

ATTACHMENT A

Administrative Civil Liability Order No. R5-2016-XXXX Malaga County Water District Calculation of Liability for Violations

Background and Introduction

In accordance with Waste Discharge Requirements (“WDRs”) Order No. R5-2008-0033 (National Pollutant Discharge Elimination System (“NPDES”) No. CA0084239) (the “2008 Permit”) for the Malaga County Water District (“Discharger”) Wastewater Treatment Facility (“WWTF”), Fresno County, the Discharger is required to ensure compliance with any existing or future pretreatment standard promulgated by the United States Environmental Protection Agency under section 307 of the Clean Water Act (“CWA”), or amendment thereto, for any discharge to the WWTF or its collection system. (2008 Permit, at p. 16, Provisions—Standard Provisions VI.A.2.g.) The 2008 Permit specifies that the Discharger shall implement the pretreatment functions required by 40 Code of Federal Regulations (“CFR”) part 403. (2008 Permit, at p. 25, Provisions—Special Provisions—Special Provisions for Municipal Facilities (POTWs Only)—Pretreatment Requirements VI.C.5.a.) The pretreatment requirements of 40 CFR part 403 are specifically incorporated into the requirements of the 2008 Permit. Both the 2008 Permit and Cease and Desist Order R5-2008-0032 (the “2008 CDO”) were adopted by the Central Valley Regional Water Quality Control Board (“Central Valley Water Board”) on 14 March 2008.

Violation 1 is a violation of the 2008 Permit and of the federal pretreatment requirements of 40 CFR part 403. Violation 2 is a violation based on the Discharger’s failure to submit a treatment and disposal capacity study and propose a work plan as required by the 2008 CDO. Violation 1 demonstrates a systemic, pervasive and chronic failure in the Discharger’s administration of its mandated pretreatment program. The Discharger has consistently violated pretreatment program requirements, despite numerous attempts on the part of Central Valley Water Board staff, made over a five-year period, to aid the Discharger in returning to compliance. The actions or failures to act, which constitute Violation 1, critically impair the Discharger’s ability to implement the pretreatment program in accordance with state and federal law and thwart the oversight role of the Central Valley Water Board. While the Regional Water Board could elect to treat each violation of each requirement imposed by the Code of Federal Regulations as a distinct violation, based on the unique circumstances of this case, the Board declines to do so. Instead, and for purposes of this case only, the Central Valley Water Board chooses to treat the Discharger’s violation of seven distinct requirements of the 2008 Permit’s pretreatment requirements as a single, programmatic violation – “Failure to Implement the Required Pretreatment Program.” The Board believes taking this approach achieves substantial justice on the unique facts of this case.

Each factor of the State Water Resources Control Board (“State Water Board”) Water Quality Enforcement Policy (“Enforcement Policy”) methodology and its corresponding category, adjustment, or amount for the violations alleged in this Administrative Civil Liability (“ACL”) Order (“Order”) is presented below.

Violation No. 1: The Discharger Failed to Implement the Required Pretreatment Program

Steps 1 and 2 - Potential for Harm and Assessments for Discharge Violations

These steps are not applicable because the violation considered herein is not a discharge violation.

The Discharger's violations of the Code of Federal Regulations' pretreatment program requirements and of the 2008 Permit fall into seven general categories, which are described in greater detail in Exhibit 1—Detailed Analysis of Individual Permit Component and CDO Violations ("Exhibit 1"), which is hereby incorporated:

A. The Discharger Failed to Adopt Significant Industrial User Permits Containing the Minimum Requirements of the Pretreatment Program (40 CFR sections 403.8(f)(1), 403.12(g)(3).)

The Discharger is required to issue individual permits or equivalent individual control mechanisms to its Significant Industrial Users ("SIUs"). (40 CFR section 403.8(f)(1)(iii); 2008 Permit, at p. 25, Pretreatment Requirements VI.C.5.a.ii.) Permits must specify effluent limits based on local limits, sampling location, correct sample type, and a statement of applicable civil and criminal penalties for violation of pretreatment requirements. (40 CFR § 403.8(f)(1)(iii)(B)(3)-(5) and 40 CFR § 403.12(g)(3).)

The Discharger failed to set effluent limits based on local limits for oil and grease, and for pH in applicable SIU permits. (See Exhibit 1, pp. 2-3.) (Tabs 1A; 1D) The Discharger failed to include sampling location in its SIU permits. (See Exhibit 1, p. 3.) (Tabs 1G; 1H; 1I; 1K; 1L; 1M) This is illustrated by the fact that at some SIUs, samples were collected at a point that is downstream of where one facility's wastewater comingles with another's. (Tab 2E) The Discharger failed to include sampling type in its SIU permits. (See Exhibit 1, p. 4.) (Tabs 1E; 1K; 1O; 1P; 1Q) The Discharger failed to include a statement of applicable civil and criminal penalties in its SIU permits, and in some instances, completely failed to establish and implement permits. (See Exhibit 1, p. 5.) (Tabs 1E; 1F; 1H; 1I; 1J; 1L; 1M; 2G; 3G)

B. The Discharger Failed to Inspect and Sample the Effluent of Significant Industrial Users Annually and Maintain Records (40 CFR sections 403.8(f)(2)(v), 403.12(o).)

Pursuant to the federal regulations and the 2008 Permit, the Discharger is required to inspect and sample the effluent of SIUs at least once a year. (40 CFR § 403.8(f)(2)(v); 2008 Permit, at p. 25, Pretreatment Regulations VI.C.5.a.ii.) The federal regulations require a Publicly Owned Treatment Works ("POTW") to maintain records of all information resulting from monitoring, including compliance and enforcement activities. (40 CFR § 403.12(o).) The 2008 Permit requires the Discharger to retain records of all monitoring information for a period of at least three years from the date of the sample, measurement, report or application. (2008 Permit, at p. D-5, Attachment D—Standard Provisions—Records IV.A.) From 2008 through 2014, the Discharger failed to comply with these requirements. (See Exhibit 1, pp. 9-12.) (Tabs 1E; 2A; 2B; 2C; 2D; 2E; 2F; 2G; 2H; 2I; 3G)

C. The Discharger Failed to Publish its List of Industrial Users in Significant Non-Compliance with Pretreatment Requirements (40 CFR section 403.8(f)(2)(viii).)

Pursuant to federal regulations and the 2008 Permit, the Discharger is required to, at least annually, publish a list of its industrial users which, at any time during the previous 12 months,

were in Significant Non-Compliance (“SNC”), as defined, with applicable pretreatment program requirements. (40 CFR § 403.8(f)(2)(viii); 2008 Permit, at p. 25, Pretreatment Requirements VI.C.5.a.ii.e.) The Discharger had industrial users in SNC in 2009, 2010, 2011, and 2012 and failed to publish a list of those users. (See Exhibit 1, pp 13-17.) (Tabs 3A; 3B; 3C; 3D; 3F; 3G; 5B)

D. The Discharger Failed to Evaluate Whether a Slug Control Plan is Necessary for Each SIU and Produce Them Upon Request (40 CFR section 403.8(f)(2)(vi).)

Pursuant to 40 CFR section 403.8(f)(2)(vi), the Discharger is required to develop and implement procedures to evaluate whether each of its Significant Industrial Users needs a plan or other action to control Slug Discharges, as defined. 40 CFR section 403.8(f)(2)(vi) requires that the Discharger make the results of slug evaluations available to the Central Valley Water Board upon request. The Discharger failed to comply with these requirements. (See Exhibit 1, pp. 18-19.) (Tabs 1E; 3G; 4A; 4B; 4C; 1O; 4D; 4E; 4F)

E. The Discharger Failed to Comply with Annual Pretreatment Reporting Requirements (40 CFR section 403.12(i).)

Pursuant to federal requirements and the 2008 Permit, the Discharger is required to file annual pretreatment reports. (40 CFR § 403.12(i); 2008 Permit, at p. 25, Pretreatment Requirements VI.C.5.a.ii; 2008 Permit, at p. E-17, Attachment E, Annual Pretreatment Reporting Requirements X.D.4.) The Discharger failed to include the following required elements in its annual pretreatment reports: (1) The analytical results for influent, effluent, or sludge; (2) a discussion of upset, interference, or pass-through incidents at the treatment plant, which the Discharger knows or suspects were caused by its industrial users; (3) a summary of industrial user compliance status; (4) a summary of inspection and sampling activities; (5) a summary of the annual pretreatment budget, and; (6) the requisite signature and certification. (See Exhibit 1, pp. 22-24.) (Tab 2F; 5A; 5B; 5C) For example, in some annual pretreatment reports, the Discharger included a statement that “[a]nalytical results for pollutants identified [sic] in §307(a) of the Clean Water Act and 40 CFR 401.15 are limited. The industries served by the Malaga County Water District are generally not identified as dischargers of these pollutants.” (See for example Tab 5A) Yet, permits issued by the Discharger to several of its SIUs included limits and required sampling for a range of heavy metals, listed in §307(a) of the CWA and 40 CFR section 401.15. (See for example Tab 5E) Additionally, the Discharger failed to submit annual pretreatment reports by the required due date. (See Exhibit 1, p. 24.) (Tab 5D)

F. The Discharger Failed to Comply with Quarterly Pretreatment Reporting Requirements (2008 Permit, Monitoring and Reporting Program (MRP) section X.D.4.d.)

Pursuant to the requirements of the 2008 Permit, the Discharger is required to submit quarterly pretreatment reports. (2008 Permit, at p. 25, Pretreatment Requirements VI.C.5.a.ii; 2008 Permit, at p. E-18, Attachment E, Annual Pretreatment Reporting Requirements X.D.4.d.) The Discharger failed to identify the compliance status of each industrial user in its submissions, failed to include the requisite certification, and failed to submit reports by the required due dates. (See Exhibit 1, pp. 28-30.) (Tabs 6A; 6B; 6C; 6D; 6E; Tab 3A; 3B; 3C; 3D; 3G) To date, the Discharger has not submitted the first quarterly pretreatment reports for 2009 or 2014.

G. The Discharger Failed to Analyze Self-Monitoring Reports (40 CFR section 403.8(f)(2)(iv).)

Pursuant to the federal regulations and the 2008 Permit, the Discharger is required to analyze self-monitoring reports and other notices submitted by Industrial Users in accordance with the self-monitoring requirements in 40 CFR section 403.12. (40 CFR § 403.8(f)(2)(iv); 2008 Permit, at p. 25, Pretreatment Requirements VI.C.5.a.ii.) The Discharger has failed to comply with this requirement from at least 2010 through rescission of the 2008 Permit. (See Exhibit 1, p. 34.) (Tabs 2B; 3G; 4A; 4E; 7A)

Step 3 – Per Day Factor for Non-Discharge Violations

Step 3 of the Enforcement Policy's penalty calculation methodology directs the Central Valley Water Board to calculate a per day factor for non-discharge violations by considering the Potential for Harm and the Extent of Deviation from the applicable requirements.

Potential for Harm: The Enforcement Policy requires a determination of whether the characteristics of the violation resulted in a minor, moderate, or major potential threat to beneficial uses or for harm. (Enforcement Policy, at p. 16.)

The beneficial uses of the underlying groundwater are municipal and domestic supply, agricultural supply, industrial service supply, industrial process supply, water contact recreation, and non-contact water recreation. Based on the *Water Quality Control Plan for the Tulare Lake Basin* ("Basin Plan"), the beneficial uses of the Central Canal are municipal and domestic supply, agricultural supply, water contact recreation, and warm freshwater habitat. This violation deprives the Central Valley Water Board of the opportunity to perform its regulatory function of assuring the protection of beneficial uses by masking the cause and potential magnitude of water quality impacts in relevant receiving waters.

By failing to implement local limits, including those for pH and oil and grease, in industrial user permits, the Discharger is hindered from ensuring that industrial influent loading to its WWTF headworks can be adequately treated to avoid "pass through"¹ or "interference"² and meet the effluent limits in its NPDES permit, thereby, protecting receiving water quality. For example, excessive levels of oil and grease contribute to creation of blockages in sanitary sewer pipelines and may cause or exacerbate sewage overflows. Additionally, oils and greases can adversely affect beneficial uses through reduced surface aeration of water, increased turbidity, clogging of gills, oily sheens and foaming, and off tastes and odors.

Unrepresentative results stemming from failing to specify, or specifying improper, sampling locations hinder both the Discharger and Central Valley Water Board staff from readily identifying sources of pollutants (e.g., copper, chromium) at or above hazardous waste concentrations in the WWTF sludge and impedes their ability to adequately characterize waste, ascertain compliance, and respond appropriately. (See Tab 0A; 2C) Proper sampling protocol

¹ "Pass through" means a discharge which exits a wastewater treatment plant to waters of the United States in quantities or concentrations, which alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the wastewater treatment plant's NPDES permit. (40 CFR § 403.3(p).)

² "Interference" means a discharge which, alone or in conjunctions with a discharge or discharges from other sources, both inhibits or disrupts the wastewater treatment plant, its treatment processes or operation, or its sludge processes, use or disposal; and therefore is a cause of a violation of any requirement of the wastewater treatment plant's NPDES permit or of the prevention of sewage sludge use or disposal in compliance with section 405 of the Clean Water Act, Resource Conservation and Recovery Act, the Clean Air Act, the Toxic Substances Control Act, and the Marine Protection, Research and Sanctuaries Act. (40 CFR § 403.3(k).)

is critical to determine whether industrial users are complying with the pretreatment program, to understanding the characteristics of the waste entering the collection system and WWTF, and to ensuring that incompatible wastes are not introduced to the treatment system.

The Discharger's failure to sample SIUs at least once a year prevents the Discharger from knowing the levels at which pollutants of concern are entering its WWTF, thereby impairing its ability to timely identify and address potential adverse impacts to both the WWTF's ability to treat wastewater (*i.e.*, interference) and the receiving water itself (*i.e.*, pass-through). By failing to sample its SIUs at least once a year, the Discharger impedes the Central Valley Water Board's efforts to assess the potential impacts and risks to water quality posed by the Discharger, and circumvents the Central Valley Water Board from ensuring that the Discharger is implementing its approved pretreatment program.

The Discharger failed to publish a list of users in SNC that would have provided notice to communities that could be affected by incidents of non-compliance. While the requirement to provide such notice plays an important role in providing the public with information, the failure to do so does not pose a significant potential for harm to beneficial uses.

The Discharger's failure to assess the need for slug control plans impairs the Discharger's ability to timely develop and implement plans to prevent or mitigate potential adverse impacts to both the WWTF's ability to treat wastewater (*i.e.*, interference) and the receiving water itself (*i.e.*, pass-through) due to non-routine, episodic discharges, which has the potential to harm beneficial uses and degrade water quality. While slug control plans are a critical prevention measure in mitigating adverse impacts during non-routine discharges, the need for such plans to be implemented is likely infrequent.

The annual pretreatment report requirements exist to provide the Central Valley Water Board with information necessary to evaluate the operation of the Discharger's pretreatment program, in order to protect the health and safety of the public and environment. By failing to comply with the minimum annual pretreatment report requirements, the Discharger inhibits its ability and the ability of the Central Valley Water Board to timely identify and provide feedback regarding deficiencies in the Discharger's implementation of its pretreatment program and, potentially, to prevent and properly address risks to beneficial uses.

By providing information on the compliance status of industrial users, the quarterly pretreatment report serves a role in identifying problems with compliance and ensuring that they are appropriately addressed. By failing to comply with the minimum quarterly pretreatment report requirements, the Discharger inhibits the ability of the Central Valley Water Board to identify and address risks to beneficial uses.

The Discharger's failure to receive and analyze self-monitoring reports poses an egregious threat to beneficial uses. The receipt and analysis requirements ensure that the Discharger is implementing the practices necessary to properly regulate the disposal of industrial wastewater, protect the physical structures and safety of operation of its collection and treatment system, and to comply with its approved pretreatment program. The analysis of self-monitoring reports serves an important role in identifying problems with compliance and ensuring that they are appropriately addressed. By failing to comply with the minimum receipt and analysis requirements, the Discharger inhibits its ability and the ability of the Central Valley Water Board to prevent and properly address risks to beneficial uses. Specifically, failure to analyze

industrial user monitoring reports effectively precluded the Discharger from complying with other pretreatment program requirements, such as accurately discussing industrial user compliance characterizations in quarterly and annual pretreatment reports, and identifying and publicly noticing instances of industrial user SNC.

The combined effect of the failure to adequately implement the pretreatment program, including failure to identify and address instances of significantly non-compliant levels of arsenic, barium, chromium, and copper, has likely contributed to copper and chromium concentrations in sludge at hazardous levels (Tab 0A), and repeated instances of chronic toxicity of the alga *Selenastrum capricornutum* in three-species chronic toxicity bioassays. (Tabs 0B; 0C; 0D) Specific factors contributing to inadequate characterization of industrial user discharges, including failure to identify and specify appropriate sample locations and types in permits, failure to inspect and comprehensively sample industrial user facilities, failure to identify users in non-compliance, failure to respond to non-compliance with appropriate enforcement or other control measures, and failure to evaluate and understand the nature of contributing industrial processes and the need for slug control plans have, however, collectively rendered the available information regarding industrial discharges so deficient that a definitive determination of causes and environmental impacts cannot be made.

Given the foregoing discussion, the Potential for Harm is determined to be **moderate**, as the characteristics of the violations present a substantial threat to beneficial uses. (Enforcement Policy, at p. 16.)

Deviation from Requirement: The Discharger failed to develop and issue industrial pretreatment permits that specified effluent limits based on local limits, sampling location, correct sample type, and a statement of applicable civil and criminal penalties for violation of pretreatment requirements. In addition, the Discharger failed in several instances to meet the basic requirement of having an individual control mechanism in place for its SIUs. While permits issued by the Discharger have included some of the required elements, several of the core purposes of having individual control mechanisms in place were rendered ineffective by the omission of critical information.

By failing to collect samples on an annual basis (Tab 2D), and on some occasions, by collecting unrepresentative samples from comingled locations (Tab 2E), the Discharger rendered the purposes of the applicable federal and state requirements—including confirmation of compliance with pretreatment standards, verification of self-monitoring data reported by industrial users, support of potential enforcement actions and permit re-issuance, and identification of problems associated with sample locations and industrial users sampling practices—ineffective in their essential functions. By failing, over at least a five-year period, to publish a list of Industrial Users which were in SNC, the intended effectiveness of the applicable federal requirements, including the public participation requirements of 40 CFR part 25, were rendered completely ineffective.

The Discharger's failure to conduct slug evaluations and produce them upon request for at least seven of its SIUs pursuant to 40 CFR section 403.8(f)(2)(vi), rendered that requirement ineffective. While the Discharger reported conducting an evaluation for SIU Air Products, it was unable to produce results of that evaluation upon request as required by law. Furthermore, during the 25/26 March 2015 Pretreatment Compliance Inspection ("PCI"), inspectors found it necessary to thoroughly discuss the definition of a slug discharge with Discharger personnel—

suggesting that Discharger personnel were not even familiar with the term's regulatory meaning. (Tab 1O) Given the foregoing information, it cannot be concluded that the Discharger complied with the requirement at any point prior to rescission of the 2008 Permit.

The Discharger's submissions made pursuant to the annual pretreatment report requirements of 40 CFR section 403.12(i), Provision VI.C.5.a.ii of the 2008 Permit, and Provision X.D.4 of the MRP have been intermittent, untimely, and materially deficient. The quarterly pretreatment reports submitted by the Discharger pursuant to the 2008 Permit were not submitted timely, contained inaccurate characterizations of compliance, failed to contain the requisite certification in all but two cases and, as such, are materially deficient. Two of the required quarterly pretreatment reports were never submitted.

The Discharger's deviation from the requirement in both 40 CFR § 403.8(f)(2)(iv) and the 2008 Permit to receive and analyze self-monitoring reports was rendered ineffective as inspections and audits from 2010 through 2015 show that the Discharger repeatedly failed to do so.

Based on the foregoing, the Deviation from the Requirement is determined to be **major** as the requirements have been rendered partially compromised. (Ibid.)

Per Day Factor: Applying a Potential for Harm of moderate and an Extent of Deviation of major results in a factor of **0.55**. (Enforcement Policy, at p. 16, Table 3.)

Days of Violation: The Discharger failed to implement significant elements of the pretreatment program requirements from at least the adoption of the 2008 Permit on 14 March 2008 through the rescission of the 2008 Permit on 31 January 2015. The total days of violation are 2,515.

Multiple Day Violations: For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to 30 days. For violations that last more than 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. (Enforcement Policy, at p. 18.) In this case, though the Discharger experienced a programmatic cost savings from failing to comply with the minimum pretreatment requirements, there is no discrete daily cost associated with the violations.³ Therefore, the alternate approach for calculating multi-day violations may be applied, and liability shall not be less than an amount calculated based on the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment for each 30 days of violation. (Ibid.) Under this approach, the minimum number of days of violation is 89. Although it is within the Board's discretion to find that the days of violation lie anywhere between 89 and 2,515, the Board chooses to apply the minimum number allowed under the Enforcement Policy of 89.

³ Although the economic benefit model relies on specific date ranges associated with compliance, non-compliance, and penalty payment to calculate an appropriate benefit, these dates are used solely to determine the effective discount rate applied to the one-time expense. Therefore, no discrete daily economic benefit is realized, only compounding interest based on the expected penalty payment date.

Violation No. 1 - Initial Liability Amount

The initial liability amounts for the violations calculated on a per-day basis are as follows:

89 days x \$10,000 x 0.55

Total Initial Liability = \$489,500

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator’s culpability, efforts to clean up or cooperate with regulatory authority, and the violator’s compliance history.

Culpability: 1.2

For culpability, the Enforcement Policy suggests an adjustment resulting in a multiplier between 0.5 and 1.5, with a lower multiplier for accidental incidents, and a higher multiplier for intentional or negligent behavior. (Enforcement Policy, at p. 17.)

A reasonable and prudent person would have complied with the standard of care established by the CFR and 2008 Permit pretreatment requirements. The Discharger failure to comply with those requirements, despite having knowledge of them, which falls far below the due standard of care.

The Discharger knew of the elements required in industrial user permits, as evidenced by the numerous occasions—at least six—during which those elements were discussed, including verbally during 18 February 2010 PCI, the 6/7 January 2014 Pretreatment Compliance Audit (“PCA”), and the 25/26 March 2015 PCI, and in writing in a Notice of Violation (“NOV”) dated 6 September 2013, the *Final Summary Report* for the 6/7 January 2014 PCA transmitted by NOV on 14 February 2014, and in a 7 July 2014 NOV (supplemented on 18 August 2014), and the 2015 PCI. (Tabs 1B; 1C; 1H; 1J; 1K; 1L; 1M; 1O; 2C; 3G; 8K) Similarly, the Discharger knew of the requirement to conduct annual sampling of its industrial users, as that requirement was discussed on at least six occasions, including verbally during the 18 February 2010 PCI, the 6/7 January 2014 PCA, and the 25/26 March 2015 PCI, and in writing in an NOV dated 6 September 2013 and attached *Final Summary Report* for the 2010 PCI, the *Final Summary Report* for the 6/7 January 2014 PCA transmitted by NOV on 14 February 2014, and in a 7 July 2014 NOV (supplemented on 18 August 2014). (Tabs 2B; 2C; 2E; 2G; 2H; 2I; 8K) The Discharger’s willful disregard of its known obligations warrants a high culpability multiplier.

In February of 2010, the Discharger was notified in the 2010 PCI *POTW Pretreatment Compliance Inspection Checklist* (Section III) that it was required, at least annually, to publish a list of its industrial users which, at any time during the previous 12 months, were in SNC with applicable Pretreatment requirements, and that it had not met that requirement. (Tab 3E) This was communicated again to the Discharger in subsequent years. (Tabs 3F; 3G; 5B) The Discharger was reminded of the slug control plan requirement verbally during the 18 February 2010 PCI, during the 6/7 January 2014 PCA, and in writing in the *Summary Report* for the 2010 PCI transmitted with the 4 September 2013 NOV. (Tabs 1E; 1O; 3G; 4A; 4D; 4E; 4F) The Discharger was informed of the inadequacy of its industrial user self-evaluation approach in the final report for the 6/7 January 2014 PCA transmitted by NOV on 14 February 2014. (Tab 4A)

The Discharger was notified of deficiencies in its annual and quarterly pretreatment reports in a 12 April 2012 NOV (Tab 5D) and received notices of inadequate or late pretreatment reports in April 2012 (Tab 5D), and in July and August of 2014. (Tabs 8K; 8L) The Discharger was given notice of its failure to receive and analyze self-monitoring reports during the 2010 PCI (Tab 2B; Tab 3G). The 2014 PCA *Final Summary Report* reiterated the requirement to analyze monitoring reports. (Tabs 4A) Yet, the Discharger's failure to comply with the requirement was again documented in detail during the 2015 PCI. (Tab 4E; 3F) In continuing to violate the receipt and analysis requirements despite knowledge of them, the Discharger's actions, at best, demonstrate gross negligence.

Evidence shows that when the Discharger carried out, or failed to carry out, the actions that constituted failing to implement its pretreatment program, it acted with knowledge of what those pretreatment requirements were. The continued failure to comply despite knowledge of the requirements suggests a negligent, if not willful, disregard of those requirements. A factor of 1.2 is appropriate for this violation because the Discharger's actions fell below the due standard of care in failing to implement the pretreatment program.

Cleanup and Cooperation: 1.2

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. (Enforcement Policy, at p. 17.)

The Discharger was given many opportunities to cooperate with Central Valley Water Board staff and come into compliance. With each PCI, PCA, and NOV detailed above, the Discharger was given an opportunity to return to compliance and demonstrate cooperation. (Tabs 1E; 1H; 1J; 1K; 1L; 1M; 1O; 2B; 2C; 2E; 2G; 2H; 2I; 3E; 3F; 3G; 4A; 4D; 4E; 5B; 5D; 8J; 8K) Specifically, with each annual SIU permit reissuance, the Discharger had the opportunity to correct deficiencies in the SIU permits. (Tab 1B; 1N)

The Discharger has made some improvements in implementing its pretreatment program, including the hiring of an Environmental Compliance Inspector whose responsibilities include assistance with permit drafting and sampling and inspections. (Tab 2J) The Discharger's extent of cooperation has, however, been severely lacking in other areas.

For example, in 2012, the Discharger exceeded its chronic toxicity limits, which triggered the requirement that it develop a Toxicity Reduction Evaluation ("TRE") Report to determine the source of the toxicity exceedance. It was not until that additional onus that the Discharger conducted more comprehensive sampling of its SIUs. Still, the Discharger failed to come into compliance, as documented by the 2014 Annual Pretreatment Report, in which the Discharger reported that it failed to collect samples from six of its SIUs. (Tab 2D)

During discussions as a component of the 2015 inspection, the Discharger's representatives stated that they had not performed the calculations necessary to determine if any of its SIUs were in SNC for the 2014/2015 year, without which the Discharger cannot comply with the SNC public notice requirements. (Tab 3F)

The 2014 Annual Pretreatment Report, received in February 2015, improved upon prior submittals by including a higher proportion of required elements, but continued to be materially deficient. While the Discharger began to submit quarterly pretreatment reports in a timelier

manner after receiving the April 2012 NOV, the reports submitted continued inaccurate or misleading requisite information and were materially deficient. Following the 7 July 2014 NOV, the Discharger began including in its quarterly pretreatment reports the required certification and discussion of pretreatment program compliance status components, but omitted the required industrial user compliance status component, which had been included in prior reports. Quarterly pretreatment reports for the 1st quarters of 2009 and 2014 have not been submitted to date.

The Discharger was assessed a multiplier value of 1.2 based on the lack of cooperation exhibited by the Discharger in returning to compliance.

History of Violations: 1.1

The Enforcement Policy states that where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this. (Enforcement Policy, at p. 17) In this case, a multiplier of 1.1 should apply because there is a history of violations, which have been fully adjudicated. In 2006 (ACL R5-2006-0003) and 2013 (ACL R5-2013-0090) the Central Valley Water Board issued Administrative Civil Liability Orders to the Discharger for violations of the Discharger's 2008 Permit.

Step 5 - Determination of Recommended Total Base Liability Amount

The Recommended Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation No. 1 – Recommended Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$489,500 \times 1.2 \times 1.2 \times 1.1 = \$775,368$$

Statutory Maximum Civil Liability for Violation No. 1 = \$25,150,000

Recommended Total Base Liability Amount for Violation No. 1 = \$775,368

Steps 6 through 10 are applied to the combined total base liability amount for the sum of all violations, and are discussed following the total base liability recommendations for each violation.

Violation No. 2: The Discharger Failed to Submit Treatment and Disposal Capacity Study and Propose Workplan Required by Cease and Desist Order No. R5-2008-0032

The 2008 CDO, Task 3(a), required the Discharger to evaluate WWTF treatment and disposal capacity and identify short-term and long-term measures to secure adequate treatment and disposal capacity for the volume, type, and concentrations of wastes in influent projected through at least 2028. In order to meet that requirement, the Discharger was required to submit the results of a study evaluating the WWTF treatment and disposal capacity and proposing a work plan and time schedule to implement short-term and long-term measures to ensure compliance with waste discharge requirements. The study must include evaluations of, but not limited to, ongoing operations and maintenance, and long-term measures to meet WWTF treatment and disposal needs through at least 2028. The 2008 CDO required that technical reports submitted in accordance with this requirement include actions to generate appropriate

population and WWTF flow projections and their rationale. The 2008 CDO required the Discharger to submit the results of the study evaluating treatment and disposal capacity and propose the work plan described in Task 3(a) by 13 June 2008.

On 25 July 2008, over a month past due, Provost and Pritchard Consulting Group, on behalf of the Discharger, submitted a *Study Evaluating Treatment and Disposal Facilities* to fulfill the requirements of Task 3(a). (Tab 8A) In a memorandum and letter, dated 19 August 2009 (Tab 8B) and 24 September 2009 (Tab 8C) respectively, Central Valley Water Board staff informed the Discharger that the study was materially deficient and requested a revised study by 27 October 2009. The letter and memorandum cited deficiencies and required corrective actions including, but not limited to, revising short-term and long-term flow projections, revising the work plan for expansion of design capacity, including reclamation proposals, revising consolidation, and updating work plan and time-schedules.

By letter dated 28 April 2011, the Discharger submitted a report to comply with Task 3(d). (Tab 8D) That report, however, indicated that not all the short-term measures had been completed, as required. The report did not include long-term measures or a revised work plan, and did not remedy the deficiencies in the 25 July 2008 report. The report did not bring the Discharger into compliance with Tasks 3(a) or 3(d). The cover letter for that report incorrectly stated that the Discharger had not received a response to the 25 July 2008 workplan. (Tab 8D) On 12 April 2012, Central Valley Water Board staff issued a NOV citing the Discharger's failure to comply with Tasks 3(a) and 3(d) of the 2008 CDO. (Tab 5D)

On 19 August 2013, Central Valley Water Board staff again sent the Discharger a letter requesting that it submit technical information regarding disposal capacity by 3 October 2013, which was originally due 13 June 2008. (Tab 8B) In summary, the letter requested that the Discharger address whether the discharge to the Central Canal will cease, provide an estimate of the pond disposal capacity after pond maintenance was performed in 2008 and thereafter, revise influent flow projections, provide the status of land acquisition for additional disposal ponds, and provide the status of alternative disposal measures. On 10 October 2013, Central Valley Water Board staff called the Discharger's Board President requesting an update on the response due 3 October 2013. (Tab 8F) On 10 October 2013, Central Valley Water Board staff received by e-mail a memorandum dated 23 September 2013 from the Discharger's consulting engineer written to the Discharger requesting additional information in order to prepare a response to the Central Valley Water Board's letter. (Tab 8G)

On 21 October 2013, Central Valley Water Board staff sent the Discharger's General Manager an email to again inquire on the status of the Discharger's response. (Tab 8H) On 29 October 2013, the Discharger submitted a deficient and late response. (Tab 8I) The Discharger admitted in its response that it had not yet developed a schedule to isolate one or more ponds to confirm and monitor percolation capacity, and that follow-up reports would be forthcoming.

On 7 July 2014, Central Valley Water Board staff sent the Discharger a NOV, which cited, in part, the Discharger's failure to comply with Task 3 of the 2008 CDO. (Tab 8J) On 18 August 2014, Central Valley Water Board staff sent the Discharger a Supplemental NOV, which again cited, in part, the Discharger's failure to comply with the 2008 CDO Task 3. (Tab 8K)

After the Discharger learned its flow limit had been restricted in its proposed revised permit, the Discharger submitted technical data in November 2014 and January 2015 in order to confirm

pond disposal capacity. The 2008 CDO was rescinded on 4 December 2014 and tasks not complied with in the 2008 CDO were carried over to CDO R5-2014-0146 and to Waste Discharge Requirements R5-2014-0145 (NPDES No. CA 0084239).

The Discharger violated the 2008 CDO by failing to submit an adequate and complete study of its treatment and disposal capacity and a workplan to address treatment and disposal capacity issues from 13 June 2008 through the rescission of the CDO on 4 December 2014, for a total of **2,365 days**. However, based on the interactions between Central Valley Water Board staff and the Discharger recited above, this Order incorporates “tolling” the days of violation during the 387-day period between the 28 July 2008 date upon which the Discharger’s initial report was submitted and the 19 August 2009 date upon which staff notified Discharger in writing that the report was deficient. This Order further “tolls” the days of violation for the 351-day period between the 28 April 2011 date upon which the Discharger submitted a revised report and the 12 April 2012 date upon which staff issued a Notice of Violation documenting the deficiencies in the revised report. Other than these two time periods, Discharger was on written notice that its report was overdue, incomplete and insufficient to meet the directives of the 2008 CDO. This Order calculates the civil liability for Violation 2 on the basis of **1,640** days of violation.

Pursuant to Water Code section 13350, a violation of those requirements is subject to administrative civil liability in an amount of up to \$5,000 for each day in which the violation occurs.

Step 3 – Per Day Factor for Non-Discharge Violations

Step 3 of the Enforcement Policy’s penalty calculation methodology directs the Central Valley Water Board to calculate a per day factor for non-discharge violations by considering the Potential for Harm and the Extent of Deviation from the applicable requirements.

Potential for Harm: The Discharger’s failure to comply with Task 3 of the CDO in a timely manner hindered Central Valley Water Board staff’s efforts to assess disposal capacity for the renewal of the Discharger’s NPDES permit, which delayed issuance of the Permit.

Based on the Basin Plan, the beneficial uses of the Central Canal are municipal and domestic supply, agricultural supply, water contact recreation, and warm freshwater habitat. The beneficial uses of the underlying groundwater are municipal and domestic supply, agricultural supply, industrial service supply, industrial process supply, water contact recreation, and non-contact water recreation.

The 2008 CDO was issued, in part, because the Discharger discharged and threatened to discharge waste in violation of the 2008 Permit. In addition, a number of conditions at the WWTF relating to minimum freeboard requirements, pond evaporation and percolation capacity, increasing influent flow and base flow, and total disposal capacity, were found to create a risk of overtopping and levee breach. The Discharger’s WWTF ponds are adjacent to the Central Canal, several businesses, and the main railroad line for the Santa Fe Railroad and Amtrak. Overflow of undisinfected secondary treated wastewater from the ponds to the Central Canal would adversely affect its beneficial use for unrestricted agricultural supply, water contact recreation, and municipal and domestic supply due to excessive pathogen loading. Overflow of the ponds to area businesses, which occurred in 2000, or to the railroad right-of-way would cause or threaten to create public health risks and a nuisance condition. (Tab 8L)

The Discharger's actions in failing to meet the 2008 CDO requirements pose a high potential for harm to beneficial uses. Given the foregoing discussion, the Potential for Harm is determined to be **moderate**. (Enforcement Policy, at p. 16.)

Deviation from Requirement: The 2008 CDO required the Discharger to submit specified study results to the Central Valley Water Board. While the Discharger submitted documents pursuant to the 2008 CDO requirements, those submissions were materially deficient and late. Therefore, the Deviation from the Requirements is determined to be **moderate** as the requirements have been partially compromised. (Ibid.)

Per Day Factor: Applying a Potential for Harm of moderate and an Extent of Deviation of moderate results in a factor of **0.55**. (Enforcement Policy, at p. 16, Table 3.)

Days of Violation: The Discharger has failed to comply with the 2008 CDO requirements since 14 June 2008, the first date of non-compliance with Task 3, through 4 December 2014. The period of violation totals 2,365 days, but as indicated above, the Prosecution Team recommends reducing this number to 1,640 days based on two periods where it believes the Central Valley Water Board should exercise its discretion to equitably toll the violation period.

Multiple Day Violations: For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to 30 days. For violations that last more than 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. (Enforcement Policy, at p. 18.) In this case, the failure to comply with the 2008 CDO results in an economic benefit that cannot be measured on a daily basis, though the Discharger may have experienced a programmatic cost savings from failing to comply with the requirements. Therefore, the alternate approach for calculating multiday violations may be applied, and liability shall not be less than an amount calculated based on the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment for each 30 days of violation. (Ibid.) Under this approach, assuming the Central Valley Water Board agrees with the Prosecution Team's recommendation to equitably toll the violation period, the minimum days of violation total 60. Although it is within the Board's discretion to find that the days of violation lie anywhere between 60 and 2,365, the Board chooses to apply the minimum number of days allowed under equitable tolling and the Enforcement Policy of 60.

Violation No. 2 - Initial Liability Amount

The initial liability amounts for the violations calculated on a per-day basis are as follows:

$$60 \text{ days} \times \$5,000 \times 0.55$$

Total Initial Liability = \$165,000

Step 4 – Adjustment Factors

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

Culpability: 1.2

A factor of 1.2 is appropriate for this violation. The Discharger knew of the 2008 CDO requirement as it was granted the opportunity to comment on those tasks prior to the 2008 CDO adoption date. In addition, as evidenced by the 23 September 2013 Memorandum (Tab 8G) from the Discharger’s consultant, the Discharger had notice of the specific regulatory requirements which remained to be met. The Discharger’s knowledge of the material inadequacy of its submissions is demonstrated by the fact that those deficiencies were discussed in a series of correspondence between the Discharger and Central Valley Water Board staff. (Tab 8B; 8C; 8E; 8F; 8J; 8K) A reasonably prudent person would have complied with the 2008 CDO requirements in a timely manner. The Discharger knowingly disregarded the requirements associated with Task 3.

Cleanup and Cooperation: 1.2

For non-discharge violations, efforts towards cleanup are not applicable. Beginning in September 2009, Central Valley Water Board contacted the Discharger through phone calls, email, and letters, in attempts to retrieve the requisite information and bring the Discharger into compliance. (Tab 8B; 8C; 8E; 8F; 8J; 8K) The Discharger had multiple opportunities to correct the violation, yet failed to work cooperatively with Central Valley Water Board staff to achieve the common goal of compliance and failed to submit the technical information required pursuant to Task 3 of the 2008 CDO.

History of Violations: 1.1

A factor of 1.1 is appropriate for this violation. In 2001, the Central Valley Water Board issued CDO 5-01-001 due to pond capacity issues and due to the overflow of the ponds to neighboring businesses in 2000. The issuance of the 2008 CDO stemmed, in part, from the Discharger’s ongoing failure to comply with the 2001 CDO. Therefore, the application of a 1.1 is appropriate.

Step 5 - Determination of Recommended Total Base Liability Amount

The Recommended Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

<p style="text-align: center;"><u>Violation No. 2 – Recommended Total Base Liability Amount</u></p> <p style="text-align: center;">Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability</p> <p style="text-align: center;">$\\$165,000 \times 1.2 \times 1.2 \times 1.1 = \\$261,360$</p> <p style="text-align: center;">Statutory Maximum Civil Liability for Violation No. 2 = \$8,200,000</p> <p style="text-align: center;">Recommended Total Base Liability Amount for Violation No. 2 = \$261,360</p>

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

Adjusted Combined Total Base Liability Amount: \$1,036,728

Consistent with Water Code section 13385, the Enforcement Policy provides that if the Central Valley Water Board has sufficient financial information to make a finding that the Discharger lacks the ability to pay the Total Base Liability, or to make a finding that the Total Base Liability

will negatively impact the Discharger's ability to continue in business, then it may adjust the Total Base Liability amount downward. Ultimately, the adjusted Final Liability Amount may not fall below ten percent higher than the economic benefit the Discharger realized from committing the violations. (Enforcement Policy, at p. 20-21.)

The Discharger's February 2010, Malaga County Water District *Water, Sewer, & Solid Waster Rate Study Final Report* found that non-residential sewage comprises approximately 92 percent of the influent to the WWTF. (Tab 9A) The combined influent flow is approximately equivalent to the wastewater generated by a population of 6,000 people. The Discharger has the ability to levy and collect fees or charges upon sewer ratepayers, and regularly collects such fees. (Water Code § 31144.72.)

Therefore, the Central Valley Water Board has enough information to suggest that the Discharger has the ability to pay the proposed liability without risking the Discharger's ability to continue in business. Based on the reasons discussed above, an ability to pay factor of 1 has been applied to the Combined Total Base Liability Amount.

Step 7 – Other Factors as Justice May Require

The Enforcement Policy provides that an adjustment may be made under this step if it is determined that the proposed liability amount is inappropriate and express findings are made to justify the adjustment. No factors warrant adjustment under this step.

Step 8 – Economic Benefit

Estimated Economic Benefit: \$710,655

The Economic Benefit amount is any savings or monetary gain derived from the act or omission that constitutes the violation. (Enforcement Policy, at p. 20.) Pursuant to Water Code section 13385(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 a violation. To act as an appropriate deterrent and not merely be considered a cost of doing business by a discharger, the Enforcement Policy requires that, at a minimum, a civil liability be established at ten percent higher than the economic benefit the discharger realized from committing the violations.

A. Economic Benefit of Pretreatment Program Violation (Violation 1)

The violations of the 2008 Permit were due to the failure to adhere to the pretreatment requirements of 40 CFR part 403. Based on the violations considered, the following compliance actions constitute the minimum effort avoided by the Discharger:

- The Discharger failed to identify sampling locations for its SIUs. The Central Valley Water Board estimates that at a minimum, a site inspection and evaluation would have been necessary for each SIU at the time of adoption of the Order.
- The Discharger failed to adequately conduct annual inspections and sampling events from 2008 to 2014 at each of its SIUs.
- The Discharger failed to adequately review the compliance status for its SIUs and publicly publish a list of those users in SNC from 2010 to 2014.

- The Discharger failed to conduct slug control evaluations at its SIUs at the time of adoption of the 2008 Permit. The Central Valley Water Board contends that these evaluations would include site visits in addition to process review, evaluation, and documentation.
- The Discharger submitted deficient annual pretreatment reports and failed to properly certify those reports from 2008 to 2012. The Central Valley Water Board contends that although each annual pretreatment report is deficient in different aspects, all would require substantial improvements in order to comply with the 2008 Permit.
- The Discharger submitted deficient quarterly reports and in two cases, the Discharger failed to submit the required report. The Central Valley Water Board contends that deficient quarterly reporting may have been significantly rectified by avoided labor associated with other violations and therefore cost benefits are assumed to have already been captured. However, the Central Valley Water Board estimates that a benefit was afforded the Discharger when they failed to prepare and submit two quarterly reports.
- The Discharger failed to adequately review the self-monitoring reports generated by its SIUs. As a result, the Discharger failed to identify violations and enforcement opportunities to correct such deficiencies.

The compliance actions described above demonstrate a chronic failure in the administration of the Discharger's pretreatment program. The Discharger's lack of adequate administration of the program is indicative of a lack of dedicated and trained staff. The Central Valley Water Board evaluated comparably-sized pretreatment programs located within the Central Valley and determined that a minimum of one additional staff member should be fully dedicated to program administration from the effective date of the 2008 Permit. (Tab 9B) As a result, the Discharger avoided annual salary expenses of \$706,539.

This cost assessment assumes that appropriate program staffing was achieved with the June 2014 hiring of an environmental compliance inspector to administer the pretreatment program. As violations have continued to reoccur, the staffing estimate is considered conservative, and may still be inadequate to maintain program compliance.

B. Economic Benefit of 2008 CDO Violation (Violation 2)

In addition to the pretreatment program violation, the Discharger violated the conditions of the 2008 CDO. The Discharger incurred an economic benefit by routinely failing to adequately evaluate, oversee, and report on its pretreatment program. The Discharger also avoided costs associated with preparing a technical report required by the CDO and failing to comply with annual status reporting requirements of the Order. The Central Valley Water Board contends that the Discharger avoided minimum costs of \$4,116 for these actions.

The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit of non-compliance. Cost estimate and other assumptions are detailed in the Economic Benefit tables, which are attached and hereby fully incorporated (Attachment B). For computational purposes, the penalty payment date was established as the projected hearing date, 21 April 2016. Changes to this date will affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of non-compliance was determined to be at least \$710,655.

Step 9 – Maximum and Minimum Liability Amounts

Minimum Liability Amount: \$781,721

The Enforcement Policy states (p. 21) that the total liability shall be at least 10 percent higher than the economic benefit, “so that liabilities are not construed as the cost of doing business and the assessed liability provides meaningful deterrent to future violations.” The minimum total liability associated with the economic benefit is approximately \$781,270.

Maximum Liability Amount: \$33,350,000

The maximum administrative liability amount for Violation 1 is the maximum amount allowed by Water Code section 13385, which is ten thousand dollars (\$10,000) for each day in which the violation occurs. The maximum administrative liability amount for Violation 2 is the maximum amount allowed by Water Code section 13350, which is five thousand dollars (\$5,000) for each day in which the violation occurs.

The total maximum liability amount is \$33,350,000 (Violation No. 1 [\$25,150,000] + Violation No. 2 [\$8,200,000]). The proposed liability falls between the maximum and minimum liability amounts.

Final Liability Amount

Statutory Maximum for Violations 1 and 2 (\$25,150,000 + \$8,200,000) = \$33,350,000

Minimum Penalty Amount (Economic Benefit Amount + 10%) = \$781,721

**Recommended Final Liability Amount for Violations 1 and 2 (\$775,368 + \$261,360)
=\$1,036,728**

Step 10 – Final Proposed Liability Amount: \$1,036,728

The final liability amount proposed is one million thirty-six thousand seven hundred and twenty-eight dollars (\$1,036,728).