

Date: June 19, 2012

To: Central Valley Regional Water Quality Control Board

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**Re: Submission of Evidence and Policy Statement regarding Hearing on
Administrative Civil Liability Complaint R5-2012-0542**

A. Introduction.

We are James G. Sweeney and Amelia M. Sweeney, doing business as Sweeney Dairy, and are the "Dischargers" named under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2012-0542 (Complaint). Our address is 30712 Road 170, Visalia, CA 93292. Our telephone number is (559) 280-8233 and our email address is japlus3@aol.com.

B. Statement of Facts/Background.

1. 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.
2. The Regional Board's Order No. R5-2007-0035 (2007 Order) compelled us, along with all other dairymen, to prepare and file all of the following reports with the Regional

Board by July 1, 2009. The Regional Board amended the 2007 Order in 2009 with Order No. R5-2009-0029 (2009 Order) in which the filing date for these reports was extended for one year, to July 1, 2010. The 2009 Order cited financial distress in the dairy industry as the justification for the extension.

The 2009 Annual Report, due on July 1, 2010, consisted of an Annual Dairy Facility Assessment for 2009, and a Waste Management Plan (WMP), consisting of the following reports:

- (a) Retrofitting Plan for needed improvement to storage capacity, flood protection or design of the production area.
- (b) Dairy site and Cropland maps.
- (c) Wastewater lagoon capacity evaluation.
- (d) Flood protection evaluation.
- (e) Dairy and cropland design and construction evaluation.
- (f) Cross-connection assessment report.

The 2010 Annual Report, due on July 1, 2011, consisted of the following reports:

- (a) Nutrient Monitoring Element:
 - (1) Waste Water, amounts and test results
 - (2) Manure, amounts and test results
 - (3) Crop, amounts and test results
- (b) Groundwater Monitoring Element (domestic and ag wells), test results.
- (c) Certification of Nutrient Monitoring Program "retrofitting."
- (d) Certification of storage capacity "retrofitting."
- (e) Certification of flood protection "retrofitting."
- (f) Certification of housing and manure storage area "retrofitting."

The 2007 Order required most of the 2009 and 2010 reports, technical and otherwise, to be prepared by licensed professionals/engineers and consultants, with all of the sample testing to be done by licensed laboratories, all of which are very expensive.

3. During 2008 and 2009, the dairy industry suffered through a dreadful period due to a combination of low milk prices and high feed costs that were unprecedented in recent memory. Virtually all dairies, large and small, had to borrow substantially in order to remain in business. It was a period from which most dairymen have not yet financially recovered. Indeed, the Regional Board's 2009 Order acknowledged the seriousness of the situation by postponing for a year the filing date for most of the 2009 reports.
4. This year, the dairy industry has returned to a period of low milk prices and high feed and energy costs. For most, there is insufficient revenue to pay all bills, and because of insufficient equity, lenders are unwilling to loan additional funds to most dairies to make up the shortfall.
5. Environmental groups have often been critical of large dairies, referring to them as "mega dairies" and "factory farms." Larger dairies discharge larger volumes of waste and generally pose a greater potential threat to our groundwater. Yet, in adopting the 2007

Order, the Regional Board imposed very costly monitoring and reporting requirements that are pretty much the same for all dairies, regardless of size. Because smaller dairies have fewer cows over which to spread these fixed regulatory costs, it is much more burdensome, and puts them at an even greater competitive disadvantage. In some cases it is even fatal, for we know of a number of small dairies who told us that they sold out because they could not afford the costs of complying with the new reporting requirements adopted in the 2007 Order.

6. In response to our request, the Regional Board's staff supplied us with data (broken down by herd size) that show the number of dairies that filed reports in the Fresno Office in 2010, versus 2007. While there was less than a 1% decline in the number of large dairies (over 700 cows) filing reports between 2007 and 2010, there were 36% fewer medium sized dairies (between 400 and 700 cows), and 46% fewer small dairies (less than 400 cows) that filed reports in 2010 than did in 2007. So the evidence is not just anecdotal; it is quite compelling that it was the smaller dairies that were disappearing in much larger measure during this financially stressful period. There should be no dispute that the Regional Board's costly reporting requirements as set forth in the 2007 Order are a contributing reason why large dairies are growing even larger, and they are taking over the production lost by the small dairies going out of business.
7. As a result of the financial situation in which we found ourselves in 2009 and 2010, we wrote a letter dated March 28, 2010 to the Regional Board's staff – more than three months before the July 1, 2010 filing deadline - in which we asked for a waiver from submitting these reports. We wrote a follow-up letter dated April 7, 2010 to the Regional Board staff in which we requested a one-year suspension of filing the reports. Anticipating that the staff would refuse to grant said relief, we stated in both of these letters that if they were unable to grant our request, to please schedule the matter for a face-to-face hearing before the Regional Board at a future meeting so that we could present our request for relief to the Board.
8. The Regional Board's staff replied to our March 28 and April 7 letters by a letter dated June 15, 2010. They did not agree to our request to a one-year suspension, and they did not schedule a hearing before the Regional Board, as we had asked. Instead, they advised us that we could address the Board during the "Public Forum" section of their agenda. Such presentations are limited to three (3) minutes.
9. In a letter dated June 27, 2010, we again asked the staff to schedule a hearing before the Regional Board, and it was ignored.
10. On August 20, 2010, we received a Notice of Violation dated August 16, 2010 from the Regional Board staff charging us with failing to file the July 1, 2010 reports.
11. In a letter to the Regional Board's staff dated August 22, 2010 we again mentioned our request for a hearing before the Regional Board. Again, the staff continued to ignore our request. We later found out why. At the July 14, 2011 hearing before the Hearing Panel, Mayumi Okamoto, one of the Regional Board's legal counsel, stated that "the decision to

place a matter on the agenda remains with the discretion of your [Regional Board's] management in consultation with the Executive Officer as the *gatekeeper*." Regional Board staff member, Clay Rodgers, also testified that "Mr. Sweeney did approach us to ask for an extension. We decided that an extension, as the *gatekeepers* to the Board, that the extension of the Waste Management Plan had already been granted. ... And we did not feel that the extension of the annual report would be appropriate."

While the Regional Board may delegate some of its powers and duties, some are not delegable. According to Section 13223 (a) of the California Water Code, the modification of any waste discharge requirement is one of those powers and duties that is not delegable. It is the Regional Board's nondelegable duty and responsibility to hear and decide, or to refuse to hear and decide, our request for a modification of the waste discharge requirements contained in the 2007 Order. Since Section 13223 (a) grants only the Regional Board the authority to make such determinations, Ms. Okamoto and Mr. Rodgers both admitted that the staff operated outside their legal authority.

12. On May 10, 2011 an Administrative Civil Liability Complaint, R5-2011-0562, (2011 Complaint) was served on us for failing to file the July 1, 2010 reports, and seeking civil penalties against us in the amount of \$11,400.00. Oddly, the Complaint prejudicially failed to mention our multiple efforts to schedule a hearing before the Regional Board to seek relief.
13. On July 1, 2011, the 2010 Annual Reports became due, but we did not file them as we were still seeking a hearing before the Regional Board to obtain relief from having to file them.
14. On September 21, 2011, we emailed Alex Mayer, one of the Regional Board's legal counsel, wherein we again asked that a hearing be scheduled before the Regional Board where we could ask the Board for a modification of the reporting requirements of the 2007 Order.
15. We were advised by Mr. Mayer's email dated September 29, 2011 that he had no authority to schedule the hearing we requested before the Board, but that we could appear before the Board as "a member of the public" and would be allowed only three minutes to speak during their "public forum" section of their agenda.
16. We sent a document to Mr. Mayer, dated October 2, 2011, which included another written request for a hearing before the Regional Board where we could request a modification of the reporting requirements. The document included evidence and arguments in support of the request.
17. We appeared at the hearing on the 2011 Complaint before the Regional Board on October 13, 2011. Mr. Mayer mentioned our October 2 document, but recommended that it not be accepted into the record. Chair Hart, without asking us for our response, immediately ruled that it would not be accepted. She then informed us that we would only be given five minutes and that it would be limited to evidence regarding dairy herd size data (not a

particularly significant issue). I began reading a two-page presentation, beginning with an introduction. One minute into the presentation, just as I was about to request a hearing for a modification of the 2007 Order's reporting requirements, Board legal counsel Okamoto interrupted me and objected to what I was requesting. Chair Hart responded by telling me the following untrue statement: "We are fully advised what your position is." She then ordered me to limit my comments to just the herd size data.

So I began commenting on the herd size data. However, during that time, the Chair, Mr. Landau and both legal counsel interrupted me, debated the herd size issue, and ended up taking up much of my five minutes. Then Chair Hart stopped me and said "Thank you Mr. Sweeney and your time is up." The Regional Board then went ahead and adopted the proposed order for civil liability against us in the amount of \$11,400.00.

18. We were sent an email on October 25, 2011 by Ken Landau, Assistant Executive Officer of the Regional Board in which he listed the documents that had been "made available to the Board members for their consideration at the 13 October hearing." Our document of October 2 was not on that list. Therefore, the record seems clear that our request for a modification hearing was not read or considered by the Regional Board in connection with the actions it took at the October 13 hearing.
19. On November 9, 2011, we appealed all of the Regional Board's decisions at its October 13, 2011 hearing by filing a Petition with the State Water Resources Control Board (A-2190). Said petition/appeal is still pending decision before the State Board.
20. On May 9, 2012 an Administrative Civil Liability Complaint, R5-2012-0542 (2012 Complaint), was mailed to us for failing to file the July 1, 2011 reports. The Complaint seeks civil penalties against us in the amount of \$7,650.00. The Complaint fails to mention our efforts to secure a hearing before the Regional Board to obtain relief from these reporting requirements. It also fails to note that the Regional Board failed to grant us such a hearing, and that this failure is currently under appeal by us to the State Water Resources Control Board.

C. Documents/Evidence.

You require us to identify and provide all documents and other evidence that we intend to use or rely upon at the hearing. At the present time we intend to use or rely upon the following, which we submit by reference because they are believed to already be in the files or otherwise in the possession of the CVRWQCB:

1. CVRWQCB Report of Compliance Inspection for Sweeney Dairy, dated December 31, 1998.
2. CVRWQCB Inspection Report letter for Sweeney Dairy, dated April 7, 2003.

3. Letter from CVRWQCB to us, dated October 15, 2003, regarding our groundwater supply well test results:

Irrigation Well #1 Nitrate (NO3)	2.0 mg/L
Domestic Well " "	3.2 mg/L

4. Certificate of Analysis from BSK Laboratories to us, dated November 6, 2007, regarding our groundwater supply well test results:

Irrigation Well #1 Nitrate (NO3)	1.1 mg/L
Irrigation Well #2 " "	1.2 mg/L
Domestic Well " "	3.2 mg/L

5. Reports from FGL Environmental to us, dated July 14, 2010, regarding our groundwater supply well test results:

Irrigation Well #1 Nitrate (NO3)	1.1 mg/L
Irrigation Well #2 " "	.2 mg/L
Domestic Well " "	1.4 mg/L

6. Letter from Farm Credit West to us dated September 30, 2009.

7. Dairy Inventory Worksheet, dated December 12, 2009, prepared by us for Farm Credit West.

8. Jim Sweeney letter to CVRWQCB dated March 28, 2010.

9. Jim Sweeney letter to CVRWQCB dated April 7, 2010.

10. CVRWQCB letter to the Sweeneys dated June 15, 2010.

11. Jim Sweeney letter to CVRWQCB dated June 27, 2010.

12. CVRWQCB Notice of Violation sent to the Sweeneys on August 16, 2010.

13. Jim Sweeney letter to CVRWQCB dated August 22, 2010.

14. CVRWQCB letter to Sweeneys from Clay Rodgers dated May 5, 2011 re Administrative Civil Liability Complaint R5-2011-0562.

15. Administrative Civil Liability Complaint, R5-20011-0562, (2012 Complaint) against James G. and Amelia M. Sweeney, dated May 5, 2011(together with all attachments, including the Hearing Procedures).

16. Jim Sweeney letter to CVRWQCB dated May 15, 2011.
17. Jim Sweeney letter to CVRWQCB dated May 31, 2011.
18. Jim Sweeney letter (Written Testimony and Arguments) to CVRWQCB dated July 8, 2011.
19. Transcript of July 14, 2011 hearing before the Hearing Panel regarding 2011 Complaint.
20. Jim Sweeney letter to Alex Mayer dated September 5, 2011.
21. Email from Alex Mayer (CVRWQCB legal counsel) to Jim Sweeney dated September 20, 2011.
22. Jim Sweeney letter to Alex Mayer dated September 21, 2011.
23. Email from Alex Mayer to Jim Sweeney dated September 29, 2011
24. Second email from Alex Mayer to Jim Sweeney dated September 29, 2011.
25. Jim Sweeney letter to Alex Mayer dated September 30, 2011.
26. Jim Sweeney letter to CVRWQCB (Written Testimony and Arguments) dated October 2, 2011.
27. Transcript of hearing held on October 13, 2011 before Regional Board regarding 2011 Complaint.
28. Email from Ken Landau to Jim Sweeney dated October 25, 2011.
29. Sweeneys' Petition and appeal to State Water Resources Control Board regarding Regional Board's decisions at the October 13, 2011 hearing on the 2011 Complaint.
30. Order No. R5-2007-0035, "Waste Discharge Requirements General Order for Existing Milk Cow Dairies."
31. The Administrative Record of all Public Hearings and Public Input, upon which Order R5-2007-0035 was based and adopted.

32. Water Quality Control Plan for the Tulare Lake Basin (2nd ed., 1995) and subsequent amendments thereto.
33. State Water Resources Control Board ("SWRCB") Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California."
34. Final Report of Brown, Vence & Associates, "Review of Animal Waste Management Regulations – Task 4 Report (November, 2004)." While we believe that your Agency is in possession of a copy, please advise if you do not.
35. Study Findings, Recommendations, and Technical Report (Parts I & II) of the University of California Extension, entitled "Manure Waste Ponding and Field Application Rates (March, 1973). Please advise if your agency does not have a copy.
36. NRCS Guidelines for Water Treatment Lagoons, Natural Resources Conservation Service Conservation Practice Standards, Code 359 (July, 2000). Please advise if your agency does not have a copy.
37. "Impact of Dairy Operations on Groundwater Quality," a research project conducted and a report prepared by the Lawrence Livermore National Laboratory in cooperation with the State Water Resources Control Board. The report was submitted to the State Board in August, 2009. We believe this report is in the possession of the CVRWQCB, and if it is not, please advise.
38. "Fate and Transport of Waste Water Indicators: Results from Ambient Groundwater and from Groundwater Directly Influenced by Wastewater," a report prepared by the Lawrence Livermore National Laboratory in connection with the State Water Resources Control Board. We believe this report is in the possession of the CVRWQCB, and if it is not, it is available at the State Board's website:
<http://www.swrcb.ca.gov/gamadocs.shtml>.
39. Jorge Bacca's (CVRWQCB) reporting data by herd size for both 2007 and 2010.
40. Groundwater Monitoring Directive from CVRWQCB to Sweeneys dated May 4, 2012.
41. Letter from Douglas Patteson (CVRWQCB) to Sweeneys dated May 23, 2012.
42. Email from Clay Rodgers (CVRWQCB) to Jim Sweeney dated May 27, 2012.

At the present time we intend to use the following additional documents at the hearing, which we attach to this submission:

1. California Dairy Herd Improvement Association (DHIA) dairy herd size and numbers, Central Valley, 2011. (Exhibit 1)
2. San Francisco Bay Regional Water Quality Control Board Resolution No. R2-2003-0094. (Exhibit 2)
3. San Francisco Bay Regional Water Quality Control Board, Annual Certification Reporting Form, Dairy Waiver Compliance Documentation (Exhibit 3)
4. North Coast Regional Water Quality Control Board Order No. R1-2012-0002. (Exhibit 4).
5. North Coast Regional Water Quality Control Board Order No. R1-2012-0003. (Exhibit 5)
6. Email from J. P. Cativiela (Community Alliance for Responsible Environmental Stewardship - CARES) to Jim Sweeney dated May 29, 2012. (Exhibit 6)

D. Witnesses.

1. Jim Sweeney. His testimony and arguments are set forth herein. He will take 30 minutes.

We reserve our right to use other evidence and witnesses not listed above if any come to light during the course of continuing to develop our case. We will notify you when such evidence or witnesses become known.

E. Legal Arguments and Analysis.

1. The Administrative Civil Liability Complaint (R5-2012-0542) is legally defective because it is premature and is the result of us being deprived of due process.

- (a) The 2007 Order declares that it “serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes.” (2007 Order, p.1) The Order describes the procedures where a Discharger makes a request for a modification of the Order or of any of its 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 someone like us may seek modification, exemption or other similar relief.
- (b) Addressing waste discharge requirements, Section 13263 (e) provides that “(e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements ...” Therefore, we, as affected persons, have the right to apply to the Regional Board for a *modification* or *revision* of the general waste discharge requirements, including the reporting requirements contained in the 2007 Order.
- (c) Section 13269 (a) (1) and (2) of the Water Code goes on to say that a regional board may *waive* waste discharge requirements (dealt with in section 13263) as they apply to the performance of an individual, such as ourselves.
- (d) Section 13223 (a) of the Water Code specifies that the regional board may not delegate modification of waste discharge requirements. It is the regional board’s undelegable duty and responsibility to hear and decide our request for relief from these waste discharge requirements. The staff cannot appoint itself as the “gatekeepers” in these matters, and the board is prohibited under section 13223 (a) and other applicable law to appoint the staff as “gatekeepers.” We have a right to appear before the Regional Board to ask for a modification or waiver from any of the Order’s general waste discharge requirements. Even a decision to not hear our request for relief would have to be made by the Regional Board - not by its staff. The evidence in the record is that our requests for such a hearing were never communicated to the Board by the staff and there is no evidence in the record that the Board deliberated and voted on whether to grant us such a hearing. Even if the Board had, they did not give us the opportunity to argue before them why such a hearing should be granted. In preventing our request for such a hearing from being heard and decided by the Board, the staff acted unlawfully and beyond their statutory authority. They deprived us of due process and violated our civil rights.
- (e) Had the Regional Board’s staff scheduled such a hearing before the Board, as we had requested over and over, there is the possibility that the Board would have granted us relief from some or all of those reporting requirements, including the July 1, 2011 deadline, in which case, we would not be in violation of the reporting requirements. The Regional Board cannot contend that we have violated the 2007 Order’s reporting

requirements due on July 1, 2011 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) Thus, the filing and serving of the 2012 Complaint is premature.

2. Order R5-2007-0035 is unlawful and unenforceable against us because it fails to comply with applicable law, including provisions of the Water Code and Government Code.

(a) **The need for the 2007 Order is not supported by substantial evidence.** No rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by substantial evidence. We have reviewed all 34,000 pages of the administrative record of the hearings held in connection with the adoption of the 2007 Order, and we found no substantial evidence – in fact, no evidence whatsoever – that supports the need to replace the former reporting requirements with the new reporting requirements adopted in the 2007 Order. We have encountered no evidence in the record that the data, reports and information that the Regional Board staff obtained from or about dairies prior to the 2007 Order were inadequate, insufficient, unreliable or otherwise flawed. And we have encountered no evidence in the record that claimed or demonstrated that the new reporting requirements were necessary or needed to replace the former. We made this argument to the Regional Board in connection with the 2011 Complaint, and the Regional Board staff entirely failed to dispute it.

(b) **The Regional Board has not shown the need for the reports specified in the 2007 Order and has not justified their burden.** 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.”

The Regional Board failed to comply with Section 13267 in that the 2007 Order does not contain “a written explanation with regard for the need for the reports,” and it fails to “identify the evidence that supports requiring [us] to provide the reports.” In addition, the Regional Board never provided us with “a written explanation with

regard for the need for the reports,” and it did not “identify the evidence that supports requiring [us] to provide the reports.”

Over the years, the Regional Board’s staff visited our dairy site to inspect and obtain information about it. For example, staff member Ken Jones visited our dairy in 2003 and spent one day gathering information. He measured and calculated the storage capacity of our three waste water lagoons and concluded that our storage capacity exceeded what the Regional Board required. In fact, it was 128% of what was required. He also concluded that we had sufficient cropland for application of waste water. We have his letter dated April 17, 2003, confirming that our dairy was in full compliance with all Regional Board requirements. We are prepared to submit evidence that our dairy has essentially the same number of animals, the same lagoon capacity and even more cropland now than we had in 2003.

A dairy has been continuously operating on our site for over eighty years. We have submitted to the Regional Board staff test results from water samples taken from each of our supply wells in 2003, 2007 and 2010. The results have ranged between .2 and 3.4 mg/L, all incredibly low levels. All well results were and are substantially below the state’s maximum contaminant levels (MCL); in fact, they are incredibly low.

We have argued to the Regional Board staff that these test results that we have submitted to them in the past are compelling evidence that our operation was and is not adversely impacting ground water, and therefore the cost of filing these reports due July 1, 2011 did not and do 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.” But the Regional Board recently brushed off these results by telling us that “Groundwater supply wells are typically screened in deeper aquifer zones ... groundwater quality data collected from the Dairy’s on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy.”

The Regional Board has the audacity to tell us this after demanding for years that we test our supply wells and send them the results. Indeed, their 2007 Order, at page MRP-7, orders dairymen to “sample each domestic and agricultural supply well,” and to submit the laboratory analysis for nitrate-nitrogen to it on an annual basis. For nine years they have been demanding these costly reports and now tell us that they are meaningless. Absolutely outrageous!

It is actually worse than that. The Regional Board has been advising dairymen, including us, that as an alternative we can join a “Representative Monitoring Program,” (RMP) and the results from RMP monitoring wells can be submitted and will be treated as satisfying the monitoring well requirement. I recently asked the Regional Board what representative monitoring program they would accept for my dairy. Clay Rodgers responded with an email dated May 27, 2012 in which he informed me that I should join the Central Valley Dairy Representative Monitoring Program (CVDRMP) administered by CARES in Sacramento. I checked with CARES and was advised by email dated May 29, 2012 that it would accept my

application to join the program. I also discovered that the nearest CVDRMP monitoring wells are many, many miles away from my dairy. And after being admonished by the Regional Board staff that my supply well test results "do not necessarily represent the quality of first encountered groundwater beneath the Dairy," they tell me they will accept the results from monitoring wells that are miles and miles away from my dairy as meaningful information! This is insanity of the highest level. One cannot imagine a more egregious example of the worthlessness of the reports that the 2007 Order and the staff require.

In conclusion, the reports due on July 1, 2011 were, for the most part, redundant, duplicative, unneeded, unjustified and added nothing useful or valuable, besides being terribly costly. In this regard, the Regional Board's refusal to accept this already available information in its files ignores Section 13267's requirement that the reports should "bear a reasonable relationship to the need for the reports." We made these same arguments to the Regional Board in connection with the 2011 Complaint, and the Regional Board staff entirely failed to dispute these arguments.

(c) The 2007 Order fails to implement the most modern and meaningful scientific findings and technologies. Section 13263 (e) of the Water Code 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 above section imposes on the Regional Board a legal duty to review such issues and revise its requirements accordingly. New and old research and advanced technologies presently 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 *Environmental Science Technology*, (2007) 41, 753-765. (The State Board has copies) 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 have also 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, the 2007 Order contains a "one-size-fits-all" approach, and generally requires reports that provide little to no meaningful information. Indeed, some of these reports are ludicrous and unnecessary. One example is that we are required to provide monthly photos of our lagoons to show that the water level was not too high during the month. This is as absurd as requiring us to photograph our speedometer to prove we didn't drive over the speed limit during the month.

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. The Regional Board has not continued to sufficiently examine and consider recent research results and advanced testing technologies, and it has not modified its Order accordingly. We made these arguments to the Regional Board, and the Regional Board staff again entirely failed to dispute them.

(d) The 2007 Order fails to take into account economic considerations. The 2007 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 2007 Order does not do so. It specifically fails to set or implement water quality objectives that are within the economic means of smaller dairies – operations that have to 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.

The administrative record (AR) of the 2007 Order consists of 34,000 pages of documents and testimony. A great deal of testimony was presented concerning how expensive the new reporting requirements would be, and how especially unbearable it would be for smaller dairies:

(1) There was testimony that the cost would be “as high as \$89,000.00 initially and \$58,000.00 annually per dairy.” (AR 002089) Mr. Souza testified that “some dairies will be out of business as a result of this waste discharge requirement ... (AR 000384).”

(2) Ms Asgill, an agricultural economist, testified that because of these regulations, “we are probably looking at the smaller dairies going under. Probably those dairies that we [are] usually fond of protecting – dairies under 500 milking cows - will be going out.” (AR 000444)

(3) A letter from the State Department of Food and Agriculture Board mentioned that Governor Schwarzenegger “made a commitment to reject new regulations that unfairly impact small business. ... It is expected that new and existing regulations will be reviewed for economic impact to small business. ... we encourage the RWQCB to review your proposal ... propose alternatives that are less burdensome.” (AR 007297)

(4) The Federal government presented input: The EPA's Small Business Advocacy Panel submitted its recommendation to streamline the reporting requirements and that operations under 1000 animal units should be exempted from certain requirements. (AR 02397)

(5) The State Water Board expressed concern in its submission during the hearings that the proposed requirements “may have significant adverse economic impact on small business.” The State Board went on to recommend “different

compliance or reporting requirements ... which would take into account the resources available to small business ... [and] exemption or partial exemption from regulatory requirements for small business.” (AR 019632)

(6) Even Regional Board member Dr. Longley expressed concern: “Whereas larger dairies, a 10,000 cow dairy, would be able to absorb the costs, a 100 cow dairy is going to be faced with possible disaster.” (AR 002163)

(7) In response to a written question submitted by Baywatch, Sierra Club, California Sportfishing Protection Alliance and Waterkeeper Alliance, the Regional Board staff gave them assurances that “the Board has the option of limiting the application of this order based on the *size of herd*,” and that “waste discharge requirements or a *waiver* of waste discharge requirements would be adopted for facilities that are not covered by the order.” (AR 000583)

(8) No economic analysis or evidence was presented into the record that disputed the testimony that the proposed 2007 Order would be harmful, even fatal, to smaller dairies.

Small dairies are under much greater economic stress than larger, more efficient dairies and, therefore, are less able to handle the high costs of complying with the 2007 Order’s reporting requirements.

As an example of how the 2007 Order adversely affects smaller dairies, Dairy Cares of Sacramento estimated the average cost for a dairy to install their own individual monitoring well system to be \$42,000.00, and thousands of dollars each year thereafter for ongoing sampling, testing and reporting. The cost of monitoring well programs, both the installation and the periodic reporting costs, are for the most part the same for large dairies as they are for small dairies.

We requested data from the Regional Board staff that would reveal the report filing compliance rate of dairies, broken down by herd size. In response to our request, Jorge Baca, from the CVRWQCB, provided us with data concerning the dairies dealt with by its Fresno office. But the compliance rate is not what is most meaningful in this data. Rather it is the rate of loss of dairies, by herd size, since the adoption of the 2007 Order. This data shows the following with respect to the dairies that provided reports to the Fresno office:

Herd Size	2007	2010	Attrition
Less than 400 cows	56	30	-26 = 46% attrition
400 to 700 cows	92	62	-30 = 32% attrition
Over 700 cows	485	455	-30 = .6% attrition

Total 633 547 -86 = 13% overall attrition

In other words, only about half the number of smaller dairies filed reports in 2010 as compared to the number of smaller dairies that filed reports in 2007.

Not only are small dairies less able to deal with the high regulatory costs, they pose a dramatically smaller threat to the groundwater. California DHIA data shows that DHIA dairies in the San Joaquin Valley of our size or smaller represent less than 1/10 of 1% (.09%) of all DHIA cows in the San Joaquin Valley.

Other agencies recognize these facts. Both the North Coast Regional Water Quality Control Board and the San Francisco Bay Regional Water Quality Control Board have recognized how smaller dairies have a much smaller impact on groundwater, and how they are less able to bear the same regulatory expenses and burdens that larger dairies can. These Regional Boards saw fit to adopt special performance and reporting relief for dairies under 700 cows (See Orders R1-2012-003 and R2-2003-0094, respectively).

In the case of the North Coast Region's Order R1-2012-0003, it declares that "this Order applies to dairies that pose a low or insignificant risk to surface water or groundwater." The Order goes on to say that "economics were considered, *as required by law*, during the development of these objectives," and "that a waiver of WDRs [waste discharge requirements] for a specific type of discharge is in the public best interest."

In the case of the San Francisco Bay Region, it requires smaller dairies to complete and file a two-page "Reporting Form" which does not require the involvement of expensive engineers.

In addition, the SJ Valley Air Pollution Control District exempts smaller dairies from many of its requirements.

Despite all of the foregoing, the CVRWQCB refused to adopt any waivers, or make any special provisions for, or grant any reporting relief to smaller dairies, and none appear in its 2007 Order. Its refusal not only violates the law, but it puts smaller dairies in the Central Valley region at a greater competitive disadvantage with larger dairies in the Central Valley, and at a competitive disadvantage with small dairies in the North Coast and San Francisco Bay regions. Even Dr. Longley, who had earlier expressed concern with the adverse impact on smaller dairies, went ahead and voted to adopt the Order without it containing any such provisions.

(e) The 2007 Order is subject to the requirements of the California Administrative Procedure Act (APA). The California Administrative Procedure Act (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. Section 11340 of APA 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.” APA created the Office of Administrative Law to administer the Act. Section 11340.1 declares that it is the legislature’s intent under APA 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 Section 11340.9 (i) of APA 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.

The Tulare Lake Basin Water Quality Control Plan of 1995 and its subsequent amendments are covered by APA because it is a “plan” adopted by the State Board in 1995. The Office of Administrative Law (OAL) has reviewed and approved this Plan and its amendments. The 2007 Order recites that its waste discharge requirements are an “implementation” of the Tulare Lake Basin Plan. Therefore, we contend that the 2007 Order and its WDRs should be considered a part of and an extension of said Plan. If the law requires a regional plan such as the Tulare Lake Basin Plan to be reviewed and approved by State Board and the OAL, then logic tells us that the waste discharge requirements adopted to implement the Plan should also be reviewed and approved by the OAL. Thus, it is our contention that the 2007 Order should have been reviewed and approved by the OAL.

Section --- of the Government Code provides that if any regulation or order that should be reviewed and approved by the OAL is not, then the same is invalid and unenforceable. Because the 2007 Order was not reviewed and approved by the OAL, we contend that it is invalid and unenforceable.

Under Government Code sections 11350 and 11353, we have the right to file an action for declaratory relief with the superior court, under which we can ask the court whether this Order is a “regulation” that should be subject to the requirements of APA. Given the significant adverse impact that the Order has on small dairies, we are inclined to think a court would see fit to declare that the 2007 Order is subject to APA requirements, and that it is invalid and unenforceable because it did not follow its requirements.

Respectfully submitted,

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