

ATTACHMENT A TO ACL ORDER R7-2019-0039

SPECIFIC FACTORS CONSIDERED FOR ADMINISTRATIVE CIVIL LIABILITY

PALM SPRINGS AERIAL TRAMWAY
MOUNTAIN STATION
RIVERSIDE COUNTY

The State Water Resources Control Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under Water Code section 13327. Each factor of the ten-step approach is discussed below, as is the basis for assessing the corresponding score.

The 2010 Enforcement Policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

**VIOLATION: FAILURE TO SUBMIT MONTHLY MONITORING REPORTS
CALCULATION OF PENALTY FOR VIOLATION**

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 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. The Discharger has undermined the efforts of the Colorado River Basin Regional Water Board's (Regional Water Board) Land Disposal Program by disregarding the requirement to submit timely reports. Discharger's compliance with reporting requirements is foundational to the Regional Water Board's efforts to protect water quality. The Land Disposal Program's Orders adopted by the Regional Water Board specify the expectations and requirements for water quality protection.

The Discharger failed to submit three Monthly Monitoring Reports as required by Waste Discharge Requirements (WDRs) Order No. R7-2008-0038 (Mountain Station WDRs). Additionally, the Discharger has submitted seventy-three late Monthly Monitoring Reports. By not submitting or submitting late monitoring reports, the Discharger has undermined the Regional Water Board's ability to analyze the reports to ensure compliance with the Mountain Station WDRs. The Discharger has therefore avoided potential violations related to its discharge which could potentially degrade the groundwater quality and impact beneficial uses.

Additionally, the regulatory program is compromised when Regional Water Board staff resources are directed toward bringing the Palm Springs Aerial Tramway Mountain Station Wastewater Treatment Facility (Mountain Station WWTF) into compliance rather than being available for outreach and applying technical knowledge to ensure the protection of the Region's groundwater.

Deviation from Requirement

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

The deviation from requirement is **major**. To date, the Discharger has a combined 1629 days of violation for late monitoring reports and 90 days of violation for missing reports. The maximum days of violation that the Discharger could be penalized as of December 31, 2017 would be 2756 days.

The requirements in the applicable Mountain Station WDRs are rendered ineffective when the Discharger fails to meet its reporting requirements. The Discharger continuously failed to submit monitoring reports on time, or at all, since 2010. During that period, the Discharger failed to request extensions or provide an explanation for the late and missing reports to the Regional Water Board. Therefore, the deviation from requirement is major.

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 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

Pursuant to the Mountain Station WDRs, the Discharger was required to submit timely monitoring reports. Between June 15, 2010 and December 31, 2017, the Discharger consistently failed to submit timely Monthly Monitoring Reports resulting in a total of 1629 days of late Monthly Monitoring Reports. The Discharger also did not submit three Monthly Monitoring Reports, which resulted in 90 days of violation. Each Monthly Monitoring Report can be assessed up to 30 days of violation.

Violations under Water Code section 13268 are assessed on a per day basis. However, the violations at issue qualify for the alternative approach to penalty calculation under the 2010

Enforcement Policy (page 18). Under the 2010 Enforcement Policy, violations that last more than thirty (30) days, can have a daily assessment that is 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 Regional 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.

Here, the Regional Water Board Prosecution Team finds that the Discharger's failure to submit Monthly Monitoring Reports is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's late and missing reports impacted the environment on a daily basis, since submitting these reports does not result in immediate changes to practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because the Discharger submitted many of the Monthly Monitoring Reports, albeit not in a timely manner.

Due to the nature of the case, using the minimum days generated from the Multiple Day approach is appropriate, resulting in an assessment of **63** days for both late and missing reports.

Initial Liability Amount

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

Violation, Failure to File Monitoring Reports: \$1,000/day x 63 days x 0.55 = \$ 34,650

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 amount for each violation to determine the revised amount for that violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.75 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** for the culpability factor. It is the Discharger's responsibility to be aware of, and to comply with, the reporting requirements of the Mountain Station WDRs. The Regional Water Board expects dischargers to work with their consultants in order to ensure that monitoring requirements are met.

Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance by submitting timely monitoring reports.

Cleanup and Cooperation

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 **1.1**. The Discharger hired a new consultant to ensure timely submission of monitoring reports. However, the Discharger was out of compliance with the Mountain Station WDRs for several years despite efforts by Regional Water Board staff, including the issuance of notices of violation, to bring the facility into compliance.

History of Violations

When there is a history of repeat violations, the Enforcement Policy assigns a neutral multiplier of 1.0. The Discharger does not have a history of violations with the Regional Water Board therefore a **1.0** is assigned.

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.

Total Base Liability = Initial Liability (\$ 34,650) x Adjustments (1.3) (1.1) (1.0) = **\$ 49,549.50**

Step 6. Ability to Pay and Continue in Business

The Discharger has the ability to pay the administrative civil liability and there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

Regional Water Board staff member spent 60 hours to get the facility into compliance amounting to \$16,000 in staff costs. State Board staff expended an additional \$5,000 in staff costs. The total staff costs are \$21,000.

Step 8. Economic Benefit

The Enforcement Policy provides that the economic benefit of noncompliance should be calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model

(BEN)¹ penalty and financial modeling program unless it is demonstrated that an alternative method of calculating the economic benefit is more appropriate. Economic benefit was calculated using BEN Version 2019.0.0. For this case, BEN was determined to be the appropriate method. Using standard economic principals such as time-value of money and tax deductibility of compliance costs, BEN calculates a discharger's economic benefit derived from delaying or avoiding compliance with environmental statutes.

In this case, the Discharger failed to submit three monthly monitoring reports to the Regional Water Board. Regional Water Board staff estimate that each report should cost the Discharger approximately \$1,000 to complete. As a result, the Discharger avoided at least \$3,000 in reporting costs. In addition, the Discharger submitted 73 monthly monitoring reports beyond their required due dates. Although the Discharger did benefit by delaying the expense of reporting in these cases, the benefit is suspected to be negligible and therefore is not incorporated in this analysis. The noncompliance date for each report is assumed to be the day following each report's required submittal date. For calculation purposes, the penalty payment date is assumed to be the tentative hearing date, June 13, 2019. Changes to this date will affect the economic benefit calculation.

Based on information provided by the Discharger, in addition to standard accounting assumptions, the BEN model was used to determine the economic benefit of the avoided expenditures to be approximately \$3,351. Individual compliance actions, assumptions, and BEN output are described in Attachment B.

Step 9. Maximum and Minimum Liability Amounts

Minimum Liability Amount: \$3,686.10

Maximum Liability Amount: \$ 1,719,000

The Enforcement Policy states that the total liability shall be at least 10 percent higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides meaningful deterrent to future violations." The minimum liability here is \$3,686.10. This number is derived from the economic benefit which is calculated to be \$3,351. The final liability amount is more than the economic benefit plus 10 percent, therefore, the Enforcement Policy's requirement is met in this matter.

The maximum liability under Water Code section 13268 for the failure to submit a report under Water Code section 13267 is \$1,000 per day of violation. The Discharger was required to submit timely monthly monitoring reports beginning on June 15, 2010. As of December 31, 2017, 3 missing reports are accrued, resulting in 90 days of violation and 73 reports were submitted late with a combined total of 1629 days of violation. The discharger accrued a total of 1719 days of violation, which results in a total maximum liability of \$1,719,000.

Step 10. Final Liability Amount

¹ 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 Regional Water Board's application of the BEN Model to the circumstances here is summarized in Attachment B.

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount for failure to submit timely monitoring reports is **\$ 70,549.50**.