

ATTACHMENT E

Calculation of Penalty per SWRCB
Water Quality Enforcement Policy

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

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 Discharger's 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

Step 1. 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 "per day" factor is calculated for each non-discharge violation considering the potential for harm and the extent of the deviation from the applicable requirements.

Potential for Harm

The Enforcement Policy requires a determination of whether the characteristics of the violations resulted in a minor, moderate, or major potential for harm or threat to beneficial uses.

The Discharger failed to submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order for discharges from irrigated cropland despite evidence indicating that it irrigates cropland. 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.

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.

By failing to file a RoWD or to enroll under an applicable General Order, the Discharger has 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 Discharger impeded the Central Valley Water Board's efforts to assess potential impacts and risks to water quality, and circumvented the Central Valley Water Board's ability to take enforcement actions to address problems.

Additionally, 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 Central Valley Water Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of pollutants of concern, increasing the potential of associated risks. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

Deviation from Requirement

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

The deviation from the requirement is major. The Discharger has undermined the efforts of the Central Valley Water 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 p. 16 of the Enforcement Policy).

Multiple Day Violations: On 30 January 2015, the Discharger was mailed a Directive Letter pursuant to Water Code section 13260 (Directive), which required it to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Discharger on 2 February 2015. Thus, regulatory coverage was required by 17 February 2015. The Discharger failed to obtain regulatory coverage by this date and therefore is 538 days late in meeting the regulatory requirements as of the date of this Complaint.

Violations under Water Code section 13261 are assessed on a per day basis. However, the violations at issue 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 Discharger's failure to submit a RoWD or Notice of Intent (NOI) (and join the Coalition) is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's 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 Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's 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 the one-time delayed expenditure of obtaining regulatory coverage under an applicable General Order, which is discussed further 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 under the alternate approach in this case is 23. However, this approach generates a Total Base Liability Amount that is not a sufficient deterrent for an operation of this size. Because the Discharger's inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, and because the unregulated discharges from the Discharger's agricultural properties present a significant threat to water quality, it is appropriate to increase the number of days of violation above the Minimum Approach to a total number of 30 days of violation.

Initial Liability Amount

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

$$\$1,000/\text{day} \times 30 \text{ days} \times 0.55 = \$16,500$$

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 history of violations. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

a) Culpability: 1.3

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 Discharger was given the score of 1.3, which increases the fine. Central Valley Water Board staff

mailed a 13260 Directive on 30 January 2015 after the Discharger failed to respond to the initial notices and failed to obtain regulatory coverage for the parcel's waste discharges. The Discharger did not respond to the Directive or the subsequent Notice of Violation that was mailed on 17 April 2015.

Despite knowledge of the regulatory requirements, which is exemplified by the notices described above, the Discharger is 538 days out of compliance as of the date of this Complaint. The multiple notices indicate that the Discharger had knowledge and ignored the requirement to get regulatory coverage. Therefore, a culpability factor of 1.3 is warranted.

b) *Cleanup and Cooperation: 1.5*

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. The Discharger was given the score of 1.5, which increases the fine.

The Central Valley Water Board issued the Discharger a NOV in an effort to allow the Discharger to address the violation prior to the issuance of a complaint. The Discharger did not respond despite being awarded ample time in which to do so. Despite opportunities to come into compliance, the Discharger did not make any attempt to cooperate with the Central Valley Water Board.

Cleanup is not applicable here.

c) *History of Violations: 1.0*

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger was given the score of 1.0 because the Discharger has no record of a history of violations prior to those described herein.

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: \$32,175.* (Initial Liability (\$16,500) x Adjustments (1.3)(1.5)(1.0)).

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 Discharger has the ability to pay the Base Liability Amount based on the value of the Discharger’s property and estimated revenues of its crop. According to the Madera County Assessor’s Office, the parcels listed have an assessed value of \$156,935. Further, the Discharger owns approximately 40 acres of vineyard in Madera County, which generated an estimated \$205,000 in 2014¹.

Thus, the Discharger has the ability to pay the proposed administrative civil liability based on its revenue and assets. There are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

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.

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 a significant amount of staff costs associated with the investigation and enforcement of the violations alleged herein. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, is electing not to pursue staff costs in this matter.

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

Step 8. Economic Benefit²

Economic Benefit: \$4,756

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. Economic benefit was calculated using the United States Environmental Protection Agency’s (US EPA) Economic Benefit Model (BEN)³ penalty and financial modeling program, version 5.6.0. BEN

¹ Information provided by calculating 39 acres of dried grapes from the 2014 Madera County Agricultural Crop Report, available at

<http://www.madera-county.com/index.php/publications/crop-reports>

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

³ US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>.

calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes.

The BEN model is the appropriate tool for estimating the economic benefit in this case. The benefit is calculated by identifying the regulation at issue, the appropriate compliance action, the date of noncompliance, the compliance date, and the penalty payment date.

Under the Irrigated Lands Regulatory Program, an individual may choose to comply with the program by either filing an NOI to get regulatory coverage as an "individual grower," or filing a NOI for regulatory coverage under a third-party group Order and joining the Coalition. For the purpose of determining the economic benefit, the Prosecution Team assumes that the General Order No. R5-2013-0100 (Individual General Permit) will apply to the Discharger's operation, as the Central Valley Water Board cannot compel the Discharger to join a coalition.

The economic benefit was calculated based on delayed and avoided costs. Delayed costs are those costs that should have been born earlier, but that a discharger can and is still required to pay. Avoided costs are the costs of those compliance activities which a discharger can no longer perform, and that a discharger would have conducted had they come into compliance earlier.

The date of noncompliance for the filing of the NOI and payment of initial fees was 18 February 2015 - the deadline specified in the Directive. Annual fees are assumed to be payable on the anniversary of enrollment. As a result, the Discharger has failed to pay the \$1,271 permit fees for enrollment years 2015 and 2016.

Once enrolled under the General Order, the Prosecution Team estimates that a Notice of Applicability (NOA) would have been issued within one month of receiving the NOI (i.e. 20 March 2015). Under the Individual General Order, the Discharger would have been required to prepare and implement a Farm Water Quality Plan (FWQP) within one year of the NOA issuance (i.e. 17 March 2016). The estimated cost to prepare this plan is \$2,500.

The Individual General Order would also require the Discharger to conduct groundwater monitoring of domestic and agriculture supply wells. This monitoring would commence within six months of the NOA issuance (i.e. 17 September 2015). 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 one supply well, the Discharger avoided monitoring costs of approximately \$2,244.

An Annual Monitoring Report (AMR) would have also been required, with the first report due on 1 May 2015, with the second occurring a year later. The Prosecution Team estimates the cost of preparing the two AMRs at approximately \$4,800. In summary, the Discharger should have spent approximately \$12,086 to comply with the Individual General Order. Using BEN, the Discharger gained an economic benefit of \$4,756 after consideration of delayed and avoided costs.

Step 9. Minimum and Maximum Liability Amounts

a) *Minimum Liability Amount:* **\$5,232**

The Enforcement Policy recommends 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 Discharger's economic benefit obtained from the violation is \$4,756. Therefore, the minimum liability is \$5,232.

b) *Maximum Liability Amount:* **\$538,000**

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 Discharger was in violation for 538 days, which results in a maximum liability of \$538,000.

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 as required under Water Code section 13260 is **thirty two thousand one hundred and seventy five dollars (\$32,175)**.