

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2018-XXXX
IN THE MATTER OF
KONARK RANCHES LLC
KERN COUNTY

This Order is issued pursuant to Water Code section 13323 to Konark Ranches LLC (Discharger) for failing to submit a Report of Waste Discharge as required by Water Code section 13260.

The California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board or Board) finds the following:

1. ~~The discharge of irrigation return flows or storm water from~~ Irrigated **agricultural** lands in the Central Valley Region may contribute, or have the potential to contribute waste to ground and/or surface waters. The term "waste" is broadly defined in Water Code section 13050, subdivision (d), and includes runoff of sediment or agricultural chemicals. The term "waters of the state" includes all surface water and groundwater within the state. (Wat. Code, § 13050, subd. (e).) The Central Valley Water Board is required to regulate the amount of waste that may be discharged to waters of the state. (Wat. Code, § 13263.)
2. Attachment E of the Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers Not Participating in a Third-Party Group (Order R5-2013-0100) and of the Waste Discharge Requirements General Order for Growers within the Tulare Lake Basin Area that are Members of the Third-Party Group (Order R5-2013-0120) defines "irrigated lands" as "land irrigated to produce crops or pasture for commercial purposes; nurseries; and privately and publicly managed wetlands."
3. Central Valley Water Board staff developed a list of landowners in Kern County, including the Discharger, which were likely to be discharging wastewater from irrigated lands to waters of the state and did not have regulatory coverage under waste discharge requirements (i.e., permits) or waivers of waste discharge requirements.
4. In developing this list, Central Valley Water Board staff used county assessor data and geographical land use data (i.e., the California Department of Conservation Farmland Mapping and Monitoring Program (FMMP) land use data) to assist in identifying potential discharges of agricultural wastewater to waters of the state and to identify owners and operators of agricultural lands who may not have complied with the Water Code. Both data sets were used to develop lists of parcels for which Water Code section 13260 Directive Letters were issued that require parcel owners to obtain regulatory coverage for commercial irrigated lands.
5. Evaluation of county assessor and FMMP data indicates that the Discharger owns approximately 158 acres of agricultural land in Kern County, as identified as Assessor's Parcel Number (APN) 047-290-13.
6. On 29 January 2015, Board staff conducted field inspections of Kern County parcel 047-290-13, and found evidence of commercially irrigated almonds.

7. On 19 February 2015, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Discharger, sent via certified mail. The Directive was sent based on evidence that the subject parcels contained commercially irrigated lands without regulatory coverage.
8. The Directive required the Discharger to obtain regulatory coverage for its irrigated agricultural parcels within 15 calendar days of receipt of the Directive. As detailed in the Directive, the Discharger could comply by joining the Kern River Watershed Coalition Authority (Coalition or KRWCA), or by submitting a RoWD/Notice of Intent (NOI).
9. The Discharger received the Directive on 21 February 2015. The Discharger did not obtain regulatory coverage by 8 March 2015 and did not contact the Board.
10. Because the Discharger failed to respond by the deadline specified in the 19 February 2015 Directive, a Notice of Violation (NOV) was sent via certified mail to the Discharger on 7 April 2015.
11. The Discharger received the NOV on 9 April 2015. The Discharger neither obtained regulatory coverage nor contacted the Board in response to the NOV.
12. On 4 January 2017, the Prosecution Team sent the Discharger a notification letter via certified mail and 5 January 2017 via FedEx that an Administrative Civil Liability Complaint would be issued if the Discharger did not obtain regulatory coverage and initiate settlement discussions by 12 January 2017.
13. The Discharger received the notification letter on 10 January 2017 via FedEx. The Discharger has yet to obtain regulatory coverage but did contact the Board in response to the letter on January 17, 2017 via email.
14. Central Valley Water Board records indicate that as of the date of this order, the Discharger has not submitted a RoWD, proof of coalition membership, or a NOI to the Central Valley Water Board.

VIOLATION

15. On 24 January 2017, the Assistant Executive Officer of the Central Valley Water Board issued Administrative Civil Liability Complaint (ACL Complaint) R5-2017-0502 to the Discharger in the amount of seventy thousand, seventy dollars (\$70,070) for failing to obtain coalition membership or submit a Report of Waste Discharge as required by Water Code section 13260.

REGULATORY CONSIDERATIONS

16. The Central Valley Water Board's authority to regulate waste discharges that could affect the quality of the waters of the state, which includes both surface water and groundwater, is found in the Porter-Cologne Water Quality Control Act (California Water Code Division 7).
17. Water Code section 13260, subdivision (a), requires that any "person discharging waste or proposing to discharge waste within any region that could affect the quality of the

waters of the state, other than into a community sewer system,” shall file with the appropriate regional board a RoWD containing such information and data as may be required by the regional board. The Central Valley Regional Board implements Water Code section 13260 in the area where the Dischargers’ lands are located.

18. Pursuant to Water Code section 13261, subdivision (a), “[a] person who fails to furnish a report or pay a fee under Section 13260 when so requested by a regional board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).”
19. Water Code section 13261, subdivision (b)(1), states:

Civil liability may be administratively imposed by a regional board or the state board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount not exceeding one thousand dollars (\$1,000) for each day in which the violation occurs. Civil liability shall not be imposed by the regional board pursuant to this section if the state board has imposed liability against the same person for the same violation.
20. Pursuant to Water Code section 13327, in determining the amount of civil liability, the Central Valley Water Board shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
21. On 17 November 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing an administrative civil liability as outlined in Water Code section 13327.
22. **On 4 April 2017, the State Water Board amended the 2010 Enforcement Policy. The amendments became effective on 5 October 2017. The penalty methodology from the 2010 Enforcement Policy is nonetheless being used to calculate the assessed civil liability in this action because the violations occurred, and the ACL Complaint was issued, when the 2010 Enforcement Policy was in effect. However, the amendments adopted by the State Water Board on 4 April 2017 would not have resulted in any substantive changes to the analysis described in Attachment A to this Order.**
23. The administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A. The administrative civil liability takes into account such factors as the Dischargers’ culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

24. **Maximum and Minimum Penalties.** As described above, the statutory maximum penalty under Water Code section 13261, subdivision (b)(1) is \$1,000 per day of violation. As of the date of the ACL Complaint, the Dischargers were out of compliance for 688 days, thus resulting in a maximum penalty of \$688,000. The Enforcement Policy recommends that the minimum liability imposed be at least ten percent higher than the economic benefit of non-compliance so that liabilities are not construed as the cost of doing business and so that the assessed liability provides a meaningful deterrent to future violations. The economic benefit to the Dischargers resulting from the failure to enroll under Order R5-2013-0100 is estimated at \$13,581 (see Attachment A for how this estimate was derived).

Per the Enforcement Policy, the minimum penalty is the economic benefit plus ten percent (\$14,870).

25. Notwithstanding the issuance of this ACL Order, the Central Valley Water Board retains the authority to assess additional penalties for violations of the Water Code that may subsequently occur.
26. This Order is effective and final upon issuance by the Central Valley Water Board. Payment must be received by the Central Valley Water Board no later than thirty (30) days from the date on which this Order is issued.
27. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegee is authorized to refer this matter to the Attorney General's Office for enforcement.
28. Issuance of this Administrative Civil Liability Order is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321, subdivision (a)(2).

IT IS HEREBY ORDERED THAT:

1. Konark Ranches LLC shall be assessed an Administrative Civil Liability in the amount of seventy thousand, seventy dollars (\$70,070).
2. Payment shall be made no later than thirty (30) days from the date of issuance of this Order by check payable to the *State Water Pollution Cleanup and Abatement Account*, and shall have the number of this Order written upon it.

I, PAMELA C. CREEDON, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order issued by the California Regional Water Quality Control Board, Central Valley Region on xx April 2018.

Pamela C. Creedon, Executive Officer

KONARK RANCHES LLC
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Attachment A: Penalty Calculation Methodology

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at:

http://www.waterboards.ca.gov/public_notices/petitions/water_quality

or will be provided upon request.

ATTACHMENT A
Calculation of Penalty per State Water Board's Water Quality Enforcement Policy

The administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy). The administrative civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

Step 1. Potential for Harm for Discharge Violations

This step is not applicable.

Step 2. Assessment for Discharge Violations

This step is not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations

The "per day" factor is calculated for each non-discharge violation considering the potential for harm and the extent of the deviation from the applicable requirements.

Potential for Harm

The Enforcement Policy requires a determination of whether the characteristics of the violations resulted in a minor, moderate, or major potential for harm or threat to beneficial uses.

Staff determined that the potential for harm is moderate, because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm.

The Discharger failed to submit a Report of Waste Discharge (RoWD) or submit a Notice of Intent (NOI) to enroll under an applicable General Order for discharges from commercially irrigated cropland despite evidence that the Discharger owns such cropland. Irrigated cropland can be a source of sediment, pesticide residue, nitrate, and other waste discharged to the waters of the state. Unregulated discharges of such wastes can present a substantial threat to beneficial uses and/or indicate a substantial potential for harm to beneficial uses.

By failing to file a RoWD or to enroll under an applicable General Order, the Discharger undermined the regulatory program. Dischargers regulated under an applicable General Order either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with their operations. In addition, dischargers report on the practices in which they engage to protect water quality. By failing to provide that information, the Discharger impaired the Central Valley Regional Water Quality Control Board's (Central Valley Water Board) efforts to assess potential impacts and risks to water quality, and circumvented the Central Valley Water Board's ability to take necessary enforcement actions to address problems.

The greater the size of the operation, the greater the potential risk, since any practices being implemented by the Discharger that are detrimental to water quality may impact a much greater area. Additionally, the regulatory program is compromised when staff resources are directed to bringing dischargers into compliance rather than being available for outreach and assistance with regulatory compliance. Since the violation thwarts the Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

Deviation from Requirement

The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements.

The deviation from requirement is major. The Discharger has disregarded the regulatory requirements and rendered those requirements ineffective. The Discharger undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for its waste discharges. A discharger's regulatory coverage is foundational to the Board's efforts to protect water quality. The Orders adopted by the Board specify the expectations and requirements for water quality protection, which do not apply until a discharger is covered by an appropriate Order. The requirements in the applicable Orders are rendered ineffective when a discharger has not gone through the process of becoming subject to the Order.

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from the requirement is major. Based on the above factors, a per day factor of 0.55 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

Multiple Day Violations

On 19 February 2015, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Discharger, which required the Discharger to obtain regulatory coverage for all commercially irrigated lands within 15 calendar days or face a potential administrative civil liability. The Directive was received by the Discharger on 21 February 2015. Thus, regulatory coverage was required by March 8 2015. The Discharger has yet to obtain regulatory coverage and is 688 days late in meeting the regulatory requirements as of the date of this ACL Complaint.

Violations under Water Code section 13261 are assessed on a per day basis. However, the violations at issue qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 18). Under that approach, 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. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Discharger's failure to submit a RoWD or NOI is not causing daily detrimental impacts to the environment or the regulatory program.

There is no evidence that the Discharger's failure to submit a RoWD or NOI has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's failure to submit a RoWD or NOI results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with costs of permit fees, groundwater monitoring, and preparing reports, such as an Annual Monitoring Report, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The minimum number of days of violation to be assessed in this case under the alternate approach is 28. However, because this amount does not result in a sufficient deterrent, the days of violation are increased to 70.

Initial Liability Amount

The initial liability amount for the violation calculated on a per-day basis is as follows:

$$\$1,000/\text{day} \times 70 \text{ days} \times 0.55 = \$38,500$$

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 clean up or cooperate with regulatory authority, and the violator's history of violations. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

a) *Culpability*: 1.3

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 intentional or negligent behavior. The Discharger was given the score of 1.3, which increases the fine. The Discharger received a Directive and Notice of Violation (NOV) requiring the Discharger to obtain coverage. Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance. The two notices and failure to respond suggest the Discharger acted intentionally, or at least negligently, in ignoring the requirement to obtain regulatory coverage, resulting in a multiplying factor of 1.3.

b) *Cleanup and Cooperation*: 1.4

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 the score of 1.4. The Central Valley Water Board issued the Discharger a NOV in an effort to allow the Discharger to address the violation prior to the issuance of

a complaint, as well as attempting to contact the Discharger by phone and leaving messages. The Discharger submitted membership fees to the Coalition, but did not submit an NOI to the Central Valley Water Board, despite efforts to get the Discharger to do so. Because the Discharger failed to submit the NOI, the Coalition returned the membership fees and did not enroll the Discharger in the Coalition. The Central Valley Water Board Prosecution Team also sent a pre-ACL letter to the Discharger, providing another opportunity to address the violation. The Discharger did respond to the pre-ACL and scheduled a meeting with the Central Valley Water Board Prosecution Team. Cleanup is not applicable in this case.

c) *History of Violations: 1.0*

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger was given the score of 1.0, as there is no evidence that the Discharger has a history of violations.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$70,070.* (Initial Liability (\$38,500) x Adjustments (1.3)(1.4)(1.0)).

Step 6. Ability to Pay and Continue in Business

As per the Enforcement Policy, “[t]he ability of a discharger to pay an ACL is determined by its income and assets.” The Discharger has the ability to pay the Base Liability Amount based on the value of the Discharger’s property and estimated revenues for their crop. According to the Kern County Assessor’s Office, the parcel owned by the Discharger is a significant asset with a 2016/2017 assessed value of \$2,206,233. Revenue generated from the Discharger’s ownership of approximately 158 acres of almonds yielded an estimated \$1,096,078 in revenue in 2015¹ according to the Kern County Agricultural Crop Report. Thus, the Discharger has the ability to pay the proposed administrative civil liability based on its revenue and assets and there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require” but only if express findings are made.

The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. The Central Valley Water Board Prosecution Team has incurred a significant amount of staff costs associated with the investigation and

¹ Information provided by the 2015 Kern County Agricultural Crop Report, available at http://www.kernag.com/caap/crop-reports/crop10_19/crop2015.pdf

enforcement of the violations alleged herein. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, is electing not to pursue staff costs in this matter.

There are no factors under this category that warrant an adjustment.

Step 8. Economic Benefit²

Economic Benefit: **\$13,518**

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. Economic benefit was calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)³ penalty and financial modeling program, version 5.6.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes.

The BEN model is the appropriate tool for estimating the economic benefit in this case. The benefit is calculated by identifying the regulation at issue, the appropriate compliance action, the date of noncompliance, the compliance date, and the penalty payment date.

Under the Irrigated Lands Regulatory Program, an individual may choose to comply with the program by either filing an NOI to get regulatory coverage as an "individual grower" under General Order R5-2013-0100 Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers not Participating in a Third-party Group (Individual General Order), or filing an NOI for regulatory coverage under a third-party group Order and joining the appropriate coalition for the area in which the discharger's land is located. As of the date this Complaint was issued, the Discharger has not chosen to join a coalition. The Central Valley Water Board cannot compel the Discharger to join a coalition. Economic benefit was, therefore, calculated based on the assumption that General Order R5-2013-0100 (Individual General Order) will apply to the Discharger.

The economic benefit was calculated based on delayed and avoided costs. Delayed costs are those costs that should have been born earlier, but that a discharger can and is still required to pay. Avoided costs are the costs of those compliance activities, which a discharger can no longer perform, and that a discharger would have conducted had they come into compliance earlier.

The economic benefit in this case has been calculated based on the verifiable costs associated with obtaining regulatory coverage under the Individual General Order, as well as estimates of other avoided costs that were required of the Discharger to comply with the Individual General Order.

The State Water Resources Control Board charged a Notice of Intent fee of \$50 and a

² Order R5-2013-0100 includes an estimate of average annual costs per acre related to that Order. The average annual costs are not used in this economic benefit analysis, since the costs represent an average cost, if the Order were applied Central-Valley wide. The cost estimates made in this analysis are based on the circumstances and facts related to this Discharger, rather than a broad class of dischargers.

³ US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>

permit fee of \$2,692 plus \$3.40 per acre for farms 101 to 500 acres⁴ during the 2014-15, 2015-16, and 2016-17 billing years. The Discharger has 158 acres of land irrigated for a commercial purpose, which results in an annual permit fee of \$3,229 for each billing year. The Discharger avoided paying these permit fees for three years.

Under the Individual General Order, the Discharger would be required to prepare and submit a Farm Water Quality Plan for 2015 and an update for 2016 at an estimated cost of \$4,000 and \$2,000, respectively. The Discharger would need to prepare Annual Monitoring Plans for 2015 and 2016 at a cost of \$2,400 per year. And the Discharger would also need to prepare a Management Practices Evaluation Work Plan at a cost of \$2,500. Additionally, the Discharger would be required to conduct groundwater monitoring for 2015 and 2016, at an estimated cost of \$3,229 per year. The groundwater monitoring cost estimate is based on sampling two wells⁵ once for the constituents listed in the Individual Grower Order and includes labor costs and lab fees.

Using BEN, the Discharger gained an economic benefit of \$13,518 after consideration of delayed and avoided costs.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$14,870*

The Enforcement Policy recommends 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 violation is \$13,518. This number plus ten percent results in a Minimum Liability of \$14,870.

b) *Maximum Liability Amount: \$688,000*

The maximum administrative liability amount is the maximum amount allowed by Water Code section 13261, which is \$1,000 for each day in which the violation occurs. The Discharger was in violation for 688 days, which results in a maximum liability of \$688,000.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit a RoWD as required under Water Code section 13260 is **seventy thousand seventy dollars (\$70,070)**.

⁴ See section 2200.6 of the 2014-15 and 2015-16 Fee Schedules at http://www.waterboards.ca.gov/resources/fees/docs/fy1415_fee_schedule.pdf and http://www.waterboards.ca.gov/resources/fees/water_quality/docs/fy1516_ilrp_fees.pdf.

⁵ Based on the multiple parcels listed in the ACL Complaint, staff estimates that the Discharger has three irrigation supply wells, which would be sampled once per year.