

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0549

**THE MORNING STAR PACKING COMPANY, LP
THE MORNING STAR TOMATO PACKING PLANT
COLUSA COUNTY**

**PROSECUTION TEAM'S LEGAL AND TECHNICAL ANALYSIS
SUPPORTING ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0549**

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I. Introduction

The Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) Prosecution Team recommends the Central Valley Water Board assess an administrative civil liability in the amount of one million five hundred thousand dollars (\$1,500,000) against The Morning Star Packing Company, LP (hereinafter Discharger) for alleged violations of Waste Discharge Requirements Order R5-2013-0144 (2013 WDRs). Specifically, the Prosecution Team alleges that the Discharger violated the 2013 WDRs on two separate occasions when it 1) completed an unpermitted expansion of the Cooling Pond from 60 acres to 100 acres by removing 90.5 acres of Land Application Areas (LAA); and 2) completed an unpermitted expansion of the Settling Pond from 5 acre-feet to approximately 10.16 acre-feet. These unpermitted expansions of the Cooling Pond and Settling Pond constitute violations of Prohibition A.3 of the 2013 WDRs which states "Discharge of waste at a location or in a manner in different from that described in the Findings [of the 2013 WDRs] is prohibited."

California Water Code section 13350 authorizes assessing administrative civil liability when a person, in violation of a waste discharge requirement, discharges waste into waters of the state. Discharges of waste to waters of the state from the unpermitted portions of the Cooling and Settling Ponds are taking place at a calculated rate of 276,300 gallons per day and 3,672 gallons per day, respectively. In addition, the unpermitted expansion of the Cooling Pond at the expense of 90.5 acres of LAA necessarily means that wastewater is being discharged to a smaller LAA which resulted in violations of the biochemical oxygen demand (BOD) and nitrogen loading limits during the 2015 processing season and created additional groundwater quality concerns. The Prosecution Team asserts that the proposed administrative civil liability is appropriate for the reasons explained in Administrative Civil Liability Complaint (Complaint) R5-2015-0549, Attachment A to the Complaint, and for the reasons discussed herein.

II. Discharger, Facility, and 2013 WDR Background

The Discharger owns and operates a tomato processing facility (Facility) in Williams, California. According to the Discharger's website, Morning Star accounts for over 25% of the California processing tomato production, supplying 40% of the United States ingredient tomato paste and diced tomato markets, with industrial sales of approximately \$350 million.¹ The Morning Star Company includes three separate tomato processing facilities, a trucking company, and farming operations. The Williams Facility operates during the tomato harvest season from approximately June to mid-October each year. Processing operations occur 24 hours per day, every day during the harvest season.

On 5 December 2013, the Board adopted the 2013 WDRs which prescribe requirements for the discharge of industrial wastewater to land. According to the 2013 WDRs, there are five wastewater streams: water softener reject, condensate from the evaporation process, boiler blowdown, plant cleaning water, and tomato waste generated in the flume system. Water softener reject, condensate, and boiler blowdown are directed to the Cooling Pond. Tomato

¹The Morning Star Company Website <http://morningstarco.com/index.cgi?Page=About%20Us/Company%20History>

waste is directed to the Settling Pond. Wastewater generated from sanitation or cleaning activities flows directly to the LAA. All of these wastewater streams are applied to 695 acres of cropland at agronomic rates as authorized by the 2013 WDRs which identify the availability of 695 acres of LAA as the current treatment and control measure for the discharges to land. Throughout the processing season, the Cooling Pond is full of water comprised of water softener reject, condensate from the evaporation process, and boiler blowdown. The water in the Cooling Pond is recirculated back to the processing plant.

A. Cooling Pond and Land Application Area as described in 2013 WDRs

According to the 2013 WDRs, the Cooling Pond is approximately 60 acres in size. Attachment B of the 2013 WDRs depicts the Cooling Pond directly north of the Facility and south of Fields MS20, a 64.6 acre LAA, and MS21, a 25.9 acre LAA. The Cooling Pond is unlined and the base of the pond is approximately 1.7 to 3.2 feet above groundwater.² Water softener reject and boiler blowdown are high strength wastes. Finding 17 of the 2013 WDRs states that the boiler blowdown has an average electrical conductivity of 1,200 to 1,400 $\mu\text{mhos/cm}$, while Finding 18 of the 2013 WDRs shows that the electrical conductivity of wastewater generated during the water softener regeneration cycle ranges from 850 to 8,600 mg/L. The 2013 WDRs anticipate that condensate from the evaporators will be discharged to the Cooling Pond. The 2013 WDRs do not contemplate the discharge of tomato waste or byproducts to the Cooling Pond as demonstrated by the limited Cooling Pond monitoring required by the Monitoring and Reporting Program.³

As referenced above and in Finding 19 of the 2013 WDRs, approximately 695 acres of LAA are available for irrigation with wastewater from the Settling Pond and/or Cooling Pond. The LAA are surface irrigated using the border check method whereby checks are sequentially irrigated until the entire field has been irrigated. However, the length of the checks results in an uneven distribution of wastewater due to higher application rates and longer infiltration periods at the top end of the field as opposed to the bottom. It can take up to ten days or more to irrigate one field to ensure that the lower end of the check receives sufficient water to sustain the crop. Though the 2013 WDRs do not specifically require the Discharger to continually utilize all 695 acres of LAA during the processing season, the 2013 WDRs establish requirements and limitations protective of groundwater quality with the assumption that 695 acres are available for irrigation. Furthermore, the 2013 WDRs conclude that the Discharger's operations and land disposal results in "limited groundwater degradation" in compliance with State Water Board Resolution 68-16 (Resolution 68-16) on the basis that "effective source control and treatment and control measure are being implemented by the Discharger." BOD loading rate control and the availability of 695 acres of LAA are identified as the source, treatment, and control measures.

² See footnote 2 of ACL Complaint R5-2015-0549.

³ The MRP requires limited constituent monitoring at the Cooling Pond for dissolved oxygen and pH. The Discharger is not required to monitor the Cooling Pond for biochemical oxygen demand, salts, or nutrients, as is required for the Settling Pond.

B. The Expansion of the Cooling Pond is not authorized by the 2013 WDRs

Prior to the 2015 processing season, the Discharger increased the size of the Cooling Pond by 40 acres to total size of 100 acres. This increase resulted in a decrease in available LAA due to the removal of LAA MS20A, MS20B, and MS21, totaling 90.5 acres, in order to accommodate the Cooling Pond expansion. According to statements from the owner of the company, Mr. Chris Rufer, the purpose of the Cooling Pond expansion was twofold: 1) to provide a larger surface area to cool the wastewater and 2) to add oxygen to the wastewater to mitigate the BOD that enters it.⁴ Documents produced by the Discharger in response to the Prosecution Team's administrative subpoena indicate that planning for the Cooling Pond expansion began as early as February 2012⁵ with topographic surveys of LAA MS14, MS20, and MS21 and Cooling Pond Design commencing prior to March 25, 2012.⁶ Though the 2013 WDRs generally acknowledge the Discharger's plans to increase productions by up to 65 percent in the future⁷, specific references to a planned Cooling Pond expansion and reduction in LAA are noticeably absent in any of the permit's findings, Anti-Degradation Analysis, and Information Sheet. Waste discharge requirements are typically written based on the information specifically provided by a discharger in a ROWD or addendum to that ROWD.⁸ The Prosecution Team understands that at no time during the permitting process did Morning Star representatives provide any specific information in its Report of Waste Discharge or in a supplemental addendum regarding planned expansions to the Cooling Pond or reductions in LAA acreage resulting from the removal of MS20A, MS20B, and MS21.⁹

Furthermore, it is not reasonable for a sophisticated company like Morning Star to assume that general references to future production expansion inherently include the Cooling Pond expansion nor is it reasonable for Morning Star to interpret the 2013 WDRs as impliedly authorizing or accounting for such modifications without first submitting that information to Board staff in a new Report of Waste Discharge (ROWD) or ROWD addendum. This is especially true where the expansion of the Cooling Pond results in a substantial modification of a recognized treatment and control measure that is included in the 2013 WDRs as part of a "suite of treatment or control methodologies that is expected to remedy groundwater pollution issues at the Facility over time."¹⁰ Modification to the underlying assumption that 695 acres are available for effective treatment and control may also substantially modify the Board's conclusion that limited groundwater degradation is occurring in compliance with Resolution 68-16, particularly where the Discharger has not implemented alternative treatment or control measures to make up for a decrease in LAA acreage.

The Cooling Pond expansion and corresponding decrease in LAA acreage available for irrigation results in a discharge of waste in a manner different from that described in the findings

⁴ *Summary of Meeting with Morning Star Packing Company, Williams, Colusa County, Wendy Wyels, 3 November 2015.*

⁵ Morning Star Subpoena Document 0001

⁶ Morning Star Subpoena Document 0013

⁷ Waste Discharge Requirements Order R5-2013-0144, Finding 28, p. 12.

⁸ Declaration of Lani Andam, December 22, 2015.

⁹ *Id.*

¹⁰ Waste Discharge Requirements Order R5-2013-0144, Findings 60, 61, and 62, p. 12.

of the 2013 WDRs and constitutes a material change triggering the requirement for the Discharger to submit a new ROWD with the Board for amended WDRs prior to instituting those changes.

It is clear that the Discharger knew during the 2013 WDRs process that it was planning to expand the Cooling Pond and decrease the LAA, however, at no time during that process did it memorialize those intentions in an addendum to its ROWD and submit it to Board staff for inclusion in the 2013 WDRs. Permits are not drafted based on mere conjecture. The Discharger is a sophisticated company that should have known that such modifications needed to be, at the very least, communicated to Board staff in a ROWD or ROWD addendum and ultimately approved by the Board in amended WDRs.

This is not merely a "paper violation" or failure to notify the Board, but this violation resulted in the discharge of waste in a manner different from that described in the findings of the 2013 WDRs. The Discharger's modifications without the Board's approval has 1) deprived the Board of its ability to draft requirements and conditions to ensure that such material changes are protective of water quality; 2) resulted in BOD and nitrogen overloading on a smaller LAA; and 3) created actual groundwater quality issues, as discussed in further detail below. Despite making preparations for such an expansion as early as 2012, Morning Star never apprised Board permitting staff about the Cooling Pond expansion and LAA reduction through the appropriate channels, which explains the notable absence of any specific references to these material changes in the 2013 WDRs. Board staff did not discover that these material changes had been made until its site inspection on 20 August 2015 in response to odor complaints from neighboring residents.

C. Settling Pond as described in 2013 WDRs

According to the 2013 WDRs, the Settling Pond is described as a five acre-foot pond constructed with clay soils compacted in lifts. Attachment B to the 2013 WDRs depicts the Settling Pond to the southeast of the Cooling Pond and to the west of Field MS24. The Settling Pond receives wastewater during the processing season including wash water from the flume systems and the unloading station. The Monitoring and Reporting Program requires the Discharger to conduct weekly monitoring for BOD, fixed dissolved solids (FDS), and total nitrogen at Settling Pond Station 1 prior to discharging the wastewater to the LAA.

D. The Expansion of the Settling Pond is not authorized by the 2013 WDRs

Similar to the unpermitted expansion of the Cooling Pond, the Discharger expanded the size of the Settling Pond without the knowledge or approval of the Central Valley Water Board. In its Complaint, the Prosecution Team conservatively estimated that the Discharger completed the Settling Pond expansion sometime after the 2011 processing season based on references to a "2011 staking plan for the pond expansion." Documents submitted in response to the Prosecution Team's administrative subpoena indicate that planning for the expansion of the Settling Pond began as early as June 2011¹¹ and confirm that completion of the unpermitted

¹¹ Morning Star Subpoena Documents 0511 and 0512.

Settling Pond expansion occurred approximately July 2012¹². These documents confirm the Prosecution Team's contention that the expanded Settling Pond was available for use by the Discharger beginning in the 2012 processing season.

In response to a Water Code section 13267 Order dated 3 November 2015, the Discharger provided the Prosecution Team with the current dimensions of the Settling Pond.¹³ A registered engineer determined that the top of the Settling Pond is currently 440 feet by 196 feet (1.98 acres) and that the pond has a usable depth of 7.65 feet, allowing for two feet of freeboard. Based on the average length and width, Board staff determined that the current volume of the Settling Pond is 10.16 acre-feet, more than twice the approved size and volume in the 2013 WDRs. The Discharger never apprised Board permitting staff about the Settling Pond expansion, failed to submit a new ROWD prior to initiating such changes, and even failed to mention its completion during the development of the 2013 WDRs¹⁴, as the permit still describes the pond as, "the five acre-feet (ac-ft) Settling Pond"¹⁵ though the Discharger increased the size and capacity more than one year prior to the issuance of the 2013 WDRs. The unpermitted expansions of the Cooling Pond and Settling Pond, the Discharger's failure to seek approval for these changes through the appropriate regulatory channels, and the Discharger's failure to communicate with Board staff after these material changes were made demonstrates the Discharger's disregard for the Board's regulatory process and tends to demonstrate the Discharger's belief that it is easier to ask for forgiveness after-the-fact rather than seek permission ahead of time. This is completely contrary to the manner in which the Board conducts its business.

III. Prior Enforcement Orders of the Central Valley Water Board and BOD Loading Concerns

This is not the first time the Discharger has been the subject of potential enforcement order issued by this Board. In 2005, the Board issued Cease and Desist Order No. R5-2005-0003 (2005 CDO) to address discharges of wastewater to surface water, low dissolved oxygen issues in the Settling Pond, and potential groundwater degradation from over-application of nutrients and salts. The 2005 CDO also noted that only 180 acres of cropland received wastewater in the regular irrigation cycle during the 2004 processing season.¹⁶

The 2005 CDO required the Discharger, in part, to limit BOD loading to 100 pounds per acre per day (lb/ac/day), submit a Dissolved Oxygen Compliance Report, and a Cropping Plan to ensure the use of available cropland is maximized. As recognized in the 2013 WDRs, the Discharger has a history of exceeding the 2005 CDO's BOD loading limits of 100 lb/ac/day. The maximum daily BOD loading rates during the 2009 to 2011 processing season were as high as 700

¹² Morning Star Subpoena Document 540.

¹³ Water Code section 13267 Order for Technical Report, The Morning Star Packing Company, LP, Colusa County, 3 November 2015.

¹⁴ Declaration of Lani Andam, December 22, 2015.

¹⁵ Waste Discharge Requirements Order R5-2013-0144, Finding 12.

¹⁶ Cease and Desist Order No. R5-2005-0003, Finding 5.

lb/ac/day and a review of the 2012 BOD loading data indicates maximum BOD loading rates up to 220 lb/ac/day.¹⁷ In addition to the Discharger's historical noncompliance with the BOD loading limit, during the 2015 processing season, the BOD loading limit was exceeded on numerous fields during the months of August and September, with a maximum loading rate of 216 lb/ac/day.¹⁸

IV. The Proposed Administrative Civil Liability Pursuant to California Water Code section 13350, subdivision (e)(2) is Appropriate.

The Assistant Executive Officer of the Central Valley Water Board issued this Complaint alleging two categories of violation: 1) the unpermitted expansion of the Cooling Pond constitutes a violation of Prohibition A.3; and 2) the unpermitted expansion of the Settling Pond constitutes a violation of Prohibition A.3. Both alleged violations also constitute violations of Standard Provision A.4 as the expansions of both ponds are material changes requiring the submission of a new ROWD.

California Water Code section 13350 authorizes the assessment of administrative civil liability when a person, in violation of a waste discharge requirement, discharges waste or causes or permits waste to be deposited where it is discharged into the waters of the state. In both instances, wastewater discharged to unpermitted and unlined ponds results in the seepage and discharge of waste to groundwater beneath the ponds. The Prosecution Team calculated a discharge rate of 276,300 gallons per day from the unpermitted portion of the Cooling Pond and 3,672 gallons per day from the unpermitted portion of the Settling Pond.¹⁹ California Water Code section 13350 authorizes the imposition of liability on *either* a per day basis, in the amount of \$5,000 for each day the violation occurs, or a per gallon basis, in the amount not to exceed \$10 for each gallon of waste discharged.²⁰ The Prosecution Team recommends the Board assess liability pursuant to California Water Code section 13350, subdivision (e)(2) on a per gallon basis and asserts that given the above discussion, the allegations in the Complaint, and analysis in Attachment A to the Complaint, that the assessment of \$1.5 million dollars is appropriate.

It serves as an appropriate deterrent, discourages the Discharger from committing similar violations in the future, and discourages similarly situated dischargers from committing the same or similar violations. The unpermitted expansion of the Cooling Pond at the expense of 90.5 acres of LAAs at MS20A, MS20B, and MS21 combined with increased BOD concentrations measured at Settling Pond Station 1 in 2015²¹ exacerbates groundwater quality issues and has resulted in exceedances of groundwater limits for manganese during the 2015 processing season. For these reasons, and those previously discussed in the Prosecution Team's

¹⁷ Waste Discharge Requirements Order R5-2013-0144, Finding 25.

¹⁸ See Attachment E to August 2015 and September 2015 Self-Monitoring Reports.

¹⁹ See 6 November 2015 memo from Howard Hold and Mike Fischer to Wendy Wyels, *Pond Seepage Estimate, Morning Star Packing Company, Williams*; 16 November 2015 memo from Howard Hold and Mike Fischer to Wendy Wyels, *Settling Pond Seepage Increase Estimate, Morning Star Packing Company, Williams Facility, Colusa County*.

²⁰ California Water Code section 13350, subdivisions (e)(1) and (e)(2).

²¹ Response to the Morning Star Packing Company, LP NOV dated September 11, 2015, p. 4.

Complaint and Attachment A, the proposed liability bears a reasonable relationship to the gravity of the violations, harm to waters of the State, and harm to the Board's regulatory program.

V. Corrections to the Prosecution Team's Calculation of Economic Benefit

Pursuant to California Water Code section 13327 and the State Water Board's Water Quality Enforcement Policy, the economic benefit resulting from a discharger's noncompliance must be considered when determining the proposed liability amount. The Prosecution Team calculated the Discharger's economic benefit by identifying various compliance actions required to comply or prevent the violations and estimated the delayed and avoided costs of those compliance actions. Without additional information, which is in the sole possession and control of the Discharger, it is difficult to make a more comprehensive determination of economic benefit.

It is clear from information known to the Prosecution Team and confirmed by the Discharger's response to the administrative subpoena that the Discharger dramatically increased production at its Williams Facility from 1.4 million tons in 2014 to 2.1 million tons in 2015 likely resulting in an additional economic benefit. It is conceivable that the actual economic benefit exceeds the calculated economic benefit but the Prosecution Team is unable to quantify that benefit at this time. Based on delayed and avoided costs only, the Prosecution Team determined the economic benefit to be \$792,301 resulting in a minimum liability amount of \$871,531 ($\$792,301 + (\$792,301 \times 10\%)$) as stated in the Complaint and Attachment A.

In preparing its evidence submittal, the Prosecution Team identified a mistake in the input value for the One-Time Nondepreciable Expenditure for the Compliance Action of installing and operating of 20 aerators for the Cooling Pond and has subsequently corrected the value to accurately reflect the estimated One-Time Nondepreciable Expenditure. Additionally, the associated Annual Cost for the same Compliance Action was mistakenly evaluated at \$0 and has subsequently been corrected. Finally, minor adjustments to the equations used to calculate the Annual Costs for the identified Compliance Actions for both the Cooling Pond and Settling Pond resulted in minor modifications to the calculated Annual Cost inputs. An Amended Complaint and Amended Attachment A are attached hereto reflecting these corrections and supported by Prosecution Team Exhibits 28 and 29. The revised economic benefit calculation is \$900,468 resulting in minimum liability amount of \$990,514 ($\$900,468 + (\$900,468 \times 10\%)$).

VI. Conclusion

For the reasons stated above in the Prosecution Team's Legal and Technical Analysis, the Complaint, and Attachment A to the Complaint, the Central Valley Water Board should assess administrative civil liability in the amount proposed.

For the Prosecution Team:



MAYUMI E. OKAMOTO
Senior Staff Counsel

NICKOLAUS C. KNIGHT
Senior Staff Counsel
Office of Enforcement

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

AMENDED ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2015-0549

IN THE MATTER OF

THE MORNING STAR PACKING COMPANY, LP
THE MORNING STAR TOMATO PACKING PLANT
COLUSA COUNTY

This Complaint is issued to The Morning Star Packing Company, LP (hereafter Discharger or Morning Star) pursuant to California Water Code section 13350, which authorizes the imposition of administrative civil liability, Water Code section 13323, which authorizes the Executive Officer to issue this Administrative Civil Liability Complaint (Complaint) and Water Code section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Complaint alleges that the Discharger, in violation of Waste Discharge Requirements Order R5-2013-0144, is discharging waste and causing or permitting waste to be deposited where it is discharged into waters of the state of California.

The Assistant Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) alleges the following:

BACKGROUND

1. On 5 December 2013, the Central Valley Water Board adopted Waste Discharge Requirements (WDRs) Order R5-2013-0144 (the "2013 WDRs") for Morning Star Packing Company, L.P. (Morning Star) and Fred Gobel. The WDRs prescribe requirements for the discharge of industrial wastewater to land, and replace the previous WDRs, Order 95-160.
2. Morning Star Packing Company, L.P. owns and operates a tomato processing facility (Facility). According to the 2013 WDRs, the Facility includes approximately 609 acres of associated land application areas (LAAs). An additional 95 acres of LAA (known as "Field MS1") is owned by Fred Gobel and leased to Morning Star. Though the Board issued the 2013 WDRs to both Morning Star Packing Company and Fred Gobel, the Prosecution Team, in its discretion, issues this Complaint to Morning Star only as the alleged violations are associated with Morning Star's operations and activities occurring solely on its own property. Morning Star is also referred to as the Discharger throughout this Complaint.
3. The Facility, which consists of a tomato processing facility and associated LAAs, is located south of the City of Williams, east of Interstate 5, in Colusa County (Sections 19, 20, 29 and 30, T15N, R2W, MDB&M).
4. According to the 2013 WDRs, the Facility operates during the tomato harvest season, from about June to mid-October each year, making tomato paste and diced tomatoes. There are five wastewater streams: water softener reject, condensate from the evaporation process, boiler blowdown, plant cleaning water, and tomato waste generated in the flume system. The tomato waste enters a 5 acre-foot Settling Pond. The water softener reject, condensate, and boiler blowdown are directed to the 210

acre-foot Cooling Pond. Wastewater generated from sanitation or cleaning activities flows directly to the land application area. Wastewater from the Settling Pond, Cooling Pond, and cleaning activities is applied to 695 acres of cropland at agronomic rates as authorized by the 2013 WDRs.

5. The Cooling Pond is approximately 60 acres in size.¹ The Cooling Pond is not lined and the base of the pond is currently approximately 1.7 to 3.2 feet above groundwater.² The Cooling Pond receives water softener reject, condensate from the evaporation process, and boiler blowdown. Water softener reject and boiler blowdown are high strength wastes. Finding 17 of the 2013 WDRs states that the boiler blowdown has an average electrical conductivity of 1,200 to 1,400 $\mu\text{mhos/cm}$, while Finding 18 of the 2013 WDRs shows that the electrical conductivity of wastewater generated during the water softener regeneration cycle ranges from 850 to 8,600 mg/L.
6. As shown on the Facility Site Plan in Attachment B of the 2013 WDRs, the Cooling Pond is directly north of the plant and south of Fields MS20 and MS21. This Facility Site Plan also depicts the Cooling Pond as 60-acres in size. As discussed above, the 2013 WDRs state that wastewater is applied to 695 acres of cropland³.
7. On 20 August 2015 Board staff inspected the Facility in response to odor complaints. Subsequent to the inspection, Board staff issued a Notice of Violation and transmitted an inspection report on 11 September 2015 to the Discharger. The 11 September 2015 Notice of Violation listed a number of violations observed by staff during the inspection, including the unpermitted expansion of the Cooling Pond from 60 to 100 acres and the removal of 90.5 acres of land application area. In addition, Board staff also noted that organic matter was being discharged to the Cooling Pond in violation of the 2013 WDRs. The 11 September 2015 Notice of Violation required the Discharger to submit a response by 1 October 2015. The Discharger submitted a timely response; however, the content was inadequate to ensure that Morning Star would return to compliance with its 2013 WDRs in a timely manner. The Prosecution Team is proposing a separate Cease and Desist Order to address the Discharger's compliance with the 2013 WDRs.
8. As shown on the Facility Site Plan in Attachment B of the 2013 WDRs, the Settling Pond is a 5 acre-foot pond located to the southeast of the Cooling Pond and to the west of Field MS24. According the Discharger's 12 January 1995 letter submitted with its Report of Waste Discharge, the Settling Pond is 40,000 square feet (0.92 acres) by 5 feet deep.⁴ The 2013 WDRs state that Settling Pond is 5 acre-feet in volume. The Settling Pond was constructed with clay soils compacted in lifts and includes a mechanical aerator. The Settling Pond receives wastewater during the processing season including

¹ Waste Discharge Requirements Order No. R5-2013-0144; Finding 12 and Attachment B.

² Finding 40 of the WDRs states that groundwater is 5-15 feet below the base of the Cooling Pond. However, the actual depth has been calculated using toe-of-berm elevation data provided in the engineering drawings included as Attachment A to the 1 October 2015 NOV response, and groundwater elevation data provided in Morning Star's First Quarter 2015 Groundwater Monitoring Report. The data includes: (a) a toe-of-berm elevation of 87.87 feet from a location along the southeastern portion of the pond near monitoring well MW 3, (b) a toe-of-berm elevation of 86.44 feet from a location along the northwest corner of the pond near MW 5, and (c), groundwater elevations of 86.22 feet for MW 3 and 83.27 feet for MW 5.

³ Waste Discharge Requirements Order No. R5-2013-0144; Findings 19, 28, and 60; Information Sheet.

⁴ 12 January 1995 letter *Description of liquid waste discharge to land by The Morning Star Packing Company tomato processing facility in Williams, California.*

wash water from the flume systems and the unloading station.⁵ The 2013 WDRs require the Discharger to collect wastewater samples for BOD, fixed dissolved solids (FDS) and total nitrogen from flow metering Station 1 (shown in Attachment B of the WDRs). Samples collected shall be representative of wastewater from the Settling Pond (including plant sanitation and clean-up water) prior to discharge to the LAAs.

PREVIOUS ENFORCEMENT

9. On 27 January 2005, the Central Valley Water Board issued Cease and Desist Order (CDO) R5-2005-0003 to Morning Star Packing Company, L.P. and Fred Gobel. The CDO was issued for the following violations of WDRs 95-160:
 - a. Discharges of wastewater to surface water.
 - b. Failure to comply with the dissolved oxygen limit in the Settling Pond.
 - c. Evidence that the discharge had degraded the groundwater with calcium, chloride, nitrate, sulfate, and total dissolved solids.
 - d. Application of excessive levels of nitrogen and salts to the LAAs. Monitoring reports for the year 2004 reported that nitrogen loading rates ranged from 296 to 811 pounds per acre (lb/ac); however, few crops can consume more than 400 lb/ac of nitrogen per year. The total dissolved solids loading rates ranged from 5,600 to 14,800 lb/ac.
10. The Discharger submitted the reports required by the 2005 CDO and implemented facility and operational improvements. The CDO also established a loading rate for BOD of 100 pounds per acre per day or 300 pounds per acre per irrigation cycle. However, as discussed in the 2013 WDRs, compliance with the biochemical oxygen demand and nitrogen loading rate limits has been inconsistent. The CDO was rescinded on 7 February 2014, after adoption of the 2013 WDRs.

REGULATORY CONSIDERATIONS

11. Discharge Prohibition A.3 of the WDRs states: *"Discharge of waste at a location or in a manner different from that described in the Findings is prohibited."*
12. Provision H.11 of the WDRs states: *"The Discharger shall comply with the "Standard Provisions and Reporting Requirements for Waste Discharge Requirements", dated 1 March 1991, which are attached hereto and made part of this Order by reference. This attachment and its individual paragraphs are commonly referenced as "Standard Provision(s)."*
13. Standard Provision A.4 of the WDRs states: *"Before making a material change in the character, location, or volume of discharge, the discharger shall file a new Report of Waste Discharge with the Regional Board."*

⁵ Waste Discharge Requirements Order No. R5-2013-0144, Attachment C.

14. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Board. These requirements implement the Basin Plan.
15. Local drainage is to the Colusa Basin Drain. The beneficial uses of Colusa Basin Drain as stated in the Basin Plan, are agricultural supply; water contact recreation; warm freshwater habitat; migration of aquatic organisms; spawning, reproduction, and/or early development; and wildlife habitat.
16. The beneficial uses of the underlying groundwater, as specified in the Basin Plan are municipal, domestic, and industrial supply.
17. The Central Valley Regional Water Board may impose administrative civil liabilities where a discharger in violation of a waste discharge requirement, discharges waste, or causes or permits waste to be deposited where it is discharged, into waters of the State pursuant to the procedures described in Water Code section 13323. This Complaint alleges the Discharger's conduct constitutes a violation of the 2013 WDRs, resulting in discharges to waters of the State of California, and seeks administrative civil liabilities pursuant to Water Code section 13350.
18. Issuance of this Administrative Civil Liability Complaint to enforce Division 7, Chapter 5.5 of the Water Code is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, sections 15307, 15308, 15321(a)(2) and all applicable law.

ALLEGED VIOLATIONS

Violation Category 1: Violation of Prohibition A.3 of WDRs Order R5-2013-0144 Discharge of Waste to Waters of the State from Unpermitted Expanded Cooling Pond

19. During the 20 August 2015 inspection, Board staff observed that the Cooling Pond had been expanded by 40 acres⁶ and that LAAs MS20A, MS20B, and MS21, a total of 90.5 acres, had been removed in order to construct the expansion to the Cooling Pond. The expansion of the Cooling Pond by an additional 40 acres is not authorized by the 2013 WDRs. During the 2015 processing season, unpermitted discharges of tomato material to the Cooling Pond occurred resulting in low dissolved oxygen readings as reported by the Discharger. The increased size of the Cooling Pond allowed for increased production, increased wastewater discharges to the Cooling Pond, and the potential to further impact groundwater beyond what was discussed in the Anti-degradation Analysis of the 2013 WDRs because of the decrease in acreage available for irrigation through wastewater application to land and because of increased seepage from the Cooling Pond.

⁶ During the inspection, a Morning Star representative verbally stated that the pond had been expanded from 60 acres to 100 acres.

20. On 2 November 2015, Board staff conducted another inspection of the Facility as a follow up to the 11 September 2015 Notice of Violation. Consistent with previous observations, Morning Star's owner, Mr. Chris Rufer, confirmed that the Cooling Pond was expanded from 60 to 100 acres during the spring of 2015. Mr. Rufer also indicated that the depth of the Cooling Pond ranges from 3 to 4 feet deep to the south (in the original 60 acre pond) to 6 to 8 feet to the north (in the expanded portion of the pond). The bottom of pond is constructed from compacted native soil. According to Mr. Rufer, the larger surface area of the Cooling Pond was necessary because three additional evaporators were installed prior to the 2015 processing season. The Cooling Pond allows for wastewater discharged to the pond to cool from 120 degrees Fahrenheit to 100 degrees Fahrenheit while also allowing oxygen to diffuse into the pond to reduce the biochemical oxygen demand (BOD) before the Cooling Pond water is recirculated back to the processing plant.
21. The expansion of the Cooling Pond at the expense of decreasing the size of the LAA constitutes a material change in the character, location, or volume of discharge, triggering the requirement to submit a new Report of Waste Discharge as described in Standard Provision A.4. The expansion of the Cooling Pond is also a violation of Prohibition A.3 which prohibits the discharge of waste at a location or in a manner different from that described in the Findings of the WDRs. The Prosecution Team alleges that this violation took place for the entire 92 days of the 2015 processing season (1 July 2015 through 30 September 2015).
22. In a memorandum dated 6 November 2015⁷, Board staff estimated the amount of seepage from the unpermitted expanded portion of the Cooling Pond to groundwater to be approximately 276,300 gallons per day.

**Violation Category 2: Violation of Prohibition A.3 of WDRs Order R5-2013-0144
Discharge of Waste to Waters of the State from Unpermitted Expanded Settling Pond**

23. Board staff observed an empty Settling Pond during the 2 November 2015 site inspection, and suspected that Morning Star had increased size of the Settling Pond beyond the 5 acre-foot volume (i.e., 5 foot depth by 1 acre in area) approved by the 2013 WDRs. Subsequent to the site inspection, Board staff confirmed this increase in size⁸ by comparing one group of images including pictures taken during a 4 September 2008 Board staff inspection, a 9 October 2009 Google Earth aerial image, and a 20 September 2011 Board staff inspection against a second group of images including a 10 July 2013 Google Earth aerial image, field observations, and site inspection photos taken on 20 August 2015 and 2 November 2015. The second group of images confirmed that the Settling Pond had been enlarged sometime prior to 10 July 2013. Based on the latter group of images, Board staff concluded that the Discharger enlarged the Settling Pond beyond the 5 acre-foot volume permitted in the 2013 WDRs.
24. On 3 November 2015, Water Board staff issued a California Water Code section 13267 Order requiring Morning Star to submit a technical report certifying the dimensions of the Settling Pond and the calculated volume.

⁷ Memo from Howard Hold and Mike Fischer to Wendy Wyels, titled "Pond Seepage Estimate, Morning Star Packing Company, Williams"

⁸ 4 November 2015 memo from Howard Hold to Morning Star case file, titled "Settling Pond Expansion"

25. On 13 November 2015, Morning Star responded to the 13267 Order. A registered engineer determined that the top of the Settling Pond is now 440 feet by 196 feet (1.98 acres), and that the pond has a usable depth of 7.65 feet, allowing for two feet of freeboard. Based on the average length and width, Board staff determined that the current volume of the Settling Pond is now 10.16 acre-feet⁹, as compared to the 5 acre-feet authorized by the 2013 WDRs. The increased size of the Settling Pond has allowed for increased production, increased wastewater discharges to the Settling Pond, and the potential for further impacts groundwater beyond what was discussed in the Anti-degradation Analysis of the 2013 WDRs.
26. In a memorandum dated 16 November 2015¹⁰, Board staff estimated that 3,672 gallons per day seeps into groundwater from the unpermitted expanded portion of the Settling Pond.
27. Based on the Discharger's response to the 13267 Order, it appears that the pond was expanded in 2011, but the actual date is not yet known. The Prosecution Team has made a conservative estimate that the Settling Pond was expanded after the 2011 processing season. The days of violation are the days in which the Settling Pond held wastewater, typically from the beginning of the processing season until a few days afterward. A review of Morning Star's monitoring reports shows that the 2012 processing season was 81 days (24 July through 12 October 2012), the 2013 processing season was 83 days (12 July through 2 October 2013), the 2014 processing season was 92 days long (16 July through 15 October 2014), and the 2015 processing season was assumed to be 92 days (1 July through 30 September 2015). The Prosecution Team assumed that the liquid in the settling pond was emptied on the last day of the processing season (although it is known that the solids remained for months afterward); therefore the days of violations are the cumulative days of each processing season, or 348 days.
28. The expansion of the Settling Pond constitutes a material change in the character, location, or volume of discharge triggering the requirement to submit a new Report of Waste Discharge as described in Standard Provision A.4. The expansion of the Settling Pond is also a violation of Prohibition A.3 which prohibits the discharge of waste at a location or in a manner different from that described in the Findings of the WDRs.

CALCULATION OF CIVIL LIABILITIES UNDER WATER CODE SECTION 13350

29. Water Code section 13350, subdivision (a)(2) states, in part, that any person who in violation of a waste discharge requirement discharges waste, or causes or permits waste to be deposited where it is discharged, into waters of the State shall be liable civilly and remedies may be proposed, in accordance with subdivision (e).
30. Water Code section 13350, subdivision (e), states in part:

⁹ See the 16 November 2015 memo from Howard Hold and Mike Fischer to Wendy Wyels titled "Settling Pond Seepage Increase Estimate, Morning Star Packing Company, Williams Facility, Colusa County."

¹⁰ *ibid*

(e) The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis [per subsection (e)(1)] or on a per gallon basis [per subsection (e)(2)], but not on both.

(1) The civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.

(2) The civil liability on a per gallon basis shall not exceed ten dollars (\$10) for each gallon of waste discharged.

31. As stated above pursuant to Water Code section 13350, subdivision (e) administrative civil liability may be imposed either on a "per day" or "per gallon" basis, but not both. The Central Valley Water Board Prosecution Team recommends assessing administrative civil liability pursuant to Water Code section 13350, subdivision (e)(2) on a per gallon basis. In the alternative, the Prosecution Team recommends assessing administrative civil liability on a per day basis pursuant to Water Code section 13350, subdivision (e)(1). Though the Prosecution Team is recommending that the Board assess liability on a per gallon basis, both alternatives are analyzed in Attachment A to this Complaint.

32. **Maximum Administrative Civil Liability for Violation Categories 1 and 2 Based on Volume Only Pursuant to Water Code Section 13350(e)(2):** Per Water Code section 13350, subdivision (e)(2), civil liability administratively imposed by the Central Valley Water Board may not exceed ten dollars (\$10) for each gallon of waste discharged.

a. With respect to the Cooling Pond (Violation Category 1), the Central Valley Water Board Prosecution Team alleges that Morning Star has been in violation of the 2013 WDRs from 1 July 2015 through 30 September 2015 and during that time, discharged 25,419,600 gallons of waste (276,300 gallons per day x 92 days) to waters of the State, as explained further in Attachment A to this Complaint.

b. With respect to the Settling Pond (Violation Category 2), the Central Valley Water Board Prosecution Team alleges that Morning Star has been in violation of the 2013 WDRs for a total of 348 days, for a portion of the time between 24 July 2012 and 30 September 2015. During those 348 days, 1,277,856 gallons of waste (3,672 gallons per day x 348 days) were discharged to waters of the State, as explained further in Attachment A to this Complaint.

The maximum administrative civil liability that may be assessed for the alleged violation based on the total volume discharged pursuant to Water Code section 13350, subdivision (e)(2) is **\$266,974,560 (two hundred sixty six million, nine hundred seventy four thousand, five hundred sixty dollars)** for Violation Categories 1 and 2.

33. **Maximum Administrative Civil Liability for Violation Categories 1 and 2 Based on Days of Discharge Only Pursuant to Water Code Section 13350(e)(1):** In the alternative, per Water Code section 13350, subdivision (e)(1), civil liability administratively imposed by the Central Valley Water Board may not exceed \$5,000 per violation per day.

a. With respect to the Cooling Pond (Violation Category 1), the Prosecution Team alleges that the Discharger has been in violation of the 2013 WDRs for 92 days, from

1 July 2015 (the start of the processing season) through 30 September 2015 (the end of the processing season) and during this time has discharged waste to waters of the State.

b. With respect to the Settling Pond (Violation Category 2), the Prosecution Team alleges that the Discharger has been in violation of the 2013 WDRs for 348 days between 24 July 2012 and 30 September 2015 (as described in detail in Finding 27) and during this time has discharged waste to waters of the State.

The maximum administrative civil liability that may be assessed for the alleged violation based on the total number of days of violation is (92 days + 348 days x \$5,000 per day) or **\$2,200,000 (two million two hundred thousand dollars)** for Violation Categories 1 and 2.

34. **Minimum Administrative Civil Liability:** Pursuant to the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy), administrative civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation plus ten percent. The economic benefit gained by non-compliance has been calculated using the US EPA's BEN model. An administrative subpoena will be issued concurrently with this Complaint, and will require the Discharger to produce documents responsive to the subpoena to more completely determine the Discharger's benefit of noncompliance. When that information is received, the economic benefit may be modified. Therefore, a conservative estimate of the minimum civil liability which must be assessed pursuant to the Enforcement Policy is ~~\$874,534~~ \$990,514 (i.e., economic benefit \$900,468 plus 10%).

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

35. Pursuant to Water Code section 13227, the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
36. On 17 November 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code sections 13327 and 13385(e). The entire Enforcement Policy can be found at:
- http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11179.pdf
37. The recommended administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, and Water Code sections 13327 and 13350, subdivision (e)(2), as explained in detail in Attachment A to this Complaint. The proposed

civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

38. As described above, the maximum penalty for the violation on a per gallon basis pursuant to Water Code section 13385, subdivision (e)(2) is **\$266,974,560**. In the alternative, the maximum penalty for the violation on a per day basis pursuant to Water Code section 13385, subdivision (e)(1) is **\$2,200,000**. The minimum penalty is more than \$1,096,449. Based on consideration of the above facts, and after applying the penalty methodology, the Assistant Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$1,500,000 (one million five hundred thousand dollars)** on a per gallon basis. The specific factors considered in this penalty are detailed in Attachment A.
39. Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of the requirements of the Discharger's waste discharge requirements for which penalties have not yet been assessed or for violations that may subsequently occur.
40. On 14 February 2014, the Executive Officer designated Andrew Altevogt, Assistant Executive Officer, as the Lead Prosecution Officer for all enforcement matters originating in the Central Valley Region. The 14 February 2014 Delegation of Authority also authorizes Andrew Altevogt to issue Administrative Civil Liability Complaints.

THE MORNING STAR PACKING COMPANY, L.P. IS HEREBY GIVEN NOTICE THAT:

1. The Assistant Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of **\$1,500,000 (one million five hundred thousand dollars)**. The amount of the proposed liability is based upon a review of the factors cited in Water Code section 13227, as well as the State Water Resources Control Board's 2010 Water Quality Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled on **18 February 2016** unless one of the following occurs by **10 December 2015**:
 - a) The Discharger waives the hearing by completing the attached form (checking the box next to Option #1) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of **\$1,500,000 (one million five hundred thousand dollars)**; or
 - b) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking the box next to Option #2 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed; or
 - c) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking the box next to Option #3 on the attached

form, and returns it to the Board along with a letter describing the issues to be discussed.

3. If a hearing is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
4. If this matter proceeds to hearing, the Assistant Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this Complaint through completion of the hearing.

ANDREW ALTEVOGT, Assistant Executive Officer

20 November 2015

Attachment A: Penalty Calculation Methodology

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent Morning Star Packing Company, L.P. (hereafter Discharger) in connection with Administrative Civil Liability Complaint R5-2015-0549 (hereafter Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served. The person who has been issued a complaint may waive the right to a hearing."

(OPTION 1: Check here if the Discharger waives the hearing requirement and will pay in full.)

a. I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board.

b. I certify that the Discharger will remit payment for the proposed civil liability in the full amount of **\$1,500,000 (one million five hundred thousand dollars)** by check that references "ACL Complaint R5-2015-0549" made payable to the *Waste Discharge Permit Fund*. Payment must be received by the Central Valley Water Board by **10 December 2015**.

c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after a 30-day public notice and comment period. Should the Central Valley Water Board receive significant new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.

d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

(Print Name and Title)

(Signature)

(Date)

AMENDED ATTACHMENT A to ACL Complaint No. R5-2015-XXXX
Specific Factors Considered for Administrative Civil Liability
Morning Star Packing Company, L.P., Colusa County

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13327. Each factor of the ten-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

Violation Category 1: Violation of Prohibition A.3 of WDRs Order R5-2013-0144.
Discharge of Waste to Waters of the State from Unpermitted Expanded Cooling Pond

Waste Discharge Requirements (WDRs) Order R5-2013-0144 (the "2013 WDRs") Prohibition A.3 prohibits the discharge of waste at a location or in a manner different from that described in the Findings. The 2013 WDRs issued to Morning Star Packing Company, L.P. (Morning Star or Discharger) describe the Cooling Pond as a 210 acre-foot pond approximately 60 acres in size. According to the 2013 WDRs, approximately 695 acres of cropland (also known as land application areas or LAAs) are available for irrigation with wastewater from the Settling Pond and/or Cooling Pond. During the 20 August 2015 and 2 ~~December~~ November 2015 site inspections, staff observed and confirmed that the Discharger expanded the Cooling Pond by 40 acres and that LAAs MS20A, MS20B, and MS21, a total of 90.5 acres, had been removed in order to construct the pond expansion. The Discharger's 1 October 2015 response to a Notice of Violation stated that the total acreage of LAAs had been reduced to 485 acres. During the 2 December 2015 inspection, the Discharger's representative stated that land application of wastewater to the 95 acres of land known as MS1, owned by Fred Gobel, had not occurred for the last two years. The expansion of the Cooling Pond at the expense of decreasing the size of the LAA constitutes a material change in the character, location, or volume of discharge triggering the requirement to submit a new Report of Waste Discharge (RWD) as described in WDRs Standard Provision A.4. The expansion of the Cooling Pond is also a violation of WDRs Prohibition A.3. The Discharger did not submit a RWD prior to the expansion of the Cooling Pond, the removal of LAAs MS20A, MS20B, and MS21, and the failure to obtain a lease for LAA MS1. As of the date of this Complaint, a RWD has not been submitted.

Step 1 – Potential for Harm for Discharge Violations

The "potential harm to beneficial uses" factor considers the harm to beneficial uses that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential to harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). In this case the potential harm to beneficial uses was determined to be "**Moderate**" (i.e. a score of 3), which is defined as a "*moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects.*" The *Water Quality Control Plan for the Sacramento River and San Joaquin*

River Basins, Fourth Edition (Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Board. The Basin Plan designates the beneficial uses of underlying groundwater as municipal and domestic supply, agricultural supply, and industrial supply. According to the 2013 WDRs, groundwater beneath the facility "is relatively shallow, approximately 5 to 15 feet below ground surface, and generally flows towards the north to northeast". There are two groundwater monitoring wells near the Cooling Pond; data from these wells suggest that in early 2015, groundwater was about 1.7 to 3.2 feet below the base of the Cooling Pond.

There are two separate yet related potential harms to beneficial uses resulting from the discharge of waste to waters of the State from the unpermitted expanded Cooling Pond. The first is the potential harm to beneficial uses resulting from additional wastewater seepage to groundwater beneath the Cooling Pond given the enlarged size of the pond. The second is the potential harm to beneficial uses resulting from discharging wastewater to a smaller LAA; the enlargement of the Cooling Pond resulted in the removal of MS20A, MS20B, and MS21 which accounts for a total loss of 90.5 acres. An additional 95 acre loss with the unavailability of MS1 and the Discharger's confirmation that only 485 acres are currently being used for land application exacerbate this potential for harm to beneficial uses.

According to the 2013 WDRs, the Cooling Pond received water softener reject, condensate from the evaporation process, and boiler blowdown. Water softener reject and boiler blowdown are high strength wastes with electrical conductivity (or salts which conduct electricity) ranging between 850-8,600 mg/L and 1,200-1,400 μ mhos/cm, respectively. During the 2015 processing season, unpermitted discharges of tomato material to the Cooling Pond occurred resulting in low dissolved oxygen as evidenced by Daily Assessment Reports, discussed in further detail below under Factor 2. Low dissolved oxygen readings usually indicate higher biochemical oxygen demand to break down organic material, however, the Discharger is not required to monitor BOD in the Cooling Pond as the WDRs did not contemplate the discharge of organic materials in that location. Based on the discussion in the Anti-degradation Analysis in the 2013 WDRs, BOD has the potential to create anoxic conditions that can solubilize naturally occurring metals in soil, and in fact, the 2013 WDRs state that groundwater has already been degraded by the overapplication of BOD to the LAAs.

The 2013 WDRs establish effluent and groundwater limitations for the Facility and the 695 acres available for land application are a critical component for setting limitations and control measures for constituents of concern to ensure that present and anticipated beneficial uses are not unreasonably threatened and that groundwater water quality objectives are not exceeded. The Anti-degradation Analysis in the WDRs identifies the 695 acre LAA as a current discharge treatment and control measure if wastewater application rates are carefully controlled to allow the crops to take up the nutrients found in the wastewater. The BOD loading rate control was also identified by the WDRs as a current discharge control measure. The expansion of the Cooling Pond resulting in a loss 90.5 land application acres, an additional 95 acre loss due to the unavailability of MS1, and the Discharger's statement that only 485 acres are currently being used for land application significantly alter a foundational assumption of land application availability that was used to establish protective limitations in WDRs. The reduction of LAA is particularly concerning where the Discharger has historically over-applied wastewater to the LAAs resulting excessive loading for BOD and uneven nutrient loading for nitrate. Based on the Discharger's 1 October 2015 response to a Notice of Violation, wastewater discharges to the

land application areas decreased from 1,675 gallon per minute in 2014 to 1,100 gallons per minute in 2015. However, the concentration of BOD increased from an average of 600 mg/l in 2014 to an average of 1,769 mg/L in 2015 resulting in a net increase of BOD produced by the facility which was applied on a smaller LAA. As discussed above and in the Anti-degradation Analysis, excessive BOD loading rates can deplete oxygen resulting in anoxic conditions that can solubilize naturally occurring metals in soil. This was a concern in 2013 WDRs which assumed that all 695 acres would be available for land application.

A review of the 2015 data shows that Morning Star violated the BOD loading limit on numerous fields. The 2013 WDRs limit the loading to 100 pounds of BOD/acre/day, yet Morning Star applied up to 216 pounds/acre/day. Groundwater monitoring data showed that the excessive BOD loading rates continued to deplete soil oxygen, resulting in the release of manganese and the violation of the groundwater limit for manganese in three wells. In addition, Morning Star violated the nitrogen loading limit for one of its fields. Taken together, the expansion of the Cooling Pond and associated loss of land application area has resulted in at least a moderate impact to the beneficial uses of groundwater.

Factor 2: The Physical, Chemical, Biological, or Thermal Characteristics of the Discharge

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. The constituents of concern present in wastewater in the Cooling Pond that ultimately discharged to waters of the State are BOD and salts. In this case, a score of 2 was assigned. A score of 2 is defined as "*discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection).*"

The 2013 WDRs imply that relatively clean water enters the Cooling Pond, and do not anticipate that tomato material will enter it. Therefore, the WDRs do not require monitoring for BOD, nitrogen, or fixed dissolved solids (TDS) in the Cooling Pond. However, it is now known that Morning Star routinely discharges tomato waste to the Cooling Pond¹, and in 2015, more tomato waste than normal entered the pond. Morning Star has stated that the source of the off-site odors was the tomato organics discharged to the Cooling Pond. Tomato waste is high in BOD (biochemical oxygen demand), which is a measure of the amount of biodegradable organic chemicals in waste². When wastewater with a high BOD concentration is discharged to surface water, bacteria utilizes the organic chemicals as food, and in doing so, reduces the amount of dissolved oxygen in the water causing a detrimental effect on the surrounding ecosystem. At Morning Star, wastewater containing high BOD concentrations percolated into groundwater, depleting the soil oxygen and causing adverse chemical changes. Naturally occurring soil minerals such as iron and manganese are chemically reduced in the presence of BOD to more soluble forms and are readily dissolved by oxygen deficient groundwater. In summary, the application of high-BOD water to land can result in groundwater containing levels of iron and manganese that exceed human-health based limits. This concern is discussed in the Anti-degradation Analysis section of the 2013 WDRs, which notes that "it appears that BOD overloading has caused reducing conditions that favor dissolution of manganese from native soil." Wastewater discharged from the Facility is not expected to contain manganese. However,

¹ See (1) "Summary of Meeting" memo from Wendy Wyels to Morning Star case file dated 3 November 2015 and (2) 24 August 2015 letter from Chris Rufer to Wendy Wyels

² See <http://blog.ecologixsystems.com/about-bio-chemical-oxygen-demand/> and http://www.mantech-inc.com/products/why_bod_cod/.

from December 2013 to the present, groundwater data in MW-7, MW-8, and MW-9 indicate that the Discharger is consistently exceeding the groundwater limit for manganese. In this regard, the chemical characteristics of BOD pose a level of concern and additional risk to groundwater receptors (i.e., humans) in the constituent's ability to make a naturally occurring metal like manganese more soluble than it otherwise would be.

The discharge into the Cooling Pond also contains salts, which are measured as total dissolved solids (TDS) or fixed dissolved solids (FDS). The 2013 WDRs state that the Cooling Pond receives boiler blowdown and water softener regeneration waste, both of which contain high salt concentrations. However, the WDRs state that these waste streams are a small percentage of the flow into the Cooling Pond, and imply that the majority of the wastewater, generated from evaporation condensate, does not have a significant salt content. Therefore, Morning Star is not required to measure the TDS or FDS concentration within the Cooling Pond. However, in 2015 Morning Star added three more evaporators and increased its production by 75%; therefore it is reasonable to assume that significantly more boiler blowdown and water softener regeneration waste entered the Cooling Pond, increasing the salinity of the wastewater in the pond. The Anti-degradation Analysis of the 2013 WDRs states that the discharge of waste has already caused groundwater degradation because the agricultural water quality objective has been exceeded at the facility, but that changes in the salinity content of the waste is not expected, and that the groundwater limitation is set at a level to protect water quality. However, it is noted that the salinity in monitoring well MW-9 has exceeded the "trigger limit" in 2014 and 2015, and with the probability of increased salinity in the Cooling Pond water, it is appropriate to assign a factor of "2" because the discharged material poses a moderate risk that salinity in the groundwater will increase, impacting agricultural and drinking water beneficial uses.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case the seepage from the Cooling Pond has entered groundwater and the technology exists to clean it up. Therefore, a factor of 0 is assigned.

Final Score – Potential for Harm

The scores of the three factors are added to provide a Potential for Harm score for each violation. In this case, a final score of 5 was calculated. The total score is then used in Step 2 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties based on both a per-gallon and a per-day basis for discharge violations.

Per Gallon Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per gallon basis using the Potential for Harm score from Step 1 and the extent of Deviation from Requirement of the violation. The Potential for Harm score from Step 1 is 5 and the extent of Deviation from Requirements³ is considered **Major**. The prohibition against the

³ The "Deviation from Requirement" reflects the extent to which the violation deviates from the specific requirement. In this case, the requirement (i.e., permit Prohibition A.3) was to...

"[D]ischage of waste at a location or in a manner different from that described in the Findings" was disregarded by the Discharger and rendered ineffective in its essential function when the Discharger not only expanded the size of the Cooling Pond but substantially decreased the size of the land application area without first submitting a Report of Waste Discharge for Amended WDRs. This requirement was also rendered ineffective due to the discharge of tomato material to the Cooling Pond when the Findings of the 2013 WDRs specify that the Cooling Pond would only receive, "water softener reject, condensate from the evaporation process, and boiler blowdown." Table 1 of the Enforcement Policy (p. 14) is used to determine a "per gallon factor" based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is **0.15**. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

For the penalty calculation, Board staff estimated the volume of water which seeped from the expanded portion of the Cooling Pond to groundwater. A complete description of how this volume was calculated is found in staff's 6 November 2015 memo⁴, and is based on the following data:

- A net increase in the size of the Cooling Pond of 40 acres.
- A review of the Wallace and Kuhl geotechnical engineering report.
- Five feet of separation between the bottom of the pond and groundwater.
- A hydraulic conductivity of 1×10^{-5} for the first foot and 1×10^{-6} for the remaining four feet.
- Freeboard measurements submitted by Morning Star in its monthly monitoring reports.
- The Cooling Pond was filled with water at the beginning of the processing season.

Board staff estimated that 276,300 gallons seeped from the expanded Cooling Pond into groundwater each day. The number of days of violation was conservatively set at 92 days, the extent of the 2015 processing season. It is noted however, that the Cooling Pond is not emptied after the processing season ends, and therefore wastewater continues to seep into groundwater as of the date of issuance of this Complaint. Board staff chose not to extend the days of violation because additional waste was not discharged to the Cooling Pond after the processing season ended.

The maximum civil liability allowed under Water Code section 13350 is \$10 per gallon discharged. The Enforcement Policy recommends applying the statutory maximum of \$10 per gallon discharged, however, considers certain circumstances where an alternative maximum amount of \$2 per gallon may be used in situations where high volume discharges occur. Though the circumstances in the present matter do not fall into one of the examples discussed in the Enforcement Policy (i.e. high volume sewage spills or releases of storm water from construction sites) Board staff took into consideration the flow limitations in the 2013 WDRs which allow for the discharge of up to an average of 4.3 million gallons per day and 422 million gallons per year of process wastewater combined with Cooling Pond Water to the land application areas. Based on these flow amounts, Board staff determined it was appropriate to use the "high volume discharge" rate of \$2 per gallon as described in the Enforcement Policy.

Therefore, the initial liability amount based on volume is determined using the Per Gallon Factor for Discharges of 0.15 multiplied by the number of gallons discharged multiplied by \$2 per gallon, as shown below.

⁴ 6 November 2015 memorandum from Howard Hold and Mike Fischer to Wendy Wyels titled "Pond seepage estimate, Morning Star Packing Company, Williams Facility, Colusa County"

Violation 1 - Initial Liability Amount based on Volume Only

The initial liability amounts for the violation calculated on a per gallon basis is as follows:

$$0.15 \times 276,300 \text{ gallons per day} \times 92 \text{ days} \times \$2/\text{gallon}$$

$$\text{Total Initial Liability} = \$7,625,880$$

Per Day Assessments for Discharge Violations

As stated in the Complaint, Water Code section 13350, subdivision (e) allows for administrative civil liability to be imposed either on a "per day" or "per gallon" basis, but not both. The Central Valley Water Board Prosecution Team recommends assessing administrative civil liability pursuant to Water Code section 13350, subdivision (e)(2) on a per gallon basis. However, in the alternative, the Prosecution Team recommends assessing administrative civil liability on a per day basis pursuant to Water Code section 13350, subdivision (e)(1). Though the Prosecution Team is recommending that the Board assess liability on a per gallon basis, both alternatives are being analyzed herein.

When there is a discharge, the Water Board is to determine the initial liability amount on a per day basis using the same Potential for Harm score from Step 1 and the same Extent of Deviation from Requirements used in the per-gallon analysis. The Potential for Harm score from Step 1 is **3** and the Extent of Deviation from Requirements is considered to be **Major**. Therefore the "per day" factor is **0.15** (as determined from Table 2 in the Enforcement Policy). The Per Day Assessment is calculated as $(0.15) \times (91 \text{ days of the processing season}) \times \$5,000$ per day (the maximum per day penalty allowed by Water Code section 13350).

Violation 1 - Initial Liability Amount based on Days of Discharge Only

The initial liability amount for the violation calculated on a per day basis is as follows:

$$0.15 \times 92 \text{ days} \times \$5,000 \text{ per day}$$

$$\text{Total Initial Liability} = \$69,000$$

Step 3 – Per Day Assessment for Non-Discharge Violations

This step is not applicable for Violation Category 1, which is alleged as a discharge violation, therefore liability has been determined under Step 2, above.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger violated Prohibition A.3 in the 2013 WDRs which prohibits the discharge of waste at a location or in a manner different from that described in the Findings. The conduct of the Discharger that led to this alleged violation was its unpermitted expansion of

the Cooling Pond, and the associated reduction in cropland, that resulted in the discharge of waste to waters of the State. The Discharger was given a multiplier value of 1.4 because the Discharger demonstrated a complete disregard for the Board's regulatory process prior to making material changes to its operations by expanding its Cooling Pond from 60 to 100 acres. The multiplier reflects the Discharger's failure to do what a reasonably prudent person would have done in a similar circumstance, which is comply with Prohibition A.3 and Standard Provision A.4, and submit a Report of Waste Discharge (RWD) prior to the expansion. The RWD is needed to allow the Board's Permitting staff to fully evaluate the potential water quality impacts from the Discharger's proposed changes to its facility, conduct an Anti-degradation Analysis, and prepare updated WDRs for the Board to consider. The Discharger was fully aware of the Board's permitting process, as staff spent considerable time in 2013 working with the Discharger to update the WDRs at that time. Though the 2013 WDRs acknowledge the Discharger's plans to increase production by up to 65 percent in the future and states that the planned expansion is not expected to change wastewater character, this acknowledgement does not: 1) allow the Discharger to self-certify whether expansions will have an unreasonable effect on beneficial uses or water quality nor does it; 2) negate the Discharger's responsibility to submit a new Report of Waste Discharge with the Board prior to making a material change such as expanding the Cooling Pond by 60 acres and removing 90.5 acres of land application area. During a meeting on 2 November 2015, the Discharger stated that it had not applied wastewater to the field leased from Mr. Gobel in 2014 or 2015, because it was unable to obtain a lease. Failure to apply wastewater to land described in the WDRs, and included in the Anti-degradation Analysis is also a violation of Prohibition A.3 in the 2013 WDRs.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of 1.2 because the Discharger did not take any actions during the processing season to come back into compliance with its WDRs. In particular, the Discharger has not indicated that it will submit a Report of Waste Discharge, or that it needs to apply wastewater to the 695 acres of cropland allowed by the WDRs. In fact, the Discharger's 1 October 2015 response to a Notice of Violation states, "the facility does not plan on replacing the fields replaced by the cooling pond at the current time." A review of the 2015 monitoring reports shows that the Discharger has violated the BOD and nitrogen loading rates on its cropland, and that the 2015 average BOD in the wastewater was higher than the historical concentrations described in the Findings of the WDRs. In addition, groundwater continues to exceed the manganese groundwater limitations, which is a direct result of the reduction in cropland and an overloading of BOD. The Anti-degradation Analysis in the 2013 WDRs states that groundwater has already been impacted by the discharge but finds that if the Discharger follows the provisions of the WDRs then impacts will be reduced to acceptable levels. To mitigate the current impacts to groundwater, it is imperative that the Discharger apply its wastewater to the 695 acres of the cropland described in the WDRs and reduce the size of its Cooling Pond to that allowed by the WDRs.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.0 is to be used, and is to be increased as necessary. In this case, a multiplier of 1.1 was used. In 2005, the Central Valley Water Board issued Cease and Desist Order No. R5-2005-0003 to Morning Star to address discharges of wastewater to surface water, low dissolved oxygen

issues in the Settling Pond, and potential groundwater degradation from over-application of nutrients and salts. The 2005 CDO also noted that only 180 acres received wastewater in a regular irrigation cycle during the 2004 processing season, that the Discharger had not applied wastewater to the Gobel property since 1995, and that only 554 acres out of 670 acres of land described in the 1995 WDRs was available for wastewater application since adoption of the 1995 permit. The 2005 CDO required the Discharger, in part, to limit BOD loading to 100 pounds per acre per day, submit a Dissolved Oxygen Compliance Report, and a Cropping Plan to ensure the use of available cropland is maximized. While the alleged violation of Discharge Prohibition A.3 differs from the alleged violations used as the basis of the 2005 CDO, the underlying issues addressed by the 2005 Order are similar to the underlying issues which result from the Discharger's noncompliance with Prohibition A.3 and lead to the Discharger's liability pursuant to Water Code section 13350: issues with high BOD in wastewater being land applied, instances where the Discharger is irrigating a smaller acreage of land which leads to over-application of wastewater and overloading of constituents, and low dissolved oxygen readings in both the Cooling Pond and the Settling Pond during the 2015 processing season. For the foregoing reasons, the Prosecution Team determined that it is appropriate to consider the issues and violations being addressed by the 2005 CDO as part of the history of violation for this Complaint.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 2.

Violation 1: Total Base Liability Amount based on Volume Only

Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$7,625,880 \times 1.4 \times 1.2 \times 1.1 = \$14,092,626$$

Violation 1: Total Base Liability Amount based on Days of Discharge Only

Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$69,000 \times 1.4 \times 1.2 \times 1.1 = \$139,104$$

Violation Category 2: Violation of Prohibition A.3 of WDRs Order R5-2013-0144.
Discharge of Waste to Waters of the State from Unpermitted Expanded Settling Pond

Waste Discharge Requirements (WDRs) Order R5-2013-0144 (the "2013 WDRs") Prohibition A.3 prohibits the discharge of waste at a location or in a manner different from that described in the Findings. The 2013 WDRs issued to The Morning Star Packing Company, L.P. describe the Settling Pond as 5 acre-feet in volume, and located to the southeast of the Cooling Pond and west of Field MS24. According the Discharger's 12 January 1995 letter submitted with its Report of Waste Discharge, the Settling Pond is 40,000 square feet by 5 feet deep⁵, or 4.59

⁵ 12 January 1995 letter *Description of liquid waste discharge to land by The Morning Star Packing Company tomato processing facility in Williams, California.*

acre feet. It is unknown whether the Settling Pond was slightly increased in size between 1995 and 2013, or whether Permitting staff rounded up the volume in the 2013 WDRs. In any regard, the Discharger is currently authorized to discharge waste to the Settling Pond which has a volume of 5 acre-feet.

During the 2 November 2015 site inspection, Board staff observed the Settling Pond and suspected that Morning Star had increased size of the Settling Pond beyond 5 acre-feet. Subsequent to the site inspection, Board staff compared one group of images including those taken during a 4 September 2008 Board staff inspection, a 9 October 2009 Google Earth aerial image, and a 20 September 2011 Board staff inspection against a second group of images including a 10 July 2013 Google Earth aerial image, field observations, and site inspection photos taken on 20 August 2015 and 2 November 2015. This comparison confirmed that the Settling Pond had been enlarged, and on 3 November 2015, Board staff issued a Water Code section 13267 Order for a technical report describing the dimensions of the Settling Pond.

The response was submitted on 12 November 2015. A registered engineer determined that the top of the Settling Pond is now 440 feet by 196 feet, and that the pond is 7.65 feet deep (with two feet of freeboard). Based on the average length and width, Board staff determined that the current volume of the Settling Pond is now 10.16 acre feet⁶, as compared to the 5 acre feet authorized by the 2013 WDRs. The document also references "the 2011 staking plans for the pond expansion." Based on the Discharger's response to the 13267 Order, it appears that the Settling Pond was expanded sometime in 2011, yet Morning Star did not communicate this to the Board's Permitting staff when the updated WDRs were being prepared in 2013. The Anti-degradation Analysis of the 2013 WDRs is based on a 5 acre foot Settling Pond, not an 11.55 acre foot Settling Pond.

The expansion of the Settling Pond from the 5 acre feet allowed in the 2013 WDRs to the current 10.16 acre feet constitutes a material change in the character, location, or volume of discharge triggering the requirement to submit a new Report of Waste Discharge as described in Standard Provision A.4. The expansion of the Settling Pond is also a violation of Prohibition A.3 of the WDRs.

Step 1 – Potential for Harm for Discharge Violations

The "potential harm to beneficial uses" factor considers the harm to beneficial uses that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential to harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). In this case the potential harm to beneficial uses was determined to be "**Moderate**" (i.e. a score of 3), which is defined as a "*moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects.*" The *Water Quality Control Plan for the Sacramento River and San Joaquin*

⁶ See the 16 November 2015 memo from Howard Hold and Mike Fischer to Wendy Wyels titled "Settling Pond Seepage Increase Estimate, Morning Star Packing Company, Williams Facility, Colusa County."

River Basins, Fourth Edition (Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Board. The Basin Plan designates the beneficial uses of underlying groundwater as municipal and domestic supply, agricultural supply, and industrial supply. A review of Morning Star's recent monitoring reports shows that groundwater currently exists about 13 feet below the bottom of the expanded pond.

The WDRs describe the strength of the waste discharged to the Settling Pond. In 2011, prior to the pond expansion, the annual average BOD was 241 mg/L, the fixed dissolved solids was 607 mg/L and the total Kjeldahl nitrogen was 67 mg/L. In contrast, in 2015 the annual average BOD was 1,624 mg/L, the fixed dissolved solids was 934 mg/L, and the total Kjeldahl nitrogen was 63 mg/L. The BOD is 8 times higher and the TDS is 1.5 times higher than in 2011. The expansion of the Settling Pond in 2011 has resulted in a potential harm to the beneficial uses of the groundwater not just from the increased seepage of wastewater into the groundwater, but from the significantly higher strength waste that is entering groundwater. The Anti-degradation Analysis in the 2013 WDRs was based on a Seepage Pond with a volume of 5 acre feet and a much lower strength waste.

As described in the Anti-degradation Analysis, BOD has the potential to create anoxic conditions that can solubilize naturally occurring metals such as manganese and iron in soil. In fact, the 2013 WDRs state that groundwater has already been degraded by the overapplication of BOD to the LAAs. Several monitoring wells currently exceed the groundwater limit for manganese. Fixed dissolved solids are the portion of total dissolved solids that do not degrade in the soil, and move into groundwater. One groundwater monitoring well exceeds the "trigger limit" for total dissolved solids in the groundwater. The unauthorized enlargement of the Settling Pond has resulted in at least the moderate potential that the beneficial uses of the groundwater will be impacted by, at a minimum, manganese, iron, and salts.

Factor 2: The Physical, Chemical, Biological, or Thermal Characteristics of the Discharge

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. In this case, a score of 2 was assigned. A score of 2 is defined as *"discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection)."*

The constituents of concern present in wastewater in the Settling Pond are BOD, fixed dissolved solids (FDS) and total nitrogen. In addition, the high BOD results in low dissolved oxygen concentrations, which creates odor conditions. The Monitoring and Reporting Program for the 2013 WDRs require the Discharger to collect weekly samples of wastewater in the Settling Pond prior to discharging to the LAAs and requires monthly reporting for the constituents previously mentioned.

As described above, in 2015 the annual average BOD was 1,624 mg/L, the fixed dissolved solids was 934 mg/L, and the total Kjeldahl nitrogen was 63 mg/L. The impacts of BOD on potential receptors is fully described above, in the Factor 2 discussion for Violation 1.

In summary, the presence of excessive BOD can deplete oxygen, resulting in anoxic conditions that can solubilize naturally occurring metals in soil. In its 1 October 2015 response to a Notice of Violation, the Discharger acknowledged that there was a net increase in BOD

produced by the Facility between the 2014 and 2015 processing seasons and that wastewater with increased BOD concentrations was applied on a smaller land application area. Increasing concentrations of BOD in wastewater is a specific concern because of its ability to solubilize metals in soils. In this regard, the chemical characteristics of BOD pose an additional risk to groundwater receptors in the constituent's ability to make a naturally occurring metal like manganese more soluble than it otherwise would be. The BOD concentration in the wastewater in the Settling Pond supports a Factor of 2, a moderate potential risk to receptors.

Fixed dissolved solids (FDS) is a measure of the inorganic salt content of wastewater. Fixed dissolved solids are not expected to volatilize or degrade in the soil column and will move into groundwater. Excessive salt results in unpalatable drinking water. Irrigation water containing salts can impact salt-sensitive crops. According to the 2013 WDRs, the Agricultural Water Quality Goal for total dissolved solids (of which fixed dissolved solids is a component) is 450 mg/L, and the Secondary Maximum Contaminant Level for total dissolved solids is 1,500 mg/L. The waste in the Settling Pond had an annual average FDS concentration of 934 mg/L, which supports assigning a Factor of 2, a moderate risk to potential receptors.

Total Kjeldahl nitrogen (TKN) is a measure of the reduced forms of nitrogen, whereas nitrate and nitrite are the oxidized form. Total nitrogen is the sum of TKN, nitrate, and nitrite. The 2013 WDRs contains an effluent limit for total nitrogen which is equivalent to the crop demand for nitrogen. Nitrogen is soluble, and excess nitrogen rapidly moves into groundwater. The Primary Maximum Contaminant Level for nitrate as nitrogen is 10 mg/L, and is set to protect infants from "blue baby syndrome" or *methemoglobinemia*. Morning Star has exceeded its nitrogen limit for one of its fields in 2015. The concentration of TKN in the waste in the Settling Pond supports assigning a Factor of 2, a moderate risk to potential receptors.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case the seepage from the Cooling Pond has entered groundwater and the technology exists to clean it up. Therefore, a factor of 0 is assigned.

Final Score – Potential for Harm

The scores of the three factors are added to provide a Potential for Harm score for each violation. In this case, a final score of 5 was calculated. The total score is then used in Step 2 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties based on both a per-gallon and a per-day basis for discharge violations.

Per Gallon Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per gallon basis using the Potential for Harm score from Step 1 and the extent of Deviation from Requirement of the violation. The Potential for Harm score from Step 1 is 5 and the extent of Deviation from Requirements is considered **Major**. The prohibition against the "[D]ischage of waste at a location or in a manner different from that described in the Findings"

was disregarded by the Discharger and rendered ineffective in its essential function when the Discharger expanded the size of the Settling Pond without first submitting a Report of Waste Discharge for Amended WDRs. Though the expanded portion of the Settling Pond represents approximately 5.16 acre feet more than permitted, the deviation from the underlying prohibition against discharging waste in a manner different than described in the WDRs still constitutes a major deviation because the requirement prohibits any deviation from what the WDRs describe. Table 1 of the Enforcement Policy (p. 14) is used to determine a "per gallon factor" based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is 0.15. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

For the penalty calculation, Board staff estimate that 1,277,856 gallons of unauthorized wastewater was discharged to waters of the State. A complete description of how this volume was calculated is found in staff's 16 November 2015 memo⁷, and is based on the following data:

- A net increase in the size of the Settling Pond of 5.16 acre feet.
- A review of the Wallace and Kuhl geotechnical engineering report.
- 13.6 feet of separation between the bottom of the pond and groundwater.
- A hydraulic conductivity of 1×10^{-5} for the first foot below the pond and 1×10^{-6} for the remaining distance to groundwater.
- 5.4 feet of solids accumulation over the processing season.
- A varying depth of water during the processing season to account for solids.

The days of violation were determined as follows. The technical report references a "2011 staking plan for the pond expansion". Board staff made a conservative estimate that the Settling Pond was expanded after the 2011 processing season. The days of violation are the days in which the Settling Pond held wastewater, typically from the beginning of the processing season until a few days afterward. A review of the monitoring reports shows that the 2012 processing season was 81 days (24 July through 12 October 2012), the 2013 processing season was 83 days (12 July through 2 October 2013), the 2014 processing season was 92 days (16 July through 15 October 2014), and the 2015 processing season was assumed to be 92 days (1 July 2015 through 30 September 2015). The Prosecution Team assumed that the liquid in the settling pond was emptied on the last day of the processing season (although the solids remained for months afterward); therefore the days of violations are the cumulative days of each processing season, or 348 days.

The maximum civil liability allowed under Water Code section 13350 is \$10 per gallon discharged. The Enforcement Policy recommends applying the statutory maximum of \$10 per gallon discharged, however, considers certain circumstances where an alternative maximum amount of \$2 per gallon may be used in situations where high volume discharges occur. Though the circumstances in the present matter do not fall into one of the examples discussed in the Enforcement Policy (i.e. high volume sewage spills or releases of stormwater from construction sites) Board staff took into consideration the flow limitations in the 2013 WDRs which allow for the discharge of up to an average of 4.3 million gallons per day and 422 million gallons per year of process wastewater combined with Cooling Pond Water to the land application areas. Based on these flow amounts, Board staff determined it was appropriate to use the "high volume

⁷ 16 November 2015 memo from Howard Hold and Mike Fischer to Wendy Wyels titled "Settling Pond Seepage Increase Estimate, Morning Star Packing Company, Williams Facility, Colusa County."

discharge" rate of \$2 per gallon as described in the Enforcement Policy.

Violation 2 - Initial Liability Amount based on Volume Only

The initial liability amounts for the violation calculated on a per gallon basis is as follows:

$$0.15 \times 3,672 \text{ gallons/day} \times 348 \text{ days} \times \$2/\text{gallon}$$

$$\text{Total Initial Liability} = \$383,670$$

Per Day Assessments for Discharge Violations

As stated in the Complaint, Water Code section 13350, subdivision (e) allows for administrative civil liability to be imposed either on a "per day" or "per gallon" basis, but not both. The Central Valley Water Board Prosecution Team recommends assessing administrative civil liability pursuant to Water Code section 13350, subdivision (e)(2) on a per gallon basis. However, in the alternative, the Prosecution Team recommends assessing administrative civil liability on a per day basis pursuant to Water Code section 13350, subdivision (e)(1). Though the Prosecution Team is recommending that the Board assess liability on a per gallon basis, both alternatives are being analyzed herein.

When there is a discharge, the Water Board is to determine the initial liability amount on a per day basis using the same Potential for Harm score from Step 1 and the same Extent of Deviation from Requirements used in the per-gallon analysis. The Potential for Harm score from Step 1 is **5** and the Extent of Deviation from Requirements is considered to be **Major**. Therefore the "per day" factor is **0.15** (as determined from Table 2 in the Enforcement Policy). The number of days of violation for Violation Category 2 is considered to be 344 days between 24 July 2012 and 30 September 2015. The actual number of days were calculated as described above in the "Per Gallon Assessments for Discharge Violations" section.

Violation 2 - Initial Liability Amount based on Days of Discharge Only

The initial liability amount for the violation calculated on a per day basis is as follows:

$$0.15 \times 348 \text{ days} \times \$5,000 \text{ per day}$$

$$\text{Total Initial Liability} = \$261,000$$

Step 3 – Per Day Assessment for Non-Discharge Violations

This step is not applicable for Violation Category 1, which is alleged as a discharge violation, therefore liability is determined under Step 2.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger violated Prohibition A.3 in the 2013 WDRs which prohibits the discharge of waste at a location or in a manner different from that described in the Findings. The conduct of the Discharger that led to this alleged violation was its unpermitted expansion of the Settling Pond that resulted in the discharge of waste to waters of the State. The Discharger was given a multiplier value of **1.3** because of the Discharger failed to comply with the Board's regulatory process prior to making material changes to its pond. In addition, the Discharger was fully aware of the Board's permitting process and had ample opportunity to inform Permitting staff prior to adoption of the 2013 WDRs that it had increased the size of the Settling Pond.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **1.2** for the same reasons described in the Cleanup and Cooperation section of Violation 1.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.0 is to be used, and is to be increased as necessary. In this case, a multiplier of **1.1** was used for the same reasons described in the History of Violations section of Violation 1.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 2.

Violation 2: Total Base Liability Amount based on Volume Only

Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$383,670 \times 1.4 \times 1.2 \times 1.1 = \$709,022$$

Violation 2: Total Base Liability Amount based on Days of Discharge Only

Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$261,000 \times 1.4 \times 1.2 \times 1.1 = \$482,328$$

Summation of Total Base Liability Amounts

The total base liability is the sum of the base liability for all violations. The Prosecution Team recommends assessing administrative civil liability pursuant to Water Code section 13350, subdivision (e)(2) on a per gallon basis. The total base liability based on volume only is \$14,092,626 (Violation 1) plus \$709,022 (Violation 2), or \$14,801,648.

In the alternative, the Prosecution Team recommends assessing administrative civil liability on a per day basis pursuant to Water Code section 13350, subdivision (e)(1). The total base liability based on days of violation is \$139,104 (Violation 1) plus \$482,328 (Violation 2) = \$621,432.

Step 6 – Ability to Pay and Continue in Business

The ability to pay and to continue in business must be considered when assessing administrative civil liabilities. The Prosecution Team conducted an initial inquiry regarding the Discharger's ability to pay based on publicly available information. Morning Star accounts for over 25% of the California processing tomato production, supplying 40% of the United States ingredient tomato paste and diced tomato markets, with industrial sales of approximately \$350 million dollars. According to the Discharger's website, the Facility processes approximately 630 tons of tomatoes (approximately 200,000 pounds of tomato paste) per hour, making it the largest tomato processing facility in California.⁸ According to the Discharger's November 2014 newsletter, the Facility planned to increase its processing throughput by 65% and an additional capacity of 300 million pounds of paste per year.⁹ Based on this information, there is no indication that the proposed administrative civil liability amount would result in undue hardship to the Discharger or affect its ability to continue in business.

Step 7 – Other Factors as Justice May Require

The costs of investigation and enforcement are "other factors as justice may require," and could be added to the liability amount. The Central Valley Water Board incurred over \$30,000 (200 hours at a statewide average of \$150/hour) in staff costs associated with the investigation and enforcement of the violations alleged herein. The Prosecution Team, in its discretion, is not recommending an increase in the Total Base Liability amount in consideration of these costs incurred as the proposed liability amount serves as a sufficient general and specific deterrent against future violations.

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for "other factors as justice may require" but only if express findings are made to justify this.

In this case, application of the Enforcement Policy results in a Total Base Liability of \$14,801,648 on a per-gallon discharged basis, and a Total Base Liability of \$621,432 on a per-day basis. The Prosecution Team asserts that the liability based on a per-day basis is unsuitable given the magnitude of the violations and the estimated economic benefit accrued by the Discharger.

It is appropriate to assess a liability based on the gallons of wastewater discharged to groundwater in violation of the 2013 WDRs. Application of the Enforcement Policy factors results in a Total Base Liability of \$14,801,648. This amount, although quite large, is the result of the application of the Enforcement Policy to a multi-year discharge, and a discharger who has a history of violating the Board's Orders, is fully culpable, and has not made efforts to abate the current violations. Nevertheless, the amount is disproportionate to the circumstances surrounding the discharge. Moreover, a \$14 million penalty is inconsistent with other recent penalties issued by the Central Valley Water Board, including the 2014 ACL Order issued to the California Department of Transportation's Sonora Bypass Project for \$2.7 million. In that case,

⁸ <http://morningstarco.com/index.cgi?Page=About%20Us/Company%20History>

⁹ <http://morningstarco.com/newsletters/MSPC%20Nov%202014.pdf>

822,701 gallons of turbid stormwater were discharged to surface waters, CalTrans violated multiple permit provisions for multiple days, and was highly culpable for the violations. A \$14 million penalty to Morning Star is unbalanced when compared to the CalTrans penalty. The Prosecution Team asserts that the punitive and deterrent goals of the Water Code and Enforcement Policy can be met here with a smaller, though still substantial, final liability in the amount of \$1,500,000. This application of discretion is a result of the specific circumstances peculiar to this case, and is not intended to be precedential.

Step 8 – Economic Benefit

Pursuant to the Enforcement Policy, administrative civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation plus ten percent. The economic benefit gained by non-compliance has been calculated using the US EPA's BEN model.

As discussed above and in the Complaint, the Discharger's acts of discharging waste to waters of the State from unpermitted expanded ponds result in violations of several provisions of the 2013 WDRs. Pursuant to the 2013 WDRs, the Discharger is required to operate its facility, dispose, and treat waste in the manner described in its permit and approved by the Board. Expanding the Cooling and Settling Pond, removing 90.5 acres of land application area to accommodate the Cooling Pond expansion, and having an additional 95 acres at MS1 unavailable for land application are all material changes not previously permitted or approved by the Board. An administrative subpoena will be issued concurrently with this ACL Complaint and will require the Discharger to produce additional information to more completely determine the economic benefit of non-compliance. For example, the amount the Discharger spent in planning and implementing the Cooling Pond expansion is not currently known to the Prosecution Team. Additionally, the Discharger indicated that it expanded the production by 75 percent in 2015 increasing production of fresh tomatoes to paste from 1.3 million tons to 2.01 million tons. The Discharger is continuing to generate income largely due to its expanded size, three additional evaporators, and larger Cooling Pond and Settling Pond while in violation of its 2013 WDRs. This information is needed in order to more fully assess the economic benefit of noncompliance.

Board staff identified several measures the Discharger could have implemented to comply with its 2013 WDRs and operate the ponds within the scope authorized by the WDRs. For example, rather than expanding the size of the Cooling and Settling Ponds, the Discharger could have installed additional aerators to mitigate BOD or cooling towers to cool wastewater in the Cooling Pond prior to recirculating back to the Facility. Additionally, the Discharger could have also implemented the use of dissolved air flotation (DAF) tanks to remove suspended solids and oils, and therefore reduce BOD rather than expanding the size of its Settling Pond. DAF tanks are widely used to treat wastewater, including food processing waste, and clarify wastewater by introducing pressurized air into the wastewater. The air forms tiny bubbles which then adhere to suspended matter as they float to the surface, at which point the material may be removed by a skimming device. And finally, the Discharger also achieved an economic benefit from not submitting a Report of Waste Discharge prior to expanding either pond.

Costs associated with staff identified measures that could have been implemented, costs actually expended on planning and implementation of the Cooling and Settling Pond expansions, as well as any additional capital expenditures, and profit differentials between the 2014 and 2015 processing seasons should all be considered to more completely understand the Discharger's economic benefit. Pending the subpoena response, the economic benefit of

noncompliance may be modified. However, with the information known to the Prosecution Team to date, an extremely conservative estimate of the minimum economic benefit is calculated to be ~~\$792,304~~ \$900,468. Therefore a conservative estimate of the minimum civil liability which must be assessed pursuant to the Enforcement Policy is ~~\$792,304~~ \$900,468 + 10% or ~~\$871,534~~ \$990,514.

Step 9 – Maximum and Minimum Liability Amounts

Minimum Liability Amount based on Volume Only for Violation Categories 1 and 2: Economic Benefit + 10% = ~~\$871,534~~ \$990,514

Minimum Liability Amount based on Days of Discharge Only for Violation Categories 1 and 2: Economic Benefit + 10% = ~~\$871,534~~ \$990,514

Maximum Liability Amount based on Volume Only for Violation Categories 1 and 2: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13350 based on a per gallon calculation only. The statutory maximum amount for the alleged violations based on volume only is **\$266,974,560**.

Maximum Liability Amount based on Days of Discharge Only for Violation Categories 1 and 2: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13350 based on a per day calculation only. The statutory maximum amount for the alleged violations based on days of discharge only is **\$2,660,000**.

Step 10 – Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount (based on gallons discharged) proposed for the alleged violations is **\$1,500,000 (one million five hundred thousand dollars)**. This liability falls within the statutory maximum and minimum liability amounts.