

Attachment B – ACL Complaint No. R5-2012-0500

Specific Factors Considered for Civil Liability Department of General Services, Nevada City Forest Fire Station

The State Water Board's *Water Quality Enforcement Policy* establishes a methodology for assessing administrative civil liability, addressing the factors that are required to be considered when imposing a civil liability as outlined in CWC section 13385(e). Each factor of the nine-step approach is discussed below, as is the corresponding score.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

In this case, this factor does not apply because all of the violations are related to non-discharge events and the liability is determined in Step 3 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties for the spills based on both a per-gallon and a per-day basis. In this case, this factor does not apply because all of the violations are related to non-discharge events and the liability is determined in Step 3 below.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Board shall calculate an initial liability for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. In this case, there are eight non-discharge violations to be considered. These violations are similar in that they reflect the Discharger's failure to properly implement the requirements of the General Permit. The violations also represent similar threats to water quality. Therefore, Board staff has grouped these violations together for the purpose of calculating the initial liability factor for each violation.

The Potential for Harm factor is considered “minor” because turbid storm water did not discharge off the construction site or enter storm drain systems to where it could be carried to surface waters. The Deviation from Requirement factor is considered “major” because the Discharger failed to implement its own SWPPP document requirements and rendered the General Permit requirements ineffective. Based on these two factors, a Per Day Factor of 0.3 was determined using Table 3 of the Enforcement Policy. This value is multiplied by the maximum per day amount allowed under the CWC to determine the initial liability factor for the grouped violation.

As described in detail in the Findings of the ACLC, two separate violations were identified from 5 October to 10 October (6 days) for a total of \$120,000 [2 violations X 6 days X \$10,000/day = \$120,000]. Five separate violations were identified from 11 October to 2 November (23 days) for a total \$1,150,000. Additionally, three days were identified where BMPs were not implemented for areas under active construction for a total of \$30,000, one day was identified

where BMPs were not repaired as required for a total of \$10,000, and one day was identified when a post-storm inspection was not completed as required for a total of \$10,000. The maximum liability is one million three hundred and twenty thousand dollars (\$1,320,000).

The Per Day Assessment for Non-Discharge violations is calculated as (0.3 per day factor) X (\$1,320,000) = \$396,000.

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 cleanup or cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental or intentional violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier of 1.0, due to failure to follow the site specific SWPPP and implement appropriate erosion and sediment control BMPs on the construction site.

Cleanup and Cooperation

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 cooperative in meeting the requirements of the General Permit following staff inspections and issuance of the NOV. Therefore, the Discharger was given a multiplier of 0.75 for cleanup and cooperation.

History of Violation

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. The DGS Nevada City Forest Fire Station is a short term construction site and there have not been any previous General Permit violations at this site. However, violations observed at the subject site are similar to other DGS construction sites inspected by Water Board staff over the last eight years including:

In October 2010, the contractor for the DGS Colfax Fire Station started grading work and did not stabilize the construction site prior to a storm event on October 23-24. Storm water runoff washed disturbed soils off the construction site and into roadside ditches. Water Board staff completed multiple inspections at this site to bring the contractor into compliance with the General Permit requirements.

In 2008, staff observed significant storm water management issues on the DGS 12-inch Transmission Pipeline Effluent Disposal System in Tuolumne County. This pipeline went from the Sierra Conservation Center to the future Gardella Reservoir. Staff conducted inspections in November and December and issued a verbal warning to the contractor for deficient BMPs. Staff worked extensively with the project manager and the contractor to protect water quality on this linear project.

In January to November 2009, staff also identified deficient BMP implementation at the DGS Gardella Reservoir Effluent Disposal System construction site in Tuolumne County. Staff issued two verbal warnings and worked with the contractor and DGS project manager to protect water quality at this large reservoir project.

In January 2004, Board staff also issued a Notice of Violation to DGS on the Butterfield Way State Office Buildings construction project in Sacramento County. The NOV identified a failure to implement an effective combination of erosion and sediment controls and discharge to the American River. At the request of the project manager, Water Board staff provided BMP implementation training for DGS and onsite personnel.

The concern of Board staff is that DGS's contractors are not implementing storm water BMPs as required by their SWPPPs and the General Permit, and DGS is not ensuring that their contractors comply with the General Permit.

Based on the history of violations at the subject construction site, the minimum multiplier of 1.1 is used.

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.

Total Base Liability Amount: This value is calculated as the Initial Liability Amount (\$396,000) X Adjustment Factors (1.0), (0.75), and (1.1) and is equal to \$326,700.

Step 6 - Ability to Pay and Ability to Continue in Business

Board staff is not aware of any reason why the California Department of General Services is unable to pay the liability.

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 to justify this.

Costs of Investigation and Enforcement Adjustment

The costs of investigation and enforcement are "other factors as justice may require", and should be added to the liability amount. Since early October, staff of the Central Valley Water Board has spent approximately 75 hours associated with site inspection, preparing inspection reports and the Notice of Violation, and preparation of the enforcement action. The State Water Board Office of Enforcement has directed that all regional boards are to use a value of \$150 per hour for staff costs. For this case, staff time through preparation of the Complaint is \$11,250.

The Enforcement Policy states that staff costs are to be added to the liability amount. The adjusted liability is (\$326,700+ \$11,250), or \$337,950. However, for ease of use, this value has been rounded to **\$338,000**.

Other Factors

The Enforcement Policy allows a Regional Board to adjust the penalty amount calculated in Steps 1 through 6 upward or downward if it believes the amount is inappropriate. The penalty may only be adjusted if the Regional Board makes express findings to justify the adjustment.

The Regional Board is bringing this Administrative Civil Liability Complaint because the Department of General Services has a poor record of implementing the Construction General Permit at this facility as well as at other facilities. However, the calculated penalty of \$338,000 is inappropriate given the nature of the violations and overall circumstances surrounding this individual case. There is pertinent information not previously considered that indicates a lower penalty amount is justified. The violations that are the subject of this Complaint occurred early in the wet season and the Discharger made corrections after it received a Notice of Violation. Some sediment was tracked off-site onto the roadway, but it does not appear that the violations resulted in a direct discharge of sediment to surface waters. Furthermore, the facility has made the proper adjustments to its BMPs and is currently in compliance,

In consideration of these other factors, the Regional Board believes it is appropriate to reduce the penalty by 50%, to \$168,000.

Step 8 – Economic Benefit

Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The violations of the General Permit were due to failure to implement appropriate erosion and sediment control BMPs as listed in the site specific SWPPP. Based on a survey of consultants in the greater Sacramento area, approximately \$2,000 to \$6,000 per acre is needed to provide the necessary erosion and sediment control measures for construction sites depending on the slope and soil type. The subject construction site has erodible soils and a few steep slopes; therefore, an effective combination of both erosion and sediment control BMPs is critical to protect the site. Since only perimeter BMPs were installed at the active construction site, the economic benefit received by the Discharger by not installing and maintaining an effective combination of erosion and sediment control BMPs at this site was estimated to be \$4,000 per acre. This is the midpoint of the estimated cost per acre to provide the necessary erosion and sediment control measures for construction sites in the greater Sacramento area. At 3.4 acres of disturbed area, the minimum liability is \$13,600. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the economic benefit so that liabilities are not construed as the cost of doing business and that the assessed liability provides a

meaningful deterrent to future violations. In this case, the economic benefit amount, plus 10%, is \$14,960.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for the violations are shown below. The proposed liability falls within the maximum and minimum amounts and therefore, no adjustment is necessary.

Maximum Liability Amount: \$1,320,000

Minimum Liability Amount: \$14,960

Step 10 – Final liability Amount

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Without further investigation of the discharge, calculation of economic benefits, and additional staff time, the proposed Administrative Civil Liability is **\$168,000**.

For ease of reference, the Enforcement Policy adjustment factors used in this penalty calculation are tabulated below:

Adjustment Factors

Adjustment Factors	Range	Factors Used
Harm or Potential Harm to Beneficial Uses	0 to 5	n/a
Physical, Chemical, Biological or Thermal Characteristics of the Discharge	0 to 4	n/a
Susceptibility to Cleanup or Abatement	0 or 1	n/a
Final Score	0 to 10	n/a
Per Gallon Assessment	Minor, Moderate, Major	n/a
Per Day Assessment	Minor, Moderate, Major (0.1 to 1)	0.3
Culpability	0.5 to 1.5	1.0
Cleanup and Cooperation	0.75 to 1.5	0.75
History of Violations	Minimum is 1.1	1.1
Ability to Pay		1
Other Factors as Justice May Require: Staff Costs	\$11,250	
Other Factors as Justice May Require: Adjustment	50% reduction	
Economic Benefit	\$14,960	