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ATTACHMENT C

TO STIPULATED ACL ORDER NO. R5-2007-XXXX

CONSIDERATION OF FACTORS IN CWC SECTION 13327 AND 13308

1. Stipulated Administrative Civil Liability (ACL) and Penalty Order No. R5-2007-XXXX (ACL Order) assesses administrative civil liability and penalties for alleged violations of California Water Code section 13308 Time Schedule Order (TSO) No. R5-2002-0014, as revised, and Cleanup and Abatement Order (CAO) Nos. 5-00-717 and R5-2002-0149, including violations alleged in ACL Complaint No. R5-2004-0534 and violations of the TSO subsequent to issuance of the Complaint, as set forth in Attachments A and B to this Order. The ACL Order includes violations between 25 January 2002 and 30 June 2007. It does not address alleged violations of requirements and prohibitions relevant to surface waters and surface water drainage courses set forth in those Orders and the applicable waste discharge requirements and it does not address alleged violations of prohibitions and requirements relevant to operations of the 84 million gallon reservoir.

2. The ACL Order addresses violations of the TSO that occurred between 25 January 2002 and 30 June 2007. The maximum penalty that may be assessed for violations of the TSO is $3,332,500 for the 1,327 violations that occurred between 25 January 2002 and 30 June 2007 that are subject to specified penalty amounts in the TSO. California Water Code section 13308 requires the Regional Water Board to consider the factors in California Water Code section 13327 in reducing the amount of the penalty below the maximum set forth in a TSO. The following information was considered in the determination to reduce the penalty below the maximum that could be assessed according to TSO.

3. The ACL Order also addresses certain violations of CAO No. 5-00-717 and CAO No. R5-2002- 0149 that were not included in the TSO. These violations are not subject to specified penalty amounts in the TSO, but are subject to administrative civil liability up to $5,000 per day pursuant to California Water Code section 13350. California Water Code section 13350 requires the Regional Water Board to consider the factors in California Water Code section 13327 in determining the appropriate amount of administrative civil liability. The following information was considered in determining the amount of liability.

4. Section 13327 of the CWC states: *In determining the amount of civil liability, the regional 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.

a. *Nature*: As detailed in Attachments A and B, the Discharger violated CAO No. 5-00-717, CAO No. R5-2002-0148, and TSO No. R5-2002-0014, as evidenced by self-monitoring reports and facility inspections. The Discharger has violated limits for freeboard, pH, dissolved oxygen, and dissolved sulfide in the pond and reservoir. The Discharger also violated specifications for maintenance and operation of wastewater storage and disposal systems. The Discharger has violated pH, organic, and nutrient loading rates to the land treatment units. In addition, the Discharger has violated interim effluent limitations for salts, prohibitions and specifications for maintaining wastewater and stormwater on-site, provisions requiring certain studies and technical reports and monitoring and reporting requirements.

b. *Circumstance*: Attachment B itemizes violations of CAO No. 5-00-717, and CAO No. R5-2002-0148. The circumstances are such that the violations in the million-gallon pond for dissolved oxygen, dissolved sulfide, pH, and freeboard limits could have been avoided had the Discharger replaced the pond with a closed tank at an earlier date. The violations in the 84-million gallon reservoir for dissolved oxygen could have been eliminated, and the violations in the 84-million gallon reservoir for dissolved sulfide and high pH could have been reduced, had the Discharger procured and operated sufficient functional aerators, on a temporary or permanent basis, in a timely manner. As evidenced by the significant incidental biological treatment being provided by the brush aerators that are now present in the reservoir, violations of the Effluent Limitations regarding BOD loading to the land application areas could have been avoided and high pH violations reduced, had the Discharger procured and operated sufficient functional aerators in the reservoir. Violations of Effluent Limitations for BOD, nitrogen, total dissolved solids, sodium, and chloride could have been avoided had the Discharger implemented treatment and source control measures. Violations of various Discharge Prohibitions, Discharge Specifications, and Land Application Areas Specifications could have been reduced or avoided had the Discharger implemented measures to improve its irrigation practices and reduce the salt loading to the land application areas, thereby improving percolation, reducing erosion, and minimizing solids build-up in the million-gallon pond and the 84-million gallon reservoir. Violations of the Monitoring and Reporting Program could have been avoided had the Discharger scheduled and paid for sufficient personnel to conduct monitoring at the required frequency. Alternatively, these violations could have been avoided had the Discharger chosen to contain this waste. In summary, most of the violations described in Attachment B were avoidable.

Attachment A identifies violations of the TSO. The TSO sets forth specified penalties for identified Tasks.

- Task 1 of the TSO requires compliance with MRP No. 97-037. The violations of Task 1 concern chronic omissions of data, in particular lengthy periods of inoperable monitoring equipment (*e.g.*, for continuously monitoring discharge flow and electrical conductivity) and entire weekends when the Discharger did not provide data to ensure compliance with monitoring requirements. The Discharger was issued an NOV on 8 May 2002 for submitting incomplete SMRs for January through March 2002. While SMR deficiencies decreased after June 2002, SMRs remained incomplete largely due to recurring and long-lasting monitoring equipment malfunctions (June, July, August, September, October 2002; January, February, March, June, July, August, and October 2003), as well as insufficient staffing to conduct weekend monitoring (October 2002 through May 2004).

- Task 1 violations after 1 March 2004 were due, in part, to failure to conduct daily monitoring of ponded wastewater (i.e., hydrogen sulfide and dissolved oxygen content and available freeboard) on weekends in March 2004. The Discharger is required to submit substantial data in its SMRs. Weekend monitoring data is a relatively small part of the overall requirement, but nonetheless serves a purpose. As the Discharger was consistently in noncompliance during the week with DO below the minimum 2 mg/L required by WDRs, the weekend monitoring did not prove critical in determining whether the Discharger was consistently in compliance.

- It is appropriate and reasonable not to impose a penalty for Task 1 violations that occurred from 1 September 2002 to 1 March 2004, and to reduce the penalty during the remainder of the period, in part, for failure to conduct weekend monitoring to account for the relatively low gravity of the omitted information compared to the information that the Discharger did submit. For these reasons, the maximum penalty of $2,057,500 specified under terms of the TSO is reduced to a penalty of $380,000.

- Task 5 of the TSO requires compliance with an effluent limit for dissolved inorganic solids or DIS, the inorganic fraction of total dissolved solids (TDS). WDRs R5-2002-0148 replaced the effluent DIS limit for limits on TDS (2,047 mg/L), sodium (597 mg/L), and chloride (601 mg/L). In its adoption of CAO No. R5-2002-0149, the Regional Water Board acknowledged the Discharger's inability to immediately comply with effluent TDS and sodium limits and established higher interim limits for TDS and sodium along with a time schedule for a phased reduction to limits in WDRs R5-2002-0148. It is not reasonable to impose the prescribed TSO penalty for an exceedance of the effluent limitation in Task 5 that did not also exceed

the greater limitation in CAO No. R5-2002-0149 for TDS or sodium, or the limitation for chloride in WDRs R5-2002-0148. Eight of the 12 exceedances of the effluent limitation in Task 5 also exceeded the revised limitations in CAO No. R5-2002-0149 (seven TDS limit exceedances and one sodium limit exceedance), and one Task 5 exceedance also exceeded the chloride limit in WDRs R5-2002-0148. The maximum penalty of $30,000 specified under terms of the TSO is reduced to $22,500.

- Task 8 of the TSO (submittal of a report evaluating the facility's domestic wastewater disposal system) was violated when the Discharger submitted a report on time but was determined by staff to be substantially incomplete and lacked proper technical justification. In a 19 April 2002 letter, staff notified the Discharger of the deficiencies and required a revised report be submitted by 30 May 2002. The letter did not warn that each day the report was late past the TSO due date would be considered a violation of Task 8. The next report was complete and satisfied the objective. Though the violation was completely avoidable, it had no lasting consequences. The low gravity warrants a reduction from the $175,000 specified by the TSO. An appropriate penalty for the Task 8 violations is $6,000.

c. *Extent*: To date, the Discharger has accrued more than 7,000 violations of CAO No. R5-2002-0148 and TSO No. R5-2002- 0014 (September 2002 through June 2007), including violations of Discharge Prohibitions A.1, A.2, and A.3; Discharge Specifications B.1, B.4, B.5.a, B.5.b, B.5.c, B.6, and B.9; Effluent Limitations C.1, C.2, C.3.a, C.3.b., C.3.c, and C.4; Land Application Area Specifications D.1, D.2, D.7, D.9, D.12, D.13.a, D.14, and D.15.

d. *Gravity*: Of the more than 7,000 violations described above, approximately 42% of the violations were related to noncompliance with requirements that applied to the million-gallon pond, specifically freeboard limitations and stringent pond pH, dissolved oxygen, and dissolved sulfide limitations included in the current waste discharge requirements to address nuisance odor condition. Nuisance odors have been substantially reduced and the Regional Board has not received odor complaints for nearly three years. The Discharger has recently replaced the million-gallon pond with a tank. Approximately 25% of the violations were related to non-compliance with requirements that applied to the 84 million gallon reservoir, specifically pond pH, dissolved oxygen, and dissolved sulfide limitations. The Discharger has added aerators to this reservoir. Approximately 24% of the violations were related to monitoring requirements. In general these violations are considered operational in nature and did not result in significant water quality or environmental concerns. The remaining violations were effluent limit violations, specifically related to salinity of the discharge. The impact of

those violations, the impact on groundwater, and the methods for reducing salinity are still under review pursuant to Regional Water Board orders.

e. *Susceptibility to Cleanup or Abatement*: The violations described in Attachment B vary in terms of their effect; some are transient, while others may have long-lasting or permanent impacts. The effects of the violations may not be susceptible to cleanup, but are susceptible to abatement.

f. *Degree of Toxicity:* The waste discharge requirements and applicable orders have included interim salinity limits. Land application of the wastewater on the property has resulted in increased soil salinity and the Discharger is in the process of growing highly salt tolerant hybrid grasses to control erosion and take up salt. The salty waste can impact beneficial uses of groundwater and can impact aquatic life in surface water if discharged. The Discharger is currently evaluating whether there are significant impacts to groundwater and is required to prevent surface water discharges of the wastewater. Based on the results of new information, the Regional Water Board will be updating waste discharge requirements.

g. *Ability to Pay*: As the Discharger has proposed to settle for the amount required to be paid by this Order, contingent upon a payment schedule, it appears that the Discharger is able to pay the specified amount.

h. *Effect on Ability to Continue in Business*: As the Discharger has proposed to settle for the amount required to be paid by this Order, contingent upon a payment schedule, it appears that the Discharger is able to pay the specified amount and continue in business.

i. *Voluntary Cleanup Efforts*: The Discharger has made attempts to abate the effects of its discharge. Musco has provided information to the Regional Water Board that it has expended substantial funds to conduct numerous studies to evaluate technologies, including unsuccessful efforts to use reverse osmosis treatment; made very substantial changes in its operations to achieve compliance, including planting salt tolerant grasses to prevent erosion, implementing enhanced evaporation pilot studies, and implementing process wastewater volume reduction strategies; and has resolved nuisance odor conditions at the facility.

j. *Prior History of Violations*: The Discharger has an extensive history of violations, as documented in Attachments A and B, WDRs Order No. R5-2002-0148, Cleanup and Abatement Orders No. 5-00-717 and No. R5-2002-0149, Time Schedule Orders No. R5-2002-0014 and R5-2002-0014-R01, and Administrative Civil Liability Complaint No. R5-2002-0502.

k. *Degree of Culpability*: The Discharger was aware of the requirements and limitations contained within WDRs No. R5-2002-0148. As described above,

most of the violations listed in Attachments A and B were avoidable had the Discharger expended the necessary resources to comply; therefore, the Discharger is fully culpable for these violations.

l. *Economic Benefit*: Regional Water Board staff estimated that the economic benefit derived from the violations listed in Attachment A to be greater than $182,500. Regional Water Board staff consulted with State Water Board staff in estimating the economic benefit derived by the Discharger for the violations described in Attachment B. In calculating the economic benefit, State Water Board staff utilized the United States Environmental Protection Agency's (U.S. EPA) BEN model and considered either treatment or containment as a reliable means of compliance, in addition to replacement of the million-gallon pond. In addition, the Discharger has avoided costs associated with monitoring of the million-gallon pond and 84-MG reservoir for 204 required days of monitoring. The initial date of noncompliance was assumed to be 6 September 2002. State Water Board staff estimated the present value of the economic benefit derived by the Discharger in failing to comply with WDRs Order No. R5-2002-0148 to be no less than the following values:

Compliance Measure	Economic Benefit
Avoidance of required monitoring	$1,000
Replacement of million-gallon pond	$79,000
Biological and physical wastewater treatment	$7,100,000 to $8,800,000
Total Estimated Economic Benefit:	**$7,180,000 to $8,880,000**

The total economic benefit derived by the Discharger for the violations listed in Attachments A and B ranges from $7,362,500 to $9,062,500.

The Discharger maintains that no economic benefit was realized. During the period from 25 January 2002 to 31 October 2007, the Discharger asserts that it expended over $10 million to bring its facilities into compliance. These expenditures include a reverse osmosis pilot project, improvements to on-farm water management systems, including the 84-million gallon reservoir, planting of NyPa salt grass throughout the site, implementation of a new olive process (using less salts), construction of a 200,000-gallon tank to replace the million-gallon pond, and construction of an enhanced evaporation slab pilot project. These investments by Musco to come into compliance have been made in spite of an analysis by Industrial Economics in September 2005 that, based on the U.S.EPA BEN model (as described in the State Water Board Enforcement Policy) the Discharger did not have the ability to pay the $493,500 penalty and stay in business at the time of the analysis.

m. *Other Matters as Justice May Require*: The disposal of olive processing wastewater by spray irrigation to land is unique to the Discharger's operation. According to the California Department of Food and Agriculture, California is the largest producer of olives in the United States. There are only two olive processors in California - Musco and Bell Carter. Former olive processors in the Central Valley, including those acquired by the Discharger, disposed of olive processing wastewater to ponds that became subject to Title 27. The other major olive processor in the United States (Bell Carter) discharges to the Sacramento River and is regulated under a National Pollutant Discharge Elimination System (NPDES) permit.

In the two decades that the Discharger's land application of olive processing wastewater has been regulated by the Regional Water Board, Regional Water Board staff have conducted at least 20 site inspections. More than a dozen Notices of Violation have been issued by Regional Water Board staff since mid-2001. As described above, the Discharger has been issued two Cleanup and Abatement Orders, a CWC Section 13308 Time Schedule Order, and an Administrative Civil Liability Complaint since late 2000. In addition, a Cease and Desist Order is scheduled for consideration by the Regional Water Board on the same date as this Order. The record indicates that the Regional Water Board and its staff have clearly and consistently communicated compliance expectations and consequences to the Discharger.

SUMMARY

The ACL Order would not recover the estimated economic benefit as set forth above. The ACL Order, however, would recover a substantial penalty that is consistent with the nature of the violations and recent actions of the Discharger to achieve compliance. Most of the violations are operational in nature and did not result in environmental harm. The Discharger has addressed nuisance odor conditions, replaced a large pond with a tank, taken many steps to reduce salt and the use of water, and is continuing to evaluate methods to control salt and to evaluate impacts on the environment. The ACL Order includes not only a very substantial penalty, but requires the Discharger to obtain financial assurances to address the consequences if the Discharger were to quit operating the business. There is a history in the Central Valley Region of several olive processors causing significant environmental harm, then becoming insolvent and initiating bankruptcy proceedings, with no one left to cleanup the remaining problems. The financial assurances required by this Order would address the Regional Water Board's ongoing concern with financial stability.

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