

Attachment A

Stipulated Administrative Civil Liability Penalty Methodology

Krasilsa Pacific Farms LLC and Hugh Reimers

This Stipulated Administrative Civil Liability Penalty Methodology has been prepared by the North Coast Regional Water Quality Control Board Prosecution Team and Krasilsa Pacific Farms LLC and Hugh Reimers for purposes of settlement of the allegations made in Administrative Civil Liability Complaint No. R1-2022-0024 (Complaint). Krasilsa Pacific Farms and Hugh Reimers are collectively referred to as the Dischargers; the Dischargers and the Prosecution Team are collectively referred to as the Parties. This Stipulated Penalty Methodology demonstrates that the Administrative Civil Liability Amount agreed to by the Parties comports with the State Water Resources Control Board's Water Quality Enforcement Policy, as well as Water Code sections 13327 and 13385, subdivision (e).

The Dischargers' timeline submitted in response to Cleanup and Abatement Order No. R1-2019-0045 (CAO) states that between March and June 2018, twenty acres of tree canopy and twenty acres of brush were removed, and between June and July 2018, tree roots and rocks were removed, and the ground was disced. Therefore, all of the activities that caused the underlying Violations described in the Complaint had occurred by July 31, 2018.

Regional Water Board staff (Staff) observed 164 water quality violations at 29 locations on the property during the January 2019 inspection. Of these 29 locations, two locations, WQ 1.6 south and 3.1, involved dredge and fill in wetlands that are waters of the United States while twelve other locations involved the threat of chronic discharges to receiving waters in violation of Basin Plan Prohibitions. Specifically, earthen waste materials were placed adjacent to or in tributaries to Big Sulphur Creek or Crocker Creek at locations WQ 1.2, 1.3, 1.5, 1.6 north, 2.6, 2.11, 2.12, 2.15, 2.16, 2.17, 2.18, and 3.5.

On February 27, 2019, the Dischargers reported completing implementation of required interim erosional control measures and Staff acknowledge, that although there remained an increased threat of discharge from degraded wetlands, headwater streams and riparian areas on the Property, these interim measures likely prevented further acute discharges to receiving waters caused by further precipitation events from locations WQ 1.2, 1.3, 1.5, 1.6 north, 2.6, 2.11, 2.12, 2.15, 2.16, 2.17, 2.18, and 3.5. The Prosecution Team recommends assessing liability for violations of Basin Plan Prohibitions for discharging or threatening to discharge organic and earthen material from any logging, construction, or associated activity to receiving waters for the 50 days of measurable precipitation between the initial impacts and the end of February 2019. These are Violation 1 through 12 in the Complaint. While each day that earthen waste material remained where that material could pass into a stream or watercourse is a

violation, the Prosecution Team decided to allege only those days with recorded rainfall to focus on days when actual impacts were likely to have occurred.

As of May 9, 2022, impacts to wetlands that are waters of the US (including burial, erasure, fill/partial fill, or hydromodification) will have been present for at least 1,378 days at locations WQ 1.6 south and WQ 3.1 (July 31, 2018 through May 9, 2022). The Prosecution Team recommends assessing daily liability for each of these violations over this period. These are Violations 13 and 14 in the Complaint.

The CAO required the Dischargers to submit an acceptable Restoration Mitigation and Monitoring Plan (RMMP) by April 15, 2020, and to fully implement the plan by October 15, 2020. On September 21, 2020, the Dischargers submitted an RMMP. Upon review, Staff determined that the submitted plan fell significantly short in meeting the requirements described in CAO Required Action 5. Staff provided recommendations for revising the document 31 days later in an October 22, 2020 letter. On June 29, 2021, the Dischargers submitted a revised RMMP. Upon review, Staff determined that the submitted plan again fell significantly short in meeting the requirements described in CAO Required Action 5, and provided recommendations for revising the document 56 days later in an August 23, 2021 letter and an August 24, 2021 attachment emailed to the Dischargers' consultants. On November 4, 2021, the Dischargers submitted a revised RMMP. Upon review, Staff determined that the submitted plan again fell significantly short in meeting the requirements described in CAO Required Action 5, and provided recommendations for revising the document 62 days later in a January 5, 2022 letter emailed to the Dischargers' consultant. Staff have yet to receive an acceptable RMMP from the Dischargers.

Although the Dischargers have been in violation of CAO Required Action No. 5 for a total of 754 days (from April 15, 2020, to May 9, 2022), the Prosecution Team notes that Staff took a total of 149 days to respond to all RMMP submittals. While not required, the Prosecution Team decided to allege only the days of violation when the Dischargers were in control of the development and completion of the RMMP and remove any days that draft RMMPs were being reviewed by Regional Water Board staff. Therefore, the Prosecution Team recommends subtracting the 149 days of Staff review during this period, and therefore proposes to assess liability for a total of 605 days for Violation 15 in the Complaint.

The Dischargers have been in violation of CAO Required Action No. 9 (implementing an RMMP to remediate the Property) for a total of 571 days, from October 15, 2020, to May 9, 2022, as described in Violation 16 in the Complaint. Similar to Violation 15, the Prosecution Team decided to allege only the days of violation when the Dischargers were in control of the development and completion of the RMMP and remove any days that draft RMMPs were being reviewed by Regional Water Board staff. Therefore, the Prosecution Team recommends subtracting the 149 days of Staff review of the deficient RMMP drafts, and therefore proposes to assess liability for a total of 422 days for Violation 16 in the Complaint.

The steps below provide the analysis of the enforcement policy methodology leading to the weighting of the penalty for discharge and non-discharge violations.

Summary of alleged violations:

Violations 1 through 12: Violation of Basin Plan Section 4.2.1 prohibitions, by allowing storm water or threatening to allow stormwater to transport earthen waste to tributaries to Big Sulphur Creek or Crocker Creek at locations WQ 1.2, 1.3, 1.5, 1.6 north, 2.6, 2.11, 2.12, 2.15, 2.16, 2.17, 2.18, and 3.5¹ during 50 days of precipitation between September 29, 2018 and February 27, 2019.

The Basin Plan, at Section 4.2.1, prohibits the discharge of logging and construction-related wastes into streams and watercourses, or where such wastes can enter streams or watercourses.² No later than July 31, 2018, the Dischargers caused waste to be placed where it could enter tributaries to Big Sulphur Creek and Crocker Creek from locations WQ 1.2, 1.3, 1.5, 1.6 north, 2.6, 2.11, 2.12, 2.15, 2.16, 2.17, 2.18, and 3.5. This waste material entered these streams or watercourses during precipitation events on a total of 50 days between September 29, 2018, and February 27, 2019. Such violations are subject to administrative civil liability pursuant to Water Code section 13350(a)(2).

Violations 13 and 14: Violations of Porter Cologne 13376 over 1,378 days, for dredge and fill in wetlands that are Waters of the US as identified in the Jurisdictional Mapping, Appendix A to the draft RMMP submitted by Mr. Charles Patterson on September 21, 2020, (September 2020 RMMP) at WQ 1.6 south, and 3.1.

Water Code section 13376 requires “[a] person who discharges pollutants or proposes to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or a person who discharges dredged or fill material or proposes to discharge dredged or fill material into the navigable waters of the United States ... [to] file a report of the discharge in compliance with the procedures set forth in Section 13260.” The Dischargers did not file such a report before discharging the materials to the wetlands at WQ 1.6 south and 3.1. Such violations are subject to administrative civil liability pursuant to Water Code section 13385 (a)(1).

Violation 15: Violation of CAO Required Action 5 by failing to submit an RMMP acceptable to the Regional Water Board or its delegated officer for a total of 605 days starting April 15, 2020. CAO Required Action 5 was issued under Water Code section

¹ The WQ location numbers were assigned by Staff following the inspections of December 28, 2018, and January 14, 2019.

² The Basin Plan, at section 4.2.2.B, defines “stream or watercourse” to mean: “Natural watercourse as designated by a solid line or dash and three dots symbol shown in blue on the largest scale United States Geological Survey Topographic Map most recently published.”

13267. Such violations are subject to administrative civil liability pursuant to Water Code section 13268.

Violation 16: Violation of CAO Required Action 9 by failing to implement an approved RMMP by October 15, 2020 for a total of 422 days. CAO Required Action 9 was issued under Water Code section 13304. Such violations are subject to administrative civil liability pursuant to Water Code section 13350(a)(1).

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 must be considered under California Water Code (Water Code) sections 13327 and 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

The methodology includes 9 steps. Steps 1-2 are for discharge violations (Violations 1 through 14), step 3 is for non-discharge violations (Violations 15 and 16), and steps 4-9 apply to all violations.

Step 1. Actual or Potential for Harm for Discharge Violations [Violations 1 through 14]

The Potential for Harm is **(6) six**. This is determined by the sum of the factors for 1) the physical, chemical, biological or thermal characteristics of the discharge; 2) the potential for harm to beneficial uses; and 3) the susceptibility for cleanup or abatement.

Factor 1: The Degree of Toxicity of the Discharge

Fine sediment discharged to unnamed tributaries to Big Sulphur Creek, and Crocker Creek. Sediment has physical characteristics that pose a moderate physical and biological risk or threat to aquatic life and instream habitat, both in the water column and deposited on the stream channel bottom. Sediment in the water column can cause elevated turbidity levels leading to altered light regimes which can directly impact primary productivity, species distribution, behavior, feeding, reproduction, and survival of aquatic biota.

Suspended sediment in the water column can cause other direct effects to aquatic species, including physical abrasion, clogging of filtration and respiratory organs, and, at very high concentrations, mortality.

Increased sedimentation can smother macroinvertebrates, incubating embryos and emergent fry, can fill pools, and can seal gravel and decrease interstitial water flow and dissolved oxygen concentrations.

The Prosecution Team assessed a factor of two **(2) two** here, as the physical and biological characteristics of sediment-laden water posed a moderate risk to the aquatic habitat and species.

Assigned Factor: 2 – Moderate risk or threat to potential receptors

Factor 2: Actual Harm or Potential Harm to Beneficial Uses

The Basin Plan contains water quality objectives for all waters within the Region and contains implementation programs and policies to achieve those objectives. The objectives identify constituents that are of concern when discharged into the aquatic environment, including the following:

Suspended Material

Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.

Settleable Material

Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or adversely affect beneficial uses.

Sediment

The suspended sediment load and suspended sediment discharge rate of surface waters shall not be altered in such a manner as to cause nuisance or adversely affect beneficial uses.

Turbidity

Turbidity shall not be increased more than 20% above naturally-occurring background levels. Allowable zones of dilution within which higher percentages can be tolerated may be defined for specific discharges upon the issuance of discharge permits or waivers thereof.

The Basin Plan designates beneficial uses and implements State Water Resources Control Board (State Water Board) Resolution No. 88-63, which establishes a policy that all waters, with certain exceptions, should be considered suitable or potentially suitable for municipal or domestic supply. The Property occupies two basins with the majority of the violations occurring north of the drainage divide in the Sulphur Creek Hydrologic Sub Area (HSA), and the violations identified as WQ 3.1 and 3.5 occurring to the south of the drainage divide in the Geyserville HSA. Existing beneficial uses applicable to the Russian River, specifically Sulphur Creek HSA include: Municipal and Domestic Supply (MUN); Agricultural Supply (AGR); Industrial Service Supply (IND); Industrial Process Supply (PRO); Groundwater Recharge (GWR); Navigation (NAV); Hydropower Generation (POW); Water Contact Recreation (REC-1); Non-contact Water Recreation (REC-2); Commercial and Sport Fishing (COMM); Warm Freshwater Habitat (WARM); Cold Freshwater Habitat (COLD); Wildlife Habitat

(WILD); Rare Threatened or Endangered Species (RARE); Migration of Aquatic Organisms (MIGR); Spawning, reproduction, and/or Early Development (SPWN), and Aquaculture (AQUA). The Geyserville HSA has the same beneficial uses with the addition of FRSH and SHELL.

On January 14, 2019, Staff observed a significant amount of fine sediment deposited into the tributaries to Big Sulphur Creek and Crocker Creek, which are tributary to the Russian River, which is habitat for the California Coast Evolutionarily Significant Unit (ESU) for Chinook Salmon, and the Central California Coast DPS for Steelhead Trout. The National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA-NMFS) designated the ESU and DPS to protect Chinook Salmon and Steelhead Trout, which are all listed as Threatened species under the United States Endangered Species Act.

Because the discharge clearly violated water quality objectives in the unnamed tributaries to Big Sulphur Creek and Crocker Creek for two winters, and likely violated these objectives in Big Sulphur Creek, Crocker Creek, and the Russian River, the Prosecution Team finds that the harm or potential harm to beneficial uses resulting from this discharge was likely moderate. A factor of **(3) three** is appropriate here, as the discharge posed a **moderate** threat to beneficial uses (e.g., significant impacts to aquatic life and habitat).

Assigned Factor: 3 – Moderate

Factor 3: Susceptibility to Cleanup or Abatement (1 = less than 50% of the discharge is susceptible to cleanup or abatement or if the discharger failed to clean up 50 percent or more of the discharge within a reasonable time)

A large amount of fine sediment was mobilized into watercourses after denuding and ripping hillslopes on the property. The watercourses will have transported a significant amount of fine sediment to downstream receiving waters and therefore it is unlikely 50% or more of this fine sediment is susceptible to cleanup or abatement, and in any event the discharger failed to clean up 50 percent or more of the discharge within a reasonable time. Accordingly, staff propose a score of **1** for this factor.

Assigned Factor: 1

Final Score – Potential for Harm is 6.

Step 2. Assessments for Discharge Violations

The Prosecution Team recommends assessing liability on a per-day basis, rather than volume, for the discharge violations (Violations 1 through 14).

Where there is a discharge, the Enforcement Policy requires that the Water Boards shall determine an initial liability factor per-day based on the Potential for Harm score and the extent of Deviation from Requirement of the violation. The deviation

from requirements is **major** where the requirement was rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions). Here, the Dischargers violated Basin Plan prohibitions against the discharge of logging and construction-related wastes into and where they can enter watercourses, and Water Code section 13376 by discharging dredged or fill material into navigable waters of the United States without first complying with Water Code section 13260. Both of these requirements were rendered ineffective.

Per-Day Factor for Discharge Violation:

The Regional Water Board determines initial liability for discharge violations on a per-day basis using the Potential for Harm and Deviation from Requirement factors. The Deviation from Requirement is **major**.

Using Table 2 of the Enforcement Policy, the per-day factor based on the Potential for Harm (**6**) and Deviation from Requirement (**major**) is **0.28**.

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

Violations 1 through 12: Per-Day Liability **12** (violations) x **50** (days) x **0.28** (per-day factor) x **\$5,000** (per day) = **\$840,000**.

Violations 13 and 14: Per-Day Liability **2** (violations) x **1,378** (days) x **0.28** (per-day factor) x **\$10,000** (per-day) = **\$7,716,800**.

Step 3. Per-Day Assessment for Non-Discharge Violations [Violations 15 and 16]

The Enforcement Policy provides that the Regional Water Board shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. These violations may include, but are not limited to, failure to conduct routine monitoring and reporting, failure to provide required information, and the failure to prepare required plans. While all non-discharge violations harm or undermine the Board's regulatory programs and compromise the Board's ability to perform their statutory and regulatory functions, some non-discharge violations have the potential to directly or indirectly impact beneficial uses and should result in more serious consequences.

The Dischargers are in violation of Cleanup and Abatement Order No. R1-2019-0045 (CAO) Required Action No. 5., for failing to submit an RMMP acceptable to the Regional Water Board or its delegated officer by April 15, 2020. (Violation 15.)

The Dischargers are in violation of Cleanup and Abatement Order No. R1-2019-0045 (CAO) Required Action No. 9., for failing to implement an approved RMMP by October 15, 2020. (Violation 16.)

Potential for Harm:

The Potential for Harm is **moderate**. The Dischargers were required to submit an RMMP acceptable to the Regional Water Board or its delegated officer by April 15, 2020 to provide for sufficient time for review and approval by the Regional Water Board's Executive Officer before implementing required cleanup work by October 15, 2020, before commencement of the next wet-weather period. The longer the delays, the less time available to implement cleanup and abatement and the more harm will result to Beneficial Uses. The delay in providing an RMMP that is acceptable to the Regional Water Board or its delegated officer and in implementing the RMMP have resulted in the impacted Beneficial Uses persisting for two winter wet-weather periods beyond what would have been impacted if the Dischargers had followed CAO requirements.

Deviation from Requirement:

The deviation from the Required deadline is **moderate**. As stated above, the deadlines were intended to provide sufficient time for review and approval of the RMMP, and implementation of the RMMP, before the 2020-2021 wet season. Allowing less time for regulatory review compromises the effectiveness of the required deadline.

Table 3 of the Enforcement Policy provides that the Prosecution Team may select a per-day factor for non-discharge violations with moderate potential for harm and moderate deviation from the following: 0.3, 0.35, or 0.4. The Prosecution Team recommends the midpoint penalty factor of **0.35** for failing to submit an RMMP by April 15, 2020 and for failing to implement an approved RMMP by October 15, 2020.

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

Violation 15: Per-Day Liability (1 violation x 605 (days) x 0.35 (per-day factor) x \$1,000 (per-day) = **\$211,750**.

Violation 16: Per-Day Liability (1 violation x 422 (days) x 0.35 (per-day factor) x \$5,000 (per-day) = **\$738,500**.

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 compliance history.

Culpability: 1.4

The Enforcement Policy advises that higher liabilities should result from intentional and negligent violations as opposed to accidental violations. A

multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. For this matter, staff recommend using a culpability factor of **1.4**.

Krasilsa Pacific Farms LLC is liable as the owner of the Property. Hugh Reimers was and is manager of Krasilsa Pacific Farms LLC, and directed the earth moving work that caused the violations here. Hugh Reimers is therefore personally liable as a responsible corporate officer. Hugh Reimers was or should have been aware of the permitting requirements for the earth work at issue here. Prior to, or while, Hugh Reimers directed the land disturbance on the subject Property on behalf of Krasilsa Pacific Farms LLC, he applied for Sonoma County Vineyard Erosion and Sediment Control Ordinance (VESCO) permits for four other properties. Furthermore, Hugh Reimers was the chief operating officer and president of Jackson Family Wines and, at the time of the land disturbance, Mr. Reimers was president of Foley Family Wines. In both positions, Mr. Reimers was likely aware of required VESCO permits. These permits require establishing setbacks from aquatic resources. Under the circumstances, it is reasonable to conclude that Mr. Reimers directed the land disturbance activities in a way that destroyed the aquatic resources on the Property in order to avoid the need to obtain necessary permits.

Staff recommends a multiplier of **1.4** for this incident because the Dischargers' actions appear to have been carried out intentionally and below the due standard of care.

History of Violations: 1.0

Any prior history of violations: Where the Discharger has no prior history of violations, this factor should be neutral, or 1.0. Where the Discharger has prior violations within the last five years, the Water Boards should use a multiplier of 1.1.

There are no previous orders assessing violations against Krasilsa Pacific Farms LLC or Hugh Reimers within the last five years. This Complaint covers the period from the time the current Dischargers acquired the Property so, the minimum factor of **1.0** is used.

Cleanup and Cooperation: 1.2

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.

Following receipt of the June 6, 2019 Notice of Violation and the Cleanup and Abatement Order, the Dischargers were responsive in developing and implementing a winterization plan, which was a precursor to the RMMP required under Required Action No. 5.

However, the majority of the Cleanup is still to be completed and, as noted above, although the Dischargers have submitted draft RMMPs, all have been significantly deficient and none of the drafts have been acceptable to the Regional Water Board or its delegated officer by April 15, 2020 as required by Cleanup and Abatement Order No. R1-2019-0045 (CAO) Required Action No. 5. The Dischargers have also failed to implement the RMMP by October 15, 2020.

Therefore, staff recommend assigning a score of **1.2** for this factor to reflect that the Discharger's cleanup and cooperation efforts in this case were reasonable up through implementing a winterization plan but less than adequate thereafter.

Multiple Day Violations

For violations that are assessed a civil liability on a per day basis and do not constitute a single operational upset, the initial liability amount should be assessed for each day up to thirty (30) days. For violations that last more than thirty (30) days, the daily penalty 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 Water Board must make express findings that the violation:

- a. Is not causing daily detrimental impacts to the environment and is not causing daily detrimental impacts to the regulatory program;
- b. Results in no discrete economic benefit from the illegal conduct that can be measured on a daily basis; or,
- c. Occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.

If one of the above findings is made, an alternate approach to penalty calculation for multiple day violations may be used. In these cases, the Enforcement Policy provides that liability shall not be less than an amount that is calculated based on an assessment of the initial Total Base Liability Amount for the first 30 days of the violation, plus an assessment for each 5-day period of violation thereafter, until the 60th day, plus an assessment for each 30 days of violation thereafter.

Failure to timely submit a site conceptual model or corrective action plan under a CAO or other regulatory authority, failure to submit a response to an investigation order under Water Code section 13267, as well as similar violations that delay remedial action, are not the type of violation for which the findings required by this section can ordinarily be made. Finding (b) may be made, at the discretion of the Water Board, in cases where the sole economic benefit measurable on a daily basis is "the time value of money."

The Prosecution Team alleges that although the Dischargers initially sought economic benefit from their illegal conduct, this benefit may not be realized if the impacts are fully restored, and therefore cannot be measured on a daily basis at this time. Furthermore, as described in Step 7 below, the Regional Water Board

would not have permitted the earthwork on the property. Therefore, it is not possible to estimate the economic benefit from the discharge violations on a daily basis.

Violations 1 through 12: For these discharge violations, the Prosecution Team has already limited assessing liability for only days with precipitation, a total of 50 days, and therefore does not propose further reducing the days of violation.

Violations 13 and 14: For the two sites with persisting impacts to wetlands, the Prosecution Team alleges a total of 1,378 days of violation. Therefore, using the Enforcement Policy's days collapsing methodology, the Prosecution Team recommends collapsing the number of days for which administrative civil liability shall be assessed from **1,378 to 79** (1 assessment for each of the first 30 days + 1 assessment for each 5-day period from day 31 through 60 + 1 assessment for each 30 days of violation thereafter).

Violation 15: For the failure to file an RMMP acceptable to the Regional Water Board or its delegated officer by April 15, 2020, the Discharger has been in violation for a total of 754 days through the date of the Complaint. The Prosecution Team finds that the Dischargers have been recalcitrant in developing adequate plans and therefore does not propose utilizing the Enforcement Policy's days collapsing methodology. However, in recognition of the Dischargers' efforts to submit an RMMP, albeit deficient, as well as to focus on only the days of violation when the Dischargers were in control of the development and completion of the RMMP, the Prosecution Team proposes to remove the 149 days of staff review of the deficient RMMPs from this total, as described above. The Prosecution Team proposes that the reduction in the penalty calculation from **754 to 605** days already applied above is sufficient here, and no other days collapsing should be applied.

Violation 16: For the failure to implement an acceptable RMMP by October 15, 2020, the Discharger has been in violation for a total of 571 days through the date of the Complaint. The Prosecution Team finds that the Dischargers have been recalcitrant in developing adequate plans and therefore does not propose utilizing the Enforcement Policy's days collapsing methodology. However, in recognition of the Dischargers' efforts to submit an RMMP, albeit deficient, as well as to focus on only the days of violation when the Dischargers were in control of the development and completion of the RMMP, the Prosecution Team proposes to remove the 149 days of staff review of the deficient RMMPs from this total, as described above. The Prosecution Team proposes that the reduction in the penalty calculation from **571 to 422** days already applied above is sufficient here, and no other days collapsing should be applied.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Potential for Harm determined in Steps 2 and 3.

Total Base Liability Amount for Discharge Violations:

The Total Base Liability Amount for the discharge violations calculated on a per-gallon and per-day basis is as follows:

Violations 1 through 12: [12 (Basin Plan violations) x 50 (days of precipitation) x 0.28 (per-day factor) x \$5,000/day = \$840,000] x 1.4 (culpability) x 1.0 (history of violations) x 1.2 (cleanup and cooperation) = **\$1,411,200**

Violations 13 and 14: [2 (Water Code 13376 violations) x 79 (collapsed days) x 0.28 (per-day factor) x \$10,000/day = \$442,400] x 1.4 (culpability) x 1.0 (history of violations) x 1.2 (cleanup and cooperation) = **\$743,232**

Total Discharge Violations Liability: \$1,411,200 + \$743,232 = \$2,154,432

Total Base Liability Amount for Non-Discharge Violations:

The Total Base Liability Amount for the non-discharge violation calculated on a per-day basis is as follows:

Violation 15: [1 violation x 605 (collapsed days) x 0.35 (per-day factor) x \$1,000/day = \$211,750] x 1.4 (culpability) x 1.0 (history of violations) x 1.2 (cleanup and cooperation) = **\$355,740**

Violation 16: [1 violation x 422 (collapsed days) x 0.35 (per-day factor) x \$5,000/day = \$738,500] x 1.4 (culpability) x 1.0 (history of violations) x 1.2 (cleanup and cooperation) = **\$1,240,680**

Total Non-Discharge Violations Liability: \$355,740 + \$1,240,680 = \$1,596,420

Total Discharge and Non-Discharge Liability: \$2,154,432 + \$1,596,420 = \$3,750,852

Step 6. Ability to Pay and Continue in Business

If the Water Boards have sufficient financial information necessary to assess the violator's ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in business. The ability of a discharger to pay an ACL is determined by its income (revenues minus expenses) and net worth (assets minus liabilities).

During the course of settlement negotiations, the Dischargers each provided documentation of their financial ability to pay. The Prosecution Team has reviewed this information and agrees that neither Krasilsa Pacific Farms LLC nor Hugh Reimers, individually or combined, possess assets sufficient to pay the Total Base Liability Amount set forth in Step 5. The Dischargers' inability to pay the Total Base Liability Amount set forth in Step 5 is based on a combination of consistent annual operating deficiencies since at least 2016, and insufficient net assets suitable to liquidate in order to pay the liability amount. The Prosecution

Team notes also that the Dischargers have separately entered into a stipulated civil judgment with the Sonoma County District Attorney's Office whereby the Dischargers agreed to pay a total of \$525,000 to Sonoma County and the California Department of Fish and Wildlife, with an additional \$400,000 in penalties suspended pending satisfaction of that stipulated judgment. This judgment amount further reduces the Dischargers' ability to pay the proposed penalty here.

The Prosecution Team and the Dischargers agree that the maximum administrative civil liability amount that the Dischargers can pay and still be able to come into compliance with the CAO is four hundred fifty thousand dollars (**\$450,000**). As described in the Enforcement Policy, in most cases, it is in the public interest for the discharger to be allowed to continue in business in order to bring its operations into compliance. The Prosecution Team finds that to be the case here.

Step 7. Economic Benefit

The Enforcement Policy (pages 20-21) requires that the adjusted Total Base Liability Amount be at least 10 percent higher than any economic benefit realized by the discharger.

Any estimate of economic benefit is not able to capture the fact that the Regional Water Board would not have permitted the earthwork on the property. Therefore, the Prosecution Team does not estimate economic benefit for Violations 1 through 14. Violation 15 alleges failure to provide an adequate RMMP. However, the Dischargers did hire consultants to prepare an RMMP, although the draft RMMPS submitted to date have all been deficient. Therefore, there is likely no way to calculate any economic benefit, in the form of either delayed or avoided costs, for Violation 15. Because there is no plan by which to estimate costs of remediation for the Property, there is no way to calculate any economic benefit, either as delayed or avoided costs, for Violation 16.

Step 8. Other Factors as Justice May Require

If the Regional 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 to justify this adjustment. The Regional Water Board may exercise its discretion to include some of the costs of investigation and enforcement in a total administrative civil liability.

Step 9. Maximum and Minimum Liability Amounts

The Enforcement Policy directs the Regional Water Board to consider maximum and minimum liability amounts set forth in the applicable statutes.

Pursuant to Water Code section 13350(e)(1), civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.

Pursuant to Water Code section 13385(c)(1), civil liability on a daily basis shall not exceed ten thousand dollars (\$10,000) for each day the violation occurs. And (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

Pursuant to Water Code section 13268(b)(1), Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

Statutory Maximum Liability Amount for discharge violations:

The violations addressed in this matter include **12** discharge violation pursuant to Water Code section 13350 that occurred during **50 days** with precipitation and **two** discharge violations pursuant to Water Code section 13385 that have persisted uncorrected over a **1,378-day period**.

Max. Penalty for discharge Violations 1 through 12: 12 (violations) x 50 (days) x \$5,000 (per-day) = \$3,000,000

Max. Penalty for discharge Violations 13 and 14: 2 (violations) x 1,378 (days) x \$10,000 (per-day) = \$27,560,000

Statutory Maximum Liability Amount for non-discharge violations:

The violations addressed in this matter include two non-discharge violations:

One for failing to submit the required RMMP acceptable to the Regional Water Board or its delegated officer for **605 days** from April 15, 2020 to May 9, 2022 minus 149 days for Staff review.

And

One for failing to implement an approved RMMP for **422 days** from October 15, 2020 to May 9, 2022 minus 149 days for Staff review.

Max. Penalty for Violation 15: 1 (violation) x 605 (days) x \$1,000 (per-day)) = \$605,000

Max. Penalty for Violation 16: 1 (violation) x 422 (days) x \$5,000 (per-day) = \$2,110,000

Statutory Maximum penalty for discharge and non-discharge violations:

The aggregate Max. Penalty for Violations 1-12, **\$3,000,000**, exceeds the Base Liability of **\$1,411,200**, so the Prosecution Team proposes assessing the Base Liability for Violations 1-12.

The aggregate Max. Penalty for Violations 13 and 14, **\$27,560,000**, exceeds the Base Liability of **\$743,232**, so the Prosecution Team proposes assessing the Base Liability for Violations 13 and 14.

The Max. Penalty for Violation 15, **\$605,000**, exceeds the Base Liability of **\$355,740**, so the Prosecution Team proposes assessing the Base Liability for Violation 15.

The Max. Penalty for Violation 16, **\$2,110,000**, exceeds the Base Liability of **\$1,240,680**, so the Prosecution Team proposes assessing the Base Liability for Violation 16.

Statutory Minimum Liability Amount for discharge and non-discharge violations:

Minimum Liability for discharge violations: Water Code section 13350, subdivision (e)(1)(A), requires that a minimum liability of (\$500) for each day in which the discharge occurs and for each day a cleanup and abatement order is violated.

Violations 1 through 12 do not involve discharges in violation of a cleanup and abatement order, so there is no applicable statutory minimum under Water Code section 13350.

Violations 13 and 14 do not involve discharges in violation of a cleanup and abatement order, so there is no applicable statutory minimum under Water Code section 13350.

Water Code section 13268 does not stipulate a minimum liability for violations of section 13267, so there is no applicable statutory minimum.

Water Code section 13350, subdivision (e)(1)(B), requires that a minimum of (\$100) civil liability for each day in which the violation occurs when there is no discharge, but an order issued by the regional board is violated. This minimum applies to Violation 16.

Violation 16: The Minimum Liability for Violation of Required Action 9: (1 (violation) x 422 (days) x \$100 (per-day)) = **\$42,200**.

The Enforcement Policy states that Regional Water Boards should strive to impose civil liabilities at least ten percent higher than the economic benefit to the violator.

As discussed in Step 7 above, the Regional Water Board's Prosecution Team is unable to determine if the Discharger realized any economic benefit from the violations cited in the Complaint. Therefore, for purposes of this step, the Prosecution Team does not estimate a minimum liability according to Economic Benefit and assess a minimum liability for Violations 1 through 15 of **\$0**.

The proposed liability of \$450,000 exceeds these minimum liability amounts.

Final Liability Amount

For purposes of Settlement of the Complaint, the total proposed liability amount for the violations described above is **four hundred fifty thousand dollars (\$450,000)**.