Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy). The administrative 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 "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.

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. The reporting of management practices in the Farm Evaluations will allow the Coalition and Board to effectively implement the Management Practices Evaluation Plan. This plan is a critical component of the Board's effort to address agricultural waste discharges and protect beneficial uses, including groundwater as a source of drinking water.

The Discharger has failed to submit two Farm Evaluations as required by the East San Joaquin Order. By not submitting the evaluations, the Discharger has undermined the Coalition's efforts to analyze and report its members' Farm Evaluation data to the Board. The Discharger has therefore reduced the value of the Coalition's Farm Evaluation analysis and caused harm to the Irrigated Lands Regulatory Program.

The Discharger operates a large farm operation of 593 acres. The greater the size of the operation, the greater the potential harm, since the missing Farm Evaluations cannot account for management practices used over a larger irrigated lands area. This creates a larger missing data set in the Coalition's Farm Evaluation analysis and causes a proportionally greater undermining of this analysis.

The irrigated lands that the Discharger operates are in a designated High Vulnerability Area (HVA) for groundwater protection. The East San Joaquin Order prioritizes program implementation in HVAs, since these are the areas where beneficial uses are most threatened. The missing 2014 and 2015 Farm Evaluations and lack of reporting on management practices therefore cause a greater potential for harm to beneficial uses.

Additionally, the regulatory program is compromised when staff resources are directed toward bringing Coalition members into compliance rather than being available for outreach and assistance with regulatory compliance.

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 requirement is major. To date, the Discharger has disregarded the regulatory requirements and rendered those requirements ineffective.

The Discharger has undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program and the Coalition's efforts to comply by disregarding the requirement to submit the 2014 and 2015 Farm Evaluations. A Coalition member's compliance with reporting requirements is foundational to the Board's efforts to protect water quality. The Irrigated Lands Program Orders adopted by the Board specify the expectations and requirements for water quality protection. The requirements in the applicable Orders are rendered ineffective when Coalition members fail to meet their reporting requirements.

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 requirement is major. Based on the above factors, a per day factor of 0.7 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

**Multiple Day Violations:** Pursuant to the East San Joaquin Order, the Discharger was required to submit the 2014 Farm Evaluation on 1 March 2015 and the 2015 Farm Evaluation on 1 March 2016. As of 8 August 2016, these Farm Evaluations are 526 days and 160 days past due, respectively.

Violations under Water Code section 13268 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 this 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 Farm Evaluations is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit the 2014 and 2015 Farm Evaluations has detrimentally impacted the environment on a daily basis, since submitting these evaluations does not result in immediate 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 the 2014 and 2015 Farm Evaluations results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with costs of preparing the evaluations, which are outlined in Step 8 below.

Either of the above findings justifies the use of the alternate approach to penalty calculation for multiple day violations. The minimum numbers of days to be assessed under the alternate approach for the 2014 and the 2015 Farm Evaluations are 24 and 12 days, respectively. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the numbers of days of violation for the 2014 and 2015 Farm Evaluations to 30 and 20 days of violation, respectively.

**Initial Liability Amount**
The initial liability amount for the violations calculated on a per-day basis is as follows:

Violation 1: $1,000/day x 30 days x 0.7 = $21,000

Violation 2: $1,000/day x 20 days x 0.7 = $14,000

Total Initial Liability Amount: $35,000

**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 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 for the culpability factor. As a member of the Coalition, it is the Discharger's responsibility to be aware of, and to comply with, the reporting requirements of the East San Joaquin Order. The Coalition sent the Discharger multiple notices urging the submittal of the 2014 and 2015 Farm Evaluations.

Additionally, Board staff sent a Notice of Violation (NOV) to the Discharger on 22 February 2016, and a certified mail return card was received indicating that the NOV was delivered to the Discharger's address. The NOV urged submittal of the missing Farm Evaluations in order to avoid potential enforcement action.

Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance by submitting the 2014 and 2015 Farm Evaluations.

b) *Cleanup and Cooperation*: 1.3

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 1.3. The Coalition issued multiple notices, and the Central Valley Water Board issued the Discharger an NOV in an effort to allow the Discharger to address the violation prior to the issuance of an Administrative Civil Liability Complaint. The Discharger did not respond and cooperate with the Central Valley Water Board or Coalition despite being allowed ample time in which to do so. Despite opportunities to come into compliance, the Discharger did not make any attempt to cooperate. Cleanup is not applicable in this case.

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, as there is no evidence of a history of violations.

**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:* **$59,150** ($35,490 + $23,660)

Violation 1: Initial Liability ($21,000) x Adjustments (1.3)(1.3)(1.0)) = $35,490

Violation 2: Initial Liability ($14,000) x Adjustments (1.3)(1.3)(1.0)) = $23,660

**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 appears to have the ability to pay the Base Liability Amount based on ownership of a large farm operation company. The Discharger would have a share of the revenues from orchard and vineyard crops generated from the 593 acres the Discharger operates. Based on the Discharger's reporting of acreage and crop type on its enrollment form when it joined the Coalition, the landowner of 283 acres of almonds, 89 acres of grapes, 80 acres of walnuts, 73 acres of pistachios, and 68 acres of prunes. The Prosecution Team estimates that revenues from the operation total $3,655,504. This calculation is based on the most recent Madera County Crop Report,[1] which shows that almond orchards generated about $7,008 per acre, vineyards generated between $3,094 and $18,364 per acre depending on the type of grape grown, walnuts generated about $5,782 per acre, pistachios generated about $9,410 per acre, and prunes generated about $3,638 per acre. The Prosecution Team used the conservative estimate for vineyard revenues in the estimate above. Thus, the Discharger has the ability to pay the administrative civil liability and 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. 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 Benefit**

*Economic Benefit:* **$2,685**

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) [2] 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.

[1] The 2014 Madera County Crop Report can be found online here: http://www.madera-county.com/index.php/publications/crop-reports

[2] 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 .

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.

The violations described in the Complaint identify the avoided costs of preparing the 2014 and 2015 Farm Evaluations, which has benefited the Discharger.

For the purposes of determining the economic benefit, Board staff assumed that it would take a person knowledgeable with the Discharger's farm operations, such as a farm manager or a crop advisor, about two hours per farm operation to complete the Farm Evaluation for a given year. Since the Discharger is the operator at 10 non-contiguous parcels, staff assumed that each parcel is a separate farm operation. Using an estimate of the value of the knowledgeable person's time of $120 per hour, the economic benefit of this avoided cost per Farm Evaluation is:

10 operations x 2 hours/operation x $120/hour = $2,400

Therefore, the cost for both the 2014 and 2015 Farm Evaluations is $4,800 ($2,400 per Farm Evaluation x 2 Farm Evaluations = $4,800).

In summary, the costs avoided by the Discharger are estimated at approximately $4,800. The actual economic benefit realized is derived by adjusting the avoided costs for inflation and tax deductibility. Using the BEN model, the total economic benefit of noncompliance was determined to be $2,685.

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

*a) Minimum Liability Amount:* **$2,954**

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 calculated the Discharger's economic benefit obtained from the violations cited herein to be $2,685. This number plus ten percent results in a recommended Minimum Liability of $2,954.

b) *Maximum Liability Amount:* **$686,000**

The maximum liability under Water Code section 13268 for the failure to furnish a report under Water Code section 13267 is $1,000 per each day the violation occurs. The Discharger was required to submit the 2014 Farm Evaluation on 1 March 2015 and the 2015 Farm Evaluation on 1 March 2016. As of 8 August 2016, these Farm Evaluations are 526 days and 160 days past due, respectively. The sum of these violation days is 686, so the total maximum liability is six hundred and eighty six thousand dollars ($686,000).

**Step 10. Final Liability Amount**

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount for failure to submit the 2014 and 2015 Farm Evaluations is fifty nine thousand one hundred and fifty dollars (**$59,150)**.