
Central Valley Regional Water Quality Control Board

DATE: 21 February 2023

SUBJECT: RESPONSE TO COMMENTS FOR THE PROPOSED ADMINISTRATIVE CIVIL LIABILITY SETTLEMENT OFFER, CASTLE COMPANIES, LOMA RICA RANCH

Background

On 9 January 2023, the Central Valley Regional Water Quality Control Board (Central Valley Water Board) posted a tentative Administrative Civil Liability (ACL) Order for violations of the Construction General Storm Water Permit violations at the Loma Rica Ranch construction site in Grass Valley for a 30-day public comment period. Comments were received by one party, Mr. David Brownstein of Grass Valley, by email on 11 January 2023. This document responds to those comments.

Comment 1. History of Violations Factor

The proposed settlement states several times: “The Central Valley Water Board has not previously issued any Administrative Civil Liability Orders against the Discharger; therefore, a Neutral History of Violations adjustment factor of 1.0 is appropriate.” The Developer chose a contractor with a history of repeated violations. IMO the developer is responsible for the contractors hired to implement the project, even if the developer was unaware of the repeated violations of a contractor.

Prosecution Team response to Comment 1:

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 section 13385(e). The Enforcement Policy provides the following guidance for implementing the History of Violations adjustment factor:

Where the Discharger has no prior history of violations, this factor should be neutral, or 1.0. Where the Discharger has prior violations within the last five years, the Water Boards should use a multiplier of 1.1. Where the Discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1.

In this case, the Discharger is the Owner of the Project (Castle Companies) and the Central Valley Water Board has not had compliance issues with this discharger within the last five years. The State Water Board’s Office of Enforcement provided further clarification that the History of Violations may only take into account violations that are self-reported by a discharger, stipulated to by a discharger, or adjudicated by the State

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Water Board, any of the Regional Water Quality Control Boards, or the courts. The Prosecution Team is not aware of any such violations. Therefore, a neutral History of Violations adjustment factor of 1.0 is appropriate in this case.

Comment 2. Culpability Factor

On document page 6 (PDF page 13), Step 4 states that: "Based on communication with the Discharger and the BMP installation contractor, the Discharger intended to install BMPs but failed to execute a contract prior to the first rain event in October 2021. Therefore, a neutral culpability adjustment factor of 1.0 is appropriate." Really? The intent was good, but execution failed, so they're not culpable?!? The Discharger has still damaged a public resource... if I plan to pay a bill but failed to execute that plan, I'm still delinquent on that bill, but by this logic I should be absolved because of my intent? (Also, in discussions with the developer we were told that they didn't know about rainfall characteristics in this valley. Ignorance of the law is no excuse (*ignorantia juris non excusat*). This is arguably the same - ignorance of local operating conditions is not an excuse for violating the law). I don't believe that a neutral culpability factor is justifiable in this case.

Prosecution Team response to Comment 2:

The culpability factor is an adjustment factor used to increase or decrease civil liability based on a Discharger's conduct associated with a violation. In this case, the Discharger retained the services of a Qualified Storm Water Pollution Prevention Plan Developer and Practitioner (QSD/QSP) to assist in maintaining compliance with the Construction Storm Water General Permit's requirements. The rain events that occurred in October 2021 developed quickly and were much larger than normal events for this time of year. The Discharger intended to protect the Project with erosion and sediment control BMPs; however, availability of contractors to install these BMPs was limited by the number of active projects in this area.

The Prosecution Team agrees that a public resource was damaged and is taking action to issue this ACL. Considering the circumstances surrounding the violations, the Prosecution Team does not believe that the Discharger intended to violate the requirements of the Construction General Permit; but the Prosecution Team does agree that poor implementation of BMPs was a violation. The Prosecution Team does not agree that assigning a neutral adjustment factor and proposing a penalty of \$194,235 absolves the Discharger of liability; a neutral culpability adjustment factor is appropriate in this case.

Comment 3. Discharge Volume

On document page 4 (PDF page 11), Step 2: Volume Discharged, states: " The Prosecution Team did not to [sic] calculate the volume of discharge at this time". Why not? Isn't this calculation an important part of the settlement agreement?

Prosecution Team Response to Comment 4:

California Water Code section 13385(c) allows a maximum of \$10,000 per day and up to \$10 per gallon (for discharges over 1,000 gallons) for each violation of the Construction General Permit. The Enforcement Policy section related to assessments for discharge violations provides the following guidance:

Generally, NPDES permit effluent limit violations should be addressed on a per day basis only. However, where deemed appropriate, some NPDES permit effluent limit violations, and violations such as effluent spills or overflows, storm water discharges, or unauthorized discharges, the Water Boards should consider whether to assess both per gallon and per day penalties.

Further guidance in the Enforcement Policy related to “Other Factors as Justice May Require” reads, in part:

If the 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 adjustment. Examples of circumstances warranting an adjustment under this step are:

- c. The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the same Enforcement Policy.

The Prosecution Team considered adding liability for gallons as well as days but exercised its discretion in developing the ACL to not include monetary penalties for gallons discharged.

However, if this ACL is ultimately contested by the Discharger, the Central Valley Water Board reserves the right to include a penalty for the gallons discharged if the resulting liability is not consistent with previous actions for similar violations.

Comment 4. Attachments

The proposed settlement document seems to be missing two listed appendices - on document page 10 (page 17 in the PDF) at the top of the page Appendix A and B are listed as attached, but are not present:

Attachments: Attachment A - Economic Benefit Calculation
Attachment B – Staff Cost Calculation

Prosecution Team Response to Comment 4:

All documents created by the Water Boards that are posted to the Water Boards' internet websites are required to comply with California Government Code Sections 7405 and 11135, and the Web Content Accessibility Guidelines. At the time of the posting, the Attachments did not meet this requirement. The Attachments were emailed to the commenter on 11 January 2023. No additional comments related to these attachments have