

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2017-0006
IN THE MATTER OF
BROOKS AND ARLENE RUSHING, AS INDIVIDUALS AND IN THEIR REPRESENTATIVE
CAPACITY AS TRUSTEES FOR THE BROOKS J & ARLENE J RUSHING TRUST
STANISLAUS COUNTY

This Order is issued pursuant to Water Code section 13323 to Brooks and Arlene Rushing, as individuals and in their representative capacity as trustees of the Brooks J & Arlene J Rushing Trust (Dischargers) for failing to submit a Report of Waste Discharge required under Water Code section 13260.

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

1. The discharge of irrigation return flows or storm water from irrigated lands in the Central Valley Region 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 discharges to waters of the state. (Wat. Code, § 13263.)
2. Attachment E of the Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers not Participating in a Third-Party Group (Order R5-2013-0100) and 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-R3) 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 Stanislaus County, including the Dischargers, which 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 Water Code. Both data sets were used to develop lists of parcels for which Water Code section 13260 Directive Letters were issued requiring landowners to obtain regulatory coverage for lands irrigated for a commercial purpose.
5. Evaluation of county assessor and FMMP data indicates that the Dischargers own approximately 38 acres of land, identified as Stanislaus County Assessor's Parcel Numbers (APNs) 088-009-014, 088-009-024, and 088-009-029. Based on field and aerial

inspections, staff estimates the parcels to total about 30 acres of land irrigated for a commercial purpose that require regulatory coverage.

6. On 20 February 2013 and 18 April 2013, the Central Valley Water Board issued notices to the Dischargers describing new water quality regulations and options available to comply with the regulations.
7. On 16 September 2013 Board staff conducted field inspections on two of the Dischargers' Stanislaus County parcels from public roadways and found evidence of commercial irrigated agricultural operations based on the type of crop, almonds, and the size of the operation, over 30 acres.
8. On 9 May 2014, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Dischargers, sent via certified mail. The Directive was sent based on information that the subject parcels contained commercially irrigated land without regulatory coverage. The Directive required the Dischargers to obtain regulatory coverage for their irrigated agricultural parcels within 15 calendar days of receipt of the Directive.
9. The Dischargers received the Directive on 14 May 2014. The Dischargers were required to obtain regulatory coverage by 29 May 2014. The Dischargers neither obtained regulatory coverage by 29 May 2014 nor contacted the Board.
10. Because the Dischargers failed to respond by the deadline specified in the Directive, a Notice of Violation (NOV) was sent to the Dischargers via certified mail on 30 June 2014. The Dischargers received the NOV on 2 July 2014.
11. Based on Board staff inspection of the parcels, the property does not appear to have a potential to discharge to surface waters.
12. The Dischargers joined the East San Joaquin Water Quality Coalition (Coalition) on 23 September 2016 following issuance of the Administrative Civil Liability (ACL) Complaint.

VIOLATION

13. On 8 August 2016, the Assistant Executive Officer of the Central Valley Water Board issued ACL Complaint R5-2016-0546 to the Dischargers in the amount of thirty four thousand three hundred and twenty dollars (\$34,320) for failure to obtain Coalition membership or submit a Report of Waste Discharge as required by Water Code section 13260.

REGULATORY CONSIDERATIONS

14. 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).
15. Water Code section 13260, subdivision (a), requires that any "person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system," shall file with the

appropriate regional board a report of waste discharge 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 Dischargers' lands are located.

16. 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)."
17. 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.
18. 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.
19. 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 an administrative civil liability as outlined in Water Code section 13327.
20. 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 administrative civil liability takes into account such factors as the Dischargers' culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.
21. **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 this ACL Complaint, the Dischargers were out of compliance for 802 days, thus resulting in a maximum penalty of \$802,000. 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 Dischargers resulting from the failure to enroll under Order R5-2013-0100 is estimated at \$7,395 (see Attachment A for how this estimate was derived). Per the Enforcement Policy, the minimum penalty is this economic benefit calculation plus ten percent (\$8,135).

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22. 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.
23. 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.
24. 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.
25. 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).
26. 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.
27. In the event that the Dischargers 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. Brooks and Arlene Rushing, as individuals and in their representative capacity as trustees of the Brooks J & Arlene J Rushing Trust shall be assessed an Administrative Civil Liability in the amount of eight thousand one hundred thirty-five dollars (\$8,135).
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 ACL 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 23 February 2017.

[Original signed by]

PAMELA C. CREEDON, Executive Officer

Attachment A: Penalty Calculation Methodology

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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 Dischargers' 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.

Staff 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 Dischargers failed to submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order for discharges from 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.

By failing to file a RoWD or to enroll under an applicable General Order, the Dischargers undermined the regulatory program. Dischargers regulated under an applicable General Order either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with their operations. In addition, dischargers report on the practices in which they engage to protect water quality. By failing to provide that information, the Dischargers impaired the Central Valley Water Board's efforts to assess potential impacts and risks to water quality, and circumvented the Central Valley Water Board's ability to take enforcement actions to address problems.

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Additionally, the regulatory program is compromised when staff resources are directed to bringing dischargers into compliance rather than being available for outreach and assistance with regulatory compliance. Since the violation thwarts the Central Valley Water Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

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 the requirement is **major**. The Dischargers have disregarded the regulatory requirements and rendered those requirements ineffective. The Dischargers undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for their waste discharges. A discharger's regulatory coverage is foundational to the Board's efforts to protect water quality. The Orders adopted by the Board specify the expectations and requirements for water quality protection, which do not apply until a discharger is covered by an appropriate Order. The requirements in the applicable Orders are rendered ineffective when a discharger has not gone through the process of becoming subject to the Order.

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 the requirement is major. Based on the above factors, a per day factor of 0.55 is appropriate (see Table 3 on p. 16 of the Enforcement Policy).

Multiple Day Violations: On 14 May 2014, the Assistant Executive Officer of the Central Valley Water Board issued a Water Code section 13260 Directive Letter (Directive) to the Dischargers, which required them to obtain regulatory coverage within 15 calendar days or face a potential administrative civil liability. The Directive was received by the Dischargers on 14 May 2014. Thus, regulatory coverage was required by 29 May 2014. The Dischargers have yet to obtain regulatory coverage and are 802 days late in meeting the regulatory requirements as of the date of this ACL Complaint.

Violations under Water Code section 13261 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 that 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 Dischargers' failure to submit a RoWD or NOI (and join the Coalition) is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Dischargers' failure to submit a RoWD or NOI

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has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or 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 Dischargers pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Dischargers' failure to submit a RoWD or NOI results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is the one-time delayed expenditure of joining the Coalition and various costs associated with Coalition membership, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The minimum number of days to be assessed under the alternate approach in this case is 32. Due to the nature of the case, using the minimum days generated from the Multiple Day approach is appropriate.

Initial Liability Amount

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

$$\$1,000/\text{day} \times 32 \text{ days} \times 0.55 = \$17,600$$

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 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 Dischargers were given the score of 1.3, which increases the fine. Central Valley Water Board staff mailed a 13260 Directive on 14 May 2014 after the Dischargers failed to respond to the initial notices and failed to obtain regulatory coverage. The Dischargers did not respond to the Directive or the subsequent Notice of Violation that was mailed on 30 June 2014.

Despite knowledge of the regulatory requirements, which is exemplified by the notices described above, the Dischargers are 802 days out of compliance as of the date of this ACL Complaint. The multiple notices indicate that the Dischargers had knowledge of the regulatory requirements and acted intentionally, or at least negligently, in ignoring the requirement to obtain regulatory coverage. Therefore, a culpability factor of 1.3 is warranted.

b) Cleanup and Cooperation: 1.5

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 Dischargers were given the score of 1.5, which increases the fine.

The Central Valley Water Board issued the Dischargers a Notice of Violation in an effort to allow the Dischargers to address the violation prior to the issuance of a complaint. The Dischargers did not respond despite being awarded ample time in which to do so. Despite opportunities to come into compliance, the Discharger did not make any attempt to cooperate with the Central Valley Water Board

Cleanup is not applicable here.

c) History of Violations: 1.0

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Dischargers were given the score of 1.0 because the Dischargers have no record of a history of violations prior to those described herein.

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: \$34,320. (Initial Liability (\$17,600) x Adjustments (1.3)(1.5)(1.0)).

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 Dischargers have the ability to pay the Base Liability Amount based on the value of the Dischargers property and estimated revenues for their crop. According to the Stanislaus County Assessor’s Office, the three parcel owned by the Dischargers have an assessed value of \$428,897. Revenue generated from the Dischargers’ approximately 30 irrigated acres of almonds in Stanislaus County, was approximately \$245,700 in 2014¹. Thus, the Dischargers have the ability to pay the administrative civil liability based on their revenue and assets 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 violation. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, elected not to pursue staff costs in this matter.

¹ Information provided by calculating 30 acres of almonds from the 2014 Stanislaus County Agricultural Crop Report, available at <http://www.stanag.org/pdf/cropreport/cropreport2014.pdf>

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The Central Valley Water Board finds that considerations of justice require that the total base liability amount be decreased. One of the Dischargers, unbeknownst to Central Valley Water Board staff, was likely of diminished capacity while signing for notices sent by the Central Valley Water Board.

Step 8. Economic Benefit²

Minimum Economic Benefit: **\$7,395**

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)³ penalty and financial modeling program, version 5.6.0. 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.

Under the Irrigated Lands Regulatory Program, an individual may choose to comply with the program by either filing an NOI to get regulatory coverage as an "individual grower," or filing a NOI for regulatory coverage under a third-party group Order and joining the Coalition. For the purposes of determining the economic benefit, the Prosecution Team assumes that the General Order R5-2013-0100 (Individual General Order) will apply to the Dischargers' operations, as the Central Valley Water Board cannot compel the Dischargers to join a coalition.

The economic benefit was calculated based on delayed and avoided costs. Delayed costs are those costs that should have been born earlier, but that a discharger can and is still is required to pay. Avoided costs are the costs of those compliance activities, which a discharger can no longer perform, and that a discharger would have conducted had they come into compliance earlier.

The date of noncompliance for the filing of the NOI and payment of initial fees was 30 May 2104 – the deadline provided in the Directive. Annual fees are assumed to be payable on the anniversary of enrollment. As a result, the Dischargers have failed to pay \$3,633 in permit fees for enrollment years 2014, 2015, and 2016. Costs associated with preparation of the NOI were not included in the economic benefit calculation.

Once enrolled under the General Order, the Prosecution Team estimates that a NOA would have been issued within one month of receiving the NOI (i.e. 1 July 2014). Under the Individual General Order, the Dischargers would have been required to prepare and implement a Farm Water Quality Plan (FWQP) within one year of the NOA issuance (i.e. 1 July 2015). The

² Order R5-2013-0100 includes an estimate of average annual costs per acre related to that Order. The average annual costs are not used in this economic benefit analysis, since the costs represent an average cost, if the Order were applied Central Valley-wide. The cost estimates made in this analysis are based on the circumstances and facts related to this Discharger, rather than a broad class of Dischargers.

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>

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estimated cost to prepare each this plan is a minimum of \$2,500. Also included under the Individual General Order, the Dischargers would have been required to conduct groundwater monitoring of domestic and agriculture supply wells.

The Prosecution Team assumes that such monitoring would commence within six months of the NOA issuance (i.e. 1 January 2015). Monitoring is required for the first and second year of enrollment under the General Order. Based on estimated sampling labor and laboratory costs associated with two supply wells, the Dischargers avoided monitoring costs of approximately \$4,488.

An Annual Monitoring Report (AMR) would have also been required, with the first report due 1 May 2015, with the second occurring a year later in 2016. The Prosecution Team estimates the cost of preparing the AMRs at approximately \$4,800.

Lastly since these parcels are in a Groundwater Protection Area, a Groundwater Management Practice Evaluation Program (MPEP) would have been due on 1 July 2016. The costs associated with developing the MPEP were estimated to be similar to the FWQP at \$2,500.

In summary, the Dischargers should have spent approximately \$17,921 to comply with the Individual General Order. Using BEN, the Dischargers gained a minimum economic benefit of \$7,395 after consideration of delayed and avoided costs.

Step 9. Minimum and Maximum Liability Amounts

- a) Minimum Liability Amount: **\$8,135**

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's estimate of the Dischargers' economic benefit obtained from the violation is \$7,395. Therefore, the minimum liability is \$8,135.

- b) Maximum Liability Amount: **\$802,000**

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. The Dischargers were in violation for 802 days, which results in a maximum liability of \$802,000.

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 as required under Water Code section 13260 is **eight thousand one hundred thirty-five dollars (\$8,135)**.