

## EXHIBIT A

### Calculation of Liability

#### **Violation Category #1: Unauthorized discharges of waste to waters of the United States 19 April 2011, 21 February 2012**

##### **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).

The beneficial uses of Mad Canyon, as a tributary to the Middle Fork of the American River, include municipal and domestic supply, agricultural supply, hydropower generation, water contact recreation, non-contact water recreation, warm freshwater habitat, cold freshwater habitat, spawning, reproduction, and/or early development, and wildlife habitat.

##### **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 **1** was assigned. A score of 1 means that the chemical and/or physical characteristics of the discharged material poses only minor risk or threat to potential receptors (i.e. chemical and/or physical characteristics of the discharged material are relatively benign or are not likely to harm potential receptors). Analysis of mining waste from the site indicates that the waste is classified as a Group C mining waste. Group C mining wastes are wastes from which any discharge would be in compliance with applicable water quality control plans, including water quality objectives, other than turbidity. Based on the waste characterization of sample taken from waste dumps #1-#4, samples resulted in a ratio of acid neutralizing potential to acid generating potential of 17 to 1, indicating that the waste material is not likely acid generating. None of the analytic results exceeded either hazardous waste total threshold limit concentrations or soluble threshold limit concentrations. The sand and finer grain-sized samples are expected to exhibit higher concentrations of soluble constituents than the waste rock as a whole, which is composed predominantly of gravel and cobble-sized rock fragments. Though the mining waste is classified as a Group C mining waste, the toe failures observed on the site inspections indicates a

large volume of sediment and mining waste discharges which increase the likelihood of turbidity threatening exposure pathways.

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, given the condition of the terrain where the discharges enter into Mad Canyon, cleanup or abatement would likely not be possible and therefore, a factor of **1** 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 or group of violations. 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.

Per Day Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per day basis using the same Potential Harm score from Step 1 and the Extent of Deviation from Requirements. The Potential Harm score from Step 1 is 5 and the Extent of Deviation from Requirements is considered to be **major** because the discharge of waste to surface waters is expressly prohibited by WDRs Order No. R5-2007-0181 and the Clean Water Act without the appropriate permit. Therefore a factor of **0.150** is assigned.

**Violation #1 – Initial Liability Amount**

The initial liability amount for the violations calculated on a per day basis are as follows:

Per Day Liability:

1. 19 April 2011:  $\$10,000 \times 0.150$  (1 day) = \$1,500
2. 21 February 2012:  $\$10,000 \times 0.150$  (1 day) = \$1,500

Total Initial Liability = **\$3,000**

Step 3 – Per Day Assessment for Non-Discharge Violations

In this case, this factor does not apply because the violations are related to the discharge of waste and the liability was determined in 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 cleanup 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 was given a multiplier value of **1.4** because of the Discharger's failure to implement any meaningful reclamation measures for waste dumps 1 through 4 to control erosion, reduce infiltration, and provide for increased slope stability even after the Central Valley Water Board staff provided notice to the Discharger of the alleged violations (Exhibit I). The unauthorized discharges of waste to Mad Canyon, a tributary to the Middle Fork of the American River, are the result of the Discharger's failure to implement the required reclamation measures to provide for increased slope stability.

#### 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 **1.4** because of the lack of cooperation exhibited by the Discharger to return to compliance and complete reclamation by the required deadline.

#### History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1** was used because there have been no previous unauthorized discharge violations other than the alleged violations currently at issue in 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 Adjusted Initial Liability Amount determined in Step 2.

<b><u>Violation Category #1 – Total Base Liability Amount</u></b>	
Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability	
<u>Per Day Liability:</u>	
a) 19 April 2011	\$1,500 x 1.4 x 1.4 x 1 = \$2,940
b) 21 February 2012	\$1,500 x 1.4 x 1.4 x 1 = \$2,940
Total Base Liability = <b>\$5,880</b>	
<b>*Adjusted Total Base Liability = \$20,000</b>	

\*It should be noted, while the calculated total base liability amount for Violation Category #1 is \$5,880, the estimated economic benefit for these violations, further explained in Step 8 of this analysis, is estimated at \$20,000 which is the amount of the

15 June 2005 Irrevocable Standby Letter of Credit or Financial Assurance. The amount reflects the estimated cost of reclaiming the surface mine site in the event of abandonment or financial incapability of the operator ensuring that the public does not have to bear the cost of reclaiming an abandoned surface mine. This estimated amount reflects the approximated amount the Discharger saved by failing to reclaim the mine site as required by the WDRs. This failure not only resulted in an economic savings to the Discharger but the failure to reclaim the mines is directly related to the waste dump toe failures which discharge mining waste to Mad Canyon. Since the estimated economic benefit for Violation Category #1 exceeds the calculated total base liability, the amount is adjusted to reflect recoupment of economic benefit pursuant to the Enforcement Policy. The recommended adjustment of economic benefit plus 10% equates to \$22,000, however, the statutory maximum liability is \$20,000. Therefore, the adjusted total base liability for Violation Category #1 is \$20,000.

***Violation Category #2: Failure to submit 2007-2008, 2008-2009, 2009-2010, and 2010-2011 Annual Summary Monitoring Reports by 1 July each year.***

**Step 1 – Potential for Harm for Discharge Violations**

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

**Step 2 – Assessment for Discharge Violations**

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

**Step 3 – Per Day Assessment for Non-Discharge Violations**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, the alleged violations do not directly or immediately impact beneficial uses. Even though beneficial uses may not be directly or immediately impacted by the alleged violations, the repeated failure to conduct and submit required annual monitoring has an ancillary effect on beneficial uses. The Central Valley Water Board lacks the necessary required information to monitor and evaluate the waste being discharged at the site and lacks important information about the remaining waste management unit capacity. Therefore, the potential for harm to beneficial uses is determined to be **minor**.

The violation represents either a minor, moderate, or **major** deviation from the applicable requirements. In this case, the deviation from applicable requirements is determined to be major. The requirement in WDR Order No. R5-2007-0181 and the MRP to submit the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 Annual Monitoring Reports by 1 July each year has been rendered ineffective as the Discharger has disregarded this requirement since obtaining WDRs from the Central Valley Water Board. The failure to submit the required reports undermines the Central Valley Water Board’s efforts to monitor general compliance with WDRs and more specifically, to

monitor the quantity, type, and potential impacts of waste discharged at the site. Using Table 3 in the Enforcement Policy, the **Per Day Factor of 0.3** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown below.

### **Violation Category #2 - Initial Liability Amount**

The initial liability amounts for the violations calculated on a per-day basis, are as follows:

#### Per Day Liability:

- c) 2007-2008 Annual Monitoring Report  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- d) 2008-2009 Annual Monitoring Report  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- e) 2009-2010 Annual Monitoring Report  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- f) 2010-2011 Annual Monitoring Report  $\$1,000 \times (0.3) \times (308 \text{ days}) = \$92,400$

Total Initial Liability (a+b+c+d) = **\$420,900**

### **Multiple Day Violations**

For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to thirty (30) days. 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. In this case, the failure to submit the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 Annual Monitoring Reports results in no economic benefit that can be measured on a daily basis, though the Discharger may have experienced a cost savings from failing to submit the reports. Therefore, the alternate approach for calculating multiday violations is applicable and liability shall not be less than an amount calculated based on the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30<sup>th</sup> day, plus an assessment for each thirty (30) days of violation. In this case, violations are counted as follows:

- a) 2007-2008 Annual Monitoring Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- b) 2008-2009 Annual Monitoring Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- c) 2009-2010 Annual Monitoring Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- d) 2010-2011 Annual Monitoring Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300.

### **Violation Category #2 – Adjusted Initial Liability Amount for Multiple Day Violations**

The adjusted initial liability amounts for the violations calculated on a multiple-day basis, are as follows:

#### Per Day Liability:

- a) 2007-2008 Annual Monitoring Report  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- b) 2008-2009 Annual Monitoring Report  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- c) 2009-2010 Annual Monitoring Report  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- d) 2010-2011 Annual Monitoring Report  $\$1,000 \times (0.3) \times (16 \text{ days}) = \$4,800$

Total Initial Liability (a+b+c+d) = **\$21,000**

### **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 cleanup 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 was given a multiplier value of **1.3** because of the Discharger's repeated failure to comply with this requirement even after the Central Valley Water Board staff provided notice to the Discharger of the alleged violations. Specifically, on 12 August 2009, the Central Valley Water Board staff issued a Notice of Violation (NOV) citing the Discharger's failure to submit the 2007-2008 and 2008-2009 Annual Monitoring Summary Report as required by WDRs Order No. R5-2007-0181 (Exhibit J). Furthermore, on 23 March 2010, the Central Valley Water Board staff issued a second NOV pertaining to the same alleged violations (Exhibit I). The required submission of the Annual Monitoring Summary Reports was also a topic of discussion in a face-to-face meeting with the Discharger on 9 July 2009 (Exhibit K).

#### 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 **1.3** because of the lack of cooperation exhibited by the Discharger to return to compliance and submit the missing Annual Monitoring Summary Reports. In both the 12 August 2009 and 23 March 2010 NOVs, the Central Valley Water Board staff requested that the Discharger submit the missing

reports within 30 days of the date of the NOVs (Exhibits F and G). The Discharger did not comply with either of these requests.

### History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1** was used because there have been no previous Annual Monitoring Summary Report violations other than the alleged violations currently at issue in 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 Adjusted Initial Liability Amount determined in Step 3.

#### **Violation Category #2 - Total Base Liability Amount**

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

- a) 2007-2008 Annual Monitoring Report = \$9,126 (\$5,400 x 1.3 x 1.3 x 1)
- b) 2008-2009 Annual Monitoring Report = \$9,126 (\$5,400 x 1.3 x 1.3 x 1)
- c) 2009-2010 Annual Monitoring Report = \$9,126 (\$5,400 x 1.3 x 1.3 x 1)
- d) 2010-2011 Annual Monitoring Report = \$8,112 (\$4,800 x 1.3 x 1.3 x 1)

Total Base Liability [a+b+c+d]= **\$35,490**

Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

***Violation Category #3: Failure to submit 2009, 2010, and 2011 Facility Inspection Reports by 15 November each year.***

### **Step 1 – Potential for Harm for Discharge Violations**

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

### **Step 2 – Assessment for Discharge Violations**

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

### **Step 3 – Per Day Assessment for Non-Discharge Violations**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, the alleged violations do not directly or immediately impact beneficial uses. The annual facility inspection reports are designed to assess drainage controls and vegetative cover on the waste dumps, including any necessary measures that establish self-sustaining plant cover that assists in controlling erosion, reducing infiltration, and providing increased slope stability. These reports ensure that the facility has sufficient control measures in place to assist in protecting water quality. Even though beneficial uses may not be directly or immediately impacted by the alleged violations, the repeated failure to conduct and submit required annual facility inspection reports has an ancillary effect on beneficial uses. Therefore, the potential for harm to beneficial uses is determined to be **minor**.

The violation represents either a minor, moderate, or major deviation from the applicable requirements. In this case, the deviation from applicable requirements is determined to be **major**. The requirement in WDR Order No. R5-2007-0181 and the MRP to submit the 2009, 2010, and 2011 Facility Inspection Reports by 15 November each year has been rendered ineffective. The failure to submit Facility Inspection Reports undermines the Central Valley Water Board's ability to assess the status of surface water drainage controls, vegetative cover on the waste dumps and to monitor any repairs or preventative maintenance being conducted at the site prior to the rainy season. Therefore, a **Per Day Factor of 0.3** is assigned.

### **Violation Category #3 - Initial Liability Amount**

The initial liability amounts for the violations calculated on a per-day basis, are as follows:

#### Per Day Liability:

- a) 2009 Facility Inspection Report  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- b) 2010 Facility Inspection Report  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- c) 2011 Facility Inspection Report  $\$1,000 \times (0.3) \times (171 \text{ days}) = \$51,300$

Total Initial Liability (a+b+c) = **\$270,300**

### **Multiple Day Violations**

For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to thirty (30) days. 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. In this case, the failure to submit the 2009, 2010, and 2011 Facility Inspection Reports results in no economic benefit that can be measured on a daily basis though the Discharger may have experienced a cost savings from failing to submit the reports. Therefore, the alternate approach for calculating multiday violations is applicable and liability shall not be less than an amount calculated based on the initial



Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30<sup>th</sup> day, plus an assessment for each thirty (30) days of violation. In this case, violations are counted as follows:

- a) 2009 Facility Inspection Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- b) 2010 Facility Inspection Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- c) 2011 Facility Inspection Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150.

### **Violation Category #3 – Adjusted Initial Liability Amount for Multiple Day Violations**

The adjusted initial liability amounts for the violations calculated on a multiple-day basis, are as follows:

#### Per Day Liability:

- a) 2009 Facility Inspection Report  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- b) 2010 Facility Inspection Report  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- c) 2011 Facility Inspection Report  $\$1,000 \times (0.3) \times (11 \text{ days}) = \$3,300$

Total Initial Liability (a+b+c) = **\$14,100**

### **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 cleanup 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 was given a multiplier value of **1.2** because of the Discharger's repeated failure to submit the required Facility Inspection Reports since 2009. On 23 March 2010, the Central Valley Water Board staff issued a NOV citing the Discharger's failure to submit the 2009 Facility Inspection Report (Exhibit I). Since the 23 March 2010 NOV, the Discharger has also failed to submit the 2010 and 2011 Facility Inspection Reports.

#### 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 of the lack of cooperation exhibited by the Discharger to return to compliance and submit the missing Facility Inspection Reports after receiving the NOV on 23 March 2010.

#### History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a

multiplier of 1 was used there have been no previous Annual Facility Inspection Report violations other than the alleged violations currently at issue in 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 Adjusted Initial Liability Amount determined in Step 3.

<b><u>Violation Category #3 - Total Base Liability Amount</u></b>	
Adjusted Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability	
a)	2009 Facility Inspection Report = \$7,776 (\$5,400 x 1.2 x 1.2 x 1)
b)	2010 Facility Inspection Report = \$7,776 (\$5,400 x 1.2 x 1.2 x 1)
c)	2011 Facility Inspection Report = \$4,752 (\$3,300 x 1.2 x 1.2 x 1)
Total Base Liability [a+b+c]= <b>\$20,304</b>	

Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

***Violation Category #4: Failure to submit 2008-2009, 2009-2010, and 2010-2011 Annual Industrial Stormwater Report by 1 July each year***

**Step 1 – Potential for Harm for Discharge Violations**

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

**Step 2 – Assessment for Discharge Violations**

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

**Step 3 – Per Day Assessment for Non-Discharge Violations**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, the alleged violations do not directly or immediately impact beneficial uses. The annual stormwater monitoring reports include, among other things, an evaluation of visual observations and sampling results for constituents of concern, including pH, total suspended solids, specific conductance, total organic carbon, blasting residues, and diesel and lubricants. Even though beneficial uses may not be directly or immediately impacted by the alleged violations, the repeated failure to submit required ISW annual reports has an ancillary effect on

beneficial uses. Therefore, the potential for harm to beneficial uses is determined to be **minor**.

The violation represents either a minor, moderate, or major deviation from the applicable requirements. In this case, the deviation from applicable requirements is determined to be **major**. The requirement in the Industrial Storm Water General Permit Order 97-03-DWQ (ISW Permit) to submit the Annual Stormwater Monitoring Reports by 1 July each year has been rendered ineffective as the Discharger has disregarded this requirement. The failure to submit the required reports undermines the Central Valley Water Board's efforts to monitor for constituents of concern and potential impacts of waste discharged at the site. Furthermore, the Central Valley Water Board's ability to review and evaluate the adequacy, proper installation, and maintenance of BMPs has been significantly undermined by the failure to submit the 2008-2009, 2009-2010, and 2010-2011 ISW Annual Reports. Therefore, a **Per Day Factor of 0.3** is assigned.

#### **Violation Category #4 - Initial Liability Amount**

The initial liability amounts for the violations calculated on a per-day basis, are as follows:

##### Per Day Liability:

- a) 2008-2009 ISW Annual Report  $\$10,000 \times (0.3) \times (365 \text{ days}) = \$1,095,000$
- b) 2009-2010 ISW Annual Report  $\$10,000 \times (0.3) \times (365 \text{ days}) = \$1,095,000$
- c) 2010-2011 ISW Annual Report  $\$10,000 \times (0.3) \times (308 \text{ days}) = \$924,000$

Total Initial Liability (a+b+c) = **\$3,114,000**

#### **Multiple Day Violations**

For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to thirty (30) days. 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. In this case, the failure to submit the 2008-2009, 2009-2010, and 2010-2011 ISW Annual Reports results in no economic benefit that can be measured on a daily basis. Therefore, the alternate approach for calculating multiday violations is applicable and liability shall not be less than an amount calculated based on the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30<sup>th</sup> day, plus an assessment for each thirty (30) days of violation. In this case, violations are counted as follows:

- a) 2008-2009 ISW Annual Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- b) 2009-2010 ISW Annual Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- c) 2010-2011 ISW Annual Report, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300.

#### **Violation Category #4 – Adjusted Initial Liability Amount for Multiple Day Violations**

The adjusted initial liability amounts for the violations calculated on a multiple-day basis, are as follows:

##### Per Day Liability:

- a) 2008-2009 ISW Annual Report  $\$10,000 \times (0.3) \times (18 \text{ days}) = \$54,000$
- b) 2009-2010 ISW Annual Report  $\$10,000 \times (0.3) \times (18 \text{ days}) = \$54,000$
- c) 2010-2011 ISW Annual Report  $\$10,000 \times (0.3) \times (16 \text{ days}) = \$48,000$

Total Initial Liability (a+b+c) = **\$156,000**

#### **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 cleanup 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 was given a multiplier value of **1.3** because of the Discharger's repeated failure to comply with this requirement even after the Central Valley Water Board staff provided notice to the Discharger of the alleged violations. The 12 August 2009 NOV cited the Discharger's failure to submit the 2008-2009 ISW Annual Report and requested that the Discharger submit the missing report by 11 September 2009 (Exhibit J). Furthermore, the stormwater staff of Central Valley Water Board issued two notices of noncompliance (NNC) on 23 July 2009 and 3 September 2009 for the 2008-2009 ISW Annual Report (Exhibit L), one NNC on 19 August 2010 for the 2009-2010 ISW Annual Report (Exhibit L), and one NNC on 24 August 2011 for the 2010-2011 ISW Annual Report (Exhibit L). In total the Discharger received five different notices from the Central Valley Water Board pertaining to the failure to submit the ISW Annual Reports.

##### 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 **1.3** because of the lack of cooperation exhibited by the Discharger to return to compliance and submit the missing ISW Annual Reports after receiving five different notices from the Central Valley Water Board.

##### History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1** was used there have been no previous ISW Annual Report violations other than the alleged violations currently at issue in 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 Adjusted Initial Liability Amount determined in Step 3.

#### **Violation Category #4 - Total Base Liability Amount**

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

- a) 2008-2009 ISW Annual Report = \$91,260 (\$54,000 x 1.3 x 1.3 x 1)
- b) 2009-2010 ISW Annual Report = \$91,260 (\$54,000 x 1.3 x 1.3 x 1)
- c) 2010-2011 ISW Annual Report = \$81,120 (\$48,000 x 1.3 x 1.3 x 1)

Total Base Liability [a+b+c]= **\$263,640**

Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

### ***Violation Category #5: Failure to pay annual waste discharge requirement fees for Fiscal Year 2008, 2010, and 2011***

#### **Step 1 – Potential for Harm for Discharge Violations**

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

#### **Step 2 – Assessment for Discharge Violations**

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

#### **Step 3 – Per Day Assessment for Non-Discharge Violations**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, the violation is determined to present a **minor** harm or threat to beneficial uses in that the failure to pay annual fees pertains to the administration of the waste discharge requirement program rather than the substantive requirements in the WDRs that protect water quality.

The violation represents either a minor, moderate, or major deviation from the applicable requirements. In this case, the deviation from applicable requirements is determined to be **major** because the Discharger has consistently disregarded the requirement to submit an annual fee according to the fee schedule of the State Water Board. Therefore, a **Per Day Factor of 0.3** is assigned.

**Violation Category #5 - Initial Liability Amount**

The initial liability amounts for the violations calculated on a per-day basis, are as follows:

Per Day Liability:

- a) FY 2008 Annual WDR Fee  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- b) FY 2010 Annual WDR Fee  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- c) FY 2011 Annual WDR Fee  $\$1,000 \times (0.3) \times (89 \text{ days}) = \$26,700$

Total Initial Liability (a+b+c) = **\$245,700**

**Multiple Day Violations**

For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to thirty (30) days. 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. In this case, the failure to pay annual waste discharge requirement fees for FYs 2008, 2010, and 2011 by the required deadline results in no economic benefit that can be measured on a daily basis, though the Discharger experienced a cost savings from not paying fees. Therefore, the alternate approach for calculating multiday violations is applicable and liability shall not be less than an amount calculated based on the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30<sup>th</sup> day, plus an assessment for each thirty (30) days of violation. In this case, violations are counted as follows:

- a) FY 2008 Annual WDR Fee, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- b) FY 2010 Annual WDR Fee, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- c) FY 2011 Annual WDR Fee, Day 1, 5, 10, 15, 20, 25, 30, 60.

**Violation Category #5 – Adjusted Initial Liability Amount for Multiple Day Violations**

The adjusted initial liability amounts for the violations calculated on a multiple-day basis, are as follows:

Per Day Liability:

- a) FY 2008 Annual WDR Fee  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- b) FY 2010 Annual WDR Fee  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- c) FY 2011 Annual WDR Fee  $\$1,000 \times (0.3) \times (8 \text{ days}) = \$2,400$

Total Initial Liability (a+b+c) = **\$13,200**

#### **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 cleanup 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 was given a multiplier value of **1.3** because of the Discharger's repeated failure to pay the annual WDR fee. Central Valley Water Board staff issued two NOVs citing the Discharger's failure to timely pay the required annual fee on 12 August 2009 and 23 March 2010 (Exhibit J and I). This matter was also verbally brought to the Discharger's attention in the 9 July 2009 face-to-face meeting (Exhibit K). In addition, the State Water Board's Division of Administrative Services sent three separate notices to the Discharger for the 2008 Annual WDR fee on 28 November 2008, 7 January 2009, and 18 March 2009 (Exhibit M); three separate notices for the 2010 Annual WDR fee on 16 November 2010, 5 January 2011, and 2 March 2011 (Exhibit M); and three separate notices for the 2011 Annual WDR fee on 5 January 2012, 21 February 2012, and 9 April 2012 (Exhibit M). In total, the Discharger received eleven different written notices and one verbal notice from the Central Valley Water Board and State Water Board regarding the requirement to pay Annual WDR fees. Not only is the Discharger aware of the requirement to pay fees based on the numerous notices, the Discharger paid the 2009 Annual WDR fee demonstrating acknowledgment and understanding of the obligation to meet this requirement.

##### **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 **1.3** because of the lack of cooperation exhibited by the Discharger to return to compliance and pay the required annual fees after receiving eleven different notices from the Central Valley Water Board and State Water Board. The Discharger has made unsupported claims of financial hardship to justify the non-payment of the Annual WDR fees and no attempts of payment, either in full or in installments, have been made for on these outstanding amounts.

##### **History of Violations**

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1** was used there have been no previous Annual WDR fee violations other than the alleged violations currently at issue in 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 Adjusted Initial Liability Amount determined in Step 3.

**Violation Category #5 - Total Base Liability Amount**

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

- a) FY 2008 Annual WDR Fee = \$9,126 (\$5,400 x 1.3 x 1.3 x 1)
- b) FY 2010 Annual WDR Fee = \$9,126 (\$5,400 x 1.3 x 1.3 x 1)
- c) FY 2011 Annual WDR Fee = \$4,056 (\$2,400 x 1.3 x 1.3 x 1)

Total Base Liability (a+b+c)= **\$22,308**

Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

***Violation Category #6: Failure to pay annual Industrial Stormwater Permit fees for Fiscal Year 2010 and 2011***

**Step 1 – Potential for Harm for Discharge Violations**

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

**Step 2 – Assessment for Discharge Violations**

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

**Step 3 – Per Day Assessment for Non-Discharge Violations**

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, the violation is determined to present a **minor** harm or threat to beneficial uses in that the failure to pay annual fees pertains to the administration of the Industrial Stormwater program rather than the substantive requirements in the Industrial Stormwater General Order that protect water quality.

The violation represents either a minor, moderate, or major deviation from the applicable requirements. In this case, the deviation from applicable requirements is determined to be **major** because the Discharger has consistently disregarded the requirement to submit an annual fee according to the fee schedule of the State Water Board. Therefore, a **Per Day Factor of 0.3** is assigned.



**Violation Category #6 - Initial Liability Amount**

The initial liability amounts for the violations calculated on a per-day basis, are as follows:

Per Day Liability:

- a) FY 2010 Annual ISW Permit Fee  $\$1,000 \times (0.3) \times (365 \text{ days}) = \$109,500$
- b) FY 2011 Annual ISW Permit Fee  $\$1,000 \times (0.3) \times (162 \text{ days}) = \$48,600$

Total Initial Liability (a+b) = **\$158,100**

**Multiple Day Violations**

For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to thirty (30) days. 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. In this case, the failure to pay annual ISW Permit fees for FYs 2010 and 2011 by the required deadline results in no economic benefit that can be measured on a daily basis, though the Discharger experienced a cost savings from not paying fees. Therefore, the alternate approach for calculating multiday violations is applicable and liability shall not be less than an amount calculated based on the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30<sup>th</sup> day, plus an assessment for each thirty (30) days of violation. In this case, violations are counted as follows:

- a) FY 2010 ISW Permit Fee, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150, 180, 210, 240, 270, 300, 330, 360.
- b) FY 2011 ISW Permit Fee, Day 1, 5, 10, 15, 20, 25, 30, 60, 90, 120, 150.

**Violation Category #6 – Adjusted Initial Liability Amount for Multiple Day Violations**

The adjusted initial liability amounts for the violations calculated on a multiple-day basis, are as follows:

Per Day Liability:

- a) FY 2010 Annual ISW Permit Fee  $\$1,000 \times (0.3) \times (18 \text{ days}) = \$5,400$
- b) FY 2011 Annual ISW Permit Fee  $\$1,000 \times (0.3) \times (11 \text{ days}) = \$3,300$

Total Initial Liability (a+b) = **\$8,700**

**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 cleanup 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 was given a multiplier value of **1.2** because of the Discharger's repeated failure to pay the annual ISW Permit fee. The State Water Board's Division of Administrative Services sent three separate notices to the Discharger for the 2010 Annual ISW Permit fee on 27 October 2010, 14 December 2010, and 19 January 2011 (Exhibit N); and three separate notices for the 2011 Annual ISW Permit fee on 24 October 2011, 5 December 2011, and 10 January 2012 (Exhibit N). In total, the Discharger received six different written notices from the State Water Board regarding the requirement to pay Annual ISW Permit fees. Not only is the Discharger aware of the requirement to pay fees based on the numerous notices, the Discharger paid the 2008 and 2009 Annual ISW Permit fees demonstrating acknowledgment and understanding of the obligation to meet this requirement.

### 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 **1.3** because of the lack of cooperation exhibited by the Discharger to return to compliance and pay the required annual fees after receiving six different notices from the State Water Board.

### History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1** was used there have been no previous Annual ISW Permit fee violations other than the alleged violations currently at issue in 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 Adjusted Initial Liability Amount determined in Step 3.

#### **Violation Category #6 - Total Base Liability Amount**

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

- a) FY 2010 Annual ISW Permit Fee = \$8,424 (\$5,400 x 1.2 x 1.3 x 1)
- b) FY 2011 Annual ISW Permit Fee = \$5,148 (\$3,300 x 1.2 x 1.3 x 1)

Total Base Liability (a+b) = **\$13,572**

### **COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS**

The combined Total Base Liability Amount for the five violation categories is **\$357,374** (\$20,000 + \$35,490 + \$20,304 + \$245,700 + \$22,308 + \$13,572).

The following factors apply to the combined Total Base Liability Amounts for all of the violations discussed above.

### **STEP 6 – Ability to Pay and Continue in Business**

- a) Combined Total Base Liability Amount: **\$357,374**
- b) Discussion: An asset search for the Discharger indicated that the Discharger owns property in both Placer and Los Angeles Counties. In Placer County, the Discharger owns a single family residence in Foresthill, California with an assessed value of \$154,106; a miscellaneous plot of land purchased in 1988 for approximately \$11,500; and a commercial mobile home property with an assessed value of approximately \$95,500. Additionally, in Los Angeles County, the Discharger owns a single family residence in Pasadena, California with an assessed value of \$1.17 million. Based on this information, the Discharger has the ability to pay the proposed administrative civil liability.

Based on the reasons discussed above, an ability to pay factor of 1 has been applied to the Combined Total Base Liability Amount.

### **STEP 7 – Other Factors as Justice May Require**

- a) Combined Total Base Liability Amount: **\$357,374 + \$11,250 (staff costs) = \$368,624**
- b) Discussion: The Central Valley Water Board has incurred \$ in staff costs associated with the investigation and enforcement of the violations alleged herein. This represents approximately 75 hours of staff time devoted to investigating and drafting the complaint at \$150 an hour. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

### **STEP 8 – Economic Benefit**

- a) Total Estimated Economic Benefit: \$43,080
  - i. Estimated Total Economic Benefit for Violation Category #1: \$20,000
  - ii. Estimated Total Economic Benefit for Violation Category #2: \$3,500
  - iii. Estimated Total Economic Benefit for Violation Category #3: \$2,625
  - iv. Estimated Total Economic Benefit for Violation Category #4: \$7,080
  - v. Estimated Total Economic Benefit for Violation Category #5: \$7,508
  - vi. Estimated Total Economic Benefit for Violation Category #6: \$2,367
- b) Discussion: The economic benefit is estimated for every violation. It estimated economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation. In this instance, the Discharger received

an economic benefit from the omission that constituted the alleged violations in each category. The Prosecution Team derived this reasonable estimation based on the estimated financial assurance amount, industry standards, current consulting costs of producing such reports, and the staff's familiarity with the complexity of the Annual Monitoring Summary Reports, Facility Inspection Reports, and the Annual ISW Reports to estimate the costs the Discharger saved by not submitting these reports. Additionally, the calculated economic benefit for the failure to pay annual WDR fees and ISW permit fees is based on the actual invoiced amounts for each fiscal year's fees that remain outstanding. See Exhibit O for a detailed summary of the economic benefit calculated for each violation category.

### **STEP 9 – Maximum and Minimum Liability Amounts**

- a) Minimum Liability Amount: Economic Benefit + 10%

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the violations cited in this Complaint is \$43,080. Therefore, the minimum liability amount pursuant to the Enforcement Policy is \$47,388.

- b) Total Maximum Liability Amount: **\$4,708,000**
- i. Maximum liability amount Violation Category #1: \$20,000 (2 days x \$10,000/day)
  - ii. Maximum liability amount Violation Category #2: \$1,403,000 (1403 days x \$1,000/day)
  - iii. Maximum liability amount Violation Category #3: \$901,000 (901 days x \$1,000/day)
  - iv. Maximum liability amount Violation Category #4: \$1,038,000 (1038 days x \$1,000/day)
  - v. Maximum liability amount Violation Category #5: \$819,000 (819 days x \$1,000/day)
  - vi. Maximum liability amount Violation Category #6: \$527,000 (527 days x \$1,000)

Discussion: The maximum administrative liability amount is the maximum amount allowed by CWC section 13261, 13268, and 13385. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could be assessed up to \$4,708,000 in administrative civil liabilities for the alleged violations.

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

## **STEP 10 – Final Liability Amount**

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the alleged violations in Violation Categories #1 through #6 is **\$368,624**. Exhibit B are spreadsheets that demonstrates the use of the penalty calculation methodology for each violation category.