

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2016-0082

IN THE MATTER OF

WILLIAM R. SINKS ET AL.
MADERA COUNTY

This Order is issued pursuant to California Water Code section 13323¹ to William R. Sinks et al. (Sinks or Discharger) for failing to submit a Report of Waste Discharge (RoWD) as required by Water Code section 13260.

The California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board or Board) finds the following:

1. Irrigated lands in the Central Valley Region that discharge irrigation return flows or storm water may contribute, or have the potential to contribute waste to ground and/or surface waters. The term "waste" is broadly defined in Water Code section 13050, subdivision (d), and includes runoff of sediment or agricultural chemicals. The term "waters of the state" includes all surface water and groundwater within the state. (Wat. Code, § 13050(e).) The Central Valley Water Board is required to regulate the amount of waste that may be discharged to waters of the state. (Wat. Code, § 13263.)
2. Attachment E of the Waste Discharge Requirements General Order for Growers within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group (Order R5-2012-0116-R1) defines "irrigated lands" as "land irrigated to produce crops or pasture for commercial purposes; nurseries; and privately and publicly managed wetlands."
3. Central Valley Water Board staff developed a list of landowners in Madera County, including Sinks, that were likely to be discharging wastewater from irrigated lands to waters of the state and did not have regulatory coverage under waste discharge requirements (i.e., permits) or waivers of waste discharge requirements.
4. In developing this list, Central Valley Water Board staff used county assessor data and geographical land use data (i.e., the California Department of Conservation Farmland Mapping and Monitoring Program (FMMP) land use data) to assist in identifying potential discharges of agricultural wastewater to waters of the state and to identify owners and operators of agricultural lands who may not have complied with the California Water Code. Both data sets were used to develop lists of parcels for which Water Code section 13260 Directive Letters were issued

¹ All references are to the California Water Code unless otherwise noted.

that require parcel owners to obtain regulatory coverage for commercial irrigated lands.

5. Evaluation of county assessor and FMMP data indicates that Sinks owns approximately 154 acres of agricultural land in Madera County (Madera County Assessor's parcel number 023-110-004).
6. On 20 February and 18 April 2013, the Central Valley Water Board issued notices to the Discharger describing new water quality regulations and actions available to comply with the regulations. The Discharger did not obtain regulatory coverage and did not contact the Board.
7. On 19 July 2013, staff conducted an inspection of parcel 023-110-004 and found evidence of a commercial irrigated agricultural operation based on the crop grown and the size of the operation.
8. On 31 July 2013, the Assistant Executive Officer of the Central Valley Water Board issued a Directive Letter (hereafter Directive) to the Discharger, sent via certified mail. The Directive stated that, "*You are receiving this letter because, based on information available to the California Regional Water Quality Control Board, you own the following parcels with irrigated cropland, which are subject to new regulations.*" A copy of the Directive is provided as Attachment B.
9. The Directive required the Discharger to obtain regulatory coverage for their irrigated agricultural parcel *within 15 calendar days of receipt of the Directive*. As detailed in the Directive, Sinks could comply by joining the East San Joaquin Water Quality Coalition ("Coalition" or "ESJ Coalition"), or by submitting a Report of Waste Discharge.
10. The certified mail receipt for the Directive issued to the Discharger was signed as received by Bobby Sinks on 3 August 2013. Sinks did not obtain regulatory coverage by 19 August 2013 and did not contact the Water Board.
11. Because the Discharger failed to respond by the deadline specified in the Directive, a Notice of Violation (NOV) was sent via certified mail to Sinks on 30 August 2013.
12. The certified mail package for the NOV was returned in the mail with notes from the mail carrier indicating that the letter was "refused" by the recipient on 5 September 2013.
13. Staff attempted to contact the Discharger by phone to inform them of pending enforcement, but no working phone number was found.
14. On 19 February 2014, Board staff obtained a process server to deliver the Discharger with a notification letter that an Administrative Civil Liability (ACL) in the

amount of \$3,540 would be issued if the Discharger did not (a) obtain regulatory coverage and (b) initiate settlement discussions regarding the proposed ACL fine by 6 March 2014.

15. The proof of service receipt for the pre-ACL letter issued to the Discharger shows that the pre-ACL letter was received by Bob Sinks on 23 February 2014.

VIOLATION

16. On 10 May 2014, the Assistant Executive Officer of the Central Valley Water Board issued Administrative Civil Liability Complaint (ACL Complaint) R5-2014-0528 to the Discharger in the amount of three thousand five hundred forty dollars (\$3,540) for failing to obtain coalition membership or submit a RoWD as required by Water Code section 13260.
17. On 17 July 2014, the Discharger enrolled in the Coalition and paid the Coalition dues and back dues.

REGULATORY CONSIDERATIONS

18. The Central Valley Water Board's authority to regulate waste discharges that could affect the quality of the waters of the state, which includes both surface water and groundwater, is found in the Porter-Cologne Water Quality Control Act (Water Code Division 7).
19. Water Code section 13260, subdivision (a), requires that "a 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 containing such information and data as may be required by the regional board. The Central Valley Regional Board implements Water Code section 13260 in the area where the Discharger's lands are located.
20. Pursuant to Water Code section 13261, subdivision (a), "a person who fails to furnish a report or pay a fee under Section 13260 when so requested by a regional board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."
21. Water Code section 13261, subdivision (b)(1), states:

Civil liability may be administratively imposed by a regional board or the state board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount not exceeding one thousand dollars (\$1,000) for each day in which the violation occurs. Civil liability shall not be imposed by the regional board pursuant to this section if the state board has imposed liability against the same person for the same violation.

22. Pursuant to Water Code section 13327, in determining the amount of civil liability, the Central Valley Water Board shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
23. 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. The use of this methodology addresses the factors that are required to be considered when imposing an administrative civil liability as outlined in Water Code section 13327.
24. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A. 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.
25. **Maximum and Minimum Penalties.** As described above, the statutory maximum penalty under Water Code section 13261, subdivision (b)(1) is \$1,000 per day of violation. As of the date of the ACL Complaint, the Discharger was out of compliance for 34 days, thus resulting in a maximum penalty of \$265,000. The Enforcement Policy recommends that the minimum liability imposed be at least ten percent higher than the economic benefit so that liabilities are not construed as the cost of doing business and so that the assessed liability provides a meaningful deterrent to future violations. The economic benefit to the Discharger resulting from the failure to enroll under Order R5-2013-0120 is \$31 (see Attachment A for how this was derived). Per the Enforcement Policy, the minimum penalty is the economic benefit plus ten percent (\$100).
26. Notwithstanding the issuance of this ACL Order, the Central Valley Water Board retains the authority to assess additional penalties for violations of the Water Code that may subsequently occur.
27. Issuance of this Administrative Civil Liability Order is an enforcement action, and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321, subdivision (a)(2).

28. This Order is effective and final upon issuance by the Central Valley Water Board. Payment must be received by the Central Valley Water Board no later than thirty (30) days from the date on which this Order is issued.
29. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegee is authorized to refer this matter to the Attorney General's Office for enforcement.
30. Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final 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 petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED THAT:

1. William R. Sinks shall be assessed an Administrative Civil Liability in the amount of three thousand five hundred forty dollars (\$3,540).
2. Payment shall be made no later than 30 days from the date of issuance of this Order by check payable to the *State Water Pollution Cleanup and Abatement Account*, and shall have the number of this order written upon it.

I, PAMELA C. CREEDON, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order issued by the California Regional Water Quality Control Board, Central Valley Region on 5 December 2016.

Original Signed By:

PAMELA C. CREEDON, Executive Officer

Attachment A: Penalty Calculation Methodology

ATTACHMENT A

Calculation of Penalty per SWRCB
Water Quality Enforcement Policy

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The 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 2/4/2014" (the "Penalty Calculation Worksheet"). The civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

Calculation of Penalty for Violation

Step 1. Potential for Harm for Discharge Violations

This step is not applicable.

Step 2. Assessment for Discharge Violations

This step is not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations

The Discharger has failed to submit a Report of Waste Discharge or enroll under an applicable General Order for irrigated cropland despite evidence indicating that they irrigate cropland. Irrigated cropland can be a source of sediment, pesticide residue, nitrate, and other waste discharged to the waters of the state. Unregulated discharges of such wastes can present a substantial threat to beneficial uses and/or indicate a substantial potential for harm to beneficial uses.

Using table 3 in the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy) staff has determined that the "Potential for Harm" is moderate, because the characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. The Discharger's failure to file a RoWD or to enroll under an applicable General Order for irrigated cropland undermines the collection of monitoring data, which is necessary to identify geographical areas in which growers need to improve management practices to reduce pollution discharges. The violation, thus, has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern.

The "Deviation from the Requirement" is major. Sinks has undermined the efforts of the Central Valley Waters Boards Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for their waste discharges. The requirement has been rendered ineffective. Based on the above factors, a 'per day' factor of 0.55 is appropriate (see Table 3 on p. 16 of the Enforcement Policy).

On 31 July 2013, the Discharger was served a Directive Letter pursuant to California Water Code section 13260 (13260 Directive), which required them to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Discharger on 3 August 2013, so regulatory coverage was required by 18 August 2013.

As of 10 May 2014, the Discharger is 265 days late in meeting that requirement. The maximum liability under Water Code section 13261(b)(1) for the failure to furnish a report under Water Code section 13260 is \$1,000 per each day the violation occurs, for a total of two hundred and sixty-five thousand dollars (\$265,000).

Step 4. Adjustment Factors

a) *Culpability: 1.5*

Discussion: The Discharger was given the score of 1.5, which increases the fine. Sinks has willfully disregarded its obligation to obtain the required regulatory coverage, after receiving five letters and refusing delivery of one from the Water Board. At least two of the letters were definitely received by the Discharger, as exemplified by the certified mail receipts (the first two letters were not sent via certified mail).

b) *Cleanup and Cooperation: 1.2*

Discussion: The Discharger was given the score of 1.2, which increases the fine because the Discharger has not been cooperative. Cleanup is not applicable here. Sinks has, however, been unresponsive to Central Valley Water Board staff's attempts to contact the Discharger and resolve the violation.

c) *History of Violations: 1.0*

Discussion: The Discharger was given the score of 1.0, as there is no evidence that Sinks has a history of violations.

Multiple Day Violations: Violations under Water Code section 13260 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 30). The failure to submit a RoWD does not cause daily detrimental impacts to the environment or the regulatory program. It is appropriate to assess daily penalties for the first day of violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment of one day for each thirty days of violation thereafter. Applying this assessment method on the total 265 violation days reduces the assessed penalty days to 14.

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: \$13,860.* (Initial Liability (\$1,000/day x 14 days x 0.55) x Adjustments (1.5)(1.2)(1.0)).

BASE LIABILITY AND FACTORS APPLIED TO THE VIOLATION

The Base Liability Amount for the Violation is \$13,860. The following factors apply to the Base Liability Amount for the violation.

Step 6. Ability to Pay and Continue in Business

- a) *Adjusted Base Liability Amount: \$13,860*

Discussion: As per the Enforcement Policy, “[t]he ability of a discharger to pay an ACL is determined by its revenues and assets.” The Discharger has the ability to pay based on 1) Value of property owned by the Discharger, a significant asset with a 2013-2014 assessed value of the Madera County parcel listed in the 13260 Directive at \$811,324 according to the Madera County Assessor’s office; 2) Discharger owns approximately 154 acres of almonds and alfalfa in Madera County, which generated approximately \$510,000 in 2012¹; and 3) William R. Sinks received an estimated \$11,039 in farm subsidies from the United States Department of Agriculture from in 2012².

Step 7. Other Factors as Justice May Require

Base Liability Amount: \$13,860

Discussion: As described in the previous sections, application of the Enforcement Policy Penalty Calculation Methodology here results in a proposed penalty of \$13,860. However, the Enforcement Policy Penalty Calculation Methodology does not address the differences in size between various operations subject to the RoWD requirements. In other words, an operation ten times the size of Sinks’, or one tenth the size, would be subject to the same penalty for the same number of violation days. The Central Valley Water Board believes that this result would be inappropriate. The Central Valley Water Board, therefore, proposes to adjust the penalty to account for the size of the operation. Given the size of the Discharger’s operation, and in consideration of the factors applied above, the Central Valley Water Board has elected to impose a reduced penalty of **three thousand five hundred forty dollars \$3,540** (\$10 per acre plus \$2,000).

Step 8. Economic Benefit

Economic Benefit: \$91

¹ Assuming 77 acres as Almonds and 77 acres as alfalfa. Information provided by the 2012 Madera County Agricultural Crop Report, available at

<http://www.madera-county.com/index.php/publications/crop-reports>

² Information provided from farm.ewg.org.

Discussion: Economic Benefit was calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)³ penalty and financial modeling program, version 5.4.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes. Economic benefit was calculated based on the assumption that the Discharger will choose to join the Coalition. If the Discharger joins the Coalition, there is no avoided cost, because the Discharger will be required to pay the Coalition its unpaid membership dues for prior years.

a.) 2013 Unpaid Dues and 2014 Dues

The economic benefit associated with the failure to submit a RoWD or NOI to enroll in the Coalition is the delayed cost of failing to obtain regulatory coverage by 19 August 2013. The ESJ Coalition is currently charging new members \$50 plus \$9 per acre for prior years' unpaid dues, plus \$3.75 for 2014 dues. Consequently, when the Discharger pays membership dues in 2014, the fee will include \$9 per acre for the prior unpaid years (2013) plus \$3.75 per acre for 2014. The economic benefit for these delayed costs is \$91.

Step 9. Maximum and Minimum Liability Amounts

a) Minimum Liability Amount: \$100

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 herein is \$91. This number plus ten percent results in a Minimum Liability of \$100.

b) Maximum Liability Amount: \$265,000

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13261, which is \$1,000 for each day in which the violation occurs.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount for failure to submit a RoWD under California Water Code section 13260 is **\$3,540**.

³ US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>