

Attachment A – ACL Order R5-2016-XXXX
Specific Factors Considered for Administrative Civil Liability
Cruiser Haven, Inc.,
Delta Waterways LLC
Holland Riverside Marina, Contra Costa 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 section 13327. Each factor of the ten-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.

Category 1: Violations of WDR Order 5-01-093 for Failure to Submit Monitoring Reports
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WDRs Order 5-01-093, issued by the Central Valley Water Board on 27 April 2001, requires the Dischargers to submit monitoring reports on a monthly, quarterly, and annual basis. Our records show that the Dischargers have a long history of delinquent monitoring report submittals, and most recently have not submitted the November 2015 monitoring report. The reports are required to be submitted pursuant to Water Code section 13267. Water Code section 13268 authorizes a liability of up to \$1,000 per day for each missing or incomplete report required pursuant to Water Code section 13267. Because each reporting requirement is similar in nature, they have been considered together instead of individually.

Step 1 – Potential for Harm for Discharge Violations

The Prosecution Team is not alleging a discharge violation; therefore, the evaluation of this factor has been omitted from the following calculation.

Step 2 – Assessment for Discharge Violations

The Prosecution Team is not alleging a discharge violation; therefore, the evaluation of this factor has been omitted from the following calculation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation considering the (a) potential for harm and (b) the extent of the 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 for harm or threat to beneficial uses. In this case, the failure to submit monitoring reports as required by WDRs Order 5-01-093 prevents Board staff from evaluating compliance with the WDRs. The violation represents a “substantial threat to beneficial uses” because the Water Board is deprived of the essential technical evaluations, monitoring, and data reporting to determine the extent and severity of the water quality impacts. A value of “Moderate” is therefore warranted.

Deviation from Requirement

The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements. For the Deviation from

Requirement, a “Major” factor is appropriate in this case because the Dischargers’ repeated failure to conduct monitoring and reporting as required by the WDRs shows the Dischargers’ complete disregard for compliance with regulatory requirements.

Using Table 3 in the Enforcement Policy, the Per Day Factor of **0.55** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown in the Initial Liability table below.

Days of Violation

The Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation. In order to adjust the per-day basis, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used. The Prosecution Team finds that the failure to submit monitoring reports results in no economic benefit that can be measured on a daily basis. Therefore, the Prosecution Team recommends compressing the days of violation.

Following the Enforcement Policy, for violations lasting more than 30 days, the days are counted as follows: first day of violation, every fifth day of violation until the 30th day, and every 30 days thereafter. For example, a violation lasting 62 days would be compressed to 8 days (counting days 1, 5, 10, 15, 20, 25, 30, 60).

The following table shows the actual days of violation and the compressed days of violation. The days of violation are calculated from the due date of the reports through 25 January 2016, the date the Complaint was issued.

Delinquent Monitoring Reports	Actual Days of Violation¹	Compressed Days of Violation
April 2013 Monitoring Report	968	38
May 2013 Monitoring Report	938	37
June 2013 Monitoring Report	907	36
Second Quarter 2013 Monitoring Report	907	36
July 2013 Monitoring Report	876	35

¹ Calculated from the day after the report was due through 25 January 2016.

Delinquent Monitoring Reports	Actual Days of Violation¹	Compressed Days of Violation
August 2013 Monitoring Report	846	34
September 2013 Monitoring Report	815	33
Third Quarter 2013 Monitoring Report	815	33
October 2013 Monitoring Report	785	32
November 2013 Monitoring Report	754	31
December 2013 Monitoring Report	723	30
Annual 2013/Fourth Quarter 2013 Monitoring Report	723	30
January 2014 Monitoring Report	695	29
February 2014 Monitoring Report	664	28
March 2014 Monitoring Report	634	27
First Quarter 2014 Monitoring Report	634	27
April 2014 Monitoring Report	603	26
May 2014 Monitoring Report	573	25
June 2014 Monitoring Report	542	24
Second Quarter 2014 Monitoring Report	542	24
July 2014 Monitoring Report	511	23
August 2014 Monitoring Report	481	22
September 2014 Self Monitoring Report	450	21
Third Quarter 2014 Monitoring Report	450	21
October 2014 Self Monitoring Report	420	20

Delinquent Monitoring Reports	Actual Days of Violation¹	Compressed Days of Violation
November 2014 Self Monitoring Report	389	19
December 2014 Self Monitoring Report	358	18
Annual 2014/Fouth Quarter 2014 Monitoring Report	358	18
January 2015 Monitoring Report	330	17
February 2015 Monitoring Report	299	16
March 2015 Monitoring Report	269	15
First Quarter 2015 Monitoring Report	269	15
April 2015 Monitoring Report	238	14
May 2015 Monitoring Report	208	13
June 2015 Monitoring Report	177	12
Second Quarter 2015 Monitoring Report	146	11
July 2015 Monitoring Report	146	11
August 2015 Monitoring Report	116	10
September 2015 Monitoring Report	85	9
Third Quarter 2015 Monitoring Report	85	9
October 2015 Monitoring Report	55	8
November 2015 Monitoring Report	24	24²
Total:	20,808	961 days

² Per the 20 May 2010 State Water Resources Control Board Water Quality Enforcement Policy, violations that last less than 30 days are not eligible to be compressed.

Using the reduced days of violation:

Initial Liability Amount

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

$$961 \text{ days} \times \$1,000/\text{day} \times 0.55 = \$528,550$$

$$\text{Total Initial Liability} = \$528,550$$

Step 4: Adjustment Factors

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 intentional or negligent behavior. The Dischargers were assigned a multiplier value of 1.4. The Discharger is responsible for the failure to submit the required reports, as follows:

The Dischargers have been regulated by the Central Valley Water Board under WDRs Order 5-01-093 since being named as the owner and/or operator on the WDRs on 27 May 2010 (over five years ago), and have been issued several NOVs, as described in the Complaint for the non-submittal of monitoring reports. In addition, the Dischargers met with Board staff on 15 August 2014 to discuss the non-compliance issues and the civil liability penalties associated with the non-submittal of reports. Since the August 2014 meeting with Dischargers, two additional NOVs were issued for delinquent monitoring reports, with the most recent issued on 14 January 2015.

On 1 September 2015, Board staff sent the Dischargers a letter containing an offer to enter into settlement negotiations prior to issuance of an administrative civil liability complaint.

On 18 September 2015, the Board's Prosecution Team met with the Dischargers to discuss settlement. Despite the multiple NOVs and meetings, the Dischargers continue to not submit monitoring reports as required by the WDRs.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperates 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. Despite multiple notifications of the violations, the Dischargers have not cooperated or returned to compliance with the WDRs. As noted above, the Dischargers failed to submit monitoring reports after receiving NOV letters for past due reports, and failed to submit monitoring reports after multiple meetings with Board staff. Therefore, it is appropriate to use a cleanup and cooperation factor of 1.2.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1, with higher values as appropriate. Since 27 May 2010, when the Dischargers were named as the owner and/or operator on the WDRs, Board staff has issued several NOVs for failure to submit monitoring reports as required by the WDRs and MRP. Board staff has also issued NOVs for failure to comply with the ammonia effluent limit and failure to maintain the wastewater ponds. In addition, our records show that the Discharger has not paid its annual

permit fees of \$970 and \$1,044 for fiscal years 2013 and 2014. Despite the above, a History of Violation multiplier of 1.0 was used for this factor because the Board has not assessed a formal enforcement action against the Dischargers.

Step 5 - Determination of Total Base Liability Amount

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

<p><u>Total Base Liability Amount: Violation 1</u></p> <p>Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability</p> <p>\$528,550 x 1.4 x 1.2 x 1.0 = \$887,964</p> <p style="text-align: right;">Total Base Liability = \$887,964</p>

<p>Category 2: Failure to Submit Technical Report Required by Water Code Section 13267 Order</p>

On 24 September 2015, following a meeting with the Board's Prosecution Team, a Water Code section 13267 Order was issued to the Dischargers. The Order required the Dischargers to submit a technical report by 16 October 2015 committing to one of three options in order to comply with Water Board requirements: Those options were (a) complying with the existing WDRs and submitting monitoring reports, (b) tanking and hauling the wastewater to a permitted facility while keeping WDRs in place for future expansion, or (c) tanking and hauling the wastewater, decommissioning the ponds and monitoring wells, and requesting rescission of the WDRs. The Dischargers were also informed that unless the WDRs were rescinded, he was responsible for complying with the WDRs and submitting monitoring reports. The Dischargers failed to submit the technical report required by the Water Code section 13267 Order.

Step 1 – Potential for Harm for Discharge Violations

The Prosecution Team is not alleging a discharge violation; therefore, the evaluation of this factor has been omitted from the following calculation.

Step 2 – Assessment for Discharge Violations

The Prosecution Team is not alleging a discharge violation; therefore, the evaluation of this factor has been omitted from the following calculation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The "per day" factor is calculated for each non-discharge violation considering the (a) potential for harm and (b) the extent of the 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 for harm or threat to beneficial uses. In this case, the failure to submit the technical report required by the Water Code section 13267 Order

prevents Board staff from evaluating compliance with the WDRs. The violation represents a “substantial threat to beneficial uses” because the Dischargers have not submitted the technical report describing how they plan to comply with Water Board requirements. A value of “Moderate” is therefore warranted.

Deviation from Requirement

The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements. For the Deviation from Requirement, a “Major” factor is appropriate in this case because the Dischargers’ failure to submit the technical report required by the Water Code section 13267 Order shows the Dischargers’ complete disregard for compliance with regulatory requirements.

Using Table 3 in the Enforcement Policy, the Per Day Factor of **0.55** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown in the Initial Liability table below.

Days of Violation

As mentioned above, the Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation. The Prosecution Team finds that the failure to submit the technical report results in no economic benefit that can be measured on a daily basis, and has reduced the days of violation accordingly.

The table below shows the actual days of violation and the reduced days. The days of violation are calculated from a due date for the technical report of 16 October 2015 through 25 January 2016.

Delinquent Technical Report	Actual Days of Violation	Compressed Days of Violation
Technical Report	101	9

Using the reduced days of violation:

<u>Initial Liability Amount</u>
The initial liability amount for the violations calculated on a per-day basis is as follows:
9 days x \$1,000/day x 0.55 = \$4,950
Total Initial Liability = \$4,950

Step 4: Adjustment Factors

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 intentional

or negligent behavior. The Dischargers were given a multiplier value of 1.5. The Dischargers are fully responsible for the failure to submit the technical report.

On 18 September 2015, Board's Prosecution Team met with the Dischargers to discuss the Dischargers' prolonged non-compliance with the WDRs and the accruing administrative civil liabilities for failure to submit the required monitoring reports. During the meeting, the Dischargers were informed of a forthcoming Water Code Section 13267 Order and the three options that would be included in the Order: (a) complying with the existing WDRs and submitting monitoring reports, (b) tanking and hauling the wastewater to a permitted facility while keeping WDRs in place for future expansion, or (c) tanking and hauling the wastewater, decommissioning the ponds and monitoring wells, and requesting rescission of the WDRs. The Dischargers were also informed that unless the WDRs were rescinded, they were responsible for complying with the WDRs and submitting monitoring reports. In follow-up to the meeting, on 24 September 2015 a Water Code section 13267 Order was issued to the Dischargers for submittal of a technical report committing to one of the three options. The Dischargers did not submit the required technical report despite subsequent email reminders that the Dischargers' attempts to respond to the Water Code section 13267 Order were deficient and that the Dischargers still needed to comply with the Water Code section 13267 Order.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperates 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 Dischargers have not cooperated in submitting the technical report required by the Water Code section 13267 Order. As explained above, the Dischargers made two attempts to respond to the Water Code section 13267 Order via email. However, these attempts were deficient and the Dischargers have yet to comply despite multiple reminders from Board staff. Therefore, it is appropriate to use a cleanup and cooperation factor of 1.3.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1, with higher values as appropriate. The Dischargers did not comply with the Water Code section 13267 Order, even after the Dischargers were reminded of the need to submit a response by Board staff in emails dated 15, 23, and 28 October 2015. Despite the above, a History of Violation multiplier of 1.0 was used for this factor because the Board has not assessed a formal enforcement action against the Dischargers.

Step 5 - Determination of Total Base Liability Amount

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

Total Base Liability Amount: Violation 2

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

$$\$4,950 \times 1.5 \times 1.3 \times 1.0 = \$9,652$$

Total Base Liability = **\$9,652**

COMBINED TOTAL BASE LIABILITY FOR ALL VIOLATIONS

The combined base liability for both categories of violation is \$887,964 + \$9,652, which is equal to **\$897,616**.

Step 6 – Ability to Pay and Continue in Business

The ability to pay and to continue in business must be considered when assessing administrative civil liability. The Prosecution Team conducted a preliminary asset search of publicly available information. The Prosecution Team finds that the Dischargers have the ability to pay the proposed liability because they own the property located at 7000 Holland Tract Road in Brentwood, California that has an assessed total value of \$2,434,662.

Step 7 – Other Factors as Justice May Require

The costs of investigation and enforcement are “other factors as justice may require”, and could be added to the liability amount. The Central Valley Water Board Prosecution Team has incurred over \$15,000 (100 hours at a statewide average of \$150/hour) in staff costs associated with the investigation and enforcement of the violations alleged herein. While this amount could be added to the penalty, the Prosecution Team, in its discretion, is not adding this amount to the total proposed liability.

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.

In this case, application of the Enforcement Policy results in a liability of \$897,616. The amount, while quite large, is the result of the application of the Enforcement Policy to multiple years of failure to submit monitoring reports. WDRs Order 5-01-093 allows an average monthly discharge of 7,500 gallons per day of domestic wastewater to a pond system. A penalty of \$897,616 is disproportionate to the volume of the permitted discharge. The Prosecution Team asserts that the goals of the Water Code and Enforcement Policy can be met here with a smaller, though still substantial, final liability in the amount of \$100,000. This application of discretion is a result of the specific circumstances peculiar to this case.

Step 8 – Economic Benefit

Pursuant to Water Code section 13327, civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. In other words, the Dischargers realized a gain by not expending the resources to comply with water quality laws, including completing the monitoring and reporting as required by MRP 5-01-093. In addition, the Enforcement Policy states that the total liability shall be at least 10% higher than the economic benefit, “so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations.”

The Dischargers incurred an economic benefit by not conducting the monitoring and reporting requirements as required by the MRP. In addition, the Dischargers incurred an economic benefit by having the wastewater ponds in place, and charging fees for boaters to pump out their wastewater tanks.

While the economic benefit for accepting waste from boaters is not known, it is possible to determine the economic benefit accrued by not conducting the required monitoring and reporting activities. This determination can be made using the U.S. Environmental Protection Agency's BEN computer model, which calculates the economic benefit a discharger derives from delaying and/or avoiding compliance with environmental regulations. As shown in the attached Exhibit 1, the State Water Board's Economist used the BEN model and the estimates provided by staff for the costs to monitor the wastewater ponds and groundwater, and to compile and submit the reports. These estimated costs are based on actual billed work, bid proposals, and/or estimated costs provided by other dischargers for completing similar type work and/or consulting firms that complete similar work at other treatment facilities.

Using the BEN model, the economic benefit for not completing the required monitoring and submitting the required monitoring and technical reports is estimated to be \$24,512. As stated above, the Dischargers also received an economic benefit from having the wastewater ponds in place, and charging the public to pump out their wastewater holding tanks. Board staff does not have an estimate of the economic benefit from this activity at this time; however, pending the subpoena response, the economic benefit of noncompliance may be modified. Pursuant to the Enforcement Policy, the total proposed liability amount should be at least 10% higher than the calculated economic benefit. Therefore, the minimum liability is \$26,963.

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 presented in the ACL Order, and the values are repeated here.

Maximum Liability Amount: \$20,909,000

Minimum Liability Amount: \$26,963

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. Based on the foregoing analysis, and consistent with the Enforcement Policy, the final proposed Administrative Civil Liability is **\$100,000**.

Attachment: Exhibit 1: BEN model

Exhibit 1

Cruiser Haven, Inc., Delta Waterways, LLC, Holland Riverside Marina, Contra Costa County										
Compliance Action The actions required to have prevented the violation.	One-Time Nondepreciable Expenditure			Annual Cost		Cost Index for Inflation ³	Non-Compliance Date	Compliance or Hearing Date	Benefit of Non-compliance	
	Amount	Date ¹	Delayed? ²	Amount	Date ¹					
1 - Monthly Monitoring and Reporting, Annualized, 2013, 7 reports	\$3,829	8/26/2015	n			ECI	9/15/2013	4/22/2016	\$2,323	
2 - Monthly Monitoring and Reporting, Annualized, 2014, 12 reports	\$6,564	8/26/2015	n			ECI	6/30/2014	4/22/2016	\$3,818	
3 - Monthly Monitoring and Reporting, Annualized, 2015, 11 reports	\$6,017	8/26/2015	n			ECI	6/15/2015	4/22/2016	\$3,333	
4 - Quarterly Monitoring and Reporting, Annualized, 2013, 3 reports	\$6,531	8/26/2015	n			ECI	9/1/2013	4/22/2016	\$3,973	
5 - Quarterly Monitoring and Reporting, Annualized, 2014, 4 reports	\$8,708	8/26/2015	n			ECI	7/1/2014	4/22/2016	\$5,097	
6 - Quarterly Monitoring and Reporting, Annualized, 2015, 3 reports	\$6,531	8/26/2015	n			ECI	5/15/2015	4/22/2016	\$3,648	
7 - Annual Report, 2013	\$2,000	8/26/2015	n			ECI	2/1/2014	4/22/2016	\$1,189	
8 - Annual Report, 2014	\$2,000	8/26/2015	n			ECI	2/1/2015	4/22/2016	\$1,131	
Totals	\$42,180			\$0					\$24,512	
							Date of run:	12/10/2015 10:48		
Hearing Date:	4/22/2016			Penalty Payment Date	4/22/2016					
Income Tax Schedule:	For-Profit									
Source: USEPA BEN Model:	Version 5.5.0			Status:						
Analyst:	MM Ransom									
¹ This is the Date the cost estimate was made.										
² Enter "y" if delayed, and "n" if avoided.										
³ ECI is the Employment Cost Index.										
⁴ The Non-Compliance Date is the midpoint of the non-compliance time interval annualized. For example, when there are 12 months of non-compliance for Monthly Reports, then the annualized mid-point is mid-June.										