

Attachment A – ACL Complaint No. R5-2015-0506
Specific Factors Considered – Civil Liability
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Sweeney Dairy

The Central Valley Water Board alleges that the Discharger failed to submit the 2013 Annual Report required to be submitted by 1 July 2014. For the purpose of applying the Enforcement Policy's administrative civil liability methodology, the alleged violation is a non-discharge violation. Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

Failure to submit 2013 Annual Report: In accordance with the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (Reissued General Order) and the accompanying Monitoring and Reporting Program (MRP), a 2013 Annual Report must be submitted for regulated facilities by 1 July 2014. To date, the Owner/Operator (hereinafter the Discharger) has not submitted this report for the Sweeney Dairy.

Calculation of Penalty for Failure to Submit 2013 Annual Report

Step 1. Potential for Harm for Discharge Violations

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

Step 2. Assessment for Discharge Violations

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

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.35.

This factor is determined by using the potential for harm of the violation and the extent of the Discharger's deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2013 Annual Report did not increase the amount of pollution discharged or threatened to discharge into waters of the State. However, failing to submit the Annual Report to the Central Valley Water Board hinders the Board's ability to detect and address noncompliance. The Annual Report is a key means through which the Central Valley Water Board evaluates a Discharger's compliance with the Reissued General Order, including the assessment of proper manure application to fields and waste management in a dairy's production area. By failing to provide the information in the Annual Report, the Discharger frustrates the Board's efforts to assess the potential impacts and risks to water quality and circumvents the Board's ability to take necessary enforcement action to correct problems. The regulatory program is compromised when staff resources are directed toward bringing the Discharger into compliance and those resources are

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not available for other program activities. Since the violation thwarts the Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. Failing to timely submit the Annual Report to the Central Valley Water Board hinders the Board's ability to address noncompliance. Those circumstances present at least a minor potential for harm.

The deviation from requirements was determined to be major, as the requirement to submit the Annual Report has been rendered ineffective. The failure to submit the required technical report undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the Reissued General Order.

Initial Liability

The failure to submit an annual report is an enforceable violation under Water Code section 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2013 Annual Report by 1 July 2014 as required by the Reissued General Order and the MRP, and is 253 days late as of the issuance date of this Complaint. A pre-filing settlement letter issued to the Discharger on 5 December 2014 establishes a total of 157 days in which the Discharger has been out of compliance for failure to submit the 2013 Annual Report, and is the basis for determining the recommended civil liability amount.

Step 4. Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided certain findings can be made. The Enforcement Policy also describes three factors related to the Discharger's conduct that should be considered for modification of the initial liability amount: the Discharger's culpability, the Discharger's efforts to clean up or cooperate with regulatory authorities after the violation, and the Discharger's history of violations. After each of these factors is considered for the violation alleged, the applicable factor should be multiplied by the proposed liability amount for the violation.

a) Multiple Day Violations

The Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation.

For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal

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conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Discharger's failure to submit a 2013 Annual Report is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit a 2013 Annual Report has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's failure to submit a 2013 Annual Report results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with avoided costs of preparing and submitting a 2013 Annual Report.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The alternate approach assesses daily penalties for the first day of violation, plus an assessment for each five-day period of violation until the 30th day, plus an assessment of one day for each thirty days of violation thereafter. Applying this assessment method on the total 157 violation days gives the Board the discretion to reduce the assessed penalty days to a minimum number of 11 days. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's unwillingness to comply with the Revised General Order undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation above the Minimum Approach to a total number of 22 days of violation.

A calculation of initial liability totals \$7,700 (0.35 per day factor X 22 adjusted days of violation X \$1,000 per day penalty).

b) *Culpability*: 1.5

Discussion: The Discharger was assessed a score of 1.5, which increases the liability amount. The Discharger is responsible for failing to submit the annual report alleged herein. The requirement to submit a 2013 Annual Report was detailed in the Reissued General Order. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the Reissued General Order, the Discharger continues to fail to comply. Thus, the

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Discharger had knowledge of the requirement to submit the Annual Report and failed to meet the reasonable standard of care in that regard. Given the fact that the Discharger has chosen to willfully violate the legal requirement, the maximum culpability score of 1.5 has been applied.

c) *Cleanup and Cooperation: 1.5*

Discussion: The Discharger was assessed a score of 1.5, which increases the liability amount. The Discharger was issued a Notice of Violation on 29 August 2014, which requested that the report be submitted as soon as possible to minimize liability. The Discharger was unresponsive to the NOV, and did not cooperate with the Water Board to come back into compliance. The violation of Water Code section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

d) *History of Violations: 2*

Discussion: The Discharger was assessed the score of 2, which increases the fine. The Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2011-0068 on 13 October 2011 for the Discharger's failure to submit the 2009 Annual Report and the Waste Management Plan by the required deadlines, as required by the Reissued General Order and the MRP. In addition, the Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2012-0070 on 2 August 2012 for the Discharger's failure to submit the 2010 Annual Report by the required deadline, as required by the Reissued General Order and the MRP. In addition, the Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2013-0091 on 25 July 2013 for the Discharger's failure to submit the 2011 Annual Report by the required deadline and for failure to comply with a Water Code 13267 Order issued to the Discharger on 4 May 2012, as required by the Reissued General Order and the MRP. In addition, the Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2014-0119 on 9 October 2014 for the Discharger's failure to submit the 2012 Annual Report by the required deadline, as required by the Reissued General Order and the MRP. The Enforcement Policy requires that a minimum multiplier of 1.1 be used when there is a history of repeat violations.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$34,650* [Initial Liability (\$7,700) x Adjustments (1.5)(1.5)(2)].

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Step 6. Ability to Pay and Continue in Business

The Enforcement Policy provides that if the Central Valley Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward.

a) *Adjusted Total Base Liability Amount:* **\$34,650**

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

Without additional information provided by the Discharger, based on this initial assessment of information available in the public record, it appears the Discharger has the assets to pay the Total Base Liability. Based on the reasons discussed above, no reduction in liability is warranted.

Step 7. Other Factors as Justice May Require

a) *Adjusted Combined Total Base Liability Amount:* $\$34,650 + \0 (Staff Costs) = **\$34,650.**

b) *Discussion:* No staff costs have been assessed as part of this enforcement action.

Step 8. Economic Benefit

a) *Estimated Economic Benefit:* **\$964**

Discussion: The Discharger has received an economic benefit from the costs saved in not drafting and preparing the 2013 Annual Report. This is based on the current consulting costs of producing an Annual Report, including the cost of any and all samples required under the Reissued Dairy General Order (\$964). The adjusted combined total base liability amount of \$34,650 is more than the economic benefit amount (\$964) plus ten percent as required by the Enforcement Policy.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount:* **\$1,060.40**

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not fall below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's

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estimate of the Discharger's economic benefit obtained from the alleged violation is \$964. Therefore, the minimum liability amount is \$1,060.40 [Economic Benefit (\$964) x Adjustment (1.1)].

b) *Maximum Liability Amount: \$157,000*

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (157 total days X \$1,000 per day).

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

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2013 Annual Report is **\$34,650**.