation alleged against Donahue Schriber, and the Placentia Yorba Linda ACL Complaint No. R8-2010-0024 used \$2.00 per gallon for a discharge of 55,887 gallons.

The liability proposed in ACL Complaint No. R5-2013-0519 against Donahue Schriber is not consistent with the other construction stormwater ACLs and therefore fails to comply with the Enforcement Policy’s consistency requirement. Every construction stormwater ACL penalty found that was imposed since the 2010 Enforcement Policy was adopted in 2010 has used \$2.00 per gallon as the starting point, except one, for EI-PLA 75 LLC, ACL Complaint No. R8-2010-0025, which used \$3.00. The discharge volume was higher in that case (101,631 gallons), there was a higher degree of culpability, and there was a history of violations, yet the ultimate liability amount imposed, \$197,367, is less than the amount proposed against Donahue Schriber.

Prosecution Team Response: See Below.

Comment from Richard Boon, CASQA

Summary of Comment: The proposed liability for the discharge violation alleged in ACL Complaint No. R5-2013-0519 is not consistent with the Enforcement Policy, which states that a maximum amount of \$2.00 per gallon should be used to determine the per gallon penalty amount for “high volume discharges,” including stormwater. While the Enforcement Policy does not define “high volume discharge” it appears that a stormwater discharge over 1,000 gallons could be considered high volume given that the Enforcement Policy removes the first 1,000 gallons from the penalty equation.

Use of \$10.00 per gallon is not consistent with other construction stormwater ACLs and is at odds with the multiple directives in the Enforcement Policy calling for firm, fair and consistent enforcement. The Central Valley Water Board must adopt similar penalties for comparable construction stormwater discharges and must determine the penalties in a manner consistent with the goals, intent and applicable sections of the Enforcement Policy.

Construction stormwater ACL penalties adopted since the effective date of the Enforcement Policy have all used \$2.00 per gallon as the starting point, except one; EI-PLA 75 LLC, ACL No. R8-2010-0025 used \$3.00 per gallon. In that case, EI-PLA had a history of violations and other contributing factors that were considered in the determination of the penalty.

The Central Valley Water Board should classify the subject discharge as a high volume discharge subject to the maximum \$2.00 per gallon amount to be consistent with the Enforcement Policy and

with other construction stormwater ACLs, or make clear why this discharge warrants such an extraordinary exception to the clear direction provided in the Enforcement Policy.

Prosecution Team Response: See Below.

Because each of the Commenters raises similar issues, the Prosecution Team is providing a single combined response.

THE USE OF \$10.00 PER GALLON IS APPROPRIATE TO DETERMINE THE BASE LIABILITY AMOUNT FOR THE DISCHARGE VIOLATION

Water Code section 13385 subdivision (c) states, in relevant part, that civil liability may be imposed administratively by the regional board in an amount not to exceed the sum of ten thousand dollars (\$10,000) for each day in which the violation occurs and ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.¹ Subdivision (e) of Water Code section 13385 specifies a number of factors that the regional board shall consider in determining the appropriate amount of liability, including the nature, circumstances, extent, and gravity of the violation(s), 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 the violator's 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 any other matters that justice may require. The Enforcement Policy establishes a methodology for assessing administrative civil liability using the factors outlined in Water Code section 13385(e).

A. The use of \$10.00 per gallon to calculate the initial liability amount in the ACL Complaint is consistent with the plain language in the Enforcement Policy

The Commenters state that the Enforcement Policy generally requires that the Central Valley Water Board calculate the base liability amount for stormwater discharge violations using a maximum of \$2.00 per gallon rather than the statutory maximum penalty of \$10.00 per gallon. AGC contends that only discharges of stormwater in excess of 1,000 gallons are subject to a maximum liability of \$2.00 per gallon and both AGC and BILD state that that the \$2.00 per gallon liability may not be increased unless imposing liability based on \$2.00 per gallon would result in an inappropriately small penalty and the discharge was a dry weather sewage discharge or the discharge resulted in an impact to beneficial uses. The Prosecution Team believes the Commenters are incorrectly interpreting the Enforcement Policy.

The plain language of the Enforcement Policy provides that the default maximum liability that should be applied when determining the base liability amount for any discharge violations is \$10.00 per gallon. The exception cited by the Commenters applies *only if* the discharge is determined to be "high volume." Where the plain language of the Policy is clear and unambiguous, it must be followed. (See *Barnhart v. Walton* (2002) 535 U.S. 212; *Witt Home Ranch Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543.)

The Enforcement Policy states, "[e]xcept for certain high-volume discharges discussed below, the per gallon assessment would then be the Per Gallon Factor multiplied by the number of gallons

¹ The regional board may also request that the Attorney General seek civil liability imposed judicially in an amount not to exceed \$25,000 for each day in which the violation occurs and \$25 multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons. (Wat. Code, § 13385, subd. (b).)

[discharged] subject to penalty multiplied by *the maximum per gallon penalty amount allowed under the California Water Code*.” (Enforcement Policy, p. 13, emphasis added.) Using the maximum per gallon penalty of \$10.00 as the default base volume liability assessment is reiterated later in the Enforcement Policy; “[t]he Water Boards *shall* apply the above per gallon factor to the *maximum per gallon amounts allowed under the statute for the violations involved*.” (*Id.*, at p. 14, emphasis added.) Again, the exception to this general rule is where the discharge is “high volume.” The State Water Board provided for this exception in a section of the Enforcement Policy it entitled, “High Volume Discharges.” That section provides in its entirety:

High Volume Discharges

The Water Boards shall apply the above per gallon factor to the maximum per gallon amounts allowed under the statute for the violations involved. Since the volume of sewage spills and releases of stormwater from construction sites and municipalities can be very large for sewage spills and releases of municipal stormwater or stormwater from construction sites, a maximum amount of \$2.00 per gallon should be used with the above factor to determine the per gallon amount for sewage spills and stormwater. Similarly, for releases of recycled water that has been treated for reuse, a maximum of \$1.00 per gallon should be used with the above factor. Where reducing these maximum amounts results in an inappropriately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to the maximum per gallon amount may be used. (*Id.*)

The phrase, “[s]ince the volume of sewage spills and releases of stormwater from construction sites and municipalities *can be very large* [...]” clearly recognizes that, in some instances, sewage spills and releases of stormwater from construction sites and municipalities *may not be* very large. Only in those cases where the discharge *is* very large, i.e. where the discharge is considered “high volume”, should the base liability be calculated using a maximum of \$2.00 per gallon. If the discharge is not determined to be “high volume” then the base liability amount should be calculated using \$10.00 per gallon.² This interpretation is consistent with previous language cited above which assigns “*the maximum per gallon penalty amount allowed under the California Water Code*” for discharges “*except for certain high-volume discharges*” discussed in the “High Volume Discharges” section.

The Prosecution Team also disagrees with BILD and AGC’s suggestion that if the Central Valley Water Board uses \$2.00 per gallon to determine the base liability amount, there are only two considerations which allow the Board to readjust the per gallon base liability amount back up to \$10.00 per gallon. The Comments’ argument is based on the language in the Enforcement Policy which provides, “where reducing these maximum amounts results in an inappropriately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to the maximum per gallon amount, may be used.” (Enforcement Policy, p. 14.) The two examples provided in the Enforcement Policy, however, are not the only circumstances where the Central Valley Water Board may use its discretion to increase the per gallon liability amount to \$10.00. The phrase “such as” is not a phrase of strict limitation, but is a phrase of general similarity indicating that there are other matters of the same kind which are not specifically enumerated. (Shaddox v. Bertani (2003) 110 Cal.App.4th 1406, 1414.)

² The Enforcement Policy does not define “high volume” so the Regional Board may use its discretion in deciding whether a discharge volume qualifies as a high volume discharge. The Prosecution Team recommends that the board find that the amount discharged in this case, 76,613 gallons, was not a high volume discharge.

B. The use of \$10.00 per gallon is consistent with the manner in which the Central Valley Regional Board and other Regional Water Boards have applied the Enforcement Policy.

Since the Enforcement Policy became effective on May 20, 2010, the Prosecution Team identified only twelve ACL Complaints or Stipulated ACL Orders that have been issued throughout the state where liability has been proposed for construction stormwater violations.³ Of these, only four (not including the ACL Complaint issued in this case) alleged discharges of sediment laden stormwater where liability was proposed on a per gallon basis. Thus, the pool of analogous cases from which the Central Valley Water Board may draw from for guidance in this matter is extremely small. Each of the four analogous cases is discussed below.

AGC and CASQA state that every construction stormwater ACL penalty found in California that was imposed after adoption of the 2010 Enforcement Policy, except one [in the Santa Ana Region], has used \$2.00 per gallon as the starting point for calculating base liability. This statement is simply false. On 3 May 2011, the San Francisco Regional Water Quality Control Board adopted Order No. R2-2011-0071, imposing \$381,450 in liability against the California Department of Transportation (CalTrans) for construction stormwater violations, including discharge violations similar to those at issue here where the base liability amount was calculated using \$10.00 per gallon discharged. In that case, the ACL Complaint alleged that CalTrans had failed to implement appropriate BMPs, failed to timely prepare and submit a required SWPPP amendment, and discharged 64,000 gallons of turbid water and sediment. To calculate the base liability for the 64,000 gallon discharge, a maximum per gallon liability amount of \$10.00 was used. The volume discharged in that case, as in this case, is relatively low; therefore, the liability was assessed using the maximum per gallon amount of \$10.00 rather than the \$2.00 per gallon amount for high volume discharges.

AGC and CASQA also state that the ACL Complaint issued in this matter is inconsistent with ACL Complaint No. R5-2013-0520 issued to HBT of Saddle Ridge, LLC for discharges of stormwater associated with construction activity at the Cascade Crossing construction site. Specifically, the Commenters claim that Central Valley Water Board calculated the base liability amount using \$2.00 per gallon for a discharge of 37,500 gallons. The Commenters are mistaken. In the ACL Complaint issued for the Cascade Crossing site, there were two discharges that occurred which gave rise to liability. The first discharge of 193,500 gallons occurred on 30 November 2012; the second discharge of 37,500 gallons occurred on 2 December 2012. Both discharges occurred during a single qualifying rain event, which is defined in the Construction General Permit as “any event that produces 0.5 inches or more precipitation with a 48 hour or greater period between rain events.” Because the discharges occurred during a single qualifying rain event, the amounts discharged were added and the

³ (1) ACL Complaint No R8-2010-0024;
(2) ACL Complaint No. R8-2010-0025;
(3) ACL Complaint No R2-2010-0094;
(4) ACL Complaint No. R2-2010-0071;
(5) ACL Complaint No. R9-2010-0084;
(6) ACL Complaint No. R8-2010-0050;
(7) ACL Complaint No. R4-2011-0188;
(8) ACL Complaint No. R5-2012-0500;
(9) ACL Complaint No. R6V-2012-0049;
(10) Stipulated ACL Order No. R2-2011-0054;
(11) ACL Complaint No. R5-2013-0521; and
(12) ACL Complaint No. R5-2013-0520.

cumulative amount of 230,500 gallons was considered a “high volume” discharge that qualified for the reduced base liability amount of \$2.00 per gallon in the Enforcement Policy. The discharge at the Cascade Crossing construction site was over three times higher in volume than the discharge at issue in this case, which is much closer in volume to the 64,000 gallons that was not considered high volume in the CalTrans case.

Finally, AGC and CASQA refer to two construction stormwater enforcement action from the Santa Ana Regional Water Quality Control Board (Santa Ana Water Board) to support their contention that using \$10.00 per gallon to calculate the base liability amount for construction stormwater discharges is unprecedented. In the first case, an ACL Complaint was issued to ELI-PLA proposing a liability amount of \$3.00 per gallon for a discharge of 101,631 gallons of sediment laden stormwater. No analysis was provided by the Santa Ana Water Board as to whether the discharge event was considered high volume or not. It is reasonable, however, to assume that, given the language in the Enforcement Policy, the Santa Ana Region determined that the 101,631 gallon discharge was a high volume discharge but that imposing liability based on a per gallon assessment of \$2.00 per gallon would have resulted in an inappropriately small penalty. Thus, the per gallon liability was raised to \$3.00. Because the Santa Ana Water Board did not outline its rationale for using a base liability amount of \$3.00 per gallon, the case is of limited value. In any event, the ELI-PLA case is not inconsistent with the Prosecution Team’s reading of the Enforcement Policy.

The other Santa Ana Water Board case that the Commenters refer to also does not provide any substantive analysis regarding the language at issue in the Enforcement Policy and cannot be relied on to serve as meaningful guidance in this case. In that case, an ACL Complaint was issued to the Placentia-Yorba Linda Unified School District proposing that administrative civil liability be imposed for, among other things, the discharge of 55,887 gallons of sediment laden stormwater at a construction site using a maximum per gallon liability amount of \$2.00. The ACL Complaint failed to provide any rationale for the determination that using \$2.00 per gallon as the maximum per gallon base liability amount was appropriate under the Enforcement Policy. As with the ELI-PLA case, the Placentia-Yorba Linda case is of limited value and it does not bind the Central Valley Regional Board, or any other Regional Water Board, in its consideration of the appropriate interpretation of the High Volume section in the Enforcement Policy.

Each of the cases discussed above may be considered by the Central Valley Water Board in its analysis of the Enforcement Policy; however, the cases are not precedential. It is important to remember that Central Valley Water Board has broad discretion to use the per gallon liability amount, as well as all of the other factors outlined in the Enforcement Policy, in its determination of what the ultimate appropriate liability should be.

C. Even if the Central Valley Water Board uses a \$2.00 per gallon to determine the base liability amount for the discharge violation, other factors support the imposition of \$211,038 as an appropriate liability.

If the Central Valley Water Board accepts the Commenters’ contention that the Enforcement Policy requires that the base liability for the stormwater discharge at issue using the reduced maximum of \$2.00 per gallon instead of the maximum per gallon amount of \$10.00 per gallon, it nevertheless has the discretion to readjust the per gallon amount back up to the statutory maximum and impose the liability amount of \$211,038 proposed in the ACL Complaint. The Prosecution Team believes that imposing a liability amount based on \$2.00 per gallon versus \$10.00 per gallon would result in an inappropriately small penalty.

As discussed above, BILD and AGC state that if the Central Valley Water Board uses \$2.00 per gallon to determine the base liability amount, there are only two considerations which allow the Central Valley Water Board to readjust the per gallon base liability amount back up to \$10.00 per gallon. This contention is based on the language in the Enforcement Policy which provides, "where reducing these maximum amounts results in an inappropriately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to the maximum per gallon amount, may be used." (Enforcement Policy, p. 14.) The two examples provided in the Enforcement Policy, however, are not the only circumstances where the Regional Board may use its discretion to increase the per gallon liability amount to \$10.00 gallon. The phrase "such as" is not a phrase of strict limitation, but is a phrase of general similarity indicating that there are other matters of the same kind which are not specifically enumerated. (Shaddox v. Bertani (2003) 110 Cal.App.4th 1406, 1414.)

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