

**Attachment A**  
**Settlement Agreement and Stipulation for Entry of Administrative Civil Liability**  
**Order R5-2014-0548, for David L. & Linda M. Davis Trust**  
**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 (the "Enforcement Policy") and using the "Penalty Calculation Methodology Worksheet, version date 2/4/2014" (the "Penalty Calculation Worksheet"). The proposed 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:

**Calculation of Penalty for Violation**

**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 Dischargers here have failed to 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.

Using Table 3 in the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy) staff has 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. This conclusion is, in part, based on the size of the Dischargers' irrigated land parcels, which total approximately 1,000 acres, 668 acres of which were subject to the Directive described below. By failing to file a RoWD or to enroll under an applicable General Order, the Dischargers have 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 frustrate the Regional Board's efforts to assess the potential impacts and risks to water quality posed by the Discharger, and circumvent the Regional Board's ability to take necessary enforcement action to correct any problems. The greater the size of the operation, the greater the potential risk, since any practices being implemented by the Discharger that are detrimental to water quality are impacting a much greater area (e.g., a poor practice

by a Discharger with 1,000 acres is, theoretically, 100 times more impactful to water quality than that same poor practice implemented by a Discharger with 10 acres of the same crop type). The requirement and program are compromised when staff resources are directed to bringing Davis into compliance and those resources are not available to outreach to other growers requiring regulatory compliance. Since the violation thwarts the Regional 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.

The deviation from the requirement is major. At the time that the Complaint was issued Davis had completely disregarded the regulatory requirements and rendered those requirements ineffective. Davis has 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 the Dischargers 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 0.40 is appropriate (see Table 3 on p. 16 of the Enforcement Policy).

#### **Step 4. Adjustment Factors**

a) *Culpability*: 1.3

*Discussion*: The Dischargers were given the score of 1.3, which increases the fine. Central Valley Water Board staff sent notices on both 6 February 2013 and on 18 April 2013 to Davis describing the new water quality regulations and the required actions to comply therewith. Davis also received the 13260 Directive requiring them to obtain coverage. Despite knowledge of the regulatory requirements, which is exemplified by the notices described above, Davis failed to come into compliance. The multiple notices and failure to respond suggest Davis acted intentionally in ignoring the requirement to get regulatory coverage, resulting in a multiplying factor of 1.3.

b) *Cleanup and Cooperation*: 1.1

*Discussion*: The Dischargers were given the score of 1.1, which increases the fine because, until after having received the ACL Complaint, the Dischargers were not cooperative in coming into compliance. The Dischargers did not respond to the Regional Board's Notice of Violation, or the "pre ACLC letter," which were sent after the violation occurred, and which offered the Dischargers the opportunity to remedy the violation. Cleanup is not applicable here.

c) *History of Violations*: 1.0

Discussion: The Dischargers were given the score of 1.0, as there is no evidence that Davis has a history of violations.

**Multiple Day Violations:** On 21 June 2013, the Dischargers were served a Directive Letter pursuant to California Water Code section 13260 (Directive), which required them to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Dischargers on 24 June 2013. Thus, regulatory coverage was required by 9 July 2013. The Dischargers joined the Coalition and submitted a Notice of Intent to the Board on 30 May 2014. As of 10 May 2014, the date on which the Complaint was issued, the Dischargers were 305 days late in meeting that requirement.

Violations under Water Code section 13260 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 30). 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 Discharger's failure to submit a RoWD or NOI is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's 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 Discharger's failure to submit a RoWD or NOI 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 avoided costs associated with Coalition membership, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The alternate approach assesses daily penalties for the first day of violation, plus an assessment for each five day period of violation until the 30<sup>th</sup> day, plus an assessment of one day for each thirty days of

violation thereafter. Applying this assessment method on the total 305 violation days reduces the assessed penalty days to 16.

#### **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: \$9,152.* (Initial Liability (\$1,000/day x 16 days x 0.4) x Adjustments (1.3)(1.1)(1.0)).

### **BASE LIABILITY AND FACTORS APPLIED TO THE VIOLATION**

The Base Liability Amount for the Violation is \$9,152. The following factors apply to the Base Liability Amount for the violation.

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

- a) *Adjusted Base Liability Amount: \$9,152*

*Discussion:* 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 based on 1) Value of property owned by the Discharger, a significant asset with a 2013-2014 assessed value of the six Madera County parcels listed in the 13260 Order at \$4,296,413 according to the Madera County Assessor’s office; 2) Dischargers own approximately 233 acres of almonds and/or stone fruit and 434 acres of grapes in Madera County, which generated approximately \$15,480,000 in 2012<sup>1</sup>; and 3) Davis has received an estimated \$84,320 in farm subsidies from the United States Department of Agriculture from 1995 through 2012<sup>2</sup>.

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

*Base Liability Amount: \$9,152*

*Discussion:* There are no factors under this category that warrant an adjustment.

#### **Step 8. Economic Benefit**

*Economic Benefit: \$2,080*

*Discussion:* The Enforcement Policy provides that the economic benefit of noncompliance should be calculated using the United States Environmental Protection Agency’s (US EPA) Economic Benefit Model (BEN)<sup>3</sup> penalty and financial modeling program unless it is demonstrated that an alternative method of

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<sup>1</sup> Information provided by the 2012 Madera County Agricultural Crop Report, available at <http://www.madera-county.com/index.php/publications/crop-reports>

<sup>2</sup> Information provided from farm.ewg.org.

calculating the economic benefit is more appropriate. Economic Benefit was calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)<sup>4</sup> penalty and financial modeling program, version 5.4.0. 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 of failing to apply management techniques that are required under a regulatory program. The benefit is calculated by identifying the regulation at issue, the associated management practices, 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.

As a result of settlement discussions, the Prosecution Team learned that 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 9 July, 2013, the deadline set in the Directive letter.

The economic benefit was calculated based on both delayed costs and avoided costs. Delayed costs are those costs that should have been born earlier, but that the Dischargers are still required to pay. Avoided costs are those compliance activities the Dischargers would have conducted had they come into compliance earlier.

The economic benefit in this case has been calculated based on the verifiable costs associated with joining the Coalition, as well as estimates of other delayed and avoided costs that were required of the Dischargers to comply with the Order.

The Coalition is currently charging new members \$50 for each year, plus \$9 per acre for the prior unpaid years (2013), and \$50 per Member plus \$3.75 per acre for 2014. The delayed cost for this compliance action is \$271 (see Attachment B).

Based on information provided by the Coalition<sup>5</sup>, the Coalition produces about six newsletters a year, which require about 20 minutes for a grower to review. Under the Order, growers are required to become familiar with the water quality issues in their area and methods to address those issues. By failing to enroll under the Order in a timely manner, the Dischargers avoided reviewing six Coalition newsletters. Using an estimate of the value of a grower's time<sup>6</sup> at \$120 per hour and assuming

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<sup>5</sup> Personal communication Joe Karkoski and Parry Klassen, July 2014.

Coalition newsletters went out every two months starting in July 2013, the total avoided cost for this compliance action is \$26.

Farm Evaluations were due by 1 May 2014 for Members with parcels in a high vulnerability area. Based on a review of the location of the Dischargers parcels and the Coalition's "Annual Report – Farm Evaluation Addendum" (submitted July 1, 2014), the Dischargers parcels are in a high vulnerability area. Based on information provided by the Coalition<sup>9</sup>, it takes approximately 2 hours for every 100 acres a grower has to fill out the Farm Evaluation. The cost of preparing the Farm Evaluation, using an estimate of the value of the grower's time at \$120/hour is \$2,400. This is an avoided cost, since the Farm Evaluation has not yet been completed. The avoided cost is \$1,426.

Growers in high vulnerability areas are also required to attend one Coalition outreach event annually. Several of the Dischargers' parcels are in high vulnerability areas. Since, the Dischargers did not attend an event in 2013, this is an avoided cost. Based on information provided by the Coalition<sup>7</sup>, Coalition meetings are typically two hours. On average, a Coalition member would travel 50 miles round trip, taking approximately one hour of drive time. The cost per mile is estimated to be \$0.50/mile and the value of the grower's time is \$120/hour.<sup>8</sup> The avoided cost is \$238, assuming the last outreach event occurred in December 2013.

In summary, the economic benefits associated with delayed costs are: 1) \$271 associated with fees; and 2) \$1,426 associated with the Farm Evaluation. The economic benefits associated with avoided costs are: 1) \$238 associated with attending a grower meeting; and 2) \$145 associated with review of newsletters. The total economic benefit is, therefore, \$2,080.

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

#### **a) *Minimum Liability Amount: \$2,288***

*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 estimate of the Discharger's economic benefit obtained from the violations cited in this memo is \$2,080. Therefore, the minimum liability is \$2,288.

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*(footnote continued from previous page)*

<sup>6</sup> See page 2-22 from Draft Technical Memorandum Concerning Economic Analysis of the Irrigated Lands Regulatory, July 2010.  
[http://www.waterboards.ca.gov/centralvalley/water\\_issues/irrigated\\_land/new\\_waste\\_discharge\\_requirements/program\\_environmental\\_impact\\_report/2010jul\\_draft\\_peir/econ\\_tech\\_rpt\\_draft.pdf](http://www.waterboards.ca.gov/centralvalley/water_issues/irrigated_land/new_waste_discharge_requirements/program_environmental_impact_report/2010jul_draft_peir/econ_tech_rpt_draft.pdf)

<sup>7</sup> Personal communication Joe Karkoski and Parry Klassen, July 2014.

<sup>8</sup> See page 2-22 from Draft Technical Memorandum Concerning Economic Analysis of the Irrigated Lands Regulatory, July 2010.  
[http://www.waterboards.ca.gov/centralvalley/water\\_issues/irrigated\\_land/new\\_waste\\_discharge\\_requirements/program\\_environmental\\_impact\\_report/2010jul\\_draft\\_peir/econ\\_tech\\_rpt\\_draft.pdf](http://www.waterboards.ca.gov/centralvalley/water_issues/irrigated_land/new_waste_discharge_requirements/program_environmental_impact_report/2010jul_draft_peir/econ_tech_rpt_draft.pdf)

b) *Maximum Liability Amount:* **\$305,000**

*Discussion:* 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 Discharger was in violation for 305 days, which is a maximum liability of \$305,000.

**Step 10. Final Liability Amount**

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit a RoWD under California Water Code section 13260 is nine thousand one hundred and fifty-two dollars **\$9,152**.