

Attachment A – ACL Complaint No. R5-2012-0510
Specific Factors Considered – Civil Liability
M. F. Gomes Dairy (Complaint)

Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

1. **Violation No. 1 (Failure to submit 2009 Annual Report):** In accordance with the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), a 2009 Annual Report must be submitted for regulated facilities by 1 July 2010. To date, Stanley and Vernal Gomes (hereinafter Discharger) have not submitted this report for the M. F. Gomes Dairy.

Calculation of Penalty for Failure to Submit 2009 Annual Report

Step1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.30.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2009 Annual Report did not increase the amount of pollution discharged or threatened to discharge into Waters of the State. The deviation from requirements was determined to be major, as the requirement to submit technical reports has been rendered ineffective. The failure to submit the required technical reports undermines the Regional Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the General Order.

Initial Liability

A failure to submit annual reports is punishable under CWC 13268(a)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2009 Annual Report by 1 July 2010 as required by the General Order and the MRP, which is now 558 days late.

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However, the alternative approach for calculating liability for multiday violations in the Enforcement Policy is applicable. The failure to submit required technical reports does not cause a daily detrimental impact to the environment or the regulatory program and it does not result in an economic benefit that can be measured on a daily basis. It is the extended time period of non-compliance that causes the detrimental impact to both the environment and the regulatory program. Furthermore, the Discharger only receives an economic benefit by not submitting the required technical reports, and not a per-day benefit during the entire period of violation.

Applying the per-day factor to the adjusted number of days of violation rounded to the nearest full day equals 24 days of violation. A calculation of initial liability totals \$7,200 (0.3 per day factor X 24 adjusted days of violation X \$1000 per day penalty).

Step 4. Adjustment Factors

a) *Culpability: 1*

Discussion: The Discharger was given the neutral score of 1, which neither increases nor decreases the fine.

The Discharger is fully responsible for failure to submit annual reports alleged in this Complaint. The requirement to submit a 2009 Annual Report and associated documents were detailed in the General Order. The Discharger was issued a Notice of Violation on 16 August 2010, which requested that the report be submitted as soon as possible to minimize liability. Since that time, the Discharger has failed to submit the 2009 Annual Report or any of the associated documents, and is therefore highly culpable for failure to comply with the program.

b) *Cleanup and Cooperation: 1*

Discussion: The Discharger was given the neutral score of 1, which neither increases nor decreases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the General Order, the Discharger continues to fail to comply. The violation of CWC section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

c) *History of Violations: 1*

Discussion: The Discharger was given the score of 1 which neither increases nor decreases the fine. The Regional Board has no documentation of violations for the Discharger with respect to the failure to submit technical

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and/or monitoring reports as required by an order issued pursuant to CWC section 13267(b).

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 2.

- a) *Total Base Liability Amount: \$7,200* (Initial Liability (\$4,800) x Adjustments (1)(1)(1)).

Step 6. Ability to Pay and Continue in Business

- a) *Adjusted Combined Total Base Liability Amount: \$7,200*

Discussion: The Discharger has the ability to pay the total base liability amount based on 1) the Discharger owns the Dairy, a significant asset, 2) the Discharger operates a dairy, an ongoing business that generates profits.

Based on the reasons discussed above, an ability to pay factor of 1 has been applied to the Combined Total Base Liability Amount.

Step 7. Other Factors as Justice May Require

- a) *Adjusted Combined Total Base Liability Amount: \$7,200 + \$1,800 (Staff Costs) = \$9,000.*

- b) *Discussion:* The State and Regional Water Board has incurred \$1,800 in staff costs associated with the investigation and enforcement of the violations alleged herein. This represents approximately 12 hours of staff time devoted to investigating and drafting the complaint at \$150 an hour. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount. A further adjustment of the combined total base liability amount may be made if the Discharger submits a complete 2009 Annual report by 24 February 2012. The amount of the combined total base liability amount may be reduced by \$2,000 for the completed report that is submitted to the Central Valley Water Board by 24 February 2012. This reduction in the combined total base liability amount by \$2,000 for the completed report accounts for enforcement efficiencies gained by the Discharger submitting the completed report.

Step 8. Economic Benefit

- a) *Estimated Economic Benefit: \$2,500*

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Discussion: The Discharger has received an economic benefit from the costs saved in not drafting and preparing the annual report. This is based on the current consulting costs of producing one annual report (\$2,500). The adjusted total base liability amount of \$7,200 is more than at least 10% higher than the economic benefit amount (\$2,500) as required by the enforcement policy.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$2,750*

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Regional Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the violations cited in this Complaint is \$2,750.

b) *Maximum Liability Amount: \$558,000*

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code Section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (558 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2009 Annual Reports and the Waste Management Plan is **\$9,000**. Attachment B is a spreadsheet that demonstrates the use of the penalty calculation methodology.