

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The proposed administrative civil liability was derived following the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy (Enforcement Policy). The proposed 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:

Calculation of Penalty for Violation

Step1. 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 Discharger has failed to submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order for discharges from 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.

Using Table 3 in the Enforcement Policy, staff has 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. This conclusion is, in part, based on the size of the Discharger's irrigated land parcels, which total approximately 193 acres. Additionally, one of the Discharger's parcels (assessor's parcel number 240-040-015) lies immediately adjacent to a surface water distribution canal, indicating potential for surface water impacts.

By failing to file a RoWD or to enroll under an applicable General Order, the Discharger has undermined the regulatory program. Dischargers that are 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 impairs the Regional Board's efforts

to assess potential impacts and risks to water quality, and circumvents the Regional 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. 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 the requirement is major. To date, the Discharger has disregarded the regulatory requirements and rendered those requirements ineffective. The Discharger has 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 his 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 the 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 16 January 2015, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) that required the Discharger to obtain regulatory coverage for all commercially irrigated lands within 15 calendar days of receipt of the Directive or face a potential administrative civil liability. The Directive was received by the Discharger on 22 January 2015. Thus, the Discharger needed to either submit a RoWD for enrollment in the Individual General Order or submit a NOI to enroll in the Tule Basin Water Quality Coalition by 6 February 2015. Although a Directive was issued on 9 March 2015 for an additional parcel owned by the Discharger, compliance with the 6 January 2015 Directive would have required the Discharger to enroll *all* lands that he was commercially irrigating. For purposes of this Complaint, rather than alleging two separate violations based on each Directive issued and calculating separate days of violation for each parcel, the Prosecution Team in its enforcement discretion is alleging one violation for the two parcels and basing the days of violation on the 6 February 2015 deadline to obtain regulatory coverage for all

parcels. The Discharger has yet to obtain regulatory coverage and as of 23 January 2018, the Discharger is 1,083 days late in meeting that requirement.

Violations under Water Code section 13260 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore 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 avoided costs of permit fees, groundwater monitoring, and preparing 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 to be assessed in this case under the alternate approach is 42. However, because this amount does not result in a sufficient deterrent, the days of violation are increased to 74.

Initial Liability Amount

The total maximum penalty for the violation is \$1,083,000.

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

$$(\text{Maximum per day liability}) \times (\text{Assessed number of days}) \times (\text{Per day Factor})$$

$$\text{Initial Liability: } \$1,000/\text{day} \times 74 \text{ days} \times 0.55 = \$40,700$$

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 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: 1.4*

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 1.4, which increases the fine. Central Valley Water Board staff sent 13260 Directives and a Notice of Violation requiring the Discharger to obtain coverage. The documents were sent via certified mail, as well as FedEx, and their receipt by the Discharger has been confirmed. Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance. The multiple notices and failure to respond suggest the Discharger acted intentionally or negligently in ignoring the requirement to get regulatory coverage, resulting in a multiplying factor of 1.4.

b) *Cleanup and Cooperation: 1.5*

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 1.5. The Regional Board issued the Discharger a Notice of Violation and made several phone calls to the Discharger in an effort to allow the Discharger to address the violation prior to the issuance of a complaint. The Discharger did not comply or cooperate with the Regional Board despite being awarded ample time in which to do so. 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 he 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: \$85,470.* (Initial Liability (\$1,000/day x 74 days x 0.55) x Adjustments (1.4)(1.5)(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 revenues and assets." The Discharger has the ability to pay the

Base Liability Amount based on the value of property owned by the Discharger. The agricultural land is a significant asset with a 2017 assessed value \$1,126,794 according to Tulare County Tax Assessor records. The Discharger appears to have 163 acres of mature walnuts that were in commercial production during the violation period. The Tulare County Agricultural Commissioner's 2014, 2015, and 2016 Annual Crop Reports suggest that the Discharger's 163 acres of Walnuts are capable of generating an annual gross revenue in the range of \$631,000 to \$819,000¹. Therefore, the Discharger has the ability to pay the proposed administrative civil liability based on his assets and revenue, 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 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: \$11,658

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes a 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 5.7.0. 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

¹ Information provided by the 2014, 2015, and 2016 Tulare County Agricultural Crop Report, available at <http://agcomm.co.tulare.ca.us/ag/index.cfm/standards-and-quarantine/crop-reports1/crop-reports-2011-2020/>

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>; the Central Valley Water Board's application of the BEN Model to the circumstances here is summarized on the last page of Attachment E.

compliance actions, 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, but can “...prescribe requirements although no discharge report has been filed” (Water Code section 13263(d)). The Central Valley Water Board would prescribe such requirements by issuing a Notice of Applicability to the Discharger as an individual discharger under General Order R5-2013-0100 after holding a hearing. 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 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 Board charged a permit fee of \$2,692 plus \$3.40 per acre for farms 101 to 500 acres⁴ during the 2014-15 and 2015-16 billing year. The Discharger has 193 crop acres, which results in an annual permit fee of \$3,348.20 for the two billing years. The Discharger has avoided paying this permit fee for these two years. During the 2016-17 billing year, the State Water Board charged a permit fee of \$3,123 plus \$3.94 per acre for farms 101 to 500 acres, resulting in an avoided annual permit fee of \$3,883. The Discharger has avoided paying this permit fee for one year. Collectively, the Discharger has avoided \$10,579 in annual permit fees.

Under the Individual General Order, the Discharger would also be required to prepare and submit a Farm Water Quality plan at an estimated cost of \$2,500. The Discharger has delayed completion of the required Farm Water Quality Plan until the date on which they obtain coverage. The Discharger would also need to prepare annual monitoring plans for 2015, 2016, and 2017 at a cost of \$2,400 per year. The Discharger has therefore avoided \$7,200 in costs associated with preparing annual monitoring plans. Additionally, the Discharger would be required to conduct groundwater monitoring for 2015, 2016, and 2017, at an estimated cost of \$1,122 per year. The groundwater monitoring cost estimate is based on sampling one well one time for the constituents listed in the Individual Grower Order and includes labor costs and lab fees. The Discharger has avoided a total of \$3,366 in groundwater monitoring expenses.

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

For the purposes of computing the economic benefit using BEN, the penalty payment date is assumed to be the tentative date of administrative hearing, April 5, 2018. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately \$11,658.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$12,824*

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 herein is \$11,658. This number plus ten percent results in a Minimum Liability of \$12,824.

b) *Maximum Liability Amount: \$1,083,000*

Discussion: 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 is 1,083 days past due in complying with the 16 January 2015 Water Code section 13260 Directive.

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 under California Water Code section 13260 is **eighty-five thousand four hundred seventy dollars (\$85,470)**.

Insert economic benefit table here