

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

In the matter of Administrative Civil Liability  
Order No. R5-2014-0548 (David L. & Linda  
M. Davis Trust)

Prosecution Team's Response to Letter  
Submitted by Discharger's Counsel

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The Prosecution Team hereby responds to the 24 October 2014 letter submitted by Discharger's counsel.

**I. The Discharger Agreed to Pay the Proposed Administrative Civil Liability**

The decision before the Board is whether to adopt or reject the proposed Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R5-2014-0548 ("Stipulated Order"). The Stipulated Order incorporates a Settlement Agreement between the Discharger and Prosecution Team, whereby the Discharger agreed to pay an administrative civil liability of \$9,152 to settle the violation alleged in Administrative Civil Liability Complaint No. R5-2014-0501 ("Complaint"). The 24 October letter suggests that the Discharger has changed its position and argues that the penalty should be lowered to \$7,040. As an initial matter, the Prosecution Team respectfully requests that the Discharger's arguments be rejected as the parties have already agreed to settle the matter for \$9,152.

**II. The Stipulated Order Applies Appropriate Culpability and Cleanup and Cooperation Factors**

The Discharger generally asserts that the Prosecution Team was not aware of mitigating factors, namely, the Discharger's post-Complaint compliance, which should alter the application of the Enforcement Policy methodology. But the Prosecution Team did consider the Discharger's post-Complaint efforts and lowered various penalty methodology factors in the Complaint (Attachment E to ACL Complaint R5-2014-0501) to those in the Stipulated Order (Attachment A to Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R5-2014-0548).

The Discharger specifically argues that the Prosecution Team's application of a factor of 1.3 for culpability should be lowered to 1.1 because the Discharger allegedly sought the advice of experts and acted in good faith in an attempt to come into compliance. The Complaint

proposed a factor of 1.5. The Prosecution Team considered the Discharger's claim and lowered the culpability factor to 1.3 for settlement. This factor is appropriate because the record shows that Board staff repeatedly engaged in progressive enforcement in an attempt to aid the Discharger to come into compliance prior to proceeding with formal enforcement, to no avail.

The Discharger next argues that the application of a factor of 1.1 for cleanup and cooperation should be lowered to 1.0 because the Discharger has come into compliance and waived its right to a hearing twice in an effort to resolve the alleged violation. The Complaint proposed a factor of 1.2. The Prosecution Team considered the Discharger's post-Complaint cooperation, and lowered this factor to 1.1 for settlement. A further reduction is not warranted because the record shows that the Discharger did not come into compliance until after the commencement of formal enforcement, and well after the Board's initial requests to comply.

### **III. The Dairy Regulatory Program Cases are Distinguishable**

The Discharger argues that the amount proposed here is disproportionate to two recent assessments for violations of the Central Valley Water Board's Waste Discharger Requirements General Order for Existing Milk Cow Dairies (Dairy General Order). One dairy case settled for \$1,037.50, the other settled for \$7,200, and the Discharger argues that the penalty here should be lowered to \$7,040 to fall within this range.

The Discharger claims that the dairy cases are analogous because they involve agricultural dischargers. While the both the dairy program and the irrigated lands program do generally involve agriculture, the enforcement cases involve different violations. In the dairy program cases, the dischargers enrolled under the Dairy General Order but failed to submit required technical and monitoring reports. Here, the Discharger ignored the irrigated lands program altogether, and the Complaint specifically alleges that the Discharger failed to submit a Report of Waste Discharge after having been requested to do so by the Central Valley Water Board pursuant to Water Code section 13260. A discharger who ignores an entire regulatory program should be punished more severely than a discharger who fails to file technical reports under a program in which they have enrolled.

Even if a meaningful analogy could be drawn, there are examples of dairy cases in which the Central Valley Water Board has imposed liability higher than that proposed here. For example, *In the matter of James G. and Amelia M. Sweeney, Sweeney Dairy, Tulare County, ACLO R5-*

2013-0091, the Central Valley Water board imposed \$15,000 for the discharger's violations and, *In the matter of David Albers, Vintage Dairy, Fresno County, ACLO R5-2011-0069*, the Central Valley Water board imposed \$19,800 for the discharger's failure to submit technical reports.

**V. Conclusion**

The issue in this proceeding is whether the Stipulated Order furthers the regulatory goals of the Central Valley Water Board in applying the proposed administrative civil liability for the violation alleged. The Prosecution Team contends that the imposition of the proposed amount, agreed to by the Discharger, meets those regulatory goals. The Prosecution Team respectfully requests that the Board adopt the Stipulated Order as proposed.

Dated: 3 November 2014

Respectfully submitted,

CALIFORNIA REGIONAL WATER QUALITY  
CONTROL BOARD, CENTRAL VALLEY  
REGION PROSECUTION TEAM

*Original signed by:*

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Naomi Kaplowitz