

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION**

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**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0502**

**RECOLOGY, INC. DBA RECOLOGY YUBA SUTTER  
RECOLOGY YUBA SUTTER LANDFILL  
YUBA COUNTY**

**PROSECUTION TEAM'S REBUTTAL TO RECOLOGY'S FACTUAL, LEGAL, & TECHNICAL  
ANALYSIS**

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0502**

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## I. Introduction

It is evident from the *Factual, Legal & Technical Analysis* and supporting evidence submitted by Recology, Inc. dba Recology Yuba Sutter (Discharger or Recology), that the Parties disagree on a significant number of issues. Based on the Discharger's analysis of the factors in the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy), the Discharger believes that its violation of the Amended Cleanup and Abatement Order R5-2013-0704-01 (Amended CAO) warrants a penalty of \$47,193; which represents a conservative estimation of the economic benefit calculation plus ten percent, the minimum amount of administrative civil liability that can be imposed pursuant to the Enforcement Policy.<sup>1</sup> The Prosecution Team does not believe that the Discharger's calculated liability is appropriate and continues to argue that the imposition of administrative civil liability in the amount of \$440,440 is warranted given the evidence in the record. Rather than addressing each area of contention point-for-point, the Prosecution Team's Rebuttal to the Discharger's *Factual, Legal & Technical Analysis* will focus on the major areas of disagreement: the number of days of violation, the potential for harm, the culpability of the Discharger, and the extent to which the Discharger voluntarily cooperated in returning to compliance.

Days of Violation: The Prosecution Team's determination of the number of days of violation, 112 day from 1 October 2014 through 20 January 2015, is correct and appropriate based on the evidence in the record. Determining 1 October 2014 as the start date of the violation creates a fair and consistent manner in determining the start date of the violation by reinforcing the Central Valley Regional Water Quality Control Board's (Central Valley Water Board or Board) expectation that corrective actions need to be not only timely implemented but completely implemented as required by a date certain in an enforcement order. In this case, 1 October 2014 is the date by which the Amended CAO required compliance.

Potential for Harm: The Discharger's contention that its failure to comply with the Amended CAO posed only a minor potential for harm ignores the substantial threat posed by compost leachate at this facility. Compost leachate generated during rain events is more than mere stormwater run-off. Compost leachate at the Yuba Sutter Landfill exceeds the United States Environmental Protection Agency's (USEPA) stormwater benchmarks and exceeds water quality objectives, indicating that the waste poses a substantial threat to beneficial uses particularly where the waste is high-strength waste that, in staff's best professional judgment, believes should be isolated from the environment.

Discharger's Conduct Factors: Finally, the Discharger's asserts that the Violator's Conduct Factors of culpability and cleanup and cooperation should be significantly reduced given its reliance on its consulting experts and conduct subsequent to the December 2013 rain events. The Amended CAO required that the Discharger install, by 1 October 2014, a system to collect all leachate generated from storm events up to an including 3.16 inches of rainfall. The

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<sup>1</sup> The actual calculated administrative civil liability amount using the Discharger's proposed factors in the Enforcement Policy Methodology results in a recommended liability of \$7,500. However, because this calculated liability amount is less than the minimum liability amount required by the Enforcement Policy, the Discharger cites \$47,193 as what it perceives is an appropriate penalty.

Discharger states that its culpability for its noncompliance with the Amended CAO's requirement should be reduced from a 1.3 to a 0.75. A reduction of the culpability factor to 0.75 would equate the Discharger's failure to comply with the terms of the Amended CAO to that of an "accidental incident" that no exercise of due care or foresight could have prevented. The facts do not support this position. Similarly, the Discharger states that its efforts subsequent to the December 2014 storm events warrants a reduction of the cleanup and cooperation factor from 1.1 to 0.8. The Prosecution Team asserts that a cleanup and cooperation factor of 1.1 is appropriate based on the evidence in the record regarding not only the Discharger's efforts in response to the December 2014 storm events but also the Discharger's level of cooperation to return to compliance with the water balance analysis requirement.

## II. Additional Regulatory Background

It is important to raise additional regulatory background information in response to some of the Discharger's factual statements in its *Factual, Legal, & Technical Analysis* regarding the original Title 27 design standard of a 1000-year, 24-hour storm event and the agreed upon alternate standard of a 25-year, 24-hour storm event in the Amended CAO.<sup>2</sup> Ordered Paragraph 9 of the original CAO required that the Discharger's *Compost Area Leachate Collection Work Plan* describe the type of containment system which the Discharger would construct, either a single lined pond or above ground tanks, and include a water balance showing that the proposed containment system met the capacity specifications from Table 4.1 of Title 27. This Table specifies the construction standards for surface impoundments and, more specifically, the capacity of precipitation and drainage control for Class II surface impoundment as requiring the containment of a 1000-year, 24-hour event. (Exhibit 118.) Board staff originally included this Title 27 requirement because the compost leachate likely meets the definition of "designated waste" due to its high-strength characteristics as noted in the Board's 6 March 2013 inspection report (Exhibit 4). Attachment 4 to this 2013 inspection report indicates that the samples collected from the toe of the composting pile during a rain event exceeded both USEPA's stormwater benchmarks and the Board's water quality objectives (which are established to protect beneficial uses) for various constituents. In general, wastes with concentrations like those sampled during the 6 March 2013 inspection cannot be discharged directly to the ground surface without impacting groundwater or surface water quality, and therefore must be contained to isolate them from the environment. Based on the type and strength of the waste coupled with site specific conditions, Board staff felt it was appropriate to apply Title 27 requirements to this high-strength compost leachate. This requirement to contain high-strength waste and isolate it from the environment is one that is implemented in Title 27 WDRs throughout the State to address the threats to water quality posed by compost leachate. (see Exhibits by Reference 82 and 83.)

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<sup>2</sup> The Prosecution Team omitted much of this discussion regarding the Parties' reasoning behind the transition to a smaller design storm standard as the Discharger had previously asserted its justification should be protected by Government Code section 6254.15, the Corporate Proprietary Information Efrom public disclosure. However, since the Discharger in its *Factual, Legal, & Technical Analysis* has now introduced the information into the public record that it had previously asserted was "corporate proprietary information," this is Prosecution Team's first opportunity to more fully address this regulatory background information.

The Discharger's 31 January 2014 *Work Plan* concluded that an above ground tank system consisting of 330 21,000 storage tanks would be required to comply with the Title 27 requirement unless a significant portion of the compost leachate was discharged to the City of Marysville. Alternatively, the Discharger's consultant recommended constructing a 4.3 acre lined impoundment in the "Hog Farm" area. (It is noted however, that for both of these alternatives, the *Work Plan* only evaluated a storm with a 100-year return period instead of the CAO's requirement of a 1000-year, 24-hour storm event.) Prosecution Team Exhibit 38<sup>3</sup> (Recology Response to Subpoena for Records; Document Category 6; Exhibit 115 regarding 29 April 2014 date of document prepared by Golder in Document Category 6) contains information on the approximate cost to construct this 4.3 acre surface impoundment, which ultimately helped inform the Discharger's decision conveyed to Board staff in its 30 May 2014 letter (Recology Exhibit 25) that implementing a compost leachate collection system to comply with a 1,000-year, 24-hour storm event was infeasible given the 1 October 2014 deadline<sup>4</sup> and likely cost prohibitive.

As of the date of the 30 May 2014 letter, the Discharger's compost leachate collection system consisted of "a 5,000 gallon concrete vault located in the Hog Farm that pumps to two 21,000 gallon Baker Tanks. Two additional vaults and pumps collect water from the southern end of the compost operations to an additional 21,000 gallon tank. This system provides a total of 63,000 gallons of storage capacity" to contain a 24-hour storm event of up to 1 inch of rain. (Recology Exhibit 25.) As an alternative, the Discharger indicated that "it was considering plans to transition the composting operations at Feather River Organics to a different location and it requested that these operations be allowed to continue during the transition period." (Recology's Factual, Legal, & Technical Analysis, p. 7.) This was the first time that the Discharger had indicated that it would move the composting operation to a different location. The Discharger proposed an alternate collection system design standard of 5-year, 24-hour (2.31 inches of rainfall) and potentially a 10-year, 24-hour standard (2.70 inches of rainfall) that would allow them to transition composting away from the Yuba Sutter Landfill within 3-5 years. The Discharger's consultant concluded in this 30 May 2014 letter, "In our opinion, significant upgrades to [the current system to] meet such larger storm events are not reasonably feasible given the short duration of the composting operations." (Recology Exhibit 25, p. 3.)

While the Prosecution Team was sympathetic to the Discharger's new plans to move the composting facility, the Discharger's position of minimal leachate collection was not acceptable. Staff conveyed this information in a 9 June 2014 email to Recology stating, "staff cannot approve the unauthorized discharge or leachate from the compost facility, which we believe would likely occur if some operations and capacity modifications are not implemented during this interim [transition] period." (Recology Exhibit 26.) Although Board staff understood that the

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<sup>3</sup> Prosecution Team Exhibit 38 was submitted into the record on 27 February 2015 for potential *in camera* review by the Advisory Team and Board, therefore, pending a final decision from the Board Chair, the Prosecution Team is not disclosing the specific contents of Document Category 6 in Exhibit 38 in its Rebuttal brief.

<sup>4</sup> The CAO, like most CAOs issued by the Board, contained standard boilerplate language that allows the Discharger to request an extension of the deadlines in the CAO if the Discharger is unable to perform any activity or submit any document in compliance with the schedule. In addition, the Prosecution Team and the Discharger spent significant time negotiating the content of the CAO before it was signed, and the Discharger agreed to the dates therein.

continued composting operations would be temporary pending a transition period, Board staff made clear that even though the period would represent a short-term period, staff could not approve the alternate 5-year, 24-hour standard (or 10-year, 24-hour standard for that matter) as it would likely result in an unauthorized discharge of waste during rain events. Board staff counter-proposed the 25-year, 24-hour standard and conditions as stated in the Draft Statewide Composting General Order and provided the Discharger with suggested alternatives to consider should the Discharger determine it would be cost prohibitive to meet the 25-year, 24-hour standard. Despite the Board's concern regarding the high-strength nature of the leachate, this counter-proposal represented a compromise position taken by Board staff that attempted to balance water quality protection with Recology's continued operations of its composting business, rather than requiring it to install a system that complied with the CAO's design standard or to cease compost operations to cease compost operations entirely by 1 October 2014.

**III. The Discharger's Determination of a Minor Potential for Harm Neglects to Recognize the Substantial Threat Posed by Compost Leachate that Exceeds Water Quality Objectives and Ignores Fundamental Groundwater Conditions at the Site.**

The Discharger's expert witness asserts that the potential threat to beneficial uses posed at the site by the run-off of compost stormwater during rain events was minor. (Recology Exhibit 35, p. 3.) This determination of a minor potential for harm is tied to a very narrow window of time, as it looks to only the specific period of 3 December to 11 December 2014, the ten day period the Discharger asserts is the only period it violated the Amended CAO. The Prosecution Team's determination of a moderate potential for harm also takes into account this specific period of time, but is also bolstered by some of the broader potential threats that arise from failing to comply with the CAO's requirement to install an operational compost leachate collection system by 1 October 2014 that contained all leachate generated from rainfall events up to an including a 25-year, 24-hour storm event, given the additional regulatory considerations discussed above.

The Discharger's determination of a minor potential for harm focuses almost solely on the compost leachate's potential pathways to receiving waters during a ten day period but neglects to recognize that characteristics of the compost leachate itself present a substantial threat to beneficial uses. Laboratory results from samples collected from ponded leachate at the toe of a compost pile and another from a run-off collection ditch in the southeastern portion of LF-1 (see Exhibit 4, Attachment 2 and Attachment 4) caused staff to conclude in the 6 March 2013 inspection report that leachate from the composting and chip and grind areas is likely designated waste. (Exhibit 4, Finding 5.f., p. 8.) Water Code section 13173 subdivision (b) defines designated waste as "nonhazardous waste that consists of, or contains, pollutants that, under ambient environmental conditions at a waste management unit, could be released in concentrations exceeding applicable water quality objectives or that could reasonably be expected to affect beneficial uses of the waters of the state as contained in the appropriate state water quality control plan." Sample results, summarized in Attachment 4 to the 6 March 2013

inspection report, exceeded water quality objectives for several constituents of concern expected to be present in compost leachate.

The characteristics of the compost leachate sampled at the facility were the impetus for Ordered Paragraph 9 of the CAO and Amended CAO – those characteristics warranted measures to prevent infiltration of leachate into the waste mass, and to collect, direct, and contain leachate in a system where it would be isolated from the environment. Board staff's underlying reasoning for containment was ensuring that the waste is "isolated from the environment" particularly where the waste already exceeds stormwater benchmarks and water quality objectives. The characteristics of the compost leachate in and of itself present a substantial threat to beneficial uses and the potential for harm to water quality is exacerbated where containment fails, regardless of whether the failure resulted in the waste reaching waters of the state or United States. This point is illustrated when reviewing Prohibition A.1 in the Discharger's Title 27 WDRs which states, "[t]he discharge of any waste at this site is prohibited" regardless of whether it reaches surface waters or groundwater. (Exhibit 1, Ordered Paragraph A. Prohibitions, p.7.)

The Discharger further argues that the characteristics of Hog Farm itself indicate that there are "no complete surface water migration pathways for water in the Hog Farm area to reach waters of the United States. The Hog Farm is essentially a large stormwater retention basin, bounded by flood control levees, which would serve to prevent a surface discharge from this area during a precipitation event much larger than the 25-year, 24-hour storm." (Recology *Factual, Legal, & Technical Analysis*, p. 21.) Though the property that comprises the Hog Farm is owned by the Discharger (see Exhibits 116 and 117), the argument that discharges to the Hog Farm present a minor potential for harm fails to recognize that 1) discharges to the Hog Farm area are not authorized by the current WDRs and 2) "the Hog Farm is currently not part of the permitted FRO facility and therefore does not fall with[in] the FRO use permit." (Exhibit 46, p. 11.) Any use of the Hog Farm as a "stormwater retention basin" would, at the very least, require modifications to the facility's use permit and potentially additional regulation by the Board. To the Prosecution Team's knowledge, an environmental review of the potential impacts of leachate discharges to the Hog Farm has never been conducted by the Discharger because this use was not previously contemplated by its WDRs or use permit. Though the Discharger argues potential for harm to water quality resulting from discharges to the Hog Farm are minor, because the use of the Hog Farm in this manner as a "stormwater retention basin" is not authorized nor has this area been analyzed for such use, it seems premature to assert that there is a minor threat to beneficial uses to either surface or groundwater quality. To put it simply, the discharge of compost leachate to the Hog Farm is an unpermitted, off-site discharge of waste that has the potential to impact water quality.

The Discharger also justifies its minor potential for harm determination by a low potential for the leachate to reach groundwater resources in the Hog Farm area. The Discharger's expert witness attempts to illustrate this point by noting that there is a low potential for leachate discharged to the Hog Farm to percolate into the ground and reach groundwater based on the well boring logs of MW-9. (Recology Exhibit 35, Figure 2.) The Discharger's argument assumes that the soil composition of the Hog Farm is consistent throughout its 28 acres. However, this

landfill was constructed on the bank of the Yuba River and is therefore in a fluvial environment, with interbedded layers of sand, silt, clay, and gravel (Exhibit 1, p. 3). Note the location of MW-9 in Figure 1 of Recology's Exhibit 35. Leachate from the compost area that is discharged to the Hog Farm generally occurs in the northwestern most corner of the Hog Farm area which is quite a distance away from MW-9. Therefore, it is inappropriate to use the well boring logs for MW-9 to illustrate the lower permeability of the discharge area of concern when the soil composition in this fluvial environment may substantially differ throughout.

Historic groundwater monitoring data from MW-9 is also referenced to show that composting operations have not had a negative impact on groundwater resources. (Recology Exhibit 35, p. 5-6.) In addition to the proximity issues discussed above, the use of historical groundwater data from MW-9 as a reference to indicate that groundwater in the Hog Farm has not been affected by the Discharger's composting operations indicates a lack of acknowledgement of a fundamental groundwater condition at the site: groundwater flows generally to the south-southwest direction beneath the site. (Exhibit 1, p. 4.) Based on the manner in which groundwater moves at the site, the nitrate trends in MW-9 are more likely an indication of source constituents from LF-3 rather than from the compost operations. At best, MW-9 can be considered laterally gradient to groundwater flow; it is not in a downgradient location to the composting operations occurring on LF-1. Therefore, MW-9 is in an inappropriate location to detect source contaminants from the compost operations. For the foregoing reasons and those already discussed in the Complaint, Attachment A, and the Prosecution Team's Legal and Technical Analysis, the Central Valley Water Board should determine that the Discharger's non-compliance with the requirements of the Amended CAO present a substantial threat to beneficial uses of both surface and groundwater, and the circumstances of the violation indicate a substantial potential for harm.

#### **IV. The Discharger's Interpretation of the Number of Days of Violation Renders the 1 October 2014 Deadline in the Amended CAO Meaningless.**

As stated previously in the Prosecution Team's Legal and Technical Analysis, cleanup and abatement orders are a type of injunctive relief in that the Board, through the order, directs or orders a certain type of action to "clean up the waste or abate the effects of the waste, or in the case of threatened pollution or nuisance, take other necessary remedial action." (Wat. Code § 13304, subd. (a).) These orders serve a prophylactic purpose to prevent further conditions of pollution or nuisance from occurring by ordering the implementation of some type of remedial action by date certain. The deadlines adopted in a cleanup and abatement order represent the Board's expected date certain for compliance with all aspects of the corresponding directive to prevent further threats to water quality. This framework differs from other program areas, like the stormwater program, where the implementation of required best management practices (BMPs) can be accomplished through an iterative process whereby BMPs are installed and gradually improved upon on a trial-and-error basis. The Amended CAO's requirement to install an operational compost leachate collection system by 1 October 2014 that contained all leachate generated from rainfall events up to an including a 25-year, 24-hour storm event is not

one that can be met incrementally over time during the rainy season. It is a requirement that must be met prior to the start of the rainy season.

The Discharger's assertion that the start date for the Amended CAO violation is 3 December 2014 assigns more meaning to Ordered Paragraph 9(d) "a construction schedule such that the conveyance and containment systems are installed and operational by 1 October 2014" while downplaying the required 25-year, 24-hour design standard for containment that was also required on that date. The question is not whether the Discharger had a compost leachate collection system installed on 1 October 2014, the question is whether the Discharger had the appropriately sized and designed compost leachate collection system installed by 1 October 2014.

The Discharger argues, "[t]he reasoning of the ACL Complaint would generate significant disparity in how penalties are applied." (Recology's *Factual, Legal, & Technical Analysis*, p. 16.) On the contrary, the Prosecution Team's reasoning in the Complaint generates consistency in how penalties are applied by reinforcing the Board's expectation that corrective actions must be implemented not only timely, but completely as required, by a date certain. It is Recology's approach that generates significant disparities in how penalties are applied. Furthermore, application of a penalty in the manner suggested in the Discharger's hypothetical scenarios incentivizes risking timely and complete implementation of prophylactic measures to protect water quality, particularly where the underlying violation at issue is a violation of a cleanup and abatement order. This is not about punishing someone retroactively for violations, as the Discharger suggests. Identifying 1 October 2014 as the start date for the days of violation calculation underscores the Board's expectation for timely and complete compliance with its requirements.

As a supplementary matter, Recology argues, "the prosecution team appears to contend that commencing the penalty accrual on 1 October 2014 is appropriate here because Regional Board staff had expressed disagreement with the engineering calculations performed by Recology's expert engineers" and further cites staff's comment on the engineering calculations as an attempt to dictate Recology's manner of compliance contrary to Water Code section 13360. Recology is confused about two matters with respect to this statement. First, the Prosecution Team is not contending that the number of days of violations should commence on 1 October 2014 because we disagreed with its consultant's calculations. Recology is itself muddling together two concepts in the Enforcement Policy pertaining to the number of days of violation and culpability to justify why it believes the number of days of violation should be 10 rather than 112. Secondly, merely providing comments on a fundamental aspect of a water balance analysis, i.e. the run-off calculations, does not constitute dictation of manner or method of compliance and more critically, the design standard of the system to be installed by 1 October 2014 was stipulated to by the Parties in the Amended CAO for the reasons explained in the additional regulatory background section.

With respect to the duration of the number of days of violation, Recology argues there was no violation of the Amended CAO after 12 December 2014. The Prosecution Team disagrees. The

Complaint alleges the number of days of violation is 112 days, beginning on 1 October 2014 commencing until the date the Prosecution Team issued the Complaint on 20 January 2015. The violation of the Amended CAO is alleged to be a continuing violation through the date of Complaint issuance because the Discharger's water balance analysis, required as part of Ordered Paragraph 9, failed to address both containment *and* disposal of leachate generated from rainfall events up to and including a 25-year, 24-hour storm event. From the Prosecution Team's perspective, this requirement was not met until 28 January 2015 when the Discharger finally submitted its Wastewater Discharge Permit with the City of Marysville. (Exhibit 80.) Though the Discharger argues "there is no requirement in the governing CAO or Monitoring & Reporting Program to obtain a written discharge permit from the City of Marysville," written confirmation as to the maximum flow the City could accept was critical to the Prosecution Team for several reasons. First, based on experience during rain events, Recology was sending more leachate to the City's sanitary sewer system than the orally agreed upon 65,000 gallons. (see Exhibit 70.) Obtaining a written agreement in the form of a permit between the Discharger and the City was a critical component of finalizing the disposal element of the water balance analysis so all parties involved knew the maximum flow that could be disposed of in the City's sanitary sewer. Secondly, the Board also regulates the City of Marysville through WDRs and the City is currently under Cease and Desist Order No. R5-2009-0014 to regionalize with Linda County Water District. (Exhibit 114.) Receiving written confirmation of the agreed upon maximum flow also ensure that the City is not in violation of its WDRs or CDO.

Based on the foregoing reasons and those previously stated in the Complaint, Attachment A, and the Prosecution Team's Legal and Technical Analysis, the Prosecution Team continues to assert that the number of days of violation alleged in the Complaint, 112 days from 1 October 2014 through 20 January 2015, is appropriate for the Discharger's failure to comply with Ordered Paragraph 9 of the CAO.

**V. The Discharger's Contention that its Culpability Should be 0.75 Equates its Failure to Comply with the Amended CAO to an "Accidental Incident" that No Amount of Due Care Could have Prevented. The Facts do not Support this Position.**

The Discharger asserts that because it acted reasonably, attempted to comply with the Amended CAO requirement in good faith, and reasonably relied on its consultant's run-off calculations the culpability factor should be assessed at the lower end of the range at 0.75. The Enforcement Policy's range of culpability factors spans between 0.5 and 1.5 and the Policy notes, "[h]igher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations." A neutral factor of 1, which does not change a penalty amount, indicates that a discharger exercised the appropriate amount of due care and diligence and acted as a reasonable and prudent person would have under similar circumstances. Though the Discharger argues for a lower culpability factor citing the reasonableness of its actions leading up to the violation and good faith efforts to comply with the Amended CAO, the Discharger goes even further arguing not only did it act in the same manner as a similarly situated reasonably prudent person, no amount of due care or foresight exercised by the Discharger could have

prevented its noncompliance with the CAO from occurring. That is the essence of what the Discharger is asserting when it advocates for a factor of 0.75 for culpability. The assignment of a culpability factor of 0.75 indicates that the Discharger was not culpable or at fault for its failure to install an operational compost leachate collection system by 1 October 2014 that contained all leachate generated from rainfall events up to and including a 25-year, 24-hour storm event. The assignment of a factor of 0.75 connotes that the violation at issue resulted more from an "accidental incident" than any failure on the part of the Discharger. The Discharger's failure to comply with the CAO was not caused by an act of god, nor the result of intentional misconduct of an operator, for example. The circumstances of the violation alone indicate that a culpability factor of 0.75 is not appropriate for this matter.

Furthermore, the Discharger asserts that it acted reasonably in its reliance on its consultant's run-off calculations as part of the water balance analysis. In the 30 May 2014 report prepared by Golder, the Discharger's consultant stated that it was "very confident" that a system with a storage capacity of 105,000 gallons plus disposal of 65,000 gallons to the City of Marysville would be able to accommodate a storm event of 2.31 inches (5-year, 24-hour storm event), an amount it noted has "only been exceeded 3 times" during the last 32 years. (Recology Exhibit 25, pp. 2-3.) Critical to this report is the following statement: "During a precipitation event, the initial precipitation is absorbed by the compost materials and the compost pad surface. As this absorption capacity decreases, water runs off from the FRO operations area to the collection system. Each one-inch of run-off generates 315,000 gallons of compost water to manage." (*Id.*, at 2, emphasis added.) The report concludes by stating, "However, at progressively higher storm events, the beneficial impacts of the initial absorption of the rainfall by the compost pad surface and compost materials significantly diminishes, which means that the amount of run-off to the collection system significantly increases." (*Id.*, at 3, emphasis added.) In this report, the Discharger's consultant states very clearly at the end of the report that larger storm events will cause more run-off to occur and therefore more compost leachate to manage in the collection system. Compare these statements in this report with the analysis in the 30 July 2014 run-off calculations for a 25-year, 24-hour storm event.

The 30 July 2014 analysis concludes that the consultant's hydrology calculations "indicate that the total run-off from the approximately 11.4-acres of current compost operations is approximately 183,000 gallons for a 3.16 inch storm." (Exhibit 47, p. 1.) This statement compared to the 30 May 2014 report should have caused the Discharger to immediately question the calculation's validity and the underlying assumptions input to the model. If, according to the consultant's previous report, 315,000 gallons of leachate are generated for every 1-inch of run-off and the 30 July 2014 report examined an increase in rainfall (2.31 inches in a 5-year, 24-hour storm vs. 3.16 inches in a 25-year, 24-hour storm), then by the consultant's calculation a majority of the 3.16 inches of rain would be absorbed by the compost materials and compost pad surface leaving just 183,000 gallons to manage from a progressively higher storm event. This calculation is not consistent with Golder's 30 May 2014 statement about the manner in which absorption is affected during larger storm events and this calculation similarly fails to take into account the impermeable surface of the compost pad. Though the Discharger asserts it "relied on qualified engineering experts, Golder Associates, to perform detailed runoff

calculations to estimate the size of the tank system that would be needed," the Prosecution Team asserts that its reliance may not have been reasonable given the glaring questions that arise from a comparison between the 30 May 2014 and 30 July 2014 Golder reports in addition to Board staff's repeated concerns regarding potential inaccuracies in the run-off calculations.

The Discharger places great emphasis on the fact that the analyses conducted by its primary consultant, Golder, were reviewed by a second engineering consultant, Brown & Caldwell. Though it is true that Brown & Caldwell provided supplementary review, it is important to point out that Brown & Caldwell's supplementary review of the 30 July 2014 Golder report did not involve a review of the run-off calculation of 183,000 gallons. Brown & Caldwell's 28 July 2014 letter states, "Based on calculations provided by Golder Associates (Folder)[sic] using the Regional Water Board recommended DWR database, the 25-year, 24-hr storm will produce 183,000 gallons per day (gpd) of runoff from the FRO composting operations. The purpose of this report is to recommend the best practicable solution for managing this runoff to achieve the Regional Water Board's stated goal of managing for the 25-yr, 24-hr event." (Exhibit 47, Attachment 1, emphasis added.) It does not appear that Brown & Caldwell reviewed Golder's run-off calculations nor did it rerun the model with revised run-off curve numbers. Rather the second engineering consultant assumed the 183,000 gallon calculation was accurate and merely opined on which of three runoff management options was the most appropriate. Golder later calibrated its 30 July 2014 run-off model on 13 August 2014 using actual rainfall recorded at nearby gauges for the months of February and March and provided the engineering rationale for the selected curve number values. (Recology Exhibit 29.) A one-page letter from Brown & Caldwell accompanied Golder's calibrated run-off calculation commenting on the benefit of using of data from real events in the run-off model, "the modeling performed by Golder using rain gauge records for Marysville to simulate effects of antecedent days of rain provided good additional results for comparison purposes." (*Id.*) Though this one-page statement of review generally states Brown & Caldwell's agreement with the reasonableness of Golder's calculations, there is no indication as to the extent the calculations were reviewed or whether Brown & Caldwell felt the assumptions input into the model, like the curve numbers, were appropriate. Given the foregoing discussion, the Prosecution Team continues to assert that the Discharger's culpability should be assigned a factor of 1.3.

**VI. The Facts do not Support the Discharger's Contention that its Actions Subsequent to the Violation Surpassed What Would be Expected from a Similarly Situated Discharger.**

The Discharger asserts that its actions subsequent to the storm events of 3 December and 11 December 2014 warrant the assignment of a cleanup and cooperation factor of 0.8. Similar to the Discharger's potential for harm argument, its cleanup and cooperation argument focuses on a very narrow window of time, looking only to the specific period of 3 December to 11 December 2014, the ten day period the Discharger asserts is the only period it violated the Amended CAO. What the Discharger fails to consider are the other actions or inactions outside the scope of this time period that demonstrate the Discharger's true degree of cooperation in returning to compliance with the Amended CAO requirement.

The Enforcement Policy's cleanup and cooperation factor examines the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Put another way, this factor asks the question, "In the context of the violation, what did the discharger do in response to the violation to cleanup and comply?" Assignment of a neutral factor of 1 for cleanup and cooperation indicates that the discharger's conduct with respect to this factor was reasonable and no adjustment to the penalty should be made. The inherent expectation of the Board is that after a violation occurs, a discharger will engage in a reasonable level of voluntary cleanup up and will cooperate to a reasonable extent to return to compliance. If a discharger meets this expectation, then it acted reasonably with ordinary care and will receive a neutral factor of 1.

In this case, the Discharger argues that its activities following the violation *surpassed* the Prosecution Team's expectations, going above and beyond what a similarly situated discharger would have done to cleanup and voluntarily cooperate to return to compliance, thus warranting a cleanup and cooperation factor of 0.8.

Specifically, the Discharger states it "undertook a series of significant efforts in a short period of time to improve the capacity, efficiency and performance of the collection system in response to the December 3 and December 11 overflows." (Recology's *Factual, Legal & Technical Analysis*, p. 24; pp. 10-12.) The Prosecution Team is not discrediting the efforts of the Discharger in response to the December storm events. However, implementing measures to repair or upgrade the collection system are only one aspect of expected measures to comply with the Amended CAO's requirement. The other aspect of the violation that needs consideration is the Discharger's degree of cooperation with respect to its submission of a revised water balance analysis for the Discharger's compost leachate collection system. In this regard, the Discharger's conduct fell below the Prosecution Team's expectation of reasonable cooperation to return to compliance.

The Amended CAO required the compost leachate collection system work plan to "include a water balance to justify the size of the tanks of ponds." This document was due by 1 February 2014, but a materially sufficient water balance was not submitted until 28 January 2015, and only after a Water Code 13267 Investigative Order was issued. As discussed earlier, the Discharger provided Board staff with a supplemental compost stormwater model as part of its revised water balance on 13 August 2014 using actual rainfall data from February 2014. (Recology Exhibit 29.) According to this analysis by Golder, the run-off calculations supported the Discharger's collection system of six 21,000 gallon Baker Tanks and 65,000 gallons of disposal to the City of Marysville. However, the collection system in place on 1 October 2014 and during the 3 December 2014 storm event differed from the system justified by this recalibrated water balance analysis. Furthermore, Board staff repeatedly expressed its concern that the run-off calculations upon which the water balance was based were grossly underestimated by the Discharger's consultant.

Therefore, in response to the storm event and in an attempt to obtain a more accurate calculation, the Prosecution Team issued an Investigative Order on 9 December 2014 requiring

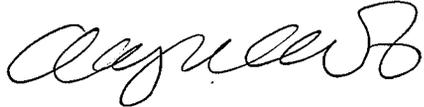
the Discharger to submit 1) a revised water balance calculation and run-off model calibrated from the 3 December 2014 event based on 3.16 inches of rain and 2) a discharge plan for leachate collected in storage tanks. (Exhibit 24, p. 3.) As the Discharger notes, it did submit a revised water balance analysis on 18 December 2014 in response to this Investigative Order (Exhibit 29) but the Prosecution Team issued a Notice of Violation on 22 December 2014 citing the deficiency in the Discharger's response as it did not include a discharge plan for leachate collected in storage tanks that accounted for consecutive days of rain up to an including 3.16 inches of rain. (Exhibit 31.) The Discharger's calculation of 747,000 gallons of run-off from 3.16 inches of rain indicated that its 819,000 gallon storage system could comply with the Amended CAO requirement. What the Discharger's water balance did not show was how this upgraded system would dispose of leachate to ensure it had adequate capacity in the event that it rained for consecutive days. In response to the NOV and again in its *Factual, Legal & Technical Analysis*, the Discharger pushed back against the Prosecution Team's request for this disposal plan despite a number of discussions regarding the importance of the Discharger's plan to dispose of the additional volume stored in its upgraded collection system. The Discharger eventually complied noting, "in an effort to avoid an enforcement dispute on this point, Recology had its consultants prepare another revised water balance report to address staff's concerns, which was submitted to the Regional Board staff on January 15, 2015." (Recology's *Factual, Legal & Technical Analysis*, p. 19.) This revised water balance was submitted on 15 January 2015, however, in order for complete compliance with the Amended CAO requirements, Board staff reiterated previous requests that the Discharger submit *in writing* a memorialization of the agreement between the Discharger and the City so that it was clear to all parties involved the maximum flow volume the Discharger could send to the City of Marysville. This was ultimately received on 28 January 2015. (Exhibit 80.)

Though the Prosecution Team encourages collaboration with dischargers to the extent possible, collaborative attempts can become drawn out to the point where they can become counterproductive and cooperation is better served by appropriately responding to Board staff's requests fully and completely in the first instance. The Prosecution Team asserts that the Parties' interaction on the water balance component of the violation was one of those instances where the Discharger's actions resulted in a drawn out back-and-forth where the Prosecution Team's expectation of cooperation to return to compliance was not met. On balance and considering the foregoing, the Prosecution Team asserts that a cleanup and cooperation factor of 1.1 is appropriate.

**VII. Conclusion**

For the reasons stated above and those previously stated in the Prosecution Team's Legal and Technical Analysis, the Complaint, and Attachment A, we respectfully request that the Central Valley Water Board assess administrative civil liability in the amount of \$440,440.

For the Prosecution Team:



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