

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
COLORADO RIVER BASIN REGION**

In the matter of:)	
)	
Reata Cattle Feeders, Inc.)	Order No. R7-2014-0040
)	
Complaint R7-2013-0078 for)	
Administrative Civil Liability)	
)	
)	Settlement Agreement and Stipulation
)	for Entry of Order
_____)	

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulated Order" or "Order") is entered into by and between the Assistant Executive Officer of the Regional Water Quality Control Board, Colorado River Region ("Colorado Regional Water Board"), on behalf of the Colorado Regional Water Board Prosecution Staff ("Prosecution Staff"), and Reata Cattle Feeders, Inc. ("Reata" or "Discharger") (Collectively the "Parties") and is presented to the Colorado Regional Water Board, or its delegee, for adoption as an order by settlement, pursuant to Government Code section 11415.60.

Section II: RECITALS

1. The Discharger owns and operates a cow feedlot, Reata Cattle Feeders Inc., (Facility) in Imperial County on parcel numbers: 041-220-020 and 041-220-024. Since approximately 1972, Reata has operated a beef cattle feedlot, with a capacity for 15,000 head. The Facility includes corrals running north to south throughout most of the production area. The feed processing and storage area, fuel tanks, and associated buildings are located at the northwest corner of the site. A silage storage area is located along the east facility boundary and a fresh water pond is at the southwest corner. A storm water runoff pond is located along the west facility boundary in the northern portion of the Facility. The Facility's north, south and east boundaries border Imperial Irrigation District ditches. The receiving waters are the Imperial Valley Drains and Alamo River, a tributary to the Salton Sea.
2. Reata is required to operate and maintain the feedlot site in compliance with the requirements of General Waste Discharge Requirements and General National Pollutant Discharge Elimination System (NPDES) Permit for Concentrated Animal Feeding Operations within the Colorado River Basin Region, Board Order No. R7-2008-0800 (General Order), which was issued by the Regional Board on June 25, 2008. The General Order specifies limitations, prohibitions, specifications, and

provisions applicable to all concentrated animal feeding operations (CAFO) necessary to protect the beneficial uses of the surface and ground waters within the Colorado River Basin Region. Monitoring and Reporting Program Order R7-2008-0800 (MRP) accompanies the General Order and contains requirements including, monitoring the production area and land application area of the permitted discharges, preparing a groundwater monitoring program, conduct visual inspections of the production area, and monitoring the wastewater and soils for dischargers that land apply manure, litter, or process wastewater. The General Order contains the requirements including:

- a. The Executive Officer has the authority to order the development and implementation of an Engineered Waste Management Plan (EWMP), as specified in Attachment B. General Order VII.C.2.c.
 - b. The Discharger shall develop and fully implement an EWMP approved by the Executive Officer in accordance with Attachment B. General Order VII.C.2.c.i.
 - c. For existing CAFOs that did not submit the EWMP required by Board Order No. 01-800, the EWMP shall be submitted within 120 days from the date this Board Order is adopted and fully implemented within 180 days following plan approval by the Executive Officer. General Order VII.C.2.c.i.(II).
3. Regional Board staff sent Reata a letter on February 6, 2001 reminding Reata of its obligation to submit an EWMP to the Regional Board. Reata responded on February 22, 2001 that the Natural Resources Conservation Service (NRCS) was to begin its assessment and work on the EWMP on February 23, 2001.
 4. Regional Board staff followed up in its April 19, 2001 inspection and noted that the EWMP was still in development and Reata claimed that it was in contact with the NRCS to perform the EWMP.
 5. Regional Board staff conducted inspections on June 20, 2002, June 10, 2003, March 12, 2009, and March 11, 2013 and noted that the Facility had not produced its EWMP at the time of inspection or submitted a EWMP for the Regional Board's approval. Staff noted in its March 12, 2009 inspection that, "facility representatives were unsure whether a EWMP had been developed for the operation" and that it was not clear whether the facility's stormwater containment pond provided sufficient capacity to contain normal runoff plus the runoff and direct precipitation from a 25-year, 24-hour storm event.
 6. Compliance evaluations for both the March 12, 2009 and March 11, 2013 inspections (Compliance Evaluation Letters dated June 16, 2009 and March 22, 2013) informed Reata that it should notify the Regional Board of any action taken to correct the deficiencies and provide updated paperwork evidencing the corrections of the deficiencies.

7. On November 14, 2013, the Assistant Executive Officer of the Colorado Regional Water Board issued Administrative Civil Liability Complaint No. R7-2013-0078 (Complaint) to Reata. The Complaint alleged Reata violated the General Order by failing to submit an EWMP in violation of the General Order section VII.C.2.c from March 11, 2013 (date of the last inspection notifying Reata of the need to submit an EWMP) through November 8, 2013.
8. On November 17, 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy ("Enforcement Policy"). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The Prosecution Staff considered the methodology set forth in the Enforcement Policy for the alleged violations above, as shown in Attachment A, which is attached hereto and incorporated by reference as though fully set forth herein.
9. The Parties have engaged in settlement negotiations and agree to fully settle the matter without administrative or civil litigation and by presenting this Stipulation to the Regional Board for adoption as an Order by settlement, pursuant to Government Code section 11415.60.
10. To resolve the alleged violations described herein by consent and without further administrative proceedings, the Parties have agreed to the imposition of \$60,000 in liability. This liability amount is less than the liability amount of \$90,960 calculated by the Colorado Regional Water Board Prosecution staff using the Enforcement Policy as shown in Attachment A. The imposition of a lesser liability amount takes into consideration settlement considerations specified in the Enforcement Policy and the specific factors required to be considered in Water Code section 13385(e). The liability amount agreed to by the Parties is justified considering the risks associated with proceeding to hearing that is consistent with the range of settlement considerations which may result in a reduction in the calculated liability specified in the Enforcement Policy. The Prosecution staff believes the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives. No further action is warranted concerning the alleged violations, except as provided in this Stipulation, and that this Stipulation is in the best interest of the public.

Section III: JURISDICTION

The Parties agree that the Colorado Regional Water Board has subject matter jurisdiction over the matters alleged and personal jurisdiction over the Parties to this Stipulated Order.

Section IV: STIPULATIONS

The Parties incorporate numbered Paragraphs 1 through 10, set forth above, as if set forth fully herein, and stipulate to entry of this Order as set forth below, and recommend that the Colorado Regional Water Board issue this Stipulation and Order to effectuate the settlement.

Upon issuance of this Stipulated Order, Reata shall be liable for a total of SIXTY THOUSAND DOLLARS (\$60,000), as set forth in Paragraphs 11 and 12, below.

11. **Paid Liability:** Within thirty (30) days of the issuance of this Order, Reata agrees to remit, by check, THIRTY THOUSAND DOLLARS (\$30,000), payable to the *State Water Resources Control Board Cleanup and Abatement Account*, and shall indicate on the check the number of this Order. Reata shall send the original signed check to State Water Resources Control Board, Division of Administrative Services, Accounting Branch 1001 I Street, 18th Floor, Sacramento, California, 95814 and a copy to Jeong-Hee Lim, Colorado River Basin Region, Regional Water Board 73-720 Fred Waring Drive, Suite 100, Palm Desert, CA 92260.

12. Enhanced Compliance Action

12.1 Against Reata's total liability of \$60,000 Reata shall be credited THIRTY THOUSAND DOLLARS (\$30,000), for the costs incurred for an enhanced compliance action (ECA). The ECA consists of increasing the height of the berm [to at least two feet] around the entire perimeter of the Facility so that the Facility is protected against discharges from a storm greater than the 25-year, 24-hour storm event.

The ECA qualifies as an action beyond those required by law. Reata is not required by the General Order or by statute or regulation to implement these more protective measures. Such improvements are an enhancement above and beyond current operations.

12.2. Reata shall provide evidence acceptable to the Director of the State Water Board's Office of Enforcement and the Colorado Regional Water Board that it has expended monies in the amount set forth above, including, without limitation, a certified report by Reata describing the expenditures made along with a certification prepared by a registered professional engineer in the State of California or other qualified individual, including an agricultural engineer with the Natural Resources Conservation Service, that the berm is built so that the Facility is protected against discharges of greater than the 25-year, 24-hour storm event. Such evidence shall be submitted to the Colorado Regional Water Board within thirty (30) days after the completion of the ECA.

12.3. The ECA must be completed by October 5, 2014 or no later than 150 days from issuance of this Order. If the ECA is not completed to the satisfaction of the Colorado Regional Water Board, the total amount suspended becomes immediately due and payable to the State Water Board Cleanup and Abatement Account.

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Payment of the suspended amount does not relieve Reata of its independent obligation to take necessary actions to achieve compliance.

13. Compliance with Applicable Laws: Reata understands that payment of administrative civil liability in accordance with the terms of this Stipulation and Order and/or compliance with the terms of this Stipulation and Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged may subject it to further enforcement, including additional administrative civil liability.

14. Party Contacts for Communications related to this Stipulation and Order:

For the Colorado Regional Water Board:

Jose Angel, Assistant Executive Officer
Colorado River Basin Region, Regional Water Board
73-720 Fred Waring Drive, Suite 100
Palm Desert, CA 92260
Jose.Angel@waterboards.ca.gov
(760) 776-8932

For Reata Cattle Feeders, Inc.:

Russell Smith
Reata Cattle Feeders, Inc.
2001 E. Keystone Road
Brawley, CA 92227

15. Attorney's Fees and Costs: Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

16. Matters Addressed by Stipulation: Upon the Colorado Regional Water Board's adoption of this Order, this Stipulation represents a final and binding resolution and settlement of the violations alleged, and all claims, violations or causes of action that could have been asserted against Reata as of the effective date of this Stipulated Order based on the specific facts alleged in the Complaint or this Stipulation and Order ("Covered Matters"). The provisions of this Paragraph are expressly conditioned on the full payment of the administrative civil liability, in accordance with Paragraphs 11 and 12 of this Order.

17. Public Notice: The Parties understand that this Stipulation and Order will be noticed for a 30-day public review and comment period on the Regional Board's website prior to settlement or imposition of any administrative civil liability by the Colorado Regional Water Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Stipulation and Order to the Colorado Regional Water Board, or its delegee, for adoption, the Assistant Executive

Officer may unilaterally declare this Stipulation and Order void and decide not to present it to the Colorado Regional Water Board, or its delegee. Reata agrees that it may not rescind or otherwise withdraw its approval of the Stipulation and Order.

18. **Addressing Objections Raised During the Public Comment Period:** The Parties agree that the procedure contemplated for the Colorado Regional Water Board's adoption of the settlement by the Parties and review by the public, as reflected in this Stipulation and Order, will be adequate. In the event procedural objections are raised prior to the Stipulation and Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
19. **No Waiver of Right to Enforce:** The failure of the Prosecution Staff or Colorado Regional Water Board to enforce any provision of this Stipulation and Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of the Order. The failure of the Prosecution Staff or Colorado Regional Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulation and Order.
20. **Interpretation:** This Stipulation and Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. Reata is represented by counsel in this matter.
21. **Integration:** This Stipulation and Order constitute the entire agreement between the Parties and may not be amended or supplemented except as provided for in this Stipulation and Order, except as may be expressly agreed in writing between the Parties.
22. **Modification:** This Stipulation and Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Colorado Regional Water Board.
23. **If Order Does Not Take Effect:** In the event that this Stipulation and Order does not take effect because it is not approved by the Colorado Regional Water Board, or its delegee, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:
 - a. Objections related to prejudice or bias of any of the Colorado Regional Water Board members or their advisors and any other objections that are premised in

whole or in part on the fact that the Colorado Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on this matter; or

- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

24. **Effect on Future Enforcement Actions:** In settling this matter, Reata recognizes that this Stipulation and Order may be used as evidence of a prior enforcement action consistent with Water Code sections 13327 and 13385(e), and the Enforcement Policy.
25. **Waiver of Hearing:** Reata has been informed of the rights provided by Water Code section 13323(b), and hereby waives its right to a hearing before the Colorado Regional Water Board prior to the adoption of the Stipulation and Order.
26. **Waiver of Right to Petition:** Reata hereby waives its right to petition the Colorado Regional Water Board's adoption of the Stipulation and Order as written for review by the State Water Board, and further waive its rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
27. **Covenant Not to Sue:** Reata covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, its officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter.
28. **Colorado Regional Water Board is Not Liable:** Neither the Colorado Regional Water Board members nor the Colorado Regional Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by Reata, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulation and Order.
29. **Authority to Bind:** Each person executing this Stipulation and Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulation and Order on behalf of and to bind the entity on whose behalf he or she executes the Order.
30. **No Third Party Beneficiaries.** This Stipulation and Order is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Stipulation and Order for any cause whatsoever.

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31. **Effective Date:** This Stipulation and Order shall be effective and binding on the Parties upon the adoption of this Order by the Colorado Regional Water Board, or its delegee, which expressly incorporates all of the terms of this Stipulation.
32. **Severability:** This Stipulation and Order are severable. Therefore, should any provision be found invalid, the remainder shall remain in full force and effect.
33. **Counterpart Signatures:** This Stipulation may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

IT IS SO STIPULATED.

Colorado Regional Water Quality Control Board Prosecution Staff
Colorado River Region

By: Jose L. Angel
Jose Angel, P.E.
Assistant Executive Officer

Date: 4/1/2014

Reata Cattle Feeders, Inc.

By: Ken Smith
Ken Smith

Date: 3-31-14

ORDER OF THE COLORADO REGIONAL WATER BOARD

AFTER HAVING CONSIDERED THE ALLEGATIONS AND THE PARTIES' STIPULATIONS, IT IS HEREBY ORDERED:

1. This Order incorporates the terms of the foregoing Stipulation as if set forth fully herein.
2. In adopting the foregoing Stipulation, the Colorado Regional Water Board or its delegatee has considered, where applicable, each of the factors prescribed in Water Code sections 13327 and 13385. The consideration of these factors is based upon information obtained by the Colorado Regional Water Board's staff in investigating the allegations in the Complaint or otherwise provided to the Colorado Regional Water Board.
3. This is an action to enforce the laws and regulations administered by the Colorado Regional Water Board. The Colorado Regional Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

I, Robert Perdue, Executive Officer, do hereby certify the foregoing is full, true and correct copy of an Order adopted by the California Regional Water Quality Control Board, Colorado River Basin Region, on May 8, 2014.



Robert Perdue
Executive Officer

Date: May 8, 2014

CALCULATION OF PENALTY

Violation: The General Waste Discharge Requirements and General National Pollutant Discharge Elimination System (NPDES) Permit for Concentrated Animal Feeding Operations within the Colorado River Basin Region, Board Order No. R7-2008-0800 (General Order), adopted June 25, 2008, requires the Discharger to submit an engineered waste management plan (EWMP) for the Regional Board's approval within 120 days of the adoption of the General Order. The Discharger has failed to submit an EWMP to the Colorado River Regional Water Board (Regional Water Board).

Per Day Assessment for Non-Discharge Violation

Step 1 and 2. Potential for Harm and Assessments for Discharge Violations

The alleged violation is a non-discharge violation. Accordingly, Steps 1 and 2 are not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations

Liability is assessed on a per day basis as shown below.

Step 3A. The per day factor is **0.4**. This factor is determined by a matrix analysis using the potential for harm (moderate) and the deviation from requirements (major).

- a. The Potential for Harm is **moderate** and determined as follows:

The beneficial uses of the Imperial Valley Drains and Alamo River, waters of the U.S., have the following beneficial uses: FRSH (Freshwater Replenishment), REC I (Water Contact Recreation), REC II (Non-Contact Water Recreation), WARM (Warm Freshwater Habitat), WILD (Wildlife Habitat), and RARE (Preservation of Rare, Threatened, or Endangered Species). The Salton Sea has the same beneficial uses as those listed for the Imperial Valley Drains and Alamo River in addition to AQUA (Aquaculture).

The characteristics of the violation present a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, the alleged violation does not directly or immediately impact beneficial uses. Even though beneficial uses may not be directly or immediately impacted by the alleged violation, the failure to submit an EWMP has an ancillary effect on beneficial uses. The Regional Board lacks the necessary required information to evaluate the capacity of waste containment structures and manured areas to contain all manure, litter, process wastewater and the runoff and direct precipitation from the 25-year, 24-hour storm event at the Facility. The EWMP is also a necessary tool for the Regional Board to assess whether the Discharger must prepare a groundwater monitoring program, including the installation of monitoring wells at the Facility pursuant to General

Order VII.C.2.c.iii. Without the Facility's EWMP, the Regional Board lacks critical information related to whether discharges are authorized under the General Order, which presents a substantial threat to beneficial uses and indicates a substantial potential for harm when there is a discharge. Therefore, the potential for harm to beneficial uses is determined to be moderate.

b. Deviation from Requirement is **major** and evaluated as follows:

The violation represents a minor, moderate, or major deviation from applicable requirements. In this case, the deviation from applicable requirements is major. The General Order requires the Discharger to submit the EWMP within 120 days from the date of the adoption of the General Order. The Discharger was reminded of the requirement to submit an EWMP but to date, the Regional Board has not received an EWMP. The failure to submit the required report undermines the Regional Board's efforts to monitor general compliance with the General Order and more specifically, to assess the Facility's operation and maintenance practices and the potential impacts of waste discharged at the Facility. The reporting requirement was rendered ineffective where the discharger disregarded the requirement to submit to the Regional Water Board an EWMP.

Using Table 3 in the Enforcement Policy, a Per Day Factor of 0.4 is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown below.

Step 3B. There are 243 days of violation, the date of the last inspection notifying the Discharger of the requirement to submit an EWMP through November 8, 2013. The maximum statutory per day liability is \$10,000 per day. Applying a per day factor of 0.4 to the number of days of violation and the maximum liability yields an initial liability of \$972,000 (no. of days of violation x per day factor x statutory maximum liability).

Step 4. Adjustment Factors

There are additional factors to be considered for modification of the amount of initial liability: multiple day violations, the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history.

Step 4A. Multiple Day Violations

The Enforcement Policy provides that, for violations lasting more than 30 days, the Regional Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation.

Conservatively, the Discharger is 243 days in violation. The Discharger failed to submit an EWMP since 120 days following the adoption of the General Order, or October 24, 2008. Most recently, the Discharger was reminded in a March 11, 2013 inspection of the requirement to submit an EWMP. The Prosecution Team selected March 11, 2013 as the start date of the violation in this Complaint. The continuance of this violation does not result in an economic benefit that can be measured on a daily basis. The economic benefit

is the one-time cost of submitting the report to the Regional Board. Therefore, an adjustment can be made.

The Water Board Prosecution Team recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period. Using this method, the revised number of days of violation is 14 days.

The Revised Initial Liability is then recalculated based upon the revised number of days of violation.

$$\begin{aligned} \text{Revised Initial Liability} &= (\text{Per Day Factor}) \times (\text{Compressed Days}) \times (\text{Maximum Penalty}) \\ &= (0.4) \times (14 \text{ days}) \times (\$10,000/\text{day}) \\ &= \$56,000 \end{aligned}$$

Step 4B. Culpability is **1.2** and is determined as follows:

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used, with a higher multiplier for intentional or negligent behavior. The Discharger was given a multiplier value of 1.2 because the required reporting requirement is described in the General Order as well as two previous orders, Orders 01-800 and 95-700 which the Discharger enrolled under. Essentially, the Regional Board has yet to receive an EWMP, a requirement of the Facility since 1995. The Discharger made claims back in 2001 that it was to begin work on the EWMP and over the years Regional Board staff reminded the Discharger of its obligation to submit the EWMP. However, no EWMP was submitted to the Regional Board. Additionally, in its March 12, 2009 inspection, Regional Board staff noted that, "facility representatives were unsure whether an EWMP had been developed for the operation." The Discharger has been formally and informally notified of its obligations under its Permit, and is fully culpable for the failure to submit an EWMP to the Regional Water Board. A reasonable person under the circumstances would have submitted an EWMP. Therefore an assessment of 1.2 is appropriate.

Step 4C. The discharger's cleanup and cooperation factor is **1.3**.

This factor reflects the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier of 1.3 where the Discharger has yet to comply despite having been reminded by Regional Board staff on several occasions of the requirement to submit an EWMP in compliance with the General Order.

Step 4D. The discharger's history of violations factor is **1**.

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 Discharger does not have a prior history of Regional Water Board enforcement actions. The Discharger was given a neutral multiplier of 1 rather than 1.1.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Revised Initial Liability Amount from reducing the days of violation.

$$\begin{aligned} \text{Total Base Liability} &= (\text{Revised Initial Liability}) \times (\text{Culpability}) \times (\text{Cleanup/Cooperation}) \times (\text{History}) \\ &= (\$56,000) \times (1.2) \times (1.3) \times (1.0) \\ &= \$87,360 \end{aligned}$$

Step 6. Ability to Pay and Continue in Business

The Regional Board has the initial burden of producing substantial evidence demonstrating the Discharger's ability to pay and continue in business. During the period provided to submit evidence and at hearing, the Discharger may submit information that it believes supports its position.

The Prosecution Team sets forward the following information in satisfaction of its initial burden. The Discharger receives income from its beef feedlot, which has the maximum capacity of 15,000 head and that has been in operation since around 1984. An asset search for the Discharger indicated that the Discharger owns several parcels in Imperial County including, APN 041-060-001, approximately 32 acres of agricultural land, with an assessed value of \$52,154 and APNs 041-210-014, 041-220-020 and 041-220-024, with an assessed value of around \$480,000. This information in the public record is indicative of the Discharger's available assets to potentially pay the assessed penalty and continue in business.

Step 7. Other Factors as Justice May Require:

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.

- a) Adjusted Combined Total Base Liability Amount: \$87,360 + \$3,600 (Staff Costs) = **\$90,960**

- b) Discussion: Regional Water Board and State Water Board staff cost associated with this enforcement action is estimated to be a minimum of 24 hours. This amount is calculated based on the hourly wage of staff multiplied by 24 hours of staff time, which includes overhead, time to review and tally violations, and prepare this Complaint and the accompanying public notices. If this matter proceeds to hearing, the Regional Water Board Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this Complaint through hearing.

Step 8. Economic Benefit

Pursuant to Water Code section 13385, subdivision (e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation.

- a. Estimated Economic Benefit: **\$243**
- b. Discussion: The economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation. The Discharger has realized an economic benefit of noncompliance by failing to submit an engineered waste management plan. In other words, the Discharger realized a gain by not expending the resources to produce an EWMP. In order to estimate the economic benefit of noncompliance, the Prosecution Team sought industry standards and current consulting costs of producing an EWMP and staff's familiarity with the complexity of preparing an EWMP to derive an average cost of \$7,500. The economic benefit of noncompliance is realized by delaying the creation of the EWMP. This is estimated by calculating the time value of the delay, net of taxes and inflation using U.S. Environmental Protection Agency's BEN model¹. The economic benefit of noncompliance of delaying the creation of an EWMP from March 11, 2013 (the start date of the violation alleged in this Complaint) through April 1, 2014 (the projected date of compliance) is \$243. This assumes compliance is completed by April 1, 2014, a discount/interest rate of 7.1%, and the Employment Cost Inflation Index.

The economic benefit of noncompliance does not take into account the cost of the report which the Discharger has not yet submitted to the Regional Board or the benefit derived from an illegal competitive advantage by operating without complying with its permit.

Step 9. Maximum and Minimum Liability Amounts

The maximum and minimum amounts for the violation are shown below. The maximum administrative liability amount is the maximum allowed by Water Code section 13385 is \$10,000 for each day of violation. The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent so that liabilities are not

¹ USEPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures such as capital investments, one-time non-depreciable expenditures, and annual operation and maintenance costs. BEN uses standard financial cash flow and net present value analysis techniques based on generally accepted financial principles. First, BEN calculates the costs of complying on time and of complying late adjusted for inflation and tax deductibility. To compare the on time and delayed compliance costs in a common measure, BEN calculates the present value of both streams of costs, or "cash flows," as of the date of initial noncompliance. BEN derives these values by discounting the annual cash flows at an average of the cost of capital throughout this time period. BEN can then subtract the delayed-case present value from the on-time-case present value to determine the initial economic benefit as of the noncompliance date. Finally, BEN compounds this initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance.

construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations.

The proposed liability falls within the maximum and minimum amounts.

a) Maximum Liability Amount: **\$2,430,000**

b) Minimum Liability Amount: **\$267**

Step 10. Final Liability Amount

Liabilities imposed by the Regional Water Board are an important part of the Water Boards' enforcement authority. Accordingly, any assessment of administrative civil liability should fully eliminate any economic advantage obtained from noncompliance, fully eliminate any unfair competitive advantage obtained from noncompliance, bear a reasonable relationship to the gravity of the violation and the harm to beneficial uses or regulatory program resulting from the violation, deter the specific Discharger from committing further violations, and deter similarly situated persons in the regulated community from committing the same or similar violations. The methodology outlined in the Enforcement Policy is a process for arriving at a liability amount consistent with these objectives.

The Prosecution Team recommends a total liability amount of **\$90,960** for this violation. This proposed liability amount is consistent with the methodology in the Enforcement Policy and with the objectives outlined above, including providing a meaningful deterrent to similarly situated Dischargers in the regulated community from committing the same or similar violations.