

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:)	
)	
Reeve Road Heifer Ranch)	Order No. R5-2014-0547 (Final)
)	
Echeverria Brothers Dairy)	
General Partnership)	
)	
)	
)	Settlement Agreement and Stipulation
)	for Entry of Order; Order (Final)
)	
_____)	

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulated Order" or "Order") is entered into by and between the Assistant Executive Officer of the Regional Water Quality Control Board, Central Valley Region ("Central Valley Water Board"), on behalf of the Central Valley Water Board Prosecution Staff ("Prosecution Staff"), and the Echeverria Brothers Dairy General Partnership ("Echeverria Partnership") (Collectively the "Parties") and is presented to the Central Valley Water Board, or its delegee, for adoption as an order by settlement, pursuant to Government Code section 11415.60.

Section II: RECITALS

1. The Echeverria Partnership owned the real property located at 21070 Reeve Road, assessor's parcel numbers 209-300-15 and 209-300-16, Tracy, San Joaquin County. The Echeverria Partnership leased the property to Mr. Henry J. Tosta ("Mr. Tosta" or "Operator") to operate a heifer ranch ("Heifer Ranch").
2. The Heifer Ranch was owned by the Echeverria Partnership since at least 1979. It has been operated by Mr. Tosta since at least 1994. The Heifer Ranch is located to the west of the city of Tracy within the legal boundaries of the Sacramento-San Joaquin Delta. The property is comprised of a total of 118 acres of cropland and 18 acres of production area and is surrounded by cropland on the north and east, by Reeve Road on the west, and by West Middle Road on the south. The cropland is bisected by the Main Drain canal of the Naglee-Burk Irrigation District.
3. The Heifer Ranch was regulated under the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter "General Order") and the General Order's corresponding Monitoring and Reporting Program during the period of alleged violations. The General Order became effective on 9 May 2007 and was reissued on 3 October 2013. A report of waste discharge was submitted on 18 October 2005 and the Heifer Ranch has not expanded operations

since 17 October 2005. The facility is permitted under the General Order to house up to 127 mature dairy cows, but currently houses 800 support stock. The Discharger paid annual fees to maintain enrollment under the General Order through 2013.

4. On 21 October 2011 Mr. Tosta submitted a letter indicating his intent to remove the Heifer Ranch from the General Order along with a closure plan. On 1 May 2012, Central Valley Water Board staff conducted an inspection of the Heifer Ranch. Staff's findings were memorialized in an inspection report dated 8 May 2012 noting alleged violations of the General Order including, the failure to clean out the old manure in the lagoons, the disposal of numerous cow bones in stockpiled manure and alleged burial sites (including two dairy cows buried in a shallow pit) adjacent to the Naglee Burk Irrigation District Main Canal.
5. On 11 June 2012 the Executive Officer of the Central Valley Water Board issued Cleanup and Abatement Order (CAO) R5-2012-0709 to Mr. Tosta, the facility operator, and the Echeverria Partnership, the owner of the property not residing on-site. The CAO required the Echeverria Partnership and Mr. Tosta to clean up and abate the effects of waste discharged to groundwater at the Heifer Ranch in accordance with a specified time schedule in the following directives: 1) immediately stopping the burial of dead animals by Mr. Tosta and ensuring proper disposal of dead animals as required by the General Order; 2) removing and properly disposing of dead animals buried on the Heifer Ranch cropland; 3) collecting groundwater samples in the vicinity of the dead cow burial area; 4) submitting a groundwater remediation plan for groundwater polluted by the improper burial of animal remains; 5) removing and properly disposing of comingled manure and dead cows from the Reeve Road manure lagoon at a landfill; and 6) repairing the domestic and agricultural wells on the Heifer Ranch property.
6. The Echeverria Partnership is alleged to have violated sections of the Water Code as follows:
 - a) Failure to timely submit proof of legal disposal of animal carcasses by 2 July 2012 (Directive 2 of the CAO) in violation of Water Code section 13267;
 - b) Failure to timely submit a groundwater remediation plan by 27 August 2012 (Directive 4 of the CAO) in violation of Water Code section 13267; and
 - c) Failure to comply with Directive 4 of the CAO to dispose of comingled manure and animal remains by 29 June 2012 in violation of Water Code section 13350.
7. On November 17, 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 May 20, 2010. The Enforcement Policy establishes a methodology for

assessing administrative civil liability. The Prosecution staff considered the methodology set forth in the Enforcement Policy and calculated a liability of \$58,174 for the alleged violations above, as shown in Attachment A, which is attached hereto and incorporated by reference as though fully set forth herein. The Echeverria Partnership disagrees with the calculation contained in Attachment A. The Echeverria Partnership asserts it was not a party that caused the violations and should not be responsible for delays caused by Mr. Tosta. Should this Stipulated Order not be approved by the Central Valley Water Board, the Echeverria Partnership reserves the right to respond more specifically to Attachment A. The Parties have engaged in settlement negotiations and agree to fully settle the matter without administrative or civil litigation and by presenting this Stipulated Order to the Regional Board for adoption as an Order by settlement, pursuant to Government Code section 11415.60.

8. To resolve the alleged violations described herein by consent and without further administrative proceedings, the Parties have agreed to the imposition of \$15,000 in liability. This liability amount is less than the liability amount of \$58,174 calculated by the Central Valley Board Prosecution staff using the Enforcement Policy as shown in Attachment A and is also less than the minimum statutory liability of \$52,400 required to be imposed pursuant to Water Code section 13350(e)(1)(B). The imposition of a lesser liability amount takes into consideration settlement considerations specified in the Enforcement Policy and the specific factors required to be considered in Water Code section 13327. The liability amount agreed to by the Parties is justified considering the risks associated with proceeding to hearing that is consistent with the range of settlement considerations which may result in a reduction in the calculated liability specified in the Enforcement Policy. The Prosecution staff believe the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives. No further action is warranted concerning the alleged violations, except as provided in this Stipulated Order, and this Stipulated Order is in the best interest of the public.

Section III: STIPULATIONS

The Parties incorporate Paragraphs 1 through 8 by this reference, as if set forth fully herein, and stipulate to entry of this Order as set forth below, and recommend that the Central Valley Water Board issue this Stipulated Order to effectuate the settlement.

9. **Administrative Civil Liability:** The Echeverria Partnership hereby agrees to the imposition of an administrative civil liability totaling **\$15,000**. Within thirty (30) days of the effective date of this Order, the Echeverria Partnership agrees to remit, by check, FIFTEEN THOUSAND DOLLARS (\$15,000), payable to the *Waste Discharge Permit Fund*, and shall indicate on the check the number of this Order. The Echeverria Partnership shall send the original signed check for \$15,000 to State Water Resources Control Board, Accounting Office, ATTN: ACL Payment, P.O. Box 1888, Sacramento, California, 95812-1888 and a copy to ATTN: Della Kramer, Central Valley Water Board 11020 Sun Center Drive, Suite 200, Rancho Cordova, California 95670.

10. Compliance with Applicable Laws: The Echeverria Partnership understands that payment of administrative civil liability in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged may subject it and/or Mr. Tosta to further enforcement, including additional administrative civil liability.

11. Party Contacts for Communications related to this Stipulated Order:

For the Central Valley Water Board:

Andrew Altevogt
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670

For the Echeverria Partnership:

Mr. Lee N. Smith
Weintraub Tobin
400 Capital Mall, 11th Floor
Sacramento, California 95814

12. Attorney's Fees and Costs: Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

13. Matters Addressed by Stipulation: Upon the Central Valley Water Board's adoption of this Stipulated Order, this Order represents a final and binding resolution and settlement of the violations alleged, and all claims, violations or causes of action that could have been asserted against the Echeverria Partnership as of the effective date of this Stipulated Order based on the specific facts alleged in this Order ("Covered Matters"). The provisions of this Paragraph are expressly conditioned on the full payment of the administrative civil liability, in accordance with Paragraph 9 of this Order.

14. Public Notice: The Parties understand that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the Central Valley Water Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Central Valley Water Board, or its delegee, for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the Central Valley Water Board, or its delegee. The Echeverria Partnership agrees that it may not rescind or otherwise withdraw its approval of the Stipulated Order if adopted as drafted herein.

- 15. Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for the Central Valley Water Board's adoption of the settlement by the Parties and review by the public, as reflected in this Stipulated Order, will be adequate. In the event procedural objections are raised prior to the Stipulated Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
- 16. No Waiver of Right to Enforce:** The failure of the Prosecution Staff or Central Valley Water Board to enforce any provision of this Stipulated Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of the Order. The failure of the Prosecution Staff or Central Valley Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order.
- 17. Interpretation:** This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.
- 18. Modification:** This Stipulated Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Central Valley Water Board.
- 19. If Order Does Not Take Effect:** In the event that this Stipulated Order does not take effect because it is not approved by the Central Valley Water Board, or its delegee, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Central Valley Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:
- a. Objections related to prejudice or bias of any of the Central Valley Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Central Valley Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on this matter; or
 - b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.
- 20. Admission of Liability:** The Echeverria Partnership does not admit to any liability regarding the alleged violations or otherwise agree that the calculation of the fine

was proper. In settling this matter the Parties agree that this Stipulated Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327. It should be recognized in the event that this Stipulated Order is used as evidence of a prior enforcement action, that there was no admission of liability.

- 21. Waiver of Hearing:** The Echeverria Partnership has been informed of the rights provided by Water Code section 13323(b), and hereby waives its right to a hearing before the Central Valley Water Board prior to the adoption of the Stipulated Order.
- 22. Waiver of Right to Petition:** The Echeverria Partnership hereby waives its right to petition the Central Valley Water Board's adoption of the Stipulated Order "if adopted as written" for review by the State Water Board, and further waives its right, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
- 23. Covenant Not to Sue:** The Echeverria Partnership covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, its officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter.
- 24. Central Valley Water Board is Not Liable:** Neither the Central Valley Water Board members nor the Central Valley Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Echeverria Partnership, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order.
- 25. Authority to Bind:** Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of and to bind the entity on whose behalf he or she executes the Order.
- 26. No Third Party Beneficiaries:** This Stipulated Order is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.
- 27. Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Central Valley Water Board, or its delegee, enters the Order.
- 28. Counterpart Signatures:** This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

IT IS SO STIPULATED.

California Regional Water Quality Control Board Prosecution Staff
Central Valley Region

By: Andrew Altevogt
Andrew Altevogt
Assistant Executive Officer

Date: 6/30/14

By: Javier Echeverria
Echeverria Brothers Dairy General Partnership

Date: 6/24/14

Order of the Central Valley Water Board

1. In adopting this Stipulated Order, the Central Valley Water Board or its delegee has considered, where applicable, each of the factors prescribed in Water Code section 13327. The consideration of these factors is based upon information and comments obtained by the Central Valley Water Board's staff in investigating the allegations or otherwise provided to the Central Valley Water Board or its delegee by the Parties and members of the public.
2. This is an action to enforce the laws and regulations administered by the Central Valley Water Board. The Central Valley Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.
3. The terms of the foregoing Stipulation are fully incorporated herein and made part of this Order of the Central Valley Water Board.

Pursuant to Water Code section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** on behalf of the California Regional Water Quality Control Board, Central Valley Region.



(Signature)

KENNETH D. LANDAU

(Print Name and Title)

Date: 7 August 2014

Attachment A

Attachment A
Specific Factors Considered for Administrative Civil Liability
ECHEVERRIA BROTHERS DAIRY GENERAL PARTNERSHIP
SAN JOAQUIN 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 nine-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.

A. Factors Considered Relating to Violation of CAO Directive 2: Submittal of Legal Proof of Disposal of Animal Carcasses

The following steps are used in determining administrative civil liability for the failure to timely submit proof of legal disposal of illegally buried carcasses by 2 July 2012.

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.35. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. Proof of legal disposal provides confirmation to Regional Water Board staff that the illegally buried animals have been removed and do not pose an ongoing threat to water quality. Delay in the submittal of the report results in ongoing questions about the method and thoroughness of removal activities and whether the discharge has ceased and the waste properly hauled to the appropriate landfill.

b. The Deviation from Applicable Requirements is moderate. The report was submitted late; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from 3 July 2012 (the day after the report was due) to 20 July 2012 (the date the Central Valley Water Board received a report and receipt from the landfill) for a total of 18 days date. Therefore the Per Day Assessment is calculated as (0.35 factor from Table 3) x (18 days) x (\$1,000 per day). **The Initial Liability value is \$6,300.**

Step 4 – Adjustment Factors

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

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. Evidence does not support a finding of negligent or intentional behavior, justifying a 1.5; or of inadvertent behavior, justifying a lower multiplier. The Discharger was aware of the need for the timely submittal of the comprehensive report but failed to submit the report on time in accordance with the deadlines in the cleanup and abatement order (CAO). The Discharger was assessed a multiplier value of **1.3**.

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 report was ultimately submitted 18 days late, not long after the deadline. The Discharger was assessed a neutral multiplier value of **1.0**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger has no history of violations and therefore, Staff assessed a multiplier value of **1.0**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$6,300) X Adjustment Factors (1.3) (1.0) (1.0) and is equal to **\$8,190**.

B. Factors Considered Relating to Violation of CAO Directive 4: Failure to Submit a Groundwater Remediation Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is **0.40**. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The CAO directed the Discharger to collect groundwater samples and determine if the illegal burial of dead animals had caused pollution of groundwater. The groundwater samples indicated pollution. Therefore, a groundwater remediation plan was required under the CAO. For the period of time the plan had not been submitted, the plan could not be approved or implemented, and groundwater impacts remained unremediated.

b. The Deviation from Applicable Requirements is moderate. The Groundwater Remediation Plan was submitted; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from 28 August 2012 (the date the Groundwater Remediation Plan was due) through 12 April 2013 (the date that the Groundwater Remediation Plan was received), a total of 227 days. Therefore, the Per Day Assessment is calculated as (0.4 factor from Table 3) x (227 days) x (\$1,000 per day). **The Initial Liability value is \$90,800.**

Step 4 – Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation.

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Regional Water Board Prosecution Team applied the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (0.4) X (13 days of violation) X (\$1,000) = \$5,200

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 CAO clearly stated the requirement to submit the Groundwater Remediation Plan if groundwater sampling indicated groundwater pollution. The status letter issued by staff on 14 September 2012 states that staff's evaluation of groundwater data received from the Discharger's consultant on 20 July 2012 indicates negative impacts to groundwater in the vicinity of the dead animal burial area and that a plan for the remediation of the groundwater was required by 27 August 2012. The plan was not received until 12 April 2013, approximately eight months after the due date in the CAO. Where staff clearly communicated the

requirement to the Discharger and compliance was not achieved until months after, a higher degree of culpability is warranted for conduct considered beyond reasonable. The Discharger was assessed a multiplier value of 1.4.

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 submitted the Groundwater Remediation Plan on behalf of Mr. Tosta. The Discharger was assessed a lower multiplier value of 0.8.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger has no history of violations and therefore, Staff assessed a multiplier value of 1.0.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$5,200) X Adjustment Factors (1.4) (0.8) (1.0) and is equal to \$5,824.

C. Factors Considered Relating to Violation of CAO Directive 4: Failure to Remove and Properly Dispose of the Manure Containing Animal Remains from the Area South of the Wastewater Lagoon

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.4. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. Mr. Tosta placed dead cows in an area south of the lagoon at the Heifer Ranch and covered the cows with manure. When the lagoon at the Heifer Ranch was cleaned out, as required by the CAO, the removed manure, which also contained animal remains, was added to the pile of manure containing animal remains south of the wastewater lagoon. Land application of manure containing residues from mammalian tissue is not allowed because pathogens that are resistant to decomposition may be present, including prions responsible for Transmissible Spongiform Encephalopathy (TSE). Prions are very resistant to degradation, heat, and normal sterilization processes. While TSE is rare, should prions be present in a cow placed in the manure, prions could be transferred to the soil when the manure is land applied. The disease

can be transmitted at very low exposure levels and is fatal to humans. Because of the severity of the impacts of TSE, should the disease-causing prions be present, this material must be discharged to a landfill that is permitted to accept this material.

b. The Deviation from Applicable Requirements is moderate. Mr. Tosta failed to remove the manure containing animal remains. Mr. Tosta along with the Discharger have been repeatedly informed of the requirement to haul this material to an appropriate landfill; this requirement was reiterated in letters dated 14 September 2012, 26 August 2013, and 29 October 2013. The Discharger eventually complied but failed to meet the deadline of 29 June 2012 to remove the manure mixed with animal remains. The effectiveness of the requirement was partially achieved where the Discharger cleaned up and properly disposed of the waste months after the CAO deadline.

The length of the violation is alleged from 30 June 2012 (the day after the manure and animal remains were to be removed per the CAO) through 6 December 2013 (the day it was confirmed that the removal of manure and animal remains was complete) for a total of 524 days late. Therefore the Per Day Assessment is calculated as (0.4 factor from Table 3) x (524 days) x (\$5,000 per day). The Initial Liability value is \$1,048,000.

Step 4 – Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The failure to remove the manure and animal remains does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Regional Water Board Prosecution Team applied the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

$$\text{Revised Initial Liability} = (0.4) \times (23 \text{ days of violation}) \times (\$5,000) = \mathbf{\$46,000}$$

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 CAO issued to the Discharger clearly stated that the manure and animal remains must be removed by 29 June 2012. The status letter sent to the Discharger on 14 September 2012, and additional letters sent on 26 August 2013 and 29 October 2013, reminded the Discharger that the removal had not been done. On 19 December 2013, the Discharger submitted a letter to Regional Board staff along with a final report confirming the removal of manure mixed with animal remains was complete on 6 December 2013. Part of the delay was related to the Discharger's request to land apply the manure mixed with animal remains. Where the Discharger was contemplating disposal methods, the delay was not due to the Discharger's complete disregard for the regulatory program, conduct which warrants a higher multiplier of at least 1.3. However, credit for cooperation is not appropriate where the Discharger was repeatedly reminded of the requirement but had delayed compliance. The Discharger was assessed a multiplier value of 1.2.

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 removed the manure mixed with animal remains over a three week period. A multiplier of .80 was assessed.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger has no history of violations and therefore, Staff assessed a multiplier value of 1.0.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$46,000) X Adjustment Factors (1.2) (0.80) (1.0) and is equal to \$44,160.

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

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities.

The Echeverria Partnership has significant landholdings throughout the Central Valley. Publicly available records indicated that they are the titled landowner of numerous parcels of land in Bakersfield. In addition, members of the Echeverria Partnership operate at least 3 separate dairies outside of Bakersfield that milk a combined total of more than 7,000 milking cows. The ongoing profits from these dairies and the equity in existing landholdings represent significant assets to pay the liability assessed. The Discharger has not brought forward claims of economic hardship or inability to pay to rebut these findings.

Step 7 - Other Factors as Justice May Require

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," if express findings are made to justify this.

Step 8 – Economic Benefit

The Enforcement Policy requires that the economic benefit of noncompliance be estimated for every violation. The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. In other words, the Discharger realized a gain by not expending the resources to timely comply with water quality laws, including the Dairy General Order and the Cleanup and Abatement Order. The Discharger has realized an economic benefit of noncompliance of approximately \$4,313. The economic benefit of noncompliance is estimated by calculating the time value of the delayed expenditures, net of taxes, and inflation using the U.S. Environmental Protection Agency's BEN model¹.

Final Adjusted liability

The final adjusted liability is **\$58,174**.

Step 9 – Maximum and Minimum Liability Amounts

The maximum liability amount the Regional Water Board may assess for the above-referenced violations pursuant to Water Code sections 13350 and 13268 is \$5,000 and \$1,000 per day, respectively. Therefore, the maximum liability the Regional Water Board may assess is \$2,865,000.

The minimum liability amount provided in Water Code section 13350 is \$100 per day of violation. Therefore, the minimum amount the Regional Water Board must assess is \$52,400 unless specific findings are made supporting a reduction.

Step 10 – Final Liability Amount

The final adjusted liability amount is **\$58,174**.

¹ USEPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures such as capital investments, one-time non-depreciable expenditures, and annual operation and maintenance costs.

BEN uses standard financial cash flow and net present value analysis techniques based on generally accepted financial principles. First, BEN calculates the costs of complying on time and of complying late adjusted for inflation and tax deductibility. To compare the on time and delayed compliance costs in a common measure, BEN calculates the present value of both streams of costs, or "cash flows," as of the date of initial noncompliance. BEN derives these values by discounting the annual cash flows at an average of the cost of capital throughout this time period. BEN can then subtract the delayed-case present value from the on-time-case present value to determine the initial economic benefit as of the noncompliance date. Finally, BEN compounds this initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance.