

ACL Complaint No. R5-2012-0561
Henry J. Tosta (DBA Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited
Partnership, and Henry J. Tosta Trust
San Joaquin County

<u>Violation No.</u>	<u>Description</u>	<u>Formula</u>	<u>Assessed Penalty</u>	<u>Maximum Penalty</u>
1.	Dairy General Order Prohibition A.4: Discharge or disposal of waste resulting in the pollution of groundwater	$(0.15^1) \times (200 \text{ days}) \times (\$5,000 \text{ per day}) = \$150,000 \times \text{Adjustment Factors } (1.5^2)(1.5^3)(1.1^4) = \$371,250$ $(0.060) \times (200 \text{ days}) \times (\$5,000 \text{ per day}) = \$60,000 \times \text{Adjustment Factors } (1.0)(0.75) = \$45,000$	<p>\$371,250</p> <p>\$45,000</p>	\$1,000,000
<p>“Per Day” Assessment: The “Per Day” factor should be calculated at 0.060 or less. My client’s actions were not a “major” deviation from the requirement as he did not disregard the requirement, but rather were a “minor” deviation, as he had a general intent to follow the requirement. However, he was financially unable to do so. Additionally, I would argue that the “potential for harm” score should be lower, however this would require the use of an expert to analyze the toxicity of the discharge.</p> <p>Adjustment Factors: My client’s actions were not intentional, nor completely absent of efforts, but rather he was not able financially. He is currently in the process of correcting the violations and cleaning the site. Therefore, the first two adjustment factors as assessed are not warranted. Additionally, my client’s 2002 violation was remedied more than 10 years ago and unrelated to the current violations, and therefore should not be a factor.</p>				

¹ This number represents the “Per Day” Factor, which is a combination of the Potential for Harm Score and the Deviation from Requirement. The Potential for Harm Score is comprised of three factors: (1) Harm to Beneficial Uses, (2) Physical, chemical, biological or thermal characteristics of discharge, and (3) Susceptibility to cleanup and abatement. The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, construction deadline, etc.) that was violated, and are assessed as Minor, Moderate and Major.

² This adjustment factor assesses the culpability of the discharger’s conduct on a scale of 0.5 to 1.5. Discharger’s degree of culpability regarding the violation, with higher liability resulting from intentional or negligent violations than for accidental, non-negligent violations. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

³ This adjustment factor assesses the cleanup and cooperation efforts of the discharger on a scale of 0.75 to 1.5, with the lower multiplier where there is a high degree of efforts and the higher multiplier where this is absent altogether. This takes into account the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage.

⁴ This adjustment factor assesses the history of violations of the discharger. Where there is a history of repeat violations, a minimum multiplier of 1.1 should be used, however, if no repeat violation exists, then no multiplier should be used.

2.	13267 Failure to Submit Adequate Waste Management Plan	$(0.85) \times (32 \text{ days}) \times (\$1,000 \text{ per day}) = \$27,200 \times \text{Adjustment Factors } (1.5)(1.5)(1.1) = \$67,320$ $(0.35) \times (32 \text{ days}) \times (\$1,000 \text{ per day}) = \$11,200 \times \text{Adjustment Factors } (1.0)(0.75) = \$8,400$	\$67,320 \$8,400	\$789,000
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“Per Day” Assessment: The “Per Day” factor should be calculated at 0.35 or less. My client’s actions were not a “major” deviation from the requirement as he did not disregard the requirement, but rather were a “moderate” deviation at most, as he had a general intent to follow the requirement. My client relied on a consultant to accurately depict/characterize the WMP and had no intent to deceive.

Adjustment Factors: My client’s actions were not intentional, nor completely absent of efforts, but rather he was not able financially. He is currently in the process of correcting the violations and cleaning the site. Therefore, the first two adjustment factors as assessed are not warranted. Additionally, my client’s 2002 violation was remedied more than 10 years ago and unrelated to the current violations, and therefore should not be a factor.

3a.	CAO Directive 1: Develop a plan for cleanup of the Production Area	$(0.40) \times (10 \text{ days}) \times (\$1,000 \text{ per day}) = \$4,000 \times \text{Adjustment Factors } (1.2)(1.1)(1.1) = \$5,808$ $(0.25) \times (10 \text{ days}) \times (\$1,000 \text{ per day}) = \$2,500 \times \text{Adjustment Factors } (1.0)(0.75) = \$1,875$	\$5,808 \$1,875	\$145,000
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“Per Day” Assessment: The “Per Day” factor should be calculated at 0.35 or less. My client’s actions were not a “major” deviation from the requirement as he did not disregard the requirement, but rather were a “moderate/minor” deviation at most, as he had a general intent to follow the requirement. My client submitted a cleanup plan in July 2012 and had no intent to deceive.

Adjustment Factors: My client’s actions were not intentional, nor completely absent of efforts, but rather he was not able financially. He is currently in the process of correcting the violations and cleaning the site. Therefore, the first two adjustment factors as assessed are not warranted. Additionally, my client’s 2002 violation was remedied more than 10 years ago and unrelated to the current violations, and therefore should not be a factor.

3d.	CAO Directive 6: Submission of Revised WMP	(0.55) x (8 days) x (\$1,000 per day) = \$4,400 x Adjustment Factors (1.5)(1.2)(1.1) = \$8,712 (0.35) x (8 days) x (\$1,000 per day) = \$2,800 x Adjustment Factors (1.0)(0.75) = \$2,100	\$8,712 \$2,100	\$82,000
<p>“Per Day” Assessment: The “Per Day” factor should be calculated at 0.35 or less. My client’s actions were not a “major” deviation from the requirement as he did not disregard the requirement, but rather were a “moderate” deviation at most, as he had a general intent to follow the requirement. My client has engaged Prevost & Pritchard Consulting Group to meet this requirement by preparing a revised WMP.</p> <p>Adjustment Factors: My client’s actions were not intentional, nor completely absent of efforts, but rather he was not able financially. He is currently in the process of correcting the violations and cleaning the site. Therefore, the first two adjustment factors as assessed are not warranted. Additionally, my client’s 2002 violation was remedied more than 10 years ago and unrelated to the current violations, and therefore should not be a factor.</p>				
3e.	CAO Directive 7: Submission of Remediation Groundwater Plan	(0.35) x (7 days) x (\$1,000 per day) = \$3,850 x Adjustment Factors (1.5)(1.2)(1.1) = \$7,623 (0.35) x (7 days) x (\$1,000 per day) = \$2,450 x Adjustment Factors (1.0)(0.75) = \$1,838	\$7,623 \$1,838	\$51,000
<p>“Per Day” Assessment: The “Per Day” factor should be calculated at 0.35 or less. My client’s actions were a “moderate” deviation at most, as he had a general intent to follow the requirement. My client has engaged Prevost & Pritchard Consulting Group to meet this requirement by preparing a Remediation Groundwater Plan.</p> <p>Adjustment Factors: My client’s actions were not intentional, nor completely absent of efforts, but rather he was not able financially. He is currently in the process of correcting the violations and cleaning the site. Therefore, the first two adjustment factors as assessed are not warranted. Additionally, my client’s 2002 violation was remedied more than 10 years ago and unrelated to the current violations, and therefore should not be a factor.</p>				
	Staff Costs	(100 Hours) x (\$150 Per Hour)	\$15,000	
	Totals:		\$1,140,713 \$248,776	\$2,732,000
<p>Minimum Liability Amount: The minimum liability according to the Enforcement Policy is equal to the economic benefit plus 10%, which estimated to be \$826,991. [\$751,810 + 75,181 (10%)] Since the Adjusted Total Base Liability Amount (\$1,125,713) is greater than 110% of the economic benefit of non-compliance (\$751,810), no adjustment is necessary based on the economic benefit analysis.</p>				