
San Diego Regional Water Quality Control Board

September 7, 2021

In reply refer to: 803119:CMean

Janet Hsu
A-1 Sunshine Farms, LLC
4521 Campus Drive #168
Irvine, California 92612

Ms. Hsu:

Settlement Order No. R9-2021-0189 to Resolve Administrative Civil Liability for Alleged Violation of California Water Code Section 13260

The California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Prosecution Team alleges that A-1 Sunshine Farms, LLC and Janet Hsu, as the LLC's responsible corporate officer, (together, Discharger) violated California Water Code (Water Code) section 13260 for failure to obtain regulatory coverage for discharges from multiple commercial agricultural operations in the San Diego Region, as detailed below. This letter contains a Settlement Order from the San Diego Water Board Prosecution Team reflective of the agreement in principle reached by email on July 18, 2021, to resolve potential claims for administrative civil liability arising out of the alleged violation.

This Settlement Order provides the Discharger with an opportunity to resolve the alleged violation through payment of \$5,000.

Description of Alleged Violation

Water Code section 13260 requires a report of waste discharge be submitted to the San Diego Water Board when any person discharges waste, or proposes to discharge waste, that could affect the quality of waters of the State in the San Diego Region. Such discharges include irrigation return flows or storm water runoff from irrigated lands that may contribute waste to groundwater or surface waters. A person that owns or operates a commercial agricultural operation in the San Diego Region can meet the report of waste discharge requirement by applying for coverage under one of two General Agricultural Orders issued by the San Diego Water Board: 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* (Third-Party General Order); or 2) Order No. R9-2016-0005, *General Waste Discharge Requirements for Discharges from Commercial Agricultural Operations for Dischargers Not Participating in a Third-Party Group in the San Diego Region* (Individual General Order) (together, General Agricultural Orders).

CELESTE CANTÚ, CHAIR | DAVID GIBSON, EXECUTIVE OFFICER

The [General Agricultural Orders](#)¹ are available on the San Diego Water Board's website.

To obtain coverage in one of the General Agricultural Orders, a person must either submit a complete Notice of Intent (NOI) under membership with an approved Third-Party Group grower coalition or obtain regulatory coverage by submitting an NOI without the assistance of a Third-Party Group. The Discharger originally enrolled in the Third-Party General Order on January 16, 2020, but its membership was terminated by the San Diego Region Irrigated Lands Group (SDRILG) because it failed to pay the required annual fee after receiving three invoices. The SDRILG is a grower coalition approved by the San Diego Water Board to collect fees, conduct water quality monitoring, and assist growers with achieving compliance.

The Discharger owns at least 118.63 acres of irrigated lands that are used for Agricultural Operations in northwestern San Diego County, California and is therefore required to enroll in one of the General Agricultural Orders.

NOV/NOT/Directive

On August 5, 2020, the San Diego Water Board issued the Discharger Notice of Violation No. R9-2020-0219 (NOV) /Directive Letter (Directive) to obtain regulatory coverage for its Agricultural Operation pursuant to Water Code section 13260. The NOV/Directive detailed the alleged violations, explained that the Discharger's enrollment had been terminated for noncompliance with the Third-Party General Order (Notice of Termination [NOT]), and included a legal directive to obtain regulatory coverage for its commercial agricultural operations pursuant to Water Code section 13260. The NOV/Directive required the Discharger to obtain regulatory coverage on or before August 20, 2020 by enrolling in one of the two General Agricultural Orders. The NOV/Directive cited publicly available information regarding the parcels owned or operated by the Discharger.

Proposed Settlement Offer R9-2020-0247

On October 1, 2020, the San Diego Water Board Prosecution Team issued the Discharger Settlement Offer R9-2020-0247. This offer proposed to settle the alleged violation for \$4,192 if the Discharger enrolled in one of the two General Agricultural Orders. The Discharger had until November 2, 2020 to accept the offer. No response was received from the Discharger by the due date.

¹ https://www.waterboards.ca.gov/sandiego/water_issues/programs/commercial_agriculture/

Administrative Civil Liability Complaint R9-2021-0018

On May 14, 2021, the San Diego Water Board Prosecution Team issued the Discharger Administrative Civil Liability Complaint (ACLC) R9-2021-0018 with a proposed liability of \$62,247. The hearing date was scheduled for August 12, 2021. On June 12, 2021 the Discharger contacted the Prosecution Team by email with new information regarding the actual acreage of the operation and the Discharger's efforts to communicate with their third party growers group. The Prosecution Team subsequently re-initiated settlement negotiations with the Discharger.

The Discharger enrolled in the San Diego Region Irrigated Lands monitoring group and came into compliance on June 24, 2021. On July 18, 2021 The Prosecution Team and Discharger reached an agreement in principle to settle this matter for \$5,000.

Statutory Liability

Pursuant to Water Code section 13261, the Discharger is liable for administrative civil liability of up to \$1,000 per day of violation. The State Water Resources Control Board's [Water Quality Enforcement Policy](#)² states that the minimum liability should be the economic benefit plus ten percent. For the alleged violation described in Exhibit 1, the maximum liability is \$308,000, and the minimum liability is \$117 (as recalculated by the USEPA BEN model using delayed instead of avoided costs, and the revised irrigated acreage).

Issuance of Order R9-2021-0189

This Settlement Order is based on an application of the Enforcement Policy's Penalty Calculation Methodology, which addresses factors that are required to be considered by Water Code section 13327. The attached "Penalty Calculation Methodology" describes in detail how the settlement amount was calculated for the alleged violation (Exhibit 1). The Prosecution Team believes that the proposed resolution of the alleged violation is fair and reasonable, fulfills the San Diego Water Board's enforcement objectives, and is in the public's best interest.

If the Discharger chooses to accept this Settlement Offer, then the enclosed *Acceptance of Settlement Offer and Waiver of Right to Hearing* (Exhibit 2, Acceptance and Waiver Form) shall be completed and submitted, via email, no later than September 21, 2021.

California Regional Water Quality Control Board, San Diego Region
Attention: 803119:CMean
Email: SanDiego@waterboards.ca.gov

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https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

Respectfully,

KELLY DORSEY, P.G.
Assistant Executive Officer

Documents Relied upon:

1. Notice of Violation/ Directive Letter No. R9-2020-0219 (Doc Handle 8865653)
2. Settlement Offer R9-2020-0247 (Doc Handle 9095284)
3. Administrative Civil Liability Complaint R9-2021-0018 (Doc Handle 9246592)
4. USEPA BEN Model calculations (Doc Handle 9246983)
5. A1 Sunshine Additional information submittal 6/12/21 (Doc Handle 9247008)
6. A1 Sunshine Additional information submittal 7/13/21 (Doc Handle 9247000)
7. A1 Sunshine Settlement Offer acceptance email (Doc Handle 9247011)

CC via email:

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

Roger Mitchell, San Diego Water Board, roger.mitchell@waterboards.ca.gov

Catherine Hawe, State Water Board, catherine.hawe@waterboards.ca.gov

Ben Neill, San Diego Water Board, ben.neill@waterboards.ca.gov

Jason DuMond, San Diego Water Board, jason.dumond@waterboards.ca.gov

Vincent Vu, State Water Board, vincent.vu@waterboards.ca.gov

ECM PIN: CW-803119 (San Diego Region Agricultural Operations)

Exhibit 1: Penalty Calculation Methodology

Exhibit 2: Order No. R9-2021-0189

EXHIBIT 1**Penalty Calculation Methodology****Step 1. Actual Harm or 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 two factors: the potential for harm and the extent of deviation from the applicable requirements.

Potential for Harm: Moderate

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

A "moderate" potential for harm is appropriate when the characteristics of the violation have substantially impaired the San Diego Water Board's ability to perform its statutory or regulatory functions, present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most non-discharge violations should be considered to present a moderate potential for harm.

Failure to enroll in and comply with the conditions of the General Agricultural Orders impaired the San Diego Water Board's ability to perform its statutory and regulatory functions. Owners or operators of Agricultural Operations regulated under the General Agricultural Orders either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with agricultural practices. Regulated dischargers are subject to educational requirements, and they regularly report on the practices they engage to protect water quality. By failing to provide monitoring results or information on its practices, the Discharger impaired the San Diego Water Board's efforts to assess potential impacts and risks to water quality.

Because the Discharger impaired the San Diego Water Board's ability to perform its statutory or regulatory functions, and given the threat to the beneficial uses of the San Luis Rey River and tributaries of San Elijo Lagoon from the Discharger's Agricultural Operations, a moderate potential for harm is appropriate.

Deviation from Requirement: Major

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

A "major" deviation from requirement is appropriate when a violator disregards the requirement, and/or the requirement is rendered ineffective in its essential functions.

The deviation from requirement in this instance is major. The Discharger's enrollment in the Third-Party Order was terminated because the Discharger failed to maintain its' membership status with the SDRILG by failing to pay its annual fee after receiving three invoices. Additionally, the San Diego Water Board issued the NOV/Directive to the Discharger on August 5, 2020, formally notifying it that the San Diego Water Board considered it to be operating without appropriate permit coverage and directing it to enroll under one of the General Agricultural Orders. San Diego Water Board staff reached out to the Discharger multiple times to offer assistance with the enrollment process. Yet, the Discharger failed to obtain regulatory coverage for its ongoing Agricultural Operation until the San Diego Water Board Prosecution Team issued an ACLC.

Coverage under one of the General Agricultural Orders is foundational to the San Diego Water Board's efforts to protect water quality from discharges of waste associated with Agricultural Operations. This failure to enroll undermines the regulatory program because staff resources are directed to bringing the Discharger into enrollment compliance rather than conducting field inspections or reviewing annual reports. Additionally, failure by the Discharger to enroll renders the requirements of the program, including monitoring, reporting, and completion of educational requirements, completely ineffective.

Per Day Assessments for Non-Discharge Violations = 0.55

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.4 to 0.7 for non-discharge violations with a moderate potential for harm and major deviation from requirement. The Prosecution Team determined that the midpoint of the range of 0.55 is appropriate for the per day factor given the size of the Discharger's Agricultural Operation and the substantial threat to beneficial uses.

Days of Violation = 308

The San Diego Regional Irrigated Lands Group confirmed that the Discharger had been reinstated to the group and was no longer in violation of Water Code section 13260 as of June 24, 2021. The NOV/Directive required the Discharger to obtain regulatory coverage by enrolling in one of the two General Agricultural Orders through submission of a complete NOI on or before August 20, 2020. Therefore, the Discharger was in violation from August 21, 2020 to June 24, 2021, or 308 days. In accordance with the Enforcement Policy, the Prosecution Team proposes to reduce the number of days of violation to 44 because the alleged violation is not causing daily detrimental impacts to the environment or to the regulatory program. The Discharger's failure to comply with the NOV/Directive does not likely cause a daily detrimental impact to the environment or regulatory program because enrollment in one of the General Agricultural Orders would not result in a daily change to the Discharger's operation. Instead, the Discharger would be required to conduct routine, but not daily, sampling and reporting. Therefore, there is not a daily impact to the regulatory program and the Enforcement Policy allows the Prosecution Team to collapse the total days of violation.

Initial Liability Amount = \$24,200

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

$$[\$1,000 \text{ (per day statutory maximum)} \times 0.55 \text{ (factor)} \times 44 \text{ (days of violation)}] = \mathbf{\$24,200}$$

Step 4. Adjustment Factors

The San Diego Water Board must consider three additional factors for potential modification of the administrative civil liability amount: the violator's degree of culpability, the violator's prior violation history, and the violator's voluntary efforts to cleanup, or its cooperation with regulatory authorities after the violation.

Degree of Culpability = 1.4

Higher penalties should result from intentional or negligent violations as opposed to accidental violations. The Enforcement Policy allows a multiplier between 0.75 and 1.5 to be used, with a higher multiplier for intentional or negligent behavior, and a lower multiplier for accidental or non-negligence behavior.

The Prosecution Team assigned a multiplier of 1.4 because the Discharger was aware of the requirement to enroll and failed to obtain coverage. The Discharger's previous enrollment in the Third-Party Order demonstrates that the Discharger was aware of the requirement to obtain permit coverage and understood how to satisfy that obligation. In addition, the NOV/Directive was clear about how the Discharger could satisfy its obligation to obtain permit coverage and San Diego Water Board staff followed up with the Discharger regarding the NOV/Directive to assist the Discharger with the enrollment process.

History of Violations = 1.0

The Discharger does not have a history of violations, so a neutral factor was applied.

Cleanup and Cooperation = 1.3

This factor reflects the extent to which a violator voluntarily cooperated in returning to compliance and correcting environmental damage. The Enforcement Policy allows a multiplier between 0.75 and 1.5 to be used, using a lower multiplier where there is exceptional cleanup and cooperation compared to what can reasonably be expected, and a higher multiplier where there is not. The Prosecution Team assigned a multiplier of 1.3, due to the fact that the Discharger failed to obtain regulatory coverage for an extended period of 308 days, even after receiving San Diego Water Board staff assistance and written communication. Cleanup is not applicable here.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability Amount is determined by multiplying the initial liability by the Adjustment Factors in Step 4:

$$\text{Total Liability Amount} = [\$24,200 \text{ (initial liability amount)} \times 1.4 \text{ (degree of culpability)} \times 1.0 \text{ (history of violations)} \times 1.3 \text{ (cleanup and cooperation)}] = \mathbf{\$44,044}$$

Step 6. Ability to Pay and Ability to Continue in Business

The Enforcement Policy allows for an adjustment to a proposed liability after an analysis of a violator's ability to pay a proposed penalty and continue in business. This is determined by looking at the violator's income and net worth. According to the [2018 San Diego County Agricultural Production Report](#),³ the annual value of avocados from 118.63 acres was \$914,993 (3 tons/acre and \$2,571/ton). Therefore, the Prosecution Team believes that the Discharger has the ability to pay the proposed penalty based upon its income, and the Discharger has provided no evidence to the contrary.

Step 7. Economic Benefit

The economic benefit is any savings or monetary gains from noncompliance. The Prosecution Team considered new information from the Discharger regarding the details of the agricultural operation to modify the economic benefit amount calculated in the ACLC. The economic benefit for the delay in paying the annual fee for the year 2019 was \$80, and for the year 2020 was \$26.

The economic benefit was calculated using the delayed cost of enrollment in the Individual General Order from August 20, 2020 to June 24, 2021 for an operation of 118.63 acres using the USEPA BEN Model Version 2021.0.0. This resulted in an economic benefit of \$106.

Step 8. Other Factors as Justice May Require

The Enforcement Policy allows an adjustment to the administrative civil liability if the San Diego Water Board believes that the amount determined using the above factors is inappropriate. In light of the Discharger's ultimate enrollment in the Third Party General Order, and in consideration of the relatively new regulatory program for the agricultural community, the Prosecution Team believes it is appropriate to adjust the final liability amount to \$5,000. The resulting liability is fair and it ensures that no competitive economic advantage is attained through non-compliance.

Step 9. Maximum and Minimum Liability Amounts

Water Code section 13261 states that the maximum administrative civil liability for a violation of Water Code section 13260 is \$1,000 per day. The Enforcement Policy states that the minimum liability should be at least ten percent higher than the economic benefit amount.

Statutory maximum liability = (308 days multiplied by \$1,000 per day) = **\$308,000**

Minimum liability = [\$106 + (\$106 X 10%)] = **\$117**

Step 10. Final Liability Amount

As described in Step 8 above, the final liability amount is **\$5,000**.

³ https://www.sandiegocounty.gov/content/dam/sdc/awm/docs/2018_Crop_Report_web.pdf

EXHIBIT 2**ORDER NO. R9-2021-0189**ACCEPTANCE OF SETTLEMENT OFFER
AND WAIVER OF RIGHT TO A HEARING FOR
A-1 SUNSHINE FARMS, LLC

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), A-1 Sunshine Farms, LLC and Janet Hsu, as the LLC's responsible corporate officer (together, Discharger) hereby accepts the Settlement Offer described in the letter dated September 7, 2021, with subject title **Settlement Order No. R9-2021-0189 to Resolve Administrative Civil Liability for an Alleged Violation of California Water Code Section 13260**. The Discharger also hereby waives its right to a hearing before the San Diego Water Board to dispute the alleged violation described in the Settlement Offer and its exhibits.

The Discharger agrees that the Settlement Order 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 violation. The Discharger agrees to perform the following:

1. Pay an administrative civil liability in the sum of **\$5,000** to the "State Water Pollution Cleanup and Abatement Account." This payment shall be deemed payment in full of any civil liability pursuant to Water Code sections 13261 and 13350 that might otherwise be assessed for the violation described in the Settlement Offer and its attachments; and
2. Fully comply with the requirements of 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 (Third-Party General Order).

The Discharger understands that by signing this *Acceptance and Waiver*, it is waiving its right to contest the violation alleged in the Settlement Order and the assessed civil liability amount. The Discharger further understands that this *Acceptance and Waiver* does not address or resolve any liability for any violation not specifically identified and alleged in the Settlement Order and its Exhibits.

Upon execution by Discharger, the completed Acceptance and Waiver shall be submitted by email to SanDiego@waterboards.ca.gov, attention 803119:CMeans or by mail to the following address:

California Regional Water Quality Control Board, San Diego Region
2375 Northside Drive, Suite 100
San Diego, CA 92108-2700
ATTN: 803119:CMears

The Discharger understands that the San Diego Water Board Prosecution Team (Prosecution Team) publishes notice of and provides at least 30 days for public comment on any proposed resolution of an enforcement action for Water Code violations. Accordingly, this *Acceptance and Waiver*, prior to being formally endorsed by the San Diego Water Board, or its delegate, will be published 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 formal endorsement on behalf of the San Diego Water Board.

The Discharger understands that if significant comments are received in opposition to the settlement, then the Prosecution Team may withdraw the Settlement Order. If the Settlement Order is withdrawn, then the Discharger will be notified, and the *Acceptance and Waiver* will be treated as withdrawn. The unresolved violation will be addressed in a formal enforcement action. An administrative civil liability complaint (ACL Complaint) may be issued and the matter may be set for a hearing before the San Diego Water Board.

The Discharger understands that once this *Acceptance and Waiver* is formally endorsed, then the full payment of the administrative civil liability amount (\$5,000) is a condition of this *Acceptance and Waiver*. An invoice will be sent upon endorsement, and full payment will be due within 30 days of the date of the invoice.

ORDER NO. R9-2021-0189 SIGNATURE PAGE

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

A1 Sunshine Farms LLC

By: _____	_____
Signed Name	Date
_____	_____
Janet Hsu Printed or Typed Name	Owner Title

IT IS SO ORDERED, pursuant to Water Code section 13261.

By: _____	_____
DAVID W. GIBSON Executive Officer	Date