

ATTACHMENT A

FACTOR CONSIDERATION AND PENALTY CALCULATION METHODOLOGY FOR SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R3-2022-0006

K&A FARMS LLC BLANCO RANCH AGRICULTURAL IRRIGATED LANDS MONTEREY COUNTY

This document provides details on the proposed administrative civil liability penalty methodology related to K&A Farms LLC's (K&A Farms) failure to submit the 2020 Total Nitrogen Applied Report (TNA Report) for Blanco Ranch (GeoTracker Global Identifier AGL020004847) by the annual March 1 deadline. The California Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board) Prosecution Team derived the proposed administrative civil liability by following the State Water Resources Control Board's (State Water Board) 2017 Water Quality Enforcement Policy (Enforcement Policy), which was adopted on April 4, 2017, and became effective on October 5, 2017.¹ The proposed administrative civil liability takes into account such factors as K&A Farms' culpability, cooperation in returning to compliance, ability to pay the proposed liability, and other factors as justice may require.

Application of the State Water Board's Enforcement Policy

The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in California Water Code (Water Code) section 13327, which require the Central Coast Water Board to consider several factors when determining the amount of civil liability to impose, including "...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 its 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 that justice may require."

The Prosecution Team developed the proposed administrative civil liability based on the procedures included in the Enforcement Policy methodology. The steps used to calculate the proposed liability are discussed and summarized in the table below.

Regulatory Basis of Alleged Violation and Proposed Liability

Irrigated agricultural waste discharges have been regulated by the Central Coast Water Board for over 15 years, since the adoption of the first agricultural order in 2004. At the

¹ Link to State Water Board 2017 Enforcement Policy:
https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

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time of the alleged violation, K&A Farms was subject to Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands Order No. R3-2017-0002 (Agricultural Order 3.0), a Central Coast Water Board order that went into effect on March 9, 2017. K&A Farms failed to submit the 2017, 2018, 2019, and 2020 TNA Reports for Blanco Ranch by the annual March 1 deadline set forth in Agricultural Order 3.0.

For purposes of this settlement only, the Central Coast Water Board Prosecution Team is only pursuing enforcement for the failure to submit the 2020 TNA Report for Blanco Ranch.

Failure to submit the TNA Reports is a violation of Water Code section 13267. Pursuant to Water Code section 13268, subdivision (b), a violation of a Water Code section 13267 requirement subjects K&A Farms to administrative civil liability up to \$1,000 per day for each day in which the violation occurs.

In the table below, the Central Coast Water Board Prosecution Team presents the procedural steps used to calculate the proposed liability for failure to submit the 2020 TNA Report for Blanco Ranch.

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PENALTY CALCULATION METHODOLOGY STEPS	VALUE	DISCUSSION
Step 1 – Actual or Potential for Harm for Discharge Violations	Not applicable	This step is not applicable because this is not a discharge violation.
Step 2 – Assessments for Discharge Violations	Not applicable	This step is not applicable because this is not a discharge violation.
Step 3 – Per Day Assessments for Non-Discharge Violations	<p>Potential for Harm – Moderate</p> <p>Deviation from Requirement – Major</p> <p>Per Day Factor for Non-Discharge Violation – 0.55</p> <p>Initial Liability Amount – \$151,800</p>	<p>The per day assessment for non-discharge violations considers potential for harm and the extent of deviation from applicable requirements. Failing to submit a TNA Report substantially impairs the Central Coast Water Board’s ability to perform its regulatory functions, because the Central Coast Water Board uses TNA Reports to assess threats to water quality and compliance with Agricultural Order 3.0. Therefore, a moderate potential for harm score is appropriate. Failing to submit the TNA Report also rendered the requirements ineffective in its essential function. Therefore, a major deviation from requirement is appropriate. Table 3 in the Enforcement Policy (page 16) is used to determine the initial penalty factor for a violation. Based on the potential for harm and the deviation from requirement determinations, a per day factor for a non-discharge violation of 0.55 is appropriate.</p> <p>For purposes of settlement, the days of violation are alleged from March 1, 2021 to December 1, 2021 (276 days). On December 1, 2021, the Prosecution Team gave notice to K&A Farms of forthcoming assessment of administrative civil liabilities and K&A Farms subsequently agreed to enter into confidential settlement discussions to resolve the</p>

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		<p>alleged violation. The Prosecution Team calculated days of violation up to the date of the letter that was issued on December 1, 2021.</p> <p>The initial liability amount is calculated by multiplying the days of violation by the per day factor for non-discharge violations (0.55) by the statutory maximum liability pursuant to Water Code section 13268 (\$1,000 per day of violation). Initial liability amount: 276 days x 0.55 x \$1,000 per day = \$151,800</p>
Step 4 – Adjustment Factors (Conduct Factors)	Degree of Culpability – 1.3	Adjustment should result in a multiplier between 0.75 and 1.5 , with a higher multiplier for intentional misconduct and gross negligence, and a lower multiplier for more simple negligence. K&A Farms failed to submit the 2020 TNA Report, as required by Agricultural Order 3.0, despite numerous reminder emails and a notice of violation from the Central Coast Water Board. Because K&A Farms’ failure to submit this report demonstrates, at best, a negligent deviation from the standard of care, a score of 1.3 is appropriate.
Step 4 – Adjustment Factors (Conduct Factors)	History of Violations – 1.0	Where the discharger has no prior history of violations, this factor should be neutral, or 1.0. K&A Farms has no history of violations. Therefore, a neutral score of 1.0 is appropriate.
Step 4 – Adjustment Factors (Conduct Factors)	Cleanup and Cooperation – 1.2	Adjustment should result in a multiplier between 0.75 to 1.5 , using the lower multiplier where there is exceptional cleanup and cooperation compared to what can reasonably be expected, and higher multiplier where there is not. After discussions with Central Coast Water Board staff and initiation of settlement negotiations, K&A Farms submitted the missing TNA Report for 2017 on January 12, 2022, and the missing TNA

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		Reports for 2018, 2019, and 2020 on January 13, 2022. Therefore, a score of 1.2 is appropriate.
Step 4 – Adjustment Factors (Multiple Day Violations)	Multiple Day Violations – 43 days	For violations that last more than 30 days, the daily assessment can be less than the calculated daily assessment, provided it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Coast Water Board must make express findings that the violation: a) is not causing daily detrimental impacts to the environment and is not causing daily detrimental impacts to the regulatory program; b) results in no discrete economic benefit from the illegal conduct that can be measured on a daily basis; or c) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. The violation is not causing daily detrimental impacts to the environment and is not causing daily detrimental impacts to the regulatory program. Therefore, the Prosecution Team has collapsed the number of days of violation for purposes of settlement. 276 days collapsed to 43 days
Step 5 – Determination of Total Base Liability Amount	Total Base Liability Amount – \$36,894	After each of the above factors is considered for the violation, the applicable factors are multiplied by the initial liability amount proposed for the violation considering the adjusted number of days of violation to determine the total base liability amount for the violation. $\$1,000 \times 0.55 \times 43 \text{ days} \times 1.3 \times 1.0 \times 1.2 = \$36,894$
Step 6 – Ability to Pay and Ability to Continue in Business	Ability to pay and continue in business – No adjustment	The ability to pay and to continue in business must be considered when assessing administrative civil liability. The Prosecution Team finds that K&A Farms has the ability to pay the proposed liability. Blanco Ranch consists of 97.4 acres of celery, cauliflower, and leaf lettuce crops which are valued at \$18,360, \$11,184, and \$14,284 per acre, respectively,

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		according to the County of Monterey’s 2019 Crop Report. Together, the estimated annual crop value of the operation is the following: $[(97.4 \div 3) \text{ acres} \times \$18,360/\text{acre}] + [(97.4 \div 3) \text{ acres} \times \$11,184/\text{acre}] + [(97.4 \div 3) \text{ acres} \times \$14,284/\text{acre}] = \$1,422,949$
Step 7 – Economic Benefit	Economic Benefit Amount – \$27	The economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation. Here, the economic benefit is the delayed costs associated with submitting the 2020 TNA Report. For this violation, the economic benefit is \$27.
Step 8 – Other Factors as Justice May Require	Other factors as justice may require – \$1,331	The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. The Central Coast Water Board has incurred over \$1,331 in staff costs associated with the investigation and enforcement of the alleged violation.
Step 9 – Maximum and Minimum Liability Amounts	Minimum Liability – \$29.70 Maximum Liability – \$276,000	<u>Minimum Liability:</u> \$29.70 (economic benefit plus 10 percent) <u>Maximum Liability:</u> \$276,000 (\$1,000 per day per violation under Water Code section 13268)
Step 10 – Final Liability Amount	Final Liability Amount – \$38,225	Based on the foregoing analysis, and consistent with the Enforcement Policy, the final proposed Administrative Civil Liability is the sum of the Total Base Liability Amount and other factors as justice may require totaling \$38,225. The Final Liability Amount is between the Minimum and Maximum Liability Amounts.