

**Note: This document has been prepared by the
Central Valley Water Board's Prosecution Team**

ITEM: 16

SUBJECT: Morning Star Packing Company, LP; Morning Star Tomato Packing Plant, Colusa County

BOARD ACTION: *Consideration of an Administrative Civil Liability Order (ACLO)*

FACILITY
BACKGROUND: Morning Star Packing Company, LP (Discharger) owns and operates a tomato processing facility (Facility) in the city of Williams in Colusa County. The Facility operates during the tomato harvest season, from about June to mid-October each year, making tomato paste. The Facility processes approximately 630 tons of tomatoes per hour, and is the largest tomato processing plant in California.

The Facility was regulated under Waste Discharge Requirements Order (WDRs) 95-160 and is currently regulated under WDRs Order R5-2013-0144. The WDRs 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.

The tomato waste enters a Settling Pond. According to the Discharger's 1995 report of waste discharge (ROWD) and the 2013 WDRs, the Settling Pond is approximately 5 acre-feet in volume [40,000 square feet (0.92 acres) by 5 feet deep] and was constructed with clay soils compacted in lifts. The Settling Pond contains one mechanical aerator. Wastewater samples are collected from Settling Pond and analyzed for biochemical oxygen demand (BOD), fixed dissolved solids (FDS) and total nitrogen prior to discharge to the land application areas (LAAs).

The water softener reject, condensate, and boiler blowdown are directed to the Cooling Pond. Water softener reject and boiler blowdown are high strength wastes with electrical conductivity averaging between 850 to 8,600 mg/L and 1,200 to 1,400 µmhos/cm, respectively. According to the 2013 WDRs, the Cooling Pond is approximately 210 acre-feet in volume and described as 60 acres in size. The Cooling Pond is unlined and the base of the pond is currently 1.7 to 3.2 feet above groundwater.

Wastewater generated from sanitation or cleaning activities flows directly to the LAAs. Wastewater from the Settling Pond, Cooling Pond, and cleaning activities is land applied to 695 acres of cropland (i.e., the LAAs) at agronomic rates as authorized by the 2013 WDRs.

On 20 August 2015 Board staff inspected the Facility in response to odor complaints from the surrounding community. Subsequent to the inspection, Board staff issued the Discharger a Notice of Violation on 11 September 2015 which listed a number of violations observed by staff during the inspection. During the 20 August 2015 inspection, staff discovered that the Discharger completed an unpermitted expansion of the Cooling Pond. The Discharger removed 90.5 acres of LAA in order to increase the size of the Cooling Pond from 60 to 100 acres. Board staff also noted that organic matter was being discharged to the Cooling Pond in violation of the 2013 WDRs.

On 2 November 2015, Board staff conducted another inspection of the Facility as a follow up to the 11 September 2015 Notice of Violation. Board staff observed an empty Settling Pond during this 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. The Prosecution Team conservatively estimated that the Discharger completed the Settling Pond expansion sometime after the 2011 processing season based on references in Discharger documents to a “2011 staking plan for the pond expansion.” Documents submitted in response to the Prosecution Team’s administrative subpoena, issued on 20 November 2015, indicate that planning for the expansion of the Settling Pond began as early as June 2011 and confirm that unpermitted Settling Pond expansion occurred in the spring of 2012. The Discharger doubled the size of the Settling Pond from 0.92 acres to 1.98 acres.

1995 AND 2013 WASTE
DISCHARGE
REQUIREMENTS

Provision E.2 of the 1995 WDRs requires the Discharger to comply with the *Standard Provisions and Reporting Requirements for Waste Discharge Requirements*. Provision H.11 of the 2013 WDRs contains identical requirements. Standard Provision A.4 for both 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.*”

Additionally, the 2013 WDRs contain Discharge Prohibition A.3 which states: “*Discharge of waste at a location or in a manner different from that described in the Findings is prohibited.*”

ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT

On 20 November 2015, the Assistant Executive Officer issued an Administrative Civil Liability Complaint in the amount of \$1.5 million based on the State Water Board’s Enforcement Policy. The Complaint alleges two categories of violation in which the Discharger violated the above-referenced WDR provisions: 1) violation of Prohibition A.3 and Provision H.11 of the 2013 WDRs

resulting in discharges of waste to waters of the state from the unpermitted expanded Cooling Pond; and 2) violation of Provision E.2 of the 1995 WDRs and Prohibition A.3 of the 2013 WDRs resulting in discharges of waste to waters of the state from the unpermitted expanded Settling Pond.

The Complaint alleges that violation category 1 took place for the entire 2015 processing season for a total of 92 days (1 July through 30 September 2015). During this period of violation, the Prosecution Team estimated that approximately 276,300 gallons per day of wastewater seeped from the unpermitted expanded portion of the Cooling Pond to groundwater.

The Second Amended Complaint alleges that violation category 2 took place during the 2012 processing season for 81 days (24 July through 12 October 2012), the 2013 processing season for 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 for 92 days (1 July through 30 September 2015) for a total of 348 days. During these periods of violation, the Prosecution Team estimated that approximately 3,672 gallons per day of wastewater seeped from the unpermitted expanded portion of the Settling Pond to groundwater.

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. Whether adverse impacts or groundwater degradation resulted from the alleged violation is not a relevant inquiry to determine whether a person is liable pursuant that section, but it is a relevant inquiry into the amount of the administrative civil liability.

Pursuant to section 13350, 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 on a per gallon basis. In the alternative, the Prosecution Team recommends assessing administrative civil liability on a per day basis. Though the Prosecution Team is recommending that the Board assess liability on a per gallon basis, it analyzed both alternatives in Attachment A to the Complaint.

The maximum penalty for violation categories 1 and 2 pursuant to Water Code section 13350 on a per gallon basis is **\$266,974,560**. The maximum penalty for violation categories 1 and 2 pursuant to Water Code section 13350 on a per day of discharge basis is **\$2,200,000**. The minimum penalty pursuant to the Enforcement Policy is the economic benefit plus 10%.

The total base liability based on a per day of discharge basis is \$609,840. With respect to the total base liability based on a per gallon basis, even after utilizing the Enforcement Policy to determine the appropriate amount of liability for the alleged violations, the total base liability totaled over \$14 million. The Prosecution Team made specific findings in its analysis to determine that the \$14 million total base liability resulting from the Enforcement Policy methodology is disproportionate to the circumstances surrounding the discharge and is inconsistent with other recent penalties issued by the Board. Pursuant to "other factors as justice may require," the Prosecution Team asserts that the deterrent goals of the Water Code and Enforcement Policy can be met with a smaller, though still substantial, final liability in the amount of \$1,500,000.

ACL ISSUES:

There is a fundamental disagreement between the Parties as to whether the Discharger's actions of 1) removing 90.5 acres of land application to increase the Cooling Pond by 40 acres and 2) increasing the size of the Settling Pond from 0.92 acres to 1.98 acres constitute violations of the Discharger's WDRs. Furthermore, the Parties disagree over the proposed administrative civil liability. The Prosecution Team proposed liability in the amount of \$1.5 million. The Discharger asserts that the appropriate penalty is \$0.

Did the Discharger Violate its WDRs?

As stated above, with respect to the Cooling Pond expansion, the Prosecution Team alleges that the removal of 90.5 acres to expand the Cooling Pond by 40 acres is not authorized by the 2013 WDRs and constitutes a material change for which a new ROWD must be submitted to obtain amended WDRs. The Discharger argues that the WDRs explicitly acknowledge and contemplate the anticipated Cooling Pond expansion in Paragraph 28 of the 2013 WDRs.

With respect to the Settling Pond expansion, the Prosecution Team alleges that doubling the size of the Settling Pond is not authorized by the WDRs and constitutes a material change for which a new ROWD must be submitted to obtain new WDRs. The Discharger argues that the failure of the 2013 WDRs to accurately describe the size and capacity of the Settling Pond was an oversight and technical error, largely due to a lack of staff diligence to process its Report of Waste Discharge. However, it is important to note that the expansion of the Settling Pond occurred in 2012, the same year that Board staff began drafting the updated WDRs. At no time did the Discharger approach Board staff with an amended ROWD nor did it notify Board staff that it completed such modifications. Board staff discovered the Settling Pond expansion

on its own during the 2 November 2015 site visit

What is the Appropriate Liability for the Alleged Violations?

The disagreement between the Parties on this issue is so vast that it cannot be adequately summarized in this Summary Sheet. However, the one factor where there appears to be the most disagreement for both categories of violation is the Potential for Harm factor. The Enforcement Policy states, in relevant part, “[t]he potential harm to beneficial uses factor considers the harm that may result from exposure to the pollutants or contaminants in the illegal discharge.” Further, this factor “evaluates direct or indirect harm or *potential for harm* from the violation.” Step 1 of this factor examines the potential harm to beneficial uses.

Cooling Pond – Potential for Harm

The Prosecution Team chose a factor of 3, which is described as a “moderate threat to beneficial uses.” The Prosecution Team identified two separate potential harms to beneficial uses. The first is the direct 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 indirect potential harm to beneficial uses resulting from discharging wastewater to a smaller LAA because of the removal of 90.5 acres which, the Prosecution Team asserts, exacerbates groundwater quality concerns in the LAA when combined with BOD loading exceedances in 2015. An example of this is the manganese groundwater limit exceedances which tend to result from anoxic conditions created by BOD overloading. The Discharger argues that there is no potential for harm and that the Cooling Pond expansion actually provided the opportunity for improvement in groundwater quality. The Discharger’s conclusion is based on a Technical Memorandum (MS Exhibit K) that examines only two sampling events post-Cooling Pond expansion in 2015. The Prosecution Team contends that such conclusions cannot be drawn from two data points, as even the Discharger’s Technical Memorandum suggests, “further monitoring would be needed to establish any definitive trends.” The Prosecution Team continues to assert that a score of 3, a moderate potential for harm, is appropriate.

Settling Pond – Potential for Harm

The Prosecution Team also chose a factor of 3, a moderate threat to beneficial uses, for the Settling Pond based on the increased seepage of wastewater into the groundwater and the significantly higher strength waste entering groundwater. The Discharger similarly asserts that there is no evidence that the Settling Pond expansion has adverse impacts on water quality or beneficial uses based on a Technical Memorandum (MS Exhibit N) which

compares pre-pond expansion data with post-pond expansion data. However, this memorandum does not demonstrate a clear-cut trend for the constituents reviewed in the groundwater monitoring wells but does denote an increasing trend in chloride concentrations in the well dowgradient from the Settling Pond and potential noncompliance with the 1995 WDR groundwater limitation for nitrate nitrogen in that same dowgradient well in 2012 and 2013, just after Settling Pond expansion. The Prosecution Team continues to assert that a score of 3, a moderate potential for harm, is appropriate.

SUMMARY:

The Discharger's removal of 90.5 acres of LAA to expand the Cooling Pond by 40 acres in 2015 and doubling the size of the Settling Pond from 0.92 acres to 1.98 acres in 2012 were not authorized by the Discharger's WDRs. These modifications resulted in a material change to the character, location, or manner of the discharge triggering the requirement to submit a new ROWD for amended WDRs. Furthermore, the unpermitted expansion of the Cooling Pond resulted in a discharge of waste in a manner different from that described in the findings of the 2013 WDRs. The unpermitted expansion of the Cooling and Settling Ponds resulted in the Discharger, in violation of its WDRs, discharging waste to waters of the state.

RECOMMENDATION:

The Prosecution Team recommends that the Board adopt the ACLO for \$1.5 million, as proposed.

Mgmt. Review WSW
Legal Review MeO

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Central Valley Water Board
11020 Sun Center Drive
Rancho Cordova, California