

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

ACL COMPLAINT R5-2011-0599

ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF

ANTONIO P AND MARY R BETTENCOURT, TRUSTEES OF THE 1993 ANTONIO P AND MARY R BETTENCOURT LIVING TRUST, OWNER, TOM BLOOMFIELD, LESSEE, AND F.A. MAGGIORE & SONS, LLC, SUBLESSEE, OF 25771 MARSH CREEK ROAD, BRENTWOOD, CALIFORNIA

CONTRA COSTA COUNTY

This Complaint is issued to Antonio P and Mary R Bettencourt, as Trustees of the 1993 Antonio P and Mary R Bettencourt Living Trust, owner, Tom Bloomfield, lessee, and F.A. Maggiore & Sons, LLC, sub-lessee, of 25771 Marsh Creek Road, Brentwood, California (hereinafter collectively referred to as "Discharger") pursuant to California Water Code (CWC) section 13350, which authorizes the imposition of Administrative Civil Liability (ACL) and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that indicate the Discharger failed to comply with the conditions of the Coalition Group Conditional Waiver of Waste Discharge Requirements from Irrigated Lands (the "Conditional Waiver").

The Executive Officer of the Central Valley Regional Water Quality Control Board (hereinafter Central Valley Water Board or Board) alleges the following:

Background

1. The Discharger owns a 57-acre parcel identified as Contra Costa County Assessor's parcel number 011-110-026 (hereinafter "parcel"), located at 25771 Marsh Creek Road, Brentwood, California, which is used to grow tomatoes. Irrigation return flows from this parcel discharge into a roadside canal that discharges into Kellogg Creek. Subsequently, Kellogg Creek discharges into Discovery Bay, which is tributary to waters of the Sacramento/San Joaquin Delta.
2. The Discharger has obtained regulatory coverage for their waste discharges by enrolling in the San Joaquin County & Delta Water Quality Coalition (Coalition). Coalitions cover their members' waste discharges under Resolution R5-2011-0032, Short Term Renewal of Order R5-2006-0053, the Conditional Waiver. Upon obtaining regulatory coverage under the Conditional Waiver, the Discharger must comply with the conditions it sets forth.

3. The Conditional Waiver requires dischargers to implement management practices, as necessary, to improve and protect water quality and to achieve compliance with applicable water quality standards. The applicable water quality standards are outlined in the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition*, (the "Basin Plan"). These water quality objectives give narrative limits to the suspended sediment load of discharges, as well as quantitative limits to increases in turbidity.

Chronology of Events

4. On 1 July 2010, staff of the Central Valley Water Board investigated a complaint of waste discharge to waters of the state in Contra Costa County. During the investigation, staff observed sediment-laden water discharging from the Discharger's parcel into a roadside canal. This canal discharges to Kellogg Creek, a tributary to waters of the Sacramento/San Joaquin Delta. The discharge had a turbidity reading of 260 nephelometric units (ntus) compared to the likely irrigation supply water, which had a turbidity of 11ntu (an increase of over 2,000 %). The source water for the aforementioned supply originated from the Clifton Court Forebay, also waters of the Sacramento/San Joaquin Delta.
5. On 31 August 2010, the Discharger was issued a Water Code section 13267 Order requiring the submission of a technical report describing actions that will be taken to prevent future pollution discharges.
6. On 18 October 2010, the Discharger submitted a technical report stating that they plan to reduce discharge flows, install a double sump drain system, and monitor discharge flows for excessive turbidity.
7. On 29 November 2010, staff of the Central Valley Water Board mailed the Discharger a comment letter concluding that the technical report was incomplete. The letter also specified the technical report's deficiencies.
8. On 31 January 2011, staff of the Central Valley Water Board received an updated technical report from the operator, who signed the technical report on the Discharger's behalf. The updated technical report explained that discharges will be monitored for excessive sediment. It also explained that if excessive sediment discharges are observed, the length of irrigation sets would be reduced and water would be held on site longer before being released.

9. On 15 June 2011, Board staff conducted a follow-up inspection of the Discovery Bay area to identify source properties discharging sediment-laden irrigation return flows to waters of the state. During the inspection, staff observed sediment-laden water with a turbidity reading of 571 ntu discharging from the Discharger's parcel into the aforementioned water conveyance system. The closest accessible supply water had a turbidity of 60 ntu. This discharge contributed to a sediment discharge of 74 ntu into Kellogg Creek; compared to the upstream creek turbidity measured at 24 ntu (an increase of about three fold).

Alleged Violations

10. The discharge observed on 1 July 2010 created a condition of pollution or nuisance in violation of the Basin Plan. It also violated applicable water quality objectives by raising the turbidity concentration by over 20 percent, thus violating the water quality objectives in the Basin Plan. This is also a violation of the conditions in the Conditional Waiver.
11. The discharge observed on 15 June 2011 also created a condition of pollution or nuisance in violation of the Basin Plan. It also violated applicable water quality objectives by raising the turbidity concentration by over 20 percent, thus violating the water quality objectives in the Basin Plan. This is also a violation of the conditions in the Conditional Waiver.

REGULATORY CONSIDERATIONS

12. California Water Code (Water Code) Section 13260(a) requires that any person discharging waste or proposing to discharge waste within any region that could affect the quality of the waters of the State, other than into a community sewer system, shall file with the appropriate Regional Board a report of waste discharge (RWD) containing such information and data as may be required by the Central Valley Water Board, unless the Central Valley Water Board waives such requirement.
13. Water Code Section 13263 requires the Central Valley Water Board to prescribe Waste Discharge Requirements (WDRs), or waive WDRs, for the discharge. The WDRs must implement relevant water quality control plans and the Water Code.
14. Pursuant to CWC section 13269, subdivision (a)(1), on and after 1 January 2000, the provisions of subdivisions (a) and (c) of Section 13260, subdivision (a) of Section 13263, or subdivision (a) of Section 13264 may be waived by the state board or a regional board as to a specific discharge or type of discharge if the state board or a regional board determines, after any necessary state board or regional board meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest. The state board or a regional board shall give notice of any necessary meeting by publication pursuant to Section 11125 of the Government Code.

15. Resolution R5-2011-0032, Short Term Renewal of Order R5-2006-0053, Coalition Group Conditional Waiver of Waste Discharge Requirements from Irrigated Lands (the "Conditional Waiver") was adopted pursuant to CWC section 13269. The Conditional Waiver sets forth conditions for which the enrollee must follow to remain in compliance.
16. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition*, (the "Basin Plan") establishes water quality objectives designed to protect the beneficial uses delineated in the Basin Plan. In regard to suspended sediment and turbidity the Basin Plan states at III-7.00 and III-9.00, respectively:

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.

Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases in turbidity attributable to controllable water quality factors shall not exceed the following limits:

- *Where natural turbidity is less than 1 Nephelometric Turbidity Unit (NTU), controllable factors shall not cause downstream turbidity to exceed 2*
- *Where natural turbidity is between 1 and 5 NTUs, increases shall not exceed 1 NTU.*
- *Where natural turbidity is between 5 and 50 NTUs, increases shall not exceed 20 percent.*
- *Where natural turbidity is between 50 and 100 NTUs, increases shall not exceed 10 NTUs.*
- *Where natural turbidity is greater than 100 NTUs, increases shall not exceed 10 percent.*

17. The Conditional Waiver states at Item 3:

"Dischargers who are participants in a Coalition Group shall implement management practices, as necessary, to improve and protect water quality and to achieve compliance with applicable water quality standards."

18. The Conditional Waiver states at Item 6:

“Coalition Groups and the Dischargers who are participants in Coalition Groups shall comply with the terms and conditions of the Conditional Waiver and take action to improve and protect waters of the State.”

19. The Conditional Waiver states, at Attachment B, Part C:

“1. ...Dischargers must comply with applicable water quality standards... Dischargers shall not cause or contribute to an exceedance of any applicable water quality standard.”

“2. ...Dischargers shall implement management practices to achieve best practicable treatment or control of the discharge that will reduce wastes in the discharges to the extent feasible and that will achieve compliance with applicable water quality standards, protect the beneficial uses of waters of the State, and prevent nuisance.”

20. CWC section 13350 states: (a) A person who (1) violates a cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of a waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other actions or provisions of this division, shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

CALCULATION OF CIVIL LIABILITIES UNDER CWC SECTION 13350

21. CWC section 13350 states at section (e): The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not on both.
22. CWC section 13350 states at section (e)(1): The civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.
23. An administrative civil liability may be imposed pursuant to the procedures described in CWC section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.

24. The discharge to surface water described in paragraphs 4 & 9 are violations of the Conditional Waiver. Any discharge of waste that creates, or threatens to create, a condition of pollution or nuisance is in violation of the Basin Plan. Additionally, raising the turbidity level by over 20% is a violation of the applicable water quality objectives in the Basin Plan. CWC sections 13350(e) and (e)(1) authorize the imposition of administrative civil liability for such violations.
25. **Maximum Civil Liability for Discharge to Surface Waters:**
Per CWC section 13350, civil liability can be imposed administratively by the Central Valley Water Board on a daily or per gallon basis, but not both. Accurate flow data is not available for the violations that occurred on both 1 July 2010 and 15 June 2011; however, Board staff did observe a significant waste discharge from the Discharger's field. Therefore the civil liability will be imposed on a per day basis. This liability may not exceed \$5,000 for each day in which the violation occurs. The maximum administrative civil liability that may be assessed pursuant to section 13350 is **\$10,000**.
26. **Minimum Civil Liability for Discharge to Surface Waters:**
On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability that addresses the factors that must be considered when imposing an administrative civil liability. The entire Enforcement Policy can be found at: http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final_111709.pdf. The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent.

In general, the discharge was due to excessive sediments being carried off the field during irrigation. In a technical report submitted on 31 January 2011, signed by the operator on the Discharger's behalf, the Discharger claimed that discharges would be monitored for excessive sediments. In the event that excessive sediment was observed in the discharges, the technical report read that the length of irrigation sets would be reduced and water would be held on site longer before being released. The discharges were not monitored and/or the sediment laden tail waters were not kept on site.

The economic benefit was estimated based on the Discharger neglecting to check the tail water discharges. Board staff estimated that if the Discharger irrigated approximately every 10 days during irrigation season (April through June) and checked the tail water discharges twice per irrigation session, the Discharger would have spent a total of 3 hours through the entire irrigation season checking their tail water discharges for excessive sediment (9 irrigation sessions X .33hrs/session to check the ponds). This equals an avoided cost of \$150 (3hrs X \$50 per hr).

Per the Enforcement Policy, the minimum administrative civil liability that may be imposed by the Central Valley Water Board must be 10 percent greater than the economic benefit. This amount is equal to **\$165**.

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

27. Pursuant to CWC section 13327, in determining the amount of any civil liability imposed, the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on the violator's ability to continue business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
28. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in Attachment H. 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.
29. As described in paragraph 25, the maximum administrative civil liability for the above violations is **\$10,000**. After consideration of the above facts and after applying the penalty methodology, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$10,000**, which represents the economic benefit derived from the violations, as detailed in paragraph 26, the recovery of enforcement staff costs, and the minimum 10 percent economic benefit penalty required by the Enforcement Policy. The specific factors considered in this administrative civil liability are detailed in Attachment H.
30. Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional civil liabilities for violations of the conditions of the Discharger's conditional waiver of waste discharge requirements and/or applicable orders for which civil liabilities have not yet been assessed, or for violations that may subsequently occur.

ANTONIO P AND MARY R BETTENCOURT, TRUSTEES OF THE 1993 ANTONIO P AND MARY R BETTENCOURT LIVING TRUST, OWNER, TOM BLOOMFIELD, LESSEE, AND F.A. MAGGIORE & SONS, LLC, SUBLESSEE, OF 25771 MARSH CREEK ROAD, BRENTWOOD, ARE HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of **ten thousand dollars (\$10,000)**. The amount of the proposed liability is based upon an analysis of the factors cited in CWC section 13323 and the Enforcement Policy, includes consideration of the economic benefit or savings resulting from the violation, and accounts for staff costs.
2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled for **29/30 March 2012**, unless one of the following occurs by **21 February 2012**:
 - a) The Discharger waives the hearing by completing the attached form (checking the box next to Option 1) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of **ten thousand (\$10,000)**; or
 - b) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking the box next to Option 2 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed; or
 - c) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking the box next to Option 3 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed.
3. If a hearing is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
4. If this matter proceeds to hearing, the Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this Complaint, and through completion of the hearing.

Original signed by

PAMELA C. CREEDON, Executive Officer

20 January 2012

Date

ACL Complaint R5-2011-0599
Antonio P and Mary R Bettencourt,
Trustees of the 1993 Antonio P and Mary R Bettencourt Living Trust
Tom Bloomfield and F.A. Maggiore & Sons, LLC
Contra Costa County

20 January 2012

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Attachment A: 1 July 2010 Inspection Report
Attachment B: 31 August 2010 13267 Order
Attachment C: 18 October 2010 Technical Report
Attachment D: 29 November 2010 Staff Letter to Discharger
Attachment E: 31 January 2011 Updated Technical Report
Attachment F: 4 March 2011 Staff Response Letter
Attachment G: 15 July 2011 Inspection Report
Attachment H: Penalty Calculations

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent Antonio P and Mary R Bettencourt, as Trustees of the 1993 Antonio P and Mary R Bettencourt Living Trust, owner, Tom Bloomfield, lessee, and F.A. Maggiore & Sons, LLC, sub-lessee, of 25771 Marsh Creek Road, Brentwood, California (hereinafter collectively referred to as "Discharger") in connection with Administrative Civil Liability Complaint R5-2011-0599 (hereafter Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served. The person who has been issued a complaint may waive the right to a hearing."

(OPTION 1: Check here if the Discharger waives the hearing requirement and will pay in full.)

a. I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board.

b. I certify that the Discharger will remit payment for the proposed civil liability in the full amount of **ten thousand dollars (\$10,000)** by check that references "ACL Complaint R5-2011-0599" made payable to the *State Water Pollution Cleanup and Abatement Account*. Payment must be received by the Central Valley Water Board by **21 February 2012**.

c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after a 30-day public notice and comment period. Should the Central Valley Water Board receive significant new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.

d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

(Print Name and Title)

(Signature)

(Date)

Attachment A to ACL Complaint No. R5-2011-0599

ATTACHMENT A

1 July 2010

Inspection Report

Attachment B to ACL Complaint No. R5-2011-0599

ATTACHMENT B

31 August 2010

Order for Technical Report
and Notice of Violation

Attachment C to ACL Complaint No. R5-2011-0599

ATTACHMENT C

18 October 2010 Technical Report

Submitted by:
Anthony Bettencourt (Landowner)
&
Tom Bloomfield (Lessee)

Attachment D to ACL Complaint No. R5-2011-0599

ATTACHMENT D

29 November 2010

Staff Letter to Discharger
Response to 18 October 2010 Technical Report

ATTACHMENT E

31 January 2011 Technical Report

Submitted by:
Tom Bloomfield (Lessee)
&
FA Maggiorie & Sons (sub-lessee)

On behalf of:
Anthony Bettencourt (Landowner)
&
Mary Bettencourt (Landowner)

ATTACHMENT F

4 March 2011

Staff Letter to Discharger
Response to 31 January 2011 Technical Report

ATTACHMENT G

15 July 2011

Inspection Report

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The proposed administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (the "Enforcement Policy") and using the "Penalty Calculation Methodology Worksheet, version date 6/24/2010" (the "Penalty Calculation Worksheet"; see attached). 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:

1. Violation No. 1 (1 July 2010 Discharge of Waste in violation of the Conditional Waiver)

Calculation of Penalty for Violation No.1

Step1. Potential for Harm for Discharge Violations

The *Potential for Harm for Discharge Violations* was calculated using the Penalty Calculation Worksheet (see attached). This steps looks at the nature, circumstances, extent and gravity of the violation.

Harm or Potential Harm to Beneficial Uses: 3

Discussion: The Discharger was given the score of 3 (moderate), which is summed with the other factors to give the final 'Potential for Harm' factor below. A moderate score was given because the discharge had moderate impact to beneficial uses, as the observed discharge is likely to attenuate over time without acute or chronic affects.

Physical, Chemical, Biological or Thermal Characteristics of the Discharge: 3

Discussion: The Discharger was given the score of 3 (above moderate), which is summed with the other factors to give the final 'Potential for Harm' factor below. An above moderate score was given as the discharge was to waters of the Sacramento/San Joaquin Delta, an area where there is a substantial concern regarding receptor protection.

Susceptibility to Cleanup or Abatement: 1

Discussion: The Discharger was given the score of 1 (< 50% of the discharge is susceptible to cleanup or abatement), which is summed with the other factors to give the final 'Potential for Harm' factor below. As the discharge has proceeded downstream less than 50% of the discharge is susceptible to cleanup.

Summing the scores given for the above factors the 'Potential for Harm' factor score is found to be 7 (Harm or Potential Harm to Beneficial Uses score of 3 + Physical, Chemical, Biological or Thermal Characteristics of the Discharge score of 3 + Susceptibility to Cleanup or Abatement score of 1).

Step 2. Assessment for Discharge Violations

Flow data is not available for this event. Therefore, the initial liability will be assessed based on a per day calculation.

Using Table 2 of the in the Enforcement Policy, the per day factor for this violation was determined to be 0.2. This factor was determined using Table 2 with the appropriate 'Deviation from Requirement' and the 'Potential for Harm' factor generated above. The Discharger violated the conditions of the Conditional Waiver, as outlined above in the "Regulatory Considerations" section of the Administrative Civil Liability Complaint. Therefore the 'Deviation from Requirement' factor is moderate because the discharge of sediment resulted in the condition not being met.

Step 3. Per Day Assessment for Non-Discharge Violations

This step is not applicable.

Initial Liability

The Discharger has obtained regulatory coverage for their waste discharges under the Conditional Waiver by enrolling in a Coalition. Discharging sediment has violated the conditions of the Conditional Waiver, which are referenced above.

Violations of the Conditional Waiver are punishable under Water Code section 13350 by civil liability in an amount which shall not exceed five thousand dollars (\$5,000) for each day in which the violation occurs.

Applying the per-day factor to the number of days of violation, calculation of the initial liability totals \$1,000 (0.2 per day factor X 1 day of violation X \$5000 per day penalty).

Step 4. Adjustment Factors

a) Culpability: 1

Discussion: As this violation was the Discharger's first offense staff determined that a neutral culpability score was fair. Therefore the Discharger was given the neutral score of 1, which neither increases nor decreases the fine.

b) *Cleanup and Cooperation: 1*

Discussion: The Discharger submitted a technical report outlining steps being taken to reduce excessive sediment in future discharges. A sediment basin was listed in the technical report as one of the measures that would be taken to reduce sediment being discharged from their parcel. As described in the technical report the sediment basin was constructed prior to the following irrigation season. The Discharger was given the neutral score of 1, which neither increases nor decreases the fine.

c) *History of Violations: 1*

Discussion: The Discharger was given the score of 1 which neither increases nor decreases the fine. Prior to this event, staff is unaware of any violations that occurred from the parcel.

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: \$1,000* (Initial Liability (\$1,000) x Adjustments (1)(1)(1)).

2. Violation No. 2 (15 June 2011 Discharge of Waste in violation of the Conditional Waiver)

Calculation of Penalty for Violation No. 2

Step1. Potential for Harm for Discharge Violations

The *Potential for Harm for Discharge Violations* was calculated using the Penalty Calculation Worksheet (see attached). This steps looks at the nature, circumstances, extent and gravity of the violation.

Harm or Potential Harm to Beneficial Uses: 3

Discussion: The Discharger was given the score of 3 (moderate), which is summed with the other factors to give the final 'Potential for Harm' factor below. A moderate score was given because the discharge had moderate impact to beneficial uses, as the observed discharge is likely to attenuate over time without acute or chronic affects.

Physical, Chemical, Biological or Thermal Characteristics of the Discharge: 3

Discussion: The Discharger was given the score of 3 (above moderate), which is summed with the other factors to give the final 'Potential for Harm' factor below. An above moderate score was given as the discharge was to waters of the Sacramento/San Joaquin Delta, an area where there is a substantial concern regarding receptor protection.

Susceptibility to Cleanup or Abatement: 1

Discussion: The Discharger was given the score of 1 (< 50% of the discharge is susceptible to cleanup or abatement), which is summed with the other factors to give the final 'Potential for Harm' factor below. As the discharge has proceeded down stream less than 50% of the discharge is susceptible to cleanup.

Summing the scores given for the above factors the 'Potential for Harm' factor score is found to be **7** (Harm or Potential Harm to Beneficial Uses score of 3 + Physical, Chemical, Biological or Thermal Characteristics of the Discharge score of 3 + Susceptibility to Cleanup or Abatement score of 1).

Step 2. Assessment for Discharge Violations

Flow data is not available for this event. Therefore, the initial liability will be assessed based on a per day calculation.

Using Table 2 of the in the Enforcement Policy, the per day factor for this violation was determined to be 0.31. This factor was determined using Table 2 with the appropriate 'Deviation from Requirement' and the 'Potential for Harm' factor generated above. The Discharger failed to follow the plan outlined in the technical report submitted on 31 January 2011. Therefore the 'Deviation from Requirement' factor is major as the requirement has been rendered ineffective.

Step 3. Per Day Assessment for Non-Discharge Violations

This step is not applicable.

Initial Liability

The Discharger has obtained regulatory coverage for their waste discharges under the Conditional Waiver by enrolling in a Coalition. Discharging sediment has violated the conditions of the Conditional Waiver, which are referenced above.

Violations of the Conditional Waiver are punishable under Water Code section 13350 by civil liability in an amount which shall not exceed five thousand dollars (\$5,000) for each day in which the violation occurs.

Applying the per-day factor to the number of days of violation, calculation of the initial liability totals \$1,550 (0.31 per day factor X 1 day of violation X \$5000 per day penalty).

Step 4. Adjustment Factors

a) *Culpability: 1.2*

Discussion: The Discharger was given the score of 1.2, which increases the fine. This was based on the fact that the Discharger had been notified of the prior violation, and still had failed to stop the discharge of sediment-laden water. The Prosecution Team contends that the fact that the Discharger was on notice of the prior violations can lead to the conclusion that the second discharges were the result of the Discharger's negligence.

b) *Cleanup and Cooperation: 1.2*

Discussion: The Discharger submitted a technical report with a plan to monitor and reduce sediment. It appears that the sediment basin described was constructed, but the settling pond failed to reduce the suspended sediment load in the water. Additionally, the Discharger claimed that they would be monitoring discharges from their parcel for excessive sediment. It appears that they did not complete that task. The Discharger was given a score of 1.2

c) *History of Violations: 1.1*

Discussion: The Discharger was given the score of 1.1, as this was the Discharger's second offense.

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.

b) *Total Base Liability Amount: \$2,455* (Initial Liability (\$1,550) x Adjustments (1.2)(1.2)(1.1)).

COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS

The Combined Total Base Liability Amount for the two Violations is \$3,455 (\$1,000 from Violation No. 1 and \$2,455 from Violation No. 2).

The following factors apply to the combined Total Base Liability Amounts for both of the violations discussed above.

Step 6. Ability to Pay and Continue in Business

- a) *Adjusted Base Liability Amount: \$3,455*

Discussion: As per the Enforcement Policy, “[t]he ability of a discharger to pay an ACL is determined by its revenues and assets.” Board staff contends that the Discharger has the ability to pay based on 1) the Discharger’s own the property, a significant asset, 2) the Discharger has an agricultural operation on the property, an ongoing business that generates revenues.

Based on the reasons discussed above, staff is not recommending a reduction to the Combined Total Base Liability Amount based on the Discharger’s inability to pay.

Step 7. Other Factors as Justice May Require

- a) *Base Liability Amount: \$3,455 + \$9,900 (staff costs) = \$13,355*

- b) *Discussion:* The Central Valley Water Board has incurred \$9,900 in staff costs associated with the investigation and enforcement of the violation alleged herein. This represents approximately 66 hours of staff time devoted to investigating and reporting the violations, and drafting this memo at \$150 an hour. In accordance with the Enforcement Policy, this amount is added to the Base Liability Amount.

Step 8. Economic Benefit

- a) *Estimated Economic Benefit: \$150*

Discussion: Staff estimates that monitoring the settling pond for excessive sediment discharges should not take longer than 20 minutes per irrigation session (one 10 minute check half way through the irrigation session and another 10 minute check towards the end of the session).

According to the technical report submitted by the Discharger on 31 January 2011, if excessive sediments are observed in the discharge, the Discharger has the ability to hold the tailwater on the property for a longer period before releasing. The discharger also claims they can respond by reducing irrigation flows. If the discharges had been monitored, the Discharger could have been able to prevent the discharge of excessive sediments from their parcel.

Also according to the aforementioned technical report, the irrigation season typically is from April through June, approximately 91 days. If the Discharger irrigates approximately every 10 days during this period they would spend approximately 3 hours through the irrigation season checking the discharges for excessive sediment (9 irrigation sessions X .33hrs/session to check the ponds). This equals an avoided cost of \$150 (3hrs X \$50 per hr).

In calculating the 'Estimated Economic Benefit' for this ACL complaint, Staff considered calculating the cost of retrofitting the sediment basin on site as well as the use of Polyacrylamide (a synthetic water-soluble polymer used to bind soil particles and assists in pulling suspended sediments out of the water). However, Staff did not want to assume that either of these Best Management Practices ("BMPs") would be applicable to this site, as the Discharger should know which BMPs are best for their operation. In drafting the ACL Complaint, the Board should reserve the right to adjust the Estimated Economic Benefit, should evidence be produced that indicates that the Discharger should have installed these BMPs.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$ 165*

Discussion: 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 in this memo is \$150. Therefore \$150 x 10% results in a Minimum Liability of \$165.

b) *Maximum Liability Amount: \$10,000*

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13350, which is \$5,000 for each day in which the violation occurs.

Step 10. Final Liability Amount

Based on the above analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the Discharge of Waste in violation of the Conditional Waiver is \$13,355. This amount is a sum of the 'Base Liability' and 'Staff Costs' and takes into account the multipliers applied in the 'Ability to Pay and Continue Business' factor as well as 'Other Factors as Justice May Require'. Attached to this memo is a spreadsheet that demonstrates the use of the penalty calculation methodology. However, due to the maximum fine being set at \$5,000 per day, the final liability amount must be reduced and set at **\$10,000**, to reflect the 2 violation days.

Attachment H to ACL Complaint No. R5-2011-0599

For ease of reference, the Enforcement Policy adjustment factors used in this civil liability calculation are tabulated below:

Adjustment Factors

Adjustment Factors	Range	Factors Used	
		Violation No. 1	Violation No. 2
Harm or Potential Harm to Beneficial Uses	0 to 5	3	3
Physical, Chemical, Biological or Thermal Characteristics of the Discharge	0 to 4	3	3
Susceptibility to Cleanup or Abatement	0 or 1	1	1
Final Score	0 to 10	7	7
Deviation from the Requirement	Minor, Moderate, Major	Moderate	Major
Per Day Factor	0.1 to 1	.2	.31
Culpability	0.5 to 1.5	1	1.2
Cleanup and Cooperation	0.75 to 1.5	1	1.2
History of Violations	Subjective, based on history	1	1.1
Ability to Pay	Based on financial information	1	
Other Factors as Justice May Require	None Applicable	1	
Economic Benefit	\$150		
Staff costs	\$9,900		