
Central Valley Regional Water Quality Control Board

TO: Central Valley Water Board Advisory Team
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FROM: Central Valley Water Board Prosecution Team
Andrew Altevogt, Lead Prosecutor

CC: Larry W. and Shireen I. Slate

DATE: 7 October 2014

SUBJECT: POLICY STATEMENT, EVIDENCE, AND WITNESS LIST FOR THE LARRY W. AND SHIREEN I. SLATE (SLATE) ADMINISTRATIVE CIVIL LIABILITY COMPLAINT (ACLC) R5-2014-0564

By this memorandum, the Prosecution Team is transmitting its Policy Statement, Evidence, and Witness List for the Slate Administrative Civil Liability Complaint.

Policy Statement

On 11 July 2014, the Advisory Team provided the Prosecution Team with comments on the David L. & Linda M. Davis Trust and William R. Sinks, et al. proposed settlements. The issues and facts in the Slate ACLC are similar to the aforementioned proposed settlements. Therefore, this Policy Statement addresses, in part, concerns raised in that letter and our understanding that this case is primarily about the appropriateness of the factors used by the Prosecution Team in determining the proposed penalty. The facts of this case are not disputed by the Slates. In determining an appropriate penalty, the Prosecution Team attempted to answer the question – “What is the proper application of the Enforcement Policy Penalty Calculation Methodology?”

Although the Penalty Calculation Methodology is rather detailed and provides fairly clear guidance, answering this question is not as straightforward as it might seem at first glance. For “Non-Discharge Violations”, there are a number of factors used to calculate the penalty, most of which include some amount of judgment. In addition, typical “Non-Discharge” violations include failure to conduct monitoring or provide reports, so there are not the precedents or examples available as a reference for violations alleged in this case – failure to get required regulatory coverage.

The Prosecution Team took what it felt was a reasoned approach in applying the Penalty Calculation Methodology, while leaving room for the Board to make adjustments in this case and future related cases. Absent prior similar cases or other Board direction, the Prosecution Team felt it was appropriate to apply the factors in this case, as well as the Davis case also being considered at the December board meeting, in a similar manner (specific discussion of the Penalty Calculation Factors is provided on the following pages). In taking this approach, the Prosecution Team hopes to glean from the board’s deliberations some guidance as to how to

apply the penalty calculation factors in consideration of the differences, and similarities, between these types of cases.

Finally, the Prosecution Team understands that the Board strives to ensure that the penalty applied in this case, not only conforms to the Enforcement Policy, but is also a fair penalty, provides a sufficient deterrent, and is generally consistent with how the Board handles similar cases.

With respect to deterrence, the Prosecution Team recognizes that there may be a relationship between factors that incentivize growers without regulatory coverage to come into compliance. For example, both high penalty amounts and the timeliness with which enforcement actions are brought contribute to the deterrent effect of an enforcement program. Yet, in some instances, the imposition of large penalty amounts can detract from the speediness with which cases are brought before the board. In bringing enforcement actions, the Prosecution Team considers these variables and strives to strike a balance that provides the maximum benefit to the program.

The Prosecution Team believes the Board's goal of ensuring that all growers requiring regulatory coverage come into compliance is best served by issuing fines that provide a disincentive for avoiding compliance, but can generally be resolved quickly. The fine proposed is approximately 20 times greater than the annual dues for a current Coalition Group member with equivalent acreage, and the Discharger is still required to pay the Coalition Group all back fees. The Prosecution Team believes that the adoption of the proposed fine will send a strong signal to similarly situated non-compliant growers to come into compliance.

Importantly, a progressive enforcement approach that is resolved in a timely manner is a critical element in a successful regulatory program. A loss in momentum can jeopardize the effectiveness of the deterrence that is necessary to encourage the regulated community to anticipate, identify, and correct violations.

The Prosecution Team believes that the approach used to develop the proposed fine here can be effectively applied in other cases; will result in rapid resolution of cases; and will send a clear deterrent signal to other non-compliant growers.

Original Signed by

Andrew Altevogt, Lead Prosecutor
Assistant Executive Officer

Penalty Calculation Factors

Step 3 – Per Day Assessments for Non-Discharge Violations

The “Per Day Factor” (Table 3 of the Enforcement Policy) includes a matrix of factor ranges that takes into consideration the “Potential for Harm” to beneficial uses and the “Deviation from Requirements”. The Prosecution Team believes the “Deviation from Requirements” is “major”, the most severe category, since the Board’s irrigated lands regulatory program is rendered ineffective for those dischargers that do not get regulatory coverage – regulation of the discharge cannot even start, absent regulatory coverage.

The Prosecution Team felt the “Potential for Harm” to beneficial uses should be based on consideration of the size of an operation, since a larger farming operation generally uses proportionally more material than a smaller farming operation and has a greater potential to release that material and harm uses in a groundwater basin or watershed. The Enforcement Policy also indicates that “...Most incidents would be considered to present a moderate potential to harm”. Understanding that the Board may have similar cases with much smaller farming operations (e.g., less than 10 acres), as well as much larger farming operations (e.g., greater than 10,000 acres), selecting the “0.4” factor within the moderate “Potential for Harm”/ “Major Deviation from Requirement” range provides the Board with flexibility and a rationale for making appropriate adjustments based on consideration of farm size.

Step 4 – Adjustment Factors

Culpability – the Enforcement Policy has an adjustment factor for culpability between 0.5 to 1.5, with the lower factor for accidental incidents and the higher factor for intentional or negligent behavior. The Prosecution Team chose a factor of 1.3, since the evidence indicates Slate received notice of the need for regulatory coverage and intentionally disregarded that notice.

Cleanup and Cooperation – the Enforcement Policy has an adjustment factor between 0.75 and 1.5 based on whether there was a high or low degree of cleanup and cooperation. Cleanup is not applicable. However, the Prosecution Team selected a score of 1.1 based on the lack of cooperation in getting regulatory coverage prior to issuance of the administrative civil liability complaint.

History of Violations – the Enforcement Policy indicates that a minimum multiplier of 1.1 should be used for repeat violations. A factor of 1.0 was chosen, since there is not a history of violations.

Multiple Day Violations – the Enforcement Policy allows for the number of days used to calculate the violations to be reduced if one of three express findings can be made. The Prosecution Team made two of three findings – there was no evidence of daily detriment to the environment or evidence that the economic benefit could be measured on a daily basis. At the time the original ACL complaint was issued, the Discharger was 323 days late in meeting the requirement to get regulatory coverage. Per the Enforcement Policy, liability can be assessed for the first day of violation and for every five day period up to 30 days (“7 days’ worth of violation), plus “1 day” of violation for every thirty day period, thereafter. The 323 days, therefore, translates into 16 violation-days per the Enforcement Policy.

Total Base Liability – the Total Base Liability amount is the product of the maximum allowable per day times the number of days times the adjustment factors: \$1,000/day x 16 days x 0.4 [per

day assessment from table 3 of the Enforcement Policy] x 1.3 [culpability] x 1.1 [cleanup and cooperation] x 1.0 [history of violations] = \$9,152.

The Prosecution Team certainly understands that selection of these factors includes both consideration of the facts of the case and some amount of judgment or discretion. We believe we have presented a reasoned approach that results in a fair penalty in this case, as well as providing a reasonable framework and flexibility to the board for adjudicating future cases.