

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
LAHONTAN REGION**

**LATE REVISION**

**MEETING OF JULY 16-17, 2014  
SOUTH LAKE TAHOE, CA**

**ITEM 6**

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The Advisory Team has made modifications to the Proposed Order and Attachment A to reflect the June 12, 2014 Prosecution Team recommendations (bates pages 6-31 to 6-32).

Please replace bates pages 6-8 to 6-20 in their entirety.









24. Issuance of this Order is an enforcement action and is, therefore, exempt from the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), pursuant to California Code of Regulations (CCR), title 14, section 15321, subdivision (a)(2).
25. Any person aggrieved by this action of the Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and CCR, title 23, section 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 will be provided upon request, and may be found on the Internet at:  
[http://www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitions/water_quality).

**IT IS HEREBY ORDERED THAT:**

1. Administrative civil liability is imposed upon the Discharger in the amount of **\$137.50**.
2. The Discharger shall submit payment with a cashier's check or money order in the full amount of **\$137.50** payable to the State Water Resources Control Board's Waste Discharge Permit Fund within 30 days of the date this Order is adopted.
3. Should the Discharger fail to make the specified payment to the State Water Resources Control Board's Waste Discharge Permit Fund within the time limit specified in this Order, the Water Board may enforce this Order by applying for a judgment pursuant to Water Code section 13328. The Water Board's Executive Officer is hereby authorized to pursue a judgment pursuant to Water Code section 13328 if the criterion specified in this paragraph is satisfied.

I, Patty Z. Kouyoumdjian, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Lahontan Region on July 16, 2014.

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Patty Z. Kouyoumdjian  
Executive Officer

Attachment A: Administrative Civil Liability Methodology

## ATTACHMENT A

### ADMINISTRATIVE CIVIL LIABILITY METHODOLOGY

The Complaint alleges that the Discharger failed to comply with a cease and desist order issued by the Lahontan Water Board, which required the Discharger by November 10, 2011, to either connect the Discharger's onsite wastewater disposal system to the Spalding Community Services District's (District) community sewer system or to properly abandon the Discharger's onsite wastewater disposal system, in accordance with Lassen County regulations. For the purpose of applying the Enforcement Policy's administrative civil liability methodology, the alleged violation is a non-discharge violation. Because the Complaint only alleges a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

#### Step 3: Initial Liability Determination

The per-day factor for the violation is **0.55**. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

- a. The Potential for Harm for the violation is determined to be **moderate**. The Discharger's failure to connect his onsite wastewater disposal system to the District's sewer system or to properly abandon it allows waste containing nutrients to be discharged to the groundwater of the Eagle Lake basin. Such discharges, should they occur, can introduce nutrients, such as nitrogen and phosphorus, to the groundwater, which flows into Eagle Lake. Nitrogen and phosphorus can increase algal growth and the rate of eutrophication in Eagle Lake, a closed-basin lake. Increased eutrophication can adversely affect the habitat for the Eagle Lake trout, and other aquatic and terrestrial organisms supported by Eagle Lake. Increased algal growth also has the potential to adversely affect the public's water contact recreation (e.g., wading, swimming, water skiing) and non-contact water recreation (e.g., aesthetic enjoyment) of Eagle Lake.

To prevent these types of adverse impacts to Eagle Lake's beneficial uses, the Lahontan Water Board amended its *Water Quality Control Plan for the Lahontan Region* (Basin Plan) in September 1984, to prohibit the discharge of waste containing nutrients to the surface waters and groundwater of the Eagle Lake basin beginning September 14, 1989. The Lahontan Water Board's cease and desist order issued to the Discharger enforces that Basin Plan prohibition. At a minimum, the Discharger's onsite wastewater disposal system presents a threatened discharge of waste containing nutrients that can reasonably be expected to adversely affect Eagle Lake's cold freshwater habitat (COLD), water contact recreation (REC-1), non-contact water recreation (REC-2), and sport fishing (COMM) beneficial uses. It is also reasonable to expect that such impacts are reversible upon ceasing such waste discharges.

Waste discharges from onsite wastewater disposal systems in the Spalding Tract subdivision can also introduce bacteria into the groundwater, which is the local water supply. Many Spalding Tract subdivision property owners have private wells, and past studies have shown that bacteria levels increase in those private wells when nearby onsite wastewater disposal systems are being used. Bacteria contained in domestic wastewater can adversely affect human health when consumed. Such conditions represent an adverse impact to the Eagle Lake groundwater basin's municipal and domestic supply (MUN) beneficial use. This impact can reasonably be expected to occur when waste discharges from onsite wastewater disposal systems occur. Fortunately, past studies have also shown that this impact is relatively short term in nature when the waste discharge ceases. Therefore, violating the cease and desist order presents a **moderate** threat to beneficial uses that will likely attenuate without acute or chronic effects, once the Discharger has complied with the cease and desist order.

- b. The Deviation from Applicable Requirements to abandon or connect the septic system is **major**. The reason for the **major** designation is that Lahontan Water Board staff notified the Discharger of his failure to comply with the cease and desist order's November 10, 2011 compliance date in a July 3, 2013 Notice of Violation (NOV). The NOV was issued after the Discharger had approximately 1.5 construction seasons to comply with the cease and desist order's requirement to either connect the Discharger's onsite wastewater disposal system to the District's community sewer system or to properly abandon the Discharger's onsite wastewater disposal system, if appropriate. The remainder of the 2013 construction season has past, and to date, the Discharger has still failed to comply.

There was ample time to satisfy the requirements of the cease and desist order since its adoption. The District's community sewer system has been available to connect to since October 2007; however, the Discharger failed to connect or properly abandon his onsite wastewater disposal system and subsequently was issued a cease and desist order in September 2011. The Discharger has now had an additional two full construction seasons since the cease and desist order was issued to comply with its requirements, but has not.

- c. There are 722 days of violation for the period beginning November 11, 2011 and ending November 1, 2013, the date of drafting Administrative Civil Liability Complaint No. R6T-2013-0093. The statutory maximum amount per day per violation is \$5,000. Therefore, 722 days of violation at the statutory maximum per day of \$5,000, yields a maximum initial liability of **\$3,610,000** (722 days x \$5,000/day). Applying the Potential for Harm per-day factor of 0.55 from Table 3, and the statutory maximum liability amount for each day of violation, yields an initial liability of **\$1,985,500** (0.55 x 722 days of violation x \$5,000 per day).

#### **Step 4: Adjustment Factors**

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability; the violator's efforts to clean up or cooperate

with regulatory authorities after the violation; and the violator's compliance history. After each of these factors is considered for the violations alleged, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

a. Multiple Day Violations

The Enforcement Policy provides that, for violations lasting more than 30 days, the Lahontan Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation.

The Discharger has failed to comply with his cease and desist order for at least 722 days. The continuance of these violations does not result in an economic benefit that can be measured on a daily basis. The economic benefit is the delayed cost of having the onsite wastewater disposal system either connected to the District's community sewer system or properly abandoned, if appropriate. Therefore, an adjustment can be made.

The Lahontan Water Board Prosecution Team (Prosecution Team) recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period. Using this approach, the total number of days is revised to 30 days of violation.

This results in a Revised Initial Liability Amount as follows:

$$\text{Revised Initial Liability} = (0.55) \times (30 \text{ days of violation}) \times (\$5,000) = \mathbf{\$82,500}$$

b. Adjustment for Culpability

For culpability, the Enforcement Policy suggests an adjustment resulting in a multiplier between 0.5 to 1.5, with the lower multiplier for accidental incidents, and the higher multiplier for intentional or negligent behavior. In this case, a Culpability multiplier of **1.3** has been selected for the reasons described below:

The Prosecution Team has exercised its discretion in deciding whether to pursue administrative civil liability for violating the cease and desist order. Doing so is consistent with the Lahontan Water Board's primary interest to achieve compliance. The Prosecution Team diligently worked with property owners towards meeting the compliance objective. After providing approximately 1.5 construction seasons to comply, the Prosecution Team issued a July 3, 2013 Notice of Violation (NOV), notifying the Discharger that the time to comply with his cease and desist order's requirements without additional enforcement action was running out. In spite of the Prosecution Team's efforts to allow ample time to comply before issuing an

administrative civil liability complaint, the Discharger has not provided the Prosecution Team with any information indicating any hardship related to the failure to comply or shown any intent to comply.

The Prosecution Team does not have any evidence of willful or intentional negligence in this matter. Therefore, the Prosecution Team does not recommend assigning a value of 1.4 or greater for Culpability, as these values have been reserved for situations where there is evidence of willful or intentional negligence. However, given the lack of initial response by the Discharger in spite of the amount of time given to comply and notification of the Prosecution Team's intent to pursue administrative civil liability, a value of 1.3 for Culpability is appropriate.

c. Adjustment for Cleanup and Cooperation

For cleanup and cooperation, the Enforcement Policy suggests an adjustment resulting in a multiplier between 0.75 and 1.5. A lower multiplier is appropriate for situations where there is a high degree of cleanup and/or cooperation and a higher multiplier is appropriate for situations where cleanup and/or cooperation is minimal or absent. In this case, a Cleanup and Cooperation multiplier of **1.5** has been selected for the reasons described below:

The Discharger has not cooperated with the Lahontan Water Board on this issue. The Discharger's representative did contact the Prosecution Team by phone after receiving the July 3, 2013 NOV to report that the Discharger thought he had complied with the cease and desist order. The Prosecution Team explained that the Lahontan Water Board had no records supporting the Discharger's claim. The Prosecution Team went on to explain the Discharger's compliance options and how to demonstrate compliance.

The Prosecution Team has not observed any attempt by the Discharger to comply nor has it received any compliance documentation since the above-referenced phone conversation. Additionally, neither the Discharger nor his representative has contacted the Prosecution Team since the above-referenced phone conversation to discuss why compliance has not occurred or why compliance documentation has not been provided. The lack of effort to comply with the cease and desist order, or even to communicate with the Prosecution Team regarding the reason why compliance has not occurred, warrants a value of 1.5.

d. Adjustment for History of Violations

The Enforcement Policy suggests that where there is a history of repeat violations, a **minimum** multiplier of 1.1 should be used for this factor. In this case, a multiplier of **1.0** has been selected based upon the absence of prior violations of Cease and Desist Order No. R6T-2011-0069. A review of the California Integrated Water Quality System (CIWQS) and Lahontan Water Board files shows that the violation represents the first violation of Cease and Desist Order No. R6T-2011-0069. Therefore a multiplier of 1.0 is appropriate, and no adjustment to the above liability amount should be made in response to this factor.

**Step 5: Determination of Total Base Liability Amount**

The Total Base Liability for the violation is **\$160,875.00**. The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability = (Revised Initial Liability) X (Culpability) X (Cleanup/Cooperation) X (History of Violations) = (\$82,500) X (1.3) X (1.5) X (1.0) = **\$160,875.00**.

**Step 6: Ability to Pay and Ability to Continue Business**

The Enforcement Policy provides that if the Lahontan Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward.

The Discharger owns the parcel of land listed below.

Assessor's Parcel No.	County	Property Address	Use Type	Mailing Address	Assessed Total Value	Assessment Year
077-351-27	Lassen	687-225 Hemlock Way Susanville, CA	Recreational	368 Green Valley Rd Scotts Valley, CA	\$15,277	2013
				<b>TOTAL</b>	<b>\$15,277</b>	

Without additional information provided by the Discharger, based on this initial assessment of information available in the public record, it appears the Discharger does not have assets to pay the Total Base Liability determined in Step 5. However, it appears the Discharger does have assets to pay the Proposed Liability identified below.

**Step 7: Other Factors as Justice May Require**

The Enforcement Policy provides that if the Lahontan Water Board believes the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express findings are made.

a. **Adjustments for Other Factors as Justice May Require**

As shown in Step 9, below, \$72,200 is the minimum statutory liability that shall be assessed unless express findings are made supporting a reduction. The Prosecution Team has determined that this amount is excessive in light of the violations alleged herein and in relation to the cost savings associated with the non-compliance from those violations. Below are specific factors under Water Code section 13327 that the Prosecution Team considered in determining the proposed liability amount.

- i. **Reducing the days of violation:** The Prosecution Team considered calculating the administrative civil liability based on a reduced number of days of violation. Using a start date of July 3, 2013, the date of the Notice of Violation where Lahontan Water Board staff reminded the Discharger that his property was out of compliance, would reduce the days of violations to 122 days (July 3, 2013 – November 1, 2013). Using 122 days of violation would result in a minimum liability of **\$12,200**, based upon the statutory minimum liability of \$100 per day of violation. Even considering the reduction of the minimum liability based on reducing the days of violation, the Prosecution Team believes this liability amount of \$12,200 is excessive.
- ii. **Other Considerations:** In determining the proposed liability amount, the Prosecution Team considered the following specific factors.
  - a) **Economic Benefit:** As detailed in an updated June 12, 2014 letter from the Prosecution Team to the Executive Officer, Gerald Horner, Senior Economist with the State Water Resources Control Board prepared an economic benefit analysis for Mr. Johnson's case, and found that the economic benefit of delayed compliance with the Cease and Desist Order No. R6T-2011-0069 until May 14, 2014 was \$125. The Enforcement Policy requires the recovery of at least economic benefit plus ten percent, which would be 137.50.
  - b) **Property Values of Property Owned:** Lahontan Water Board staff reviewed Lassen County Assessor's Office records for the properties whose owners are subject to the administrative civil liability for the failure to either connect his onsite wastewater disposal system to the District's sewer system or to properly abandon it.<sup>1</sup> County records for the year 2013 show that the properties range in value from \$15,277 to \$63,981. These properties have an average value of \$32,022. Relative to the value of the Discharger's Spaulding Tract property, the minimum statutory liability of \$72,200 is excessive.
  - c) **Consistency with Similar ACL Orders Previously Adopted:** Attachment B to the June 12, 2014 letter from the Assistant Executive Officer, Lauri Kemper is a table that shows recent administrative liability complaints issued by the board in 2012-2014 for Spaulding Tract properties. This table shows that a penalty amount of \$137.50 is within the range of other penalties issued by the board.
- iii. **Proposed Liability Amount:** Water Code section 13350(f) provides that the Lahontan Water Board may impose civil liability in an amount less than the minimum amount specified where express findings setting forth the reasons for its action based on the specific factors required in Water Code section 13327.

For the reasons specified above, which are based on the specific factors outlined in Water Code section 13327, the Prosecution Team recommends imposing an administrative civil liability in the amount of **\$137. 50, which represents that**

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<sup>1</sup> As of the date of drafting the Complaint, November 1, 2013, there were three property owners failing to comply with their Cease and Desist Orders.

**economic benefit that Mr. Johnson obtained, plus an additional 10%, consistent with the Enforcement Policy.**

b. Staff Costs

The Lahontan Water Board has suspended the practice of adding staff cost into administrative civil liabilities based upon the California State Auditor's findings stated in its 2012-120 Audit Report. Specifically, one of the findings in the Audit Report is that staffing costs in penalty actions for water quality certification violations are, "generally not supported and are inaccurate because of inflated cost rates." (California State Auditor Report 2012-120 State Water Resources Control Board, *It Should Ensure a More Consistent Administration of Water Quality Certification Program*, June 2013). This enforcement action does not involve violations of a 401 Water Quality Certification as was the focus in Audit Report 2012-120. However, staff believes the justification in the Audit Report still applies to this enforcement action where the staff cost rate has not yet been revised to reflect actual staff salaries and overhead cost for each program. In an abundance of caution, the Lahontan Water Board, in consultation with the State Water Board, has suspended adding staff cost into administrative civil liabilities until the issues identified by the State Auditor can be addressed.

**Step 8: Economic Benefit**

The Enforcement Policy requires that the economic benefit of noncompliance be estimated for any violation. The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation.

The Discharger has realized an economic benefit of noncompliance by failing to connect to the District's system as required by Cease and Desist Order No. R6T-2011-0069. In order to estimate the economic benefit of noncompliance, Lahontan Water Board staff Gerald Horner, Senior Economist with the State Water Resources Control Board, to prepare an economic benefit analysis for Mr. Johnson's case using the U.S. Environmental Protection Agency's BEN model<sup>2</sup>, and found that the economic benefit of delayed compliance with the Cease and Desist Order No. R6T-2011-0069 until May 14,

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<sup>2</sup> USEPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures such as capital investments, one-time non-depreciable expenditures, and annual operation and maintenance costs.

BEN uses standard financial cash flow and net present value analysis techniques based on generally accepted financial principles. First, BEN calculates the costs of complying on time and of complying late adjusted for inflation and tax deductibility. To compare the on time and delayed compliance costs in a common measure, BEN calculates the present value of both streams of costs, or "cash flows," as of the date of initial noncompliance. BEN derives these values by discounting the annual cash flows at an average of the cost of capital throughout this time period. BEN can then subtract the delayed-case present value from the on-time-case present value to determine the initial economic benefit as of the noncompliance date. Finally, BEN compounds this initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance.

2014 was \$125. The Enforcement Policy requires the recovery of at least economic benefit plus ten percent, which would be 137.50.

### **Step 9: Maximum and Minimum Liability Amounts**

The maximum liability amount the Lahontan Water Board may assess for the above-referenced violations pursuant to Water Code section 13350, subdivision (e)(1), is \$5,000 per day of violation. Therefore, the maximum liability the Lahontan Water Board may assess for 722 days of violation (elapsed time since the date of compliance in the cease and desist order) is **\$3,610,000**.

The minimum liability amount provided in Water Code section 13350, subdivision (e)(1)(B) is \$100 per day. Therefore, the minimum liability the Lahontan Water Board must assess for 722 days of violation is **\$72,200** unless specific findings are made supporting a reduction.

The Enforcement Policy also requires that:

*The adjusted Total Base Liability shall be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations.*

The economic benefit amount plus ten percent is **\$137.50**. The Total Base Liability and the Proposed Liability amounts are both at least \$137.50.

### **Step 10: Final Liability Amount**

The Total Proposed Liability Amount is **\$137.50** based upon the considerations discussed in detail, above.