



Lahontan Regional Water Quality Control Board

July 28, 2023

Mr. David W. Park, Park Livestock Co.
2837 Topaz Lane
Topaz, CA 96133

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7021 2720 0003 2708 2461**

Valerie Kincaid (Counsel for Dischargers)
Paris Kincaid Wasiewski LLP
1800 J Street
Sacramento, CA 95811

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7021 1970 0001 8927 1009**

ENFORCEMENT PROGRAM: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R6T-2023-0027, DAVID PARK AND PARK LIVESTOCK CO.

Enclosed is an administrative civil liability complaint (Complaint) issued pursuant to California Water Code sections 13268 and 13323. The Complaint alleges that David Park and Park Livestock Company (referred to collectively as Dischargers) violated provisions of the Water Code and the Clean Water Act when they discharged waste to the West Walker River. The Complaint recommends an administrative civil liability in the amount of **three million fifty-three thousand and twenty-six dollars and forty-two cents (\$3,053,026.42)**.

A hearing will be scheduled for the **October 25-26, 2023** Regional Board meeting. This hearing will be governed by a Hearing Procedure which will be issued by the Advisory Team.

In order to conserve resources, this letter transmits paper copies of the documents to the Dischargers only. Interested persons may request the documents from Elizabeth van Diepen, whose contact information is provided below. Additional information about this matter will be posted to: www.waterboards.ca.gov/lahontan.

If you have any questions or comments regarding the Complaint, please contact Elizabeth van Diepen at (530) 542-5492 or elizabeth.vandiepen@waterboards.ca.gov.

Sincerely,

John B. Letton
Assistant Executive Officer

See next page for Enclosure and cc information -

Mr. David W. Park, Park Livestock Co. - 2 -
Valerie Kincaid (Counsel for Dischargers)

July 28, 2023

Enclosure: Complaint with Attachment A

cc *(via email only)*:

Vaneeta Chintamaneni, Attorney III, SWRCB Office of Enforcement
Naomi Rubin, Attorney IV, SWRCB Office of Enforcement
David Boyers, Assistant Chief Counsel, SWRCB Office of Enforcement
Elizabeth Beryt, Attorney IV, SWRCB Office of Chief Counsel
Michael R. Plaziak, PG, Executive Officer, Lahontan Water Board
Elizabeth van Diepen, Engineering Geologist, Lahontan Water Board
Shelby Barker, Sr. Engineering Geologist, Lahontan Water Board

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R6T-2023-0027
IN THE MATTER OF PARK LIVESTOCK CO. AND DAVID PARK**

WEST WALKER RIVER, MONO COUNTY

This administrative civil liability complaint (Complaint) is issued to Park Livestock Co. and David Park (Dischargers) by the Assistant Executive Officer of the California Regional Water Quality Control Board, Lahontan Region (Regional Board), on behalf of the Prosecution Team (collectively, the Parties) pursuant to California Water Code sections (Water Code) 13385 and 13323. This Complaint proposes imposing an administrative civil liability of \$3,053,026.42 based on evidence that the Dischargers violated provisions of the Water Code and the Clean Water Act when they discharged waste to the West Walker River.

The Assistant Executive Officer of the Regional Board alleges the following:

Background

1. At all times relevant to this action, Park Livestock Co. has leased the land located at 113548 and 113052 Highway 395 in Antelope Valley (Site), Mono County Assessor's Parcel Nos. 001-100-059 and 001-100-027, respectively. David Park is a part owner, president, and majority shareholder of Park Livestock Co.
2. On March 19, 2019, Nick Buckmaster of the California Department of Fish and Wildlife (CDFW) called Liz van Diepen of the Regional Board to report unpermitted channel disturbance (i.e., earthwork) in the West Walker River north of Coleville in northern Mono County, which is a water of the United States. Mr. Buckmaster informed Ms. van Diepen that a complaint had been reported to CDFW Warden Chad Elliott earlier that day.
3. On March 19, 2019, Mr. Elliott inspected the Site and reported to Ms. van Diepen his observations of a bulldozer and two backhoes, operated by three laborers, actively moving sediment in the river channel. Mr. Elliott reported that he then halted the work and issued a citation to Mr. Park, who made the decision to have the work done and directed employees of Park Livestock Co. to perform the work.
4. On March 25, 2019, with the consent of Mr. Park, Regional Board staff Ms. van Diepen and Kerri O'Keefe accompanied Mr. Elliott and Mr. Buckmaster to inspect the Site to assess water quality impacts from the unpermitted activity. Photographs and videos show heavy mechanical equipment in the river channel, which moved earthen material to allegedly protect cattle grazing lands from erosion during anticipated spring melt river flows. During the inspection, Regional Board staff discussed the matter with Mr. Park who stated that the work in the West Walker River began on March 18, 2019 and was being done at his direction. Mr. Park stated he leased the Site and primarily used the land for cattle grazing operations. Mr. Park

stated that he was conducting the work in order to straighten the river and reduce the amount of riverbank erosion he expected upcoming spring flood flows to cause.

5. During the inspection, Regional Board staff noted that a large portion of the bed of the West Walker River had been graded. Mature riparian vegetation and anaerobic soils had been removed, as evidenced by stockpiles of organic material on the east bank of the West Walker River at the upper end of the disturbed area. Based on Regional Board staff observations and conversations with Mr. Park, two cut banks (outer bends) had been filled using material from opposing point bars (inner bends) of the West Walker River.
6. The Dischargers failed to obtain the required Clean Water Act section 404 permit from the United States Army Corps of Engineers, Clean Water Act section 401 Water Quality Certification from the Regional Board, and Fish and Game Code section 1600 Lake and Streambed Alteration Agreement from CDFW.
7. As a result of Regional Board staff observations made during the March 25, 2019 inspection, the Regional Board issued Mr. Park Investigative Order No. R6T-2019-0258 (Investigative Order) pursuant to Water Code section 13267 on August 9, 2019, requiring Mr. Park to submit technical reports addressing specific issues related to the unpermitted activities observed by Regional Board and CDFW staff.
8. On October 9, 2019, Mr. Park responded to the Investigative Order by submitting a report documenting the unpermitted grading and excavation work. The report estimated that 11,300 cubic yards of material was deposited to the subject portion of the West Walker River between 2011 and September 2019 based on available data but stated it was not possible to accurately characterize the volume of discharge related to the Dischargers' activities due to inundation of the disturbed area by flood flows between the time of the unpermitted activity and issuance of the Investigative Order. The Prosecution Team rejects the contention that it is not possible to estimate the volume of discharge resulting from the grading activities that took place on March 18 and 19, 2019.
9. Based on a review of satellite imagery representative of Site conditions during the Dischargers' unpermitted dredge and fill activities and Site photographs taken at the March 19 and 25, 2019 inspections, it is estimated that at least 381,843 gallons (or 1,891 cubic yards) of earthen material were discharged to the West Walker River as a result of the Dischargers' activities.¹

¹ The Prosecution Team's volume analysis may be read in accordance with the Dischargers' Investigative Order. It is reasonable to attribute 16.7% of the material the Dischargers estimate were deposited to the subject portion of the West Walker River over an eight-year period to the Dischargers' dredge and fill activities, and the remaining 83.3% to natural accretion and avulsion (1,891 cubic yards is 16.7% of 11,300 cubic yards).

10. The Dischargers are responsible for the unpermitted dredge and fill activities in the West Walker River. Park Livestock Co. carried out the activities that caused the violation and is, thus, appropriately named herein. Mr. Park is liable for these activities pursuant to the Responsible Corporate Officer Doctrine. “[A]n affirmative duty is properly placed on corporate officers by strict liability statutes regulating the public welfare. “[I]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. [Citation.]” (*People v. Matthews* (1992) 7 Cal.App.4th 1052, 1062, citing *U.S. v. Dotterweich* (1943) 320 U.S. 277, 281; *People v. Roscoe* (2008) 169 Cal.App.4th 829.) Mr. Park is the president and primary owner of Park Livestock Co. The activities that caused the violations were performed at his sole direction. Mr. Park’s actions and inactions facilitated the violations.

Alleged Violations

11. Section 301 of the Clean Water Act (33 U.S.C. § 1311) and Water Code section 13376 prohibit the discharge of pollutants to waters of the United States, except in compliance with a permit for dredge and fill material.
12. The Prosecution Team alleges that the Dischargers violated Section 301 of the Clean Water Act and Water Code section 13376 for a period of two days (March 18 through March 19, 2019) by discharging fill material to waters of the United States without a permit or Clean Water Act section 401 Water Quality Certification. The unauthorized activity resulted in the discharge of approximately 381,843 gallons (or 1,891 cubic yards) of sediment to waters of the United States.

Calculation of Penalties Under Water Code Section 13385

13. Water Code section 13385 states, in relevant part:
 - (a) Any person who violates any of the following shall be liable civilly in accordance with this section:
 - (1) Section 13375 or 13376.
 - ...
 - (5) A requirement of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the federal Clean Water Act, as amended.
14. Water Code section 13385 states, in relevant part:
 - (c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:
 - (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
 - (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned

up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

Proposed Administrative Civil Liability

15. Pursuant to Water Code section 13385(e), in determining the amount of any civil liability imposed under Water Code section 13385(c), the Regional Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
16. On April 4, 2017, the State Water Resources Control Board adopted Resolution No. 2017-0020 amending the Enforcement Policy. The Enforcement Policy was approved by the Office of Administrative Law and became effective on October 5, 2017. 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 13385(e).
17. The maximum penalty for the violations is \$3,828,430.00. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the estimated economic benefit of \$51,275, 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 \$56,402.50. Based on consideration of the above facts and after applying the penalty methodology and allowing for staff costs pursuant to the Enforcement Policy, the Assistant Executive Officer of the Regional Board proposes that civil liability be imposed administratively on the Dischargers in the amount of **\$3,053,026.42**. The specific factors considered in this penalty are discussed in detail in Attachment A.

Regulatory Considerations

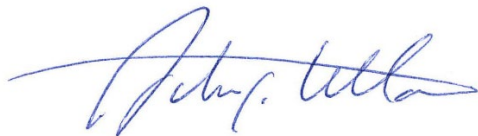
18. Notwithstanding the issuance of this Complaint, the Regional Board retains the authority to assess additional penalties for unpermitted discharge violations which have not yet been assessed or for violations that may subsequently occur.
19. An administrative civil liability may be imposed pursuant to the procedures described in Water Code section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.

California Environmental Quality Act

20. Issuance of this Complaint to enforce Water Code Division 7, Chapter 5.5 is 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(a)(2).

THE DISCHARGERS ARE HEREBY GIVEN NOTICE THAT:

1. The Prosecution Team proposes an administrative civil liability in the amount of **three million fifty-three thousand and twenty-six dollars and forty-two cents (\$3,053,026.42)**. The amount of the proposed civil liability is based upon a review of the factors cited in Water Code sections 13327 and 13385, as well as the Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be conducted by the Regional Board on October 25-26, 2023.
3. If a hearing is held before the Regional Board, the board may choose to impose the recommended administrative civil liability, impose a different amount, decline to impose administrative civil liability, or refer the matter to the Attorney General to have a superior court consider enforcement.
4. There are no statutes of limitations that apply to these proceedings. The statutes of limitations that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not an administrative proceeding. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, section 405(2), p. 510.
5. Payment of the assessed liability amount does not absolve the Dischargers from complying with all applicable laws.



John B. Letton
Assistant Executive Officer

July 28, 2023

Date

Attachment A: Administrative Civil Liability Methodology

ATTACHMENT A

ADMINISTRATIVE CIVIL LIABILITY METHODOLOGY

The State Water Resource Control Board's (State Water Board) 2017 Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code (Water Code) section 13385(e). Each factor of the ten-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

Violation Synopsis

Unauthorized Discharge of Fill Material to Waters of the United States

On March 18 through March 19, 2019, Park Livestock Co. and David Park (Dischargers) discharged 381,843 gallons (or 1,891 cubic yards) of fill material (earthen materials) to waters of the United States without first obtaining a National Pollutant Discharge Elimination System permit, or a Clean Water Act section 404 permit or a Clean Water Act section 401 Water Quality Certification, which constitutes violations of Clean Water Act section 301 and Water Code section 13376. This violation subjects the Dischargers to administrative civil liability pursuant to Water Code section 13385.

While the Prosecution Team could have alleged assessed administrative civil liability for the dredging activities, in an exercise of discretion it proposes only the assessment administrative civil liabilities for the discharge of fill material. In addition, in regard to the per-day assessment for the discharge of fill materials, the Prosecution Team could have alleged each day that fill material remained in place as a day of violation—this would have resulted in a substantial increase in administrative civil liabilities, but instead the Prosecution Team elected to allege only two days of violation.¹

Step 1 – Actual Harm or Potential for Harm for Discharge Violations

Step 1 considers the harm that the violation caused or may have caused using a three-factor scoring system to quantify. The three-factor scoring system includes: (1) the degree of toxicity of the discharge; (2) the actual or potential for harm to beneficial uses; and (3) the discharge's susceptibility to cleanup or abatement for each violation or group of violations.

Factor 1: The Degree of Toxicity of the Discharge

¹Days of violation may be calculated as each day fill remains in place, as opposed to active days of placing fill. *United States v. Cumberland Farms of Connecticut, Inc.* (1986) 647 F.Supp. 1166; *U.S. v. Tull*, (1983) 615 F. Supp. 610.

This factor evaluates the degree of toxicity by considering the physical, chemical, biological, and/or thermal characteristics of the discharge, waste, fill, or material involved in the violation or violations and the risk of damage the discharge could cause the receptors or beneficial uses. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways.

Discharges of sediment cloud receiving water, which reduces the light transmitted to underwater growing plants and reduces the ability of underwater plants to produce energy and dissolved oxygen through photosynthesis. Sediment discharges can also clog fish gills, smother aquatic habitat and spawning areas, and bury macroinvertebrates. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can negatively impact aquatic life and habitat, and can expose human and wildlife receptors to adsorbed toxicants.

Due to the physical characteristics of the earthen materials discharged into the river and their ability to smother and subsequently kill aquatic organisms, the characteristics of the discharged material poses a **moderate** risk or threat to potential receptors. The Enforcement Policy defines moderate as:

Discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of threat to potential receptors).

Accordingly, a score of **2** is assigned to this factor.

Factor 2: Actual Harm or Potential Harm to Beneficial Uses

This factor evaluates the actual harm or the potential harm to beneficial uses by considering the harm to beneficial uses in the affected receiving water body that may result from exposure to the pollutant or contaminants in the discharge consistent with the statutory factors of the nature, circumstances, extent, and gravity of the violation(s). A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5).

The Water Quality Control Plan for the Lahontan Region (Basin Plan) is designed to preserve and enhance water quality and protect the beneficial uses of all surface and ground waters in the Lahontan Region. The Basin Plan includes the following beneficial uses for the West Walker River (405.43):

- 1) Municipal and Domestic Supply (MUN)
- 2) Agricultural Supply (AGR)
- 3) Groundwater Recharge (GWR)

- 4) Navigation (NAV)
- 5) Water Contact Recreation (REC-1)
- 6) Noncontact Water Recreation (REC-2)
- 7) Commercial and Sportfishing (COMM)
- 8) Cold Freshwater Habitat (COLD)
- 9) Wildlife Habitat (WILD)
- 10) Spawning, Reproduction, and Development (SPWN)

The Dischargers discharged approximately 1,891 cubic yards or 381,843 gallons of earthen materials, damaging or destroying approximately 2 acres of habitat located between the banks of the West Walker River by burying and/or altering the riverbed, and likely increasing turbidity levels in the West Walker River downstream of the discharge. Beneficial uses that were harmed or potentially harmed include COLD, WILD, SPWN, COMM, REC-1, REC-2, NAV, and MUN.

The discharge of earthen materials and grading within the river channel likely adversely impacted COLD, SPWN, WILD, and COMM beneficial uses. The discharge of earthen materials into the river buried cold freshwater habitat (COLD beneficial use), destroying any existing spawning habitat for fish in the affected river channel (SPWN beneficial use), and destroying habitat for macroinvertebrates that are a food source for fish, birds, and other wildlife (WILD beneficial use). Creating sufficiently high turbidity levels can also result in harm to fish (COLD beneficial use) causing reduction in feeding, reducing resistance to disease, lowering growth rates, and affecting egg and larval development. Grading the riverbed also likely disturbed/destroyed any existing spawning habitat for fish in the affected river channel (SPWN beneficial use), and disturbed habitat for macroinvertebrates (COLD/WILD beneficial uses). Sportfishing (COMM beneficial use) was also likely adversely affected through harm to fish (potential mortality), destruction of any existing spawning habitat in the affected river channel, and a reduction in the visibility of lures and bait due to increased turbidity levels downstream of the affected river channel.

The discharge of earthen materials and grading activities within the river channel also has the ability to adversely affect REC-1 and REC-2 beneficial uses due to increased turbidity levels. Recreational activities such as swimming, wading, and kayaking/floating tend to decrease if water is turbid. Additionally, the NAV beneficial use would have been impacted where the discharge and grading activity were occurring due to heavy equipment use and moving significant quantities of earthen materials into the river.

The MUN beneficial use was potentially impacted due to increased turbidity levels that likely occurred when earthen materials were discharged into the river and grading

activities were occurring within the river. Such discharges and activities have the ability to increase turbidity levels beyond the maximum contaminant level (MCLs) for drinking water established by the State Water Board's Division of Drinking Waters. Typically, when turbidity levels increase in the raw water supply (i.e., the river), increased water treatment to reduce turbidity levels or time to allow turbidity levels to return to acceptable levels is required.

Based upon the information provided above, the discharge of earthen materials into and grading activity within the West Walker River channel resulted in major harm to beneficial uses of the West Walker River. The impacts discussed above could last for two to three days (e.g., increased turbidity levels) or for months or longer until river flows are able to redistribute the discharged earthen materials downstream and river channel conditions are restored to pre-discharge and pre-grading conditions. The Enforcement Policy defines major as:

A high harm or threat of harm to beneficial uses. A score of major is typified by observed or reasonably expected potential significant impacts, and involves potential for or actual acute, and/or chronic (e.g., more than five days) restrictions on, or impairment of, beneficial uses, aquatic life, and/or human health.

Accordingly, a score of **5** is assigned to this factor.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if the discharger cleans up 50 percent or more of the discharge within a reasonable amount of time. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement, or if 50 percent or more of the discharge is susceptible to cleanup or abatement, but the discharger failed to clean up 50 percent or more of the discharge within a reasonable time. Natural attenuation of discharged pollutants in the environment is not considered cleanup or abatement for purposes of evaluating this factor.

Less than 50 percent of the discharge was susceptible to cleanup and abatement given the high flows in the river following the discharge. Therefore, a value of **1** is assigned to this factor.

Final Score – “Potential for Harm”

The scores for the three factors are added to provide a Potential for Harm score for each violation or groups of violations. A final score of **8** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessments for Discharge Violations

The Enforcement Policy provides that the initial liability amount shall be determined on a per day and a per gallon basis per Water Code section 13385, subdivision (c), using the Potential for Harm score from Step 1 in conjunction with the Extent of Deviation from the Requirement of the Violation (see Enforcement Policy Table 1 and 2).

Extent of Deviation from the Requirement

When there is a discharge, the Regional Board is to determine the initial liability amount on a per gallon basis using the same Potential Harm score from Step 1 and the Extent of Deviation from Requirements of the violation. The Deviation from Requirement score reflects the extent to which the violation deviates from the specific requirement.

In this case, the requirement (i.e., Clean Water Act sections 404 and 401) was to obtain the appropriate federal dredge and fill permit and associated state water quality certification prior to the initiation of the discharge of earthen materials to and grading activities within the West Walker River. If the Dischargers had applied for these permits, Regional Board staff would have worked diligently with the Dischargers to avoid, minimize, and mitigate the discharges and their impacts, described above, as state and federal policies require. The majority, if not all, of the surface water impacts would have been avoided if the Dischargers had applied for and received the appropriate Regional Board and other environmental agency permits. Doing so would have likely involved an alternatives analysis showing there were feasible alternatives (e.g., riverbank stabilization with a temporary diversion during construction) that would achieve project objectives, while significantly reducing short-term and long-term environmental impacts

The above-referenced discharge of earthen materials into and grading within the West Walker River without obtaining appropriate permits is a **major** deviation from the requirement. The Enforcement Policy defines “major deviation” as:

The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential function).

The Dischargers did not attempt to apply for and obtain the appropriate Regional Board permits. Accordingly, based upon a Potential for Harm score of 8 and major deviation from the requirement, the per-gallon and per-day factors are both **0.6**.

Water Code section 13385(c)(2) states that the civil liability amount is to be based on the number of gallons discharged but not cleaned up, over 1,000 gallons for each spill event. Of the 381,843 gallons discharged that reached surface water, a total of 380,843 gallons was discharged in excess of 1,000 gallons into waters of the United States.

Initial Liability Amount

The initial base liability amount for the discharge is calculated as follows:

$$[(\text{per-gallon factor}) \times (\text{gallons discharged but not cleaned up over 1,000 gallons}) \times (\text{maximum per-gallon liability})] + [(\text{per-day factor}) \times (\text{days of violation}) \times (\text{maximum per-day liability})] = \text{Initial Base Liability}$$

$$[(0.6) \times (380,843 \text{ gallons}) \times (\$10/\text{gallon})] + [(0.6) \times (2 \text{ days}) \times (\$10,000/\text{day})] = \$2,297,058$$

Step 3 – Per Day Assessments for Non-Discharge Violations

This analysis addresses discharge violations only. Step 3 is therefore not applicable.

Step 4 – Adjustment Factors

The Enforcement Policy describes three factors related to the violator's conduct that should be considered for modification of the amount of initial liability: the violator's culpability, the violator's efforts to clean up or cooperate with regulatory authorities after the violation, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed liability amount for each violation to determine the revised amount for that violation.

Degree of Culpability

This factor considers a discharger's degree of culpability. Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier for negligent behavior.

A reasonable person would have made the appropriate inquiries regarding permitting prior to undertaking the action that resulted in the unauthorized discharge of waste to waters of the United States. The Dischargers did not anticipate what a reasonable person would have done and did not take the appropriate action to avoid the violations. While the Dischargers were aware of permitting requirements, the Dischargers believed they were acting under an emergency exemption. However, the Dischargers did not exercise due diligence in ascertaining whether an emergency exemption applied. A reasonable person would have done so. Thus, a value of **1.2** has been assigned to this factor.

History of Violations

The Enforcement Policy states that if the discharger has a prior history of violations within the last five years, the Regional Board should use a multiplier of 1.1. Where the

discharger has a history of similar or numerous dissimilar violations, the Regional Board should consider adopting a multiplier above 1.1.

The Dischargers do not have a history of violations. Therefore, a neutral value of **1** has been applied.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperates with regulatory authorities in returning to compliance and correcting environmental damage after the violation. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation.

The Dischargers met with Regional Board staff in the field on March 25, 2019 to discuss the violations. On April 15, 2019, the Regional Board issued a Notice of Violation with recommendations to stabilize the disturbed riverbanks and provide a long-term restoration plan for the disturbed site. While the Dischargers communicated with Regional Board staff regarding proposed immediate measures to stabilize material, they failed to propose a long-term restoration plan for the disturbed site, as requested in the Notice of Violation. Therefore, a factor of **1.1** was selected.

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. This results in a Total Base Liability Amount of \$3,032,116.56 (1.2 multiplied by 1 multiplied by 1.1 multiplied by \$2,297,058).

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

The ability to pay and to continue in business must be considered when assessing administrative civil liability. The Prosecution Team conducted a preliminary asset search of publicly available information and finds that the Dischargers have the ability to pay the proposed liability because Park Livestock, Co. is a business that continues to operate and generate profits.

In addition, publicly available information indicates that the land assets associated with Dischargers are significant. These assets include real property identified as Mono County tax assessor parcel numbers 001-040-018-000, 001-150-011-000, 001-150-003-000, 001-060-029-000, 001-040-011-000, 001-060-030-000, 001-060-034-000, 001-060-033-000, 001-060-036-000, 001-150-001-000, 001-140-002-000, 001-040-008-000, 001-060-031-000, 001-040-002-000, 001-060-035-000, 001-060-032-000, 001-140-004-000, 002-080-002-000, and 001-140-005-000. The total assessed value of these properties is \$5,148,943.

Based on publicly available information, the Prosecution Team believes that the Dischargers have the ability to pay the proposed liability and remain in business.

However, the Enforcement Policy recognizes that it is difficult to evaluate a violator's ability to pay and continue in business because many financial records are private and within the exclusive possession of the violator.

Since the Prosecution Team has made an initial showing that the Dischargers have an ability to pay, the Enforcement Policy shifts the burden to the Dischargers to provide evidence of an inability to pay. The Enforcement Policy goes on to state the Water Boards should treat that failure to produce financial documents in response to a subpoena as a waiver of the Dischargers' right to challenge their ability to pay or effect on their ability to continue in business at the hearing, or an admission that the Dischargers are able to pay the proposed liability and that the proposed liability will not affect their ability to continue in business.

Step 7 – Economic Benefit

Estimated Economic Benefit: \$51,275

Pursuant to Water Code section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute a violation. The economic benefit here is based on the dredge (excavation) and fill activity that occurred on the site from March 18 through March 19, 2019.

The violation that is being assessed in this economic benefit analysis is the failure to obtain a 401 water quality certification. Section 401 of the Clean Water Act (CWA) requires that discharges into waters of the United States must obtain a 401 water quality certification, which includes projects involving discharges of dredged or fill material. The Dischargers conducted a dredge and fill operation and straightened a section of the West Walker River, an activity that would have required a 401 water quality certification. This operation would not have been allowed, but rather, the Regional Board would have permitted a bank stabilization project. For this analysis, a conservative approach was taken and broken down into two parts: the avoided cost of failing to obtain a 401 water quality certification, and the avoided cost of implementing a bank stabilization project.

Based on the inspection reports and information provided by the Regional Board, the banks of the Lower and Upper disturbed areas are 660 and 905 feet, respectively. The average width for bank stabilization is assumed to be 5 feet. Therefore, the total riparian area that would have required bank stabilization is 7,825 square feet, or 0.18 acres. The 2018/2019 dredge fill calculator was used to determine the cost to obtain certification, resulting in an application fee cost of \$1,638 and a category A project fee of \$970. It is also assumed that the project would have been completed within a year (i.e., no annual fees).

Information provided by the Regional Board indicates that the bank stabilization project would have included riprap and vegetation. It is assumed that half would have been riprap and half would have been vegetation (i.e., 3,912.5 square feet of riprap and 3,912.5 square feet of vegetation, based on the total riparian area). The cost of the

riprap is \$105 per square foot² and a location factor of 1.141 is used³ resulting in a total riprap cost of \$52,081.90. Vegetation assumes live staking and only the cost of the stakes. Live stakes are to be placed 3 feet apart as a conservative approach (2-3 feet apart as described by the Best Management Practices Handbook for the Tahoe Regional Planning Agency⁴), resulting in a total of 434 live stakes needed. The cost of the live stakes is \$1 per stake⁵, resulting in a total vegetation cost of \$434.

For computational purposes, the compliance date and penalty payment date were established as November 10, 2022. Based on specific assumptions within the model, the total economic benefit of non-compliance was determined to be approximately \$51,275.

Step 8 – Other Factors as Justice May Require

The costs of investigation and enforcement are “other factors as justice may require” and may be considered by the Board as an increase to the Total Base Liability Amount in a manner that serves as a sufficient general and specific deterrent against future violations. There are no factors in this case that warrant a downward adjustment under this step.

Costs of Investigation and Enforcement Adjustment

Staff costs incurred by the Regional Board to date are \$20,909.86. This represents approximately 165 hours of staff time devoted to investigating and drafting the complaint. No attorneys’ fees and not all management staff rates were included in this calculation. It is appropriate to increase the Total Base Liability amount by this amount in consideration of these investigation and enforcement costs. Increasing the final proposed liability amount in this manner serves to create a more appropriate specific and general deterrent against future violations.

Final adjusted liability

The final adjusted liability is \$3,053,026.42.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts must be determined for comparison to the proposed liability.

² RSMMeans 2019, 31 37 Riprap, 0200 18” minimum thickness, not grouted, pg. 277.

³ RSMMeans 2019, Location Factor – Commercial, 942,956-958 Sacramento, pg. 640.

⁴ Best Management Practices Handbook, Tahoe Regional Planning Agency, May 2914, Section 4.2-d Vegetated Slope Stabilization, pg. 17.

⁵ Live Staking and Joint Planting, Contra Costa Clean Water Program, pg. 7.

Maximum Liability Amount: The maximum penalty is the sum of the statutory per day and per gallon penalties. Pursuant to Water Code section 13385, the maximum penalty is \$3,828,430.

Minimum Liability Amount: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, Regional Board staff estimate the Dischargers' economic benefit from the alleged violation is \$51,275. Therefore, the minimum liability amount pursuant to the Enforcement Policy is \$56,402.50.

Step 10 – Final liability Amount

The final liability amount consists of the added amounts for the violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. The proposed administrative civil liability is \$3,053,026.42.