

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2016-0550

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF

VICTOR PRODUCE, INC.
MERCED COUNTY

This Administrative Civil Liability (ACL) Complaint is issued pursuant to California Water Code section 13323 to Victor Produce, Inc., (Victor Produce or Discharger), for failing to submit a Farm Evaluation as required by the Waste Discharge Requirements for Growers within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group (Order R5-2012-0116-R3 or East San Joaquin Order).

The Assistant Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) alleges the following:

BACKGROUND

1. The East San Joaquin Order applies to owners and operators of irrigated lands within the Eastern San Joaquin River Watershed. Pursuant to the East San Joaquin Order, either the owner or operator may enroll an irrigated lands parcel for regulatory coverage under the East San Joaquin Order.
2. On 10 February 2015, Victor Produce enrolled nine parcels in the East San Joaquin Water Quality Coalition (Coalition) as an operator, thus obtaining coverage under the East San Joaquin Order. The parcels that the Discharger enrolled are Merced County Assessor's Parcel Numbers (APN) 049-050-087, 049-050-088, 049-050-089, 049-050-091, 049-060-073, 049-080-003, 049-080-006, 049-080-015, and 049-080-016. These parcels have a total area of 271 acres.
3. The East San Joaquin Order requires that all members complete a Farm Evaluation describing management practices implemented to protect surface and groundwater quality. The Farm Evaluation also includes information such as location of the farm, surface water discharge points, location of in service wells and abandoned wells and whether wellhead protection practices have been implemented.
4. The Farm Evaluation is intended to provide the third-party coalition and the Central Valley Water Board with information regarding individual member implementation of the East San Joaquin Order's requirements. Without this information, the Board would rely solely on regional surface and groundwater monitoring to determine compliance with water quality objectives. The regional monitoring cannot determine whether all members are implementing protective practices, such as wellhead protection measures for groundwater. Regional monitoring also does not allow identification of which practices are protective in areas where impacts are observed and multiple practices are employed. For groundwater protection practices, it may take years in many areas (even

decades in some areas) before broad trends in groundwater may be measured and associated with implementation of the East San Joaquin Order. Farm Evaluations are intended to provide assurance that members are implementing management practices to protect groundwater quality while trend data is collected.

5. The reporting of practices identified in the Farm Evaluation will allow the third-party coalition and Board to effectively implement the Management Practices Evaluation Plan. Evaluating management practices at representative sites (in lieu of farm-specific monitoring) only works if the results of the monitored sites can be extrapolated to non-monitored sites. One of the key ways to extrapolate those results will be to have an understanding of which farming operations have practices similar to the site that is monitored. The reporting of practices will also allow the Board to determine whether the Groundwater Quality Management Plan is being implemented by members according to the approved schedule.
6. On 21 December 2015, the Coalition sent a notice to the Discharger that the Farm Evaluation for 2015 (2015 Farm Evaluation) was due to the Coalition on 1 February 2016. The Discharger did not submit the 2015 Farm Evaluation in response to the notice.
7. On 22 February 2016, Board staff sent the Discharger a Notice of Violation (NOV) for failure to submit the 2013 and 2014 Farm Evaluations. The NOV urged the Discharger to submit the evaluations to the Coalition and warned that failure to do so may result in enforcement action by the Central Valley Water Board. Board staff later discovered that Victor Produce did not join the Coalition until February 2015 and therefore was not required to submit Farm Evaluations for 2013 and 2014. A copy of the NOV is provided as Attachment A.
8. The Discharger received the NOV on 25 February 2016. The Discharger did not contact the Board in response to the NOV. A copy of the certified mail receipt is included with Attachment A.
9. In March 2016, the Coalition sent a postcard to the Discharger providing notice that submittal of the 2015 Farm Evaluation was past due and requesting that the Discharger submit the evaluation as soon as possible. The Discharger did not submit the 2015 Farm Evaluation in response to the postcard.
10. On 19 April 2016, the Coalition sent the Board a list of members who had not submitted the 2015 Farm Evaluation. The list indicated that Victor Produce had not submitted the 2015 Farm Evaluation.
11. In May 2016, the Coalition sent a final notice to the Discharger that the 2015 Farm Evaluation had not been submitted, and that failure to do so may lead to an enforcement action by the Central Valley Water Board. The notice urged the Discharger to submit the required 2015 Farm Evaluation as soon as possible. The Discharger did not submit the 2015 Farm Evaluation in response to the notice.

12. On 6 May 2016, Board staff sent the Discharger a pre-ACL letter indicating that an ACL Complaint was forthcoming and inviting the Discharger to engage in settlement negotiations prior to issuance of an ACL Complaint. A copy of this pre-ACL letter is provided as Attachment B.
13. The pre-ACL letter was sent via Federal Express, which delivered the letter to the Discharger's address on 10 May 2016. The Discharger did not submit the missing Farm Evaluation or contact Board staff in response to the pre-ACL letter. A copy of the Federal Express proof of delivery for the pre-ACL letter is included with Attachment B.
14. Central Valley Water Board records indicate that at the time of issuance of this ACL Complaint, the Coalition has not received the Discharger's 2015 Farm Evaluation.

ALLEGED VIOLATIONS

15. The Discharger failed to submit the 2015 Farm Evaluation as required by the East San Joaquin Order. As of 8 August 2016, this Farm Evaluation is 160 days past due.

REGULATORY CONSIDERATIONS

16. Water Code section 13267, subdivision (b)(1) provides that

In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposed to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

17. Pursuant to Water Code section 13268, subdivision (b)(1), any person who fails or refuses to furnish a technical or monitoring report as required by Water Code section 13267, subdivision (b), may face an ACL in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
18. The required 2015 Farm Evaluation is 160 days past due. 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, for a total maximum of one hundred and sixty thousand dollars (\$160,000).

19. Pursuant to Water Code section 13327, in determining the amount of civil liability, the Central Valley Water Board shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
20. On 17 November 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13327.
21. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment C. 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.
22. The Enforcement Policy endorses progressive enforcement action for violations of waste discharge requirements when appropriate, but recommends formal enforcement as a first response to more significant violations. Progressive enforcement is an escalating series of actions that allows for the efficient and effective use of enforcement resources. The Enforcement Policy recommends formal enforcement actions for the highest priority violations, chronic violations, and/or threatened violations. The East San Joaquin Order identifies failure to submit required reports on time as a priority violation with regard to enforcement.
23. **Maximum and Minimum Penalties.** As described above, the maximum penalty for the violations is \$160,000. The Enforcement Policy recommends that the minimum liability imposed be at least ten percent higher than the economic benefit so that liabilities are not construed as the cost of doing business and so that the assessed liability provides a meaningful deterrent to future violations. The economic benefit to the Discharger resulting from the failure to submit the 2015 Farm Evaluation is estimated at \$522 (see Attachment C for how this estimate was derived). Per the Enforcement Policy, the minimum penalty is the economic benefit plus ten percent (\$575).
24. Notwithstanding the issuance of this ACL Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of the Water Code that may subsequently occur.

25. Issuance of this ACL Complaint is an enforcement action, and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321, subdivision (a)(2).

VICTOR PRODUCE IS HEREBY GIVEN NOTICE THAT:

1. The Assistant Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an administrative civil liability in the amount of **fifteen thousand two hundred ten dollars (\$15,210)**. The amount of the proposed liability is based upon a review of the factors cited in the Enforcement Policy. The calculation of the penalty amount is explained in Attachment C.
2. A panel of the Central Valley Water Board will hold a hearing on this matter on **3/4 November 2016**, unless the Discharger does any of the following by **24 August 2016**.
 - a) The Discharger waives the right to a hearing by completing the waiver form provided as Attachment D (checking off the box next to Option 1) And returning it to the Central Valley Water Board, along with full payment of the proposed civil liability of **fifteen thousand two hundred ten dollars (\$15,210)**. The check must be payable to the State Water Pollution Cleanup and Abatement Account and sent to State Water Resources Control Board, Division of Administrative Services, Accounting Branch, P.O. Box 1888, Sacramento, CA 95814, with a copy of the check mailed to the Central Valley Water Board at 11020 Sun Center Drive, Suite 200, Rancho Cordova, CA 95670, Attn: Brett Stevens; OR
 - b) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking the box next to Option 2 on the attached form, and returns it to the Central Valley Water Board along with a letter describing the issues to be discussed; OR
 - c) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking the box next to Option 3 on the attached waiver form, and returns it to the board along with a letter describing the issues to be discussed.
3. The hearing will be governed by the Hearing Procedure, which is provided as Attachment E. During the hearing, the panel may choose to recommend that the Central Valley Water Board affirm, reject, or modify the proposed ACL, which may include raising the monetary value of the ACL, or whether to recommend referral of the matter to the Attorney General for recovery of judicial civil liability.

4. The Assistant Executive Officer reserves the right to amend the proposed amount of administrative civil liability to conform to the evidence presented, including but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this ACL Complaint, and through completion of the hearing.



Andrew Altevogt, Assistant Executive Officer



(Date)

- Attachment A: February 2016 NOV and Proof of Receipt
- Attachment B: May 2016 Pre-ACL Notification Letter and Proof of Delivery
- Attachment C: Calculation of Penalty per SWRCB Water Quality Enforcement Policy
- Attachment D: Hearing Waiver
- Attachment E: Hearing Procedure
- Attachment F: ACL Fact Sheet