CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION

ADVISORY TEAM SUMMARY REPORT

MEETING OF NOVEMBER 13, 2024
BISHOP, CA

ITEM # 5
Administrative Civil Liability Complaint R6T-2023-0027 Issued to David Park and Park Livestock Co., Mono County

KEY ISSUE
The Water Board will consider adopting Proposed Order No. R6-2024-XXXX Assessing Administrative Civil Liability Against David Park and Park Livestock Co.

DISCUSSION

On July 28, 2023, the Prosecution Team on this matter issued Administrative Civil Liability Complaint No. R6T-2023-0027 (Complaint) to Park Livestock Co. and David Park (Dischargers). The Complaint alleges that the Dischargers violated Clean Water Act section 301 and Water Code section 13376 for a period of two days (March 18 through March 19, 2019) by discharging fill material to the West Walker River, a water of the United States, without a permit. The Complaint alleges that this unauthorized activity resulted in the discharge of approximately 381,843 gallons (or 1,891 cubic yards) of sediment to waters of the United States and proposes assessment of administrative civil liability in the amount of three million fifty-three thousand and twenty-six dollars and forty-two cents ($3,053,026.42).

The parties (Prosecution Team and Respondents) submitted evidence and briefing on this matter in accordance with the applicable Hearing Procedures for the matter. A hearing was held on August 19, 2024, to receive evidence and testimony regarding the alleged violations.

The Board will consider adopting the Proposed Order No. R6-2024-XXXX Assessing Administrative Civil Liability Against David Park and Park Livestock Co. (Enclosure 1) in the amount of $20,000 as detailed in Attachment C (Administrative Civil Liability Methodology) to Order No. R6-2024-XXXX. The Water Board will consider imposing the proposed civil liability, imposing a higher or lower amount, or declining to impose any liability. In so doing, the Board may meet in closed session to deliberate on the evidence pursuant to Government Code section 11126, subdivision (c)(3).

ENCLOSURES	**BATES NUMBER**
1. Proposed Order No. R6-2024-XXXX Assessing Administrative Civil Liability Against David Park and Park Livestock Co. (with attachments A-C)	**5 - 3**

ENCLOSURE 1

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

LAHONTAN REGION

(PROPOSED) ORDER NO. R6-2024-XXXX
ASSESSING ADMINISTRATIVE CIVIL LIABILIY
AGAINST DAVID PARK AND PARK LIVESTOCK CO.

In the Matter of
David Park and Park Livestock Co.
Discharge of Sediment to West Walker River
Mono County

The Lahontan Regional Water Quality Control Board (Lahontan Water Board or Board), having held a public hearing on August 19, 2024, to hear evidence and comments on the allegations contained in Administrative Civil Liability Complaint No. R6T-2023-0027 (Complaint), and having considered and deliberated on the evidence received during the public hearing and in the record, and having considered all comments received, orders David Park and Park Livestock Co. (Dischargers or Respondents) to pay administrative civil liability in the amount of $20,000 and finds as follows[1]:

INTRODUCTION AND BACKGROUND

1. David Park and Park Livestock Co. bulldozed approximately two acres of land along the West Walker River without obtaining a single required permit or even attempting to determine what permits were required. The entirety of the two-acre area was significantly impacted due to riparian and sediment removal, disturbance, and/or displacement, resulting in significant adverse effects to riparian and aquatic habitat (present and future). (PT Exh. 9 [California Department of Fish and Wildlife (CDFW) report and memo]; Hearing Transcript at 51:9-15, 52:4-7.) Two inspectors stated the violations were the most egregious conduct they had ever seen. (PT Exh. 1 [Notice of Violation (NOV) and inspection report]; PT Exh. 9 [CDFW report and memo].) The activities were allegedly taken to prevent emergency flooding based on high flows that could have been predicted well in advance. (Hearing Transcript at 80; PT Exh. 16 [Park testimony at 19:18-25, 22:16-19]; PT Exh. 9 [CDFW report and memo].) The Dischargers' alleged reliance on the Governor's emergency proclamation appears to be an afterthought. No reasonable person would conclude that the February 2019 proclamation (RT. Exh. 3 [Emergency Proclamation]) suspended applicable law. A state governor has no authority to suspend federal law, including Clean Water Act section 404. (U.S. Const., art. VI, cl. 2.; *Hines v. Davidowitz*, (1941)

[1] This Order is consistent with the evidence in the record and circumstances of this case, as independently evaluated by the Lahontan Water Board, including, but not limited to, the evidence cited within the Order. References to "PT" exhibits refer to evidence submittals submitted by the Prosecution Team. References to "RT" exhibits refer to evidence submittals submitted by Respondents.

312 U.S. 52, 67 [a state enactment is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"].) While the Emergency Services Act allows the suspension of *state* law (Ca. Gov. Code § 8571), the Governor must do so explicitly. The 2019 Proclamation did not do so. Ignorance of the law is not a defense to a violation (see, *Hale v. Morgan* (1978) 22 Cal.3d 388, 396). Remaining willfully ignorant does not justify a lower penalty. Nor does failure to plan constitute an emergency. (PT Exh. 9 [CDFW inspector explained Dischargers had time to obtain permit].)

2. The Dischargers' conduct warrants a significant penalty. Unfortunately, based on the record before us, the Board cannot accurately calculate a per-gallon penalty. This Order therefore imposes the maximum per-day penalty available for each of the two violation days, for a total of $20,000.

3. On March 18 and 19, 2019, the Dischargers conducted unpermitted dredge and fill activities along the West Walker River in Mono County, in violation of the California Water Code (Water Code) and the Clean Water Act. (PT Exh. 1 [NOV and inspection report]; (PT Exh. 9 [CDFW report and memo]; PT Exh. 20 through 27 [CDFW videos]; PT Exh. 2 [Investigative Order]; PT Exh. 16 [Park testimony at 19:18-25, 22:16-19]; Hearing Transcript at 80:19-24.) Specifically, the Dischargers engaged in earth moving activities that resulted in an area of disturbance of approximately two acres and in an unauthorized discharge of earthen fill material (sediment) within the ordinary high water mark of the West Walker River, a water of the United States. (PT Exh. 1 [NOV and inspection report]; PT Exh. 4 [13267 Response]; PT Exh. 9 [CDFW report and memo]; PT Exh. 16 [Park testimony at 19:18-25, 22:16-19]; PT Exh.s 20 through 27 [CDFW videos]); RT Exh. 1 [Park declaration].)

4. The West Walker River is a water of the United States.

   a. The West Walker River is tributary to the Walker River, which is tributary to Walker Lake. (Hearing Transcript at 31:10-16, 32:10-14; PT Rebuttal Ex. 38 [Basin Plan, Chapter 2, Table 2-1].) The West Walker River is a perennial river flowing from California into Nevada downstream of the site. (Hearing Transcript at 31:10-16; PT Rebuttal Exh. 46 [Walker River Watershed Image].) The West Walker River is an interstate water. (Hearing Transcript at 101:12-21; PT Rebuttal Exh. 46 [Walker River Watershed Image].) Walker Lake is in Nevada. (Hearing Transcript at 101:12-14; PT Rebuttal Exh. 46 [Walker River Watershed Image]) Walker Lake is a water of the United States "[b]ased on the historical documentation of past commercial use." (PT Rebuttal Exh. 49 [Walker Lake].)

   b. The operative definition of "waters of the United States" for purposes of this case is the 2015 Clean Water Rule (80 Fed. Reg. 37045-1 (June 29, 2015) (2015 Rule)). (See, *United States v. Lucero* (9th Cir. 2021) 989 F.3d 1088, 1104.)[2] The

[2] The 2015 Rule was stayed from October 9, 2015, to no later than February 28, 2018. (*In re E.P.A.* (6th Cir. 2015) 803 F.3d 804, 809, vacated sub nom. *In re United States Department of Defense* (6th Cir.

2015 Rule should be read in light of *Sackett v. Environmental Protection Agency* (2023) 598 U.S. 651. *Sackett* addressed when a wetland adjacent to a water of the United States could be considered a water of the United States. The Court rejected the "significant nexus" test set forth in the 2015 Rule, which, as discussed below, is relevant to the 2015 Rule's definition of "tributary." *Sackett* did not otherwise consider or modify aspects of the 2015 Rule relevant here, which are the same under the 2015 Rule and the Clean Water Act regulations currently in effect. The current regulatory definition of "waters of the United States" has been updated to conform to *Sackett* (88 Fed. Reg. 61964-01 (Sept. 8, 2023 (2023 Rule)).

Under either the 2015 Rule or the 2023 Rule, the West Walker River is an interstate water and thus a water of the United States. (2015 Rule at §328.3(a)(1)(iii); 33 CFR §328.3(a)(1)(iii).) It is therefore unnecessary to address the two other relevant definitions, but the Board will briefly do so.

c. The 2015 Rule defined "tributary" as "a water that contributes flow, either directly or through another water …, to a [traditional navigable water] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." (2015 Rule at §328.3(a)(5), (c)(3) [tributary], (c)(6) [ordinary high water mark].) The definition of tributary was intended to demonstrate that the water contributes sufficient "volume, frequency, and flow … to establish a significant nexus" with the downstream water. (80 Fed. Reg. at 37058.) Both parties presented evidence that the West Walker River has a bed and banks and an ordinary high water mark, but that analysis is unnecessary because the river clearly meets *Sackett*'s more restrictive definition: a "relatively permanent, standing or continuously flowing [body] of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes." (*Sackett*, 598 U.S. at 1336 [citations and internal quotations omitted]; 33 CFR §328.3(c)(3).) Flow volumes of the West Walker River over at least 25 years establish that the river is a relatively permanent, standing, continuously flowing body of water and therefore a tributary. (PT Exh. 4 [13267 response]; RT Exh. 2 [Anderson declaration]; PT Rebuttal Exh. 41 [USGS data].) The West Walker River is tributary to the Walker River, which is tributary to Walker Lake, an adjudicated water of the United States. The West Walker River is therefore a water of the United States.

d. Finally, "waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" are waters of the United States. (2015 Rule at 33 CFR §328.3(a)(1); 33 CFR §328.3(a)(1)(i).) The Clean Water Act test considers either susceptibility to commercial use or actual commercial use.

2018) 713 Fed.Appx. 489.) A 2018 regulation suspending the 2015 Rule's "applicability date" until February 2020 (83 Fed. Reg. 5200 (Feb. 16, 2018)) was enjoined nationally on August 16, 2018. (*S.C. Coastal Conservation League v. Pruitt* (D.S.C. 2018) 318 F. Supp. 3d 959.) No further rulemaking occurred until the agencies reinstated the pre-2015 definition effective December 23, 2019. (84 Fed. Reg. 56626 (Oct. 22, 2019).) Therefore, the 2015 Rule was in effect on the violation dates.

However, given the highly controversial and complex nature of this issue, the Prosecution Team's failure to fully and timely address the issue, and our conclusions above that the West Walker River is a water of the United States for other reasons, the Board finds it unnecessary to decide whether the record demonstrates susceptibility to commercial use.

5. The Clean Water Act defines "pollutant" broadly to include "dredged spoil ... biological materials ... rock, sand [and] cellar dirt." (33 U.S.C.A. § 1362(6).) Additionally, the Act defines "pollution" to include the "man-induced alteration of the…physical…integrity of water." (*Ibid*.) Water Code section 13376 prohibits the discharge of pollutants or dredged or fill material unless as authorized by waste discharge requirements or dredged or fill material permits. The term "pollutants" in Water Code section 13376 has the same meaning as in the Clean Water Act. (Wat. Code § 13373.) The earthen materials moved by the Dischargers are both "pollutants," as used in the Clean Water Act and Water Code section 13376, and "dredged or fill material" as used in Water Code section 13376.

6. The Dischargers' movement of sediment within the West Walker River, including the redepositing of earthen material back into the same waterbody, constitutes a discharge of pollutants under the Clean Water Act. (*United States v. Sweeney* (E.D. Cal. 2020) 483 F.Supp.3d 871, 912-916; *U.S. v. Deaton* (4th Cir. 2000) 209 F.3d 331 [holding that sidecasting, which involves deposit of dredged or excavated material from a wetland back into that same wetland, constitutes discharge of a pollutant under the Clean Water Act]; *Avoyelles Sportsmen's League, Inc. v. Marsh* (5th Cir.1983) 715 F.2d 897, 923 [holding that the word "addition" may be reasonably understood to include "redeposit"]; (*Borden Ranch Partnership v. U.S. Army Corps of Engineers* (9th Cir. 2001) 261 F.3d 810, 814, aff'd (2002) 537 U.S. 99 ["This argument is inconsistent with Ninth Circuit precedent and with case law from other circuits that squarely hold that redeposits of materials can constitute an "addition of a pollutant" under the Clean Water Act."]; *Rybachek v. United States Envtl. Prot. Agency* (9th Cir.1990) 904 F.2d 1276, 1285-1286 ["[E]ven if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act."].) Cases defining "addition of a pollutant" for purposes of Clean Water Act section 402 (NPDES permits) do not apply under sections 401 and 404. (*S.D. Warren Co. v. Maine Bd. of Environmental Protection* (2006) 547 U.S. 370, 380-381.)

7. At all times relevant to this action, Park Livestock Co. has leased the land where the unpermitted activities occurred, located at 113548 and 113052 Highway 395 in Antelope Valley (Site), Mono County Assessor's Parcel Nos. 001-100-059 and 001-100-027, respectively. (PT Exh. 1 [NOV and inspection report]; PT Exh. 16 [Park testimony at 8:11-19.]; PT Exh. 4 [13267 response].) Park Livestock Co. carried out the activities that caused the violation. David Park is the president, primary owner, and majority shareholder of Park Livestock Co. (PT Exh. 16 [Park testimony at 12:5-16, 14:18-14, 16:10-22].) He is liable for the violation pursuant to the Responsible Corporate Officer Doctrine. "[A]n affirmative duty is properly placed on corporate officers by strict liability statutes regulating the public welfare. '[I]n the interest of the

larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. [Citation.]'" (*People v. Matthews* (1992) 7 Cal.App.4th 1052, 1062, citing *U.S. v. Dotterweich* (1943) 320 U.S. 277, 281; *People v. Roscoe* (2008) 169 Cal.App.4th 829.) The activities that caused the violations were performed at his sole direction. (PT Exh. 16 [Park testimony at 8:11–11:1]; RT Exh. 1 [Park declaration at 2:7-16].) Park's actions and inactions facilitated the violations. (PT Exh. 1 [NOV and inspection report]; PT Exh. 16 [Park testimony at 8:11–11:1]; RT Exh. 1 [Park declaration at 2:7-16].)

8. The Dischargers' deposit of dredge and fill material into the West Walker River, which constitutes a discharge of pollutants into the waters of the United States, was conducted without authorization under a dredge and fill permit (i.e., Clean Water Act section 404 permit) to conduct the activity (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 16 [Park testimony at 19:18-25, 22:16-19]; Hearing Transcript at 80:19-24), and therefore the Dischargers are in violation of Clean Water Act section 301 and Water Code section 13376.

9. The West Walker River is located in the Antelope Valley Hydrological Area of the West Walker Hydrologic Unit and has the following beneficial uses: municipal and domestic supply (MUN), agricultural supply (AGR), ground water recharge (GWR), navigation (NAV), water contact recreation (REC-1), noncontact water recreation (REC-2), commercial and sportfishing (COMM), cold freshwater habitat (COLD), wildlife habitat (WILD), and spawning, reproduction, and development (SPWN). (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Rebuttal Exh. 38 [Basin Plan, Chapter 2, Table 2-1].)

CHRONOLOGY

10. On March 20, 2019, Nick Buckmaster of the CDFW called Liz van Diepen of the Lahontan Water Board to report unpermitted channel disturbance (i.e., earthwork) in the West Walker River north of Coleville in northern Mono County. (PT Exh. 1 [NOV and inspection report].) Buckmaster informed van Diepen that a complaint had been reported to CDFW Warden Chad Elliott. (PT Exh. 1 [NOV and inspection report]; PT Exh. 9 [CDFW report and memo]; PT Exh. 11 [CDFW citation].) On March 19, 2024, Elliott inspected the Site and observed a bulldozer and two backhoes, operated by three laborers, actively moving sediment in the river channel. (PT Exh. 9 [CDFW report and memo]; PT Exh. 20 through 27 [CDFW videos].) Elliott reported that he then halted the work and issued a citation to Park, who made the decision to have the work done and directed employees of Park Livestock Co. to perform the work. (PT Exh. 9 [CDFW report and memo], PT Exh. 11 [CDFW citation]; PT Exh. 16 [Park testimony at 8-10:11-4]; RT Exh. 1 [Park declaration at 2:7-16].)

11. On March 25, 2019, Lahontan Water Board staff van Diepen and Kerri O'Keefe accompanied Elliott and Buckmaster to inspect the Site to assess water quality impacts from the unpermitted activity. (PT Exh. 1 [NOV and inspection report]; PT Rebuttal Exh. 6 [O'Keefe inspection notes]; PT Exh. 9 [CDFW report and memo]; PT Rebuttal Exh. 31 [van Diepen depo at 22:10-12, 25:14-19]; PT Rebuttal Exh. 33

[Elliott depo at 11-13, 29:1-7].) During the inspection, Lahontan Water Board staff noted that a large portion of the bed of the West Walker River had been graded. Mature riparian vegetation and anaerobic soils had been removed, as evidenced by stockpiles of organic material on the east bank of the West Walker River at the upper end of the disturbed area. (PT Exh. 1 [NOV and inspection report]; PT Exh. 9 [CDFW report and memo]; PT Exh. 28 [CDFW video]; PT Rebuttal Exh. 2 [O'Keefe photos]; PT Rebuttal Exh. 3 [van Diepen photos].)

12. On July 28, 2023, the Prosecution Team issued the Complaint.

STATUTORY REQUIREMENTS AND VIOLATION

13. Section 301 of the Clean Water Act (33 U.S.C. § 1311) and Water Code section 13376 prohibit the discharge of pollutants to waters of the United States, except in compliance with a permit.

14. The Dischargers violated Section 301 of the Clean Water Act and Water Code section 13376 for a period of two days (March 18 through March 19, 2019) by discharging fill material to waters of the United States without a permit.

PROCEDURAL AND EVIDENTIARY ISSUES

15. An evidentiary hearing was conducted on August 19, 2024. In preparation for the hearing, Parties exchanged evidence, submitted legal argument, rebuttal evidence and argument, procedural and evidentiary objections and responses. The evidence submitted by the Prosecution Team to support the alleged violations consists largely of inspection reports prepared by Lahontan Water Board and CDFW staff with corresponding photographs and videos, Lahontan Water Board records such as the notice of violation and investigative order along with responses from the Dischargers, and testimony given by witnesses of the Prosecution Team and of the Dischargers.

16. The parties submitted evidentiary and procedural objections and other prehearing motions. The Chair, acting as the presiding officer, issued various prehearing rulings. The Chair, as presiding officer, made additional rulings at the hearing, as follows:

    a. The Dischargers moved to strike the testimony of van Diepen presented at the hearing from slides 46 onward for lack of foundation, and Prosecution Team Rebuttal Exhibits 51 through 55 that were included in the PowerPoint slides. The Chair overruled the objection as to Prosecution Team Rebuttal Exhibits 51 through 55 because a prehearing ruling was already made regarding that objection, and overruled the objection as to van Diepen's testimony because the proceeding does not require oral testimony to be submitted prior to the hearing.

    b. Ben Letton, lead of the Prosecution Team, provided a closing statement at the hearing. The Dischargers moved to strike those portions of Letton's closing

statement that was new testimony. The Chair ruled that a review of the hearing transcript would be performed to identify new testimony in Letton's closing statement and that the new testimony would be stricken. Upon review, Letton's testimony consisted almost entirely of a summary of the evidence or the Enforcement Policy, or the Prosecution Team's opinion of reasonable inferences to be drawn therefrom. Those portions of Letton's closing statement that are new testimony are stricken, as indicated in Attachment A.

17. The Lahontan Water Board hereby rules as follows:

a. Regarding Respondent's objection to Prosecution Team Exhibits 1 (Notice of Violation and Inspection Report issued on April 15, 2019), 2 (Investigative 13267 Order issued August 9, 2019), 12 (Kerri O'Keefe's Photos taken March 25, 2019), and 13 (Liz van Diepen's Photos taken March 25, 2019), and Lahontan Water Board staff testimony on their observations during the site inspection, as being the product of an unconstitutional search by Lahontan Water Board staff of property leased by Park Livestock Co., the Dischargers' objection is overruled and the Lahontan Water Board does not exclude the exhibits or testimony from evidence. See Attachment B for further explanation regarding this ruling. In addition, the Lahontan Water Board notes that even if the Board sustained the objections, it would not strike the entirety of the four exhibits and related testimony, but, at most, only those photographs, measurements or observations taken on the Park property or references to them. And the Board would assess the same penalty in this case even without considering *any* part of the four exhibits because other evidence in the record provides ample support for all findings in this Order.

b. Respondent's foundational/reliability objections to the Prosecution Team's Rebuttal Exhibit 2 are overruled. The photographs meet the "responsible persons" standard in Government Code section 11513 because O'Keefe testified to the reliability of the photographs and the reasons for the errors in the metadata.

c. Respondent's foundational/reliability objections to the Prosecution Team's Rebuttal Exhibit 3 are overruled. The photographs meet the "responsible persons" standard in Government Code section 11513 because van Diepen testified to the reliability of the photographs and the reasons for the errors in the metadata.

d. The hearsay objection to the Prosecution Team's Rebuttal Exhibit 35 is overruled because Elliott appeared at the hearing and affirmed the declaration. Exhibit 35 is not hearsay.

e. The hearsay objection to the Prosecution Team's Rebuttal Exhibit 36 is overruled because Letton appeared at the hearing and affirmed the declaration. Exhibit 36 is not hearsay.

f. The hearsay objection to the Prosecution Team's Rebuttal Exhibit 37 is overruled because van Diepen appeared at the hearing and affirmed the declaration. Exhibit 37 is not hearsay.

g. The Lahontan Water Board hereby modifies the Ruling on the Prosecution Team's Rebuttal Exhibit 38 as follows: The Chair previously ruled, "The Presiding Officer has granted official notice of this Exhibit in the Ruling on Prosecution Team's Request for Official Notice. Respondents' objections are overruled." However, the Ruling on Prosecution Team's Request for Official Notice only granted official notice of the regulatory portions of the Basin Plan cited by the Prosecution Team. Respondents' objections that the Basin Plan was required to be included in the Prosecution Team's case in chief or constitutes surprise evidence are overruled. The Basin Plan was cited in the Complaint, albeit in a different context; the Basin Plan is well known to be a foundational document for the board's regulatory programs; adoption and amendments of Basin Plan provisions are subject to extensive public participation requirements (Wat. Code, §§ 13240-13245; 40 C.F.R. Part 25); and Respondents were aware of the Prosecution Team's arguments almost four months before the hearing. The foundational (reliability) arguments are overruled for the same reasons. *See also,* Ruling On Respondents' Objections to Rebuttal; Order Allowing Surrebuttal, p. 3. The hearsay objection is overruled. (See, Evid. Code, § 1280.)

h. The Lahontan Water Board hereby modifies the Ruling on the Prosecution Team's Rebuttal Exhibit 56 as follows: This exhibit is within the scope of rebuttal to Dischargers' evidence and argument that the Prosecution Team's analysis did not prove the Enforcement Policy's penalty factors. This exhibit was submitted according to the deadlines within the hearing procedures and does not constitute surprise evidence. The Dredge and Fill Application Fee Calculator is an official record of the State Water Resources Control Board, and is admissible under the official record exception to the hearsay rule. In addition, the outputs listed in the exhibit are generated by the Calculator, which is not a declarant.

i. At the hearing, Dischargers renewed their foundational objections to Prosecution Team Rebuttal Exhibits 51-55, 59 and 60, and moved to strike van Diepen's testimony from slide 46 onward. The Prosecution Team argued the exhibits and testimony were necessary to show Park knew he was not operating under an emergency exception. The Chair overruled the objections. However, it is not necessary to determine Park's subjective state of mind and the Lahontan Water Board has not done so. Rather, as stated in Finding 1, the Board finds that no reasonable person would have believed the work was exempt from permitting requirements based on the Governor's declaration. The Lahontan Water Board has not considered the testimony or Letton's closing comments on this issue (Hearing Transcript at 56:6-57:24, 131:12-15) for any purpose.

18. The Lahontan Water Board affirms all prehearing rulings and oral rulings made during the hearing by the Chair except as explicitly stated above. All objections not specifically addressed in either a prehearing ruling, a ruling made during the hearing, or this Order are overruled.

19. Volume Analysis of Fill Material

a. The Prosecution Team presented a Volume Analysis of Fill Material (VAFM) and estimated that at least 381,843 gallons (or 1,891 cubic yards) of earthen fill material were discharged to the West Walker River because of the Dischargers' unpermitted activities. (PT Exh. 17 [Volume analysis].) The VAFM was completed by German Myers, a Water Resources Control Engineer and member of the Prosecution Team, and was based on a review of satellite imagery, Site photographs, and working with other members of the Prosecution Team including the inspectors that conducted the inspection on March 25, 2019. (PT Rebuttal Exh. 29 [Myers depo at 35-153]; PT Rebuttal Exh. 31 [van Diepen depo at. 85-96]; PT Rebuttal Exh. 37 [van Diepen declaration at 3:13-16]; Hearing Transcript at 38-48.)

b. Myers used geographic information system (GIS) software to plot relative photo locations on a map to estimate the surface area of the various areas of disturbance. Polygons were then established in GIS based on the location of the Site photographs taken during the inspection and input from the Site inspectors. The polygons that were generated were used to measure the surface area of the earth moving activity. The calculated areas were then tabulated in the VAFM. (PT Exh. 17 [Volume analysis at 3].) When added together, the tabulated areas total approximately 2 acres. The Dischargers (RT Exh. 1 [Park declaration at 8]), CDFW staff (PT Exh. 9 [CDFW report and memo]), and the Prosecution Team (PT Exh. 1 [NOV and inspection report]) all estimated the disturbed area to be approximately two acres. The Board finds that approximately two acres were disturbed during the unauthorized activities by the Discharger within the West Walker River channel.

c. Myers used the relative heights of people, fences, boulders, and cliff banks seen in photos to estimate depth ranges of earthen fill materials. These depth assumptions can primarily be found in photo captions in the VAFM. The VAFM states the assumed depth (or range of depths) of the fill material but does not explain the derivation of the heights for the objects (i.e. people, fences, boulders, etc.). In some cases, staff deposition testimony provided a basis for object heights. For example, van Diepen estimated cattle fences to be four feet high based on the standard height of cattle fencing and relative to her own height, and provided that information to Myers. (PT Rebuttal Exh. 31 [van Diepen depo at 89:17-91:7].) However, van Diepen could not recall how much time passed before she provided height and depth information to Myers or whether she looked at notes or anything other than the photos. In other cases, the basis for estimating object height is unclear. For example, Myers assumed a boulder was one foot high and that was verified against another estimate in the VAFM. Myers estimated the boulder to be one foot tall by comparing it to a nearby stockpile that was estimated to be approximately 8-feet tall based on the relative height of a person in the photo. In other words, the stockpile appeared to be eight times the height of the boulder and thus the boulder must have been one foot tall. (PT Rebuttal Exh. 29 [Myers depo at 139:23-140:19].) No substantiated explanation

was given as to how the boulder in the photo was estimated to be one foot tall, and in this example, any error in that estimate would be multiplied eightfold. Some estimates were based on the height of unidentified persons in the photos of unknown height. Myers testified that some estimates were based on the assumed height of a cliff bank without stating the basis for estimating its height. (Hearing Transcript at 40.) In addition, distance between the objects and the fill material and the vertical angle of the camera were not taken into account, making it difficult or impossible to determine relative height accurately. (RT Exh. 2 [Anderson declaration at 9:25-10:12].) Similarly, there is no explanation as to how the estimated average depths of fill of 0.50 to 0.67 feet (i.e. 6 to 8 inches) in Table 1 of the VAFM were calculated from these assumptions, or how the VAFM arrived at an average based solely on a range of depths within the two-acre area of disturbance.

With appropriate evidentiary support, estimates based on relative height or depth of objects, use of arial imagery, photographs, and/or GIS software can reliably measure depth where traditional measurements (GPS, measuring devices) are unavailable. However, in this case the VAFM is unpersuasive due to the lack of evidence to support the assumptions used to determine depth.

d. Myers did not take porosity into account in the volume estimate because he assumed that the sediment from the waterway was saturated when the sediment was removed from the West Walker River channel. (Hearing Transcript at 43.) Myers had previously testified at his deposition that 100% displacement method was used at his supervisor's direction and did not know why this was chosen in this case or in the typical enforcement case. (PT Rebuttal Exh. 29 [Myers depo at 149, 168].) The Dischargers provided evidence that a significant portion of the sediment was not fully saturated and that the 100% displacement method was inappropriate. (Hearing Transcript at 88:13-89:10; RT Exh. 2 [Anderson declaration at 12-13]) The VAFM is unpersuasive due to the failure to support the use of the 100% displacement method.

e. The Prosecution Team argued that using fill volume but not dredge volume was conservative because adding the volume of dredged material would have doubled the total volume. (Hearing Transcript at 41, 44, 129-130.) The Board can assess penalties for each gallon of waste discharged to a water of the United States. (Wat. Code, §§ 13373, 13385, subd. (e)(2).) There is no evidence to support the Prosecution Team's stated assumption that dredge spoils would have or could have eventually discharged into the river. Nor did the Prosecution Team provide any basis to estimate the volume of dredged sediment or sediment-laden runoff that may have flowed over any dredged material that had not yet been discharged into the river. (See, 33 C.F.R. § 323.2(d)(ii).) In short, the Prosecution Team argued the VAFM was conservative but did not substantiate that argument.

f. The Dischargers objected to the VAFM and Myers' testimony based on, among other things, the Prosecution Team's failure to designate him as an expert and his lack of an engineering license. (Objection to Evidence No. 1 [Apr. 26, 2024].)

They also pointed out Myers' relative inexperience when compared to their expert. (Hearing Transcript at 144:20-145:15.) The Lahontan Water Board has considered these factors, along with the VAFM's deficiencies discussed above, in determining the weight to be afforded each party's evidence and testimony.

g. The Lahontan Water Board finds that the Prosecution Team has not met its burden of proving, by a preponderance of evidence, the volume of the unpermitted discharge. The Lahontan Water Board has no alternative basis on which to calculate volume and is therefore unable to assess a per-gallon penalty.

ADMINISTRATIVE CIVIL LIABILITY

20. Water Code section 13385, subdivision (a) states, in relevant part:

> (a) Any person who violates any of the following shall be liable civilly in accordance with this section:
>
> (1) Section 13375 or 13376.
>
> …
>
> (5) A requirement of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the federal Clean Water Act, as amended.

21. Water Code section 13385, subdivision (c) states, in relevant part:

> (c) Civil Liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:
>
> (1) Ten thousand dollars ($10,000) for each day in which the violation occurs.
>
> (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars ($10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

22. The Dischargers violated provisions of law for which the Lahontan Water Board may impose civil liability pursuant to Water Code section 13385.

23. Pursuant to Water Code section 13385, subdivision (e), in determining the amount of any civil liability imposed under Water Code section 13385, subdivision (c), the Regional Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its 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 violations, and other matters that justice may require.

24. On April 4, 2017, the State Water Resources Control Board adopted Resolution No. 2017-0020 amending the Enforcement Policy. The Enforcement Policy was approved by the Office of Administrative Law and became effective on October 5, 2017. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385, subdivision (e). The Board has considered the required factors for the violation alleged in the Complaint using the penalty calculation methodology in the Enforcement Policy, as explained in detail in Attachment C.

25. The maximum penalty for the violations pursuant to Water Code section 13385, subdivision (c) is $20,000. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the estimated economic benefit derived from the acts that constitute the violation so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. In this case, the economic benefit amount could not be determined and so will be considered to be $0.

26. The penalty calculation methodology analysis described in Attachment C, which is incorporated in full in this Order, is consistent with the evidence received and the circumstances of this case, as independently evaluated by the Lahontan Water Board, and supports the administrative civil liability in the amount of **$20,000**.

REGULATORY CONSIDERATIONS

27. Notwithstanding issuance of this Order, the Lahontan Water Board retains the authority to assess additional penalties for unpermitted discharge violations which have not yet been assessed or for violations that may subsequently occur.

28. This is an action to enforce the laws and regulations administered by the Lahontan Water Board. The method of compliance with this enforcement action consists entirely of payment of an administrative liability. The Lahontan Water Board finds that issuance of this Order is not subject to the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.) as it will not result in a direct or reasonably foreseeable indirect physical change in the environment, and it is not considered a “project” (Public Resources Code sections 21065, 21080(a); California Code of Regulations, Title 14, sections 15060(c)(2),(3); 15378(a)). The Lahontan Water Board finds that issuance of this Order is also exempt from the provisions of CEQA in accordance with section 15061(b)(3), Title 14, of the California Code of Regulations because it can be seen with certainty that the project will not have a significant effect on the environment and in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations as an enforcement action by a regulatory agency, and there are no exceptions that would preclude the use of this exemption.

29. Any person aggrieved by this action 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 of this Order, except that if the thirtieth day following the date of this Order 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.

30. Fulfillment of the Dischargers' obligations under this Order constitutes full and final satisfaction of the Complaint.

31. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for collection or other enforcement if the Dischargers fail to comply with payment of the administrative civil liability.

IT IS HEREBY ORDERED, pursuant to Water Code section 13385, that administrative civil liability be imposed upon the Dischargers in the amount of $20,000 for the above violations of the Clean Water Act and Water Code. The Dischargers shall pay the total administrative civil liability amount within thirty (30) days of adoption of this Order executed by the Lahontan Water Board. Payment shall be made by check to the "State Water Board Cleanup and Abatement Account" and a copy e-mailed to Lahontan Water Board contact Shelby Barker at shelby.barker@waterboards.ca.gov. The Dischargers shall include the number of this Order (R6-2024-XXXX) on the check and send it to:

State Water Resources Control Board
Accounting Office
Attn: ACL Payment
P.O. Box 1888
Sacramento, California 95812-1888

I, Michael Plaziak, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an order imposing civil liability assessed by the California Regional Water Quality Control Board, Lahontan Region on November 13, 2024.

Michael R. Plaziak, PG
Executive Officer

Attachment A: Ben Letton Closing Statement, Excerpt from Hearing Transcript August 19, 2024

Attachment B: Ruling On Dischargers' Objection to Prosecution Team Exhibits 1, 2, 12, 13 and Lahontan Water Board Staff Testimony Related to Observations During Their Site Inspection

Attachment C: Administrative Civil Liability Methodology

ATTACHMENT A

ATTACHMENT A

BEN LETTON CLOSING STATEMENT,
EXCERPT FROM HEARING TRANSCRIPT OF AUGUST 19, 2024

Those portions of Ben Letton's closing statement that are new testimony are striken, as indicated herein with strikethrough text.

[begin Hearing Transcript at 127:23]

CHAIR HORNE: Okay. All right. Thank you.

So, Prosecution Team, closing statements.

Mr. Poach, can you remind them how much time they have?

MR. POACH: Nine minutes and ten seconds left.

MR. LETTON: Good afternoon, Board members. My name is Ben Letton. I'm the Assistant Executive Officer for the Lahontan Water Board. I've taken the oath, and I'm lead for the Prosecution Team.

And I just wanted to start by pointing out, the graph that Mr. Anderson showed with turbidity is a good illustration of how they're -- they have brought up some frivolous non-relevant points as far as his investigative work. We're alleging two days of violation on March 18th and 19th and those turbidity samples were from June. So that's just something to keep in mind as you consider the testimony provided.

This is a really egregious violation. We reserve the right to conduct progressive enforcement as part of our policy, enforcement policy and we consider it very important.

If Mr. Anderson, Mr. Park and others had communicated with us early and often, we always would be willing to consider

permitting actions or, even after the fact, restorative -- restoration efforts. However, that was not the case here. Specifically with the Investigative Order, nothing was provided that could be of utility to us in trying to avoid this right here, this enforcement hearing right now, including settlement with the parties that went pretty much nowhere.

You know, the -- Mr. Park and his counsel will contend that they weren't provided opportunity to communicate with after the NOV had been issued. Essentially, the egregiousness of the case made that very difficult to do. And essentially, what I -- my interpretation of that is they would like to have seen after the fact permitting.

That's not the way that it works. That's not why regulation and law is in place. It's there to protect resources. If every landowner who had river-adjacent property conducted work and then had -- and then after the fact sought permitting, the very framework of the regulation and the resource protection would not work.

With respect to the volume calculations, these were incredibly conservative. We pursued only fill-only, not dredge activities, which could have had a two-fold increase on the volume that we're considering. We also used extreme conservative estimates in terms of depth of volume. It is, you know, being a professional geologist myself ~~and having done a lot of volume calculations in a natural setting such as this,~~ it's perfectly permissible to do pace calculations then

corroborated and checked by aerial imagery for accuracy, which is length and width and depth. Again, very conservative on our part.

I will just add that in terms of turbidity and harm, again, we're only alleging two days of violation. There was a lot of discussion about porosity and how that influenced this case. ~~But what it doesn't account for is that one cubic yard of sediment has the potential to contaminate thousands of gallons of water.~~ So again, you know, just using the, let's say, roughly 1,800, 1,900 cubic yards of volume calculated, and then converting that directly to gallons is a super conservative estimate compared to the volume of water, turbid water that could have flowed down the West Walker on March 18th and 19th.

With respect to WOTUS, I think that the Prosecution Team has demonstrated beyond a reasonable doubt that that the West Walker River is navigable. It is a water at the U.S. I find that Mr. Anderson's inability to answer that question perhaps speaks to his, you know, technical capabilities in this case.

I'm familiar with the West Walker River. I've been there multiple times. I've fished it. I've watched people boat it. I live in this region, too, and I'm very familiar with that waterbody. And I can assure you that there's direct evidence, as well as the Basin Plan's beneficial uses, that indicate that the West Walker is a navigable water.

The penalty amount for this case is appropriate given

the seriousness of the violations. Again, we can't have citizens determining on their own whether or not an emergency exists. We did a thorough investigation of the permits that could have been ascertained prior to commencing activities and there were none.

After-the-fact permitting is not an appropriate description discretionary action in this case. That would set a bad precedence moving forward to modify the recommended amount of the penalty calculation that you're considering today based on that consideration.

~~And finally, I suspect that these violations for just two days of violation are just the tip of the iceberg in terms of what has been going on in Antelope Valley on properties that are either leased by or owned by Mr. Park. Mr. Park is a rancher, and I understand cares about, you know, the lands and the resources, but this was a travesty in terms of damage to the ecosystem.~~

If the Board doesn't consider the full amount of this penalty, you know, it will continue to be -- it will be -- it won't be a deterrent factor for others that are out there watching who may be considering similar types of approaches.

That's all I have for closing comments.

MS. BERYT: Board Chair, before Respondent's closing statement, I believe some of what Mr. Letton indicated was testimony, and I wanted to give an opportunity for the Respondents to conduct a cross if they'd like to.

MS. KINCAID: I think we just would propose to strike any new testimony.

MS. OKUN: There's two options. You could strike the portions of the closing statement that were actually testimony. In order to be able to do that, I don't want to do that off the top of my head, we'd have to look at a transcript and go line by line and compare it to the record and see what was new testimony as opposed to a summary, which is the purpose of the closing argument.

Alternatively, you can let it in. Mr. Letton could have provided all this testimony an hour ago during their case-in-chief. The only difference is that Respondents will be allowed to cross-examine now as opposed to having done it earlier. They can indicate if they want to have Mr. Anderson or one of their other witnesses respond.

CHAIR HORNE: To be very conservative, I prefer the first option of looking at a transcript and seeing and then striking whatever is new testimony.

MS. RUBIN: Can I ask for a clarification on that? When you say, "looking at a transcript," what you are referring to is comparing what he just said to what is in the record, not just in the presentation or today, but also that his deposition --

CHAIR HORNE: Correct.

MS. RUBIN: Okay. Thank you.

CHAIR HORNE: In that case --

MS. OKUN: Is that clear to everyone?

MS. KINCAID: Yes. I mean, I think we probably need a discussion about who's going to strike that and what the process is to do that. But I think that's probably a discussion for another time.

CHAIR HORNE: Okay. Okay. So in that case, it's time now for the Respondent's closing statement.

[end Hearing Transcript at 133:13]

ATTACHMENT B

ATTACHMENT B

Ruling on Dischargers' Objection to Prosecution Team Exhibits 1, 2, 12, 13 and Lahontan Water Board staff testimony related to observations during their site inspection.

Dischargers contend that Prosecution Team Exhibits 1 (Notice of Violation and Inspection Report issued on April 15, 2019), 2 (Investigative 13267 Order issued August 9, 2019), 12 (Kerri O'Keefe's Photos taken March 25, 2019), and 13 (Liz van Diepen's Photos taken March 25, 2019), are the product of an unconstitutional search of property leased by Park Livestock Co. ("Park property"), and Dischargers request that Prosecution Team Exhibits 1, 2, 12, and 13, and Lahontan Water Board staff testimony related to observations during their site inspection, be excluded from evidence. The Lahontan Water Board overrules Dischargers' objections. This Attachment provides further explanation regarding the ruling.[1]

Overview of the Fourth Amendment

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by police officers and other government officials. (U.S. Const. 4th Amend.) The Fourth Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable. (*Oliver v. U.S*. (1984) 466 U.S. 170, 177.) The party claiming an unreasonable search has the burden of proving a protectable interest in the area being searched and that there is a legitimate expectation of privacy in the premises or effects searched. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104-105; *United States v. Taketa* (9th Cir. 1991) 923 F.2d 665, 670, citing *U.S. v. Nadler* (9th Cir. 1983) 698 F.2d 995, 998 (9th Cir. 1983).) Reasonableness "is measured in objective terms by examining the totality of the circumstances." (*Ohio v. Robinette* (1996) 519 U.S. 33, 39.).

The U.S. Supreme Court has held that those activities taking place in "open fields" are not accorded the protections of the Fourth Amendment. (*Hester v. U.S.* (1924) 265 U.S. 57.) Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. (*Oliver v. U.S.* (1984) 466 U.S. 170, 179.) Open fields are not "persons, houses, papers, and effects" accorded protections in the Fourth Amendment. (*Hester v. U.S.*, supra, at 59; *Oliver v. U.S.*, supra at 177-178.) "Effects" are "less inclusive than 'property' and cannot be said to encompass open fields." (*Oliver v. U.S.*, supra at 178.) In *Air Pollution Variance Bd. v. Western Alfalfa Corp*., the Supreme Court relied on *Hester* in sustaining

[1] As a preliminary matter, Dischargers waived any objections to Investigative Order R6T-2019- 0258 (PT Exh. 2 [Investigative Order]) by failing to timely petition the Order (see, Wat. Code §§ 13320, 13330, subd. (b), (d)) and by responding to it (PT Exh. 4 [13267 response]). Nonetheless, the Lahontan Water Board has addressed the merits of the objections to all four exhibits.

the power of a health inspector to enter an open field for the visual inspection of smoke plumes. (*Air Pollution Variance Bd. v. Western Alfalfa Corp.*, (1974) 416 U.S. 861.) Any observations of illegal activity found in an "open field" would not be subject to suppression as an unreasonable search since the government employee's presence within the "open field" is not a search. (*Oliver v. U.S.*, (1984) 466 U.S. 170.)

Likewise, observation from public places or places where the officer otherwise has a right to be is not a "search." An observation of an item or activity from a position that the officer otherwise has a right to be would involve no invasion of privacy and therefore would not constitute a "search" under the Fourth Amendment. (*Horton v. California* (1990) 496 U.S. 128, 133–134 & n.5.)

If an activity constitutes a "search" under the Fourth Amendment, then a warrant is required unless an exception applies. Consent to a "search" is a recognized exception to the Fourth Amendment's warrant requirement. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218 222; *People v. Bishop* (1996) 44 Cal.App.4th 220, 236). Whether consent was voluntarily given is determined by looking at the totality circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218 222, 227.)

Ruling

The March 25, 2019, inspection is described as occurring on two properties: (1) the "neighboring property" owned by James Coffron, and (2) the Park property leased by Park Livestock Company. (PT Exh. 1 [NOV and inspection report].)

Coffron granted permission for CDFW and Lahontan Water Board staff to access the neighboring property. (PT Exh. 1 [NOV and inspection report]; PT Exh. 9 [CDFW report and memo]); PT Rebuttal Exh. 6, [O'Keefe inspection notes]); (PT Rebuttal Exh. 33 [Elliott depo at 12: 11-17]); (PT Rebuttal Exh. 31 [van Diepen depo at 22: 8-11]; PT Rebuttal Exh. 34 [Buckmaster depo at 20: 15-20].) Photos, videos, and observations of the Park Property by CDFW and Lahontan Water Board staff from the neighboring property do not constitute a "search," as they were made in plain view of a location CDFW and Lahontan Water Board staff had permission to access. Likewise, any photos and video, or observations taken from Highway 395 were taken from a legal vantage point and do not constitute a "search."

The Park property is private property, and it is leased by Park Livestock Company. (PT Exh. 1 [NOV and inspection report]; PT Exh. 16 [Park testimony at 8:11-19]; PT Exh. 2 [Investigative Order]; PT Exh. 4 [13267 response].) No evidence was presented that the inspection took place near or within any structure, home, or building, nor does any evidence indicate that a structure, home, or building is on the property. (PT Exh. 1 [NOV and inspection report]; PT Exh. 4 [13267 response]; PT Exh. 14 [Elliott photos]; RT Exh. 2 [Anderson declaration].) The "Park Property" is used for agricultural purposes including cattle grazing and hay production. (PT Exh. 1 [NOV and inspection report]; PT Exh. 4 [13267 response].) The unpermitted earth moving activities were conducted within the West Walker River. (PT Exh. 1 [NOV and inspection report]; PT Exh. 4 [13267

Response]; PT Exh. 9 [CDFW report and memo]; PT Exh. 16 [Park testimony at 19:18-25, 22:16-19]; PT Exh.s 20 through 27 [CDFW videos]); RT Exh. 1 [Park declaration].) And those activities could be seen from Highway 395 (PT Exh. 9 [CDFW report and memo]; PT Exh. 20 [CDFW video]; PT Rebuttal Exh. 33 [Elliott depo at 12:9-10, 14:6-11].) The property could also be viewed from the neighboring property. (PT Exh. 9 [CDFW report and memo]; PT Rebuttal Exh. 33 [Elliott depo at 11-13, 14:6-11, 15:20-22, 28:16-23]; PT Rebuttal Exh. 31 [van Diepen depo at 22:8-11].) And the property was viewable from satellite imagery. (PT Exh. 1 [NOV and inspection report]; PT Exh. 4 [13267 response]; and RT Exh. 2 [Anderson declaration]). Beyond establishing the property as being leased by Park Livestock Co., the Respondents did not provide any evidence or argument regarding an expectation of privacy on the property. As the property is exposed to the public and consists of agricultural fields, the Lahontan Water Board finds that the property is an “open field” that does not provide the setting for intimate activities that the Fourth Amendment is intended to shelter from government interference. Therefore, the inspection of the Park property does not constitute an unreasonable search.

Even if Respondents had established a reasonable expectation of privacy on the Park property such that the inspection had constituted a “search,” the Lahontan Water Boad finds that consent was granted by Park for Board staff to access the Park property.

The Lahontan Water Board finds that it is the customary practice of the Lahontan Water Board staff to identify themselves when conducting inspections. (PT Rebuttal Exh. 37 [van Diepen declaration at 2:5-6]; PT Rebuttal Exh. 31 [van Diepen depo at 96:8-12].) Testimony by van Diepen and Elliott further supports the finding that the Lahontan Water Board staff identified themselves to Park. (PT Rebuttal Exh. 31, [van Diepen depo at 25: 14-19]); PT Rebuttal Exh. 37, [van Diepen declaration at 2: 5-9]; Hearing Transcript at 35:23-36:1, 29:11-22.) Documentation close to the time of the inspection indicates Lahontan Water Board staff obtained consent from Park to access the Park property. (PT Exh. 1 [NOV and inspection report]); PT Exh. 9 [CDFW report and memo].) Testimony further supports that Lahontan Water Board staff obtained consent to access the Park property. (PT Rebuttal Exh. 31, [van Diepen depo at 22: 8-11, 25: 9-19]; PT Rebuttal Exh. 37 [van Diepen declaration at 2: 5-9]). The Lahontan Water Board finds the Prosecution Team witness testimony to be credible and reliable, and that looking at the totality of the circumstances the Lahontan Water Board staff had Park’s voluntary consent to access the Park property.

Regarding Respondent’s objection to Prosecution Team Exhibits 1 (Notice of Violation and Inspection Report issued on April 15, 2019), 2 (Investigative 13267 Order issued August 9, 2019), 12 (Kerri O’Keefe’s Photos taken March 25, 2019), and 13 (Liz van Diepen’s Photos taken March 25, 2019), and Lahontan Water Board staff testimony on their observations during the inspection, as being the product of an unconstitutional search by Lahontan Water Board staff of the Park property, the Dischargers’ objection is overruled and the Lahontan Water Board does not exclude the evidence from the record.

ATTACHMENT C

ATTACHMENT C

ADMINISTRATIVE CIVIL LIABILITY METHODOLOGY

The State Water Resource Control Board's (State Water Board) 2017 Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for determining administrative civil liability (ACL) by addressing the factors that are required to be considered under California Water Code (Water Code) section 13385(e). Each factor of the ten-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

This document provides a summary of factual and analytical evidence that support the findings in Administrative Civil Liability Order No. R6-2024-XXXX (Order) issued to David Park and Park Livestock Co. for violation of the California Water Code (Water Code) and the Clean Water Act.

Violation Synopsis
Unauthorized Discharge of Fill Material to Waters of the United States

On March 18 through March 19, 2019, Park Livestock Co. and David Park (Dischargers) discharged fill material (earthen materials) to waters of the United States without first obtaining a Clean Water Act section 404 permit, which constitutes violations of Clean Water Act section 301 and Water Code section 13376. This violation subjects the Dischargers to administrative civil liability pursuant to Water Code section 13385.

The Prosecution Team proposed only the assessment of administrative civil liabilities for the discharge of fill material. In regard to the per-day assessment for the discharge of fill materials, the Prosecution Team could have alleged each day that fill material remained in place as a day of violation—this would have resulted in a substantial increase in administrative civil liabilities, but instead the Prosecution Team elected to allege only two days of violation.[1]

The Lahontan Regional Water Quality Control Board (Lahontan Water Board or Board) is assessing administrative civil liability for discharge of fill material for two days of violation.

[1]Days of violation may be calculated as each day fill remains in place, as opposed to active days of placing fill. *United States v. Cumberland Farms of Connecticut, Inc.* (1986) 647 F.Supp. 1166; *U.S. v. Tull*, (1983) 615 F. Supp. 610.

Step 1 – Actual Harm or Potential for Harm for Discharge Violations

Step 1 considers the harm that the violation caused or may have caused using a three-factor scoring system to quantify. The three-factor scoring system includes: (1) the degree of toxicity of the discharge; (2) the actual or potential for harm to beneficial uses; and (3) the discharge's susceptibility to cleanup or abatement for each violation or group of violations.

Factor 1: The Degree of Toxicity of the Discharge

This factor evaluates the degree of toxicity by considering the physical, chemical, biological, and/or thermal characteristics of the discharge, waste, fill, or material involved in the violation or violations and the risk of damage the discharge could cause the receptors or beneficial uses. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways.

Discharges of sediment cloud receiving water, which reduces the light transmitted to underwater growing plants and reduces the ability of underwater plants to produce energy and dissolved oxygen through photosynthesis. Sediment discharges can also clog fish gills, smother aquatic habitat and spawning areas, and bury macroinvertebrates. (PT Exh. 2 [Investigative Order]; PT Exh. 9 [CDFW report and memo]; PT Rebuttal Exh. 61 [Final White Paper: Turbidity and Suspended Sediment Effects on Salmonids and Aquatic Biota in Flowing Systems]; PT Rebuttal Exh. 62 [The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review].) Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can negatively impact aquatic life and habitat, and can expose human and wildlife receptors to adsorbed toxicants. (PT Exh. 2 [Investigative Order].)

Due to the physical characteristics of the earthen fill materials discharged into the river and their ability to smother and subsequently kill aquatic organisms, the characteristics of the discharged material poses a **moderate** risk or threat to potential receptors. (PT Exh.s 20 through 27 [CDFW videos]; PT Rebuttal Exh. 61 [Final White Paper: Turbidity and Suspended Sediment Effects on Salmonids and Aquatic Biota in Flowing Systems]; PT Rebuttal Exh. 62 [The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review].) The Enforcement Policy defines moderate as:

> Discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of threat to potential receptors).

Accordingly, a score of **2** is assigned to this factor.

Factor 2: Actual Harm or Potential Harm to Beneficial Uses

This factor evaluates the actual harm or the potential harm to beneficial uses by considering the harm to beneficial uses in the affected receiving water body that may

result from exposure to the pollutant or contaminants in the discharge consistent with the statutory factors of the nature, circumstances, extent, and gravity of the violation(s). A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5).

The Water Quality Control Plan for the Lahontan Region (Basin Plan) is designed to preserve and enhance water quality and protect the beneficial uses of all surface and ground waters in the Lahontan Region. The Basin Plan includes the following beneficial uses for the West Walker River (PT Rebuttal Exh. 38 [Basin Plan]):

1) Municipal and Domestic Supply (MUN),

2) Agricultural Supply (AGR),

3) Groundwater Recharge (GWR),

4) Navigation (NAV),

5) Water Contact Recreation (REC-1),

6) Noncontact Water Recreation (REC-2),

7) Commercial and Sportfishing (COMM),

8) Cold Freshwater Habitat (COLD),

9) Wildlife Habitat (WILD), and

10) Spawning, Reproduction, and Development (SPWN).

The Dischargers damaged or destroyed approximately two acres of land located between the banks of the West Walker River by burying and/or altering the riverbed, discharging earthen fill materials, and likely increasing turbidity levels in the West Walker River downstream of the discharge. (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 9 [CDFW report and memo]; PT Exh. 11 [CDFW citation]; PT Exh. 14 [Elliott photos]; PT Exh. 15 [Elliott photos]; PT Exh.s 20 through 27 [CDFW videos].) Beneficial uses that were harmed or potentially harmed include COLD, WILD, SPWN, COMM, REC-1, REC-2, NAV, and MUN. (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [13267Order]; PT Exh. 9 [CDFW report and memo]; PT Exh. 14 [Elliott photos]; PT Exh. 15 [Elliott photos]; PT Exh.s 20 through 27 [CDFW videos]; PT Rebuttal Exh. 61 [Final White Paper: Turbidity and Suspended Sediment Effects on Salmonids and Aquatic Biota in Flowing Systems]; PT Rebuttal Exh. 62 [The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review].)

The discharge of earthen fill materials and grading within the river channel likely adversely impacted COLD, SPWN, WILD, and COMM beneficial uses. The discharge of earthen fill materials into the river buried or altered cold freshwater habitat (COLD

beneficial use), adversely affecting any existing spawning habitat for fish in the affected river channel (SPWN beneficial use), and adversely affecting habitat for macroinvertebrates that are a food source for fish, birds, and other wildlife (WILD beneficial use). Creating sufficiently high turbidity levels can also result in harm to fish (COLD beneficial use) causing reduction in feeding, reducing resistance to disease, lowering growth rates, and affecting egg and larval development. Grading the riverbed also likely disturbed/destroyed any existing spawning habitat for fish in the affected river channel (SPWN beneficial use), and disturbed habitat for macroinvertebrates (COLD/WILD beneficial uses). (PT Exh. 2 [Investigative Order]; PT Exh. 9 [CDFW report and memo]; PT Exh. 14 [Elliott photos]; PT Exh. 15 [Elliott photos]; PT Exh.s 20 through 27 [CDFW videos]; PT Rebuttal Exh. 38 [Basin Plan]; PT Rebuttal Exh. 61 [Final White Paper: Turbidity and Suspended Sediment Effects on Salmonids and Aquatic Biota in Flowing Systems]; PT Rebuttal Exh. 62 [The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review].) Sportfishing (COMM beneficial use) was also likely adversely affected through harm to fish (potential mortality), destruction of any existing spawning habitat in the affected river channel, and a reduction in the visibility of lures and bait due to increased turbidity levels downstream of the affected river channel. (PT Exh. 2 [13267Order]; PT Exh.s 20 through 27 [CDFW videos]; PT Rebuttal Exh. 38 [Basin Plan].)

The discharge of earthen fill materials and grading activities within the river channel also can adversely affect REC-1 and REC-2 beneficial uses due to increased turbidity levels. (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 9 [CDFW report and memo]; PT Exh. 15 [Elliott photos]; PT Exh.s 20 through 27 [CDFW videos]; PT Rebuttal Exh. 38 [Basin Plan].) Recreational activities such as swimming, wading, and kayaking/floating tend to decrease if water is turbid. Additionally, the NAV beneficial use would have been impacted where the discharge and grading activity were occurring due to heavy equipment use and moving significant quantities of earthen materials into the river. (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [13267Order]; PT Exh. 9 [CDFW report and memo]; PT Exh. 15 [Elliott photos]; PT Exh.s 20 through 27 [CDFW videos]; PT Rebuttal Exh. 38 [Basin Plan].)

The MUN beneficial use was potentially impacted due to increased turbidity levels that likely occurred when earthen fill materials were discharged into the river and grading activities were occurring within the river. Such discharges and activities can increase turbidity levels beyond the maximum contaminant level (MCLs) for drinking water established by the State Water Board's Division of Drinking Water. (PT Exh. 18 [Primary MCL for drinking water]; PT Exh. 15 [Elliott photos]; PT Exh. 22 [CDFW video]; PT Exh. 23 [CDFW video]; PT Exh. 27 [CDFW video]; PT Rebuttal Exh. 38 [Basin Plan].) Typically, when turbidity levels increase in the raw water supply (i.e., the river), increased water treatment to reduce turbidity levels or time to allow turbidity levels to return to acceptable levels is required.

Based upon the information provided above, the discharge of earthen fill materials into and grading activity within the West Walker River channel resulted in **major** harm to beneficial uses of the West Walker River. (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [13267Order]; PT Exh. 9 [CDFW report and memo]; PT Exh.s 20 through 27

[CDFW videos]; PT Rebuttal Exh. 61 [Final White Paper: Turbidity and Suspended Sediment Effects on Salmonids and Aquatic Biota in Flowing Systems]; PT Rebuttal Exh. 62 [The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review].) The impacts discussed above could last for two to three days (e.g., increased turbidity levels) or for months or longer until river flows are able to redistribute the discharged earthen materials downstream and river channel conditions are restored to pre-discharge and pre-grading conditions. (PT Exh. 9 [CDFW report and memo]; PT Rebuttal Exh. 61 [Final White Paper: Turbidity and Suspended Sediment Effects on Salmonids and Aquatic Biota in Flowing Systems]; PT Rebuttal Exh. 62 [The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review].) The Enforcement Policy defines major as:

> A high harm or threat of harm to beneficial uses. A score of major is typified by observed or reasonably expected potential significant impacts, and involves potential for or actual acute, and/or chronic (e.g., more than five days) restrictions on, or impairment of, beneficial uses, aquatic life, and/or human health.

Accordingly, a score of **5** is assigned to this factor.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if the discharger cleans up 50 percent or more of the discharge within a reasonable amount of time. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement, or if 50 percent or more of the discharge is susceptible to cleanup or abatement, but the discharger failed to clean up 50 percent or more of the discharge within a reasonable time. Natural attenuation of discharged pollutants in the environment is not considered cleanup or abatement for purposes of evaluating this factor.

Less than 50 percent of the discharge was susceptible to cleanup and abatement given the high flows in the river following the discharge of the earthen fill materials. (Hearing Transcript at 36: 1-13; 46: 12-21; 52-53; PT Exh 4 [13267 Response at 16]; PT Rebuttal Exh. 31 [van Diepen Depo at 27:15-23].) Therefore, a value of **1** is assigned to this factor.

Final Score – "Potential for Harm"

The scores for the three factors are added to provide a Potential for Harm score for each violation or groups of violations. A final score of **8** was calculated. The total score is then used in Step 2, below.

<u>Step 2 – Assessments for Discharge Violations</u>

The Enforcement Policy provides that the initial liability amount shall be determined on a per day and/or a per gallon basis per Water Code section 13385, subdivision (c), using the Potential for Harm score from Step 1 in conjunction with the Extent of Deviation from the Requirement of the Violation (see Enforcement Policy Table 1 and 2).

As the record is insufficient to determine the number of gallons subject to penalty, the Lahontan Water Board determined the initial liability amount on a per day basis only.

Extent of Deviation from the Requirement

When there is a discharge, the Regional Board is to determine the initial liability amount on a per day basis using the same Potential Harm score from Step 1 and the Extent of Deviation from Requirements of the violation. The Deviation from Requirement score reflects the extent to which the violation deviates from the specific requirement. In this case, the requirement was to obtain the appropriate federal dredge and fill permit prior to the initiation of the discharge of earthen materials to and grading activities within the West Walker River. Clean Water Act Sections 401 and 404 and Water Code section 13260 require the permitting agencies to review project applications for compliance with state and federal water quality requirements, consider alternatives, impose mitigation requirements, and collect fees. (33 U.S.C. § 1341; 33 U.S.C. § 1344; Wat. Code § 13260; *See also, PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 700; Pub. Res. Code § 21000 et seq. [CEQA]; Cal. Code of Regs., tit. 23, § 2200(a)(4) [fees].) The Lahontan Water Board agrees that it could not have permitted the project in the manner in which it was conducted. (PT Rebuttal Exh. 30 [Letton depo at 159 et seq.].) The Dischargers did not apply or obtain a dredge and fill permit. (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 16 [Park testimony at 19:18-25, 22:16-19]; Hearing Transcript at 80:19-24.) Therefore, the requirement to obtain permits was rendered ineffective to its essential function.

The above-referenced discharge of earthen materials into and grading within the West Walker River without obtaining appropriate permits is a **major** deviation from the requirement. The Enforcement Policy defines “major deviation” as:

> The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential function).

The Dischargers did not attempt to apply for and obtain the appropriate permits. (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 16 [Park testimony at 19:18-25 and 22:16-19]; Hearing Transcript at 80:19-24; PT Exh. 9 [CDFW report and memo].) Accordingly, based upon a Potential for Harm score of 8 and major deviation from the requirement, the per-gallon and per-day factors are both **0.6**.

Initial Liability Amount

The initial base liability amount for the discharge is calculated as follows:

[(per-day factor) x (days of violation) x
(maximum per-day liability)] = Initial Base Liability

[(0.6) x (2 days) x ($10,000/day)] = $12,000

Step 3 – Per Day Assessments for Non-Discharge Violations

This analysis addresses discharge violations only. Step 3 is therefore not applicable.

Step 4 – Adjustment Factors

The Enforcement Policy describes three factors related to the violator's conduct that should be considered for modification of the amount of initial liability: the violator's culpability, the violator's efforts to clean up or cooperate with regulatory authorities after the violation, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed liability amount for each violation to determine the revised amount for that violation.

Degree of Culpability

This factor considers a discharger's degree of culpability. Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier for negligent behavior.

A reasonable person would have made the appropriate inquiries regarding permitting prior to undertaking the action that resulted in the unauthorized discharge of waste to waters of the United States. On March 19, 2019, CDFW Warden Elliott documented two excavators and a bulldozer working in the active channel of the West Walker River and halted the work. (PT Exh. 9 [CDFW memo and report]; PT Exh. 11 [CDFW citation]; PT Exh. 15 [Elliott photos]; PT Exh.s 20 through 27 [CDFW videos]; PT Rebuttal Exh. 33 [Elliott depo]; PT Rebuttal Exh. 34 [Buckmaster depo].) The Dischargers stopped work and indicated to CDFW Warden Elliott that permits were not obtained for the work. (PT Exh. 16 [Park testimony at 19:18-25 and 22:16-19]; Hearing Transcript at 80:19-24; PT Exh. 9 [CDFW report and memo].) The Dischargers did not anticipate what a reasonable person would have done and did not take the appropriate action to avoid the violations. While the Dischargers were aware of permitting requirements, the Dischargers believed they were acting under an emergency exemption. (PT Exh. 16 [Park testimony at 19:18-25, 22:16-19]; Hearing Transcript at 80:10-25.) However, the Dischargers did not exercise due diligence in ascertaining whether an emergency exemption applied. A reasonable person would have done so. Thus, a value of **1.2** has been assigned to this factor.

History of Violations

The Enforcement Policy states that if the discharger has a prior history of violations within the last five years, the Regional Board should use a multiplier of 1.1. Where the discharger has a history of similar or numerous dissimilar violations, the Regional Board should consider adopting a multiplier above 1.1.

The Dischargers do not have a history of violations. Therefore, a neutral value of **1** has been applied.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperates with regulatory authorities in returning to compliance and correcting environmental damage after the violation. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation.

Lahontan Water Board staff and CDFW staff inspected the site on March 25, 2019, to document site conditions. (PT Exh. 1 [NOV and inspection report]; PT Rebuttal Exh. 2 [O'Keefe photos]; PT Rebuttal Exh. 3 [van Diepen photos]; PT Rebuttal Exh. 4 [Elliott photos]; PT Rebuttal Exh.33 [Elliott depo]; PT Rebuttal Exh. 31 [van Diepen depo]; PT Rebuttal Exh. 34 [Buckmaster depo].) On April 15, 2019, the Regional Board issued a Notice of Violation with recommendations to stabilize the disturbed riverbanks and provide a long-term restoration plan for the disturbed site. (PT Exh. 1 [NOV and inspection report].) While the Dischargers communicated with Lahontan Water Board staff regarding proposed immediate measures to stabilize material, they failed to propose a long-term restoration plan for the disturbed site (PT Exh. 4 [13267 response]; Hearing Transcript at 100:24-25, 101:1-11), as requested in the Notice of Violation (PT Exh. 1 [NOV and inspection report]). Therefore, a factor of **1.1** was selected.

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 2. This results in a Total Base Liability Amount of $15,840 (1.2 multiplied by 1 multiplied by 1.1 multiplied by $12,000).

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

The ability to pay and to continue in business must be considered when assessing administrative civil liability. The Water Boards are under no obligation to ensure that a violator has the ability to pay or continue in business, but, rather, they are obligated to consider these factors when imposing a civil liability. The Water Boards consider the ability to pay and the ability to continue in business as defenses available to dischargers to mitigate a potential civil liability. The Enforcement Policy recognizes that it is difficult to evaluate a violator's ability to pay and continue in business because many financial records are private and within the exclusive possession of the violator. If the discharger fails to produce evidence about its finances to rebut the staff's prima facie evidence and/or fails to respond to a subpoena, the Water Boards should treat that failure as a waiver of the right to challenge its ability to pay or effect on its ability to continue in business at the hearing, or an admission that the discharger is able to pay the proposed liability and that proposed liability will not affect its ability to continue in business.

The Prosecution Team conducted a preliminary asset search of publicly available information and presented information that the Dischargers' assets include real property identified as Mono County tax assessor parcel numbers 001-040-018-000, 001-150-011-000, 001-150-003-000, 001-060-029-000, 001-040-011-000, 001-060-030-000, 001-060-034-000, 001-060-033-000, 001-060-036-000, 001-150-001-000, 001-140-002-000, 001-040-008-000, 001-060-031-000, 001-040-002-000, 001-060-035-000, 001-

060-032-000, 001-140-004-000, 002-080-002-000, and 001-140-005-000. (PT Exh. 5 [Assessor data].). The total assessed value of these properties is $5,148,943. (PT Exh. 5 [Assessor data].)

Since the Prosecution Team has made an initial showing that the Dischargers have an ability to pay, the Enforcement Policy shifts the burden to the Dischargers to provide evidence of an inability to pay. The Lahontan Water Board finds that the burden of proof on this factor shifted to the discharger to produce sufficient evidence that it lacks an ability to pay.

On December 20, 2023, the Prosecution Team issued subpoenas to the Dischargers seeking financial documents relevant to the ability to pay and continue in business determination. (PT Rebuttal Exh.s 22 through 27 [Subpoenas].) The cover letters of the subpoenas provided that: “If you are willing to stipulate to your ability to pay the proposed administrative civil liability, then the Lahontan Regional Water Quality Control Board (Lahontan Water Board) Prosecution Team will waive the requirement to produce documents requested in the Subpoena and you will no longer be obligated to produce the documents described therein.” (PT Rebuttal Exh.s 24 and 25 [Subpoenas].) On January 31, 2024, the Dischargers replied that “[n]either David Park nor Park Livestock Co. intends to claim inability to pay as a basis to reduce the liability among proposed in the Administrative Civil Liability Complaint in this matter. Accordingly, we accept the Lahontan Water Board’s representation in your letter that any obligation to further or otherwise respond to the conditional subpoenas or produce any document described therein is discharged.” (PT Rebuttal Exh. 28 [Ability to pay waiver].) The Board finds the statement by Dischargers’ Counsel to be a waiver by the Dischargers of the right to challenge its ability to pay or effect on its ability to continue in business at the hearing. Furthermore, the Dischargers did not produce documents in response to Prosecution Team’s subpoenas and did not provide any evidence to rebut the staff’s prima facie evidence.

The Lahontan Water Board has considered the Dischargers’ ability to pay and ability to continue in business and finds the Dischargers have not proven the defense available to dischargers to mitigate a potential civil liability. Therefore, the Total Base Liability Amount is not adjusted to address the ability to pay or to continue in business.

Step 7 – Economic Benefit

Estimated Economic Benefit: $0

Pursuant to Water Code section 13385, subdivision (e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute a violation. The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. The economic benefit here is based on the dredge (excavation) and fill activity that occurred on the site from March 18 through March 19, 2019. Economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation.

The Water Boards cannot assess liability in excess of the statutory maximum. As described in Steps 8 and 9, this Order assesses the statutory maximum liability. A detailed discussion of economic benefit or savings would not change the assessment and is therefore of limited utility in this case. This section is included to demonstrate the Lahontan Water Board considered this factor, as required by statute.

The Prosecution Team presented Prosecution Team Exhibit 6, Economic Benefit Analysis, prepared by German Myers, Prosecution Team Exhibit 56, and Prosecution Team Exhibit 16 as evidence of the economic benefit of the failure to obtain a Clean Water Act section 404 permit, which would also have required a 401 water quality certification. The Prosecution Team's economic benefit analysis was limited to the cost of obtaining 401 water quality certifications and the avoided cost of a bank stabilization project. However, the record is insufficient to determine the economic benefit derived from not conducting a bank stabilization project. Furthermore, the record is insufficient to determine the economic benefit derived from depositing dredge and fill material into the West Walker River without a dredge and fill permit in violation of the Clean Water Act and Water Code section 13376.

Since the economic benefit or savings of non-compliance cannot be determined based on the record, the economic benefit will be considered to be $0. The final liability amount would not change whether the economic benefit or savings is considered to be $0, $2,433, or $51,275.

Step 8 – Other Factors as Justice May Require

The costs of investigation and enforcement are "other factors as justice may require" and may be considered by the Board as an increase to the Total Base Liability Amount in a manner that serves as a sufficient general and specific deterrent against future violations. There are no factors in this case that warrant a downward adjustment under this step.

An upward adjustment under this step is justified because the significant high volume discharge and costs of investigation and enforcement justify a higher amount.

Other Factors

The principle of fairness in enforcement requires that those who are unwilling to incur the expenses of regulatory compliance not be rewarded for making that choice. While the volume of the gallons discharged cannot be estimated to support a "per gallon" administrative civil liability assessment, there is evidence that indicates that the discharge was high volume (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 9 [CDFW report and memo]; PT Exh. 11 [CDFW citation]; PT Exh. 15 [Elliott photos]; PT Exhs. 20 through 27 [CDFW videos]), and that the dischargers completely disregarded environmental laws (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 9 [CDFW report and memo]; PT Exh. 11 [CDFW citation]; PT Exh. 16 [Park testimony at 19:18-25, 22:16-19];

Hearing Transcript at 80:19-24; PT Exh. 9 [CDFW report and memo]), resulting in the straightening of the West Walker River (PT Exh. 1 [NOV and inspection report]; PT Exh. 2 [Investigative Order]; PT Exh. 9 [CDFW report and memo]). Justice requires that the Dischargers not be rewarded for this behavior. Taken as a whole, increasing the Total Base Liability Amount to the statutory maximum is just in light of the violations.

Costs of Investigation and Enforcement Adjustment

Staff costs incurred by the Lahontan Water Board as of the date of the Complaint were $20,909.86. (PT Exh. 7 [Staff Cost Declaration]; PT Exh. 8 [Staff Cost Tracking]; PT Rebuttal Exh. 36 [Letton declaration]; PT Rebuttal Exh. 37 [van Diepen declaration].) This represents approximately 165 hours of staff time devoted to investigating and drafting the complaint. (PT Exh. 7 [Staff Cost Declaration]; PT Exh. 8 [Staff Cost Tracking]; PT Rebuttal Exh. 36 [Letton declaration]; PT Rebuttal Exh. 37 [van Diepen declaration].) No attorneys' fees and not all management staff rates were included in this calculation. In addition to the Other Factors discussed above, it is appropriate to increase the Total Base Liability Amount to the statutory maximum of $20,000 in consideration of these investigation and enforcement costs. Increasing the final proposed liability amount in this manner serves to create a more appropriate specific and general deterrent against future violations.

Final adjusted liability

Therefore, the Lahontan Water Board adjusts the Total Base Liability Amount to the maximum statutory per day penalty of $20,000. The final adjusted liability is $20,000.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts must be determined for comparison to the proposed liability.

Maximum Liability Amount: The maximum penalty is the sum of the statutory per day and per gallon penalties. Pursuant to Water Code section 13385, the maximum penalty is $20,000.

Minimum Liability Amount: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, there is insufficient evidence in the record to determine the Dischargers' economic benefit from the alleged violation. Therefore, the minimum liability amount pursuant to the Enforcement Policy is $0.

Step 10 – Final liability Amount

The final liability amount consists of the added amounts for the violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. The proposed administrative civil liability is $20,000.