

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2014-0009

IN THE MATTER OF

HENRY J. TOSTA  
REEVE ROAD HEIFER RANCH  
SAN JOAQUIN COUNTY

This Administrative Civil Liability Order (hereafter Order) is issued to Henry J. Tosta (hereafter referred to as Discharger) based on findings that the Discharger violated Cleanup and Abatement Order (CAO) No. R5-2012-0709 and provisions of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (Dairy General Order). Water Code Sections 13268 and 13350 authorize the imposition of Administrative Civil Liability.

The Regional Water Quality Control Board, Central Valley Region (hereinafter Central Valley Water Board) finds, with respect to the Discharger's acts, or failure to act, the following:

**BACKGROUND**

1. Henry J. Tosta operates the Reeve Road Heifer Ranch (Heifer Ranch) located at 21070 Reeve Road, Tracy, San Joaquin County. The Heifer Ranch is enrolled under the Dairy General Order, which was adopted by the Central Valley Water Board on 3 May 2007 and updated on 3 October 2013. The Heifer Ranch has operated since 2006 as a heifer ranch and currently houses approximately 800 heifers. The Heifer Ranch's production area occupies approximately 18 acres, with support stock housed in corrals. Solid manure is stockpiled in an area south of the unused wastewater storage lagoon. As an enrolled facility, the Heifer Ranch is subject to the requirements of the Dairy General Order for regulatory purposes.

**CHRONOLOGY OF EVENTS**

2. On 1 May 2012 the Central Valley Water Board performed a closure inspection of the Heifer Ranch. During the 1 May 2012 inspection, Board staff identified violations of the Dairy General Order, including the burial of two dead cows in cropland immediately adjacent to the Main Drain canal of the Naglee-Burke Irrigation District, the burial of animal remains within the area south of the wastewater lagoon (within the production area), and the improper maintenance of well pads.
3. On 11 June 2012 the Executive Officer for the Central Valley Water Board issued Cleanup and Abatement Order R5-2012-0709 (CAO) to the Discharger to address the violations identified during the 1 May 2012 inspection. The CAO required that the Discharger cease any further on-site burials of dead animals, cleanup the dead cows buried in groundwater, collect groundwater samples in the vicinity where the dead cows were buried in groundwater, and submit a plan for remediation of the groundwater if samples indicated that waste disposal had caused pollution.

4. Staff conducted four inspections of the Heifer Ranch between the date of issuance of the CAO and 14 September 2012, the date the Assistant Executive Officer issued a letter notifying the Discharger of his failure to comply with deadlines and directives in the CAO. The four inspections identified late and incomplete responses to the CAO and an ongoing failure to comply with certain deadlines in the CAO, including the failure to remove manure mixed with animal remains from the area south of the wastewater lagoon by 29 June 2012.
5. Staff conducted an inspection of the Heifer Ranch on 10 October 2012, and identified an ongoing failure to comply with the CAO requirement to remove the pile of manure and animal remains from the area south of the wastewater lagoon.
6. Staff conducted an additional seven inspections between 19 November 2012 and 15 November 2013 to monitor the Discharger's progress with the directives of the CAO and compliance with the Dairy General Order.
7. On 21 November 2013, the Assistant Executive Officer issued Complaint No. R5-2013-0592 to the Discharger, recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$310,775.
8. On 19 December 2013, Regional Board staff received a report from the Reeve Road Heifer Ranch property owner, the Echeverria Brothers Dairy General Partnership, confirming that the manure mixed with animal remains from the area south of the wastewater lagoon was removed.

### **REGULATORY CONSIDERATIONS**

9. On 3 May 2007, the Central Valley Water Board adopted the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035 (hereinafter Dairy General Order) and a Monitoring and Reporting Program (hereinafter MRP) that accompanies the Dairy General Order. The Dairy General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007. The Dairy General Order is a set of general waste discharge requirements that apply to owners and operators of existing milk cow dairies that (1) submitted a Report of Waste Discharge in response to the Central Valley Water Board's 5 August 8, 2005 request and (2) have not expanded operations since 17 October 2005.
10. Water Code Section 13268 states, in part: (a)(1) [a]ny person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
11. Water Code section 13268(b)(1) provides that "civil liability may be administratively imposed by a regional board in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs."
12. Water Code section 13350 states, in part: (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).

13. Water Code section 13350(e)(1) provides that “civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.”
14. Water Code section 13350(e)(1)(B) provides that “when there is no discharge, but an order issued by the regional board is violated, except as provided in subdivision (f), the civil liability shall not be less than one hundred dollars (\$100) for each day in which the violation occurs.

### **VIOLATIONS**

15. Violation A: The Discharger violated Prohibition A.6 of the Dairy General Order and Water Code section 13350(a)(2) by burying dead cows causing waste to be deposited where it discharged to groundwater, a water of the state from at least 1 May 2012, the date of the initial discovery inspection, through 25 June 2012, the date the carcasses were removed and hauled to a landfill for disposal, for a total of 56 days.
16. Violation B: The Discharger violated directive 2 of CAO R5-2012-0709 and Water Code section 13267 by failing to timely submit proof of legal disposal of animal carcasses from 2 July 2012, the deadline for submittal in the CAO, through 20 July 2012, the date that proof of legal disposal was received, for a total of 18 days.
17. Violation C: The Discharger violated directive 4A of CAO R5-2012-0709 and Water Code section 13267 by failing to timely submit a Groundwater Remediation Plan from 28 August 2012, the day after the deadline for submittal in the CAO, through 12 April 2013, the date that a groundwater remediation plan was received, for a total of 228 days.
18. Violation D: The Discharger violated directive 4B of CAO R5-2012-0709 and Water Code section 13350(a)(1) by failing to timely remove manure containing animal remains from the area south of the wastewater lagoon from 30 June 2012, the day after the deadline for removal in the CAO through 15 November 2013, the date of the last inspection by staff prior to issuance of the Complaint, for a total of 504 days.
19. In determining the amount of any civil liability imposed, Water Code section 13327 provides that the Regional Board must consider 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.

20. On 17 November 2009 the State Water Resources Control 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 discretionary administrative civil liability. Use of the methodology addresses the factors used to assess a penalty under Water Code section 13327. The required factors under Water Code section 13327 have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A to this Order and shown in the civil liability penalty calculation spreadsheet in Attachment B of this Order. Attachments A and B are attached hereto and incorporated herein by reference.
21. Maximum Civil Liability: The maximum administrative civil liability that may be assessed pursuant to Water Code sections 13350 and 13268 for the violations described above is \$3,047,000.
22. Minimum Civil Liability: The minimum administrative civil liability for the violations described above according to the Enforcement Policy is equal to the economic benefit plus 10%, which is estimated to be \$5,274. The minimum administrative civil liability for the liability assessment for Violation D pursuant to Water Code section 13350(e)(1)(B) is \$50,400.
23. Issuance of this Administrative Civil Liability Order to enforce Water Code Division 7 is exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) in accordance with title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).
24. 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.
25. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegatee is authorized to refer this matter to the Attorney General's Office for Enforcement.
26. 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/petitins/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitins/water_quality) or will be provided upon request.

**IT IS HEREBY ORDERED THAT:**

1. Henry J. Tosta shall be assessed an Administrative Civil Liability in the amount of **three hundred ten thousand and seven hundred seventy-five dollars** (\$310,775).

2. Payment shall be made no later than thirty days from the date of issuance of this Order. Payment shall be made in the form of a check made payable to the State Water Resources Control Board Waste Discharge Permit Fund, and shall have the number of this Order written upon it.

I, Kenneth D. Landau, Assistant Executive Officer, do hereby certify that the foregoing is a full, true, correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 6 February 2014.

Original signed by

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KENNETH D. LANDAU, Assistant Executive Officer

Attachment A: Administrative Civil Liability Penalty Methodology

Attachment B: Administrative Civil Liability Penalty Methodology Matrix

**Attachment A – ACL Order No. R5-2014-0009**  
**Specific Factors Considered for Administrative Civil Liability**  
**HENRY J. TOSTA**  
**SAN JOAQUIN COUNTY**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code sections 13350, subdivision (a) and 13327. 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: [http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_final111709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf).

**A. Factors Considered Relating to Dead Cow Discharge to Groundwater**

The following steps are used in determining administrative civil liability for the discharge of dead cows to groundwater.

**Step 1 – Potential for Harm for Discharge Violations**

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

**Factor 1: Harm or Potential Harm to Beneficial Uses.**

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5). The designated beneficial uses of groundwater for this region are municipal and domestic water supply, agricultural supply, industrial service supply, and industrial process supply. Impacts to beneficial uses are reasonably expected to occur from the discharge of dead cows to groundwater. The decomposition of a dead mature cow releases approximately 63 gallons of fluid<sup>1</sup>; a 1,200 pound cow carcass contains from 24 to 36 pounds of organic nitrogen<sup>2,3</sup>. The U.S. Environmental Protection Agency in the National Primary Drinking Water Regulations has set a maximum contaminant level (MCL) in drinking water for nitrogen in the form of nitrate-nitrogen of 10 mg/l. Infants below the age of six months who drink water containing nitrate in excess of the MCL could become seriously ill and, if untreated, may die. Symptoms include shortness of breath and blue-baby syndrome. The Water Quality Control Plan for the Sacramento and San Joaquin River Basins, 4<sup>th</sup> Edition (Basin Plan), for drinking water the Most Probable Number (MPN) of coliform organisms over any seven-day period shall not exceed 2.2/100 mL. While not a health threat in itself, coliform is used to indicate whether other potentially harmful bacteria may be present. Any positive result for the coliform bacteria *E.coli* is a cause for concern according to the U.S. Environmental Protection Agency's Primary Drinking Water Regulations, because *E.coli* only comes from human and animal fecal waste. Groundwater

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<sup>1</sup> Nutsch, N. and M. Spire. 2004. Carcass Disposal: A Comprehensive Review

<sup>2</sup> Payne, J. On-Farm Mortality Composting of Livestock (Oklahoma Cooperative Extension Service BAE-1749)

<sup>3</sup> Glanville, T. Planning Considerations for Dairy Cattle Disposal by On-Farm Burial, Department of Agricultural and Bio-systems Engineering.

samples collected from the excavation when some of the dead cows were removed contained nitrate-nitrogen at 21.9 and 30 mg/l, and total coliform greater than 2419.6 MPN/100/mL, well in excess of the MCL for nitrate-nitrogen and the Basin Plan standard for coliform. In addition, both samples contained E.coli, at 68.9 and 156.5 MPN/100mL. These concentrations are cause for serious concern, and while bacteria can attenuate as they move through soil, attenuation of nitrate-nitrogen is unpredictable. However, based on available data on the location and construction of existing supply wells in the area, staff would expect that the nitrate and bacteria in groundwater would attenuate or dilute over time without appreciable effects on local receptors. Because the nitrate-nitrogen and bacteria concentrations exceed the limits that are protective of water quality, the Regional Board has identified the burial of dead cows in shallow groundwater as a moderate threat to beneficial uses, where impacts are reasonably expected without appreciable or chronic effects. A score of **3** is assigned for this factor.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways. The Discharger illegally buried dead cows in several feet of groundwater, which results in the direct discharge of decomposing flesh to waters of the state. The decomposition of a dead cow releases many chemicals, including nitrogen and chloride<sup>4</sup>, and potential pathogens such as E.coli, salmonellae, campylobacter spp., and prions. If the cows were treated with antibiotics or other pharmaceuticals, these chemicals are released into the groundwater as well via the decomposing flesh<sup>5</sup>. The chemicals discharged into groundwater as a result of the illegal burial of dead cows has the potential to pose a significant threat to environmental and human health. Because the release of nitrogen, chloride, and pathogens from decomposing cow carcasses poses "a significant risk or threat to potential receptors", a score of **4** was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, more than 50% of the discharge was susceptible to abatement. Once the source of the discharge (the dead cow carcasses) was removed from groundwater, the ongoing discharge of decomposing carcass materials would have stopped. In addition, the Discharger could have abated at least some of the impacts of the discharge of its waste if it pumped the underlying groundwater and applied it to cropland. Therefore, a factor of **0** is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, **a final score of 7** was calculated. The total score is then used in Step 2, below.

## Step 2 – Assessment for Discharge Violations

<sup>4</sup> Freedman, R. and R. Fleming. 2003. Water Quality Impacts of Burying Livestock Mortalities.

<sup>5</sup> Watanabe et al.. 2010. Use and Environmental Occurrence of Antibiotics in Free Stall Dairy Farms with Manured Forage Fields, Environ. Sci 44:6591-6600.

This step addresses administrative civil liabilities for the discharge based on a per-day basis.

#### Per Day Assessments for Discharge Violations

The “per day” factor (determined from Table 2 of the Enforcement Policy) is 0.31 based on the total score from Step 1 and the deviation from requirements. The deviation from requirements was determined to be major where the requirement was rendered ineffective. The burial of dead cows is a violation of Prohibition A.6 of the Dairy General Order which prohibits the burial of animal carcasses at a facility enrolled under the Dairy General Order.

The days of violation for the buried dead cows that are the subject of this enforcement action have been calculated from 1 May 2012, the date of the inspection when dead cows were first observed buried in groundwater, to 25 June 2012, the date the carcasses were hauled off to a landfill, or a total of 56 days. Therefore, the Per Day Assessment is calculated as: (0.31 factor from Table 2) x (56 days) x (\$5,000 per day). The **Initial Liability** value is **\$86,800**.

#### Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Central Valley Water Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violations are related to the discharge of pollutants via dead animals, and the liability was determined in Step 2.

#### Step 4 – Adjustment Factors

The Enforcement Policy describes three factors related to the violator’s conduct that should be considered for modification of the initial liability amount: the violator’s culpability, efforts to clean up or cooperate with regulatory authority, and the violator’s compliance history. 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.

#### Culpability

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 negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Dairy’s enrollment under the Dairy General Order and was provided with a copy of the Dairy General Order. Additionally, the Discharger’s Waste Management Plan for the Dairy identifies a renderer for the disposal of dead cows from the Dairy. Nonetheless the Discharger buried dead cows from the Dairy at the Reeve Road Heifer Ranch. Prohibition A6 of the Dairy General Order prohibits the disposal of dead animals on property except in certain very limited emergency circumstances. The Discharger disposed of his cattle in a manner in violation of the Dairy General Order.

#### Cleanup and Cooperation

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 did cooperate with the Cleanup and Abatement Order R5-2012-0709 (CAO) directive where the Discharger removed between eight and twelve cows and properly disposed of them by the



required deadline. However, the Discharger did not cleanup the dead cows voluntarily and was ordered to do so under the CAO. Additionally, the Discharger has not taken actions to clean up or remediate the contaminated soil and water. On balance, the cleanup and cooperation multiplier factor has been set at **1.0**, which neither increases nor decreases the proposed liability.

#### History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger Henry Tosta has a history of violations of water quality laws. On 25 July 2013 the Central Valley Water Board adopted Order No. R5-2013-0095 imposing an administrative civil liability in the amount of \$685,000 for the Discharger's noncompliance at the Henry Tosta Dairy for the discharge of manure to groundwater and violations of a cleanup and abatement order. The Regional Board, therefore, assessed a multiplier value of **1.1**.

#### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Initial Liability (\$86,800) X Adjustment Factors **(1.5) (1.0) (1.1)** and is equal to **\$143,220**.

#### **B. Factors Considered Relating to Violation of CAO Directive 2: Submittal of Legal Proof of Disposal of Animal Carcasses**

The following steps are used in determining administrative civil liability for the failure to timely submit proof of legal disposal of illegally buried carcasses by 2 July 2012. A report with narrative and photographs documenting removal of animal remains was received by the Central Valley Water Board on 20 July 2012.

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

#### **Step 3 – Per Day Assessment for Non-Discharge Violation**

The per-day factor for the violation is 0.35. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The purpose of the proof of legal disposal via a comprehensive report is to document that the illegally buried animals have indeed been removed and do not pose an ongoing threat to water quality. Delay in the submittal of the report results in ongoing questions about the method and thoroughness of removal activities and whether the discharge has ceased and the waste properly hauled to the appropriate landfill.

b. The Deviation from Applicable Requirements is moderate. The Discharger's submission was 18 days late; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from 3 July 2012 (the day after the report was due) to 20 July 2012 (the date the Central Valley Board received from the Discharger a report and receipt from the landfill) for a total of 18 days date. Therefore the Per Day Assessment is calculated as (0.35 factor from Table 3) x (18 days) x (\$1,000 per day). **The Initial Liability value is \$6,300.**

#### **Step 4 – Adjustment Factors**

The Enforcement Policy describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history. 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.

#### **Culpability**

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 negligent behavior. The Discharger was given a multiplier value of 1.3. Evidence does not support a finding of negligent or intentional behavior, justifying a 1.5; or of inadvertent behavior, justifying a lower multiplier. The Discharger was aware of the need for the timely submittal of the comprehensive report but failed to submit the report on time in accordance with the deadlines in the CAO.

#### **Cleanup and Cooperation**

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. A report was submitted by representatives of the Echeverria General Partnership, although it was not timely. The report was ultimately submitted not long after the deadline. The Discharger was assessed a neutral multiplier value of **1.0**.

#### **History of Violation**

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, a multiplier value of **1.1** was assessed.

#### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Initial Liability (\$6,300) X Adjustment Factors **(1.3) (1.0) (1.1)** and is equal to **\$9,009**.

### **C. Factors Considered Relating to Violation of CAO Directive 4: Failure to Submit a Groundwater Remediation Plan**

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

#### **Step 3 – Per Day Assessment for Non-Discharge Violation**

The per-day factor for the violation is **0.40**. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The CAO directed the discharger to collect groundwater samples and determine if the illegal burial of dead animals has caused pollution of groundwater. Groundwater samples collected after the excavation of the dead cows indicated pollution as described above. Therefore a groundwater remediation plan was required under the CAO. For the period of time the plan had not been submitted, the plan could not be approved or implemented, and groundwater impacts were not remediated.

b. The Deviation from Applicable Requirements is moderate. The Discharger submitted the Groundwater Remediation Plan approximately eight months late; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from 28 August 2012 (the date the groundwater remediation plan was due) through 12 April 2013 (the date that a groundwater remediation plan was received), a total of 228 days. Therefore, the Per Day Assessment is calculated as (0.4 factor from Table 3) x (228 days) x (\$1,000 per day). **The Initial Liability value is \$91,200.**

#### **Step 4 – Adjustment Factors**

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

#### **Multiple Day Violations**

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.

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Regional Board has applied the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the

first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

**Revised Initial Liability = (.4) X (13 days of violation) X (\$1,000) = \$5,200**

#### Culpability

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 negligent behavior. The Discharger was given a multiplier value of **1.4**. The CAO clearly stated the requirement to submit the groundwater remediation plan if groundwater sampling indicated groundwater pollution. The Status letter issued by staff on 14 September 2012 stated that staff's evaluation of groundwater data received from the Discharger's consultant on 20 July 2012 indicated negative impacts to groundwater from dairy operations and stated that a plan for the remediation of the groundwater was required by 27 August 2012. The plan was not received until 12 April 2013, approximately eight months after the due date in the CAO.

#### Cleanup and Cooperation

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. Because the remediation plan was not submitted until 12 April 2013, the Discharger was given a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.1**.

#### History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, a multiplier value of **1.1** was assessed.

#### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Revised Initial Liability (**\$5,200**) X Adjustment Factors (**1.4**) (**1.1**) (**1.1**) and is equal to **\$8,808.80**.

#### **D. Factors Considered Relating to Violation of CAO Directive 4: Failure to Remove and Properly Dispose of the Manure Containing Animal Remains from the Area South of the Wastewater Lagoon**

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

#### **Step 3 – Per Day Assessment for Non-Discharge Violation**

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

a. The Potential for Harm for the violation is determined to be moderate. The Discharger placed dead cows in an area south of the lagoon at the Heifer Ranch and covered the cows with manure. When the lagoon at the Heifer Ranch was cleaned out, as required by the CAO, the removed manure, which also contained animal remains, was added to the pile of manure containing animal remains south of the wastewater lagoon. Land application of manure containing residues from mammalian tissue is not allowed because pathogens that are resistant to decomposition may be present, including prions responsible for Transmissible Spongiform Encephalopathy (TSE). Prions are very resistant to degradation, heat, and normal sterilization processes. While TSE is rare, should prions be present in a cow placed in the manure, prions could be transferred to the soil when the manure is land applied. The disease can be transmitted at very low exposure levels<sup>6</sup> and is fatal to humans. Because of the severity of the impacts of TSE, should the disease-causing prions be present, this material must be discharged to a landfill that is permitted to accept this material.

b. The Deviation from Applicable Requirements is major. The Discharger has failed to remove the manure containing animal remains. By adding manure from the lagoon to the piled manure containing animal remains, the total volume of material requiring landfill disposal has actually increased from the amount at the time of issuance of the CAO. The Discharger has been repeatedly informed of the requirement to haul this material to an appropriate landfill; this requirement was reiterated in letters dated 14 September 2012, 26 August 2013, and 29 October 2013. The Discharger rendered the requirement ineffective, therefore warranting a major deviation from requirements.

The length of the violation is alleged from 30 June 2012 (the day after the manure and animal remains were to be removed per the CAO) through 15 November 2013, the date of the last inspection by staff, for a total of 504 days late. Therefore the Per Day Assessment is calculated as (0.55 factor from Table 3) x (504 days) x (\$5,000 per day). The Initial Liability value is \$1,386,000.

#### **Step 4 – Adjustment Factors**

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

#### **Multiple Day Violations**

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

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<sup>6</sup> Federal Register 21 CFR 589, 25 April 2008, p 22725, Department of Health and Human Services, Food and Drug Administration, Substances Prohibited From Use in Animal Food or Feed.

any, resulting from the violation. The failure to remove the manure and animal remains does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Regional Water Board has applied the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.55) X (22 days of violation) X (\$5,000) = **\$60,500**

#### Culpability

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 negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO issued to the Discharger clearly stated the requirement to remove the manure and animal remains by 29 June 2012. The Status letter sent to the Discharger on 14 September 2012, and additional letters sent on 26 August 2013 and 29 October 2013, reminded the Discharger that the removal had not been done. The manure and animal remains have not been removed as of 14 November 2013. Despite repeated attempts by staff to reach out to and remind the Discharger of the outstanding violation, the Discharger failed to comply with the requirements of the CAO. The Discharger's behavior was intentional and therefore, a multiplier of 1.5 was assessed.

#### Cleanup and Cooperation

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. Because the manure and animal remains have not been removed, because the Discharger and the Discharger's consultant have repeatedly questioned the need to remove the material to a landfill without taking any steps towards removal, and because actions taken at the Heifer Ranch have only increased the amount of material requiring landfill disposal, the Discharger was given the maximum multiplier value of **1.5**.

#### History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, a multiplier value of **1.1** was assessed.

#### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Revised Initial Liability (**\$60,500**) X Adjustment Factors (**1.5**) (**1.5**) (**1.1**) and is equal to **\$149,737.50**

### **Step 6 - Ability to Pay and Ability to Continue in Business**

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. Pursuant to the Enforcement Policy, “[i]n most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance” and that the liability amount “may be adjusted to address the ability to pay or to continue in business.” As part of the cost of doing business, the Discharger is liable for compliance with the Dairy General Order at the Reeve Road Heifer Ranch and for penalties the Central Valley Water Board assesses for failing to comply with the Dairy General Order. Besides the available income that may be generated from operations at the Reeve Road Heifer Ranch, the Discharger owns and operates a 1,196 cow dairy in the immediate area. The dairy is an ongoing business that potentially generates profits that may be used to pay the assessed penalty. The Discharger owns an additional five parcels of land in the vicinity of the Heifer Ranch, together with a restaurant/bar in a neighboring community. Public records show that the Discharger is the legal property owner of the following parcels.

APN 229-060-15 (agricultural); APN 239-270-06 (residential); APN 209-290-06 (agricultural); APN 209-290-07 (agricultural); APN 209-300-18 (agricultural); APN 239-160-02; APN 239-160-16 (dairy); APN 239-160-15 (agricultural); APN 212-090-01 (agricultural); APN 239-270-02 agricultural); APN 209-300-18 (agricultural); APN 249-020-06; APN 229-060-16 (agricultural); APN 229-060-17 (agricultural)

Additionally, the Discharger’s ability to pay and continue in business was further informed by review of Tosta Dairy LP’s tax returns from 2008 to 2012, Dr. Gerald Horner’s memo dated 14 January 2014, and Mark Fuhrman’s declaration dated 18 July 2013. Based on the above, there is substantial evidence in the record to support a finding that the Discharger has the ability to pay and continue in business.

### **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 to justify this.

### **Step 8 – Economic Benefit**

The Enforcement Policy requires that the Economic Benefit of Noncompliance be estimated for every violation. The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. In other words, the Discharger realized a gain by not expending the resources to comply with water quality laws, including the Dairy General Order and the Cleanup and Abatement Order. The Discharger has realized an economic benefit of noncompliance of \$4,795. The economic benefit of noncompliance is estimated by calculating the time value of the delayed expenditures, net of taxes, and inflation using the U.S. Environmental Protection Agency’s BEN model<sup>7</sup>.

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USEPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. BEN calculates the economic benefits gained from delaying and avoiding

The economic benefit of noncompliance of \$4,334, for the disposal of manure containing animal remains does not take into account the actual cost of disposing of the waste. Additionally, the total economic benefit of noncompliance of \$4,795 does not consider the benefit derived from an illegal competitive advantage by operating without complying with its permit and/or the requirements of the Cleanup and Abatement Order.

**Final adjusted liability**

The final adjusted liability is **\$310,775**.

**Step 9 – Maximum and Minimum Liability Amounts**

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Complaint, and the values are repeated here.

Maximum Liability Amount: \$3,047,000

Minimum Liability Amount: the minimum liability is the lowest amount allowed by statute and by policy. The Enforcement Policy requires that, at a minimum, the assessed penalty must be equal to the economic benefit plus ten percent. The economic benefit of non-compliance plus ten percent is an estimated amount of **\$5,274**. The Adjusted Total Base Liability Amount is greater than economic benefit plus ten percent, and therefore, no adjustment is necessary based on the economic benefit analysis.

Below is a table with the minimum and maximum amounts allowed by statute. The proposed liability amount for each violation falls within the minimum and maximum allowable amounts.

Violation	Statute	Minimum	Maximum	Proposed
Dead Cow Discharge to Groundwater	Water Code sections 13350(e)(1) and 13350(e)(1)(A)	\$28,000	\$280,000	\$143,220
Violation of CAO Directive 2: Submittal of Legal Proof of Disposal of Animal	Water Code section 13268	--	\$18,000	\$9,009

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



Carcasses				
Violation of CAO Directive 4: Failure to Submit a Groundwater Remediation Plan	Water Code section 13268	--	\$229,000	\$8,808.80
Violation of CAO Directive 4: Failure to Remove and Properly Dispose of the Comingled Manure and Animal Remains from the Wastewater Lagoon and from the Area South of the Wastewater	Water Code sections 13350(e)(1) and 13350(e)(1)(B)	\$50,400	\$2,520,000	\$149,737.50

**Step 10 – Final Liability Amount**

Liabilities imposed by the Regional Water Board are an important part of the Water Boards' enforcement authority. Accordingly, any assessment of administrative civil liability should fully eliminate any economic advantage obtained from noncompliance, fully eliminate any unfair competitive advantage obtained from noncompliance, bear a reasonable relationship to the gravity of the violation and the harm to beneficial uses or regulatory program resulting from the violation, deter the specific Discharger from committing further violations, and deter similarly situated persons in the regulated community from committing the same or similar violations. The methodology outlined in the Enforcement Policy is a process for arriving at a liability amount consistent with these objectives.

The final proposed liability amount of **\$310,775** is consistent with the methodology in the Enforcement Policy and with the objectives outlined above.

**Penalty Calculation for Civil Liability, Henry J. Tosta**  
**Reeve Road Heifer Ranch**  
**Attachment B**

Penalty Calculation Methodology Worksheet - Version Date: 6/24/2010  
 Password for Workbook Protection: enforcement

**Instructions**

1. Select Potential Harm for Discharge Violations
2. Select Characteristics of the Discharge
3. Select Susceptibility to Cleanup or Abatement
4. Select Deviation from Standard
5. Click "Determine Harm & per Gallon/Day..."
6. Enter Values into the Yellow highlighted fields

Select Item **3 = Moderate**  
 Select Item **4 = Discharged material poses significant risk**  
 Select Item **> 50% of Discharge Susceptible to Cleanup or A**  
 Select Item **Major**

Select Item **Potential Harm for Discharge Violations**  
 Select Item **Characteristics of the Discharge**  
 Select Item **Susceptibility of Cleanup or Abatement**  
 Select Item **Moderate**

Discharger Name/ID: **Henry J Tosta, Reeve Road Heifer Ranch, Tracy, San Joaquin County**

		Dairy General Order Violation: Dead Cow Discharge to Groundwater		CAO Directive 2: Submittal of Legal Proof of Disposal		CAO Directive	
Discharge Violations	Step 1	Potential Harm Factor (Generated from Button)	7				
	Step 2	Per Gallon Factor (Generated from Button)	0.31				
		Gallons					
		Statutory / Adjusted Max per Gallon (\$)					
		<b>Total</b>		\$ -			
Non-Discharge Violations	Step 3	Per Day Factor (Generated from Button)	0.31				
		Days	56				
		Statutory Max per Day	5000.00				
		<b>Total</b>		\$ 86,800		\$ -	
		<b>Initial Amount of the ACL</b>		\$ 86,800.00		\$ 6,300.00	
Add'l Factors	Step 4	Culpability	1.5	\$ 130,200.00	1.3	\$ 8,190.00	1.4
		Cleanup and Cooperation	1	\$ 130,200.00	1	\$ 8,190.00	1.1
		History of Violations	1.1	\$ 143,220.00	1.1	\$ 9,009.00	1.1
	<b>Step 5 Total Base Liability Amount</b>		\$ 310,775.30				
	Step 6	Ability to Pay & to Continue in Business		\$ -			
	Step 7	Other Factors as Justice May Require		\$ -			
Staff Costs			\$ -				
	Step 8	Economic Benefit		\$ 4,795.00			
	Step 9	Minimum Liability Amount		\$ 5,274.50			
		Maximum Liability Amount		\$ 3,047,000			
	Step 10	<b>Final Liability Amount</b>		\$ 310,775.30			

**Penalty Day Range Generator**

Start Date of Violation= 5/1/12  
 End Date of Violation= 6/25/12

Maximum Days Fined (Steps 2 & 3) = 56 Days  
 Minimum Days Fined (Steps 2 & 3) = 7 Days

**Penalty Day Range Generator**

Start Date of Violation= 7/3/12  
 End Date of Violation= 7/20/12

Maximum Days Fined (Steps 2 & 3) = 18 Days  
 Minimum Days Fined (Steps 2 & 3) = 4 Days

**Penalty Calculation for Civil Liability, Henry J. Tosta**  
**Reeve Road Heifer Ranch**  
**Attachment B**

Potential Harm for Discharge Violations  
 Characteristics of the Discharge  
 Susceptibility of Cleanup or Abatement  
 Major

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

4: Submission of Groundwater Remediation Plan	CAO Directive 4: Proper Disposal of Comingled Manure and Dead Animal Remains	Violation 5
\$ -	\$ -	\$ -
		0
\$ -	\$ -	\$ -
	0.55	
	22	
	\$ 5,000	
\$ 5,200.00		\$ 60,500.00
\$ 5,200.00		\$ -
\$ 7,280.00	1.5	\$ 90,750.00
\$ 8,008.00	1.5	\$ 136,125.00
\$ 8,808.80	1.1	\$ 149,737.50

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1480000

Penalty Day Range Generator	Penalty Day Range Generator
Start Date of Violation= 8/28/13	Start Date of Violation= 6/30/12
End Date of Violation= 4/12/13	End Date of Violation= 11/15/13
Maximum Days Fined (Steps 2 & 3) = 228	Maximum Days Fined (Steps 2 & 3) = 504
Minimum Days Fined (Steps 2 & 3) = 13	Minimum Days Fined (Steps 2 & 3) = 22