

Attachment C
ACL Complaint No. R5-2011-0595
Specific Factors Considered – Discretionary Civil Liability
Washington Mine (Complaint)

Each factor of the Enforcement Policy and its corresponding score for each violation are presented below. A spreadsheet showing calculation of administrative civil liability for Violations 1-3 is provided in Attachment B:

- 1. Violation No. 1 (Failure to use appropriate analytical methodologies to obtain low detection limits for sample analyses for heavy metals):** In accordance with the Waste Discharge Requirements (WDRs) Order No. R5-2010-0052, Attachment E (Monitoring and Reporting Program), the Discharger was required to analyze pollutants using the analytical methods described in 40 CFR Part 136. For priority pollutants the methods must meet the lowest minimum levels (MLs) specified in Attachment 4 of the State Implementation Policy. For the months of February, March, and April 2011, the Discharger failed to use the appropriate analytical methodologies.

Calculation of Penalty

Step1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is not a discharge violation. The failure to use the proper detection limits did not result in an actual exceedance of effluent limitations for priority pollutants in February, March, and April.

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 0.20.

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 use the minimum level analytical methodology did not increase the amount of pollution discharged or threatened to be discharged into Waters of the State. The deviation from requirements was determined to be moderate, as the intended effectiveness of the requirement has been partially compromised. The requirement to analyze pollutants using the analytical methods in 40 CFR 136 was not complied with, but the general requirement to analyze the influent and effluent for priority pollutants remained intact.

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Initial Liability

A failure to comply with the Monitoring and Reporting Program contained in the WDRs is subject to administrative civil liabilities pursuant to CWC section 13385(c) of up to ten thousand (\$10,000) dollars per day for each day in which the violation occurs. The violation occurred for three days, one day each in February, March and April 2011.

A calculation of initial liability totals \$6,000 (0.2 per day factor X 3 days of violation X \$10,000 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 the failure to use the appropriate analytical methodology alleged in this Complaint. The requirement to use the specific analytical methodology was detailed in the Monitoring and Reporting Program.

b) *Cleanup and Cooperation: 0.75*

Discussion: The Discharger was given a score of 0.75, which decreases the fine. As soon as the Discharger was notified of the failure to use the appropriate analytical methodology for heavy metals, the Discharger promptly corrected the issue. The violation of CWC section 13385(c), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

c) *History of Violations: 0.75*

Discussion: The Discharger was given the score of 0.75 which decreases the fine. The Regional Board has no documentation of violations for the Discharger with respect to the failure to use the appropriate analytical methodology as required in the Monitoring and Reporting program beyond those described in this Complaint.

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: \$3,375* (Initial Liability (\$3,000) x Adjustments (1)(0.75)(0.75).

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Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

2. **Violation No. 2 (Failure to use required analytical methodologies for mercury):** In accordance with the WDRs, Attachment E (Monitoring and Reporting Program), the Discharger was required to analyze for mercury using a specified analytical methodology to achieve low detection limits. For the months of August, September, and October 2010; May, June and July 2011 (excluding similar violations in February, March, and April, 2011 which are included in Violation No. 1 above), the Discharger failed to use the appropriate analytical methodology.

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 0.20.

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 use the minimum level analytical methodology did not increase the amount of pollution discharged or threatened to be discharged into Waters of the State. The deviation from requirements moderate, as the intended effectiveness of the requirement has been partially compromised.

Initial Liability

A failure to comply with the Monitoring and Reporting Program contained in the WDRs is subject to administrative civil liabilities pursuant to CWC section 13385(c) of up to ten thousand (\$10,000) dollars per day for each day in which the violation occurs. The violation occurred for six days, one day each in August, September, October 2010; and May, June, and July 2011.

A calculation of initial liability totals \$12,000 (0.2 per day factor X 6 days of violation X \$10,000 per day penalty).

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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 the failure to use the appropriate analytical methodology alleged in this Complaint. The requirement to use the specific analytical methodology was detailed in the Monitoring and Reporting Program.

b) *Cleanup and Cooperation: 0.75*

Discussion: The Discharger was given a score of 0.75, which decreases the fine. As soon as the Discharger was notified of the failure to use the appropriate analytical methodology for mercury, the Discharger promptly corrected the issue. The violation of CWC section 13385(c), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

c) *History of Violations: 0.75*

Discussion: The Discharger was given the score of 0.75 which decreases the fine. The Regional Board has no documentation of violations for the Discharger with respect to the failure to use the appropriate analytical methodology as required in the Monitoring and Reporting program beyond those described in this Complaint.

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: \$6,750* (Initial Liability (\$12,000) x Adjustments (1)(0.75)(0.75).

Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

3. **Violation No. 3 (Failure to submit technical report outlining minimum levels, method detection limits, and analytical methods for sample analyses):** In accordance with the WDRs, Attachment E (Monitoring and Reporting Program), section X.D.2., within **60 days** of permit adoption, the Discharger shall submit a report outlining minimum levels, method detection limits, and analytical methods for approval, with a goal to achieve detection levels below applicable water quality criteria. The Report was submitted 342 days late.

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Step 1. 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 0.20.

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 technical report did not increase the amount of pollution discharged or threatened to be discharged into Waters of the State. The deviation from requirements was determined to be moderate, as the requirement to submit technical reports was compromised. The failure to submit the required technical reports undermines the Regional Board's efforts to prevent water quality degradation and determine if the regulatory protection measures detailed in the WDRs are effective.

Initial Liability

A failure to submit the technical report is a violation of the WDRs and is punishable under CWC 13350(e)(1)(B) by civil liability in an amount which shall not be less than one hundred dollars (\$100) for each day in which the violation occurs. The Discharger failed to submit the report for 342 days.

A calculation of initial liability totals \$6,840 (0.2 per day factor X 342 days of violation X \$100 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 the technical report alleged in this Complaint. The requirement to submit the technical report was detailed in the WDRs.

b) *Cleanup and Cooperation*: 1

Discussion: The Discharger was given a score of 0.75, which decreases the fine. As soon as the Discharger was notified of the failure to submit the report, the Discharger promptly developed the required information and

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submitted the report. The violation of CWC section 13350(e)(1)(B), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

c) *History of Violations:* .75

Discussion: The Discharger was given the score of 0.75 which decreases the fine. The Regional Board has no documentation of violations for the Discharger with respect to the failure to submit technical and/or monitoring reports.

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:* **\$3,847** (Initial Liability (\$6,840) x Adjustments (1)(0.75)(0.75)).

Step 6. Ability to Pay and Continue in Business

Discussion: The Discharger has the ability to pay the total base liability amount based on 1) the Discharger owns the Washington Mine, a significant asset, and 2) the Discharger operates the Washington Mine, 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) *Liability Amount:* \$14,000 (0.75) + \$1000.00 (Staff Costs) = **\$11,500**

Discussion: The Discharger was given the score of 0.75 which decreases the fine. The violations did not result in the discharge of additional pollutants to waters of the State. Further, as soon as the Discharger was notified of the violations, immediate actions were taken to correct the violations.

Step 8. Economic Benefit

Discussion: The discharger has received an economic benefit from the costs saved in not using the proper analytical methods for analyses of all the required heavy metals in February, March and April, 2011. The cost saving for using the higher detection limit methodology for heavy metals was approximately \$250.

The discharger has received an economic benefit from the costs saved in not using the proper analytical methodology for mercury in Aug, Sept, and October 2010; and May, June, and July 2011. The cost saving to not using the required analytical methodology for mercury was approximately \$5,800. These costs are based on the costs of the respective laboratory analyses.

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The discharger received an economic benefit from the late submission the required report for outlining minimum levels, method detection limits, and analytical methods for approval required by Monitoring and Reporting Program Section X.D.2. The report should have been submitted on 21 July 2010, but was submitted on 28 June 2011, 342 days late. The discharger had the benefit of retaining money that should have been spent on creating the report for an extra 342 days. Using EPA's BEN calculator and assuming the estimated cost of the report as \$5,000, the economic benefit for late reporting was \$160.

The adjusted liability amount of \$10,479 is greater than the minimum liability amount of combined economic benefit (\$6,210) plus 10% (**\$6831**) as required by the enforcement policy.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: **\$6,831***

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 staff's estimate of the Discharger's economic benefit obtained from the violations cited in this Complaint is \$6,050.

b) *Maximum Liability Amount: **\$124,200***

Discussion: The maximum administrative liability amount is the maximum amount allowed by CWC section 13385: one thousand dollars (\$1,000) for each day in which the violation occurs, and CWC section 13350: one hundred (\$100) 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 (9 total days X \$1,000 per day plus 342 total days X \$100 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 use the lower detection analytical methodology for heavy metals analyses, failure to use the required methodology for mercury analyses, and late submittal of the required report describing what analytical methods would be used in the sample analyses is **\$11,500**. Attachment B includes the spreadsheet that demonstrates the use of the penalty calculation methodology.