

Attachment A – ACL Complaint No. R5-2012-0561
Specific Factors Considered for Administrative Civil Liability
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PARTNERSHIP, AND HENRY J. TOSTA TRUST
SAN JOAQUIN COUNTY

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code sections 13350, subdivision (a) and 13327. Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

I. Violation 1: Discharge to Groundwater from the Production Area

The following steps are used in determining administrative civil liability for the production area discharges.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5). The designated beneficial uses of groundwater are municipal and domestic water supply¹, agricultural supply, industrial service supply, and industrial process supply.

Dairy waste, including manure and urine, can seriously impact groundwater unless the discharges are carefully managed. Such discharges can introduce nitrogen, salts, and bacteria to the groundwater, either by the movement of waste constituents through soil or by the movement of waste constituents through man-made conduits such as improperly constructed wells. Nitrogen contamination, in the form of both nitrate and ammonia, pose a serious threat to beneficial uses, including the drinking water supply. Groundwater beneath the dairy is very shallow, at a depth of less than 10 feet. The bottom of lagoons and settling basins at the dairy are likely at or near the groundwater surface, providing a direct conduit between wastes and groundwater. The placement of manure and wastewater in the production area has been identified as moderate threat to beneficial uses resulting in exceedances of primary and secondary MCLs thereby justifying score of **3** is assigned for this factor.

¹ Although groundwater in monitoring wells at the dairy contains total dissolved solids (TDS) in excess of 3,000 mg/l, evidence suggests that the TDS concentration is the result of on-site dairy operations and does not necessarily represent the natural quality of shallow groundwater in the area.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways. Dairy waste contains nitrogen, salts, and bacteria. Nitrogen, total dissolved solids (TDS). Nitrate-nitrogen has a primary Maximum Contaminant Level (MCL) of 10mg/L. TDS has a secondary MCL ranging between 500mg/L and 1500mg/L. Because dairy waste poses a threat to beneficial uses, a score of **3** was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, more than 50% of the discharge was susceptible to abatement, because the Discharger, once the source of the discharge (manure and manure wastewater) was removed, could have pumped underlying groundwater and applied it to cropland at agronomic rates for use as a fertilizer. Therefore, a factor of **0** is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a **final score of 5** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses administrative civil liabilities for the discharge based on a per-day basis.

Per Day Assessments for Discharge Violations

The "per day" factor (determined from Table 2 of the Enforcement Policy) is 0.15. The deviation from requirements is major because the Dairy General Order requirements (Prohibition A.4) prohibiting the discharge of waste that results in 1) discharge of waste constituents in a manner which could cause degradation of groundwater, or 2) contamination or pollution of groundwater, have been rendered ineffective.

The length of the alleged violation is from the date of the first inspection, 1 May 2012 through 16 November 2012, for a total of 200 days.

The Per Day Assessment is calculated as: (0.15 factor from Table 2) x (200 days) x (\$5,000 per day). The **Initial Liability** value is **\$150,000**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Central Valley Water Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violation is related to the discharge of wastewater, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Multiple Day Violations

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. The violation at issue does not qualify for the alternative approach to the penalty calculation under the Enforcement Policy because none of the three required criteria can be met. The continuance of this violation causes daily detrimental impacts to the water quality of the groundwater where the accumulation of manure waste causes degradation and pollution to groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not removing manure and wastewater as it accumulates; and the Discharger knew and could have taken action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger did not follow the Operation and Maintenance Plan that was part of its Waste Management Plan (WMP) for the Dairy, requiring regular cleanout of lagoons and settling basins in the production area. Manure and wastewater was placed in areas of the production area not identified for manure storage on maps associated with the WMP. Despite repeated attempts during the 12 July 2012, 17 July 2012 and 26 July 2012 inspections reminding the Discharger of cleanup obligations under the Dairy General Order and the CAO, the Discharger failed to comply with cleanup of the 3 to 4 acre central portion of the Production Area potentially exacerbating the water quality issues at the Tosta Dairy. No effort was made to ensure that dairy waste did not come into contact with shallow groundwater. Dairy manure was allowed to accumulate and even bury one of the monitoring wells. A reasonably prudent person under similar circumstances would have managed manure and wastewater to minimize or prevent prohibited discharges to groundwater, in compliance with the Dairy General Order. Accordingly, the culpability factor has been set at the maximum.

Cleanup and Cooperation

This factor reflects the extent to which a 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 failed to operate and maintain the Dairy in a manner to prevent adverse impacts to water quality, an essential component of the requirements of the Dairy General Order. Moreover, the Discharger has not complied with the cleanup measures required in the CAO, which would

have reduced further harm and minimize the source of the pollution. Therefore, the cleanup and cooperation multiplier factor has been set at the maximum, **1.5**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger has a history of violations of water quality laws.

On 1 March 2002, staff from the Central Valley Water Board and the Department of Fish and Game (DFG) investigated a discharge of wastewater from cropland operated by the Henry Tosta Dairy into a Naglee-Burk drain; this cropland is now part of the current Henry Tosta Dairy production area. Mr. Tosta explained to the investigators that he had been pumping wastewater out onto approximately 15 acres for approximately one year instead of using his waste pond. The reason given for not using the waste pond was the lack of a pump and distribution system. No crop was growing in the field receiving the wastewater. In addition, manure scraped from the freestall barn had been deposited into the Main Drain canal of the Naglee-Burk Irrigation District south of the production area (Exhibit 23). On 28 March 2002, staff from the Central Valley Water Board and DFG conducted a follow-up inspection of the Henry Tosta Dairy to determine what steps had been taken to abate the discharge of 1 March 2002. The inspection revealed ongoing discharges of wastewater from the same field into the Naglee-Burk drain and no significant improvements (Exhibit 24). On 3 February 2003, a settlement agreement was reached between Henry Tosta and the Deputy District Attorney for San Joaquin County in the sum of \$141,730 for discharges of manure wastewater to the Naglee-Burk Canal (Exhibit 25). The Prosecution Team has factored this violation as a history of violation for the purposes of this Complaint, since the reason for the surface water discharge in 2003 was that the Discharger lacked infrastructure to deliver wastewater to cropland for agronomic use. This lack of infrastructure is closely related to the lack of proper manure handling which led to the discharge to groundwater in this violation. Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$150,000) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$371,250**.

II. Violation #2: Failure to Submit Adequate Waste Management Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be major. The General Order uses the preparation and implementation of a complete and accurate Waste Management Plan (WMP) as the tool to determine if a dairy has sufficient capacity for the waste generated by the herd, if the dairy production area is protected from flooding, if modifications are needed to the production area to ensure that the dairy waste management operations are protective of water quality, and includes an Operation and Maintenance Plan that will provide a schedule and list of activities needed to maintain waste management features at the dairy. An evaluation of the WMP submitted to Staff for the dairy on 21 September 2010 reveals that the WMP: 1) does not accurately describe the dimensions of the lagoons and settling basins, thus leading to an incorrect evaluation of the storage capacity as more than adequate; 2) lists a critical storage period that is much less than the actual amount of time that waste is stored in the production area, thus leading to an incorrect evaluation of the storage capacity as more than adequate; and 3) includes a Production Area Design & Construction Report and a Waste Management Plan Modification Progress Status Report, both signed by the Discharger, stating that the entire production area drains into ponds and that no modifications of the production area are needed to comply with the General Order. As a requirement of the Dairy General Order, the failure to submit an adequate WMP creates a major potential for harm to the regulatory program of the Dairy General Order requiring the submission of the WMP to prevent adverse impacts to groundwater and surface water quality.

b. The Deviation from Applicable Requirements is major. Although the Discharger submitted a Waste Management Plan within the required time period, the Discharger's submission was deficient for the reasons explained above. The Discharger failed to submit an adequate Waste Management Plan and in effect, disregarded the requirement in the General Order that the plan accurately reflect existing conditions and identify needed remedial measures.

The length of the violation is alleged from the date of the submission of the WMP, 20 September 2010 through 16 November 2012, for a total of 789 days late. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (789 days) x (\$1000 per day). The Initial Liability value is \$670,650.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit an adequate plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.85) X (32 days of violation) X (\$1,000) = **\$27,200**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The documents signed by the

Discharger as part of the WMP all include a certification that states: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment." The Discharger was therefore aware that it was important that the information in the WMP be accurate in reflecting the operations and maintenance of the Tosta Dairy, yet when compared to the Discharger's actual operations and maintenance, demonstrates inherent deficiencies and inaccuracies in the information provided by the Discharger.

Cleanup and Cooperation

This factor reflects the extent to which a 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 value of **1.5**. The General Order, as a phased-in set of requirements, provides multiple points at which dischargers are required to evaluate various documents regarding their operations, correct any problems, and modify plans as needed to reflect changed conditions. The Discharger never submitted any modifications to the WMP submitted in 2010, even though a reasonable person could have recognized that there were serious problems with manure management in the production area that merited a review of the WMP provisions.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount for Lagoon Discharges: This value is calculated as the Revised Initial Liability (\$27,200) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$67,320**.

III. Violation #3: Failure to Comply with the Cleanup and Abatement Order Directives

A. Violation #3a: CAO Directive 1: Submittal of Production Area Cleanup Plan

The following steps are used in determining administrative civil liability for the failure to develop and submit a Production Area Cleanup Plan in compliance with Directive 1 of CAO R5-2012-0708 (CAO), addressing 1) removal of all slurry manure in the 3 to 4 acre central portion of the Production Area by 27 August 2012; 2) removal of all manure within the two settling basins by 27 September 2012; and 3) removal of excess vegetation, excess manure, and manure used

for construction on the six lagoons, and installation of staff gages, by 27 September 2012.

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.40. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The Discharger submitted an incomplete plan on 5 July 2012 and referenced cleanup activities in a second document received 3 August 2012. The Discharger was notified by letter dated 10 August 2012 that the plan and cleanup activities were inadequate. Absent a complete cleanup plan that contains a time schedule and specific information on who will handle manure removal, how manure will be removed, and where removed manure will go, the cleanup of a significant quantity of waste as in this case is unlikely to proceed in a timely manner and, has not been completed as of the date of this Complaint. A plan is typically a pre-requisite for implementation. The failure to submit the Production Area Cleanup Plan potentially increases the potential for harm of manure waste discharge to groundwater in the production area. Not having a plan, in of itself, however, does not necessarily mean cleanup is not addressed. At the same time, the placement of waste in violation of the General Order undermines the regulatory program of the Dairy General Order; absent a complete cleanup plan, the Tosta Dairy remains in violation of the Dairy General Order's requirements. In all, the Prosecution Team assessed moderate potential for harm.

b. The Deviation from Applicable Requirements is moderate. The Discharger's initial submission was ten days late but Board staff deemed the plan inadequate; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from June 25, 2012 (the date that the cleanup plan was due) through 16 November 2012, for a total of 145 days late. Therefore the Per Day Assessment is calculated as (0.4 factor from Table 3) x (145 days) x (\$1,000 per day). The Initial Liability value is \$58,000.

Step 4 – Adjustment Factors

Multiple Day Violations

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. The failure to prepare and submit a plan does not cause daily detrimental impacts to the environment. 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.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.4) X (10 days of violation) X (\$1,000) = **\$4,000**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.2**. Where the Discharger submitted a report, albeit incomplete, such circumstances do not warrant a 1.4 or above where there is no evidence of willful or intentional negligence. The Discharger's culpability is higher than a neutral 1.0 where a reasonable and prudent person under similar circumstances would have submitted a complete report addressing the cleanup requirements under the CAO.

Cleanup and Cooperation

This factor reflects the extent to which a 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 cooperative in submitting a plan, although it was not timely or complete. However, even after notifying the Discharger of the incomplete submittal, the Discharger has failed to provide a plan to supplement the initial submittal. Exhibit 14 identifies a letter, dated 10 August 2012 from the Assistant Executive Officer to the Discharger discussing the status of the Discharger's compliance with the CAO, including how the submission of the Discharger's cleanup plan was unrealistic because land applying the excess manure is insufficient if agronomic application rates are to be maintained. Therefore, the Discharger is assessed a multiplier value of **1.1**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$4,000) X Adjustment Factors **(1.2) (1.1) (1.1)** and is equal to **\$5,808**.

b. Violation #3b: CAO Directive 1A: Removal of Slurry Manure in the Central Portion of the Production Area

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

- a. The Potential for Harm for the violation is determined to be major. As long as the manure remains in this area it poses a threat to underlying shallow groundwater and to the existing beneficial uses, as detailed in the potential for harm section of Violation #1.
- b. The Deviation from Applicable Requirements is major. The General Order requires that waste be placed in areas identified in a WMP for waste storage and where the storage of the waste will not result in degradation, contamination, or pollution of groundwater. Placing slurry manure on unprepared native soil with no controls to contain the waste is a major deviation from the requirements of the General Order and the requirement in the CAO.

The length of the violation is alleged from 27 August 2012 (the date removal of manure from this area was to be complete) through 16 November 2012, a total of 82 days. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (82 days) x (\$5,000 per day). The Initial Liability value is \$348,500.

Step 4 – Adjustment Factors

Multiple Day Violations

The violation at issue does not qualify for the alternative approach to penalty calculation under the Enforcement Policy. The continuance of this violation: causes daily detrimental impacts to the water quality of the groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not expending the money to remove the slurry manure and transport it offsite; and the Discharger knew and had control to take action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Dairy's enrollment under the General Order and was provided with a copy of the General Order. On 21 September 2010, the Discharger submitted a signed WMP to the Board describing, among other things, his manure management practices. The WMP did not identify the central area as a manure storage area. Additionally, Board staff followed up and inspected Tosta Dairy on 3 July 2012, 12 July 2012, 17 July 2012, and 26 July 2012, and continued to find the Discharger placing and storing the solid manure and liquid wastewater in the 3-4 acre area. Placement of newly-generated manure in the 3-4 acre area ceased briefly but resumed by Board staff's inspection on 30 October 2012. The Discharger was aware of the requirements of the Dairy General Order, but chose to manage his waste in violation of the Dairy General Order. In the status letter of 10 August 2012 in Exhibit 14, Staff specifically rejected a request for an extension of time to clean manure in the production area because of concerns that the cleanup would not be completed before winter rains; Staff also cited the lack of any progress in cleaning up the central area and, in fact, the continued use of the central area for dumping of newly-generated manure as additional reasons to deny the extension request. Therefore, the Prosecution Team assessed a multiplier of 1.5.

Cleanup and Cooperation

This factor reflects the extent to which a 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 deadline of 27 August 2012 to remove the slurry manure in the central area. On 5 September 2012, Staff inspected Tosta Dairy and determined that a minimal amount of manure rearrangement was being done, but that no manure had been removed from the area. Subsequent inspections, referenced above, indicate that only minimal progress was conducted in the cleanup of this area. Therefore, the Discharger is assessed a multiplier value of **1.5**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$348,500) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$826,538**. In considering the maximum statutory liability of \$5,000 per day of violation, the Total Base Liability exceeds the statutory maximum of \$410,000 (82 days x \$5,000). Therefore, the Total Base Liability must be adjusted to **\$410,000**.

c. Violation #3c: CAO Directive 1B: Removal of Manure from Two Settling Basins

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be major. Settling basins are required to have freeboard to prevent the overtopping of the basin embankments by waste and the subsequent uncontrolled release of waste from the basin. The two settling basins, at the time of the initial inspection on 1 May 2012, neither settling basin had any freeboard. Although the Discharger removed some material from the settling basins, subsequent deposition of waste into the settling basins resulted in overtopping of some embankments and threatened discharge of waste into the Naglee-Burk Canal.

b. The Deviation from Applicable Requirements is major. Settling basins are to be maintained and regularly cleaned so that they can function to separate solid and liquid fractions of waste. Freeboard is to be maintained to ensure that embankments are not

overtopped by waste and subsequent loss of containment and embankment integrity. Failure to remove the manure from the settling basins is violation of the CAO directive. Therefore, because the requirement was rendered ineffective, the violation was a major deviation from applicable requirements.

The length of the violation is alleged from 27 September 2012 (the date that removal of all manure within the two settling basins was to be complete) through 16 November 2012, a total of 51 days. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (51 days) x (\$5,000 per day). The Initial Liability value is \$216,750.

Step 4 – Adjustment Factors

Multiple Day Violations

The violation at issue does not qualify for the alternative approach to penalty calculation under the Enforcement Policy. The continuance of this violation: causes daily detrimental impacts to the water quality of the groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not expending the money and resources to appropriately manage the settling basins, effectively reaping an advantage in the cost of operating the dairy Facility; and the Discharger knew and had control to take action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Tosta Dairy's enrollment under the Dairy General Order and was provided with a copy of the General Order. On 21 September 2010, the Discharger submitted a signed WMP to the Board describing, among other things, his manure management practices. The Discharger was therefore aware of the need to regularly maintain his settling basins. In the Status letter of 10 August 2012, Staff specifically rejected a request for an extension of time to clean manure in the production area because of concerns that the cleanup would not be completed before winter rains. At an inspection on 5 September 2012, Settling Basin #1 had no freeboard. At an inspection on 10 October 2012, Settling Basin #1 was overtopping and flooding a road inside the production area. At an inspection on 22 October 2012, staff noted that a small manure berm had been constructed along Settling Basin #1 to prevent manure and wastewater from discharging across an access road and into the Naglee-Burk Canal. These conditions indicate a complete lack of intent to comply with the General Order.

Cleanup and Cooperation

This factor reflects the extent to which a 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. Because the settling basins have not been cleaned of manure, the Discharger was given a higher factor than a neutral score of 1.0. Unlike the removal of manure from the production area, Board staff noted that manure removal activities in the settling basins commenced around 12 July 2012. On 17 July 2012, Board staff noted the manure solids had been removed and stacked on the embankments of Settling Basins #1 and #2, but that significant amounts of wastewater were

still present in the basin. On 5 September 2012 Central Valley Water Board staff noted Settling Basin #1, which had two to three feet of freeboard at the time of the last inspection on 26 July 2012, had no freeboard. Also, manure generated by the current herd was being pushed into Settling Basin #1 instead of being placed in the 3-4 acre manure disposal area. Settling Basin #2 still contained significant amounts of manure. At the 10 October Inspection Board staff observed settling basin #1 overtopping the southern and northern embankment and adjacent dirt access roads. At the 22 October Inspection, Board staff observed a small manure berm had been constructed along the south side of Settling Basin #1 to prevent the discharge of wastewater from that basin into the Naglee Burk canal. On 30 October 2012, Board staff observed Settling Basin #1 was lowered in the level of liquids but Settling Basin #2 was now overtopping.

Board staff observed manure removal activities in Settling Basin #1 and #2 but, given the ineffectiveness of the Discharger's activities and conduct, assessed a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$216,750) X Adjustment Factors **(1.5) (1.2) (1.1)** and is equal to **\$429,165**. In considering the maximum statutory liability of \$5,000 per day of violation, the Total Base Liability exceeds the statutory maximum of \$255,000 (51 days x \$5,000). Therefore, the Total Base Liability must be adjusted to **\$255,000**.

d. Violation #3d: CAO Directive 6: Submission of Revised WMP

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. A plan is typically a pre-requisite before implementation. The existing WMP failed to identify areas of the production area requiring improvement to ensure that storage of waste is protective of water quality. The failure to submit revisions to the WMP potentially increases the potential for harm of manure waste discharge to groundwater in the production area. The placement of waste in violation of the General Order undermines the regulatory program of the Dairy General Order; absent a revised WMP, the Tosta Dairy remains in violation of the Dairy General Order's requirements.

b. The Deviation from Applicable Requirements is major. The Discharger failed to submit revisions to the WMP and in effect, disregarded the requirement. Staff routinely requests the submittal of revised WMPs when inspections indicate that revision of the WMP is necessary to represent on site conditions or correct deficiencies.

The length of the violation is alleged from 27 August 2012 (the date the revised WMP was due) through 16 November 2012, for a total of 82 days late. Therefore the Per Day Assessment is calculated as (0.55 factor from Table 3) x (82 days) x (\$1,000 per day). The Initial Liability value is \$45,100.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.55) X (8 days of violation) X (\$1,000) = **\$4,400**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO issued to the Discharger clearly stated the requirement to submit the revised WMP. The Status letter sent to the Discharger on 10 August 2012 reminded the Discharger of the upcoming deadline to submit the revised WMP. The revised WMP has not been submitted as of the date of this Complaint.

Cleanup and Cooperation

This factor reflects the extent to which a 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. Because the revised WMP has not been submitted and no explanation for the lack of the revised WMP has been provided, the Discharger was assessed a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$4,400) X Adjustment Factors (1.5) (1.2) (1.1) and is equal to **\$8,712**.

e. Violation #3e: CAO Directive 7: Submission of Groundwater Remediation Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

- a. The Potential for Harm for the violation is determined to be moderate. Without a plan, groundwater impacts will remain unremediated. A plan is typically a pre-requisite before implementation. As long as the submission of the Groundwater Remediation Plan remains outstanding, the Discharger is taking no steps to remediate currently impacted groundwater; absent the Groundwater Remediation Plan, the Tosta Dairy remains in violation of the Dairy General Order's requirements.
- b. The Deviation from Applicable Requirements is major. The Discharger failed to submit the groundwater remediation plan and in effect, disregarded the requirement of the CAO.

The length of the violation is alleged from 27 September 2012 (the date the plan was due) through 16 November 2012, for a total of 51 days late. Therefore the Per Day Assessment is calculated as (0.55 factor) x (51 days) x (\$1,000 per day). The Initial Liability value is \$28,050.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. 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.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.55) X (7 days of violation) X (\$1,000) = **\$3,850**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO clearly stated the

requirement to submit the groundwater remediation plan if groundwater sampling indicated groundwater pollution. The Status letter issued by Staff on 10 August 2012 states that Staff's evaluation of groundwater data received from the Discharger's consultant on 20 July 2012 indicates negative impacts to groundwater from dairy operations and states that a plan for the remediation of the groundwater, including an engineering evaluation of the impacts of the existing lagoons and settling basins on groundwater quality and a proposal for remedial measures is required by 27 September 2012. None of the elements of the plan have been received.

Cleanup and Cooperation

This factor reflects the extent to which a 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. Because the remediation plan has not been submitted and no explanation for the lack of the remediation plan has been provided, the Discharger was given a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$3,850) X Adjustment Factors **(1.5) (1.2) (1.1)** and is equal to **\$7,623**.

The follow penalty methodology steps apply to all prior violations.

Step 6 - Ability to Pay and Ability to Continue in Business

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. Below is a brief analysis of the Discharger's financial situation, which may be revised based on the submission of additional information by the Discharger.

Besides the Heifer Ranch operated on property leased from the Echeverria Brothers Dairy General Partnership, the Discharger owns and operates a 1,196 cow dairy in the immediate area. The Tosta Dairy is an ongoing business that generates profits that may be used to pay off the assessed penalty. The Discharger owns additional parcels of land in the vicinity of the Heifer Ranch, together with a restaurant/bar in a neighboring community. Public records show that the Discharger is the legal property owner of the following parcels:

APN 229-060-15 (agricultural); APN 239-270-06 (residential); APN 209-290-06 (agricultural); APN 209-290-07 (agricultural); APN 209-300-18 (agricultural); APN 239-160-02; APN 239-160-16 (dairy); APN 239-160-15 (agricultural); APN 212-090-01 (agricultural); APN 239-270-02 (agricultural); APN 209-300-18 (agricultural); APN 249-020-06; APN 229-060-16 (agricultural); APN 229-060-17 (agricultural).

In all, based on the information publicly available, the Prosecution Team finds that Henry Tosta has the ability to pay the proposed administrative civil liability amount.

Step 7 – Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this.

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. Staff of the Central Valley Water Board has spent over 100 hours associated with the investigation of the discharges alone, independent of time required for preparation of the enforcement action. The State Water Board Office of Enforcement has directed that all regions are to use a value of \$150 per hour for staff costs. For this case, staff time for investigation of the discharges is \$15,000. The Enforcement Policy states that staff costs should be added to the liability amount.

Step 8 – Economic Benefit

The Enforcement Policy directs the Water Board to determine any Economic Benefit Amount of the violation based upon the best available information. The Enforcement Policy suggests that the Water Board compare the Economic Benefit Amount to the Adjusted Total Base Liability and ensure that the Adjusted Total Base Liability is at a minimum, 10 percent greater than the Economic Benefit Amount. Doing so should create a deterrent effect and will prevent administrative civil liabilities from simply becoming the cost of doing business.

The Prosecution Team has estimated the economic benefit of non-compliance at \$751,810. This estimation is based on actions the Discharger should have taken to comply with the Dairy General Order (Exhibit 26):

- Install Lagoon Management System
- Submission of Clean-up Plan
- Submission of Revised WMP
- Submission of Accurate WMP in 2010
- Submission of Remediation Groundwater Plan
- Avoided Manure Management cost
- Avoided General Maintenance

The economic benefit of non-compliance plus 10% is **\$826,991**. The Adjusted Total Base Liability Amount is greater than 110 percent, and therefore, no adjustment is necessary based on the economic benefit analysis.

Final adjusted liability

The final adjusted liability is **\$1,125,713** plus **\$15,000** in staff costs, or **\$1,140,713**.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Complaint, and the values are repeated here.

Maximum Liability Amount:

Violation #	Requirement	Days of Violation	Maximum Potential Liability
1	Dairy General Order Prohibition A.4: Discharge or disposal of waste resulting in the pollution of groundwater	200	\$1,000,000
2	13267 Failure to Submit Adequate Waste Management Plan	779	\$789,000
3a	CAO Directive 1: Develop a plan for cleanup of the Production Area	145	\$145,000
3b	CAO Directive 1A: Remove manure in 3 to 4 acre central portion of production area	82	\$410,000
3c	CAO Directive 1B: Remove all manure within two settling basins	51	\$255,000
3d	CAO Directive 6: Submission of Revised WMP	82	\$82,000
3e	CAO Directive 7: Submission of Remediation Groundwater Plan	51	\$51,000
		TOTAL	\$2,732,000

Minimum Liability Amount: the minimum liability according to the Enforcement Policy is equal to the economic benefit plus 10%, which estimated to be \$826,991.

Step 10 – Final liability Amount

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Without further investigation of the discharge, calculation of economic benefits, and additional staff time, the proposed Administrative Civil Liability is **\$1,140,713**.