

Attachment A
Penalty Calculation Methodology
Administrative Civil Liability Complaint No. R4-2022-0217-A1
Day to Day Imports Inc. and Virgin Scent Inc. dba ArtNaturals

Day to Day Imports Inc. (Day to Day) and its sublessee Virgin Scent Inc. dba ArtNaturals (Virgin Scent) (collectively, Dischargers) are alleged to have failed to file a Report of Waste Discharge (ROWD) prior to commencement of discharges associated with industrial activities at the facility located at 16325 South Avalon Boulevard in Carson, California (Facility). The Dischargers could have satisfied this requirement by enrolling under the State Water Resources Control Board's (State Water Board's) National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Industrial Activities, Order No. 2014-0057-DWQ as amended in 2015 and 2018, NPDES Permit No. CAS000001 (General Permit) or filing a ROWD to obtain individual waste discharge requirements.

Failure to file a ROWD prior to discharging to waters of the United States is a violation of Water Code section 13376. Pursuant to Water Code section 13385, subdivision (c) the Dischargers are subject to administrative civil liability of up to \$10,000 per day of violation.

Factors required to be considered in determining the amount of administrative civil liability pursuant to Water Code section 13385, subdivision (e) and the State Water Board's Water Quality Enforcement Policy (Enforcement Policy) effective October 5, 2017 are discussed for the violations below. The Enforcement Policy can be found at https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/0404_17_9_final%20adopted%20policy.pdf.

Violations 1-2: Failure to file a Report of Waste Discharge

Violation 1 includes the days of violation from October 5, 2017 to February 7, 2022. Violation 2 includes the days of violation from February 8, 2022 to May 12, 2022.

Step 1. Actual or Potential for Harm for Discharge Violations

This factor does not apply to these violations.

Step 2. Assessment for Discharge Violations

This factor does not apply to these violations.

Step 3. Per Day Assessment for Non-Discharge Violations

a) Potential for Harm: Major

A Potential for Harm score of Major is assigned for Violations 1-2. The Enforcement Policy defines Major Potential for Harm as "[t]he characteristics of the violation have wholly impaired the Water Boards' ability to perform their statutory and regulatory functions, present a particularly egregious threat to beneficial uses,

and/or the circumstances of the violation indicate a very high potential for harm.”

The Facility discharges into storm drains connected to the municipal separate storm sewer system that discharges into the Dominguez Channel Estuary. The Dominguez Channel Estuary is a Clean Water Act section 303(d) listed impaired waterbody. The Water Quality Control Plan for the Los Angeles Basin Plan (Basin Plan) designates the following beneficial uses for the Dominguez Channel Estuary: Water Contact Recreation (REC-1); Non-Contact Water Recreation (REC-2); Commercial and Sport Fishing (COMM); Estuarine Habitat (EST); Marine Habitat (MAR); Wildlife Habitat (WILD); Rare, Threatened or Endangered Species; Migration of Aquatic Organisms; Spawning, Reproduction and/or Early Development of Fish (SPWN).¹

As an unpermitted industrial facility, the Dischargers were not regulated under the General Permit or individual waste discharge requirements, which would have required them to implement Best Management Practices (BMPs) to prevent potential discharge of pollutants in their industrial stormwater discharges. Without permit coverage, the Dischargers were not required to implement the BMPs necessary to protect their stormwater runoff from pollutants. The Dischargers also were not required to sample stormwater and report the results that would have informed the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) of the water quality of the stormwater discharged from the Facility and whether the BMPs were effective in ensuring the discharge did not exceed water quality standards. Therefore, the violations wholly impaired the Los Angeles Water Board’s ability to regulate and protect against discharges of waste entering the impaired Dominguez Channel Estuary. Because these violations wholly impaired the Los Angeles Water Board’s ability to perform its statutory and regulatory functions, the Potential for Harm score is Major.

b) Deviation from Requirement: Major

A Deviation from Requirement score of Major is assigned for Violations 1-2. The Enforcement Policy defines a Major Deviation from Requirement as “[t]he requirement has been rendered ineffective (e.g., the requirement is rendered ineffective in its essential functions).” The Dischargers failed to enroll in the General Permit or file a ROWD for their industrial stormwater discharges, rendering the requirement ineffective in its essential function of protecting water quality by obtaining permit coverage under the General Permit or individual waste discharge requirements and being legally bound by requirements designed to protect water quality. Therefore, the Deviation from Requirement is Major.

c) Per Day Factor: 0.85

In accordance with Table 3 of the Enforcement Policy, for a Major Potential for

¹ The Dominguez Channel Estuary also lists Navigation as a potential beneficial use.

Harm and a Major Deviation from Requirement, the per day factor for Violations 1-2 is 0.85.

d) Multiple Day Violations

Day to Day was required to enroll in the General Permit or to file a ROWD by at least October 8, 2015, the start date of Day to Day's business license and operations at the Facility. Virgin Scent was required to enroll in the General Permit or to file a ROWD by at least November 1, 2016, the date it subleased the Facility from Day to Day.

Violation 1: The Los Angeles Water Board Prosecution Team is using its prosecutorial discretion to start the days of violation on October 5, 2017, the effective date of the Enforcement Policy. The end date of the violation is February 7, 2022, the date the Los Angeles Water Board issued a Notice of Violation (NOV) to the Dischargers. The total from October 5, 2017 to February 7, 2022 is 1,587 days of violation.

Violation 2: The start date of the violation is February 8, 2022, the day after the Los Angeles Water Board issued an NOV to the Dischargers. The end date of the violation is May 12, 2022, when the Dischargers vacated the Facility. The total from February 8, 2022 to May 12, 2022 is 94 days of violation.

The total days of violation for Violations 1-2 is 1,681 days.

The Enforcement Policy allows the daily assessment to be less than the calculated daily assessment for violations that last more than 30 days, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Los Angeles Water Board must make an express finding that the violation: (1) is not causing daily detrimental impacts to the environment and is not causing daily detrimental impacts to the regulatory program; (2) results in no discrete 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. Under this alternate approach to penalty calculation, the liability shall be not less than an amount that is calculated based on an assessment of the initial Total Base Liability Amount for the first 30 days of the violation, plus an assessment for each 5-day period of violation, until the 60th day, plus an assessment for each 30 days of violation thereafter.

Here, the Dischargers' failure to file a ROWD did not result in discrete economic benefits from the illegal conduct that can be measured on a daily basis. By failing to file a ROWD or enroll under the General Permit, the Dischargers were not legally bound to spend money to develop plans and reports, pay the permit application and annual fees, invest in tools or equipment necessary to implement stormwater best management practices, and contract a lab to analyze samples collected from

the Facility's stormwater discharge. However, these costs do not amount to daily economic benefit, as the costs are incurred from making initial investments (i.e., BMPs and developing plans) or occur on an as-needed basis (i.e., BMP maintenance, fees, reporting, or sampling).

Using the Enforcement Policy's methodology for multiple day violations, 1,587 days of violation were collapsed to 86 days for Violation 1. Even though the Los Angeles Water Board Prosecution Team is separating the violation period into two violations due to the differences in the Culpability and Cleanup and Cooperation factors discussed below, it recommends fully collapsing the days of violation for Violation 2 to four days of violation instead of restarting the methodology for collapsing days with the start date of Violation 2, which would result in 37 days of violation. Collapsing the days of violation for Violation 2 to four days is a conservative approach that is to the Dischargers' benefit, is supported by the Enforcement Policy, does not result in an inappropriately low penalty, and is warranted in this case. Applying this approach, there is a total of 90 days of violation: 86 days for Violation 1 and four days for Violation 2.

e) Initial Liability Amount: \$765,000

The Initial Liability Amount is the (per day factor) x (number of days of violation) x (per day statutory maximum liability).

The per day factor is 0.85, days of the violation are 86 and four, respectively, and the per day statutory maximum liability is \$10,000 under Water Code section 13385, subdivision (c).

Violation 1 Initial Liability Amount = $0.85 \times 86 \text{ days} \times \$10,000/\text{day} = \$731,000$

Violation 2 Initial Liability Amount = $0.85 \times 4 \text{ days} \times \$10,000/\text{day} = \$34,000$

Total Initial Liability Amount = $\$731,000 + \$34,000 = \$765,000$

Step 4. Adjustment Factors

a) Degree of Culpability

The Culpability multiplier ranges between 0.75 and 1.5, with a higher multiplier for intentional misconduct and gross negligence, and a lower multiplier for more simple negligence.

Violation 1: 1.1

A reasonable and prudent person would know the applicable laws and have sought to obtain all appropriate permits for their operations. The Dischargers should have known of the need to enroll in the General Permit or to file a ROWD as a business

working in the warehousing industry. Therefore, a Culpability multiplier of 1.1 is assigned for Violation 1.

Violation 2: 1.5

On February 7, 2022, the Los Angeles Water Board issued an NOV instructing the Dischargers to immediately obtain coverage under the General Permit or file a ROWD for individual waste discharge requirements. Despite receiving the NOV notifying them of the need to enroll immediately, the Dischargers continued to fail to obtain permit coverage. Thus, the Dischargers knew of the requirement but chose not to obtain permit coverage. Therefore, a Culpability multiplier of 1.5 is assigned for Violation 2.

b) History of Violations: 1.0

Where the discharger has no prior history of violations, this factor should be neutral, or 1.0. Where the discharger has prior violations within the last five years, the Water Boards should use a multiplier of 1.1. Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1. Because the Dischargers have no prior history of violations, a multiplier of 1.0 was assigned for Violations 1-2.

c) Cleanup and Cooperation

The Cleanup and Cooperation multiplier ranges from 0.75 to 1.5, with 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.

Violation 1: 1.1

Cleanup does not apply to this violation. A Cleanup and Cooperation multiplier of 1.1 is assigned for Violation 1 because the Dischargers made no voluntary efforts to communicate with the Los Angeles Water Board regarding the need for permit coverage or return to compliance by obtaining coverage under the General Permit or filing a ROWD. The Dischargers did not undertake any efforts to contact the Water Boards or attempt to comply with the requirements of Water Code section 13376.

Violation 2: 1.5

Cleanup does not apply to this violation. On February 7, 2022, the Los Angeles Water Board issued an NOV instructing the Dischargers to immediately obtain coverage under the General Permit or file a ROWD for individual waste discharge requirements. On May 12, 2022, the Dischargers vacated the Facility. By May 12, 2022, the Dischargers had not applied for the General Permit or filed a ROWD. A Cleanup and Cooperation multiplier of 1.5 is assigned for Violation 2 because the

Dischargers failed to apply for permit coverage after notification from the Los Angeles Water Board, failed to otherwise communicate with the Los Angeles Water Board regarding the need for permit coverage, and failed to take any voluntary efforts to come into compliance.

Step 5. Total Base Liability Amount

Violation 1 Total Base Liability Amount = \$731,000 (Initial Liability Amount) x 1.1 (Culpability) x 1.0 (History of Violations) x 1.1 (Cleanup and Cooperation) = \$884,510

Violation 2 Total Base Liability Amount = \$34,000 (Initial Liability Amount) x 1.5 (Culpability) x 1.0 (History of Violations) x 1.5 (Cleanup and Cooperation) = \$76,500

Total Base Liability Amount = \$884,510 + \$76,500 = \$961,010

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

The Enforcement Policy requires the Los Angeles Water Board to analyze the Dischargers' ability to pay the Total Base Liability Amount and the effect paying the Total Base Liability Amount may have on the Dischargers' ability to continue in business. The Dischargers have the ability to pay the Total Base Liability Amount and continue in business. According to public records, Virgin Scent and Day to Day earned approximately \$20 million and \$2.5 million, respectively, in revenue in 2020. Therefore, the Dischargers' assets are more than sufficient to pay the Total Base Liability Amount and continue in business.

Step 7. Economic Benefit

The Enforcement Policy provides that the economic benefit of noncompliance should be calculated using the United States Environmental Protection Agency's (U.S. EPA) Economic Benefit Model (BEN) program unless it is demonstrated that an alternative method of calculating the economic benefit is more appropriate. Economic benefit was calculated using BEN Version 2021.0.0 (April 2021). For this case, BEN was determined to be the appropriate method. Using standard economic principals such as time-value of money and tax deductibility of compliance costs, BEN calculates a discharger's economic benefit derived from delaying or avoiding compliance with environmental statutes. In this case, the economic benefit was calculated based on the costs the Dischargers' avoided by not enrolling in the General Permit, as it is generally less expensive for a discharger to enroll under a General Permit than file a ROWD for individual waste discharge requirements. Specifically, this analysis considered the economic benefit associated with avoiding annual General Permit fees and the costs associated with preparing annual reports. Using BEN, the economic benefit of noncompliance for Violations 1-2 is \$10,531, collectively.

Step 8. Other Factors as Justice May Require

If the Los Angeles Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this adjustment.

a) Environmental Justice Considerations

The Enforcement Policy provides that “a consideration of environmental justice issues,” is appropriate in this factor. Consideration of environmental justice ensures that enforcement is conducted in a manner that advances the fair treatment of people of all races, cultures, and income levels. The area where the Facility is located is classified as an Environmental Justice (EJ) and/or Disadvantaged Community (DAC). An appropriately filed ROWD, or enrollment in the General Permit, is especially important given this Facility’s location because any conditions of noncompliance could impact an already overburdened community. CalEPA utilizes a screening tool, the California Communities Environmental Health Screening Tool (CalEnviroScreen), to identify communities in California that bear a disproportionate burden of environmental pollution and other hazards. For the area where the Facility is located, CalEnviroScreen identifies the community as being within the 92nd percentile of communities. Such a high score indicates that the community is an EJ community and/or DAC. The location of the violations supports the imposition of the proposed administrative civil liability in this case and no downward adjustment is warranted.

b) Costs of Investigation and Enforcement Adjustment: \$10,287

The Enforcement Policy allows for the costs of investigation and enforcement to be considered under other factors as justice may require. To date, the Los Angeles Water Board has incurred \$10,287 in staff costs associated with the investigation, preparation, and enforcement of the violations. This represents approximately 91.84 hours of staff time devoted to this matter. No attorneys’ fees are included in this calculation. The Los Angeles Water Board Prosecution Team finds that it is appropriate to increase the Total Base Liability Amount by \$10,287 in consideration of investigation and enforcement costs incurred in prosecuting this matter. Increasing the Total Base Liability Amount in this manner serves to create a more appropriate deterrent against future violations.

Step 9. Maximum and Minimum Liability Amounts

The Enforcement Policy directs the Los Angeles Water Board to consider maximum and minimum liability amounts set forth in the applicable statutes.

a) Maximum Liability Amount

Water Code section 13385, subdivision (c) provides for liability of up to \$10,000

per day of violation. For Violation 1, the total days of violation is 1,587. Therefore, the statutory maximum for Violation 1 is \$15,870,000. For Violation 2, the total days of violation is 94. Therefore, the statutory maximum for Violation 2 is \$940,000. The combined statutory maximum for Violations 1-2 is \$16,810,000.

b) Minimum Liability Amount

Water Code section 13385, subdivision (e) requires that when pursuing civil liability under Water Code section 13385, “[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.” Therefore, the statutory minimum for Violations 1-2 is \$10,531, collectively.

The Enforcement Policy requires the Los Angeles Water Board to recover, at a minimum, 10% more than the economic benefit. The economic benefit is \$10,531. Therefore, the minimum under the Enforcement Policy for Violations 1-2 is \$11,584, collectively.

Step 10. Final Liability Amount: \$971,297

The Final Liability Amount consists of the amount for the violations, provided the amount is within the minimum and maximum liability amounts. The Total Base Liability Amount was added to the investigation and enforcement costs accrued by the Los Angeles Water Board Prosecution Team. Therefore, the Final Liability Amount is \$971,297, which is within the minimum and maximum liability amounts.