

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ACL AND PENALTY ORDER NO. R5-2007-_____

STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY AND PENALTY
ORDER

IN THE MATTER OF

MUSCO FAMILY OLIVE COMPANY AND THE STUDLEY COMPANY
SAN JOAQUIN COUNTY

This Stipulation for Entry of Administrative Civil Liability and Penalty Order (hereafter Order or Stipulated Order) is issued to Musco Family Olive Company and the Studley Company (hereafter jointly referred to as Discharger) based on failure to comply with Time Schedule Order (TSO) No. R5-2002-0014, as revised, as issued pursuant to Sections 13267 and 13308 of the California Water Code, and Cleanup and Abatement Order Nos. 5-00-717 and R5-2002-0149. This Order is issued pursuant to California Water Code Division 7, Chapter 5, which authorizes the imposition of administrative civil liability and penalties and Government Code section 11415.60.

Whereas:

1. The Musco Family Olive Company owns and operates an olive brining and packaging facility on land (Assessor's Parcel Numbers 209-11-018, 209-11-019, 209-11-031, 209-11-032, 251-32-008, 251-32-009) leased from the Studley Company, a California limited partnership. The facility is southwest of the town of Tracy, near Patterson Pass Road in San Joaquin County, in Section 4, T3S, R4E, and Section 34 T2S, R4E, MDB&M.
2. Two separate Waste Discharge Requirements (WDRs) Orders regulate the discharge of the facility's processing wastewater to land. WDRs Order No. R5-2005-0024, adopted on 27 January 2005, regulates the Title 27 Class II surface impoundments used to store concentrated brines, and is not the subject of this Order. WDRs Order No. R5-2002-0148, adopted on 6 September 2002, regulates the discharge to land of less concentrated wastewater, and replaced WDR Order No. 97-037. Monitoring and Reporting Program (MRP) Order No. R5-2002-0148, adopted on 6 September 2002, replaced MRP No. 97-037.
3. On 17 November 2000 the Executive Officer issued Cleanup and Abatement Order (CAO) No. 5-00-717, which required the Discharger to prepare technical reports and construct wastewater treatment system improvements to comply with WDR Order No. 97-037 and MRP No. 97-037 by 1 November 2001.
4. The Discharger did not comply with CAO No. 5-00-717 and, therefore, the Regional Water Board adopted Time Schedule Order (TSO) No. R5-2002-0014 on 25 January 2002 after a public hearing. The TSO allowed an interim greater flow and increased effluent limits for dissolved inorganic solids (DIS) from April 2002 through

6 September 2002; but required control of nuisance odors; installation of groundwater monitoring wells, an evaluation of the domestic wastewater system, construction of wastewater treatment improvements, expanded cropping of land application areas, submittal of the delinquent reports required by WDRs Order No. 97-037 and CAO No. 5-00-717, submittal of the monthly status reports, and compliance with Revised MRP No. 97-037. The TSO specified civil penalties ranging from \$2,500 to \$5,000 for violations of the requirements in the TSO. On 6 June 2002, the Regional Water Board revised the terms of the time schedule by adopting TSO No. R5-2002-0014-R01. It authorized greater flow, application of wastewater as dust control in disturbed areas of the impoundment construction area, and an additional month to complete the 84 million gallon reservoir. The revision required the Discharger to provide an odor control report, evaluate the adequacy of monitoring well MW-9, and perform and submit the results of an additional groundwater monitoring event.

5. On 9 April 2002, the Executive Officer issued Administrative Civil Liability (ACL) Complaint No. R5-2002-0502 in the amount of \$150,000, which addressed civil liabilities incurred by the Discharger for failure to comply with CAO No. 5-00-717 from the date of the CAO issuance (November 2000) through issuance of TSO R5-2002-0014 (January 2002). The Discharger paid the liability in full.
6. On 6 September 2002, the Regional Water Board issued WDRs Order No. R5-2002-0148 and Cleanup and Abatement Order No. R5-2002-0149 to address continuing violations of the WDRs.
7. On 6 August 2004, the Executive Officer issued Administrative Civil Liability (ACL) Complaint No. R5-2004-0534 in the amount of \$493,500. This Complaint was based on the Discharger's violations of certain tasks required by TSO No. R5-2002-0014, as revised, from the date of issuance (25 January 2002) through 31 May 2004.
8. ACL Complaint No. R5-2004-0534 alleged that the Discharger was in violation of TSO tasks during 795 days from 1 February 2002 through 31 May 2004 as summarized below. Attachment A contains a day-by-day summary of violations that occurred during this time period that were considered in the Complaint.
9. Subsequent to the issuance of the Complaint and Discharger's objections thereto, representatives of the Discharger and the Executive Officer (collectively, the "Parties") entered into settlement negotiations because of a desire to resolve this matter and settle the allegations described herein without a formal hearing. Without the admission of liability or any fact or claim by the Discharger, or the adjudication of any claim in this matter, the Parties have requested that the Regional Water Board adopt this Order based on the stipulation set forth below.

THE PARTIES HEREBY STIPULATE AS FOLLOWS:

A. Statement of the Case

Attachment A (which is attached hereto and made part of this Order by reference) lists the TSO violations considered in issuance of the ACL Complaint. Attachment B (which is attached hereto and made part of this Order by reference) lists violations of the TSO and CAO identified by Regional Water Board staff through reviewing the Discharger's self-monitoring reports for the months of September 2002 through June 2007. These violations total more than 7,000 in number and were considered in settling this matter. Pursuant to California Water Code section 13308, the *maximum* penalty that can be imposed for the violations of TSO No. R5-2002-0014, as revised, for 1,327 violations from 25 January 2002 through 30 June 2007 totals \$3,332,500. Pursuant to California Water Code section 13350(e), the Regional Water Board may impose up to \$5,000 per day in administrative civil liability for violations of the CAO. This Order recovers the costs incurred by the staff of the Regional Water Board in evaluating the violations and preparing the Complaint and related documents. This Order imposes administrative civil liability pursuant to California Water Code section 13350 and penalties pursuant to California Water Code section 13308 in an amount less than the maximum amount specified in the TSO but is fair based on consideration of all the factors prescribed in California Water Code section 13327 and 13308.

B. Matters Not Resolved

ACL Complaint No. R5-2004-0534 did not consider potential violations of Task 16 of the TSO, which required the Discharger to submit a report showing that a liner, adequate to prevent the stored wastewater from impacting the groundwater, had been installed in the 84-MG reservoir. Additional technical information is required to evaluate and determine whether the Discharger achieved compliance with Task 16. This Stipulated Order does not address Task 16. The Regional Board reserves the right to take future action on any confirmed violations of Task 16, as appropriate. This Order also does not address alleged violations of requirements and prohibitions of discharges relevant to surface waters and surface water drainage courses set forth in those Orders and applicable waste discharge requirements or prohibitions.

C. Relevant Legal Authority

TSO No. R5-2002-0014, as revised, was issued pursuant to California Water Code section 13308(a), which states, in part: The Regional Water Board *"may issue an order establishing a time schedule and prescribing a civil penalty, which shall become due if compliance is not achieved in accordance with the time schedule"*.

California Water Code Section 13308 (c) states: *"Any person who fails to achieve compliance in accordance with the schedule established in an order issued pursuant to subdivision (a) shall be liable civilly in an amount not to exceed the amount prescribed by the order. The regional board may impose the penalty administratively in accordance with Article 2.5 (commencing with Section 13323). If the regional board imposes the*

penalty in an amount less than the amount prescribed in the order issued pursuant to subdivision (a), the regional board shall make express findings setting forth the reasons for its action based on the specific factors required to be considered pursuant to Section 13327.”

Section 13323 (a) of the CWC states: *Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.*

California Water Code Section 13350(a) states, in part: *Any person who violates any . . . cleanup and abatement order hereafter issued, reissued, or amended by a regional board . . . shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).*

California Water Code section 13350(e) states, in part: *The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a gallon basis, but not both.*

(1) The civil liability on a daily basis may not exceed five thousand dollar (\$5,000) for each day the violation occurs.

Section 13327 of the CWC states: *In determining the amount of civil liability, the regional board . . . shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, 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 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 other matters as justice may require.*

D. Public Notice of Stipulated Order

Public Notice of a proposed Stipulated Order was published on 17 September 2007 initiating a 28-day period for the public to comment on the proposed Stipulated Order. Because this is a settlement between the Parties, the Regional Water Board will not conduct an evidentiary hearing on this matter.

If the Executive Officer receives significant new information that reasonably affects the propriety of entering into this Stipulated Order, the Executive Officer may unilaterally declare this Stipulated Order void. Musco agrees that it may not rescind or otherwise withdraw its approval of this Stipulated Order.

Musco covenants and agrees that it will not contest or otherwise challenge this Stipulated Order before the Regional Water Board, the State Water Resources Control Board (State Water Board), or any court. The Executive Officer likewise covenants and agrees that she will not contest or otherwise challenge this Stipulated Order before the

Regional Water Board, the State Water Board or any court, provided that she does not exercise her authority to declare the Stipulated Order to be null and void as the result of public comment.

E. Right to Petition

Any person affected by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with Sections 2050 through 2068, Title 23, California Code of Regulations. The petition must be received by the State Water Board within 30 days of the date of adoption of this Order by the Regional Water Board. Copies of the law and regulations applicable to filing petitions are available at and will be provided upon request.

F. Exemption from California Environmental Quality Act

Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000 *et seq.*), in accordance with Sections 15061(b)(3) and 15321 (a)(2), of Title 14 of the California Code of Regulations.

This Stipulated Order and assessment of administrative civil liability and penalties provides for the full and final resolution of each of the alleged violations addressed by this Order.

G. Payment of Administrative Civil Liability

Musco Family Olive Company and the Studley Company shall pay an administrative civil liability/penalty in the amount of \$493,500 in accordance with California Water Code Division 7. Pursuant to Water Code section 13323(d), full payment is due within thirty days of adoption of this Order by the Regional Water Board. However, the Executive Officer shall not initiate any collection actions to collect the full payment so long as timely payments are made according to the following schedule:

<u>Date</u>	<u>Amount Due</u>
15 April 2008	\$125,000
15 October 2008	\$125,000
15 April 2009	\$125,000
15 October 2009	\$118,500

As of each of the dates above, the Discharger shall submit a check in the stated amount to the Regional Water Board. The check shall be made payable to the "*State Water Resources Control Board Waste Discharge Permit Fund*" and shall have written on it the number of this Stipulated Order. If any payment deadline is missed, the entire outstanding balance of the administrative civil liability/penalty shall become due and payable immediately.

H. Financial Assurances

Musco Family Olive Company and the Studley Company shall develop and maintain financial assurances according to the following schedule:

- a. By 31 December 2007, the Discharger shall submit a Site Closure and Maintenance Report to the Executive Officer for approval that contains:
 - i. A detailed plan for the short-term maintenance of the site, including a reasonable and complete annual cost estimate, to assure that no discharges of waste from the site occur via surface water drainages. This plan will include an inventory of the tasks needed to maintain and operate pumps and conveyance systems in the interim between the discontinuation of olive processing and the final closure of the site.
 - ii. A detailed plan for the complete closure of the site, including a reasonable and complete estimate of the cost of such closure. This plan shall include at least two alternatives for closure and one alternative of these alternatives will be directed by the Executive Officer.
 - iii. A detailed plan for post-closure maintenance and monitoring of the site, including a reasonable and complete estimate of the cost of maintaining the 84 million gallon reservoir to collect the site run-off for the design seasonal precipitation required by WDRs Order No. R5-2002-0148, Discharge Specification B.8, and the cost of necessary monitoring.
 - iv. A reasonable and complete estimate of the cost of initiating and completing corrective action for all known or reasonably foreseeable releases from the site that pose a threat to water quality.
- b. The Executive Officer will either approve the Site Closure and Maintenance Report or specify the areas of the report that are deficient. In the event of a determination of material deficiency, the Discharger shall have **45 days** from the date of written notice of the deficiencies to submit a revised report which addresses all of the deficiencies. The issuance of a notice of deficiency does not preclude the assessment of penalties for an initially deficient report.
- c. Within **60 days** after written notice of Executive Officer approval of the Site Closure and Maintenance Report, the Discharger shall submit a Financial Assurances Report to the Executive Officer for approval that contains proposed mechanisms and a time schedule to obtain financial assurances in the form of an irrevocable fund or other mechanism(s), with the Regional Water Board named as beneficiary, to ensure that funds are available to address the items (a)(i) through (iv) listed above and a time schedule for obtaining financial assurances. Due to the Discharger's admissions of past financial instability, the Executive Officer may

prohibit the Discharger from using a Financial Means Test or similar method for providing financial assurances.

- d. The Executive Officer will either approve the Financial Assurances Report or specify the areas of the report that are deficient. In the event of a determination of material deficiency, the Discharger shall have 60 days from the date of written notice of the deficiencies to submit a revised report which addresses all of the deficiencies. The issuance of a notice of deficiency does not preclude the assessment of penalties for an initially deficient report.
- e. Within **60 days** after written notice of Executive Officer's approval of the Financial Assurances Report, the Discharger shall provide proof to the Executive Officer demonstrating that the Discharger has obtained financial assurances consistent with the approved Financial Assurances Report and in accordance with the approved time schedule in the Report.
- f. The Regional Water Board intends that the Discharger update the cost estimates for financial assurances annually and maintain financial assurances until no longer required by the Regional Water Board. Continuing requirements for financial assurances will be set forth in subsequent orders of the Regional Water Board. This Order sets forth penalties contingent upon timely completion of the tasks set forth in this Order for those tasks required by the approved report up through and including 15 October 2009. Tasks set forth in the approved Financial Assurances Report that extend beyond 15 October 2009 and the annual review of the cost estimates will be set forth in a separate order of the Regional Water Board. This Stipulated Order is intended to apply only to those tasks set forth in the approved Report required up to and including 15 October 2009.

I. Stipulated Administrative Civil Liability

If Musco Family Olive Company and the Studley Company fail to comply with Section H of this Order by the specified dates, Musco Family Olive Company and the Studley Company shall be subject to stipulated administrative civil liability in the amounts as follows:

Failure to submit complete Site Closure and Maintenance Report or Financial Assurances Report by the respective due dates:

- i. \$100,000 for initial due date
- ii. \$5,000 per day for each additional day it is late or materially incomplete as determined by the Executive Officer.

Failure to demonstrate that Discharger has obtained financial assurances in the amount set forth in the approved Financial Assurances Report and in accordance with the approved time schedule:

- i. \$200,000 for missing initial due date

- ii. \$5,000 for each additional day a time schedule date for funding the financial assurances mechanism is missed (up to 15 October 2009).

If administrative civil liability becomes due and owing based on this paragraph, Musco Family Olive Company and the Studley Company shall submit a check in the stated amount to the Regional Water Board within 30 days of notice by the Executive Officer. The check shall be made payable to the "*State Water Resources Control Board Waste Discharge Permit Fund*" and shall have written on it the number of this Stipulated Order.

J. Scope of Order

Upon receipt of the administrative civil liability and penalty in the amount of \$493,500 and the full satisfaction of the requirements of Paragraph H above, including the payment of any administrative civil liability for failure to comply with the terms of this Order, This Order resolves violations alleged in ACL Complaint No. R5-2004-0534 that occurred from 25 January 2002 through 31 May 2004, as set forth in Attachment A to this Stipulated Order. This Order also resolves violations of TSO No. R5-2002-0014, as revised, that occurred from 1 June 2004 through 30 June 2007 and violations of CAO No. R5-2002-0149, as set forth in Attachment B to this Order. The resolved violations shall be referred to as "Covered Matters." The Discharger waives its right to a hearing on the resolution of the Covered Matters.

Neither this Stipulated Order nor any payment pursuant to the Order shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgment of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule or regulation. However, this Order and/or any actions or payment pursuant to the Order may constitute evidence in actions seeking compliance with this Order. This Order may be used as evidence of a prior enforcement action in any future actions by the Regional Water Board.

K. Right to Declare Order Null and Void and Withdraw the Order

This Stipulated Order is contingent on the Discharger's ability to fully satisfy all of the terms of this Order including but not limited to the financial assurance requirements set forth in Paragraph H. If the Discharger does not satisfy those requirements, the Regional Board may declare the Order null and void and withdraw this Order. In that event, the Discharger agrees that any statute of limitations period for the Covered Claims has been tolled from the date of entry of the Order until the date of withdrawal of the Order, inclusive ("Tolling Period"). This means that the Tolling Period will not be included in computing the time limited by any statute of limitations under the causes of action that may arise out of the Covered Claims, in any statute of limitations is applicable. The Tolling Period will also not be considered as part of any defense of laches or similar defense concerning timeliness of commencing a civil action against the Discharger by the Regional Board.

L. Public Review

The Parties intend that the procedure that has been adopted for the approval of the settlement by the Parties and review by the public, as reflected in this Order, will be adequate. In the event procedural objections are raised prior to this Stipulated 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.

M. Procedures in the Event of that Stipulated Order Does Not Take Effect

In the event that this Stipulated Order does not take effect, i.e., the Stipulated Order is not approved by the Regional Water Board, or the Order 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 Regional 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 also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to, objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional Water Board Members or their advisors were exposed to some of the material facts and the Parties' settlement positions, and therefore may have formed impressions or conclusions, prior to conducting the contested evidentiary hearing.

N. Authority to Enter into Stipulated Order

Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Order on behalf of and to bind the entity on whose behalf he or she executes the Order.

O. Interpretation

This Order shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this Order and any uncertainty and ambiguity shall not be interpreted against any one party.

P. Effect if Portion of Order is Unenforceable

If any portion of this Order is ultimately determined not to be enforceable, the entire Order shall become null and void.

Q. Modification of Order

This Order shall not be modified by any of the Parties by oral representation made before or after the execution of this Order. All modifications must be in writing and approved by the Regional Water Board.

R. Attorneys Fees and Costs

Except as otherwise provided, each party shall bear all attorneys' fees and costs arising from that party's own counsel in connection with the matters referred to herein.

S. Documents and Performance

The Discharger shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Order.

T. Counterparts.

This Order 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 and the same document.

IT IS SO STIPULATED:

Original Signed by

Felix Musco
Musco Family Olive Company

Original Signed by

Nicholas Musco
Studley Company

Approved as to Form:

Original Signed by

Michael A. Campos
Stoel Rives LLP
Attorneys for Musco Family Olive Company and Studley Company

Original Signed by

Pamela C. Creedon
Executive Officer
On behalf of the Regional Water Board Enforcement Team

Approved as to Form:

Original Signed by

Frances L. McChesney, Senior Staff Counsel
Office of the Chief Counsel
State Water Resources Control Board
Attorney for Regional Water Board Enforcement Team

In adopting this Order, the Regional Water Board has considered all the factors prescribed in California Water Code section 13327 and 13308. The Regional Water Board's consideration of these factors is based upon information and comments provided by the Parties and by members of the public. An evaluation of the factors in California Water Code section 13327 that form the basis for assessing a penalty less than the maximum set forth in the TSO is contained in Attachment C to this Order (attached hereto and made a part of this Order by reference).

I, PAMELA CREEDON, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on _____ 2007.

PAMELA C. CREEDON, Executive Officer

Attachments:

- A: Time Schedule Order violations
- B: Violations of the WDRs and CDO from September 2002 through June 2007
- C: Consideration of Factors in CWC Section 13327 AND 13308

10/1/2007