

ATTACHMENT G

Calculation of Penalty per SWRCB
Water Quality Enforcement Policy

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The proposed administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (the "Enforcement Policy") and using the "Penalty Calculation Methodology Worksheet, version 5.4.0" (the "Penalty Calculation Worksheet"). The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

Calculation of Penalty for Violation

Step1. Potential for Harm for Discharge Violations

This step is not applicable.

Step 2. Assessment for Discharge Violations

This step is not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations

The Dischargers have failed to submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order for discharges from irrigated cropland despite evidence indicating that they irrigate cropland. Irrigated cropland can be a source of sediment, pesticide residue, nitrate, and other waste discharged to the waters of the state. Unregulated discharges of such wastes can present a substantial threat to beneficial uses and/or indicate a substantial potential for harm to beneficial uses.

Using Table 3 in the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy), staff has determined that the potential for harm is moderate, because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm. This conclusion is, in part, based on the size of the Dischargers' irrigated land parcels, which total approximately 108 acres. By failing to file a RoWD or to enroll under an applicable General Order, the Dischargers have undermined the regulatory program. Dischargers regulated under an applicable General Order either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with their operations. In addition, Dischargers report on the practices in which they engage to protect water quality. By failing to provide that information, the Dischargers frustrate the Regional Board's efforts to assess the potential impacts and risks to water quality posed by the Dischargers, and circumvent the Regional Board's ability to take necessary enforcement action to correct any problems. The greater the size of the operation, the greater the potential risk, since any practices being implemented by the Dischargers that are detrimental to water quality are impacting a much greater area (e.g., a poor practice by a Discharger with 100 acres is, theoretically, 10 times more impactful to water quality than that same poor practice implemented by a Discharger with 10 acres of the same crop type). The requirement and program are compromised when staff resources are directed to bringing Slate into compliance and those resources are not available to outreach to other growers

requiring regulatory compliance. Since the violation thwarts the Regional Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

The deviation from the requirement is major. To date, Slate has disregarded the regulatory requirements and rendered those requirements ineffective. Slate has undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for their waste discharges. A Discharger's regulatory coverage is foundational to the Board's efforts to protect water quality. The Orders adopted by the Board specify the expectations and requirements for water quality protection, which do not apply until the Discharger is covered by an appropriate Order. The requirements in the applicable Orders are rendered ineffective when a Discharger has not gone through the process of becoming subject to the Order.

On 9 October 2013, the Dischargers received a Directive Letter pursuant to California Water Code section 13260 (Directive), which required them to obtain regulatory coverage within 15 calendar days or face a potential civil liability. Hence, regulatory coverage was required by 24 October 2013.

As of 12 September 2014, the Dischargers are 323 days late in meeting that requirement. The maximum liability under Water Code section 13261(b)(1) for the failure to furnish a report under Water Code section 13260 is \$1,000 per each day the violation occurs, for a total of three hundred and twenty-three thousand dollars (\$323,000).

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from the requirement is major. Based on the above factors, a per day factor of 0.40 is appropriate (see Table 3 on p. 16 of the Enforcement Policy).

Step 4. Adjustment Factors

a) Culpability: 1.3

The Dischargers were given the score of 1.3, which increases the fine. Central Valley Water Board staff sent notices on both 20 February 2013 and 18 April 2013 to Slate describing the new water quality regulations and the required actions to comply therewith. Slate also received the 13260 Directive requiring them to obtain coverage. Despite knowledge of the regulatory requirements, which is exemplified by the notices described above, Slate failed to come into compliance. The multiple notices and failure to respond suggest Slate acted intentionally in ignoring the requirement to get regulatory coverage, resulting in a multiplying factor of 1.3.

b) *Cleanup and Cooperation*: 1.1

The Dischargers were given the score of 1.1, which increases the fine because the Dischargers have not been cooperative in coming into compliance. The Dischargers did not respond to the Regional Board's ACL Complaint R5-2014-0529. Cleanup is not applicable here.

c) *History of Violations*: 1.0

The Dischargers were given the score of 1.0, as there is no evidence that Slate has a history of violations.

Multiple Day Violations: On 7 October 2013, the Dischargers were served a Directive Letter pursuant to California Water Code section 13260 (Directive), which required them to obtain regulatory coverage within 15 calendar days or face a potential civil liability. The 13260 Directive was received by the Dischargers on 9 October 2013. Thus, regulatory coverage was required by 24 October 2013. As of 12 September 2014, the date on which this Complaint was issued, the Dischargers were 323 days late in meeting that requirement.

Violations under Water Code section 13260 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 30). Under that approach, for violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Dischargers' failure to submit a RoWD or NOI is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Dischargers' failure to submit a RoWD or NOI has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Dischargers pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Dischargers' failure to submit a RoWD or NOI results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with avoided costs of permit fees and a Farm Water Quality Plan, as well as delayed costs associated with groundwater monitoring, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The alternate approach assesses 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. Applying this assessment method on the total 323 violation days reduces the assessed penalty days to 16.

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: \$9,152.* (Initial Liability (\$1,000/day x 16 days x 0.4) x Adjustments (1.3)(1.1)(1.0)).

BASE LIABILITY AND FACTORS APPLIED TO THE VIOLATION

The Base Liability Amount for the Violation is **\$9,152**. The following factors apply to the Base Liability Amount for the violation.

Step 6. Ability to Pay and Continue in Business

As per the Enforcement Policy, “[t]he ability of a discharger to pay an ACL is determined by its revenues and assets.” The Dischargers have the ability to pay the Base Liability Amount based on 1) Value of property owned by the Dischargers, a significant asset with a 2013-2014 assessed value of the five Merced County parcels listed at \$1,382,108 according to the Merced County Assessor’s office; 2) Dischargers own approximately 108 acres of almonds in Merced County, which generated approximately \$518,957 in 2012¹; and 3) Slate has received an estimated \$68,520 in farm subsidies from the United States Department of Agriculture from 1995 through 2012². Therefore, there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

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

¹ Information provided by the 2012 Merced County Agricultural Crop Report, available at <http://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/453>

² Information provided from farm.ewg.org.

Step 8. Economic Benefit³

Economic Benefit: \$5,136

The Enforcement Policy provides that the economic benefit of noncompliance should be calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)⁴ penalty and financial modeling program unless it is demonstrated that an alternative method of calculating the economic benefit is more appropriate. Economic benefit was calculated using BEN version 5.4.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes.

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

Under the Irrigated Lands Regulatory Program, an individual may choose to comply with the program by either filing an NOI to get regulatory coverage as an "individual grower" under General Order R5-2013-0100 *Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers not Participating in a Third-party Group* (Individual Grower Order), or filing an NOI for regulatory coverage under a third-party group Order and joining the Coalition. As of the date this Complaint was issued, the Dischargers have not chosen to join the Coalition. The Central Valley Water Board cannot compel the Dischargers to join the Coalition, but can "...prescribe requirements although no discharge report has been filed" (Water Code section 13263(d)). The Central Valley Water Board would prescribe such requirements by issuing a Notice of Applicability to the Dischargers as an individual discharger under General Order R5-2013-0100 after holding a hearing. Economic benefit was, therefore, calculated based on the assumption that General Order R5-2013-0100 (General Order) will apply to the Dischargers.

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

³ Order R5-2013-0100 includes an estimate of average annual costs per acre related to that Order. The average annual costs are not used in this economic benefit analysis, since the costs represent an average cost, if the Order were applied Central Valley-wide. The cost estimates made in this analysis are based on the circumstances and facts related to this Discharger, rather than a broad class of Dischargers.

⁴ US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>; the Central Valley Water Board's application of the BEN Model to the circumstances here is summarized on the last page of Attachment G.

The economic benefit in this case has been calculated based on the verifiable costs associated with obtaining regulatory coverage under the General Order, as well as estimates of other delayed and avoided costs that were required of the Dischargers to comply with the General Order.

The State Water Resources Control Board currently charges a permit fee of \$3,033 plus \$3.40 per acre for farms 101 to 500 acres⁵. Slate has 108 acres, which results in an annual permit fee of \$3,400. Slate has avoided paying this permit fee for one year.

Under the Individual Grower Order, Slate would be required to prepare and implement a Farm Water Quality Plan, at an estimated cost of \$2,500. Additionally, Slate would be required to conduct groundwater monitoring, at an estimated cost of \$4,650 per year (including \$3,210 for annual monitoring costs and \$ 1,440 in annual labor costs). The groundwater monitoring cost estimate is based on sampling 5 wells⁶ one time for the constituents listed in the Individual Grower Order. The benefit of noncompliance associated with groundwater monitoring, the Farm Water Quality Plan, and permit fees were calculated as avoided costs, because Slate has not yet borne any of these costs and the Board cannot be sure that Slate will bear these costs by any set date.

As shown in the attached summary, the estimated economic benefit associated with avoided costs are \$1,499 associated with groundwater monitoring, \$2,127 associated with fees, and \$1,510 associated with the Farm Water Quality Plan. The total estimated economic benefit is, therefore, \$5,136.

Step 9. Maximum and Minimum Liability Amounts

*a) Minimum Liability Amount: **\$5,649.60***

The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Dischargers' economic benefit obtained from the violations cited herein is \$5,136. This number plus ten percent results in a Minimum Liability of \$5,649.60.

*b) Maximum Liability Amount: **\$323,000***

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13261, which is \$1,000 for each day in which the violation occurs.

⁵ See section 2200.6 of the 2013-14 Fee Schedule at <http://www.waterboards.ca.gov/resources/fees/docs>

⁶ Based on the layout of the five parcels listed in the ACL, staff estimates that the Dischargers have two domestic supply wells (there are two dwellings) and three irrigation supply wells, which will each need to be sampled once per year. There are three parcel groupings; two single non-contiguous parcels and a group of three parcels.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit a RoWD under California Water Code section 13260 is nine thousand one hundred and fifty-two dollars **\$9,152.**

Compliance Action (Determine the actions required to comply or to prevent the violation)	One-Time Nondepreciable Expenditure			Annual Cost		Non-Compliance Date	Compliance Date	Penalty Payment Date	Benefit of Noncompliance
	Amount	Date ¹	Delayed? ²	Amount	Date ¹				
Permit Fee ³	\$3,400	8/15/2014	n	\$0	1/1/2014	10/24/2013	12/4/2014	12/4/2014	\$2,127
GW Monitoring ⁴	\$0	1/1/2014	y	\$3,210	8/15/2014	5/24/2014	12/4/2014	12/4/2014	\$1,035
GW Monitoring labor ⁵	\$0	1/1/2014	y	\$1,440	8/15/2014	5/24/2014	12/4/2014	12/4/2014	\$464
Water Quality Plan ⁶	\$2,500	1/1/2014	n	\$0	1/1/2014	11/24/2014	12/4/2014	12/4/2014	\$1,510
Totals	\$5,900			\$4,650					\$5,136

Cost Index for Inflation: ECI user must link data Date of run: 9/2/2014 14:10

Income Tax Schedule: For-Profit (not C-Corp.)

Discount/Compound Rate: 6.7%

Source: USEPA

BEN Model: Version 5.4.0

Analyst: ghomer

Status:

1 Date of the cost estimate.

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

3 \$3,033 + (\$3.40 * 108 acres)

4 \$642 * 5 wells

5 \$120 * 12 hours

6 \$2,500