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GOVERNOR



JARED BLUMENFELD
SECRETARY FOR
ENVIRONMENTAL PROTECTION

San Diego Regional Water Quality Control Board

August 22, 2019

Jonathan Saperstein
TreeSap Farms, LLC
1589 North Main Street
Orange, CA 92867

CERTIFIED MAIL
7016 2140 0000 3904 2720
In reply refer to:
AGL020034903:rstewart

Jonathan Saperstein
TreeSap Farms, LLC
5151 Mitchelldale Street, Suite B-2
Houston, TX 77092

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7017 0190 0000 3951 6764
In reply refer to:
AGL020034903:rstewart

David Hernandez
Hines Growers, Inc.
2500 Rainbow Valley Blvd.
Fallbrook, CA 92028

CERTIFIED MAIL
7016 2140 0000 3904 2683
In reply refer to:
AGL020034903:rstewart

Dear Messrs. Saperstein and Hernandez:

SUBJECT: OFFER R9-2019-0144 TO SETTLE ADMINISTRATIVE CIVIL LIABILITY FOR VIOLATIONS RESULTING FROM FEBRUARY 1, 2019 INSPECTION AT HINES GROWERS RAINBOW FACILITY, 2500 RAINBOW VALLEY BLVD., FALLBROOK, CA 92028

HENRY ABARBANEL, PH.D., CHAIR | DAVID GIBSON, EXECUTIVE OFFICER

2375 Northside Drive, Suite 100, San Diego, California 92108-2700 | www.waterboards.ca.gov/sandiego

This letter (hereafter, "Settlement Offer") contains an offer from the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Prosecution Team to settle potential claims for administrative civil liability arising from the discharge of irrigation runoff to Rainbow Creek caused by improper operation and maintenance of the irrigation recycling system. The alleged violations were discovered as a result of a San Diego Water Board inspection at the Hines Growers Rainbow Facility (Hines) on February 1, 2019. Hines allegedly violated Prohibition No. IV.A of San Diego Water Board Order No. R9-2016-0004¹ and Waste Discharge Prohibition No. 1 of the *Water Quality Control Plan for the San Diego Basin – Region 9* (Basin Plan) by discharging waste (irrigation runoff high in nutrients) to waters of the State causing and/or threatening to cause a condition of pollution in Rainbow Creek, an impaired waterbody for total nitrogen and total phosphorus. Hines also violated Waste Discharge Control Requirement V.B.9 of Order No. R9-2016-0004 by failing to properly operate and maintain the irrigation recycling system.

An additional alleged violation was discovered after review of the Water Quality Protection Plan (WQPP) submitted by Hines as part of its application for coverage under Order No. R9-2016-0004. The WQPP does not contain the total maximum daily load (TMDL)-required management measures contained in the County of San Diego's Rainbow Creek Nutrient Reduction and Management Plan. The non-compliant WQPP is a violation of Waste Discharge Control Requirement V.B.10 of Order No. R9-2016-0004. In addition, Hines failed to submit a timely and complete response to Investigative Order No. R9-2019-0099, issued as a result of the February 1, 2019 inspection findings, a violation of California Water Code (Water Code) section 13267.

This Settlement Offer provides TreeSap Farms, LLC with an opportunity to resolve the alleged violations through payment of eighteen thousand one hundred thirty-two dollars (\$18,132). Please read this letter carefully and respond no later than September 20, 2019.

Responsible Parties

HINES submitted a Notice of Intent to comply with the requirements of Order No. R9-2016-0004 on July 18, 2018 identifying Hines Growers, Inc. as the operator of 21 parcels and 225.77 acres of irrigated lands in Rainbow Valley. In its response, dated May 20, 2019 to Investigative Order No. R9-2019-0099, **HINES** indicated that Treesap Farms LLC purchased Hines Growers, Inc. in August 2018, but has continued doing business under the name Hines Growers. As a result, this Settlement Offer names Treesap Farms, LLC as the Discharger and refers to the facility as Hines Growers (hereinafter Hines). A transfer of enrollment may be required by section III.C of Order No. R9-2016-0004 if the contact information and/or ownership has changed for the facility. Please take necessary steps to determine if you need to update enrollment information.

¹ Order No. R9-2016-0004, *General Waste Discharge Requirements for Discharges from Commercial Agricultural Operations for Dischargers That Are Members of a Third-party Group in the San Diego Region.*

Alleged Violations Subject to this Offer

The San Diego Water Board Prosecution Team (Prosecution Team) alleges the following violations, as summarized below, and further described in the attached documents (Exhibits 1–3).

1. **Violation #1, discharge of irrigation runoff:** The discharge of irrigation runoff with elevated nutrient concentrations to Rainbow Creek is a violation of Prohibition IV.A. of Order No. R9-2016-0004 and Waste Discharge Prohibition No. 1 of the Basin Plan, which prohibit the discharge of waste to waters of the State in a manner causing or threatening to cause a condition of contamination, pollution or nuisance as defined in Water Code section 13050. The alleged violation occurred on one day, February 1, 2019.
2. **Violation #2, failure to operate and maintain waste discharge control equipment:** Failure to properly operate and maintain the irrigation recycling system is a violation of Discharge Specification V.B.9 of Order No. R9-2016-0004. The violation occurred for at least 92 days (February 1, 2019 – May 3, 2019).
3. **Violation #3, failure to include the Total Maximum Daily Load (TMDL) based requirements in the WQPP:** Failure to include the TMDL-based management measures for priority nutrient sources (commercial nurseries) in the Rainbow Valley is a violation of Discharge Specification V.B.10 of Order No. R9-2016-0004. The violation occurred for at least 367 days (July 31, 2018 – August 1, 2019) and continues.
4. **Violation #4, failure to submit a complete and timely response to Investigative Order No. R9-2019-0099:** Failure to respond to Investigative Order No. R9-2019-0099 by the required due date, and failure to provide all information by that due date is a violation of Water Code section 13267. The response was submitted 14 days late and was incomplete. Additional information was submitted on June 4, 2019, a total of 29 days of violation.

Statutory Liability

Pursuant to Water Code section 13350, subdivision (e), Hines is liable for administrative civil liability of up to \$5,000 per violation for each day in which the violation occurs or, for discharge violations (i.e. violation no. 1), up to \$10 per gallon. Pursuant to Water Code section 13268, subdivision (b), for violation nos. 3 and 4, Hines is liable for administrative civil liability up to \$1,000 per violation for each day in which the violation occurs.

The statutory minimum civil liability is the economic benefit resulting from the violation(s). The State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy)² states that the minimum penalty is to be the economic benefit plus 10 percent (10%). For the violations described in the attachments, the maximum potential liability is \$861,000 (Exhibit 2) and the statutory minimum liability is \$906.40.

Settlement Offer

The Prosecution Team proposes to resolve the alleged violations with this Settlement Offer of \$18,132. This Settlement Offer was determined based on an assessment of the factors set forth in Water Code section 13327 using the penalty methodology set forth in the Enforcement Policy. The enclosed "Liability Methodology" (Exhibit 2) describes in detail how the penalty amount was calculated. The Prosecution Team believes that the proposed resolution of the alleged violations is fair and reasonable, fulfills the San Diego Water Board's enforcement objectives, and is in the best interest of the public.

As a settlement consideration, the Prosecution Team is willing to forego the inclusion of staff costs incurred (\$6,451) and calculate liability based on one day of non-compliance for violations 2 and 3, rather than 92 days and 367 days respectively.

Should Hines choose *not* to accept this Settlement Offer, please be advised that the Prosecution Team reserves the right to seek a higher liability amount, up to the maximum allowed by statute, and the right to refer the matter to the Attorney General's Office. The Prosecution Team also reserves the right to conduct additional investigations, including issuance of investigation orders and/or subpoenas to determine if additional violations occurred. Any additional violations subjecting Hines to liability may be included in a formal enforcement action. Hines can avoid the risks inherent in a formal enforcement action and settle the alleged violations by accepting this Settlement Offer.

This Settlement Offer does not address or resolve liability for any violation that is not specifically identified in Exhibit 2. The Prosecution Team reserves the right to take further enforcement actions against Hines for all past violations not identified in this Settlement Offer and further violations of the Water Code or subsequently adopted orders.

² The 2017 Water Quality Enforcement Policy is available on-line at:
https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

Options for Responding to the Settlement Offer

Option A: Accept the Offer

If Hines chooses to accept this Settlement Offer, then the enclosed *Acceptance of Settlement Offer and Waiver of Right to Hearing (Acceptance and Waiver)* (Exhibit 1) shall be completed and submitted, via email, no later than **September 20, 2019**, to the following address:

California Regional Water Quality Control Board, San Diego Region
Attention: AGL020034903:rstewart
Email: SanDiego@waterboards.ca.gov

Important! Upon receipt of the *Acceptance and Waiver*, this settlement will be publicly noticed for a 30-day comment period as required by State regulations. If no substantive comments are received within the 30 days, the Prosecution Team will ask the San Diego Water Board's Executive Officer to formally endorse the *Acceptance and Waiver* as an Order of the San Diego Water Board. Payment is due within 30 days from when the Settlement Offer is signed by the Executive Officer.

If, however, comments are received in opposition to this settlement or the Executive Officer declines to accept the settlement, then the Settlement Offer may be withdrawn. In this case, Hines will be notified, and its waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. An administrative civil liability complaint may be issued, and the matter may be set for an evidentiary hearing.

Option B: Contest the Alleged Violations

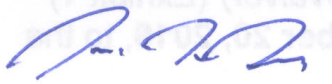
If Hines wishes to contest the violations alleged in this Settlement Offer, it must submit a written response identifying the basis for the challenge, including any evidence to support its claims. Hines' response must be received by the San Diego Water Board no later than **September 20, 2019**. The Prosecution Team will evaluate Hines' basis for a challenge and may seek clarifying information or schedule an in-person meeting. The Prosecution Team will inform Hines as to whether a reduction in the settlement amount is warranted, or whether the original settlement amount is appropriate. Hines will be provided a final opportunity to accept the revised/original settlement amount before proceeding to formal enforcement.

Option C: Reject Offer

If Hines chooses to reject this Settlement Offer or does not timely respond to this offer, the Prosecution Team will initiate a formal enforcement action with regard to the alleged violations. Hines will receive notice of any deadlines associated with that action. As previously stated, in such an action, the liability amount sought or imposed may exceed the liability amount set forth in this Settlement Offer. Moreover, the staff costs of investigating the violations and proceeding with formal enforcement are factors that will be considered in assessing the liability amount.

If you have any questions about this settlement offer, please contact Rebecca Stewart at (619) 516-1977 or at Rebecca.stewart@waterboards.ca.gov.

Respectfully,



JAMES G. SMITH
Assistant Executive Officer

JGS:jh:cmc:cma:rls

See next page for ccs:

cc: (via email with enclosures)

Chiara Clemente, Enforcement Coordinator, San Diego Water Board,
chiara.clemente@waterboards.ca.gov

Kelly Dorsey, Chief, Site Restoration and Groundwater Protection Branch, San Diego Water Board, Kelly.dorsey@waterboards.ca.gov.

Craig Carlisle, Senior, Site Restoration & Agricultural Program, San Diego Water Board,
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Christina Arias, Site Restoration & Agricultural Program, San Diego Water Board,
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Susie Loscutoff, Attorney III, Office of Enforcement, State Water Board,
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Eric Larson, San Diego Region Irrigated Lands Group, eric@sdfarmbureau.org

Craig Lawson, Agriculture Weights & Measures, County of San Diego,
craig.lawson@sdcounty.ca.gov

Jo Ann Weber, Watershed Protection Program, County of San Diego,
joann.weber@sdcounty.ca.gov

Exhibits: Exhibit 1 – Tentative Order No. R9-2019-0144
 Exhibit 2 – Liability Methodology

Documents Relied Upon: (available upon request)

Notice of Violation and Investigative Order R9-2019-0099. (ECM DH 4046843)

Revised Inspection Report. (ECM DH 4046838)

First Response to Investigative Order R9-2019-0099. (ECM DH 4432272)

Second Response to Investigative Order R9-2019-0099. (ECM DH 4434869)

Economic Benefit Analysis (ECM DH 4618953)

Staff Costs Worksheet (ECM DH 4618958)

For Internal Use Only:

Order No. R9-2016-0004

Place ID 781197

GT Global ID AGL020034903

EXHIBIT 1

ORDER NO. R9-2019-0144

ACCEPTANCE OF SETTLEMENT OFFER AND WAIVER OF RIGHT TO A HEARING

FOR
TREESAP USA, LLC
dba HINES GROWERS
2500 RAINBOW VALLEY BLVD.
FALLBROOK, CA 92028

By signing below and returning this *Acceptance of Settlement Offer and Waiver of Right to Hearing (Acceptance and Waiver)* to the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), **TreeSap Farms LLC dba Hines Growers** (hereinafter Hines) hereby accepts the Settlement Offer described in the letter dated August 15, 2019 and titled *Offer to Settle Administrative Civil Liability for Violations Resulting from February 1, 2019 Inspection at Hines Growers Rainbow Facility, 2500 Rainbow Valley Blvd., Fallbrook, CA 92028*. Hines also hereby waives the right to a hearing before the San Diego Water Board to dispute the alleged violations described in the Settlement Offer and its enclosures.

Hines agrees that the Settlement Offer shall serve as a complaint pursuant to Article 2.5 of the California Water Code (Water Code) and that no separate complaint is required for the San Diego Water Board to assert jurisdiction over the alleged violations. Hines agrees to perform the following:

- Pay an administrative civil liability in the sum of **eighteen thousand one hundred thirty-two dollars (\$18,132)** by cashiers' check or certified check made payable to the "State Water Resources Control Board Waste Discharge Permit Fund." This payment shall be deemed payment in full of any civil liability pursuant to Water Code sections 13268 and 13350 that might otherwise be addressed for violations described in the Settlement Offer and its enclosures.
- Fully comply with the requirements of San Diego Water Board Order No. R9-2016-0004.

Upon execution by Hines, the *Acceptance and Waiver* shall be returned to the following address:

California Regional Water Quality Control Board, San Diego Region
Attention: AGL020034903:rstewart
Email: SanDiego@waterboards.ca.gov

Hines understands that State regulations require the San Diego Water Board Prosecution Team (Prosecution Team) to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action for violations of the Water Code. Accordingly, this *Acceptance and Waiver*, prior to its execution by the San Diego Water Board, or its delegate, will be published as required by law for public comment.

If no comments are received within the notice period that cause the Prosecution Team to reconsider the Settlement Offer, then the Prosecution Team will present this *Acceptance and Waiver* to the San Diego Water Board's Executive Officer for signature and issuance on behalf of the San Diego Water Board.

Hines understands that if significant comments are received in opposition to the settlement, then the offer may be withdrawn by the Prosecution Team. If the Settlement Offer is withdrawn, then Hines will be notified and its waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violation(s) will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued and the matter may be set for a hearing. For such a liability hearing, Hines understands that its executed *Acceptance and Waiver* will be treated as a settlement communication and will not be used as evidence by the Prosecution Team in that hearing.

Hines understands that once this *Acceptance and Waiver* is signed it becomes an order issued by the San Diego Water Board and full payment is a condition of the Order. An invoice will be sent upon issuance, and full payment will be due within 30 days of the issued Order.

I hereby affirm that I am duly authorized to act on behalf of and to bind Hines in the making and giving of this *Acceptance and Waiver*.

By: JK - Jonathan Superstein
Title: CEO
Date: 9/11/19

IT IS SO ORDERED, pursuant to Water Code sections 13268 and 13350.

By: David W. Gibson
David W. Gibson, Executive Officer, San Diego Water Board
Date: 25 October 2019

EXHIBIT 2

Alleged Violation No. 1: Unauthorized Discharge of Irrigation Runoff to Waters of the State

*The discharge of irrigation runoff with nutrient concentrations exceeding water quality objectives to waters of the State is a violation of the Water Quality Control Plan for the San Diego Basin (9) Waste Discharge Prohibition No. 1, which prohibits the discharge of waste to waters of the State in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code (Water Code) section 13050(m). The unauthorized discharge of irrigation runoff exceeding the water quality objectives to waters of the State is also a violation of San Diego Water Board Order No. R9-2016-0004 Provision IV.A and Provision 11A of Attachment F. A person who, in violation of a prohibition issued by a regional board, discharges waste into waters of the state, shall be civilly liable in accordance with subdivision (d) or (e) pursuant to Water Code section 13350, subdivision (a). **HINES** is therefore subject to administrative liability pursuant to Water Code section 13350, subdivision (e)(1) or (e)(3), but not both.*

On February 1, 2019, San Diego Water Board staff conducted a compliance inspection and collected samples from **HINES**' irrigation run-off discharging to Rainbow Creek, a water of the State impaired for nutrients with an active TMDL. The discharge contained concentrations of total nitrogen (11.6 mg/L), total phosphorus (2.37 mg/L), and ammonia (0.861 mg/L) that exceeded the Basin Plan's water quality objectives and threatens to cause a condition of pollution in Rainbow Creek.

PENALTY CALCULATION METHODOLOGY

STEP 1 – Actual or Potential for Harm for Discharge Violations

FACTOR	VALUE	DISCUSSION
Degree of Toxicity of the Discharge	3	<p>HINES' irrigation runoff poses an above moderate risk to potential receptors due to high concentrations of total nitrogen, total phosphorus, and ammonia. The chemical, physical and biological characteristics of the irrigation runoff, high in biostimulatory substances (nitrogen and phosphorus), contribute to excessive algae which can create conditions harmful to aquatic life. Discharges with high concentrations of ammonia can be toxic to fish and other aquatic life. The concentrations of total nitrogen and total phosphorus in the discharge far exceeded the Basin Plan water quality objectives for biostimulatory substances (1.0 mg/L for total nitrogen, 0.1 mg/L for total phosphorus), a significant threat to habitats and ecosystems in downstream receiving waters.</p> <p>In addition, HINES applies herbicides, pesticides, fungicides and insecticides which, if discharged to receiving waters, poses additional risks to potential receptors.</p>

FACTOR	VALUE	DISCUSSION
Actual Harm or Potential Harm to Beneficial Uses	4	<p>The discharge of irrigation runoff high in nutrient concentrations presents an above moderate potential for harm to the habitat and ecosystem beneficial uses of Rainbow Creek (WARM, COLD, WILD) and the Santa Margarita River Estuary (EST, WILD, RARE, MAR, MIGR), key beneficial uses in a key area designated to support those uses.</p> <p>The discharge to waterbodies impaired for nutrients and eutrophication meets the definition of pollution as defined in Water Code section 13050(l)(1)(A) as any addition of nutrients in excess of load allocations to nutrient impaired waterbodies alters the quality of the receiving waters to a degree which unreasonably affects the habitat and ecosystem beneficial uses currently impaired.</p> <p>The discharge of irrigation runoff high in nutrient concentrations also poses a significant threat to the aesthetic and recreational beneficial uses (REC1, REC2) of Rainbow Creek, the Santa Margarita River, and the Santa Margarita River Estuary.</p>
Susceptibility to Cleanup or Abatement	1	None of the discharge was susceptible to cleanup or abatement.

Final Score: Potential for Harm

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 1	8	The potential for harm score is calculated as follows: (degree of toxicity)+(potential for harm)+(susceptibility to cleanup and abatement) = (3)+(4)+(1) = 8.

STEP 2 – Assessments for Discharge Violations

FACTOR	VALUE	DISCUSSION
Per Gallon assessments for Discharge Violations	n/a	A Per gallon assessment was not calculated for this alleged violation.
High volume discharges	n/a	A Per gallon assessment was not calculated for this alleged violation.
Per Day Assessments for Discharge Violations	1	The discharge was observed on one day (February 1, 2019). According to Water Code section 13350 (e)(1) the maximum penalty is \$5,000 for each day the violation occurred.
Deviation from Requirement	Major	While discharging irrigation runoff is not a Basin Plan violation, discharges exceeding the Basin Plan water quality objectives for total nitrogen, total phosphorus, and ammonia to an impaired waterbody

FACTOR	VALUE	DISCUSSION
		with minimal assimilative capacity represents a discharge of waste that threatens to cause a condition of pollution. As such, it is expressly prohibited in the Water Code, Basin Plan, Resolution R9-2005-0036, and Order No. R9-2016-0004, and is a major deviation from the requirements.

Per Day Factor for Discharges

FACTOR	VALUE	DISCUSSION
Per Day Factor for Discharges	0.6	Enforcement Policy, Table 2 – Per Day Factors for Discharges

Initial Liability Amount

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 1	\$3,000	The initial liability is calculated as follows: (per day factor)(days violated)(maximum liability) = (0.6)(1)(\$5,000) = \$3,000.

STEP 3 – Factor does not apply to discharge violations

STEP 4 – Adjustment Factors

FACTOR	VALUE	DISCUSSION
Degree of Culpability	1.3	HINES bears a moderate degree of culpability for the discharge because it failed to conduct any water quality monitoring on irrigation runoff, as required by the County of San Diego’s Rainbow Creek Nutrient Reduction and Management Plan and likely had no idea that discharges from its irrigation runoff contained concentrations of total nitrogen, total phosphorus and ammonia far in excess of the Basin Plan objectives. A reasonable and prudent person would have had a history of water quality data relating to its irrigation runoff as required, and, based on the concentration of pollutants in the discharge, would have measures in place to ensure that its essential water quality protection equipment (irrigation recycling system) was operational at all times to avoid the unauthorized discharge of waste causing or threatening to cause a condition of pollution in Rainbow Creek. HINES was at least negligent in allowing the unauthorized discharge to occur and therefore a factor of 1.3 is appropriate.
History of Violations	1.0	HINES has no prior history of violations with the San Diego Water Board.
Cleanup and Cooperation	1.0	HINES stopped the discharge when requested by the San Diego Water Board inspectors.

STEP 5 – Determination of Total Base Liability Amount

FACTOR	VALUE	DISCUSSION
Total Base Liability Amount	\$3,900	The total base liability is: (initial liability)(culpability)(history of violation)(cleanup and cooperation) = (\$3,000)(1.3)(1.0)(1.0)=\$3,900.

STEP 6 – Ability to Pay and Ability to Continue in Business

FACTOR	VALUE	DISCUSSION
Ability to Pay	Yes	Based on publicly available information, TreeSap USA, LLC, the owner of HINES and an owner of commercial nurseries nationwide has the ability to pay the recommended liability amount.

STEP 7 – Economic Benefit

FACTOR	VALUE	DISCUSSION
Economic Benefit	\$161	The unauthorized discharge would not have occurred if the irrigation recycling system was properly operated and maintained. Using the USEPA's BEN model with the cost of replacing/repairing the faulty irrigation recycling system pump(s) (\$10,957) and the delayed implementation of repairs for 92 days, HINES realized an economic benefit of \$161. This is a conservative estimate since it is likely that the recycling system pumps failed prior to the date of the inspection.

STEP 8 – Other Factors As Justice May Require

FACTOR	VALUE	DISCUSSION
Staff Costs	\$0	The Enforcement Policy allows Water Boards to recover the cost of the investigation and enforcement under this factor. To date, the San Diego Water Board costs associated with the investigation and preparation of the enforcement action is \$6,451. In this instance, the Prosecution Team has elected to not seek staff costs incurred in preparation of this enforcement action as a settlement consideration.

STEP 9 Maximum and Minimum Liability Amounts

FACTOR	VALUE	DISCUSSION
Maximum Liability Amount	\$5,000	The maximum liability amount is: (total days of violation)(statutory maximum) = (1)(\$5,000)=\$5,000.
Minimum Liability Amount	\$177	The maximum liability amount is: (economic benefit)+(ten percent) = (\$161)(1.1)=\$177.

Final Liability Amount

FACTOR	VALUE	DISCUSSION
Alleged Violation No. 1	\$3,900	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability and less than or equal to the maximum liability.

Maximum Liability	Minimum Liability	Initial Liability	Base Liability	Final Liability
\$5,000	\$177	\$3,000	\$3,900	\$3,900

Alleged Violation No. 2: Failure to Implement Management Practices that Prevent or Reduce Discharges of Waste

Failure to properly operate the irrigation recycling system is a violation of San Diego Water Board Order No R9-2016-0004 Discharge Specification V.B.9, which states that Members shall properly operate and maintain in good working order any facility, unit, system, or monitoring device installed to achieve compliance with the General Order. This constitutes a violation of Water Code section 13350, subdivision (a) because a discharge of waste into a water of the state occurred as a result of this violation of a waste discharge requirement issued by a regional board. HINES is therefore subject to administrative liability pursuant to Water Code section 13350, subdivision (e)(1).

On February 1, 2019, San Diego Water Board staff conducted an inspection at the **HINES** facility and observed a discharge of irrigation water to Rainbow Creek. During the inspection, the inspectors were told that a valve on the irrigation recycling system was opened to ensure the facility did not flood, although it was not raining and there was no threat of flooding during the inspection.

PENALTY CALCULATION METHODOLOGY

STEP 1 – Factor does not apply to non-discharge violations

STEP 2 – Factor does not apply to non-discharge violations

STEP 3 – Per Day Assessments for Non-Discharge Violations

FACTOR	VALUE	DISCUSSION
Potential for Harm	Major	<p>Failure to properly operate and maintain the irrigation recycling system represents a major potential for harm because resulting discharges present a particularly egregious threat to the habitat and ecosystem beneficial uses (WARM, COLD, WILD) of Rainbow Creek and (EST, WILD, RARE, MAR, MIGR) of the Santa Margarita River Estuary. These are key beneficial uses in a key area designated to support those uses.</p> <p>The failed irrigation recycling system also poses a significant threat to the aesthetic and recreational beneficial uses (REC1, REC2) of Rainbow Creek, the Santa Margarita River, and the Santa Margarita River Estuary.</p> <p>In addition, HINES applies herbicides, pesticides, fungicides and insecticides which, if discharged to receiving waters, poses additional risks to potential receptors.</p>
Deviation from Requirements	Major	The Deviation from Requirement is major because the requirement to maintain the irrigation recycling system was intended to reduce or

FACTOR	VALUE	DISCUSSION
		eliminate discharges to Rainbow Creek, and the nonoperational status rendered the requirement ineffective in its essential function.
Per Day Factor	0.85	Enforcement Policy, Table 3 – Per Day Factor for Non-Discharge Violations
Per Day Assessment	\$4,250	The per day assessment is: (per day factor)(one day)(statutory maximum) = (0.85)(1)(\$5,000) = \$4,250.
Days of Violation	1	The violation was observed on February 1, 2019. HINES submitted documentation indicating that the irrigation recycling system was not repaired until at least May 3, 2019, 92 days. For settlement considerations, the Prosecution Team has elected to lower the days of violation to one day.

Initial Liability Amount

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 2	\$4,250	The initial liability amount is: (per day factor)(days of violation)(statutory maximum) = (0.85)(1)(\$5,000)=\$4,250.

STEP 4 – Adjustment Factors

FACTOR	VALUE	DISCUSSION
Degree of Culpability	1.4	<p>HINES failed to properly operate and maintain the irrigation recycling system. During the inspection, the inspectors were told that a discharge was occurring due to the risk of flooding, although the inspector noted there was no such risk present. And, in response to the investigative Order, HINES indicated that a pump in the irrigation recycling system had failed and the failure had not been noticed because the position assigned oversight of the recycling system had been vacant. This indicates that at least one of its responses was misleading and not accurate.</p> <p>A reasonable and prudent person would have transferred the responsibility to oversee the irrigation system to someone when the responsible position became vacant; would have continued regular inspections to ensure proper operation; would have noticed a discharge was occurring with no potential for flooding; and would have promptly investigated the cause of the discharge and identified the needed repair in a timely manner.</p>
History of Violations	1.0	HINES has no prior history of violations with the San Diego Water Board.
Cleanup and Cooperation	1.4	HINES provided information indicating that it did not attempt to repair or replace the failed pump until May 3, 2019, 92 days after the inspection where the violation was identified.

STEP 5 – Determination of Total Base Liability Amount

FACTOR	VALUE	DISCUSSION
Total Base Liability Amount	\$8,330	The total base liability is calculated as follows: (initial liability)(culpability)(history of violation)(cleanup and cooperation) = (\$4,250)(1.4)(1.0)(1.4)=\$8,330.

STEP 6 – Ability to Pay and Ability to Continue in Business

FACTOR	VALUE	DISCUSSION
Ability to Pay	Yes	Based on publicly available information, TreeSap USA, LLC, the owner of HINES and an owner of commercial nurseries nationwide has the ability to pay the recommended liability amount.

STEP 7 – Economic Benefit

FACTOR	VALUE	DISCUSSION
Economic Benefit	\$161	Using the USEPA’s BEN model with the cost of replacing/repairing the faulty irrigation recycling system pump(s) (\$10,957) and the delayed implementation of repairs for 92 days, HINES realized an economic benefit of \$161. This is a conservative estimate since it is likely that the recycling system pumps failed prior to the date of the inspection.

STEP 8 – Other Factors As Justice May Require

FACTOR	VALUE	DISCUSSION
Penalty Adjustment	-\$3,330	The Enforcement Policy allows for an adjustment to the calculated penalty amount if express findings can be made to justify the adjustment. The calculated penalty amount exceeds the maximum per day assessment, therefore the penalty amount has been reduced by \$3,330 to the statutory maximum for one day of violation.
Staff Costs	\$0	The Enforcement Policy allows the Water Boards to recover the cost of the investigation and enforcement under this factor. To date, the San Diego Water Board costs associated with the investigation and preparation of the enforcement action is \$6,451. In this instance, the Prosecution Team has elected to not seek staff costs incurred in preparation of this enforcement action as a settlement consideration.

STEP 9 – Maximum and Minimum Liability Amounts

FACTOR	VALUE	DISCUSSION
Maximum Liability Amount	\$460,000	The maximum liability amount is: (total days of violation)(statutory maximum) = (92)(\$1,000)=\$460,000.
Minimum Liability Amount	\$177	The maximum liability amount is: (economic benefit)+(ten percent) = (\$161)(1.1)=\$177.

Final Liability Amount

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 2	\$5,000	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability and less than or equal to the maximum liability. The total base liability amount calculated for this alleged violation exceeds the statutory maximum liability of \$5,000 per day. The Prosecution Team has lowered the total base liability amount by \$3,330 to the maximum liability amount of \$5,000.

Maximum Liability	Minimum Liability	Initial Liability	Base Liability	Final Liability
\$460,000	\$177	\$4,250	\$8,330	\$5,000

Alleged Violation No. 3: Failure to Include Management Measures/Management Practices for Priority Nutrient Sources to Address the Rainbow Creek TMDL

Failure to include management measures/management practices for priority nutrient sources to address the Rainbow Creek TMDL in its Water Quality Protection Plan (WQPP) required by Discharge Specification V.B.10 of San Diego Water Board Order No. R9-2016-0004 is a violation of Water Code section 13267 subdivision (b)(1). HINES is therefore subject to administrative liability pursuant to Water Code section 13268, subdivision (a)(1).

On July 31, 2018, **HINES** submitted a WQPP as required for enrollment in a third-party group and Order No. R9-2016-0004. The WQPP failed to include management measures/management practices required for priority nutrient sources located in hydrologic subareas 902.22 and 902.23 within the Rainbow Creek watershed identified in the County of San Diego’s Nutrient Reduction and Management Plan (NRMP). Most importantly, **HINES’** WQPP failed to include water quality monitoring information for irrigation source water (B.1.1., B.1.3 and B.1.4), fertigation water (B.1.9) and storm water runoff (C.2), information vital to determine if management measures/practices are reducing or eliminating the discharge of nutrients to Rainbow Creek.

PENALTY CALCULATION METHODOLOGY

STEP 1 – Factor does not apply to non-discharge violations

STEP 2 – Factor does not apply to non-discharge violations

STEP 3 – Per Day Assessments for Non-Discharge Violations

FACTOR	VALUE	DISCUSSION
Potential for Harm	Major	<p>Failure to include the TMDL-based management measures/management practices applicable to HINES represents a major potential for harm to beneficial uses. The additional management measures/management practices were specifically designed to address high priority nutrient (total nitrogen and total phosphorus) sources in Rainbow Valley and HINES has been identified in the NRMP as a high priority nutrient source.</p> <p>Nutrient discharges in irrigation runoff to Rainbow Creek present a particularly egregious threat to the habitat and ecosystem beneficial uses (WARM, COLD, WILD) of Rainbow Creek and the habitat and ecosystem beneficial uses (EST, WILD, RARE, MAR, MIGR) of the Santa Margarita River Estuary. These are key beneficial uses in a key area designated to support those uses.</p> <p>Nutrient discharges also pose a significant threat to the aesthetic and recreational beneficial uses (REC1, REC2) of Rainbow Creek, the Santa Margarita River, and the Santa Margarita River Estuary.</p>

FACTOR	VALUE	DISCUSSION
		In addition, HINES applies herbicides, pesticides, fungicides and insecticides which, if discharged to receiving waters, poses additional risks to potential receptors.
Deviation from Requirements	Major	The Deviation from Requirement is major because failing to identify and include management measures/management practices in HINES' WQPP for the Rainbow Creek watershed to address the TMDL requirements in Order No. R9-2016-0004 renders the requirement ineffective in its essential function.
Per Day Factor	0.85	Enforcement Policy, Table 3 – Per Day Factor for Non-Discharge Violations
Per Day Assessment	\$850	The per day assessment is: (per day factor)(one day)(statutory maximum) = $(0.85)(1)(\$1,000) = \850 .
Days of Violation	1	The WQPP was submitted without the TMDL-based management measures on July 31, 2018. The WQPP continues to be incomplete and in violation of Order No. R9-2016-0004 for 367 days (to August 1, 2019) and counting. For settlement considerations, the Prosecution Team has elected to lower the days of violation to one day.

Initial Liability Amount

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 3	\$850	The initial liability is: (per day factor)(days violated)(maximum liability) = $(0.85)(1)(\$1,000) = \850 .

STEP 4 – Adjustment Factors

FACTOR	VALUE	DISCUSSION
Degree of Culpability	1.3	HINES bears a high degree of culpability for not including the water quality monitoring management measures/management practices described in the NRMP and required by Order No. R9-2016-0004. HINES operates commercial nurseries at 21 different parcels in Rainbow Valley totaling 225.77 acres of irrigated land. A reasonable and prudent person operating the majority of commercial nurseries in Rainbow Valley would be adhering to the monitoring requirements in the NRMP to demonstrate compliance with the requirements of Order No. R9-2016-0004.
History of Violations	1.0	HINES has no prior history of violations with the San Diego Water Board.
Cleanup and Cooperation	1.0	While HINES prepared and submitted the required WQPP, the document does not contain all of the required information.

STEP 5 – Determination of Total Base Liability Amount

FACTOR	VALUE	DISCUSSION
Total Base Liability Amount	\$1,105	The total base liability is: (initial liability)(culpability)(history of violation)(cleanup and cooperation) = (\$850)(1.3)(1.0)(1.0)=\$1,105.

STEP 6 – Ability to Pay and Ability to Continue in Business

FACTOR	VALUE	DISCUSSION
Ability to Pay	Yes	Based on publicly available information, TreeSap USA, LLC, the owner of HINES and an owner of commercial nurseries nationwide has the ability to pay the recommended liability amount.

STEP 7 – Economic Benefit

FACTOR	VALUE	DISCUSSION
Economic Benefit	\$663	Using a value of \$1,000 as the cost to prepare an adequate WQPP and the USEPA’s BEN model, the delayed cost of not preparing an adequate WQPP was \$663. This value is based on the WQPP original submittal date of July 31, 2018.

STEP 8 – Other Factors As Justice May Require

FACTOR	VALUE	DISCUSSION
Penalty Adjustment	-\$105	The Enforcement Policy allows for an adjustment to the calculated penalty amount if express findings can be made to justify the adjustment. The calculated penalty of \$1,105 exceeds the daily maximum allowed by statute. The calculated penalty amount has been reduced by \$105 to the daily maximum of \$1,000 per day of violation.
Staff Costs	\$0	The Enforcement Policy allows the Water Boards to recover the cost of the investigation and enforcement under this factor. To date, the San Diego Water Board costs associated with the investigation and preparation of the enforcement action is \$6,451. In this instance, the Prosecution Team has elected to not seek staff costs incurred in preparation of this enforcement action as a settlement consideration.

STEP 9 – Maximum and Minimum Liability Amount

FACTOR	VALUE	DISCUSSION
Maximum Liability Amount	\$367,000	The maximum liability amount is: (total days of violation)(statutory maximum) = (367)(\$1,000)=\$367,000.
Minimum Liability Amount	\$729	The maximum liability amount is: (economic benefit)+(ten percent) = (\$663)(1.1)=\$729.

Final Liability Amount

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 3	\$1,000	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability and less than or equal to the maximum liability. The total base liability amount calculated for this alleged violation exceeds the statutory maximum liability of \$1,000 per day. The Prosecution Team has lowered the total base liability amount by \$105 to the maximum liability amount of \$1,000.

Maximum Liability	Minimum Liability	Initial Liability	Base Liability	Final Liability
\$367,000	\$729	\$805	\$1,105	\$1,000

Alleged Violation No. 4: Failure to Comply with Investigative Order No. R9-2019-0099

Failure to submit a complete and timely response to Investigative Order No. R9-2019-0099 is a violation of Water Code section 13267, subdivision (b)(1). HINES is therefore subject to administrative liability pursuant to Water Code section 13268, subdivision (a)(1).

On May 7, 2019, San Diego Water Board staff contacted **HINES** because its response to Investigative Order No. R9-2019-0099, due May 6, 2019, had not been received. On May 20, 2019, **HINES** submitted its response. The response was submitted 14 days late, was incomplete, and did not contain the required statement that the information submitted was accurate, complete, and submitted under penalty of perjury. After San Diego Water Board staff asked for additional information on June 4, 2019, **HINES** submitted two attachments referenced in its original submittal that were not in the response. The documents were received on June 4, 2019. To date, a statement that the information was submitted under penalty of perjury has not been received.

PENALTY CALCULATION METHODOLOGY

STEP 1 – Factor does not apply to non-discharge violations

STEP 2 – Factor does not apply to non-discharge violations

STEP 3 – Per Day Assessments for Non-Discharge Violations

FACTOR	VALUE	DISCUSSION
Potential for Harm	Moderate	Failure to submit a timely and complete technical report in response to Investigative Order No. R9-2019-0099 constitutes a moderate potential for harm as the violation substantially impairs the San Diego Water Board’s ability to perform its statutory and regulatory functions to protect water quality.
Deviation from Requirements	Moderate	The Deviation from Requirement is moderate because most elements of the request for information were received by June 4, 2019.
Per Day Factor	0.35	Enforcement Policy, Table 3 – Per Day Factor for Non-Discharge Violations
Per Day Assessment	\$350	The per day assessment is: (per day factor)(one day)(statutory maximum) = (0.35)(1)(\$1,000) = \$350.
Days of Violation	14	HINES submitted the report 14 days late. The Prosecution Team has elected not to assess liability for the 29 days the report was incomplete.

Initial Liability Amount

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 4	\$4,900	The initial liability amount is: (per day factor)(days of violation)(statutory maximum) = (0.35)(14)(\$1,000)=\$4,900.

STEP 4 – Adjustment Factors

FACTOR	VALUE	DISCUSSION
Degree of Culpability	1.4	HINES bears a heightened degree of culpability for the violation because HINES acknowledged receipt of the investigative order yet did not submit the required information until after the due date. A reasonable and prudent person would have provided a complete and timely response to an investigative order issued by the San Diego Water Board.
History of Violations	1.0	HINES has no prior history of violations with the San Diego Water Board.
Cleanup and Cooperation	1.2	San Diego Water Board staff had to contact HINES after the report due date to request its submittal. After HINES ' initial report was received, San Diego Water Board staff had to contact HINES again in order to get a complete submittal.
Days of Violation	14	HINES report was due on May 6, 2019 and was not received until May 20, 2019.

STEP 5 – Determination of Total Base Liability Amount

FACTOR	VALUE	DISCUSSION
Total Base Liability Amount	\$8,232	The total base liability is calculated as follows: (initial liability)(culpability)(history of violation)(cleanup and cooperation) = (\$4,900)(1.4)(1.0)(1.2)=\$8,232.

STEP 6 – Ability to Pay and Ability to Continue in Business

FACTOR	VALUE	DISCUSSION
Ability to Pay	Yes	Based on publicly available information, TreeSap USA, LLC, the owner of HINES and an owner of commercial nurseries nationwide has the ability to pay the recommended liability amount.

STEP 7 – Economic Benefit

FACTOR	VALUE	DISCUSSION
Economic Benefit	\$0	Using a value of \$50 as the cost to prepare the response to the Investigative Order and the USEPA's BEN model, the delayed cost of not preparing a complete and timely response was negligible, and afforded HINES no economic benefit.

STEP 8 – Other Factors As Justice May Require

FACTOR	VALUE	DISCUSSION
Staff Costs	\$0	The Enforcement Policy allows the Water Boards to recover the cost of the investigation and enforcement under this factor. To date, the San Diego Water Board costs associated with the investigation and preparation of the enforcement action is \$6,451. In this instance, the Prosecution Team has elected to not seek the staff costs incurred in preparation of this enforcement action as a settlement consideration.

STEP 9 – Maximum and Minimum Liability Amounts

FACTOR	VALUE	DISCUSSION
Maximum Liability Amount	\$29,000	The maximum liability amount is: (total days of violation)(statutory maximum) = (29)(\$1,000)=\$29,000.
Minimum Liability Amount	\$0	The maximum liability amount is: (economic benefit)+(ten percent) = (\$0)(1.1)=\$0.

Final Liability Amount

VIOLATION	VALUE	DISCUSSION
Alleged Violation No. 4	\$8,232	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability and less than or equal to the maximum liability.

Maximum Liability	Minimum Liability	Initial Liability	Base Liability	Final Liability
\$29,000	\$0	\$4,900	\$8,232	\$8,232

SUMMARY OF LIABILITY AMOUNTS

Violation 1	Violation 2	Violation 3	Violation 4	Total Liability Amount
\$3,900	\$5,000	\$1,000	\$8,232	\$18,132