

**To: Central Valley Regional Water Quality Control Board Hearing Panel**

**Cc: [AMayer@waterboards.ca.gov](mailto:AMayer@waterboards.ca.gov)**

**[klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)**

**[MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov)**

**[dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)**

**Date: July 8, 2011**

**Re: Complaint R5-2011-0562 – Sweeney Dairy**

**Written Testimony**

My name is James Sweeney, and my wife and I are the named Dischargers under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2011-00562.

I begin by asking once again for a continuance of this proceeding on grounds that to refuse our request gives us insufficient time to develop our defense against the Complaint and therefore deprive us of a fair hearing.

**Facts.**

We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 300 cows on a site where a dairy has continuously been conducted for over eighty years. We are a small business in that our gross receipts from our agricultural operation were under \$1,000,000.00 in 2009.

Your agency's Order No. R5-2007-0035, as amended by Order No. R5-2009-0029 ("Order"), compelled us, along with all other dairymen, to prepare and file with your agency by July 1, 2010 the 2009 Annual Report, including an Annual Dairy Facility Assessment for 2009, and a Waste Management Plan, which consists of the following reports: (1) Retrofitting Plan for needed improvement to storage capacity, flood protection or design of the production area, (2) Dairy site and Cropland maps, (3) Wastewater lagoon capacity evaluation, (4) Flood protection evaluation, (5) Dairy and cropland design and construction evaluation, (6) Cross-connection assessment report. The Order required most of these reports, technical and otherwise, to be prepared by appropriately licensed professionals/engineers and consultants, who are very expensive. And these burdens do not include the costs of the expensive reports that we are required to submit to the San Joaquin Valley Air Pollution Control District. In total, we were facing regulatory costs of approximately \$20,000.00.

The dairy industry suffered through a dreadful period in 2009 due to a combination of low milk prices and high feed costs that were unprecedented in recent memory. It was a period from which many of us dairymen have not yet recovered. Indeed, your agency's 2009 Order acknowledged

the seriousness of the dairy industry's economic situation by postponing for a year the filing date for most of the above reports.

Our dairy was losing money in 2009 and in 2010. By the fall of 2009, our lender had categorized our loan as "distressed," and it advanced it a limited amount of funds that was barely enough to purchase feed and to pay such essentials as labor and utility bills. Had we used these funds to hire the engineers and consultants needed to prepare these reports, then we would have been put in a position where we would have been guilty of fraud - buying feed from farmers while knowing that we would not have the funds to pay for it. On a per cow basis, the regulatory costs imposed by the Order's requirements are disproportionately higher for small dairies as compared to large operations, and put small dairies at a competitive disadvantage and threaten their very survival.

Environmental groups and your agency have both at times been critical of large dairies, calling them "mega dairies" and "factory farms." It is true that larger dairies discharge larger volumes of waste and generally pose a greater potential threat to our groundwater. Yet, ironically, your agency has adopted burdensome monitoring and reporting requirements that put extra pressure on smaller dairies to the extent of driving some of them out of business. I know of a number of small dairies who told me they sold out because they knew they could not afford the costs of complying with your agency's reporting requirements. As a result, perhaps unwittingly, your agency's requirements are causing large dairies to grow even larger as they fill the production lost by the small dairies going out of business.

On March 28, 2010, more than three months before the July 1, 2010 filing deadline, we wrote a letter to your agency asking for an extension of the deadline for submission of these reports. Anticipating that the staff would refuse to grant said relief, we asked the staff in our letter of April 7, 2010 to schedule the matter for a face-to-face hearing before the regional board so that we could present our request for a modification of the Order.

In their letter of June 15, 2010, the Central Valley staff stated that they had no authority to modify the reporting requirements, and they refused to schedule a formal, agenda-item hearing before the regional board. Instead, they advised us that we were free to address the Board during the Public Forum section of their Agenda, even though such presentations are limited to 3 minutes.

In letters dated July 27, 2010, and August 22, 2010 we continued to press the staff to schedule a hearing before the regional board. Yet, your agency continued to deny our request for a hearing before the board.

We heard nothing from your staff until May 10, 2011 when we received the Complaint by certified mail.

### **Legal Arguments.**

1. Your agency is denying us due process for the following reasons:
  - (a) On August 16, 2010, your agency sent us Notices of Violation, specifying our failure to file the above-named reports by the July 1 deadline. We did not receive your Administrative Civil Liability Complaint until May 10, 2011, almost nine months

later. Attached to the Complaint was a description of the hearing protocols, including various deadlines. One of these deadlines was that we had to notify your agency of any documents, evidence, witnesses and legal arguments we intended to use or make at the hearing by June 13, 2011, only 33 days after receiving the Complaint.

According to your self-serving rules, we could not use anything we did not identify, produce or submit as legal argument by that date. We are full time dairymen. Because we are small I actually do some of the milking and much of the feeding and cow care, and we have very little time each day to work on this matter. We asked your agency in writing for an extension of the hearing dates, waiving the 90-day requirement, but your agency refused to grant our request.

(b) On June 20, 2011 we made a Public Records Act request, asking for copies of all documents in your agency's file concerning information on our dairy, and we asked that they be provided by June 30, 2011 so that we would have time to review and evaluate them before the hearing. We were advised by agency counsel that because the documents were "voluminous" this request was "not practicable." We were told that we would have to make arrangements to go to your agency's Fresno office to personally go through the files. If the task was "impracticable" for your agency, it was certainly "impracticable" for us, as we have very few available hours beyond our full time duties at the dairy. Finally, the copies we requested were made available to us on June 30, 2011. It consists of 250 pages of documents, and while we have tried to completely review and evaluate them all, we have not been able to do so adequately before the hearing. This is additional evidence why a continuance of the hearing was needed and why a refusal to grant a continuance constituted an abuse of discretion and a denial of due process. Water Code Section 13292 states that it is the state water board's responsibility to ensure that the regional boards provide "fair" access to participants in its proceedings and to improve its "adjudication procedures." In short, your agency's self-written Hearing Procedures is a quagmire of detailed and confusing protocols and short-fused deadlines. That and your refusal to grant a continuance of the hearing effectively deprive people like us of an opportunity to satisfactorily prepare our evidence, to adequately make our case, and to defend ourselves against the Complaint. We have little doubt that it is all of intentional design to overwhelm, intimidate, discourage and set traps against anyone who would otherwise want to challenge the agency or any of its rules and regulations. We intend to bring this sad situation to the attention of the state board in the near future, and if necessary to a superior court.

2. The Administrative Civil Liability Complaint filed against us is premature, for the following reasons.

(a) Section 13269 of the Water Code recites that a regional board may waive monitoring requirements if it determines that a discharge does "not pose a significant threat to water quality." The 2009 Order declares that it "serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes." (2007 Order, p.1) Under the Order's terms, a Discharger has the right to seek a modification of any of those general waste discharge requirements. (2007 Order, SPRR-2) The reporting

requirements, including the filing deadlines for annual and technical reports, are part of the Order's general waste discharge requirements for which a dairyman may seek modification, exemption or other similar relief.

- (b) While the regional board may delegate some of its powers and duties, some are not delegable. The modification of any waste discharge requirement is one of those powers and duties that are not delegable. (Water Code Section 13223) It was the regional board's nondelegable duty and responsibility to hear and decide our request for relief.
- (c) Thus, we believe we have a right to appear before the regional board to seek a modification or waiver from any of the Order's general waste discharge requirements. Had your agency's staff scheduled a hearing before the regional board, it is possible that the regional board would have granted us relief from these deadlines, in which case, we would not be in violation of the filing requirements. The filing and serving of your Complaint for Administrative Civil Liability is premature. Your agency cannot contend that we have violated the filing requirements until such time as the regional board has heard and denied our request and after we have exhausted our appeal and all other legal remedies afforded us under the Water Code. (Water Code Sections 13320, 13325, and 13330)

3. The Order is unlawful and unenforceable in that it fails to comply with applicable provisions of the Water Code in the following ways:

- (a) The "Monitoring and Reporting Program" of the 2007 Order recites that it is issued pursuant to Water Code Section 13267. (2007 Order, p. MRP-1) Section 13267 (b) (1) states that "the regional board may require that any person who ... discharges ... waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires." But Section 13267 (b) (1) goes on to say that "The burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports. In requiring these reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

Your agency has failed to comply with Section 13267 in that it never provided us "with a written explanation with regard for the need for the reports," and it has failed to "identify the evidence that supports requiring [us] to provide the reports."

Had we been allowed to appear before the regional board, we were prepared to show that our site has continuously had a dairy operating on it for over eighty years. We were prepared to show that we have submitted to your agency water sample test results from each of our wells in 2003, 2007 and 2009. All well results were and are substantially below the state's maximum contaminant levels (MCL) Not only that, our most recent water samples from our wells tested .2, 1.1 and 1.4 mg/L for nitrate

nitrogen levels –unheard of low levels. Such results indicate that our operation not and has not been a threat to the ground water underlying our dairy site.

We were intending to show the regional board the foregoing well-water test results and intended to argue that they were compelling evidence that our operation was not adversely impacting ground water, and therefore the cost of these reports did not, in the words of Section 13267, “bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.”

Over the years, your agency’s staff has visited our dairy site to inspect and obtain information about it. For example, your Ken Jones visited our dairy in 2003 and spent a day gathering information. He measured and calculated the storage capacity of our three waste water lagoons and concluded that our storage capacity was 128% of what your agency required, and concluded that we had excess cropland for application of waste water (we have the letter confirming that our dairy was in full compliance with all RWQCB requirements). Yet, your agency is now requiring me to hire licensed engineers to calculate the storage capacity of our lagoons at a cost of \$7500.00, as well as other new reports that must be prepared by engineers and other licensed professionals that we believe are, for the most part, duplicative, and add nothing useful or valuable, besides being terribly costly. In this regard, your agency’s refusal to accept already available information in its files ignores Section 13267’s requirement that your agency’s reports should “bear a reasonable relationship to the need for the reports.” For the most part, your required Waste Management Reports are redundant, unneeded and unjustified.

- (b) Water Code Section 13263 (e) provides that “any affected person may apply to the regional board to review and revise its waste discharge requirements. All requirements shall be reviewed periodically.” If new and more cost effective ways can accomplish the same purpose, we contend that the regional board is under a legal duty to review such issues and revise its requirements accordingly. New and old research and advanced technologies exist which may provide less expensive means for evaluating groundwater contamination risk, of determining non-contamination of groundwater, and of using less expensive practices that can still prevent such contamination.

For example, Lawrence Livermore National Laboratory published two papers in 2007 in *Environmental Science Technology*, in which they stated that they discovered that soil bacteria break down and eliminate nitrates in dairy waste water in a substantial if not complete degree. They also have ascertained that there are certain compounds and gasses in manure water that can be used to determine whether water from dairy lagoons or from waste applied in irrigation water has infiltrated into first encountered groundwater. There are also simple and inexpensive ways to show the amount of highly compacted clay layers sitting beneath a dairy site and whether they constitute an impervious barrier between the dairy and the groundwater.

Yet, your Order contains a “one-size-fits-all” approach, and requires reports that in some cases may not be needed. Some of these reports are ludicrous and unnecessary. One laughable example is that we are required to provide monthly photos of our lagoons to show that the water level was not too high. This is as absurd as requiring

us to photograph our speedometer each month to prove we didn't drive over the speed limit.

In short, most of the Order's reporting requirements are primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants and laboratories. We contend that your agency will be unable to show that it has continued to sufficiently examine and consider such research results and advanced technologies, or that it has modified its Order accordingly. The foregoing represents another reason why the Complaint against us is premature. Had our request been scheduled for a hearing before the regional board and had we been allowed the opportunity to present in detail all of the matters and issues described above, we believe that there were abundant grounds under which the regional board could have granted us considerable relief from many of its reporting requirements. In such event, there would not have been a basis for filing the Complaint against us.

- (c) The Order's waste discharge requirements as they relate to water quality objectives must take into account economic considerations. (Water Code Sections 13241 and 13263 (a)) The Order does not do so, particularly failing to set or implement water quality objectives that was within the economic means of smaller dairies, which have too deal with disproportionately higher per cow reporting costs. Indeed, the Order fails to address the special economic circumstances of smaller dairies in any way whatsoever. In contrast, the SJ Valley Air Pollution Control District exempts smaller dairies from many of its requirements.
- (d) The California Administrative Procedure Act ("CAPA"- Chapter 3.5 of the California Government Code, Section 11340 et seq), is intended to keep the regulations of state agencies from becoming unreasonably costly and otherwise burdensome. Indeed, Section 11340 of CAPA recites that the legislature found that "the complexity and lack of clarity in many regulations put small businesses, which do not have the resources to hire experts to assist them, at a distinct disadvantage." CAPA created the Office of Administrative Law to administer the Act. Section 11340.1 goes on to declare that it is the legislature's intent under CAPA for state agencies to "actively seek to reduce the unnecessary regulatory burden on private individuals." It is undisputed that the regional water boards are state agencies.

While it is true that Section 11340.9 (i) of CAPA states that this chapter does not apply to a number of matters, including a regulation that "does not apply generally throughout the state," it does apply however, under Section 11353, to "any policy, plan or guideline" that (1) the State Water Resources Control Board has adopted after June 1, 1992, or (2) that a court determines is subject to this part. In other words, Section 11353 is a specific exception to the more general exception under 11340.9 (i). Section 11353 goes on to say that the policies, plans and guidelines adopted by the SWRCB are not effective until their regulatory provisions are approved by the Office of Administrative Law. Even your agency admitted in its Forward to the Tulare Lake Basin Water Quality Plan (2<sup>nd</sup> ed., 1995) that the Tulare Lake Basin Plan needed to be adopted by the SWRCB in order to be effective, and that it had to be approved by the

Office of Administrative Law (under CAPA). Even though the Tulare Lake Basin Plan is regional in nature, once adopted by the SWRCB, your agency recognized that it became subject to the requirements of CAPA. This is not illogical since the entire State has an interest in and is affected by how the waters of the Central Valley Basin, including the Tulare Lake Basin, are regulated. Excess surface waters from these basins flow to the San Francisco Bay, for example. Therefore, the burden is on your agency to show that the Tulare Lake Basin Plan was approved by the Office of Administrative Law.

Paragraph 14, page 3, of the 2007 Order recites that it is implementing the Tulare Lake Basin Plan, SWRCB Resolution 68-16 and other things. It makes no logical sense to for your agency to claim that the 2007 Order is not an extension of the Tulare Lake Basin Plan, a State adopted Plan, and therefore is not subject to the requirements of CAPA. Unless your agency can show that the provisions of the Order were processed in accordance with CAPA provisions, it is our contention that the Order is invalid and not effective.

It is also our contention that we can file an action for declaratory relief with the superior court, under Sections 11350 and 11353, under which we ask the court whether this Order is a “regulation” that should be subject to the requirements of CAPA. Given the significant adverse impact that the Order has on small dairies, we believe a court will be inclined to find a way to declare that the Order is subject to CAPA requirements.

### **Concluding comments**

In closing, let me make some final grim observations. It is extremely troublesome that the Agency’s staff prepared the Complaint but purposely chose to not mention the letters we wrote prior to the filing deadline and thereafter. The Complaint also failed to mention that we had often requested a hearing before the regional board. Thus, the Complaint is inherently deceptive and prejudicial. This only serves to bolster our contention that your Agency abuses its legal and discretionary powers.

Most dairymen, me included, appreciate the resources under our stewardship. We care about the environment and deeply respect nature. We drink the water; our families will live on this land for generations. Classifying us as ungrateful, apathetic enemies to water quality is a flagrant falsehood and unjust. Besides a deep investment our land and community, we have a demonstrable commitment to water quality and the health of this precious resource. You must agree that we are not here because of any allegation of pollution; in fact the evidence is that we have not polluted at all. It is all about us not filing unaffordable reports, and even here, we tried to approach it the right way. Before the deadline we sought a hearing to ask for relief.

I, like hundreds of other dairymen, have worked a lifetime to build my dream. We work with our animals and land to produce high-quality milk. However, the unreasonable expense of reporting requirements is forcing us from business. Your agency has imposed “country club” regulations-- only large dairies with the resources to comply will be allowed to stay in business. I agree that

polluters should be punished. However, your distinction between ‘compliers’ and ‘non-compliers’ has absolutely nothing to do with water quality. Small family dairies like ours, which has a verified record of outstanding water quality, are being eliminated because of lack of funds. Where was your economic analysis for smaller dairies? Were small dairies examined? Has anyone considered sustainable agriculture?

I continue to be denied due process. It is impossible to receive a fair hearing: your agency makes all the rules, selects the judges, decides which evidence can be allowed, and even requires that we submit our testimony to you before the hearing. And your agency knows that someone as small as me doesn’t have the resources to challenge your authority.

There seems to be a striking similarity between how your agency treats us and how the U.S. government treated the American Indian. The government convinced the public that this “dangerous threat” should be forcefully confined to reservations. Native people were blamed, denied fair hearings, and their voices were silenced. Thousands of Native Americans were killed, their land taken, and their cultures destroyed. Tribes who resisted met extreme hostility and were forced into submission.

Today, injustice takes a new form. It is one-sided power. Your agency holds all the cards. You have made it economically unfeasible for our small dairy to comply with your reporting requirements, and have created a daunting, very unfair hearing process.

Once small family dairies are gone, they are gone forever. I can’t help but feel much the same as early American Indians as you push us into submission and try to break our spirit.

Sincerely,

Jim Sweeney