

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2017-0038

IN THE MATTER OF

JAMES G. AND AMELIA M. SWEENEY
SWEENEY DAIRY
TULARE COUNTY

This Order is issued to James G. and Amelia M. Sweeney (hereafter Discharger) pursuant to California Water Code (Water Code) section 13268, which authorizes the imposition of Administrative Civil Liability. This Order is based on findings that the Discharger violated provisions of Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (hereinafter Reissued General Order).

The Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds the following:

1. The Discharger owns and operates the Sweeney Dairy (Dairy) located at 30712 Road 170, Visalia, California, County of Tulare.
2. The Dairy is regulated by the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (Reissued General Order) and accompanying Monitoring and Reporting Program (MRP), which was adopted by the Central Valley Water Board on 3 October 2013. The Reissued General Order replaces the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter 2007 General Order) and accompanying MRP, which was issued by the Central Valley Water Board on 3 May 2007. The Reissued General Order and the MRP contain reporting requirements for dairies regulated by the Reissued General Order.
3. Water Code section 13267 authorizes the Regional Water Boards to require the submittal of technical and monitoring reports from any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge to waters of the state.
4. The Reissued General Order and the MRP required the Discharger to submit a 2015 Annual Report by 1 July 2016 pursuant to the Central Valley Water Board's authority in accordance with Water Code section 13267.
5. The Discharger violated Water Code section 13267 by failing to submit the 2015 Annual Report required by the Reissued General Order and Monitoring and Reporting Program by the required deadline of 1 July 2016.
6. On 15 August 2016, the Central Valley Water Board staff issued a Notice of Violation notifying the Discharger that the 2015 Annual Report with appurtenant components had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.

7. On 1 December 2016, the Central Valley Water Board staff issued a pre-Administrative Civil Liability (ACL) letter notifying the Discharger that an ACL complaint for failure to submit the 2015 Annual Report was forthcoming. The letter included a calculation of the maximum penalty (\$153,000) as of 1 December 2016 for failure to submit the missing report. The Discharger was provided an opportunity to meet with the Central Valley Water Board staff to discuss the alleged violation and submit any information regarding the factors listed in Water Code section 13327 that would be deemed relevant to determining an appropriate monetary penalty. The letter requested that all responses be received by 6 January 2017. The letter also indicated that if staff did not receive a response from the Discharger by 6 January 2017, the Assistant Executive Officer would issue a Complaint to the Discharger. As of the date of the Complaint, the Discharger had not responded to the 1 December 2016 pre-ACL letter.
8. Central Valley Water Board's compliance tracking system and case files indicate that to date the Board has not received the 2015 Annual Report or any of the appurtenant components thereof.
9. The Discharger is alleged to have violated the following sections of the Reissued General Order and of the MRP:
 - A) Provision G.3 of the Reissued General Order, which states:

“The Discharger shall comply with the attached Monitoring and Reporting Program R5-2013-0122 which is part of this Order, and future revisions thereto or with an individual monitoring and reporting program, as specified by the Central Valley Water Board or the Executive Officer.”
 - B) Provision G.13 of the Reissued General Order, which states in part:

“The Discharger must comply with all conditions of this Order, including timely submittal of technical and monitoring reports as directed by the Executive Officer.”
 - C) The MRP, which states in part:

“An annual monitoring report is due by 1 July of each year [T]he annual report shall cover information on crops harvested during the previous calendar year”
10. The Discharger violated the Reissued General Order and the MRP by failing to submit the 2015 Annual Report with appurtenant components as required by the MRP that accompanies the Reissued General Order.

VIOLATION

11. On 13 January 2017, the Assistant Executive Officer, lead prosecutor for the Prosecution Team, issued ACL Complaint (Complaint) No. R5-2017-0504 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$75,600 pursuant to Water Code section 13268 for the failure to submit the 2015 Annual Report.

REGULATORY CONSIDERATIONS

12. The Central Valley Water Board's authority to regulate waste discharges that could affect the quality of the waters of the state, which includes both surface water and groundwater, is found in the Porter-Cologne Water Quality Control Act (California Water Code Division 7).
13. Water Code section 13267, subdivision (b)(1) requires that:

In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.
14. Pursuant to Water Code section 13268, subdivision (a)(1), "Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267...may be liable civilly in accordance with subdivision (b)."
15. Water code section 13268, subdivision (b)(1) allows civil liability to be imposed administratively by a regional board in an amount which "shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs."
16. Pursuant to Water Code section 13327, in determining the amount of civil liability, the Central Valley Water Board shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.
17. On 17 November 2009 the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The

Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of the methodology addresses the factors that are required to be considered when imposing an administrative civil liability as outlined in Water Code section 13327.

18. The administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A to this Order. The administrative civil liability takes into account such factors as the Dischargers' culpability, history of violations, ability to pay and continue in business, and other factors as justice may require. Attachment A is attached hereto and incorporated herein by reference.
19. **Maximum and Minimum Penalties.** As described above, the statutory maximum penalty under Water Code section 13268, subdivision (b)(1) is \$1,000 per day of violation. As of the date of the ACL Complaint, the Discharger was out of compliance for 196 days, thus resulting in a maximum penalty of \$196,000. The Enforcement Policy recommends that the minimum liability imposed be at least ten percent higher than the economic benefit of non-compliance so that liabilities are not construed as the cost of doing business and so that the assessed liability provides a meaningful deterrent to future violations. The economic benefit to the Discharger resulting from the failure to submit the 2015 Annual Report is estimated at \$3,047 (see Attachment A for how this estimate was derived). Per the Enforcement Policy, the minimum penalty is the economic benefit plus ten percent (\$3,352).
20. Notwithstanding the issuance of this ACL Order, the Central Valley Water Board retains the authority to assess additional penalties for violations of the Water Code that may subsequently occur.
21. This Order is effective and final upon issuance by the Central Valley Water Board. Payment must be received by the Central Valley Water Board no later than thirty (30) days from the date on which this Order is issued.
22. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegatee is authorized to refer this matter to the Attorney General's Office for enforcement.
23. Issuance of this Administrative Civil Liability Order is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321, subdivision (a)(2).
24. Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final falls on a Saturday,

Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED THAT:

1. James G. and Amelia M. Sweeney shall be assessed an administrative civil liability in the amount of seventy-five thousand six hundred dollars (\$75,600).
2. Payment shall be made in the form of a check made payable to the State Water Pollution Cleanup and Abatement Account no later than thirty days from the date of issuance of this Order.

I, Pamela Creedon, Executive Officer, do hereby certify that the foregoing is a full, true, correct copy of an Order issued by the California Regional Water Quality Control Board, Central Valley Region, and that such action occurred on 7 April 2017.

Original signed by:

PAMELA C. CREEDON, Executive Officer

Attachment A – ACL Order R5-2017-0038
Specific Factors Considered – Civil Liability
James G. & Amelia M. Sweeney
Sweeney Dairy

The Central Valley Water Board finds that James G. and Amelia M. Sweeney (hereinafter the Discharger) failed to submit the 2015 Annual Report required to be submitted by 1 July 2016. For the purpose of applying the Enforcement Policy's administrative civil liability methodology, the violation is a non-discharge violation. Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

Failure to submit 2015 Annual Report: In accordance with the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (Reissued General Order) and the accompanying Monitoring and Reporting Program (MRP), a 2015 Annual Report must be submitted for regulated facilities by 1 July 2016. To date, has not submitted this report for the Sweeney Dairy.

Calculation of Penalty for Failure to Submit 2015 Annual Report

Step 1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.35.

This factor is determined by using the potential for harm of the violation and the extent of the Discharger's deviation from requirements. The potential for harm was determined to be minor. The failure to submit the 2015 Annual Report did not increase the amount of pollution discharged or threatened to discharge into waters of the State. However, failing to submit the Annual Report to the Central Valley Water Board hinders the Board's ability to detect and address noncompliance. The Annual Report is a key means through which the Central Valley Water Board evaluates a Discharger's compliance with the Reissued General Order, including the assessment of proper manure application to fields and waste management in a dairy's production area. By failing to provide the information in the Annual Report, the Discharger frustrates the Board's efforts to assess the potential impacts and risks to water quality and circumvents the Board's ability to take necessary enforcement action to correct problems. The regulatory program is compromised when staff resources are directed toward bringing the Discharger into compliance and those resources are not available for

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other program activities. Since the violation thwarts the 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. Failing to timely submit the Annual Report to the Central Valley Water Board hinders the Board's ability to address noncompliance. Those circumstances present at least a minor potential for harm.

The deviation from requirements was determined to be major, as the requirement to submit the Annual Report has been rendered ineffective. The failure to submit the required technical report undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the Reissued General Order. Because the Discharger failed to submit the report, the Discharger was assessed a major deviation from the requirement.

Initial Liability

The failure to submit an annual report is an enforceable violation under Water Code section 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2015 Annual Report by 1 July 2016 as required by the Reissued General Order and the MRP, and is 196 days late as of the issuance date of the Complaint. Therefore, the Per Day Assessment is calculated as (0.35 factor from Table 3) X (196 days) X (\$1,000 per day). The Initial Liability Amount is \$68,600.

Step 4. Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided certain findings can be made. The Enforcement Policy also describes three factors related to the Discharger's conduct that should be considered for modification of the initial liability amount: the Discharger's culpability, the Discharger's efforts to clean up and cooperate with regulatory authorities after the violation, and the Discharger's history of violations. After each of these factors is considered for the violation alleged, the applicable factor should be multiplied by the proposed liability amount for the violation.

a) Multiple Day Violations

The Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis 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

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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 2015 Annual Report 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 2015 Annual Report 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 2015 Annual Report results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with avoided costs of preparing and submitting a 2015 Annual Report.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The Enforcement Policy provides a floor in that the liability shall not be less than an amount that is calculated based on an assessment of daily penalties for the first day of violation, plus an assessment for each five-day period of violation until the 30th day, plus an assessment of one day for each thirty days of violation thereafter (Minimum Approach). Applying this assessment method on the total 196 violation days gives the Board the discretion to reduce the assessed penalty days to a minimum number of 12 days. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's unwillingness to comply with the Reissued General Order 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 48 days of violation.

A calculation of initial liability totals \$16,800 (0.35 per day factor X 48 adjusted days of violation X \$1,000 per day penalty).

b) *Culpability*: 1.5

Discussion: The Discharger was assessed a score of 1.5, which increases the liability amount. As an enrolled dairy, the Discharger is required to comply with the requirements of the Reissued General Order, including the requirement to submit annual reports. Despite the fact that the Discharger received multiple

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notices regarding the requirements set forth in the Reissued General Order, the Discharger failed to comply. The Discharger was well aware of the requirement to submit the 2015 Annual Report, as the Discharger had submitted an annual report for the calendar year 2008 under the 2007 General Order. The Discharger also failed to submit annual reports for calendar years 2009, 2010, 2011, 2012, 2013, and 2014, and was assessed administrative civil liability for each of these violations (see *History of Violations* below). A factor of 1.5 is appropriate where the Discharger's conduct amounted to intentional or negligent behavior, falling below what a reasonable and prudent person would have done in similar circumstances. Given the fact that the Discharger has chosen to willfully violate the requirement, the maximum culpability score of 1.5 has been applied.

c) *Cleanup and Cooperation: 1.5*

Discussion: The Discharger was assessed a score of 1.5, which increases the liability amount. The Discharger was issued a Notice of Violation (NOV) on 15 August 2016, which requested that the report be submitted as soon as possible to minimize liability. The Discharger was unresponsive to the NOV, and did not cooperate with the Water Board to come back into compliance. The violation of Water Code section 13268, subdivision (a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

d) *History of Violations: 2*

Discussion: The Discharger was assessed the score of 2, which increases the liability. The Central Valley Water Board adopted Administrative Civil Liability Order No. R5-2011-0068 on 13 October 2011 for the Discharger's failure to submit the 2009 Annual Report and the Waste Management Plan by the required deadlines, as required by the 2007 General Order and the MRP. In addition, the Central Valley Water Board has adopted the following Administrative Civil Liability (ACL) Orders against the Discharger: 1) ACL Order No. R5-2012-0070 on 2 August 2012 for the Discharger's failure to submit the 2010 Annual Report as required by the 2007 General Order and the MRP; 2) ACL Order No. R5-2013-0091 on 25 July 2013 for the Discharger's failure to submit the 2011 Annual Report as required by the 2007 General Order and the MRP and for failure to comply with a Water Code 13267 Order issued to the Discharger on 4 May 2012; 3) ACL Order No. R5-2014-0119 on 9 October 2014 for the Discharger's failure to submit the 2012 Annual Report as required by the 2007 General Order and the MRP; 4) ACL Order No. R5-2015-0065 on 4 June 2015 for the Discharger's failure to submit the 2013 Annual Report as required by the Reissued General Order and the MRP; and 5) ACL Order No. R5-2016-0063 on 18 August 2016 for the Discharger's failure to submit the 2014 Annual Report as required by the Reissued General Order and the MRP. The Enforcement Policy requires that a minimum multiplier of 1.1 be used when there is a history of repeat

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violations. Because the Discharger has repeatedly violated the annual reporting requirement in the 2007 General Order and 2013 Reissued General Order, a multiplier of 2 was assessed.

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: \$75,600* [Initial Liability (\$16,800) x Adjustments (1.5)(1.5)(2)].

Step 6. Ability to Pay and Continue in Business

The Enforcement Policy provides that if the Central Valley Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward.

- a) *Adjusted Total Base Liability Amount: \$75,600*

Discussion: The Discharger has the ability to pay the Total Base Liability Amount based on 1) the Discharger owns the Dairy, a significant asset, and 2) the Discharger operates a dairy, an ongoing business that generates profits.

Without additional information provided by the Discharger, based on this initial assessment of information available in the public record, it appears the Discharger has the assets to pay the Total Base Liability. Based on the reasons discussed above, no reduction in liability is warranted.

Step 7. Other Factors as Justice May Require

- a) *Adjusted Combined Total Base Liability Amount: \$75,600 + \$0 (Step 7 adjustments) = \$75,600.*
- b) *Discussion:* No adjustment to the Total Base Liability Amount has been made based on "other factors as justice may require."

Step 8. Economic Benefit

- a) *Estimated Economic Benefit: \$3,047*

Discussion: The Discharger has received an economic benefit from the costs saved by not collecting the required samples and analytical data for manure,

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process wastewater, irrigation water, groundwater, soil, and plant tissue, and from not drafting and preparing the 2015 Annual Report. This benefit is based on the estimated costs of sampling and preparing the 2015 Annual Report required under the Reissued Dairy General Order (\$3,047). The adjusted combined total base liability amount of \$75,600 is more than the economic benefit amount (\$3,047) plus ten percent as required by the Enforcement Policy.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$3,352*

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not fall 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 alleged violation is \$3,047. Therefore, the minimum liability amount is \$3,352 [Economic Benefit (\$3,047) x Adjustment (1.1)].

b) *Maximum Liability Amount: \$196,000*

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13367, subdivision (b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. The maximum liability amount is \$196,000 (196 total days X \$1,000 per day).

The liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount for the failure to submit the 2015 Annual Report is **\$75,600**.