ATTACHMENT F

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

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The proposed administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy). The proposed civil liability takes into account such factors as the Dischargers' culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

Calculation of Penalty for Violation

Step1. Potential for Harm for Discharge Violations
This step is not applicable.

Step 2. Assessment for Discharge Violations
This step is not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations
The Dischargers have failed to submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order for discharges from irrigated cropland despite evidence that the Dischargers own such cropland as trustees. Irrigated cropland can be a source of sediment, pesticide residue, nitrate, and other waste discharged to the waters of the state. Unregulated discharges of such wastes can present a substantial threat to beneficial uses and/or indicate a substantial potential for harm to beneficial uses.

Using Table 3 in the Enforcement Policy, staff has determined that the potential for harm is moderate, because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm. This conclusion is, in part, based on the size of the Dischargers' irrigated land parcels, which total approximately 88 acres.

By failing to file a RoWD or to enroll under an applicable General Order, the Dischargers have undermined the regulatory program. Dischargers regulated under an applicable General Order either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with their operations. In addition, dischargers report on the practices in which they engage to protect water quality. By failing to provide that information, the Dischargers impair the Regional Board's efforts to assess potential impacts and risks to water quality, and circumvents the Regional Board's ability to take necessary enforcement actions to address problems.

The greater the size of the operation, the greater the potential risk, since any practices being implemented by the Dischargers that are detrimental to water quality may impact a much greater area. The regulatory program is compromised when staff resources are directed to bringing dischargers into compliance rather than being available for outreach and assistance with regulatory compliance. Since the violation thwarts the Board's ability to identify water quality risks, the violation has the potential to

exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

The deviation from the requirement is major. To date, Dischargers have disregarded the regulatory requirements and rendered those requirements ineffective. Dischargers have undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for their waste discharges. A discharger's regulatory coverage is foundational to the Board's efforts to protect water quality. The Orders adopted by the Board specify the expectations and requirements for water quality protection, which do not apply until the discharger is covered by an appropriate Order. The requirements in the applicable Orders are rendered ineffective when a discharger has not gone through the process of becoming subject to the Order.

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from the requirement is major. Based on the above factors, a per day factor of 0.55 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

On 26 March 2015, the Dischargers were sent a Directive Letter pursuant to California Water Code section 13260 (Directive), which required the Dischargers to obtain regulatory coverage within 15 calendar days of receipt or face a potential civil liability. The Directive was received on 28 March 2015; hence, regulatory coverage was required by 12 April 2015.

As of 25 January 2016, the Dischargers are 287 days late in meeting that requirement. The maximum liability under Water Code section 13261, subdivision (b)(1) for the failure to furnish a report under Water Code section 13260 is $1,000 per each day the violation occurs, for a total of two hundred eighty-seven thousand dollars ($287,000).

Step 4. Adjustment Factors

a) *Culpability*: 1.3

The Dischargers were given the score of 1.3 for the culpability factor. Central Valley Water Board staff sent a notice on 21 February and 28 April 2014 to Dischargers describing the new water quality regulations and the required actions to comply therewith. Dischargers also received a 13260 Directive and Notice of Violation requiring the Dischargers to obtain coverage. Despite knowledge of the regulatory requirements, which is exemplified by the notices described above, Dischargers failed to come into compliance. The four notices and failure to respond suggest Dischargers acted intentionally, or at least negligently, in ignoring the requirement to get regulatory coverage, resulting in a culpability factor of 1.3.

b) *Cleanup and Cooperation*: 1.5

The Dischargers were given the score of 1.5. The Regional Board issued the Discharger a Notice of Violation in an effort to allow the Dischargers to address the violation prior to the issuance of a complaint. The Dischargers did not respond and cooperate with the Regional Board despite being awarded ample time in which to do so. Despite opportunities to come into compliance, the Dischargers have yet to do so. Cleanup is not applicable in this case.

c) *History of Violations*: 1.0

The Dischargers were given the score of 1.0, as there is no evidence that Dischargers have a history of violations.

Multiple Day Violations: On 26 March 2015, the Dischargers were sent a Directive, which required the Dischargers to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Dischargers on 28 March 2015. Thus, regulatory coverage was required by 12 April 2015. As of 25 January 2016, the date on which this Complaint was issued, the Dischargers are 287 days late in meeting that requirement.

Violations under Water Code section 13260 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 18). Under that approach, for violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, 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.

Here, the Central Valley Water Board finds that the Dischargers' failure to submit a RoWD or NOI is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Dischargers' failure to submit a RoWD or NOI has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Dischargers pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Dischargers' failure to submit a RoWD or NOI results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is

associated with costs of permit fees, groundwater monitoring, and preparing an Annual Monitoring Report, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The minimum number of days to be assessed in this case under the alternate approach is 15. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Dischargers' inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation above the minimum to a total number of 26 days of violation.

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 determined in Step 3.

a) *Total Base Liability Amount:* **$27,885**. (Initial Liability ($1,000/day x 26 days x 0.55) x Adjustments (1.3)(1.5)(1.0)).

BASE LIABILITY AND FACTORS APPLIED TO THE VIOLATION

The Base Liability Amount for the Violation is **$27,885**. The following factors apply to the Base Liability Amount for the violation.

Step 6. Ability to Pay and Continue in Business

As per the Enforcement Policy, "[t]he ability of a discharger to pay an ACL is determined by its revenues and assets." The Dischargers have the ability to pay the Base Liability Amount based on the value of property owned by the Dischargers as trustees, a significant asset with a 2014-2015 assessed value of the Fresno County parcels listed as $994,935 according to the Fresno County Assessor's office; and the Dischargers' ownership of approximately 88 acres of grapes. The Fresno Agricultural Commissioner's 2014 Annual Crop Report on Agriculture suggests that based on the county average for grapes, 88 acres generated an estimated $312,554 in revenue in 2014[1]. Therefore, there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

There are no factors under this category that warrant an adjustment.

Step 8. Economic Benefit[2]

[1] Information provided by the 2014 Fresno County Agricultural Crop Report, available at http://www.co.fresno.ca.us/WorkArea/DownloadAsset.aspx?id=65462

[2] Order R5-2013-0100 includes an estimate of average annual costs per acre related to that Order. The average annual costs are not used in this economic benefit analysis, since the costs represent an average cost, if the Order were

Economic Benefit: **$3,773**

Pursuant to Water Code section 13385, subdivision (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. The violations described in the Complaint identify several avoided costs that have significantly benefited the Dischargers. As alleged in the Complaint, the Dischargers failed to enroll under an applicable General Order for discharges from irrigated cropland. As a result, the Dischargers have avoided substantial costs associated with maintaining and complying with the conditions of the General Order. In order to determine the economic benefit of noncompliance, the Regional Board has made several assumptions regarding how the Dischargers would comply with the Directive. These assumptions were necessary as the Dischargers have made no attempts to comply on their own accord, and therefore their enrollment preferences are unknown.

For the purposes of determining the economic benefit, the Regional Board assumes that the General Order R5-2013-0100 (Individual General Permit) will apply to the Dischargers' operations since the Regional Board cannot compel the Dischargers to join a coalition. The date of non-compliance for the filing of the NOI and payment of initial fees was 13 April 2015 – the deadline provided in the Directive. Annual fees are assumed to be payable on the anniversary of enrollment. The State Water Resources Control Board charged a permit fee of $1,010 plus $6.70 per acre for farms 11 to 100 acres[3] during the 2014-15 and 2015-16 billing year. Dischargers have 88 crop acres, which results in an annual permit fee of $1,600 and for the two billing years. Dischargers have avoided paying this permit fee for these two years. As a result, the Dischargers have failed to pay $3,200 in annual fees for enrollment years 2015 and 2016. Costs associated with preparation of the NOI were not included in the economic benefit calculation.

Also included under the Individual General Order, the Dischargers would have been required to conduct groundwater monitoring of domestic and agriculture supply wells. Monitoring is required for the first and second year of enrollment under the General Order. Based on estimated sampling labor and laboratory costs associated with two supply wells, the Dischargers avoided monitoring costs of approximately $2,724. An Annual Monitoring Report (AMR) would have also been required, with the first report due May 1, 2015. The Regional Board estimates the cost of preparing the AMR at approximately $960. Other costs such as data review and interpretation, or development of a groundwater action plan based on monitoring results were not considered for the economic benefit calculation.

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applied Central Valley-wide. The cost estimates made in this analysis are based on the circumstances and facts related to these Dischargers, rather than a broad class of Dischargers.

[3] See section 2200.6 of the 2014-15 and 2015-16 Fee Schedules at http://www.waterboards.ca.gov/resources/fees/docs/fy1415_fee_schedule.pdf and http://www.waterboards.ca.gov/resources/fees/water_quality/docs/fy1516_ilrp_fees.pdf

In summary, the Dischargers avoided compliance actions estimated at approximately $6,884. The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit of noncompliance. Economic benefit was calculated using BEN version 5.5.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes. Cost estimate and other assumptions are detailed in the table below. For computational purposes, the penalty payment date was established as 21 April 2016. It is further assumed that the Discharger will have applied for applicable permitting (having paid appropriate enrollment fees) by this date. Changes to this date will affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately $3,773.

Step 9. Maximum and Minimum Liability Amounts

a) Minimum Liability Amount: **$4,150**

The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Dischargers' economic benefit obtained from the violations cited herein is $3,773. This number plus ten percent results in a Minimum Liability of $4,150.

b) *Maximum Liability Amount:* **$287,000**

The maximum administrative liability amount is the maximum amount allowed by Water Code section 13261, which is $1,000 for each day in which the violation occurs. The Dischargers are 287 days past due in complying with the applicable Water Code section 13260 Directive. Therefore, the Maximum Liability is $287,000.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit a RoWD under California Water Code section 13260 is twenty seven thousand eight hundred and eighty five dollars **$27,885**.

Jim & Vera Kurnosoff (Trustees), ACL Complaint R5-2016-0550

Compliance Action The actions required to have prevented the violation.	One-Time Nondepreciable Expenditure			Recurring Annual Cost		Non-Compliance Date	If complied, enter Compliance Date (3)	Cost Index for Inflation (4)	Benefit of Non-compliance
	Amount	Date (1)	Delayed? (2)	Amount	Date (1)				
1 - 2014 Permit Fee	$1,600	7/1/2014	n	$0		4/13/2015	4/21/2016	ECI	$912
2 - 2015 Permit Fee	$1,600	7/1/2014	n	$0		4/13/2016	4/21/2016	ECI	$867
3 - 2015 AMR preparation/submittal	$960	9/1/2014	n	$0		5/2/2015	4/21/2016	ECI	$546
4 - 2015 GW Monitoring Lab Fees	$1,284	6/19/2014	n	$0		11/13/2015	4/21/2016	PPI	$660
5 - 2015 GW Monitoring Labor	$1,440	2/25/2015	n	$0		11/13/2015	4/21/2016	ECI	$788
Totals	**$6,884**			**$0**					**$3,773**

Hearing Date:	4/21/2016
Penalty Payment Date:	4/21/2016
Income Tax Schedule (5)	For-Profit
Analyst:	MMRansom
Model used:	US EPA BEN, Version **5.5.0**

Date of Run: 1/21/16 11:24 AM

(1) This is the Date of the cost estimate. Answers the question: When was the cost estimate made?

(2) Enter "y" if delayed, and "n" if avoided.

(3) The hearing date was used for the BEN analysis because the Dischargers have yet to comply.

(4) Economist chooses the most appropriate index.

(5) This determines the level of taxation for entities: for-profit entities (C-corporation or not C-corporation), and not-for-profit entities (municipality, NGO, federal facility) . Consult the economist if needed.