

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

---

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0549**

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

**PROSECUTION TEAM'S REBUTTAL ANALYSIS  
IN RESPONSE TO MORNING STAR PACKING COMPANY, LP'S LEGAL, POLICY, AND  
TECHNICAL STATEMENT**

**Table of Contents**

I. Introduction..... 1

    A. The 2013 WDRs Do Not Specifically Acknowledge that the 2005 Enforcement Action Was Resolved..... 1

    B. The Expansion of the Cooling and Settling Ponds are Not Authorized by the 2013 WDRs  
        2

    C. The Unpermitted Expansion of the Settling Pond and Unauthorized Discharges to Waters of the State during the 2012 and 2013 Processing Seasons Similarly Constitute Violations of Order No. 95-160. .... 3

II. The Prosecution Team’s Seepage Calculations for the Cooling Pond and Settling Pond are Reasonable and Use Appropriate Assumptions..... 4

III. The Factors Assigned Pursuant to the State Water Board’s Enforcement Policy are Appropriate..... 5

IV. The Discharger’s Arguments as to the Prosecution Team’s Economic Benefit Calculation are Moot..... 8

V. Conclusion..... 8

## I. Introduction

In response to Morning Star Packing Company, LP's (hereinafter Discharger) Legal, Policy, and Technical Statement, the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) Prosecution Team submits this rebuttal analysis and continues to recommend the Central Valley Water Board assess an administrative civil liability in the amount of one million five hundred thousand dollars (\$1,500,000) for alleged violations of Waste Discharge Requirements Order R5-2013-0144 (2013 WDRs). The Discharger, in opposition to our recommendation, contends that the Prosecution Team cannot establish violations of the 2013 WDRs for a number of reasons, most notably because the Prosecution Team cannot establish that the Discharger is degrading water quality,<sup>1</sup> demonstrate that the alleged unpermitted expansion of the Cooling Pond resulted in adverse impacts to groundwater quality,<sup>2</sup> or demonstrate that groundwater quality is impacted by expansion of the Settling Pond.<sup>3</sup>

To clarify, the Prosecution Team does not have the burden to make an affirmative demonstration that groundwater degradation occurred or is occurring in order to establish whether the Discharger is liable for violations alleged pursuant to California Water Code section 13350. As stated in the Prosecution Team's 24 December 2015 Legal and Technical Analysis, 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 what the appropriate remedy should be, in this case administrative civil liability, with a consideration of Potential for Harm as described in the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy (Enforcement Policy). For the reasons previously stated in the Prosecution Team's Legal and Technical Analysis and as set forth below, we continue to assert that 1) the Discharger violated its 2013 WDRs; 2) the Discharger is liable for those violations pursuant to California Water Code section 13350; and 3) the proposed remedy of \$1.5 million dollars in administrative civil liability is appropriate given the circumstances.

### A. The 2013 WDRs Do Not Specifically Acknowledge that the 2005 Enforcement Action Was Resolved

As an initial matter, the Discharger contends that the Prosecution Team failed to "recognize that the 2013 WDRs acknowledge that the 2005 enforcement action was resolved"<sup>4</sup> thereby failing to acknowledge its record of compliance. This contention mischaracterizes the 2013 WDRs and specific findings in those WDRs and corresponding Information Sheet underscoring the caveat that "with the exception of nitrogen and BOD overloading, the Discharger has complied with the CDO." While the 2013 WDRs recognize that the Discharger submitted the required reports and implemented the necessary operational improvements, its compliance with BOD and nitrogen

---

<sup>1</sup> Morning Star Packing Company, LP Legal, Policy, and Technical Statement, p. 1, lines 4-5.

<sup>2</sup> *Id.* at p. 2, lines 1-2.

<sup>3</sup> *Id.* at p. 2, lines 10-11.

<sup>4</sup> *Id.* at p. 4, lines 1-3.

loading rates was inconsistent<sup>5</sup> and specific violations of the 2005 CDO pertaining to nitrogen loading<sup>6</sup> and BOD loading<sup>7</sup> were noted in the findings resulting in the establishment of requirements and limits in the 2013 WDRs to continue to address issues dating back to 2005. To make a blanket statement that the underlying issues in the 2005 enforcement action were resolved simply ignores the Board's compliance concerns<sup>8</sup> which were subsequently addressed in the 2013 WDRs.

### **B. The Expansion of the Cooling and Settling Ponds are Not Authorized by the 2013 WDRs**

With respect to the Cooling Pond expansion, the Discharger makes reference to a general statement in Finding 28 of the 2013 WDRs to support its contention that the 40 acre expansion of the Cooling Pond is "specifically contemplated and accounted for in the WDRs." A plain reading of Finding 28 does not lead to the conclusion that expanding the Cooling Pond by 40 acres and removing 90.5 acres of Land Application Area (LAA) was specifically contemplated and accounted for in the WDRs, especially when read in the context of the Board's response to comments on the Tentative WDRs. Finding 28 in the 2013 WDRs was added in response to the Discharger's 13 October 2013 revision to the Tentative WDRs where it added a general reference to future plans to expand processing operations by 65%.<sup>9</sup> Board staff's response to comments and inclusion of Finding 28 address potential consequences from anticipated future expansion as they pertain to meeting flow limits and BOD and nitrogen mass loading.<sup>10</sup> Waste discharge requirements are typically written based on the information specifically provided by a discharger in a ROWD or addendum to that ROWD and not on mere speculation of future plans. To assume that the 2013 WDRs impliedly authorize Morning Star to expand its operations without specifying what those specific changes are and without examining whether those changes will impact water quality assumes too much.

With respect to the Settling Pond expansion, the Discharger states that the failure of the 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 which "created an administrative omission and precluded Morning Star from obtaining accurate WDRs for Morning Star's operations."<sup>11</sup> It further points the finger at Board staff stating that its inaction for seven years "impedes, if not precludes, effective regulation, as well as innovative and/or efficient business operations, among other things."<sup>12</sup> However, the alleged delay in processing the ROWD is a moot point, as the Discharger expanded the Settling Pond in 2012, the same year that Board staff began drafting the updated WDRs, yet at no time did the Discharger approach Board staff with an amended ROWD nor did it notify Board staff that it completed such modifications. It wasn't until the 2 November 2015 site visit that Board enforcement staff noticed

---

<sup>5</sup> Waste Discharge Requirements Order R5-2013-0144, Finding 9, p. 3.

<sup>6</sup> Waste Discharge Requirements Order R5-2013-0144, Finding 24, p. 10.

<sup>7</sup> Waste Discharge Requirements Order R5-2013-0144, Finding 25, pp. 10-11.

<sup>8</sup> Morning Star Exhibit A, Exhibit D, p. 17, lines 2-4.

<sup>9</sup> Morning Star Exhibit A, Exhibit F, p. 11.

<sup>10</sup> Morning Star Exhibit A, Exhibit G, p. 6.

<sup>11</sup> Morning Star Packing Company, LP Legal, Policy, and Technical Statement, p. 3, lines 14-16.

<sup>12</sup> *Id.* at p. 3, lines 21-23.

that the Settling Pond appeared significantly larger than the five acre foot pond described in the WDRs. No mention of Settling Pond expansion was made by the Discharger's representatives during that site visit either. It is important to note that the Prosecution Team and Board staff welcomes innovative operations from the regulated community, but those innovative operations and modifications must follow our traditional regulatory process so the Board can establish appropriate requirements and monitoring to ensure that water quality is being protected. The Discharger was not precluded from obtaining accurate WDRs: it had numerous opportunities to submit a revised ROWD, to review and comment on the Tentative WDRs – as it did on 30 October 2013, and to correct any errors or omissions that inaccurately depicted Morning Star's facility or operations.

The Discharger also takes Board staff's comments during the 2013 WDR hearing out of context stating, in part, "[R]egional Board staff made it clear that it had no concerns regarding potential expansion of the Settling Pond when they testified at the hearing." A review of the hearing transcript shows staff's reference to potentially expanding the Settling Pond as one option to Morning Star's lack of capacity to hold wastewater and refrain from irrigating during storm events. Board staff never indicated that any such expansion to account for more holding capacity could be completed without a revised ROWD. Further, the Discharger never sought to clarify the record at the hearing that it had actually completed an expansion the prior year.

**C. The Unpermitted Expansion of the Settling Pond and Unauthorized Discharges to Waters of the State during the 2012 and 2013 Processing Seasons Similarly Constitute Violations of Order No. 95-160.**

The Discharger argues that the Complaint unlawfully applies the WDRs retroactively given that the WDRs took effect in December 2013, yet the Complaint calculates the penalty in part for the Settling Pond by looking to the 2012 season. The alleged due process issue related to the alleged violations for the unpermitted expansion of the Settling Pond and unauthorized discharges of waste to waters of the state during the 2012 processing season (24 July through 12 October 2012; 81 days) and the 2013 processing season (12 July through 2 October 2013; 83 days) is easily remedied as these unpermitted activities similarly constitute violations of Order 95-160 (1995 WDRs), which was rescinded by the issuance of the 2013 WDRs except for enforcement purposes. Rather than constituting a violation of Prohibition A.3 and Provision H.11 of the 2013 WDRs, these unpermitted activities are also violations of Provision E.2 of the 1995 WDRs which incorporates the identical 1991 Standard Provisions requirement A.4 pertaining to material changes as originally alleged in the Complaint.<sup>13</sup> The Prosecution Team will subsequently amend the Complaint and Attachment A to correct this oversight and will incorporate these amendments into its proposed Administrative Civil Liability Order.

---

<sup>13</sup> ACL Complaint No. R5-2015-0549, Paragraphs 27-28, p. 6.

## II. The Prosecution Team's Seepage Calculations for the Cooling Pond and Settling Pond are Reasonable and Use Appropriate Assumptions

The Discharger asserts that the Prosecution Team's seepage estimation "significantly overstates the 'additional seepage' that may have resulted from Cooling Pond expansion" and instead contends that "the actual 'additional seepage' that could have resulted from Cooling Pond expansion is negligible and of considerable higher quality than the groundwater or the wastewater standards for LAA application."<sup>14</sup> To support this assertion, the Discharger relies on Technical Memorandum [No. 2], specifically Sections 3.4 and 3.5.<sup>15</sup> The Technical Memo opines that "groundwater mounding would be expected to substantially reduce the vertical groundwater gradient and subsequent seepage compared to the initial estimate by Regional Board staff."<sup>16</sup> Mounding was not taken into account in the Prosecution Team's seepage memo because Board staff made conservative assumptions as to the rate of seepage from the Cooling Pond, including (a) a relatively impermeable layer ( $10^{-6}$ ) at the bottom of the pond which gives the benefit of the doubt to the Discharger that they engaged in some work to compact the soil to achieve this level of impermeability; and (b) a more permeable layer beneath the assumed compacted clay layer which would drain the seepage, at an approximate rate of  $\frac{1}{4}$  to  $\frac{1}{2}$  inch of water depth per day. It is unlikely that mounding from this low of a seepage rate would be seen beneath the Cooling Pond. If mounding were present, as asserted by the Discharger, then one would reasonably expect to see an increase in the groundwater elevation in MW-6 and an increase in gradient between MW-6 and MW-8, which did not occur according to the Discharger's Technical Memorandum.

A fundamental performance standard when designing and constructing containment structures is to determine an appropriate vertical hydraulic conductivity, ensure that the construction practices meet this standard, and then conduct testing to assure that the necessary hydraulic conductivity was achieved. However, Morning Star did not do so in this case. Because the actual hydraulic conductivity of the pond bottom was not tested, the Prosecution Team assumed a conservative value (resulting in less seepage) based on assumed compaction of the soil type reported in the boring logs associated with the *Cooling Pond Expansion Geotechnical Engineering Report*. In the Prosecution Team's memo, Exhibit 24, a vertical hydraulic conductivity was used in the seepage calculation because it is the "accepted civil engineering practice"<sup>17</sup> and the standard for evaluating the leakage through a barrier layer (i.e. pond bottom). The downward force from head pressure in the pond will always be greater than the horizontal forces directly under the pond and horizontal movement is assumed to be minimal.

The Discharger assumed that "a 50 foot thick horizontal flow zone results in groundwater mounding up to the bottom of most of the Cooling Pond."<sup>18</sup> Using this assumption, seepage through the vadose zone would no longer exist and the pond would be directly connected and discharging into the underlying aquifer.

---

<sup>14</sup> Morning Star Packing Company, LP Legal, Policy, and Technical Statement, p. 8, lines 8-12.

<sup>15</sup> Morning Star Exhibit K.

<sup>16</sup> *Id.* at p. 5.

<sup>17</sup> See Title 27 California Code of Regulations section 20320, subdivision (c).

<sup>18</sup> *Id.*

The Technical Memorandum examines groundwater gradient effects in Section 3.3 and concludes that there is no significant seepage from the Cooling Pond due to the pond expansion as no change in gradient between MW-6 and MW-8 or significant increase in groundwater elevation in MW-6 has been observed. References are made to an interceptor drain just 20 feet north of MW-6 which collects intercepted groundwater and pumps it back to the pond. This "no significant seepage" conclusion seems incongruous with the Technical Memorandum's mounding theory, i.e. that no evidence of seepage was observed in MW-6 but enough seepage occurred causing mounding that slowed down infiltration. With respect to the interceptor drain reference, the Prosecution Team has no information on when it was installed, why it was installed, at what elevation it was installed, or how much groundwater is captured and returned to the Cooling Pond. The mere fact that the Discharger installed an interceptor drain to return water to the Cooling Pond potentially discounts the Discharger's argument that there is no seepage from the Cooling Pond. Furthermore, the impetus for installing the interceptor drain is unclear, but in Board staff's experience, these remedies are typically installed as a preventative measure to limit the migration of contaminants in groundwater.

### **III. The Factors Assigned Pursuant to the State Water Board's Enforcement Policy are Appropriate**

The Discharger asserts that it did not violate any of the Board's requirements, it took every reasonable precaution to maintain compliance with the WDRs, the Prosecution Team has grossly mischaracterized the facts, and that in the end, no penalty should be assessed. To support this contention, the Discharger places great emphasis on its conclusions that there is no potential harm to beneficial uses resulting from the alleged violations and that the Cooling Pond expansion actually "provided the opportunity for improvement in groundwater quality."<sup>19</sup>

The Prosecution Team disagrees with the reasons put forth by the Discharger justifying why \$0 is an appropriate administrative civil liability amount. Rather than reiterating much of what the Prosecution Team asserted in the Complaint and Attachment A with respect to the Enforcement Policy methodology, the Prosecution Team will herein address the potential for harm issues raised by the Discharger. 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."<sup>20</sup> Further, this factor "evaluates direct or indirect harm or *potential for harm* from the violation."<sup>21</sup> As an initial matter, nothing in the language of the Enforcement Policy mandates solely looking to evidence of actual harm but rather looking at potential or threatened impacts that may be reasonably expected to occur suffices to establish Step 1 of the methodology.

This Discharger's conclusion that there is no potential for harm is based on two sampling events post-Cooling Pond expansion, one on 24 August 2015 and one sometime in November 2015 (it should be noted that Board staff has not reviewed or verified the latter sampling data as the

---

<sup>19</sup> Morning Star Packing Company, LP Legal, Policy, and Technical Statement, p. 9, lines 17-18.

<sup>20</sup> PT Exhibit 62, p. 12.

<sup>21</sup> *Id.*, emphasis added.

report is not due until 1 February 2016) which, according to the Discharger, show decreasing salinity and manganese concentrations in MW-6.<sup>22</sup> The Prosecution Team contends that such conclusions cannot be drawn from two data points, as even the Technical Memorandum suggests, "further monitoring would be needed to establish any definitive trends."<sup>23</sup> Morning Star Exhibit M compares monitoring well data from MW-5, a background well, to MW-6 to compare pre-pond expansion data with post-pond expansion data. This evaluation does not examine any of the metals constituents, which would be expected to increase in an anoxic environment. The conclusions drawn from this evaluation are similarly misleading given the small data set used to show that there is no impact to groundwater. US EPA's minimum sampling requirements recommend obtaining a sequence of at least four samples to help ensure statistical validity.<sup>24</sup> The Discharger also argues that the expanded Cooling Pond is located in an area that was authorized by the 2013 WDRs to receive wastewater application but fails to recognize that wastewater was required to be applied at agronomic rates. The unlined Cooling Pond discharges waste directly to groundwater. The Prosecution Team continues to believe that the potential for harm score of 5 for the Cooling Pond violation is appropriate.

With respect to the potential harm to beneficial uses from the Settling Pond expansion, the Discharger similarly asserts "there is no evidence that the Settling Pond expansion has adverse impacts on water quality or beneficial uses."<sup>25</sup> Morning Star Exhibit N also compares pre-pond expansion data with post-pond expansion data and similarly does not examine any of the metals constituents. This Technical Memorandum does not demonstrate a clear-cut trend for the constituents reviewed in monitoring wells MW-1 through MW-5, with the exception of increasing chloride concentrations in downgradient well MW-3.

Additionally, subsequent to the Settling Pond expansion in May/June 2012, the Discharger reported nitrate nitrogen concentrations in MW-3 as indicated below for 2012<sup>26</sup> and 2013<sup>27</sup>:

	May 2012	August 2012	November 2012
MW-1	2.4 mg/L	1.0 mg/L	1.7 mg/L
MW-4	7.2 mg/L	7.7 mg/L	5.0 mg/L
MW-3	26.3 mg/L	20.6 mg/L	11.1 mg/L

---

<sup>22</sup> MS Exhibit K, p. 5.

<sup>23</sup> *Id.*

<sup>24</sup> United States Environmental Protection Agency, *Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities Unified Guidance*, March 2009, p. 2-10.

<sup>25</sup> Morning Star Packing Company, LP Legal, Policy, and Technical Statement, p. 11, lines 3-4.

<sup>26</sup> PT Exhibit 30, p. 34.

<sup>27</sup> PT Exhibit 31, pp. 22-23.

	February 2013	May 2013	August 2014	December 2013
MW-1	1.1 mg/L	1.2 mg/L	0.0 mg/L	0.0 mg/L
MW-4	4.1 mg/L	4.2 mg/L	2.1 mg/L	6.0 mg/L
MW-3	21.3 mg/L	16.1 mg/L	19.1 mg/L	12.0 mg/L

Monitoring Wells MW-1 and MW-4 are designated as background wells in the 2013 Monitoring and Reporting Program.<sup>28</sup> The groundwater limitations in the 1995 WDRs are defined as follows, "The discharge shall not cause underlying groundwater to contain waste constituents in concentrations statistically greater than background water quality"<sup>29</sup> When comparing the reported values in MW-3, the downgradient compliance well, with the reported values in upgradient background wells in MW-1 and MW-4, the data indicates potential noncompliance with the 1995 WDR groundwater limitation for nitrate nitrogen and show an increasing trend in nitrate nitrogen concentrations moving in the downgradient direction, indicating that the post-expansion Settling Pond discharges have a potential impact on groundwater quality.

The Prosecution Team continues to assert that a moderate potential for harm may result from exposure to increasing chlorides and elevated nitrate nitrogen concentrations in MW-3 as compared to the upgradient background wells. Furthermore, the Discharger fails to recognize that wastewater currently discharged to the unlined Settling Pond is of significantly higher strength than in 2011, prior to the Settling Pond's expansion. As noted in the Attachment A to the Complaint, BOD concentrations are 8 times higher and TDS concentrations 1.5 times higher than in 2011. In order to fully determine the impacts of the waste discharged from the Settling Pond to groundwater, specifically BOD and nitrates, the Discharger should also monitor for dissolved oxygen, oxygen reduction potential, total Kjeldahl nitrogen, and ammonia nitrogen, as these constituents would be expected to be elevated in an anoxic environment. The Monitoring and Reporting Program does not currently require their monitoring, but the Tentative CDO has been revised to include them for future groundwater monitoring events to more fully determine whether discharges from the Settling Pond are degrading groundwater quality and/or posing a potential harm to beneficial uses. Taken together, the Prosecution Team believes that the potential for harm score of 5 for the Settling Pond violation is appropriate and the proposed liability of \$1.5 million is appropriate. Even if the potential for harm factor for the Settling Pond is adjusted to something below the assigned factor of 5, the Total Base Liability for both violation categories far exceeds the Prosecution Team's proposed liability amount of \$1.5 million.

---

<sup>28</sup> PT Exhibit 8, MRP p. 4.

<sup>29</sup> PT Exhibit 2, p. 4.

**IV. The Discharger's Arguments as to the Prosecution Team's Economic Benefit Calculation are Moot**

The Discharger's arguments regarding the information sought by the Prosecution Team to attempt to establish a more comprehensive economic benefit analysis are moot. In response to a teleconference organized by Advisory Team counsel, the Parties subsequently agreed to an economic benefit methodology proffered by the Advisory Team in an attempt to streamline this issue at hearing. The Discharger's arguments regarding the Prosecution Team's effort to more thoroughly examine the true financial benefit of noncompliance are moot as the Prosecution Team agreed to stipulate to the Advisory Team's alternate methodology on 8 January 2016.<sup>30</sup> Furthermore, to characterize the Prosecution Team's attempt at obtaining a more comprehensive economic benefit calculation as "wrong" is unnecessary and, to the Prosecution Team's understanding, was not the basis for the Advisory Team suggesting an alternate solution to this issue.

**V. Conclusion**

For the foregoing reasons and those previously discussed in the Complaint, Attachment A, and the Prosecution Team's Legal and Technical Analysis, we continue to assert that 1) the Discharger violated its 2013 WDRs and 1995 WDRs; 2) the Discharger is liable for those violations pursuant to California Water Code section 13350; and 3) the proposed remedy of \$1.5 million dollars in administrative civil liability is appropriate given the circumstances.

For the Prosecution Team:



MAYUMI E. OKAMOTO  
Senior Staff Counsel

NICKOLAUS C. KNIGHT  
Senior Staff Counsel  
Office of Enforcement

---

<sup>30</sup> 8 January 2016 email from Mayumi Okamoto to Discharger's counsel and the Advisory Team.