



SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814
OFFICE: 916-446-7979 FAX: 916-446-8199
SOMACHLAW.COM

June 9, 2014

Via Electronic Mail Only

Joe Karkoski, Chief
Irrigated Lands Regulatory Program
California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
Joe.karkoski@waterboards.ca.gov

SUBJECT: Administrative Civil Liability Complaints: R5-2014-0501, for David L. and Linda M. Davis Trust; R5-2014-0525, for Todd and Monica Borba; R5-2014-0527, for Mary Jo Meirinho; R5-2014-0528, for William R. Sinks, et al.; R5-2014-0529, for Larry W. and Shireen Slate

Dear Mr. Karkoski:

Our firm represents the East San Joaquin Water Quality Coalition (ESJWQC) on matters pertaining to implementation and enforcement of the Central Valley Regional Water Quality Control Board's (Regional Board) Waste Discharge Requirements General Order for Growers Within the Eastern San Joaquin River Watershed That Are Members of the Third Party Group (East San Joaquin WDR). On behalf of the ESJWQC, we have reviewed the proposed administrative civil liability complaints (ACLs) identified above. We provide the following general comments on the penalty calculations contained in all five ACLs as an interested party. These comments are being submitted within the 30-day public comment period, as identified in the cover letter for all five ACLs.

As expressed in our May 6, 2014 Request for Immediate Action, the ESJWQC believes it essential that penalties imposed against those that have failed to comply with the Porter-Cologne Water Quality Control Act (Porter-Cologne) need to be set at a level that clearly sends a message and acts as a deterrent to future violations. Otherwise, these individuals and others may continue to blatantly ignore the law and continue to operate with impunity. Based on our review of the penalties calculated and recommended in the five ACLs, we believe that these penalties are too low to accomplish these objectives. Our concerns with the penalty calculations, which are being calculated pursuant to provisions contained in the State Water Resources Control Board's Water

Joe Karkoski, Chief

RE: ACLCs R5-2014-0501, R5-2014-0525, R5-2014-0527, R5-2014-0528, R5-2014-0529

June 9, 2014

Page 2

Quality Enforcement Policy (May 20, 2010) (Enforcement Policy), are provided here for each step that causes us concern with respect to how the step is applied in the ACLCs.

- **Step 3 - Per Day Assessment for Non-Discharge Violations**

Under step 3 of the Enforcement Policy, regional boards are required to calculate an initial liability factor for each non-discharge violation considering “Potential for Harm” and the extent of deviation from applicable harm. With respect to its determination of “Potential for Harm,” the ESJWQC disagrees with the Regional Board’s categorization of such potential for harm as moderate. Considering that these ACLCs are being issued to individuals that have failed to respond to repeated notifications with respect to the need for obtaining coverage for discharges from their irrigated lands and because they have failed to comply, the Regional Board needs to characterize this violation as an egregious threat to beneficial uses, or represent a very high potential for harm. Without being subject to waste discharge requirements (WDRs), these individuals are not subject to requirements for meeting receiving water limitations or other requirements in the orders. Without being subject to these requirements, they pose an egregious threat to beneficial uses and represent a very high potential for harm.

- **Step 4 - Adjustment Factors**

- Cleanup and cooperation: The ACLCs as presented propose to impose an adjustment factor of 1.2 out of the range of 0.75 to 1.5 with respect to cooperation. Considering that the individuals subject to the ACLCs have repeatedly ignored the Regional Board’s many notices, we recommend that the maximum adjustment factor of 1.5 be applied here.
- History of Violations: The ACLCs as presented propose to impose an adjustment factor of 1.0, claiming that the individuals do not have a history of violation. We disagree. After sending the 13260 directive, the Regional Board issued Notices of Violation to those that failed to respond. The individuals subject to these ACLCs are receiving them because they failed to respond to the Notice of Violation. Thus, they do have a history of violation and the maximum adjustment factor of 1.1 should be applied to the penalty calculation.
- Multiple Day Violations: The ACLCs state that because these are primarily “reporting” violations, they qualify for the alternative approach to penalty calculation under the State’s Enforcement Policy. We disagree with the approach in the ACLCs on this issue for several reasons. First, these are not merely “reporting” violations. Reporting violations are typically those associated with a person or entity not reporting monitoring data or information in a timely manner. That is not the case here. The violations here are discharges in violation of the law because discharges from irrigated lands are happening to waters of the state without being authorized and presumably are happening without meeting the discharge requirements contained in the East San Joaquin WDR, or the individual WDR. We consider this to be a much

more egregious and serious violation as compared to a “reporting” violation. Second, to calculate penalties using the alternative approach for multiple day violations, the Regional Board must make one of the express findings identified in the State’s Enforcement Policy. (Enforcement Policy, p. 18.) No such findings are made, nor can any findings be made in these cases. Accordingly, we disagree with the multiple day violation approach taken in the ACLCs, and this calculation should be revised accordingly.

- **Step 7 - Other Factors as Justice May Require**

Under this step, the penalty calculation is significantly lowered substantially based on considerations of acreage. We disagree with the rationale that liability for non-filers should be based essentially on a \$10 per acre amount. Such an automatic calculation fails to consider the crop grown and value of the commodity. Further, size of an operation does not itself determine threat to water quality. Many large operations are managed in a manner where the threat to water quality is limited as compared to a much smaller operation that may not implement best management practices. Accordingly, although it may be a consideration, the number of acres should not automatically control the amount of penalty proposed.

- **Step 8 - Economic Benefit**

The ESJWQC is extremely concerned with the economic benefit calculations contained in these ACLCs. As proposed, the economic benefit is limited only to the discharger’s unpaid fees. This fails to accurately capture the economic benefit that the discharger has obtained by not complying with the law. First, coalition dues are *not* the only economic benefit, and in fact should not be considered at all. For individuals that have failed to obtain coverage, the Regional Board should calculate the benefit gained as compared to falling under the Individual Waste Discharge Requirements—not the East San Joaquin General Order. Joining the ESJWQC is a privilege, not an automatic right. Thus, it should not be the barometer from which economic benefit is assessed. Second, not only have these individuals failed to pay their fair share of dues, or conduct appropriate monitoring, they have not been attending meetings, filing out Farm Evaluation Reports, or spending other time and resources in complying with the requirements of the WDRs. Accordingly, the economic benefit step in these ACLCs is significantly less than the true economic benefit that these individuals have gained by *not* complying with the law.

Joe Karkoski, Chief

RE: ACLCs R5-2014-0501, R5-2014-0525, R5-2014-0527, R5-2014-0528, R5-2014-0529

June 9, 2014

Page 4

In summary, the final liability amounts that are being assessed in these ACLCs are grossly small in comparison to the violation of avoiding compliance with the law for at least 18 months, and, for some, avoiding compliance with the law even longer if they have irrigated lands that discharge to surface waters. Accordingly, we recommend that the Regional Board recalculate the penalty amounts in light of the comments made above, and set the penalties at a level that is truly commensurate with the violation for discharging to waters of the state without authorization. Please contact me at (916) 446-7979 if you have any questions.

Very truly yours,



Theresa A. Dunham

cc: Kenneth Landau (*via email only* klandau@waterboards.ca.gov)
Alex Mayer (*via email only* alex.mayer@waterboards.ca.gov)
Brett Stevens (*via email only* bstevens@waterboards.ca.gov)
Naomi Kaplowitz (*via email only* Naomi.kaplowitz@waterboards.ca.gov)
Parry Klassen (*via email only* pklassen@unwiredbb.com)
William R. Sinks et al. (*via U.S. First Class Mail*)

TAD:cr