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8 THE MORNING STAR PACKING COMPANY,
L.P.

10 BEFORE THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD
11 STATE OF CALIFORNIA

13 In the Matter of The Morning Star Packing
14 Company, L.P.,
15 Respondent.

ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT NO. R5-2015-0549

**THE MORNING STAR PACKING
COMPANY, L.P.'S LEGAL, POLICY
AND TECHNICAL STATEMENT IN
SUPPORT OF OPPOSITION TO THE
CENTRAL VALLEY WATER BOARD
PROSECUTION TEAM'S
ADMINISTRATIVE CIVIL LIABILITY
COMPLAINT NO. R5-2015-0549**

28 **THE MORNING STAR PACKING COMPANY L.P. LEGAL, POLICY AND TECHNICAL STATEMENT
IN SUPPORT OF OPPOSITION TO PROSECUTION TEAM'S
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT - NO. R5-2015**

1 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

2 The Prosecution Team does not allege that The Morning Star Packing Company, L.P.
3 (“Morning Star”) violated any substantive provisions of the 2013 Waste Discharge Requirements
4 (“WDRs”) at issue in this proceeding, nor does the Prosecution Team establish that Morning Star
5 is degrading water quality. Instead, the grounds underlying the Administrative Civil Liability
6 Complaint (“ACLC”) and its proposed fine¹ are premised upon allegedly unpermitted pond
7 expansions of a “Cooling Pond” and “Settling Pond” being “in a manner different from that
8 described in the Findings” and a “material change.”²

9 The ACLC and its proposed fine fail as a matter of law, science, and fact, for the
10 following reasons:

11 (1) Expansion of the Cooling Pond was not unpermitted nor is it a violation of the
12 WDRs because:

- 13 (a) the WDRs explicitly *acknowledge anticipated expansion* in Paragraph 28
14 of the Findings;
- 15 (b) *expansion of the Cooling Pond was not necessary* for the facility’s
16 production expansion;
- 17 (c) the Prosecution Team *improperly assumes that a decrease in the Land*
18 *Application Area adversely impacts groundwater quality*, despite the fact
19 that Morning Star uses significantly less water (and energy) than permitted,
20 resulting in less flows that are proportionate to the acreage upon which
21 wastewater discharge is applied;
- 22 (d) reduction in the Land Application Area as a result of Cooling Pond
23 expansion *did not create BOD overloading* (to the extent any such
24 overloading occurred); and

25
26 ¹ The Prosecution Team submitted an *Amended ACLC* on December 24, 2015, which modified its “economic
benefit” calculation upward from approximately \$871,000 to \$900,000, with the total proposed fine remaining \$1.5
million.

27 ² See, ACLC, page 3, paragraphs 11 and 13 referring to the Cooling Pond, and page 6, paragraph 28 referring to the
28 Settling Pond. Ironically, Paragraph 28 in the WDRs’ Findings upon which this proceeding is based, explicitly
acknowledges that Morning Star would be expanding its operations by up to the amount it did expand - 65%.

1 (e) *expansion of the Cooling Pond did not result in adverse impact to*
2 *groundwater quality.*

3 (2) Expansion of the Settling Pond was not unpermitted nor is it a violation of the
4 WDRs because:

5 (a) *the WDRs' reference to the size of the Settling Pond is an inadvertent*
6 *error, evident from the fact that expansion was completed prior to issuance*
7 *of the WDRs and groundwater data and water quality assumptions in the*
8 *WDRs reflects information that takes the expansion into account;*

9 (b) *the WDRs, the proceedings associated with issuance of the WDRs, and*
10 *current data support a conclusion that groundwater quality is not impacted*
11 *or otherwise associated with the Settling Pond³; and*

12 (c) *the expansion was contemplated and suggested by Regional Board staff.*

13 (3) Calculations for the proposed fine against Morning Star are significantly flawed as
14 a result of improper application of the scores and characterizations assigned, incorrect calculation
15 of "economic benefit," and underlying technical assumptions, including, without limitation, as to
16 seepage, all of which are more particularly described herein.

17 Ultimately, Morning Star is not subject to a fine.

18 **II. FACTUAL BACKGROUND**

19 Morning Star is the industry-leading tomato food processor. In that capacity, Morning
20 Star recognizes its responsibilities, evident from undertaking innovative measures to conserve
21 water and energy consumption during its manufacturing and operations processes over its entire
22 history.⁴

23 Contrary to reality, the ACLC and supporting documents contain emotionally-charged,
24 inflammatory statements alleging that Morning Star acted with "negligent behavior" and has
25 "demonstrated a complete disregard for the Board's regulatory process prior to making material
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28 ³ Morning Star Exhibit K ("MS Exh.")
⁴ Exh. B to MS Exh. O.

1 changes to its operations.”⁵ Morning Star objects to all such comments as being baseless and
2 potentially misleading impressions about Morning Star that could adversely impact Morning Star.
3 All such inflammatory statements should be stricken, for at least the following reasons: (i)
4 Morning Star voluntarily invited Regional Board staff to Morning Star’s Williams Facility after
5 the 2015 production season to discuss operations and concerns, including as to odor; and (ii)
6 Regional Board staff, not Morning Star, demonstrated disregard for its own responsibilities and
7 processes by failing to process Morning Star’s Report of Waste Discharge (“ROWD”) for *seven*
8 (7) years, from 2005 to 2012, before contacting Morning Star to proceed with the 2013 WDRs.

9 Despite Morning Star’s diligence with its ROWD submission, and its invitation to
10 Regional Board staff for an onsite meeting during the 2015 season (e.g., “regard” for the process),
11 Regional Board staff’s conduct directly contributed to the events complained of now.
12 Specifically, paragraph 28 of the WDRs acknowledges Morning Star’s intent to expand its
13 operations, including the Cooling Pond, by up to the amount it did expand - 65%. As to the
14 Settling Pond, Regional Board staff’s inaction for seven (7) years on the ROWD created an
15 administrative omission and precluded Morning Star from obtaining accurate WDRs for Morning
16 Star’s operations.

17 The Regional Board staff cannot have it both ways - expecting diligence and compliance
18 with obligations from dischargers, without doing so itself as the regulating entity. Yet, that is
19 precisely what staff has done by failing to act for seven (7) years on Morning Star’s ROWD from
20 2005, and accepting Morning Star’s invitations to visit the Williams Facility, only for Regional
21 Board staff to react as it has with enforcement based on unsubstantiated grounds. To move at the
22 pace and in the manner that staff has with Morning Star impedes, if not precludes, effective
23 regulation, as well as innovative and/or efficient business operations, among other things.

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28 ⁵ See, e.g., ACLC, page 5, and ACLC Exh. A, pages 6-8 referring to State Water Resources Control Board *Water Quality Enforcement Policy (Effective May 20, 2010)* (“Enforcement Policy”), Water Quality Enforcement, Step 4, Adjustment Factor for culpability.

1 As for prior enforcement against Morning Star, Regional Board staff fail to recognize that
2 the 2013 WDRs acknowledge that the 2005 enforcement action was resolved,⁶ thus speaking to
3 Morning Star's record for compliance, rather than non-compliance.

4 Ultimately, the ACLC states that the Regional Board is seeking civil penalties against
5 Morning Star for violations of WDRs Order R5-2013-0144, specifically because the size of the
6 Cooling Pond and Settling Pond at Morning Star's facility in Williams have increased.⁷ Based on
7 the ten-step evaluation described in the State Water Resources Control Board's *Water Quality*
8 *Enforcement Policy* to determine civil liability assessed against a discharger, the Prosecution
9 Team has recommended an administrative civil liability against Morning Star in the amount of
10 one million five hundred thousand dollars (\$1,500,000).

11 For the reasons stated herein, no penalty should be assessed.

12 **III. ARGUMENT**

13 **A. Expansion of the Cooling Pond Does Not Violate the WDRs**

14 The ACLC alleges that expansion of the Cooling Pond violates Discharge Prohibition A.3
15 of WDRs, which states: "Discharge of waste at a location or in a manner different from that
16 described in the Findings is prohibited." It is notable that the ACLC finds a violation based
17 solely on the Prosecution Team's interpretation of how the facility is described in the Findings of
18 the WDRs and does not allege any violation of a specific discharge requirement or prohibition,
19 nor any actual impact to water quality as a result of the expansion of the Cooling Pond. More
20 important, however, is that the Cooling Pond expansion is specifically contemplated by and
21 accounted for in the WDRs, and the expanded Cooling Pond is not different from that described
22 in the Findings.
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28 ⁶ Exhibit D, pp. 15, MS Exh. A.

⁷ ACL Complaint, pages 4 through 5.

1 In fact, the WDRs specifically state that “[t]he Discharger plans to increase production by
2 up to 65 percent in the future....”⁸ The Cooling Pond is part of the facility production process.⁹
3 The expansion of the Cooling Pond from 60 acres to 100 acres represents a 65% increase in the
4 Cooling Pond size. Prior to issuance of the 2013 WDRs, Morning Star notified Regional Board
5 staff of its intent to increase production by 65% so that the production increase could be
6 accounted for in the 2013 WDRs. Morning Star’s intent was to ensure that the WDRs accounted
7 for a 65% increase in its entire production process, which includes the Cooling Pond. Indeed, the
8 Cooling Pond is a surrogate for cooling towers or some other mechanical method of cooling the
9 process water prior to recycling it back into the process.¹⁰ While the Cooling Pond has the
10 potential to discharge wastewater and is, therefore, regulated by the WDRs, it is not operated as a
11 wastewater disposal pond.
12

13
14 The ACL also asserts that the expansion of the Cooling Pond at the expense of decreasing
15 the size of the LAA is a “material change in the character, location, or volume of discharge”
16 requiring submittal of a new ROWD.¹¹ As noted, the WDRs contemplated this expansion and,
17 therefore, a new ROWD was not required. Moreover, the Cooling Pond expansion does not
18 represent a “material change in the character, location, or volume of discharge.” *The expansion*
19 *of the Cooling Pond did not change the character of the wastewater, nor did it change the volume*
20 *of wastewater being discharged or restrict the adequacy of the land available to meet the*
21 *discharge requirements.* As to location, the expanded Cooling Pond is located in an area that was
22 previously used for land application and even if Staff’s contention that Cooling Pond water
23 should be considered wastewater is accepted, it is authorized to receive wastewater application.¹²
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26 ⁸ WDRs, ¶ 28.

27 ⁹ See, 1995 WDRs ¶¶ 3 and 16; WDRs Attachment C (Process Flow Diagram).

28 ¹⁰ 1995 WDRs, ¶ 3; WDRs ¶ 16 and Attachment C; MS Exh. K.

¹¹ ACLC, ¶ 19.

¹² ACLC, ¶¶ 19, 21.

1 In fact, the quality of wastewater subject to contact with groundwater applied in the expanded
2 Cooling Pond area is of better quality than the wastewater authorized to be applied to this land as
3 part of the LAA.¹³

4 The ACLC incorrectly assumes, without any evidence, that expansion of the Cooling
5 Pond and associated removal of approximately 90.5 acres of LAA allowed for increased
6 wastewater discharges to the Cooling Pond and the potential to impact groundwater.¹⁴ Because
7 the Cooling Pond expansion was contemplated by the WDRs, it does not result in a material
8 change to the character, location or quantity of discharge, and has no adverse impact on water
9 quality. Therefore, no penalty should issue for expansion of the Cooling Pond.
10

11 **B. Expansion of the Settling Pond Does Not Violate the WDRs**

12 As the ACLC acknowledges, the Settling Pond was expanded, *prior to issuance of the*
13 *applicable WDRs.*¹⁵ The failure of the WDRs to accurately describe the size and capacity of the
14 Settling Pond is an oversight and technical error, but does not have any adverse impact to
15 groundwater quality and should not form the basis for a penalty.
16

17 Morning Star submitted a ROWD to support the existing WDRs in 2005. For seven (7)
18 years, Regional Board staff took no action on the ROWD and failed to communicate with
19 Morning Star regarding its status.¹⁶ It was not until 2012 that Regional Board permitting staff
20 contacted Morning Star requesting additional information about the operations. Morning Star
21 readily responded to all inquiries, but the modification to the Settling Pond was overlooked
22 during this process. Morning Star recognizes the importance of accurately describing its
23 operations in the WDRs, but in this instance, the significant time lag and the lack of staff
24 diligence to process the ROWD resulted in an oversight. Such an oversight that reflects only a
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27 ¹³ MS Exh. K.

¹⁴ MS Exh. K and M.

¹⁵ ACLC, ¶ 23.

¹⁶ Exh. B to MS Exh. O.