11 July 2014

To: David L. & Linda M. Davis Trust
David L. & Linda M. Davis, Trustees
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William R. Sinks, et al.
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Patrick Pulupa, State Water Board, Office of Chief Counsel [via email to Patrick.Pulupa@waterboards.ca.gov]

The Central Valley Water Board's Advisory Team has reviewed the proposed settlements for the David L. & Linda M. Davis Trust and for William R. Sinks et al. After reviewing the proposed settlements, the Board's Advisors, to whom the Board has delegated the authority to sign and finalize Administrative Civil Liability settlements, must ask Prosecution Team and the Dischargers to further explain how the proposed assessments adequately address the Board's regulatory interests. It appears that the proposed assessments are not sufficient to deter similarly-situated parties from engaging in identical conduct, which would seriously threaten the integrity of one of the Board's most important regulatory programs.

The State Water Board's Enforcement Policy states that, "[v]iolations involving recalcitrant parties who deliberately avoid compliance with water quality regulations and orders are ... considered class I priority

violations because they pose a serious threat to the integrity of the Water Boards' regulatory programs." Class I violations are the most serious class of violations described in the Enforcement Policy, and this description fits the violations charged in the two proposed settlements currently under consideration.

The following factors influence the Board's Advisory Team's decision to tentatively reject the proposed settlements:

- The Board's Advisory Team has not received any evidence that the appropriate fees have actually been paid to the Coalition and/or to the State Water Board. Without this information, it is impossible for the Board to treat these costs as "delayed" or "deferred" costs rather than "avoided" costs.
- Taking the position that the economic benefit of non-compliance is solely related to the non-payment of regulatory fees seems to imply that paying fees is the only obligation that the Board has imposed under the Board's Irrigated Lands Regulatory Program. Regulated entities have needed to participate in regional monitoring efforts, develop and submit farm evaluations, respond to potential water quality threats discovered during the course of preparing reports, and attend informational and educational meetings conducted by the Coalitions themselves. Therefore, there is a significant cost savings associated with non-compliance that does not appear to be captured by the economic analysis that has been provided along with the Administrative Civil Liability Complaints.
- In this context, the USEPA BEN Model may be an inappropriate tool for determining the economic benefit of non-compliance. The BEN Model works by identifying the difference between the costs that a violator would have incurred had it complied on time and those it actually incurred due to delayed compliance. This means that while the BEN Model is ideally suited for deriving the economic savings resulting from *delaying capital investments in pollution control devices and avoiding the costs of operating such equipment during the period of noncompliance* (Ben User's Manual at 1-2.), it may not truly capture the economic benefit of not complying with a regulatory program that is more dependent on the intelligent and responsible implementation of management techniques than on the installation of expensive pollution control devices. The State Water Board's Enforcement Policy allows for the use of other measures of economic benefit should the BEN analysis not adequately capture the true economic benefit realized by the violator.
- The Board can reduce multi-day violations to a lower figure if it makes express findings that the violations do not cause "daily detrimental impacts to the environment or the regulatory program." However, it is certainly conceivable that the erosion of a regulatory program by the non-participation of not only the named violators, but of many other similarly-situated parties, *does* result in daily detrimental impacts. Further explanation is warranted.
- From the material provided, the Board's Advisory Team cannot glean the rationale for reducing the proposed liability on the basis of the size of a Discharger's operation. Different sized operations may present a different potential for harm, and a larger operation might have a different ability to pay a civil liability assessment. This means that the Enforcement Policy's metrics do, in fact, account for differences between operations of different sizes. If the Prosecution Team and the Discharger wish

to continue to propose reducing the assessments on the basis of the size of Dischargers' operations, they must elaborate on the rationale for doing so, and this must include an explanation of why the requirements applicable to larger farm differ in a meaningful way from the requirements applicable to medium-sized or smaller operations.

- The Advisory Team has not been assured that the assessment wouldn't simply be considered "the cost of doing business" and would therefore not serve a significant deterrent effect.

The Board's Advisory Team invites the Discharger and the Prosecution Team to develop Administrative Civil Liability Stipulated Orders that contain findings that address the above concerns. This may or may not result in a re-assessment of the proposed liability amount. Any new Stipulated Order would need to be re-circulated for a new 30-day comment period.

If the Discharger and the Prosecution Team cannot agree to the terms of a revised Stipulated Order, then the Prosecution Team shall make arrangements to place the consideration of the Administrative Civil Liability Complaints on the Board's calendar, to be heard as expeditiously as possible.

Sincerely,

Pamela C. Creedon, Executive Officer