# ATTACHMENT E

## 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 (the "Enforcement Policy") and using the "Penalty Calculation Methodology Worksheet, version date 2/4/2014" (the "Penalty Calculation Worksheet"). 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**

**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 Discharger has failed to submit a Report of Waste Discharge or enroll under an applicable General Order for irrigated cropland despite evidence indicating that they irrigate 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.

Using table 3 in the State Water Resources Control Board's Water Quality Enforcement Policy (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/or the circumstances of the violation indicate a substantial potential for harm. The Discharger's failure to file a RoWD or to enroll under an applicable General Order for irrigated cropland undermines the collection of monitoring data, which is necessary to identify geographical areas in which growers need to improve management practices to reduce pollution discharges. The violation, thus, has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern.

The "Deviation from the Requirement" is major. Sinks has undermined the efforts of the Central Valley Waters Boards Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for their waste discharges. The requirement has been rendered ineffective. Based on the above factors, a 'per day' factor of 0.55 is appropriate (see Table 3 on p. 16 of the Enforcement Policy).

On 31 July 2013, the Discharger was served a Directive Letter pursuant to California Water Code section 13260 (13260 Directive), which required them to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Discharger on 3 August 2013, so regulatory coverage was required by 18 August 2013.

As of 10 May 2014, the Discharger is 265 days late in meeting that requirement. The maximum liability under Water Code section 13261(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 and sixty-five thousand dollars ($265,000).

**Step 4. Adjustment Factors**

a) *Culpability*: 1.5

*Discussion:* The Discharger was given the score of 1.5, which increases the fine. Sinks has willfully disregarded its obligation to obtain the required regulatory coverage, after receiving five letters and refusing delivery of one from the Water Board. At least two of the letters were definitely received by the Discharger, as exemplified by the certified mail receipts (the first two letters were not sent via certified mail).

b) *Cleanup and Cooperation*: 1.2

*Discussion:* The Discharger was given the score of 1.2, which increases the fine because the Discharger has not been cooperative. Cleanup is not applicable here. Sinks has, however, been unresponsive to Central Valley Water Board staff's attempts to contact the Discharger and resolve the violation.

c) *History of Violations*: 1.0

Discussion: The Discharger was given the score of 1.0, as there is no evidence that Sinks has a history of violations.

**Multiple Day Violations:** 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 30). The failure to submit a RoWD does not cause daily detrimental impacts to the environment or the regulatory program. It is appropriate to assess daily penalties for the first day of violation, plus an assessment for each five day period of violation until the 30$^{th}$ day, plus an assessment of one day for each thirty days of violation thereafter. Applying this assessment method on the total 265 violation days reduces the assessed penalty days to 14.

**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:* **$13,860.** (Initial Liability ($1,000/day x 14 days x 0.55) x Adjustments (1.5)(1.2)(1.0)).

## BASE LIABILITY AND FACTORS APPLIED TO THE VIOLATION

The Base Liability Amount for the Violation is $13,860. The following factors apply to the Base Liability Amount for the violation.

**Step 6. Ability to Pay and Continue in Business**
a) *Adjusted Base Liability Amount:* **$13,860**

*Discussion*: 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 based on 1) Value of property owned by the Discharger, a significant asset with a 2013-2014 assessed value of the Madera County parcel listed in the 13260 Directive at $811,324 according to the Madera County Assessor's office; 2) Discharger owns approximately 154 acres of almonds and alfalfa in Madera County, which generated approximately $510,000 in 2012[1]; and 3) William R. Sinks received an estimated $11,039 in farm subsidies from the United States Department of Agriculture from in 2012[2].

**Step 7. Other Factors as Justice May Require**
*Base Liability Amount:* **$13,860**

*Discussion:* As described in the previous sections, application of the Enforcement Policy Penalty Calculation Methodology here results in a proposed penalty of $13,860. However, the Enforcement Policy Penalty Calculation Methodology does not address the differences in size between various operations subject to the RoWD requirements. In other words, an operation ten times the size of Sinks', or one tenth the size, would be subject to the same penalty for the same number of violation days. The Prosecution Team believes that this result would be inappropriate. The Prosecution Team, therefore, proposes to adjust the penalty to account for the size of the operation. Given the size of the Discharger's operation, and in consideration of the factors applied above, the Assistant Executive Officer has elected to impose a reduced penalty of **three thousand five hundred forty dollars $3,540** ($10 per acre plus $2,000).

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[1] Assuming 77 acres as Almonds and 77 acres as alfalfa. Information provided by the 2012 Madera County Agricultural Crop Report, available at
http://www.madera-county.com/index.php/publications/crop-reports
[2] Information provided from farm.ewg.org.

**Step 8. Economic Benefit**

*Economic Benefit:* **$91**

Discussion: 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 5.4.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes. Economic benefit was calculated based on the assumption that the Discharger will choose to join the Coalition. If the Discharger joins the Coalition, there is no avoided cost, because the Discharger will be required to pay the Coalition its unpaid membership dues for prior years.

*a.) 2013 Unpaid Dues and 2014 Dues*

The economic benefit associated with the failure to submit a RoWD or NOI to enroll in the Coalition is the delayed cost of failing to obtain regulatory coverage by 19 August 2013. The ESJ Coalition is currently charging new members $50 plus $9 per acre for prior years' unpaid dues, plus $3.75 for 2014 dues. Consequently, when the Discharger pays membership dues in 2014, the fee will include $9 per acre for the prior unpaid years (2013) plus $3.75 per acre for 2014. The economic benefit for these delayed costs is $91.

**Step 9. Maximum and Minimum Liability Amounts**

a) *Minimum Liability Amount:* **$100**

*Discussion:* 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 Discharger's economic benefit obtained from the violations cited herein is $91. This number plus ten percent results in a Minimum Liability of $100.

b) *Maximum Liability Amount:* ***$265,000***

*Discussion:* 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.

**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 **$3,540**.

[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