

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2017-0009
IN THE MATTER OF
VICTOR PRODUCE, INC.
MERCED COUNTY

This Order is issued pursuant to Water Code section 13323 to Victor Produce, Inc., (Victor Produce or Discharger) for failing to submit a Farm Evaluation as required by the Waste Discharge Requirements for Growers within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group (Order R5-2012-0116-R3 or East San Joaquin Order).

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

1. The East San Joaquin Order applies to owners and operators of irrigated lands within the Eastern San Joaquin River Watershed. Pursuant to the East San Joaquin Order, either the owner or operator may enroll an irrigated lands parcel for regulatory coverage under the East San Joaquin Order.
2. On 10 February 2015, Victor Produce enrolled nine parcels in the East San Joaquin Water Quality Coalition (Coalition) as an operator, thus obtaining coverage under the East San Joaquin Order. The parcels that the Discharger enrolled are Merced County Assessor's Parcel Numbers (APN) 049-050-087, 049-050-088, 049-050-089, 049-050-091, 049-060-073, 049-080-003, 049-080-006, 049-080-015, and 049-080-016. These parcels have a total area of 271 acres.
3. The East San Joaquin Order requires that all Coalition members complete a Farm Evaluation describing management practices implemented to protect surface and groundwater quality. The Farm Evaluation also includes information such as location of the farm, surface water discharge points, location of in service wells and abandoned wells and whether wellhead protection practices have been implemented.
4. The Farm Evaluation is intended to provide the third-party coalition and the Central Valley Water Board with information regarding individual member implementation of the East San Joaquin Order's requirements. Without this information, the Board would rely solely on regional surface and groundwater monitoring to determine compliance with water quality objectives. The regional monitoring cannot determine whether all members are implementing protective practices, such as wellhead protection measures for groundwater. Regional monitoring also does not allow identification of which practices are protective in areas where impacts are observed and multiple practices are employed. For groundwater protection practices, it may take years in many areas (even decades in some areas) before broad trends in groundwater may be measured and associated with implementation of the East San Joaquin Order. Farm Evaluations are intended to provide assurance that members are implementing management practices to protect groundwater quality while trend data is collected.
5. The reporting of practices identified in the Farm Evaluation will allow the third-party coalition and Board to effectively implement the Management Practices Evaluation Plan. Evaluating management practices at representative sites (in lieu of farm-specific

monitoring) only works if the results of the monitored sites can be extrapolated to non-monitored sites. One of the key ways to extrapolate those results will be to have an understanding of which farming operations have practices similar to the site that is monitored. The reporting of practices will also allow the Board to determine whether the Groundwater Quality Management Plan is being implemented by members according to the approved schedule.

6. On 21 December 2015, the Coalition sent a notice to the Discharger that the Farm Evaluation for 2015 (2015 Farm Evaluation) was due to the Coalition on 1 February 2016. The Discharger did not submit the 2015 Farm Evaluation in response to the notice.
7. On 22 February 2016, Board staff sent the Discharger a Notice of Violation (NOV) via certified mail for failure to submit the 2013 and 2014 Farm Evaluations. The NOV urged the Discharger to submit the evaluations to the Coalition and warned that failure to do so may result in enforcement action by the Central Valley Water Board. Victor Produce did not join the Coalition until February 2015 and therefore the General Order for the East San Joaquin Coalition does not specify that the Board may assess liability for failing to submit Farm Evaluations under that Order for 2013 and 2014.
8. The Discharger received the NOV on 25 February 2016. The Discharger did not contact the Board in response to the NOV. A copy of the certified mail receipt is included with Attachment A.
9. In March 2016, the Coalition sent a postcard to the Discharger providing notice that submittal of the 2015 Farm Evaluation was past due and requesting that the Discharger submit the evaluation as soon as possible. The Discharger did not submit the 2015 Farm Evaluation in response to the postcard.
10. On 19 April 2016, the Coalition sent the Board a list of members who had not submitted the 2015 Farm Evaluation. The list indicated that Victor Produce had not submitted the 2015 Farm Evaluation.
11. In May 2016, the Coalition sent a final notice to the Discharger that the 2015 Farm Evaluation had not been submitted, and that failure to do so may lead to an enforcement action by the Central Valley Water Board. The notice urged the Discharger to submit the required 2015 Farm Evaluation as soon as possible. The Discharger did not submit the 2015 Farm Evaluation in response to the notice.
12. On 6 May 2016, Board staff sent the Discharger a pre-ACL letter indicating that an ACL Complaint was forthcoming and inviting the Discharger to engage in settlement negotiations prior to issuance of an ACL Complaint.
13. The pre-ACL letter was sent via Federal Express, which delivered the letter to the Discharger's address on 10 May 2016. The Discharger did not submit the missing Farm Evaluation or contact Board staff in response to the pre-ACL letter.

VIOLATION

14. On 8 August 2016, the Assistant Executive Officer of the Central Valley Water Board issued an Administrative Civil Liability Complaint (ACL Complaint) R5-2016-0550 to the

Discharger in the amount of fifteen thousand two hundred and ten dollars (\$15,210) for failing to submit the 2015 Farm Evaluation as required by the East San Joaquin Order.

15. On 25 August 2016, the Discharger submitted the 2015 Farm Evaluation to the Coalition following issuance of the ACL Complaint.

REGULATORY CONSIDERATIONS

16. Water Code section 13267, subdivision (b)(1) provides that

In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposed to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

17. Pursuant to Water Code section 13268, subdivision (b)(1), any person who fails or refuses to furnish a technical or monitoring report as required by Water Code section 13267, subdivision (b), may face an ACL in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
18. The required 2015 Farm Evaluation is 160 days past due. The maximum liability under Water Code section 13268 for the failure to furnish a report under Water Code section 13267 is \$1,000 per each day the violation occurs, for a total maximum of one hundred and sixty thousand dollars (\$160,000).
19. 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.
20. On 17 November 2009, 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 a civil liability as outlined in Water Code section 13327.
21. 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 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.

22. **Maximum and Minimum Penalties.** As described above, the maximum penalty for the violations is \$160,000. 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 minimum economic benefit to the Discharger resulting from the failure to submit the 2015 Farm Evaluation is estimated at \$522 (see Attachment A for how this estimate was derived). Per the Enforcement Policy, the minimum penalty is this economic benefit calculation plus ten percent (\$575).
23. 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.
24. This matter was heard on November 4, 2016, in Fresno, California before a panel consisting of Central Valley Water Board members Carmen Ramirez, Denise Kadara, and Board Chair Karl Longley. That Hearing Panel received and considered testimony and other evidence from the Designated Parties and made the findings and recommendation in the Hearing Panel Report, which is attached to and hereby incorporated into this Order by this reference.
25. On February 23/24, 2017, the full Central Valley Water Board issued this Order after independently considering the Hearing Panel's recommendation in light of the full administrative record, including policy statements from the Designated Parties received on February 23/24.
26. Issuance of this ACL 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).
27. 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.
28. 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.

IT IS HEREBY ORDERED THAT:

1. Victor Produce, Inc., shall be assessed an Administrative Civil Liability in the amount of thirty-five thousand four hundred ninety dollars (\$35,490).
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.

Victor Produce, Inc.
ACL Order R5-2017-0009

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 23 February 2017.

[Original signed by]

PAMELA C. CREEDON, Executive Officer

Attachment A: Penalty Calculation Methodology

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 of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at:

http://www.waterboards.ca.gov/public_notices/petitions/water_quality

or will be provided upon request.

ATTACHMENT A
CALCULATION OF PENALTY PER STATE WATER BOARD
WATER QUALITY ENFORCEMENT POLICY

The administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy). The administrative 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 "per day" factor is calculated for each non-discharge violation considering the potential for harm and the extent of the deviation from the applicable requirements.

Potential for Harm

The Enforcement Policy requires a determination of whether the characteristics of the violations resulted in a minor, moderate, or major potential for harm or threat to beneficial uses.

The Discharger has failed to submit at least one Farm Evaluation as required by the East San Joaquin Order. By not submitting the evaluation, the Discharger has undermined the Coalition's efforts to analyze and report its members' Farm Evaluation data to the Board. The Discharger has therefore reduced the value of the Coalition's Farm Evaluation analysis and caused harm to the Irrigated Lands Regulatory Program.

Staff has determined that the potential for harm is **moderate**, because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm. The reporting of management practices in the Farm Evaluations will allow the Coalition and Board to effectively implement the Management Practices Evaluation Plan. This plan is a critical component of the Board's effort to address agricultural waste discharges and protect beneficial uses, including groundwater as a source of drinking water.

The Discharger operates a large farm operation of 271 acres. The greater the size of the operation, the greater the potential harm, since the missing Farm Evaluation cannot account for management practices used over a larger irrigated lands area. This creates a larger missing data set in the Coalition's Farm Evaluation analysis and causes a proportionally greater undermining of this analysis.

Additionally, the regulatory program is compromised when staff resources are directed toward bringing Coalition members into compliance rather than being available for outreach and assistance with regulatory compliance.

Deviation from Requirement

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

The deviation from requirement is **major**. To date, the Discharger has disregarded the regulatory requirement and rendered this requirement ineffective.

The Discharger has undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program and the Coalition's efforts to comply by disregarding the requirement to submit the 2015 Farm Evaluation. A Coalition member's compliance with reporting requirements is foundational to the Board's efforts to protect water quality. The Irrigated Lands Program Orders adopted by the Board specify the expectations and requirements for water quality protection. The requirements in the applicable Orders are rendered ineffective when Coalition members fail to meet their reporting requirements.

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from requirement is major. Based on the above factors, a per day factor of 0.55 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

Multiple Day Violations: Pursuant to the East San Joaquin Order, the Discharger was required to submit the 2015 Farm Evaluation on 1 March 2016. As of 8 August 2016, this Farm Evaluation is 160 days past due.

Violations under Water Code section 13268 are assessed on a per day basis. However, the violations at issue qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 18). Under this approach, for violations that last more than thirty (30) days, the daily 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 Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Discharger's failure to submit a Farm Evaluation is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit the 2015 Farm Evaluation has detrimentally impacted the environment on a daily basis, since submitting these evaluations does not result in immediate changes in practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's failure to submit the 2015 Farm Evaluation results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with costs of preparing the evaluations, which are outlined in Step 8 below.

Either of the above findings justifies the use of the alternate approach to penalty calculation for multiple day violations. The minimum numbers of days to be assessed under the alternate approach for the 2015 Farm Evaluation is 12 days. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation to 20.

Initial Liability Amount

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

$$\$1,000/\text{day} \times 30 \text{ days} \times 0.7 = \$21,000$$

Total Initial Liability Amount: \$21,000

Step 4. Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's history of violations. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

a) Culpability: 1.3

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Discharger was given the score of 1.3 for the culpability factor. As a member of the Coalition, it is the Discharger's responsibility to be aware of, and to comply with, the reporting requirements of the East San Joaquin Order. The Coalition sent the Discharger multiple notices urging the submittal of the 2015 Farm Evaluation.

Additionally, Board staff sent a Notice of Violation (NOV) to the Discharger on 22 February 2016, and a certified mail return card was received indicating that the NOV was delivered to the Discharger's address. The NOV urged submittal of the missing Farm Evaluations in order to avoid potential enforcement action. Although the Discharger may not be required to submit the 2013 and 2014 Farm Evaluations, the NOV was received just days before the 2015 Farm Evaluation was to be submitted to the Coalition.

Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance by submitting the 2015 Farm Evaluation.

b) Cleanup and Cooperation: 1.3

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger

was given the score of 1.3. The Coalition issued multiple notices, and the Central Valley Water Board issued the Discharger an NOV, which emphasized the importance of submitting Farm Evaluations and the potential for enforcement for failure to do so. The Discharger did not respond and cooperate with the Central Valley Water Board or the Coalition despite being allowed ample time in which to do so. Despite opportunities to come into compliance, the Discharger did not make any attempt to cooperate. Cleanup is not applicable in this case.

c) History of Violations: 1.0

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier for 1.1 to be used. The Discharger was given the score of 1.0, as there is no evidence of a history of violations.

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: \$35,490

Initial Liability (\$21,000) x Adjustments (1.3)(1.3)(1.0) = \$35,490

Step 6. Ability to Pay and Continue in Business

As per the Enforcement Policy, “[t]he ability of a Discharger to pay an ACL is determined by its revenues and assets.” The Discharger appears to have the ability to pay the Base Liability Amount based on ownership of a farm management company. The Discharger would have a share of the revenues generated from the 271 acres the Discharger operates. Based on the Discharger’s reporting of acreage and crop type on its enrollment form when it joined the Coalition, the Discharger operates 233 acres of sweet potatoes and 38 acres of almonds. The Prosecution Team estimates that revenues from the farming operation total \$3,138,336 per year. This estimate is based on the most recent Merced County Crop Report¹, which shows that almond orchards generated about \$6,826 per acre and sweet potatoes generate about \$12,356 per acre. Thus, the Discharger has the ability to pay the administrative civil liability and there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

If the Central Valley 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.

The costs of investigation and enforcement are “other factors as justice may require,” and could be added to the liability amount. The Central Valley Water Board Prosecution Team has incurred a significant amount of staff costs associated with the investigation and enforcement of the violations alleged herein. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, is electing not to pursue staff costs in this matter.

There are no other factors under this category that warrant an adjustment.

¹ The 2014 Merced County Crop Report can be found online here:
<https://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/473>

Step 8. Economic Benefit

Minimum Economic Benefit: **\$522**

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. Economic Benefit was calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)² 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.

The BEN model is the appropriate tool for estimating the economic benefit in this case. The benefit is calculated by identifying the regulation at issue, the appropriate compliance action, the date of noncompliance, the compliance date, and the penalty payment date.

The violation described in the Complaint identifies the avoided cost of preparing the 2015 Farm Evaluation, which has benefited the Discharger.

For the purposes of determining the economic benefit, Board staff assumed that it would take a person knowledgeable with the Discharger's farm operations, such as a farm manager or a crop advisor, about two hours per farm operation to complete the Farm Evaluation for a given year. The Discharger is the operator at nine parcels divided into four groups of contiguous parcels. Staff assumed each group is a separate farm operation. Using an estimate of the value of the knowledgeable person's time of \$120 per hour, the minimum economic benefit of this avoided cost per Farm Evaluation is:

4 operations x 2 hours/operation x \$120/hour = \$960 Therefore, the estimated cost for the 2015 Farm Evaluation is \$960.

In summary, the cost avoided by the Discharger is estimated at \$960. The economic benefit realized is derived by adjusting the avoided costs for inflation and tax deductibility. Using the BEN model, the minimum economic benefit of noncompliance was determined to be \$522.

Step 9. Maximum and Minimum Liability Amounts

a) Minimum Liability Amount: **\$575**

The Enforcement Policy recommends 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 calculated the Discharger's economic benefit obtained from the violations cited herein to be \$522. This number plus ten percent results in a recommended Minimum Liability of \$575.

b) Maximum Liability Amount: **\$160,000**

The maximum liability under Water Code section 13268 for the failure to furnish a report under Water Code section 13267 is \$1,000 per each day the violation occurs. The Discharger was required to submit the 2015 Farm Evaluation on 1 March 2016. As of 8 August 2016, the Farm Evaluation is 160 days past due. The total maximum liability is therefore one hundred and sixty thousand dollars (\$160,000).

² 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>

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Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount for failure to submit the 2015 Farm Evaluation is **thirty-five thousand four hundred ninety (\$35,490)**.