

## **EXHIBIT D**

### **Factors Considered in Determining Administrative Civil Liability**

The specific required factors in Water Code section 13327 are the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, and the degree of toxicity of the discharge and, with respect to the violator, the required factors are the ability to pay, the effect on the violator's ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of the violation, the degree of culpability, economic benefit or saving, if any, resulting from the violation and other matters that justice may require.

The Enforcement Policy sets forth an approach to determine liability using a methodology that considers the following: the potential harm to beneficial uses; the violation's deviation from requirements; and economic benefit from the avoidance or delay of implementing requirements. These factors address the statute-required factors and are used to calculate penalties consistent with both the Water Code and the Enforcement Policy.

Each factor in the Enforcement Policy methodology and its corresponding category, adjustment, and/or amount for the non-discharge violation alleged in ACL Complaint No. R2-2012-0022 is presented below:

#### **Alleged Violation: Failure to submit a Technical Report, acceptable to the Executive Officer of the Regional Water Board, by May 13, 2011**

Mayhew Center failed to submit a technical Membrane Interface Probe (MIP) investigation report by the May 13, 2011, deadline set forth in a 13267 Order issued on April 4, 2011 (13267 Order). Regional Water Board staff received a preliminary and partial report for the investigation on January 20, 2012, 253 days after the required deadline.

#### **Maximum Administrative Civil Liability that may be imposed**

Pursuant to Water Code section 13368, subdivision (b)(1), the total maximum administrative civil liability that may be imposed is \$1,000 per day. The maximum administrative liability for the violation alleged in this Complaint is \$253,000.

#### **Adjustments to Determination of Initial Liability**

- a) **Specific Factor:** Potential Harm to Beneficial Uses

**Category:** Moderate

**Discussion:** The potential for harm is moderate. PCE has been detected at the Mayhew Center property at concentrations up to 11 parts per million (ppm) in vadoze zone soils<sup>1</sup> and 7.3 ppm in groundwater.<sup>2</sup> This release of contaminants threatens groundwater beneficial uses and may threaten indoor air. The full extent of impacts is not known at this time. Late submittal of the technical MIP investigation report has delayed characterization of the nature and extent of contaminants and implementation of corrective actions.

b) **Specific Factor:** Deviation from requirement

**Category:** Moderate

**Discussion:** The deviation from requirement is “moderate” because the requirement to submit a report by a required deadline was partially compromised. The 13267 order issued on April 4, 2011, required the submittal of a summary report for the MIP investigation. Mayhew Center submitted preliminary data and findings for one of three borings targeted for the MIP investigation on January 20, 2012, 253 days after the May 13, 2011, deadline in the 13267 order. Therefore, the requirement was only moderately compromised because Mayhew Center did ultimately submit (though late) the required report, and the report contained some, but not all, of the required information.

c) **Specific Factor:** Days of Violation

**Amount:** 14 days

**Discussion:** The Enforcement Policy allows for a reduction in the total days of violation in some circumstances. A reduction in the number of days of violation is recommended because there was not a notable financial gain for Mayhew Center on a daily basis resulting from the violation. A reduction in days is permissible under the Multiple Day Violations factor when there is not an economic benefit from the violation measurable on a daily basis.

Mayhew Center submitted preliminary field findings 253 days late. Pursuant to the Enforcement Policy Multiple Day Violations provision, the total days of violations are reduced from 253 to 14 days.

d) **Initial Liability:** Initial amount of ACL assessed for this violation

**Amount:** \$4,900

**Discussion:** The maximum \$1,000 per day statutory requirement is multiplied by the reduced number of days—14 days—to calculate a new starting liability of \$14,000 for the

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<sup>1</sup> LFR. Conceptual Site Model and Data Gap Evaluation 3301-3341 Vincent Road Property, Pleasant Hill, California. Figure 5. May 16, 2007.

<sup>2</sup> Schutze & Associates, Inc. Preliminary Results for PCE (Soil Borings) Mayhew Center, Pleasant Hill, California. Figure 1. February 2012.

penalty methodology. Considering the specific factors (a) through (c) above, the \$14,000 liability is multiplied by a factor of 0.35 to determine an initial liability of \$4,900.

### **Adjustments to Determination of Initial Liability for Conduct Factors**

e) **Specific Factor:** Culpability

**Adjustment:** 1.2

**Discussion:** Mayhew Center was actively negligent in failing to submit a technical report for the Property by the required deadline. Following the issuance of the April 4, 2011 13267 Order, Regional Water Board staff communicated with Mayhew Center to remind them of the late report submittal. Despite clear directives from Regional Water Board Staff “to avoid, or minimize enforcement action” in the NOV of July 27, 2011, Mayhew Center submitted the Technical report 253 days late.

f) **Specific Factor:** Cleanup and Cooperation

**Adjustment:** 1.2

**Discussion:** Mayhew Center did not cooperate with Regional Water Board staff in resolving the late report violation. The delayed submittal of the technical report has negatively impacted implementation of corrective measures. A Regional Water Board staff email, dated July 8, 2011, requested written confirmation that Mayhew Center had submitted the documents required in a court decision to gain access to the neighboring property.<sup>3</sup> As noted in the NOV of July 27, 2011, Regional Water Board staff did not receive documentation that Mayhew Center complied with the access requirements to a neighboring property to conduct the required investigation and emphasized to Mayhew Center that it should complete the investigation on its Property while waiting for approval to access the neighboring property.

g) **Specific Factor:** Prior History of Violations

**Adjustment:** 1.2

**Discussion:** Regional Water Board staff issued a Water Code section 13267 Order on July 29, 2005, requesting the submittal of a Technical Report to determine the source and extent of PCE in soils and groundwater at the Property. Mayhew Center failed to submit an acceptable Technical report by August 24, 2005, which lead to the issuance of a Notice of Violation dated September 27, 2005. Regional Water Board staff repeated their request for a site characterization and site history report on December 13, 2006, July 22,

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<sup>3</sup> Appendix D of an October 28, 2010, court decision by Claudia Wilken required Mayhew Center to submit the following documentation to the neighboring property owner to obtain access to the property: sufficient proof of liability insurance, release of waiver of liens by vendors to undertake work relating to the required remediation, and certificate of worker’s compensation.

2010, September 30, 2010, and January 10, 2011. Mayhew Center received a total of six 13267 orders between January 2005 and April 2011 which consistently directed Mayhew Center to provide information about and investigate its property for PCE contaminants prior to being issued the May 13, 2011, deadline for the technical MIP investigation report. Mayhew Center has demonstrated a chronic pattern of violating Water Code section 13267 Order requirements

- h) **Specific Factor:** The adjusted ACL for the alleged violation considering conduct factors

**Amount:** \$8,467

**Discussion:** The initial liability (\$4,900) is multiplied by 1.2, 1.2, and 1.2 to adjust for specific conduct factors (e) through (g) above. The \$4,900 liability is increased to \$8,467.

- i) **Specific Factor:** Ability to Pay and to Continue in Business

**Adjustment:** 1

**Discussion:** Mayhew Center will be able to pay the proposed civil liability and continue in business. Mayhew Center receives rent from commercial leases of office space and has funds in a \$1.15 million escrow account established for groundwater remediation costs pursuant to ongoing litigation over the contamination at the site. According to an October 28, 2010, court decision issued by Claudia Wilken U.S. District Judge, "Disbursements shall be made only to pay the reasonable fees and expenses of the Escrow Agent and for remediation work that is reasonably necessary to accomplish CLEANUP AND ABATEMENT pursuant to the Injunction Order." According to the Contra Costa County Assessor's Office the Property is valued at \$1,432,349. Mayhew Center obtains rent from tenants leasing buildings on the property. As an example of the rent gained from these leases, a June 6, 2012 posting listed three vacancies that would generate a total monthly income of \$52,758. The Regional Water Board has no evidence that Mayhew Center would be unable to pay the proposed liability set forth in this Complaint or that the amount of the liability would cause undue financial hardship.

- j) **Specific Factor:** Other Factors as Justice May Require

**Discussion:** Regional Water Board enforcement staff time incurred to prepare this Complaint and supporting information is estimated to be 56.5 hours. Based on an average cost to the State of \$150 per hour, the total staff cost is estimated to be \$8,475. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing.

- k) **Specific Factor:** Economic Benefit

**Discussion:** Mayhew Center obtained an estimated economic benefit of \$1,450 by delaying the submittal of a Technical Report for the Property. By not timely submitting an acceptable Technical Report, Mayhew Center deferred expenditures associated with

the required soil and groundwater cleanup at the Property. Staff estimated the economic benefit based on a one-time, non-depreciable expenditure of \$60,000, a conservative estimate for the initial field investigation and report writing. The U.S. Environmental Protection Agency BEN economic benefit model<sup>4</sup> was run and calculated an economic benefit of \$1,450.

l) **Civil Liability:** Minimum Liability Amount

**Amount:** \$1,595

**Discussion:** The Enforcement Policy requires that the adjusted Total Base Liability Amount be, at a minimum, 10 percent higher than the economic benefit received as a result of the alleged violation. Mayhew Center's estimated economic benefit plus 10 percent was calculated to be \$1,595 and is lower than the adjusted Total Base Liability. The economic benefit received does not exceed the Adjusted Total Base Liability of \$16,942.

m) **Civil Liability:** Maximum Liability Amount

**Amount:** \$253,000

**Discussion:** The maximum liability that may be imposed under Water Code section 13368, subdivision (b)(1) is \$253,000. This is based on the maximum liability of \$1,000 per day for 253 days of violation (from May 13, 2011, through January 20, 2012, the date Mayhew Center submitted a Technical Report for the Property).

### **Final Proposed Civil Liability**

The final liability proposed for the late report is \$16,942 (the total base liability plus staff costs) based on consideration discussed of the factors above.

The proposed liability is less than five percent of the maximum liability that the Regional Water Board has the discretion to impose.

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<sup>4</sup> <http://www.epa.gov/compliance/civil/econmodels/>