

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
FOR THE CENTRAL VALLEY REGION**

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0502
RECOLOGY YUBA SUTTER LANDFILL &
FEATHER RIVER ORGANICS COMPOSTING FACILITY**

**RECOLOGY'S FACTUAL, LEGAL & TECHNICAL ANALYSIS
IN OPPOSITION TO THE ACL COMPLAINT
MARCH 18, 2015**

**SCHEDULED FOR HEARING
APRIL 16-17, 2015**

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I. INTRODUCTION

It is essential at the outset to understand what this proceeding is about, and what it is not about. This is not a case where environmental harm occurred. The prosecution team concedes that, while stormwater that came into contact with compost (“compost water”) overtopped Recology’s collection system of storage tanks, none of the compost water entered groundwater or surface water. The compost water briefly pooled on a low-lying portion of Recology’s property that is on native soil and not on top of a landfill unit, and Recology promptly collected the water and pumped it back into the collection system for disposal to the local wastewater treatment plant or for beneficial reuse as part of the composting process.

This is not a case where an ongoing violation is occurring. Within a week of the large rain event that first caused the collection system to overtop, Recology installed 20 additional storage tanks and made a variety of other system improvements, such that during the next major rain event, no compost water left a lined secondary containment area that had been installed to prevent a discharge. Further, after the second major rain event, Recology installed still more storage tanks such that no further overtopping of the system is anticipated during the design storm event specified in the August 19, 2013 Cleanup and Abatement Order (“CAO”), as amended.

This is not a case where Recology ignored the Regional Board’s requirements. The CAO required Recology to design and install its compost water collection system by October 1, 2014. Recology took this requirement seriously, hiring two independent engineering firms to design an appropriately-sized collection system and then installing the system in advance of the CAO deadline. Regional Board staff initially expressed concerns that the engineering calculations used to design the system underestimated the amount of compost water that would be generated during a heavy storm. In response to these concerns, Recology had its engineers reexamine and supplement the previous runoff calculations, and in an effort to be conservative, Recology chose to double the capacity of the system as compared to what the engineers had recommended.

The system that Recology timely installed worked well during the early rains of the 2014-2015 wet season and there were no problems in collecting and containing the compost water. But on December 3, 2014, a powerful storm overwhelmed the system and caused an overflow. Upon discovering that improvements were needed, and with another strong storm coming, Recology moved quickly to make substantial upgrades to the system’s capacity and performance. Recology also worked with the City of Marysville to maximize the disposal of compost water to the local wastewater treatment plant, in order to prevent a larger overflow from occurring. And it took steps to quickly remove compost water that had overflowed into the “Hog Farm” area of the site and to pump the water back into the collection system for disposal to the local wastewater treatment plant or for beneficial reuse in the composting process.

By the time the next powerful storm hit a week later on December 11, 2014, Recology had increased the capacity of the collection system from 12 to 32 storage tanks and had completed numerous other improvements to the piping and pumping components of the system. As a backstop to provide an additional measure of protection, Recology also installed a heavy plastic-lined secondary containment area in a portion of the Hog Farm area. There was another overflow on December 11, but the water was contained within the lined area and again Recology pumped the water back into the collection system for disposal to the local wastewater treatment

plant or for beneficial reuse on site. As with the December 3 rain event, the prosecution team concedes there was no discharge either to waters of the state or to waters of the United States. By December 12, 2014, Recology had added another seven storage tanks, for a total of 39, and this system is in compliance with the CAO. In short, Recology installed a system that it reasonably believed would meet the applicable design standard based on its engineers' recommendations, and after first discovering on December 3 that system improvements were needed, worked to fix the problem as expeditiously as possible, successfully doing so within a little more than a week.

The proposed penalty of \$440,440 simply does not match the facts. The ACL Complaint alleges that there was a continuous, ongoing non-discharge violation starting on October 1, 2014, even though Recology installed a collection system on time that exceeded its expert engineering consultants' recommendations and no problems occurred before December 3, 2014. The ACL Complaint alleges that the violation continued until January 20, 2015, even though the record shows that as of December 12, 2014, Recology had completed substantial upgrades to the system to achieve sufficient capacity. The ACL Complaint also overstates the potential for environmental harm and the extent of the deviation from the applicable requirement in the CAO. The ACL Complaint compounds these problems by overstating the culpability of Recology, which acted reasonably and responsibly by relying on the engineering calculations and design recommendations of its two qualified engineering consultants. Moreover, the ACL Complaint understates Recology's prompt and extensive cleanup and cooperation efforts following the December 3 rain event. Finally, the proposed penalty is not consistent with the Central Valley Regional Board's ACL precedents.

A fair and careful application of the relevant factors in the State Board's Water Quality Enforcement Policy to the facts in this proceeding shows a very different picture than what is portrayed in the ACL Complaint. Whereas the ACL Complaint alleges 112 days of violation, in fact the record shows 10 days of violation, from December 3 to December 12, which results in a maximum statutory penalty under the Water Code of \$50,000. Further, this maximum penalty is substantially reduced through the application of the factors in the Enforcement Policy, although the reduced penalty amount may not be less than the calculated economic benefit plus ten percent, which the ACL Complaint assesses at \$47,193. The Regional Board accordingly should modify the ACL in this proceeding to a final amount of \$47,193.

II. STATEMENT OF FACTS

A. The Feather River Organics Composting Operations at the Recology Yuba Sutter Site

The Recology Yuba Sutter site operated as a landfill for nearly 30 years, from 1967 to 1996. The site currently includes three closed landfill units (LF-1, LF-2 and LF-3). Recology conducts an active composting operation—called Feather River Organics—on top of one of the closed landfill units (LF-1), as well as a materials recovery facility, a vehicle maintenance yard, administrative buildings and a storage area. The site also includes an area called the “Hog Farm”; this area was used as a confined animal feed lot where hogs were raised and was never used as a landfill. Recology Ex. 1 (P. Graham Decl. ¶ 5) & Recology Ex. 2 (Feather River

Organics Site Plan). Photographs of the site, including the composting area and the Hog Farm, are included as Recology Ex. 3.

The Feather River Organics composting operations, which are the subject of this proceeding, provide a variety of important community and environmental benefits. As the U.S. Environmental Protection Agency has explained, composting of organic materials and the use of the resulting compost product serve to enrich soils; reduce the need for water, fertilizers, and pesticides in growing plants and crops; reduce the production of methane, a greenhouse gas, that would result from the disposal of compostable materials in landfills; and provide a low-cost alternative to artificial soil amendments. Recology Ex. 4 (EPA's webpage on composting: <http://www.epa.gov/composting/basic.htm> & <http://www.epa.gov/composting/benefits.htm>). The California Air Resources Board similarly has explained that "[c]omposting of organic waste material has become an important method of managing California's solid waste stream. Composting diverts biomass residue from landfills. This reduces the need for landfill capacity and the production of GHG emissions." Recology Ex. 5 (CARB's webpage on composting: <http://www.arb.ca.gov/cc/compost/compost.htm>). Echoing the findings of the U.S. EPA, CARB explains that "[c]ompost application to agricultural fields increases soil health while providing multiple co-benefits. Compost application reduces the amount of synthetic fertilizer needed, reduces the amount of water used, decreases soil erosion, increases soil carbon storage and reduces the use of herbicides." Recology Ex. 6 at 3 (CARB, *Method for Estimating Greenhouse Gas Emission Reductions from Compost from Commercial Organic Waste*, Nov. 14, 2011).

Feather River Organics has been permitted by the City of Marysville since 1997. In adopting its most recent use permit, UP-11-05, the City conducted an environmental review under the California Environmental Quality Act. Feather River Organics also has been permitted by the California Integrated Waste Management Board (now CalRecycle) since 1998 under Solid Waste Facility Permit #58-AA-0015. This permit is overseen by the local enforcement agency, the Yuba County Department of Environmental Health. Feather River Organics also holds a Permit to Operate issued by the Feather River Air Quality Management District. Recology Ex. 1 (P. Graham Decl. ¶¶ 6-7).

With respect to permitting by the Central Valley Regional Board, in August 2001, after reviewing the Report of Waste Discharge submitted by Recology's predecessor (Norcal Waste Systems), the Board authorized the composting operations at the site pursuant to the Board's Resolution No. 96-31 (*Conditional Waiver of Waste Discharge Requirements for Composting Operations*, Jan. 26, 1996) and determined that the operations would not adversely affect water quality. Recology Ex. 7 (Letter from Gary Carlton, Executive Officer, to Paul Sherman, Norcal Waste Systems, Aug. 14, 2001).

B. The 2003 Waste Discharge Requirements

The Regional Board's Resolution No. 96-31, along with other waivers of WDRs throughout the state that were in effect as January 1, 2000, expired by operation of law on January 1, 2003 pursuant to Senate Bill 390 (1999). Several months after the expiration of the Regional Board's composting waiver, the Regional Board issued Waste Discharge Requirements for the Recology Yuba Sutter site. Recology Ex. 8 (Central Valley Regional Water Quality Control Board, Waste Discharge Requirements Order R5-2003-0093, issued June 6, 2003). The WDRs were issued to

regulate post-closure maintenance and corrective actions at the closed landfill, where constituents of concern had been detected in monitoring wells since monitoring began in 1987. *Id.* at 4, ¶ 19.

Even though the statewide waiver for compost facilities had expired, the WDRs did not address the ongoing composting operations at the site. The Regional Board has not updated the WDRs since they were issued in June 2003.

C. Site History Prior to the Issuance of the August 2013 Cleanup and Abatement Order

In April 2011, Regional Board staff issued a Notice of Violation based on the continued detection of the same constituents of concern that have long been detected at the site. Prosecution Team Ex. 2. The NOV required the submittal of a report evaluating the effectiveness of the ongoing corrective actions at the site being undertaken pursuant to the 2003 WDRs. In accordance with the NOV, Recology submitted a technical report prepared by its engineering consultant, Golder Associates, entitled *Monitoring System Evaluation and Corrective Action Effectiveness* (dated July 29, 2011). See Recology Ex. 9. The “Effectiveness Report” concluded that corrective actions at LF-2 had proven effective in lowering the levels of the constituents of concern and that no further corrective actions for this area were needed. *Id.* at 15-16. With regard to LF-1, the report concluded that concentrations of constituents of concern have been declining overall, but appear to fluctuate and may be influenced by the amount of annual rainfall. *Id.* The report recommended the preparation of a risk assessment to evaluate whether additional corrective actions could be implemented at LF-1. *Id.*¹

By letter dated December 6, 2011, Regional Board staff requested that Recology submit an updated engineering feasibility study describing the additional corrective actions that “could be taken to achieve background concentrations for all constituents of concern.” Staff also requested that Recology submit an amended report of waste discharge to identify the preferred corrective action measures at the closed landfill and propose a schedule for implementation. Recology Ex. 13 (Letter from Wendy Wyels, Supervisor, Compliance and Enforcement Section, to Phil Graham, Recology, dated Dec. 6, 2011).

After approving an extension until June 30, 2012 for Recology to submit the updated Engineering Feasibility Study and amended Report of Waste Discharge, Regional Board staff issued a letter on May 17, 2012 directing Recology to include within the amended Report of Waste Discharge a description of the Feather River Organics composting operations, so that those operations could be covered within the updated and revised Waste Discharge Requirements for the site. Recology Ex. 14 (Letter from Vinoo Jain, Water Resources Control Engineer, to Bryan Clarkson, Recology, dated May 17, 2012).

¹ Regional Board staff also issued a Notice of Violation in August 2011 due to ponding of water on top of the LF-1 cover that staff observed during an inspection in June 2011. Prosecution Team Ex. 3. Recology submitted a work plan to address the issue in September 2011, staff approved the work plan, and then Recology submitted a completion report documenting the implementation of the work plan. See Recology Ex. 10 (Recology’s Work Plan to Address Drainage Concerns, dated Sept. 14, 2011); Recology Ex. 11 (Regional Board staff’s Review of Work Plan to Address Drainage Concerns, dated Sept. 23, 2011); & Recology Ex. 12 (Recology’s Completion Report, dated Nov, 29, 2011).

In response to the correspondence from Regional Board staff, Recology submitted a technical report prepared by Golder entitled *Engineering Feasibility Study and Amended Report of Waste Discharge, South Area Landfill LF-1* (dated June 29, 2012). Recology Ex. 15. The report recommended the following specific corrective actions at the site:

1. Design and construct landfill gas extraction for the southeastern side of LF-1;
2. Evaluate the integrity of subsurface pipelines in LF-1;
3. Evaluate the integrity of paved surfaces constructed on LF-1; and
4. Based on the pipeline and paved surface evaluation, prioritize repairs to provide the greatest potential to reduce infiltration into LF-1.

Id. at 7. The report also included a *Compost Area Investigation Report*, which Recology previously had submitted in connection with the Regional Board's authorization in 2001 to conduct composting operations at the site. *Id.*, App. B. This 2001 report described the low permeability of the aggregate base underneath the composting operations.

By letter dated August 27, 2012, Regional Board staff stated that they "agree with the recommendation to expand the LFG [landfill gas] system into LF-1 and evaluate the existing cover and subsurface piping." Recology Ex. 16 (Letter from Todd A. Del Frate, Engineering Geologist, to Phil Graham, Recology, dated Aug. 27, 2012) at 2. This letter directed that Recology "shall continue with the corrective action program that includes the expansion of the LFG system into LF-1 and evaluation of the cover and underground piping." *Id.* The letter concluded by stating that "[b]ased on the data collected the corrective action may be revised, or discontinued." *Id.* at 3.

On September 26, 2012, Regional Board staff sent another letter requesting that Recology provide additional information about the Feather River Organics composting operations as part of the amended Report of Waste Discharge. Recology Ex. 17 (Letter from Vinoo Jain, Water Resources Control Engineer, to Bryan Clarkson, Recology, dated Sept. 26, 2012).

On November 15, 2012, Recology submitted a follow-up technical report prepared by Golder, entitled *Report on the Evaluation of the Integrity of the Subsurface Pipelines and Paved Surfaces at LF-1*. Recology Ex. 18. This "Integrity Report" included a detailed set of recommendations for reducing ponding and infiltration of water at LF-1, including completing video surveys and evaluations of subsurface drains and sewer pipelines; repairing damaged pipelines; implementing a program to inspect pipelines and surfaces; filling low areas where ponding can occur on unpaved surfaces; filling and repaving low areas on damaged pavement when weather allows; and constructing drainage swales. *Id.* at 4.

Fifteen days after the submittal of the Integrity Report, Regional Board staff conducted a facility site inspection on November 30, 2012 "[i]n preparation of revising existing Waste Discharge requirements (WDRs) Order #R5-2003-0093 for the Recology Yuba-Sutter landfill." Prosecution Team Ex. 4 (Transmittal of Inspection Report, dated Mar. 6, 2013) at 1. During the November 30 inspection, staff noted ponding of water at the toe of the compost pile, even though

Recology had not yet had sufficient time to implement the recommendations contained in Golder's November 15, 2012 Integrity Report.

On February 15, 2013, in response to the requests for documentation from Regional Board staff, Recology submitted additional information to update its previously submitted amended Report of Waste Discharge. Recology Ex. 19 (Letter from Phil Graham, Recology, to Vinoo Jain, Water Resources Control Engineer, dated Feb. 15, 2013, enclosing report by Golder entitled *Subsurface Characterization of the Compost Pad at Recology Yuba-Sutter Facility*). The Golder report concluded that the moisture content in soils underlying the areas of LF-1 where composting operations occur are similar to or less than the moisture content in soils underlying the vegetated cover in the area where no composting operations occur—a conclusion supporting the finding that the preexisting aggregate base underneath the composting operations “is effective in helping to minimize water infiltration” into LF-1. *Id.* at 7. Nevertheless, Golder recommended a series of measures to improve the cover under the composting operations. *Id.* at 8.

D. Issuance & Modification of the August 2013 Cleanup and Abatement Order and the Initial Performance of the Compost Water Collection System

As shown above, from June 2011 to February 2013, Recology and its consultants submitted a number of technical reports in response to requests from Regional Board staff with the aim of accomplishing a revision to the 2003 WDRs for the site to include the Feather River Organics composting operations. In the spring of 2013, Recology and Regional Board staff agreed to the issuance of a Cleanup and Abatement Order for the Recology Yuba Sutter site in order to document Recology's responsibilities and compliance deadlines. See Recology Exhibit 20 (P. Yamamoto Decl. ¶ 5). In June 2013, Regional Boards staff issued a Tentative CAO. Recology Exhibit 21 (Tentative Cleanup and Abatement Order XX-2013-XXXX, Recology Yuba Sutter).

On August 29, 2013, Regional Board staff issued a final Cleanup and Abatement Order for the site. Prosecution Team Ex. 5 (Cleanup & Abatement Order R5-2013-0704). The purpose of the CAO was to “address the issues that have resulted in the generation of LFG [landfill gas] to groundwater, to prevent the discharge of compost leachate, and to implement appropriate and timely inspections and maintenance of the cover [of LF-1].” *Id.* at 8, ¶ 37.

Item #5 of the CAO required modification of the “compost pad” to impede percolation of liquids into the underlying waste at LF-1. Prosecution Team Ex. 5 at 10-11, ¶ 5. Specifically, Item #5 required Recology to submit a work plan for improving the pad by October 31, 2013 (within two months of CAO issuance) and to complete construction of the improvements by October 1, 2014 (within 13 months of CAO issuance).

Item #9 of the CAO required Recology to install a compost water collection system with sufficient capacity to meet the specifications set forth in Table 4.1 of Title 27 of the California Code of Regulations. Prosecution Team Ex. 5 at 13, ¶ 9.b. Specifically, Item #9 required Recology to submit a technical report by February 1, 2014 (within five months of CAO issuance) and to design and install the collection system by October 1, 2014 (within 13 months of CAO issuance). *Id.* at 13, ¶ 9.d.

The timeframes specified by the CAO for construction of a new pad and installation of a compost water collection system were extremely short. By way of context, the draft statewide composting order currently under consideration by the State Board provides that existing composting operations must file a Notice and Intent and technical report within 12 months after the final order is adopted (which is projected for June 2015), and that the schedule for full compliance with the final order's requirements compost pad and compost water collection requirements may not exceed *six years* from the date of the NOI. Recology Ex. 22 at 8, ¶ 37 (State Water Resources Control Board, Draft Order WQ 2015-XXXX-DWQ, *General Waste Discharge Requirements for Composting Operations*, dated Jan. 6, 2015).

Despite the aggressive schedule established by the CAO, Recology complied with Item #5 by submitting its *Compost Area Work Plan* on October 31, 2013. On May 7, 2014, more than six months after submittal of the work plan, Regional Board staff responded with a letter stating that they had reviewed the work plan and that the plan was approved for implementation. Recology Ex. 23 (Letter from Todd Del Frate, Engineering Geologist, to Drew Lehman, Recology, *Approval of Compost Area Work Plan, Recology Yuba Sutter Item #5*, dated May 7, 2014).

On January 31, 2014, pursuant to Item #9 of the CAO, Recology submitted a technical report prepared by Golder entitled *Compost Area Leachate Collection Work Plan*. Recology Ex. 24. This work plan identified the options of using a lined pond or above-ground tanks for the collection of compost water to meet the Title 27 standard in the CAO. The work plan concluded that, if storage tanks were used, more than 330 21,000-gallon tanks would be needed, and that if a lined pond were used, the design, permitting and construction effort would take 18 months.

On May 15, 2014, three and a half months after the submittal of Golder's compost leachate collection work plan, Regional Board staff responded by issuing a Notice of Violation stating that the plan was inadequate. Prosecution Team Ex. 11. The NOV indicated that any construction or permitting schedule for a collection pond that went beyond October 1, 2014 "contradicts the compliance date in the CAO. Staff has no authority to extend these dates." *Id.* at 3.

On May 30, 2014, in response to the NOV, Recology indicated to Regional Board staff that, due to the infeasibility of meeting the Title 27 requirement in the CAO, it was considering plans to transition the composting operations at Feather River Organics to a different location and it requested that these operations be allowed to continue during the transition period. In support of this request, Recology submitted a *Compost Water Status Report* prepared by Golder that proposed an interim compost water collection system that would meet the 5-year, 24-hour storm event, and that might be capable of meeting a 10-year, 24-hour storm event, instead of the more stringent requirements of Item #9 of the CAO. Recology Ex. 25 (Golder Associates, *Compost Water Status Report for Feather River Organics*, dated May 30, 2014). Regional Board staff responded by stating that they were willing to modify the CAO to accommodate a transition period, but that they wanted to incorporate the requirement to meet the 25-year, 24-hour storm event, based on the draft statewide compost facility requirements that were under consideration by the State Board. Recology Ex. 26 (Email from Wendy Wyels, Supervisor, Compliance and Enforcement Section, to Drew Lehman & Paul Yamamoto, Recology, dated June 9, 2014).

To address the issues raised by Regional Board staff, Recology directed its engineer (Golder) to conduct hydrology calculations to determine the capacity of a tank system that would be needed to meet the 25-year, 24-hour storm event. Recology Ex. 20 (P. Yamamoto Decl. ¶ 10). Recology also engaged a second engineering firm with expertise in stormwater management, Brown & Caldwell, to review Golder's hydrological calculations. *Id.* (P. Yamamoto Decl. ¶ 11).

During the late spring and summer of 2014, Recology personnel also had discussions with David Lamon, City Services Director for the City of Marysville, regarding the amount of compost water that could be disposed of to the local wastewater treatment plant. Recology Ex. 1 (P. Graham Decl. ¶ 11); & Recology Ex. 27 (D. Lamon Decl. ¶ 5). As part of these discussions, the City indicated that the sewer system could handle 65,000 gallons of compost water per day without incident, although this was not intended to be a firm cap or decisive limit, but rather a general estimation based on past disposal from the site to the City's sewer system. Recology Ex. 1 (P. Graham Decl. ¶ 11); & Recology Ex. 27 (D. Lamon Decl. ¶ 5).

On July 30, 2014, Recology submitted to Regional Board staff Golder's technical report and hydrological calculations and Brown & Caldwell's technical review. Recology Ex. 28 (Golder, *Amended Compost Area Leachate Collection Work Plan for Feather River Organics*, dated July 30, 2014). Based on the calculations, the engineers recommended a system of six on-site 21,000-gallon storage tanks, coupled with disposal to the local wastewater treatment plant, to meet the proposed 25-year, 24-hour standard.

On August 1, 2014, Regional Board staff indicated they were reviewing Recology's amended work plan and requested a map of the property. Prosecution Team Exs. 66-67. Later that same day, Recology provided the requested map. *Id.* On August 4, 2014, Regional Board staff sent an email to Recology stating that staff had "a few a questions" about the map and the runoff calculations. *Id.* Regional Board staff subsequently expressed oral concerns that the engineering consultants' runoff calculations for the collection system underestimated the amount of compost water that would be generated during a 25-year, 24-hour storm event; however, Regional Board staff never provided any written comments or analysis on this issue until its February 24, 2015 "staff memorandum" produced as evidence for this enforcement proceeding. See Prosecution Team Ex. 37 (Feb. 24, 2015 Staff Memorandum from Mike Fischer to Wendy Wyels); & Recology Ex. 20 (Yamamoto Decl. ¶ 15). Further, although staff orally expressed concerns about the runoff calculations, at a meeting held on August 19, 2014, staff indicated that they were not going to continue to debate the calculations and that it was up to Recology to devise and install an appropriate system to meet the CAO requirements. Recology Ex. 20 (Yamamoto Decl. ¶ 15).

After first hearing staff's oral concerns on an August 6, 2014 conference call, Recology took these concerns seriously and directed Golder to prepare a supplemental technical report reevaluating the prior hydrology calculations. Recology Ex. 20 (P. Yamamoto Decl. ¶ 14); & Recology Ex. 29 (Golder Associates, *Compost Stormwater Run-off Calibration for the Feather River Organics Composting Operation*, dated Aug. 13, 2014). In this report, Golder provided the engineering rationale for its modeling and supporting calculations based on actual field data for its determination that the proposed tank system would meet the 25-year, 24-hour storm event. The August 13 report included another technical review by Brown & Caldwell,

which concluded that Golder's methodology and calculations were reasonable. See Recology Ex. 29.

Recology relied on the modeling and engineering calculations by its expert engineers for the design of the tank system. Recology Ex. 20 (P. Yamamoto Decl. ¶ 12). Given that the CAO deadline for completing the pad improvements (October 1, 2014) was the same as the CAO deadline for installing the compost water collection system (see Prosecution Team Ex. 5 at 11, ¶5.d, & 13, ¶ 9.d), there was no actual experience of how the improved pad would function during a significant storm event under site-specific conditions. Recology Ex. 20 (P. Yamamoto Decl. ¶ 13); & Recology Ex. 1 (P. Graham Decl. ¶ 15).²

As an additional effort to address the concerns expressed orally by Regional Board staff, Recology decided, as a measure of conservatism, to double the tank system as proposed by its engineers, from six to twelve 21,000-gallon storage tanks. Recology Ex. 20 (P. Yamamoto Decl. ¶ 16). Although both Golder and Brown & Caldwell are very well-qualified,³ Recology doubled the capacity of the tank system because its management was concerned about the company's relationship with Regional Board staff and wanted to demonstrate its good faith. Recology Ex. 21 (P. Yamamoto Decl. ¶ 16).

On September 4, 2014, Regional Board staff conducted a site inspection. At the inspection, staff reviewed a site map depicting the compost water collection system that Recology was installing prior to the October 1, 2014 deadline and staff were apprised of Recology's decision to double the number of tanks. Prosecution Team Ex. 16. According to the ACL Complaint in this matter, the resulting Site Inspection Report dated September 30, 2014 indicated that the site's compost water collection system "had not met the intent of the Work Plan, the agreed upon 25-year, 24-hour storm event design standard, or the CAO operational deadline of 1 October 2014." ACL Complaint R5-2015-0502 (Jan. 20, 2015) at 3, ¶ 10. But this assertion is incorrect—the Site Inspection Report noted some winterization tasks that needed to be completed during the month of September, but did not identify any violation of the CAO or of the 25-year, 24-hour standard. See Prosecution Team Ex. 16.

The compost water collection system was installed by the CAO deadline. Recology Ex. 1 (P. Graham Decl. ¶ 12). The system performed well and no problems occurred during rain events on October 25 (0.34 inches), October 31 (0.53 inches), November 13 (0.37 inches), November 18-22 (total of 0.67 inches), and November 28-30 (total of 0.90 inches). Recology Ex. 1 (P. Graham Decl. ¶ 13-14); & Recology Ex. 33 (Recology Yuba Sutter, Daily Report with

² The statement in the prosecution team's Legal & Technical Analysis (at page 3) that Recology had a full wet season to observe the performance of the pad is incorrect. Pursuant to the October 1, 2014 deadline in the CAO, the pad improvements and the compost water collection system were both completed during the 2014 dry season.

³ The lead engineer at Golder on this project (Ken Haskell) has nearly three decades of experience in designing dozens of landfill cover and impoundment systems. Recology Ex 30 (Ken Haskell resume). The lead engineer at Brown & Caldwell on the project (Ronald Crites) has 45 years of experience with numerous publications on innovative water quality and wastewater issues, and was the recipient of the 2009 Water Environment Foundation Camp Medal for Applied Research in recognition of his contributions to the field. Recology Ex. 31 (Ronald Crites resume). Dr. Robert Beggs also worked on the project for Brown & Caldwell. Mr. Beggs has a Ph.D. in Biological Systems Engineering from University of California, Davis and 30 years of experience in environmental engineering and water resources management. Recology Ex 32 (Robert Beggs resume).

rainfall values for October 16, 2014 to March 13, 2015). During these rain events, Recology observed the performance of the newly improved compost pad and the newly installed compost water collection system. Based on these observations, Recology made some adjustments to enhance the performance of the collection system, including increasing the pipe size and horsepower of the pumping equipment in the south sumps, and reconfiguring the system to activate the pumps more quickly during a rain event. Recology Ex. 1 (P. Graham Decl. ¶ 15). As of the evening of December 2, 2014, the collection system was empty and ready to receive water. *Id.* (P. Graham Decl. ¶ 16).

E. The December 2014 Rain Events and Recology's Response

Regional Board staff arrived at the site for an inspection during the morning of December 3, 2014. During the morning of the December 3, very heavy rains occurred in a short period of time. Recology Ex. 1 (P. Graham Decl. ¶ 17); & Recology Ex. 34 (Recology Yuba Sutter, Hourly Report for Dec. 3-4, showing that more than an inch of rain fell within three hours and more than 1.5 inches of rain fell within seven hours). During the inspection, an overflow from the tank system occurred on the northern side of the Feather River Organics facility and as a result compost water went into the Hog Farm area of the site, which is fully enclosed, does not discharge to waters of the state or to waters of the U.S., and does not overlie a closed landfill unit. Recology Ex. 1 (P. Graham Decl. ¶ 5, 18); & Recology Ex. 35 (S. Schoemann Decl. & expert report entitled *Evaluation of the Potential For Harm, Feather River Organics*).

After Regional Board staff concluded their inspection, Recology immediately moved to improve operations and system performance, working with its contractor Boston Pacific, who arrived within hours of the Regional Board staff's departure from the site, and with its engineering consultants (Golder), who conducted a field investigation on December 4. Recology Ex. 1 (P. Graham Decl. ¶¶ 19, 22). One of the immediate measures implemented was a manned night-watch system to monitor the system's operation during storms. Recology Ex. 1 (P. Graham Decl. ¶ 21).

During the December 3 storm, Recology sought to maximize the disposal of compost water to the City of Marysville sewer system, in an effort to free up as much tank capacity as possible. From the morning of December 3 to the morning of December 4, the site disposed of approximately 160,000 gallons of compost water to the City sewer system; City staff confirmed that this amount of disposal did not pose a problem to the sewer system or the wastewater treatment plant. Recology Ex. 1 (P. Graham Decl. ¶ 20); & Recology Ex. 27 (D. Lamon Decl. ¶ 7).

Recology was aware that another powerful storm was forecasted for the region. To prepare quickly in addressing the issues that arose on December 3, Recology undertook a number of immediate steps to improve the collection system. See Recology Ex. 1 (P. Graham Decl. ¶¶ 19-29). Golder visited the Site on December 4, 2014 to assess the system and its performance during the December 3 rain event. *Id.* (P. Graham Decl. ¶ 22). But Recology did not want to wait until Golder completed an engineering analysis before undertaking corrective actions. *Id.*

Thus, working with Golder and Boston Pacific, Recology made the following improvements in the immediate aftermath of the December 3 storm: (1) installing eight additional storage tanks

on December 4-5, increasing the on-site total from 12 to 20 tanks; (2) installing wattles to reduce sediment loading into the pumping system; (3) installing sand bags to prevent erosion; (4) using a vacuum truck to remove sediment from containment structures; (5) installing cleanouts to remove sediments in the tank plumbing; and (6) installing additional plumbing and improved inflow piping, pumping and inlets to help distribute the water among the tanks and to facilitate equalization of liquids in the tanks. Recology Ex. 1 (P. Graham Decl. ¶¶ 22-23). Recology also installed portable internal combustion drive pumps as back-up pumping systems, and to provide portable electric power in case of a power outage at the site during storm events. *Id.* (P. Graham Decl. ¶ 24).

On December 5, Recology pumped the compost water that had overflowed onto the Hog Farm area of the site back into the tank collection system for disposal to the City's sewer system or for beneficial reuse as make-up water in the composting process. Recology Ex. 1 (P. Graham Decl. ¶ 25). As Regional Board staff concede, there was no discharge from the Hog Farm to waters of the state or to waters of the United States. Prosecution Team's Legal & Technical Analysis (Feb. 27, 2015), at 8, 10.

Recology personnel sent emails to Regional Board staff on December 4 and December 5 to keep staff apprised of the improvements that were being undertaken and the progress being made on those improvements. Recology Ex. 1 (P. Graham Decl. ¶ 26); & Prosecution Team Ex. 23. Recology also discussed with Golder its ongoing analysis of the system based on data gathered from the December 3 storm event. In light of the approaching storm event and Golder's recommendation, Recology added another 12 tanks to the system between December 8 and 10, bring the total to 32 storage tanks, each with 21,000 gallons of capacity. Recology Ex. 1 (P. Graham Decl. ¶ 27).

On December 9 and 10, Recology also installed over 300 hay bales to channelize the compost runoff flows. Recology Ex. 1 (P. Graham Decl. ¶ 27). Further, as a backstop secondary measure to prevent overflows into the Hog Farm area, Recology installed a temporary lined secondary containment feature in a portion of that area. *Id.* (P. Graham Decl. ¶ 28).

On December 11-12, there was another heavy storm that exceeded the 25-year, 24-hour standard of 3.16 inches of rain. Recology Ex. 1 (P. Graham Decl. ¶ 31); & Recology Ex. 36 (Recology Yuba Sutter, Hourly Report for Dec. 10-12, showing that 3.45 inches of rain fell between approximately 4:00 a.m. on December 11 and 4:00 a.m. on December 12). As with the storm on December 3, a significant amount of precipitation fell within a short period of time during the late morning and early afternoon of December 11. Recology Ex. 1 (P. Graham Decl. ¶ 32); & Ex. 36 (hourly rain data showing that more than an inch of rain fell within four hours during this period). There was another overflow from the collection system on the afternoon of December 11, but the water was fully contained within the lined secondary containment feature in the Hog Farm area and was then pumped back into the collection system for disposal to the local sewer system or for on-site beneficial reuse as part of the composting process. Recology Ex. 1 (P. Graham Decl. ¶ 33).

On the evening of December 11, Recology ordered additional storage tanks, which were then installed on December 11 and 12 during the rains. Recology Ex. 1 (P. Graham Decl. ¶ 37). These additional tanks brought the collection system up to a total of 39 tanks with a capacity of

819,000 gallons, which is the same system that is in place at the site today. *Id.* (P. Graham Decl. ¶¶ 37-38). As with the prior storm, Recology also sought to maximize the disposal of compost water to the City of Marysville's sewer system and it confirmed with the City that there were no substantial adverse effects on the City's facilities. *Id.* (P. Graham Decl. ¶ 36); & Recology Ex. 27 (D. Lamon Decl. ¶ 8). Even though the storm on December 11-12 exceeded the 25-year, 24-hour design event as incorporated into the CAO, after the overflow occurred into the secondary lined containment area of the Hog Farm during the afternoon of December 11, the collection system was able to handle the flows of compost water up to and including the required design event. Recology Ex. 1 (P. Graham Decl. ¶¶ 34-35).

To complete the upgrades to the collection system from December 3 to December 12, 2014, Recology worked closely and extensively with its contractor Boston Pacific, whose personnel were on site for 16-18 hours per day to help the facility expand and improve the system. Recology Ex. 1 (P. Graham Decl. ¶ 29). The upgraded system, as completed on December 12, has a capacity that has been demonstrated to exceed the runoff from a 25-year, 24-hour storm event. Recology Ex. 37 (Golder Associates, *Update to the Water Balance Calculations for the Feather River Organics Composting Operation*, dated Jan. 14, 2015). The system worked properly during a period of 2.37 inches of rain at the site from February 6 to February 8, 2015, with no overflows or other problems. Recology Ex. 1 (P. Graham Decl. ¶ 40); & Recology Ex. 33 (Recology Yuba Sutter, Daily Report with rainfall values for October 16, 2014 to March 13, 2015).

F. The December 9, 2014 Section 13267 Order & Recology's Response

On December 9, 2014, as the site was in the midst of incorporating its system improvements in preparation for the incoming storm, Regional Board staff issued a Section 13267 Order that directed Recology to provide information on a variety of issues. Prosecution Team Ex. 24. The Order specified a December 16, 2014 deadline to respond, and stated that failure to respond could result in penalties of up to \$1,000 per day under Section 13268. *Id.* at 2, 4. Recology responded to the Order by submitting reports on December 16 and December 18, 2014. Prosecution Team Exs. 27, 29. The responses, prepared as requested by Regional Board staff within a very short timeframe, included a revised water balance report from Golder that showed that the upgraded tank system had capacity exceeding the runoff from a 25-year, 24-hour storm event.

On December 22, 2014, Regional Board staff issued a Notice of Violation that contended that the response to the Section 13267 Order was incomplete. Prosecution Team Ex. 31. The NOV alleged that the response did not adequately respond to the request in the Order for "a discharge plan for leachate collected in storage tanks for consecutive days of a 25-year, 24-hour precipitation event ..." *Id.* at 2. Echoing the Section 13267 Order, the December 22 NOV stated that "Recology may be subject to administrative civil liability of \$1,000 per day, until the information required is submitted and evaluated by staff for accuracy and completeness." *Id.* at 3.

In its response to the December 22 NOV, Recology emphasized that the standard of "consecutive days" of a 25-year, 24-hour rain event as stated in the Section 13267 Order did not match the language of the CAO, which required that the compost water collection system "shall collect and

contain all contact stormwater generated during rainfall events up to and including the 25-year, 24-hour design storm event of 3.16 inches.” Recology Ex. 38 (Letter from Phil Graham and Drew Lehman, Recology, to Howard Hold, Senior Engineering Geologist, dated Dec. 24, 2014, including attachments); Prosecution Team Ex. 34 (Amended CAO). Recology also pointed out that the standard of “consecutive days” of a 25-year, 24-hour rain event as stated in the Section 13267 Order did not match the language of the recently issued December 5, 2014 Monitoring & Reporting Program, which (like the CAO) stated: “This monitoring and reporting program requires the Discharger to maintain and monitor appropriate facilities which collect contact storm water generated within the composting area during rainfall events up to and including the 25 year, 24 hour design storm event of 3.16 inches, as measured at the DWR Marysville station.” Recology Ex. 38; Prosecution Ex. 21 (December 5, 2014 Monitoring & Reporting Program) at 1; see also MRP cover letter at 1 (“This MRP requires monitoring and reporting to demonstrate that the compost area collection system is able to control and manage all run-on, run-off, and precipitation from all operational and storage areas under conditions of a maximum probable 25-year, 24 hour peak storm event of 3.16 inches.”).

In an effort to cooperate with Regional Board staff and to avoid an enforcement dispute on this point, however, Recology had its engineers prepare another revised water balance. Recology Ex. 37. Recology also worked with the City of Marysville to formalize the issuance of a written discharge permit for the disposal of compost water to the City’s sewer system, even though the City did not require such a permit and only issued one because Regional Board staff had requested it. Recology Ex. 27 (D. Lamon Decl. ¶¶ 9-11); & Recology Ex. 39 (City of Marysville Waste Water Discharge Permit 15-05, dated Jan. 27, 2015). Similarly, neither the CAO nor the MRP requires a written discharge permit from the City of Marysville. See Prosecution Team Ex. 21 (MRP) & Prosecution Team Ex. 34 (Amended CAO). Rather, the request for a written permit was made orally by Regional Board staff during a December 30, 2014 conference call. Recology Ex. 27 (D. Lamon Decl. ¶ 9).

III. THE PROPOSED PENALTY IS EXCESSIVE AND UNSUPPORTED

The proposed penalty amount of \$440,440 in this proceeding is excessive for a variety of reasons.

- First, the ACL Complaint overstates the number of days of the violation. Whereas the Complaint alleges 112 days of an ongoing non-discharge violation of Item #9 of the Amended CAO, Recology contends the violation occurred only for 10 days, from December 3 to December 12, 2014. This reduces the maximum penalty amount from \$560,000 to \$50,000 (\$5,000 per day maximum penalty times 10 days equals \$50,000).
- Second, the ACL Complaint applies a multiplier of 0.55 to the maximum penalty amount, based on the allegation that this proceeding involves a “major” deviation from the applicable requirement of the CAO and a “moderate” potential for environmental harm. But the record shows that the deviation from the CAO requirement was “moderate,” since there was a collection system in place by the CAO deadline that served to contain and manage the majority of compost water during the December 2014 storm events. In addition, Recology has submitted an

expert analysis by Sally Schoemann, an engineer with nearly three decades of experience in water quality issues, showing that the potential for harm was “minor.” Recology Ex. 35. The combination of these two factors should result in a multiplier of 0.2 to 0.3 with a midpoint of 0.25, which is substantially less than the multiplier of 0.55 used by Regional Board staff. Applying a multiplier of 0.25 would reduce the maximum penalty of \$50,000 to \$12,500.

- Third, the ACL Complaint uses a culpability factor of 1.3, when the facts call for a much lower assessment. According to the Enforcement Policy, “[t]he test is what a reasonable and prudent person would have done or not done under similar circumstances.” Here, the facts show that Recology acted reasonably in relying on a compost water collection system design and engineering calculations prepared by two qualified engineering firms, having the engineers reevaluate their calculations in response to concerns raised by Regional Board staff, and then doubling the engineers’ recommendations for system capacity. As a result, the culpability factor should be on the order of 0.75. Applying a 0.75 factor to the \$12,500 penalty identified above, results in a penalty of \$9,375.
- Fourth, the ACL Complaint uses a factor of 1.1 for cleanup and cooperation, when the facts show that Recology acted quickly and diligently to upgrade the collection system, and to pump compost water that had flowed to the Hog Farm area back into the collection system and to the wastewater treatment plant. As the Enforcement Policy explains, a multiplier of less than one is appropriate where there is a high degree of cleanup and cooperation. In light of Recology’s substantial efforts to initiate and institute prompt corrective actions, the cleanup and cooperation factor should be on the order of 0.8. Applying the factor of 0.8 for cleanup and cooperation to the figure of \$9,375 described above would result in a penalty of \$7,500.
- Fifth, the penalty does not align with the ACL precedents of the Central Valley Regional Board. The State Board’s Enforcement Policy instructs that ACL penalties should provide “consistent treatment for violations that are similar in nature and have similar water quality impacts.” The proposed penalty in this proceeding does not conform to this principle, which further confirms that the proposed penalty is significantly overstated.

Recology acknowledges that the reduced penalty amount cannot be less than the calculated economic benefit plus ten percent. The ACL Complaint assesses this amount at \$47,193. The prosecution team’s Legal and Technical Analysis submitted on February 27, 2015 does not mention this issue and simply refers back to the ACL Complaint and Attachment A dated January 20, 2015. Recology accepts the economic benefit figure in the ACL Complaint and Attachment A. Therefore, the final penalty amount in this matter should be \$47,193.

The following chart compares the multipliers used by the ACL Complaint versus the multipliers that should be used based on a fair, careful and consistent application of the Enforcement Policy.

	Factors in the ACL Complaint	Appropriate Factors Based on Enforcement Policy
Number of Days of Non-Discharge Violation	112 days (Oct. 1, 2014 to Jan. 20, 2015)	10 days (Dec. 3, 2014 to Dec. 12, 2014)
Per-Violation Assessment	0.55	0.25
Potential For Harm	Moderate	Minor
Deviation From Requirement	Major	Moderate
Culpability	1.3	0.75
Cleanup & Cooperation	1.1	0.8

Each of the relevant factors in assessing an appropriate penalty amount are discussed individually in the sections below.

A. The ACL Complaint Overstates the Number of Days of Violation

The ACL Complaint overstates the number of days of the alleged non-discharge violation. The ACL Complaint alleges 112 days of an ongoing non-discharge violation, starting on October 1, 2014 and concluding on January 20, 2015. This allegation is inconsistent with the factual record.

First, the facts show that there was no violation of the CAO until December 3, 2014, when the very first overflow from the tank system occurred at the site. Second, the facts show that any violation of the CAO ceased on December 12, 2014, when Recology completed upgrades to the tank system in response to the overflow conditions. This constitutes ten days of violation. Each of these two issues is addressed separately below.

1. The Facts Show There Was No Violation of the CAO Until December 3, 2014

Item #9 of the CAO, as amended in August 2014, required Recology to install a “compost area collection system” by October 1, 2014 to “collect and contain all contact stormwater generated during rainfall events up to and including the 25-year, 24-hour design storm event of 3.16 inches.” Prosecution Team Ex. 34 (Amended CAO) at 2, Item #9(b), (d). The facts show that Recology acted reasonably and made a substantive, good faith effort to comply with this requirement, and that the system that Recology timely installed worked properly during rain events prior to December 3, 2014. Specifically, the following facts show there was no violation prior to this date:

- Recology timely submitted its *Compost Area Leachate Collection Work Plan* on January 31, 2014, in accordance with the deadline set by the original CAO. The Work Plan

concluded that complying with the original CAO requirement (a containment system sized to meet Table 4.1 of the Title 27 regulations) would require either an enormous number of storage tanks (337) or a large storage pond that could not be installed within the timeline provided by the CAO. Regional Board staff waited three and half months after Recology's submission of the Work Plan to provide Recology with a written response, and that response was to issue a Notice of Violation that concluded that the Work Plan was inadequate. As soon as Recology received staff's response, it proposed to design an alternative system requirement and worked with staff to modify the CAO to incorporate a 25-year, 24-hour standard for the compost water collection system.

- Recology relied on qualified engineering experts, Golder Associates, to perform detailed runoff calculations to estimate the size of the tank system that would be needed to accommodate flows generated during the 25-year, 24-hour storm event.
- Recology hired a second engineering firm with expertise in surface water management, Brown & Caldwell, to review Golder's runoff calculations and to assess information provided by the City of Marysville regarding the disposal of compost runoff to the City's sewer system.
- In response to the oral concerns raised by Regional Board about the initial runoff calculations, Recology had its engineering consultants reexamine the runoff calculations to incorporate additional data. Golder submitted a supplemental technical report on August 13, 2014, which concluded that storm data from the prior wet season confirmed the prior runoff calculations.
- In further response to the oral concerns raised by Regional Board staff about the runoff calculations, Recology also decided to double the capacity of the system as recommended by the engineers (from 6 to 12 storage tanks).
- Regional Board staff conducted a site inspection in early September 2014, prior to the CAO deadline of October 1, 2014, and Recology apprised staff of the details of the tank system. The written site inspection report did not identify any violations of the CAO.
- The system performed well in capturing flows generated by smaller rain events in October and November 2014.
- The rains on December 3, 2014 were the first time that the tank system at the site did not handle the full amount of runoff from a storm.

Under these facts, it is unreasonable to find a violation occurred from October 1 to December 2, 2014. Indeed, under the reasoning of the ACL Complaint, the number of days of violation would be the same if Recology had installed no compost containment system *at all* prior to the December 2014 rain events.

Moreover, the reasoning of the ACL Complaint would generate significant disparity in how penalties are applied. The ACL Complaint assumes a violation commences on the date a system must be installed, and regardless of the circumstances, continues through the date the system

ultimately fails and is repaired. This logic would result in enormous variations in penalties based on factors wholly outside the discharger's control. Under the logic of the ACL Complaint:

- If heavy rains resulted in an overflow on October 1, 2014 and then the problems were fixed within one week, the violation would last 7 days, for a maximum penalty of \$35,000.
- But if the very same situation did not occur until May 2015, the violation would last for months and the first overflow would have a maximum penalty exceeding \$1 million.
- And if the same situation did not occur until October 2015, the violation would last for over a year and the first overflow would have a maximum penalty approaching \$2 million.

Further, with each passing day without encountering a problem, the fines would continue to escalate—retroactively.

The prosecution team argues that the substantial penalty accrual here is appropriate on the ground that, if a December 3 start date for the non-discharge violation is used, Recology would gain a “windfall simply because it did not rain on 1 October 2014.” Prosecution Team, Legal & Technical Analysis (Feb. 27, 2015) at 9. But this argument begs the question: why should Recology merit a higher penalty because it did not rain until December? And why should a discharger deserve an even greater penalty if it did not rain until the following year? The point here is not to accrue penalties. The point is to timely, and in good faith, install a collection system, which Recology did. Recology fully apprised the Regional Board staff of its plans and designs for the collection system. No problems with the system occurred during the months of October and November 2014. The very first problem that did occur with system did not happen until December 3.

The facts and circumstances here do not support a continuous ongoing violation starting on October 1, 2014 and the examples above serve to illustrate the unreasonably harsh and unfair approach that is embodied in the ACL Complaint.

In an effort to support the allegation of an ongoing violation starting on October 1, 2014, the ACL Complaint asserts that the Regional Board staff's September 30, 2014 Site Inspection Report stated that the site's compost water collection system “had not met the intent of the Work Plan, the agreed upon 25-year, 24-hour storm event design standard, or the CAO operational deadline of 1 October 2014.” ACL Complaint R5-2015-0502 (Jan. 20, 2015) at 3, ¶ 10. But this assertion is refuted by the face of the Site Inspection Report itself (see Prosecution Team Ex. 16), which states no such thing. To the contrary, the Site Inspection Report states that staff's inspection—which was completed on September 4, 2014, nearly four weeks before the CAO deadline of October 1—noted merely that “additional work was required prior to the wet season.” The report did not suggest, much less state, that there was any violation of the CAO or the 25-year, 24-hour standard.

In essence, the prosecution team appears to contend that commencing the penalty accrual on October 1, 2014 is appropriate here because Regional Board staff had expressed disagreement

with the engineering calculations performed by Recology's expert engineers. But under Section 13360 of the Water Code, subject to limited exceptions that are not applicable here, "[n]o waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner." Thus, the Regional Board staff could not dictate the design details of the system that had to be in place by October 1, 2014. At their meeting with Recology on August 19, 2014, staff indicated that they were not going to continue to debate the calculations and that it was up to Recology to devise and install an appropriate system to meet the CAO requirements. Recology Ex. 20 (Yamamoto Decl. ¶ 15). Just as the Water Code contemplates, Recology reasonably relied on its engineers for the design of the system. The fact that the system ultimately required improvements does not support the retroactive imposition of substantial penalties going back to the CAO start date.

The facts show that there was no non-discharge violation before December 3, 2014, when Recology first discovered that system improvements were needed. The Regional Board should accordingly revise the start date of the alleged non-discharge violation from October 1, 2014 to December 3, 2014.

2. The Facts Show There Was No Violation of the CAO after December 12, 2014

In addition to the alleged start date of the violation, the end date of the alleged violation—January 20, 2015—also is unfounded. Instead, the facts show that there was no violation after December 12, 2014, when Recology completed its upgrades to the compost water collection system. In particular, the facts show that Recology worked quickly and diligently to respond to the first overflow incident that occurred on December 3 by: maximizing the amount of compost water disposed of in the City's sewer system in an effort to free up the capacity of the on-site storage tanks; instituting a manned night-watch system to improve the monitoring of system performance; adding 27 additional storage tanks and installing new equipment to improve the piping and pumping components of the system; installing wattles, sand bags and hay bales to channelize flows and reduce erosion; using vacuum trucks and installing cleanouts to remove sediments in tanks and containment structures; pumping the water that had flowed into the Hog Farm area back into the collection system to avoid impacts; and installing a lined secondary containment feature as a precautionary back-stop measure, which helped ensure that the overflow incident that occurred on December 11 did not reach the Hog Farm.

These various actions were all completed by December 12, resulting in a substantially upgraded system with a level of capacity and performance that has been demonstrated to exceed the runoff from a 25-year, 24-hour storm event and to be capable of managing this runoff in compliance with the CAO. Indeed, approximately 2.37 inches of rain fell at the site from February 6-8, 2015, and the system—which was essentially the same system that was in place as of December 12, 2014—functioned properly with no overflow conditions or other problems.

Despite these facts, the ACL Complaint alleges that a violation continued past December 12, 2014. This claim is based on the allegation that Recology did not submit a water balance report that staff considered to be complete in response to staff's Section 13267 Order issued on

December 9, or obtain a discharge permit from the City of Marysville as of January 20, 2015. There are several problems with this claim.

First, Recology did submit a revised water balance report in response to the Section 13267 Order. On December 18, Golder submitted a 62-page report containing data and calculations showing that the 39-tank system, coupled with disposal of compost water to the City's sewer system, contained sufficient capacity to meet the standard in the CAO, which requires collection and containment of rainfall "up to and including the 25-year, 24-hour storm event."

Second, even assuming for the sake of argument that Golder's report was incomplete, staff's Section 13267 Order, and its subsequent Notice of Violation of December 22, 2014, indicate that Recology "may be subject to administrative civil liability of \$1,000 per day, until the information required is submitted and evaluated by staff for accuracy and completion." Prosecution Team Exs. 24, 31. In this proceeding, however, staff attempt to convert this previously alleged non-compliance with the Section 13267 Order into an alleged violation of the CAO's requirement to have a system in place to handle the 25-year, 24-hour storm event. This is an improper attempt to impose higher penalties at \$5,000 per day, instead of the previously cited \$1,000 per day.

Third, the alleged violation cited in the December 22 NOV was the failure to respond to the request in the Section 13267 Order for "a discharge plan for leachate collected in storage tanks for *consecutive days* of a 25-year, 24-hour precipitation event ..." Prosecution Team Exs. 24, 31 (emphasis added). As Recology pointed out in its responses to staff, this request does not match the language of the CAO, which requires a system to "collect and contain all contact stormwater generated during rainfall events *up to and including* the 25-year, 24-hour design storm event of 3.16 inches." See Prosecution Team Ex. 34 (Amended CAO) (emphasis added). The language of the Section 13267 Order and December 22 NOV also does not match the language of the Monitoring & Reporting Program issued for the site on December 5. See Prosecution Team Ex. 21 (MRP) at 1 ("This monitoring and reporting program requires the Discharger to maintain and monitor appropriate facilities which collect contact storm water generated within the composting area during rainfall events up to and including the 25 year, 24 hour design storm event of 3.16 inches, as measured at the DWR Marysville station."). Nevertheless, to address staff's concerns and show good faith, and in an effort to avoid an enforcement dispute on this point, Recology had its consultants prepare another revised water balance report to address staff's concerns, which was submitted to Regional Board staff on January 15, 2015. Recology Ex. 37.

Fourth, there is no requirement in the governing CAO or Monitoring & Reporting Program to obtain a written discharge permit from the City of Marysville. See Prosecution Ex. 21 (MRP); & Prosecution Ex. 34 (Amended CAO). The facts show that (1) Recology personnel had an oral understanding and arrangement with the City for the disposal of compost stormwater in the City's sewer system; and (2) Recology worked closely with City staff during the storm events to maximize this disposal, in an effort to free up as much tank capacity as possible without overloading the City's system. The facts also show that the City itself did not require a written discharge permit, but that it nevertheless worked with Recology on the formal issuance of such a permit to address Regional Board staff's request for a permit. See Recology Ex. 27 (D. Lamon Decl.).

In sum, the claim that a non-discharge violation continued up to January 20, 2015 is not supported by the factual record. Rather, the record demonstrates that no non-discharge violation of the CAO occurred after December 12, 2014, the date on which Recology completed its upgrades to the collection system sufficient to meet the 25-year, 24-hours standard in the CAO. The Regional Board should accordingly revise the end date of the alleged non-discharge violation from January 20, 2015 to December 12, 2014.

B. The ACL Complaint Proposes an Excessive Penalty Because It Overstates the Potential for Harm and the Deviation from the Applicable Requirements

Step 3 of the Enforcement Policy specifies that an initial multiplier for non-discharge violations should be assessed based on two factors: (1) the potential for harm; and (2) the extent of the deviation from the applicable requirement. See Recology Ex. 40 (State Water Resources Control Board, *Water Quality Enforcement Policy* (Effective May 20, 2010), at 15-16). This multiplier is derived in accordance with Table 3 of the Enforcement Policy, which is reproduced below:

		POTENTIAL FOR HARM		
		Minor	Moderate	Major
DEVIATION FROM REQUIREMENT	Minor	0.1 (midpoint = 0.15) 0.2	0.2 (midpoint = 0.25) 0.3	0.3 (midpoint = 0.35) 0.4
	Moderate	0.2 (midpoint = 0.25) 0.3	0.3 (midpoint = 0.35) 0.4	0.4 (midpoint = 0.55) 0.7
	Major	0.3 (midpoint = 0.35) 0.4	0.4 (midpoint = 0.55) 0.7	0.7 (midpoint = 0.85) 1.0

Here, the ACL Complaint overstates both of these factors. The ACL Complaint alleges that the potential for harm is “moderate” and that the deviation from requirement is “major,” resulting in a proposed multiplier of 0.55. But the factual record demonstrates that the potential for harm is “minor” and the deviation from requirement is “moderate.” As a result, the multiplier should be 0.2 to 0.3, with a midpoint at 0.25, as shown by the shaded portions of the table.

Each of the two factors—the potential for harm, and the deviation from the requirement—is addressed individually below.

1. The Potential for Harm Is “Minor”

The Enforcement Policy defines a “minor” potential for harm as follows: “The characteristics of the violation present a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm.” Recology Ex. 40 at 16. A “moderate” potential for harm is

defined as: “The characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.” *Id.* As shown by the expert analysis conducted by Sally Schoemann, P.E. of Cardno Inc., the potential for harm is properly characterized as minor. Recology Ex. 35 (S. Schoemann Decl. & expert report entitled *Evaluation of the Potential for Harm, Feather River Organics*, dated Mar.17, 2015).

As Regional Board staff concede, there was no discharge to waters of the state or to waters of the United States. Prosecution Team’s Legal & Technical Analysis (Feb. 27, 2015), at 8. But the ACL Complaint nevertheless alleges that the potential for harm is “moderate,” based on the claims that (1) the requirement to install a compost water collection system was included in the CAO “to ensure that leachate generated during rain events is separated from the underlying landfill closure cover of LF-1 to prevent the generation of landfill gas (LFG)” and (2) compost leachate mixed with stormwater “presents a particular threat to beneficial uses.” ACL Complaint (Jan. 20, 2015), Attachment A at 2-3; see also Prosecution Team’s Legal and Technical Analysis (Feb. 27, 2015), at 10 (failure of the collection system “presents a substantial threat to beneficial uses,” based on the claim that compost water is “contributing to water quality impacts”).

But as the expert analysis by Ms. Schoemann explains, these allegations are misplaced, as there is no evidence that the composting operations on top of the newly constructed low-permeability compost pad could have a deleterious impact on surface or groundwater resources, or in terms of the generation of LFG. To the contrary, as shown in the attached expert report:

- There are no complete surface water migration pathways for water in the Hog Farm area to reach waters of the United States. The Hog Farm area is essentially a large stormwater retention basin, bounded by flood control levees, which would serve to prevent a surface discharge from this area during a precipitation event much larger than the 25-year, 24-hour storm.
- Although composting operations have been present on the site for 16 years, there has actually been a decrease in nitrate concentrations over time in groundwater well MW-9, which is located in the Hog Farm and beneath the drainage pathway from the Feather River Organics composting operations. This demonstrates that composting operations, which tend to generate nitrate in runoff, have not had a negative impact on groundwater. Indeed, average nitrate concentrations in groundwater over the last five years have been determined by ongoing monitoring to be consistently below regulatory benchmarks.
- Infiltration from the Hog Farm area into groundwater is limited by the presence of subsurface interbedded silty and sandy clays, which transmit water more slowly than sandy materials and therefore allow for more evaporation and transpiration.
- Golder’s compost pad study of February 15, 2013 showed that, after a storm event, the moisture levels in the soils underneath the composting operations were similar to or less than the moisture levels in the soils underneath the vegetative cover where no composting occurs. This suggests that the composting operations do not create more infiltration over the closed landfill unit than would otherwise be the case.

- The recent improvements to the low-permeability compost pad underneath the composting operations have decreased the amount of water that may infiltrate into the unlined closed landfill unit (LF-1); in fact, by decreasing permeability, these improvements caused more water to run off the pad into the Hog Farm area than would otherwise have been the case.
- With respect to the December 3 overflow, water that flowed into the Hog Farm area was promptly pumped back into the collection system, further limiting any infiltration of this water into the Hog Farm area.
- With respect to the December 11 overflow, Recology's precautionary measure of installing a plastic-lined secondary containment feature prevented any compost water from infiltrating into the Hog Farm area. As Regional Board staff acknowledge, no discharge occurred either to waters of the U.S. or waters of the state.
- With respect to any potential overflow from the compost pad into the Hog Farm area, the absence of a complete surface water transport pathway, the long record of improving groundwater nitrate levels during more than a decade of composting operations at the site, and the documented effectiveness of the compost pad, demonstrate that there is very limited potential for water quality impacts or environmental harm.

Based on this factual record, the expert analysis concludes that the potential for harm here is "minor"—i.e., "The characteristics of the violation present a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm." The Regional Board members should therefore revise this factor of the proposed ACL from "moderate" to "minor."

2. The Deviation from Requirement Is "Moderate"

The Enforcement Policy defines a "moderate" deviation from the applicable requirement as follows: "The intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and/or the effectiveness of the requirement is only partially achieved)." Recology Ex. 40 at 16. A "major" deviation is defined as: "The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)". The Enforcement Policy provides an example of this distinction, explaining that "if a facility does not have a required response plan or has not submitted a required monitoring report, the deviation would be major. If a facility has prepared a required plan or submitted the required monitoring report, but significant elements are omitted or missing, the deviation would be moderate." *Id.*

Here, the facts fit neatly within the Enforcement Policy's definition of a "moderate" deviation from the requirement. Recology did not disregard the requirements of the CAO; it timely installed a collection system based on extensive engineering input and analysis.

This also is not a case where the applicable CAO requirement was "rendered ineffective in its essential functions." The system worked well during the early storms in October and November and there were no problems. During the December 3 overflow, the system was partially

effective in containing compost water and in disposing of compost water to the local wastewater treatment plant. A large storm generates hundreds of thousands of gallons of compost water; approximately 160,000 gallons were disposed of to the local wastewater treatment plant, whereas the overflow into the Hog Farm area was estimated in the range of 17,000 to 25,000 gallons. Prosecution Team Ex. 23. During the December 11 overflow, an even smaller volume of water (approximately 15,000 gallons) overflowed into the lined secondary containment feature that Recology had installed in the Hog Farm area as a precautionary measure. See Prosecution Team Legal & Technical Analysis (Feb. 27, 2015), at 7. Moreover, after the overflow on December 11, Recology worked quickly to improve system performance through adjustments to the pumping components of the system, such that the system worked properly in handling the remainder of the rainfall on December 11-12, up to an including the 25-year, 24-hour design event. See Recology Ex. 1 (P. Graham Decl. ¶¶ 34-35).

This is simply not a case where the deviation from the applicable requirement should be characterized as “major.” Under the State Board’s Enforcement Policy, the deviation is properly characterized as “moderate”: “The intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and/or the effectiveness of the requirement is only partially achieved).” The Regional Board should accordingly revise the deviation from requirement factor from “major” to “moderate.”

C. The Culpability Factor Should Be 0.75

Step 4 of the Enforcement Policy provides for an adjustment to the calculated liability amount based on culpability. As explained in the Enforcement Policy, this adjustment results in a multiplier of 0.5 to 1.5, with the lower end of the range for accidental incidents and the higher end of the range for intentional or negligent behavior. Recology Ex. 40 at 17. “The test is what a reasonable and prudent person would have done or not done under similar circumstances.” *Id.*

Here, the record shows that Recology acted reasonably and in good faith in its effort to comply with the CAO requirement. As soon as the Regional Board staff responded to the *Compost Area Collection Work Plan* that had been submitted three and half months earlier, Recology worked quickly and diligently with Regional Board staff to propose an alternative, interim system that ultimately resulted in the adoption of a 25-year, 24-hour standard in the amended CAO. When the Regional Board staff asked in mid-July 2014 how many tanks it would take to meet the 25-year, 24-hour standard, Recology had its engineering consultant perform modeling and had another engineering expert review that modeling. In response to staff’s oral concerns about the modeling, Recology had its engineer produce another technical report to provide additional data and explanation, and again this report was reviewed by a second engineer. Recology management also doubled the size of the tank system as recommended by the engineers. There were no indications of any problems with the system during the early storms of the fall of 2014. Recology conducted reasonable due diligence and it made a good-faith effort at compliance. Accordingly, the culpability factor should be at the lower end of the range, at 0.75.

The ACL Complaint nevertheless proposes a culpability multiplier of 1.3, which is at the high end of the range. This approach does not align with the facts. As an example, consider a hypothetical scenario under which Recology did absolutely nothing to comply with Item #9 of the CAO and simply failed or refused to install a collection system at all. Under this scenario,

the culpability multiplier would be the maximum value of 1.5. As this figure reflects a 15 percent increase over the 1.3 culpability factor alleged in the ACL Complaint, the use of a 1.5 culpability multiplier would increase the proposed penalty by 15 percent. Thus, under the “do nothing scenario” the proposed penalty would be increased from \$440,440 to about \$508,000. In other words, the difference in the penalty amount between doing nothing and taking all the steps that Recology took during the spring and summer of 2014 would amount to less than \$70,000. This example illustrates the disparity between the 1.3 culpability factor and the facts and circumstances of this proceeding. The Regional Board should adjust the culpability factor to the lower end of the range.

D. The Cleanup & Cooperation Factor Should be 0.8

In addition to an adjustment for culpability, Step 4 of the Enforcement Policy calls for an adjustment based on cleanup and cooperation. This is defined as the “[e]xtent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between 0.75 and 1.5, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent.” Recology Ex. 40 at 17.

As demonstrated above (see pages 10-12), Recology undertook a series of significant efforts in a short period of time to improve the capacity, efficiency and performance of the collection system in response to the December 3 and December 11 overflows. This includes increasing the capacity of the tank system from 12 to 39 tanks; installing wattles, sand bags and hay bales to channelize flows and reduce erosion; instituting a manned night watch system for improved monitoring; cleaning out the sediments in the tanks and installing additional plumbing connections between the tanks; installing and utilizing additional equipment such as vacuum trucks and portable internal combustion drive pumps to improve system performance; pumping overflow water from the Hog Farm area back into the collection system to minimize any impacts; installing a lined secondary containment feature in the Hog Farm area as a precautionary measure, also to minimize any impacts from an overflow; and keeping the Regional Board staff apprised of the improvements that were being made at the site. In all, Recology expended approximately \$184,000 on improvements to the system between December 3 and December 12. Recology Exhibit 1 (P. Graham Decl. ¶ 39).

The facts support a cleanup and cooperation multiplier at the lower end of the range, rather than the multiplier of 1.1 as alleged in the ACL Complaint. Given Recology’s high level of cleanup and cooperation in response to the overflow events of December 3 and December 11, the Regional Board should adjust this factor to 0.8.

E. The ACL Complaint Is Not Consistent with the Regional Board’s ACL Precedents

The State Board’s Enforcement Policy instructs that the methodology used to calculate ACL penalties should ensure “a fair and consistent statewide approach to liability assessment.” Recology Ex. 40 at 1. Accordingly, ACL penalties should provide “consistent treatment for violations that are similar in nature and have similar water quality impacts.” *Id.* at 2. The proposed penalty of \$440,440 in this proceeding does not comport with this important principle.

Indeed, the proposed penalty in this matter is without support in the Central Valley Regional Board's prior ACL precedents. A review of these precedents (which are available online at http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/) shows that penalties in the range of nearly half a million dollars are reserved for mandatory minimum penalties for numerous, serious NPDES violations; large discharges to waters of the state or to waters of the United States; or particularly egregious and persistent refusals or failures to comply with fundamental regulatory requirements. In contrast, imposing a fine of such magnitude where a discharger timely installs a collection system based on the written recommendations and analysis of its qualified engineers and then promptly undertakes substantial system upgrades to fix the problem as soon as it occurs and is first discovered—without any discharge to waters of the state or to waters of the United States, and therefore without any actual environmental harm—is decidedly unique.

Three prominent ACL enforcement actions by the Central Valley Regional Board over the past few years are discussed below to provide a point of comparison and to demonstrate that the proposed penalty in this proceeding is not fair or suitable under the facts and circumstances presented.

First, in the matter of *City of Sacramento and Sylvia Dellar Survivor's Trust, Dellar Landfill*, ACL Complaint No. R5-2012-0516 (issued Mar. 9, 2012) (see Recology Ex. 41), which the prosecution team has referred to in its list of exhibits (see Prosecution Team Ex. 99), the Regional Board issued a Cleanup and Abatement Order that provided three years for the construction of a closure cover over a former landfill. As of the date of the ACL Complaint, the dischargers had violated the CAO requirement to begin closure construction activities for 786 days, had violated the CAO requirement to complete closure activities for 509 days, and had violated various CAO requirements to submit reports and certifications for a total 1,897 days. The dischargers had initiated no actions to comply with these requirements.

The ACL Complaint emphasized that the closure requirements that were violated constituted “an essential element of ensuring that the waste on site is contained in a manner protective of the environment,” that the dischargers’ “[f]ailure to properly install erosion and sedimentation controls will only exacerbate water quality impacts,” and that the required closure certification report that had not been submitted was “critical to show that the landfill was closed in compliance with the CAO and the approved closure plans.” Recology Ex. 41 at 11. Based on these issues, the ACL Complaint concluded that “the Potential for Harm is determined to be ‘moderate’ and the Deviation from Requirement is considered to be ‘moderate.’” *Id.* The ACL Complaint therefore applied a per day multiplier of 0.35 (as compared to the 0.55 multiplier used in this proceeding).

As for the number of days of violation, the ACL Complaint in the *Dellar* case used the process in the Enforcement Policy for compressing the days of violation to reduce the total days of violation from 3,192 to 116. Of the 116 days of violation of the CAO, the ACL Complaint assessed 48 days at a maximum of \$5,000 per day and 68 days as only reporting violations at a maximum of \$1,000 per day. With respect to culpability, the ACL Complaint assessed a factor of 1.2 (as compared with the factor of 1.3 in this proceeding), noting that the discharger was clearly aware of the requirements in the CAO and was provided with three years to complete the closure construction, ***which had not yet been initiated.*** With regard to cleanup and cooperation,

the ACL Complaint assessed a factor of 1.1 (the same as the factor applied in this proceeding) “based on the fact that there has been less cooperation and movement to correct the violations than would otherwise be expected.” The ACL Complaint assessed the total base liability at \$142,296 (which was then augmented to **\$164,796** to include Regional Board staff costs).

Thus, the prolonged failure to begin, let alone complete, important improvements that were needed to protect the environment resulted in a proposed fine that is about one-third of the proposed liability in this proceeding. The comparison is stark. A complete failure to take an action to protect the environment in the *Dellar* case was not pursued nearly as aggressively as good faith efforts on Recology’s part to timely install a collection system.

Second, in the matter of *California Department of General Services, Nevada City Forest Fire Station*, ACL Complaint R5-2012-0500 (issued Jan. 3, 2012) (see Recology Exhibit 42), which involved violations of the statewide Construction General Permit, Regional Board staff conducted a brief inspection on October 5, 2011 following the first rain of the season. Staff observed sediment tracking off of the construction site and identified that sediment control Best Management Practices were not effective. Staff also observed that the discharger had failed to implement soil stabilization BMPs. Staff conducted another, more thorough inspection on October 11, 2011 and observed that eight specific categories of required control measures were deficient or absent. The discharger subsequently completed corrective actions at the site by November 3, 2011. See Recology Ex. 42 at 2-3.

Based on the findings of the October 5 inspection, the ACL Complaint alleged there were two separate violations lasting 29 days each (from October 5 to November 2), for a subtotal of 58 days of violation. Based on the findings of the October 9 inspection, the ACL Complaint further alleged another three separate violations lasting 23 days each (from October 11 to November 2), for a subtotal of 69 days of violation, which brought the total to 127 days of violation. Several other violations were added to bring the total to 132 days of violation, with a maximum penalty of \$10,000 per violation. See Recology Ex. 42 at 60-7. But the actual proposed penalty was not close to this number.

The potential for harm was considered “minor” because “turbid storm water did not discharge off of the construction site or entire storm drain systems where it could be carried to surface waters.” Recology Ex. 42, Attach. B at 1. The per day assessment factor in the Nevada City Forest Fire Station case was assessed at 0.3 (as compared to the factor of 0.55 used in this proceeding), and the culpability factor was assessed at 1.0 (as compared to 1.3 here) “due to the failure to follow the site specific [Stormwater Pollution Prevention Plan] and implement appropriate erosion and sediment control BMPs on the construction site.” Recology Ex. 42, Attach. B at 2. As observed in the Notice of Violation attached to the ACL Complaint, the discharger “failed to implement good site management practices, failed to provide effective erosion and sediment controls, failed to implement an effective inspection and maintenance program, and failed in its duty to comply with the General Permit.” The NOV then listed *two pages* of General Permit provisions that were violated. But these numerous violations resulted in less culpability than what has been proposed in this proceeding, where Recology relied on two engineering firms to design a collection system to comply with the requisite standard and then doubled the capacity of the system as compared to what the engineers had recommended before the compliance deadline.

The cleanup and cooperation factor was assessed at 0.75 in the Nevada City Forest Fire Station case, as the discharger “was cooperative in meeting the requirements of the General Permit following staff inspections and issuance of an NOV.” This is compared to a 1.1 factor in this proceeding, where Recology acted voluntarily and quickly to correct the problems with the collection system after they were first encountered on December 3, 2014.

The history of violation was assessed at 1.1 in the Nevada City Forest Fire Station case, as the ACL Complaint observed that “the Department of General Services has a poor record of implementing the Construction General Permit at this facility as well as at other facilities.” Recology Ex. 42, Attach. B at 4. The ACL Complaint further observed 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.” *Id.* at 3.

The total base liability was assessed at \$338,000 (including staff costs), but the ACL Complaint significantly reduced the proposed liability, based on the following factors: (1) first, the violations occurred upon the first rains of the wet season and the discharger made corrections after it received an NOV; and (2) second, while some sediment was tracked off-site onto the roadway, “it does not appear that the violations resulted in a direct discharge of sediment to surface waters.” Recology Ex. 42, Attach. B at 4.

The ACL Complaint therefore reduced the proposed liability amount to \$168,000 Again, this is about one-third of the proposed liability in this proceeding, based on facts far more egregious than those in this proceeding—where there was no discharge to either surface or groundwater, the collection system worked properly without problems for the first two months of the wet season, and Recology made substantial system improvements promptly and effectively upon learning that improvements were needed after the first overflow from the system during the first heavy storms of the wet season.

Finally, in the matter of *The California Department of Transportation State Route 65 Lincoln Bypass Project*, ACL Complaint R5-2009-0558 (issued July 23, 2009) (Recology Ex. 43), which also involved violations of the Construction General Permit, Regional Board staff conducted seven inspections of the project site between December 11, 2008 and May 5, 2009 and observed numerous violations. As indicated in a Notice of Violation issued on February 4, 2009, “[d]uring the multiple site inspections, Water Board staff observed that the site lacked an effective combination of erosion and sediment control Best Management Practices.” *Id.*, Attach. A9 at 1. The NOV directed Caltrans to “*ensure immediate implementation of appropriate and effective erosion and sediment control measures to reduce the threat of sediment discharges to surface waters.*” *Id.*, Attach. A9 at 2 (original emphasis).

More than a month later, another NOV observed that project employees were “deliberately discharging sediment-laden water to a City of Lincoln storm vault,” which was “one of the many violations identified during the recent high rainfall events.” *Id.*, Attach. A10 at 1. The NOV indicated that the deliberate discharge was “particularly egregious” as Caltrans personnel were notified multiple times of the problem and assured Regional Board staff that control systems would be in place and operational before the next significant storm event, which did not occur. *Id.* Instead, the proper control systems were installed only after ***multiple illegal discharges occurred.***

The ACL Complaint also noted the documented conclusion of the California Department of Fish & Wildlife that the illegal and substantial discharges of silt and sediment from the project were having deleterious impacts to aquatic life in the receiving surface waters. *Id.*, Attach. A11 (July 15, 2009 memorandum from CDFW). In addition to the very large potential penalty resulting from the discharge of 302,000 gallons of sediment-laden stormwater to surface waters in violation of the Clean Water Act (with a maximum penalty of \$10 per gallon), the ACL Complaint also alleged that there were 14 days of a violation. The Complaint reasoned that ***these were the days when there was an illegal discharge to surface waters.*** *Id.* at 11. The ACL Complaint did not allege a violation on other days, even though the site exhibited serious stormwater management problems throughout the entire wet season. In other words, the complaint counted as violations only the days upon which it rained and a violation actually occurred. It did not count the other days during which protective measures were to have been in place but were not.

The ACL Complaint proposed a fine of \$524,100, which subsequently was reduced to an order of liability of **\$325,000** (see ACL Order R5-2010-0506, issued Jan. 27, 2010, which is attached to Recology Ex. 43). This penalty amount, for deliberate and egregious conduct over the course of the ***entire wet season that caused documented harm to sensitive biological resources***, is more than 25 percent below the proposed penalty in this proceeding, where Recology's timely installed collection system encountered problems on only two days, December 3 and December 11, 2014, those problems were quickly rectified, and no discharge to waters of the United States or waters of the state occurred.

These cases serve to illustrate the point that the ACL Complaint here has significantly overstated virtually every relevant factor for the assessment of a proposed penalty, and that this proposed penalty is out of proportion with the facts and circumstances, the nature of the violation, and the actual and potential environmental harm.

IV. CONCLUSION

The stated goal of the CAO requirement to install a compost water collection system was to prevent the discharge of compost water in order to protect water quality. Recology designed a collection system in reliance on the calculations and modeling prepared by its engineers and it timely installed the system by the CAO deadline of October 1, 2014. There were no problems until December 3, 2014. Starting on that date, when the first problem occurred with the system, Recology quickly mobilized a large team of people inside and outside of the company and took prompt action to make substantial improvements to the system's capacity and performance. Recology also acted quickly to pump back into the collection system compost water that had overflowed. As the prosecution team acknowledges, there was no discharge on either December 3 or December 11 to waters of the state or waters of the United States—and thus there was no actual harm to water quality. By December 12, 2014, Recology completed its significant system upgrades and it has been documented that the upgraded system is sufficient to handle the 25-year, 24-hour design event.

The stated goal of the CAO's requirement to install an effective compost water collection system has been achieved. The problems that were discovered in early December 2014 have been fixed and there has been no adverse impact to water quality or the environment.

The ACL Complaint significantly overstates the extent, nature, and severity of the alleged violation, and is inconsistent with both the facts and the Central Valley Regional Board's prior ACL precedents. For the reasons set forth above, the Regional Board should significantly reduce the proposed penalty amount, to an amount of \$47,193.

For Recology:

A handwritten signature in blue ink that reads "Marc R. Bruner". The signature is written in a cursive style and is positioned above a horizontal line.

Marc R. Bruner
PERKINS COIE LLP

March 18, 2015

