

ATTACHMENT F

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The proposed administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (the "Enforcement Policy") and using the "Penalty Calculation Methodology Worksheet, version date 2/4/2014" (the "Penalty Calculation Worksheet"). The proposed civil liability takes into account such factors as the Discharger's 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

Step1. 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 Discharger 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.

Using Table 3 in the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy) staff has 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. This conclusion is, in part, based on the size of the Discharger's irrigated land parcels, which total approximately 983 acres, 150 acres of which were subject to the Directive described below.

By failing to file a RoWD or to enroll under an applicable General Order, the Discharger has 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 Discharger impedes the Regional Board's efforts to assess potential impacts and risks to water quality, and circumvents the Regional Board's ability to take enforcement actions to address problems.

The greater the size of the operation, the greater the potential risk, since any practices being implemented by the Discharger that are detrimental to water quality may impact a much greater area. 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 Regional 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.

The deviation from the requirement is major. Athwal has 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 the 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).

Step 4. Adjustment Factors

a) *Culpability*: 1.3

Discussion: The Discharger was given the score of 1.3, which increases the fine. Central Valley Water Board staff sent notices on both 28 January 2013 and on 18 April 2013 to Athwal describing the new water quality regulations and the required actions to comply therewith. On 31 July 2013, Athwal received the 13260 Directive requiring them to obtain coverage. Staff communicated several times with Athwal and Athwal representative Roman Katuszonek regarding the need for regulatory coverage in the months following the 13260 Directive and NOV mail outs.

Despite knowledge of the regulatory requirements, which is exemplified by the notices and meetings described above, Athwal failed to come into compliance for 204 days. The multiple notices and communications with staff regarding the regulatory requirements indicate that Athwal had knowledge and acted intentionally in ignoring the requirement to get regulatory coverage. Therefore, a culpability factor of 1.3 is warranted.

b) *Cleanup and Cooperation*: 1.1

Discussion: The Discharger was given the score of 1.1, which increases the fine. Athwal has come into compliance by getting the necessary regulatory coverage,

but only after multiple notices and the threat of fines. Cleanup is not applicable here.

c) *History of Violations: 1.0*

Discussion: The Discharger was given the score of 1.0 because Athwal has no record of a history of violations prior to those described herein.

Multiple Day Violations: On 31 July 2013, the Discharger was mailed a Directive Letter pursuant to California Water Code section 13260 (Directive), which required them to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Discharger on 2 August 2013. Thus, regulatory coverage was required by 17 August 2013. The Discharger completed both steps of the regulatory requirements on 10 March 2014 by joining the Coalition and submitting a Notice of Intent to the Board. The Discharger was 204 days, therefore, late in meeting the regulatory requirement.

Violations under Water Code section 13260 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 30). 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 Discharger's 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 Discharger's failure to submit a RoWD or NOI 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 Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's 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 12. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation above the Minimum Approach to a total number of 40 days of violation.

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: \$31,460.* (Initial Liability (\$1,000/day x 40 days x 0.55) x Adjustments (1.3)(1.1)(1.0)).

BASE LIABILITY AND FACTORS APPLIED TO THE VIOLATION

The Base Liability Amount for the Violation is \$31,460. The following factors apply to the Base Liability Amount for the violation.

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 Discharger has the ability to pay the Base Liability Amount based on 1) Value of property owned by the Discharger, a significant asset with a 2014-2015 assessed value of the three Madera County parcels listed at \$624,364 according to the Madera County Assessor's office; 2) Discharger owns approximately 150 acres of almonds in Madera County, which generated approximately \$903,775 in 2013³; and 3) Athwal has received an estimated \$257,864 in farm subsidies from the United States Department of Agriculture from 1995 through 2012⁴. The value of owned property and crop values are low because Athwal enrolled 27 other parcels in Merced and Stanislaus Counties into the Coalition, totaling an additional 833 acres. Since those parcels and their acreages were not listed in the original Order, they are not used for these calculations. There are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

Base Liability Amount: \$31,460

Discussion: There are no factors under this category that warrant an adjustment.

³ Information provided by the 2013 Madera County Agricultural Crop Report, available at <http://www.madera-county.com/index.php/publications/crop-reports>

⁴ Information provided from farm.ewg.org.

Step 8. Economic Benefit

Economic Benefit: **\$396**

Discussion: The Enforcement Policy provides that the economic benefit of noncompliance should be calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)⁵ penalty and financial modeling program unless it is demonstrated that an alternative method of calculating the economic benefit is more appropriate. Economic Benefit was calculated using the BEN Model penalty and financial modeling program, version 5.4.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding the costs of compliance with environmental statutes.

The BEN model is the appropriate tool for estimating the economic benefit of failing to apply management techniques that are required under a regulatory program. The benefit is calculated by identifying the regulation at issue, the associated management practices (or 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.

As a result of settlement discussions related to the pre-ACL Letter, the Prosecution Team learned that the Discharger joined the Coalition. By joining the Coalition instead of filing a RoWD, the Discharger was required by the Coalition to pay back dues for prior years' membership. In this case, the Discharger should have joined the Coalition by 17 August 2013, the deadline set in the Directive letter.

The economic benefit was calculated based on both delayed costs and avoided costs. Delayed costs are those costs that should have been born earlier, but that the Discharger is still required to pay. Avoided costs are those compliance activities the Discharger would have conducted had they come into compliance earlier.

The economic benefit in this case has been calculated based on the verifiable costs associated with joining the Coalition, as well as estimates of other delayed and avoided costs that were required of the Discharger to comply with the Order.

The Coalition is currently charging new members \$50 for each year, plus \$9 per acre for the prior unpaid years (2013), and \$50 per member plus \$3.75 per acre for 2014. The economic benefit of this delayed cost for this compliance action is \$213.

⁵ 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>

Based on information provided by the Coalition⁶, the Coalition produces about six newsletters a year, which require about 20 minutes for a grower to review. Under the Order, growers are required to become familiar with the water quality issues in their area and methods to address those issues. By failing to enroll under the Order in a timely manner, the Discharger avoided reviewing approximately four Coalition newsletters between July 2013 and March 2014. Using an estimate of the value of a grower's time⁷ at \$120 per hour and assuming Coalition newsletters went out every two months starting in July 2013, the total economic benefit of this avoided cost for this compliance action is \$43.

Growers are also required to attend one Coalition outreach event annually. Since the Discharger did not attend an event in 2013, this is an avoided cost. Based on information provided by the Coalition⁵, Coalition meetings are typically two hours. On average, a Coalition member would travel 50 miles round trip, taking approximately one hour of drive time. The cost per mile is estimated to be \$0.50/mile and the value of the grower's time is \$120/hour⁶. The economic benefit of this avoided cost is \$139, assuming the last outreach event occurred in December 2013.

In summary, the economic benefits associated with delayed costs are \$213 associated with fees. The economic benefits associated with avoided costs are: 1) \$139 associated with attending a grower meeting; and 2) \$43 associated with review of newsletters. The total economic benefit is, therefore, \$396.

Step 9. Minimum and Maximum Liability Amounts

a) *Minimum Liability Amount: \$435*

Discussion: The Enforcement Policy requires 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 Discharger's economic benefit obtained from the violations cited in this memo is \$396. Therefore, the minimum liability is \$435.

b) *Maximum Liability Amount: \$204,000*

Discussion: 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 Discharger was in violation for 204 days, which is a maximum liability of \$204,000.

⁶ Personal communication Joe Karkoski and Parry Klassen, July 2014.

⁷ See page 2-22 from Draft Technical Memorandum Concerning Economic Analysis of the Irrigated Lands Regulatory, July 2010.
http://www.waterboards.ca.gov/centralvalley/water_issues/irrigated_lands/new_waste_discharge_requirements/program_environmental_impact_report/2010jul_draft_peir/econ_tech_rpt_draft.pdf

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit a RoWD under California Water Code section 13260 is **thirty-one thousand four hundred and sixty dollars \$31,460.**

Athwal

Compliance Action (Determine the actions required to comply with or prevent the violation)	One-Time Nondepreciable Expenditure			Annual Cost		Non-Compliance Date	Compliance Date	Penalty Payment Date	Benefit of Noncompliance
	Amount	Date ¹	Delayed? ²	Amount	Date ¹				
Coalition Annual Fees 2013 ³	\$12,585	5/13/2013	Y			8/19/2013	3/10/2014	4/16/2015	\$213
Coalition Annual Fees 2014 ⁴	\$3,737	5/13/2013	Y			2/28/2014	3/10/2014	4/16/2015	\$0
Reviewing Coalition Newsletters ⁵				\$120	12/31/2013	8/19/2013	3/10/2014	4/16/2015	\$43
Attending a Coalition Event ⁶				\$385	12/31/2013	8/19/2013	3/10/2014	4/16/2015	\$139
Totals	\$16,322			\$505					\$396

Cost Index for Inflation:	ECI	ECI	See Table 1 below for Index choices.	Date of run: 1/16/2015 15:53
Income Tax Schedule:	For-Profit			
Discount/Compound Rate:	6.5%	This percentage is provided by BEN.		
Source: USEPA BEN Model:	Version 5.4.0	Status:		
Analyst: MMRansom				

¹ Date of the cost estimate.

² Enter "y" if delayed, and "n" if avoided.

³ 3 First year of compliance fees = \$50 + (12.75 x acres) [ie \$9 one time initiation]

⁴ Additional years of compliance fees = \$50 + (3.75 x acres) [fees due by 2/28/14] Acres based on enrolled irrigated acres in Coalition

⁵ Newsletters (6/yr) @ 20 minutes x \$120/hr [# of newsletters provided by P. Klassen to J. Karkoski in 7/14] [non-compliance from 8/19/13 - 3/10/14]

⁶ Coalition Event = [(2 hour meeting + 1 hour drive) x \$120/hr] + (50 miles x \$.50/mile)