

**ACL Complaint No. R5-2013-0592
Henry J. Tosta – Reeve Road Heifer Ranch**

San Joaquin County

<u>Violation</u>	<u>Description</u>	<u>Formula</u>	<u>Assessed Penalty</u>	<u>Maximum Penalty</u>
A.	Factors Considered Relating to Dead Cow Discharge to Groundwater	$(0.31^1) \times (56 \text{ days}) \times (\$5,000 \text{ per day}) = \$86,800 \times \text{Adjustment Factors } (1.5^2)(1.0^3)(1.1^4) = \$143,220$ $(0.10) \times (56 \text{ days}) \times (\\$5,000 \text{ per day}) = \\$28,000 \times \text{Adjustment Factors } (1.0)(0.75) = \\$21,000$	<p style="text-align: center;">\$143,220</p> <p style="text-align: center;">\$21,000</p>	\$280,000
<p>“Per Day” Assessment: The “Per Day” factor should be calculated at 0.10 or less. My client’s actions were not a “major” deviation from the requirement as he did not disregard the requirement, but rather were a “minor” deviation, as he had a general intent to follow the requirement. Additionally, I would argue that the “potential for harm” score should be lower, however this would require the use of an expert to analyze the toxicity of the discharge.</p> <p>Adjustment Factors: On or about June 25, 2012, the animal carcasses were removed from the groundwater and hauled to a landfill for disposal. Mr. Tosta denies that there was a discharge that harmed the groundwater and argues that the carcasses were removed. Mr. Tosta further disputes that dead cows were routinely buried on the Heifer Ranch in the numbers and frequency alleged. Additionally, Order No. R5-2013-0095, adopted by the Central Valley Water Board on July 25, 2013 is currently pending review by the State Water Resources Control Board and unrelated to the current violations, and therefore should not be a factor.</p>				

¹ This number represents the “Per Day” Factor, which is a combination of the Potential for Harm Score and the Deviation from Requirement. The Potential for Harm Score is comprised of three factors: (1) Harm to Beneficial Uses, (2) Physical, chemical, biological or thermal characteristics of discharge, and (3) Susceptibility to cleanup and abatement. The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, construction deadline, etc.) that was violated, and are assessed as Minor, Moderate and Major.

² This adjustment factor assesses the culpability of the discharger’s conduct on a scale of 0.5 to 1.5. Discharger’s degree of culpability regarding the violation, with higher liability resulting from intentional or negligent violations than for accidental, non-negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

³ This adjustment factor assesses the cleanup and cooperation efforts of the discharger on a scale of 0.75 to 1.5, with the lower multiplier where there is a high degree of efforts and the higher multiplier where this is absent altogether. This takes into account the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage.

⁴ This adjustment factor assesses the history of violations of the discharger. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used, however, if no repeat violation exists, then no multiplier should be used.

B.	Factors Considered Relating to Violation of CAO Directive 2: Timely Submittal of Comprehensive Dead Animal Removal Report	(0.35) x (18 days) x (\$1,000 per day) = \$6,300 x Adjustment Factors (1.3)(1.0)(1.1) = \$9,009 (1 day) x (\$1,000 per day) = \$1,000	\$9,009 \$1,000	\$18,000
<p><u>“Per Day” Assessment:</u> There should be no “Per Day” factor multiplier for this violation. Mr. Tosta disputes that the untimely submittal of a report is subject to multi-day violations, and asserts that a one-time violation is more appropriate. Additionally, on or about July 20, 2012, Mr. Tosta submitted a report documenting the removal of animal carcasses, including a receipt from a landfill documenting disposal of the waste.</p> <p><u>Adjustment Factors:</u> My client’s actions were not intentional, nor completely absent of efforts, but rather he was not able financially. As discussed above, he has corrected the violation. Therefore, the first two adjustment factors as assessed are not warranted. Additionally, Order No. R5-2013-0095, adopted by the Central Valley Water Board on July 25, 2013 is currently pending review by the State Water Resources Control Board and unrelated to the current violations, and therefore should not be a factor.</p>				
C.	Factors Considered Relating to Violation of CAO Directive 4: Failure to Submit a Groundwater Remediation Plan	(0.40) x (13 days) x (\$1,000 per day) = \$5,200 x Adjustment Factors (1.4)(1.1)(1.1) = \$8,808.80 (1 day) x (\$1,000 per day) = \$1,000	\$8,808.80 \$1,000	\$229,000
<p><u>“Per Day” Factor:</u> There should be no “Per Day” factor multiplier for this violation. Mr. Tosta disputes that the untimely submittal of a report is subject to multi-day violations, and asserts that a one-time violation is more appropriate. On or about April 12, 2013, a Groundwater Remediation Plan was submitted by email to the Regional Board. Additionally, Mr. Tosta’s actions were not intentional, and the delays were largely attributable to Mr. Tosta’s ongoing financial crisis.</p> <p><u>Adjustment Factors:</u> My client’s actions were not intentional, nor completely absent of efforts, but rather he was not able financially. As discussed above, he has corrected the violation. Therefore, the first two adjustment factors as assessed are not warranted. Additionally, Order No. R5-2013-0095, adopted by the Central Valley Water Board on July 25, 2013 is currently pending review by the State Water Resources Control Board and unrelated to the current violations, and therefore should not be a factor.</p>				
D.	Factors Considered Relating to Violation of CAO Directive 4: Failure to Properly Dispose of Comingled Manure and Animal Remains	(0.55) x (22 days) x (\$5,000 per day) = \$60,500 x Adjustment Factors (1.5)(1.5)(1.1) = \$149,737.50 No Penalty.	\$149,737.50 \$0	\$2,520,000

As required by CAO Directive 4, the contested stockpile of manure with animal remains has been completely removed and taken to the landfill near Linden, California. The removal consisted of approximately 1,500 tons of manure and was complete as of December 6, 2013. I would further note that many of the delays associated with the disposal of manure and animal remains were attributable to the Regional Board's inability to render consistent and timely regulatory advice and assistance, both internally and vis a vis other governmental agencies. This stymied the disposal effort, and greatly increased its costs. Since the contested stockpile of manure has been completely removed and properly disposed of at an acceptable landfill, Mr. Tosta would argue that no penalty should be assessed for this violation.

	Totals:		\$310,775	\$3,047,000
			\$23,000	

Minimum Liability Amount: The minimum liability according to the Enforcement Policy is equal to the economic benefit plus 10%, which estimated to be \$5,274. [\$4,795 + 479 (10%)] Since the Adjusted Total Base Liability Amount (\$310,775) is greater than 110% of the economic benefit of non-compliance (\$5,274), no adjustment is necessary based on the economic benefit analysis.