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October 24, 2014

VIA ELECTRONIC MAIL AND ONTRAC

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Re: Consideration of Administrative Civil Liability, David L. & Linda M. Davis Trust

Dear Ladies and Gentlemen:

Pursuant to the hearing procedure for the above referenced matter, on behalf of the David L. & Linda M. Davis Trust, we are submitting the following documents for the Board's consideration.

1. THE DAVID L. & LINDA M. DAVIS TRUST WITNESS LIST, PROPOSED TESTIMONY & ESTIMATED TIME.

2. THE DAVID L. & LINDA M. DAVIS TRUST EVIDENCE LIST.

3. THE DAVID L. & LINDA M. DAVIS TRUST BRIEF IN THE MATTER OF THE PROPOSED ACL.

4. THE DAVID L. & LINDA M. DAVIS TRUST EXHIBITS INCLUDING DECLARATION OF MR. BRIAN DAVIS.

If you have any questions, please contact me.

Very truly yours,

Loren J. Harlow
BAKER MANOCK & JENSEN, PC

LJH:TLW

cc: The David L. & Linda M. Davis Trust (email and hardcopy)

Ms. Pamela Creedon (email only)
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Mr. Andrew Taurianen (email only)
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Mr. Joe Karkoski (email only)
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WITNESS LIST, PROPOSED TESTIMONY, ESTIMATED TIME

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Attorneys for David L. & Linda M. Davis Trust

BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD FOR THE CENTRAL VALLEY REGION

In the Matter of: Consideration of Administrative Civil Liability, David L. & Linda M. Davis, Trust	**WITNESS LIST, PROPOSED TESTIMONY, ESTIMATED TIME**

1. Mr. Brian Davis.

Son of Mr. & Mrs. Davis

Testimony:

Mr. Davis will testify regarding the Davis Family farming operation, the Irrigated Lands General Order, efforts to secure individual coverage and enrollment in the East San Joaquin Coalition.

Estimated Time:

5 to 7 Minutes

2. Ms. Linda M. Davis

Trustee of David L. & Linda M. Davis, Trust

Testimony:

Ms. Davis will testify regarding the Davis Family farming operation, the Irrigated Lands General Order, efforts to secure individual coverage, enrollment in the East San Joaquin Coalition and prior settlement efforts with Board staff.

Estimated Time:

3 to 5 minutes

3. Mr. David L. Davis

Trustee of David L. & Linda M. Davis, Trust

Testimony:

Mr. Davis will testify regarding the Davis Family farming operation, the Irrigated Lands General Order, efforts to secure individual coverage and enrollment in the East San Joaquin Coalition

Estimated Time:

3 to 5 minutes

4. Mr. Nick Davis

Son of Mr. & Mrs. Davis

Testimony:

Mr. Davis will testify regarding the Davis Family farming operation, the Irrigated Lands General Order, efforts to secure individual coverage and enrollment in the East San Joaquin Coalition

Estimated Time:

3 to 5 minutes

DATED: October 24, 2014

Respectfully submitted,

BAKER MANOCK & JENSEN, PC

By: Loren J. Harlow

Loren J. Harlow
Attorneys for DAVID L. & LINDA M. DAVIS TRUST

DAVID L. & LINDA M. DAVIS TRUST

EVIDENCE LIST

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BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD FOR THE CENTRAL VALLEY REGION

In the Matter of: Consideration of Administrative Civil Liability, David L.& Linda M. Davis Trust	**DAVID L. & LINDA M. DAVIS TRUST** **EVIDENCE LIST**

EVIDENCE LIST

1. Declaration of Mr. Brian Davis.

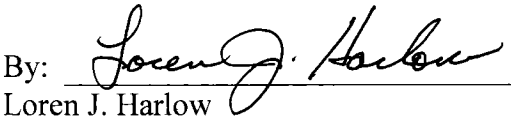
EVIDENCE BY REFERENCE

1. California Water Code
2. State Water Resources Control Board, Enforcement Policy
3. Prosecution Team Evidence List
4. *In the Matter of Joe Enos, Antonio and Maria Brasil Living Trust, Five Star Dairy # 2, Stanislaus County* (ACL Complaint R5-2011-0552)
5. *In the Matter of Johnnie L., Bruce A. and John L. Fagundes, Fagundes Agribusiness Dairy, Kings County* (ACL Compliant R5-2011-0558)

DATED: October 24, 2014

Respectfully submitted,

BAKER MANOCK & JENSEN, PC

By: 
Loren J. Harlow
Attorneys for DAVID L. & LINDA M. DAVIS

DAVID L. & LINDA M. DAVIS TRUST BRIEF REGARDING CONSIDERATION OF ADMINISTRATIVE CIVIL LIABILITY

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Attorneys for David L.& Linda M. Davis Trust

BEFORE THE CALIFORNIA REGIONAL WATER QUALITY

CONTROL BOARD FOR THE CENTRAL VALLEY REGION

In the Matter of: Consideration of Administrative Civil Liability, David L & Linda M. Davis Trust	**DAVID L. & LINDA M. DAVIS TRUST BRIEF REGARDING CONSIDERATION OF ADMINISTRATIVE CIVIL LIABILITY**

We are counsel to the David L. & Linda M. Davis Trust and David L. and Linda M. Davis, as Trustees, (Davis) and on their behalf are submitting the following comments on the noticed hearing to consider the issuance of an Administrative Civil Liability (ACL).

I.
INTRODUCTION

The primary issue at hand is application of California Water Code (CWC) Section 13327 and the State Board *Enforcement Policy* (Enforcement Policy) by the California Regional Water Quality Control Board, Central Valley Region (Board) for the late filing of a Notice of Intent by the Davis to join the East Side San Joaquin Coalition (Coalition).

In a July 11, 2014 Advisory Team letter, the question was raised whether or not the proposed assessments in a prior settlement agreement were sufficient "to deter similarly-situated dischargers from engaging in identical conduct that would seriously threaten the integrity of one of the Board's most important regulatory programs". [1]

The most recent Settlement Agreement, R5-2014-0548, although rejected by the

[1] Prosecution Team Exhibit 21

Advisory Team in order to seek guidance by the Board, contained a penalty amount that should be a significant deterrent to other growers covered by the Irrigated Lands Regulatory Program. The Prosecution Team applied the *Enforcement Policy* and the recommended penalty assessment as applied to Davis is the maximum penalty that should be imposed and based upon the facts as described herein should be significantly less.

II.
FACTUAL BACKGROUND

Davis is a family operated farming operation growing both grapes and almonds in Madera County, California.[2]

Davis implements water conservation measures and by the Spring of 2015 more than 85% of its acreage will be by micro-irritation techniques. All irrigation delivery systems have flow meters to monitor irrigation use and efficiencies. No irrigation tail water or runoff leaves Davis's properties[3].

Davis works with numerous consultants and other advisors to monitor plant tissue, soil and ground water nitrate levels to manage and control nutrient or fertilizer application.[4]

It was Davis' understanding that Growers had the option of either enrolling in the Coalition or performing the required monitoring as an individual[5].

As a result, Davis began testing its ground water wells to gain a general knowledge of representative ground water quality. By February 2014, Davis had tested 95% of all of its wells and obtained representative soil samples pursuant to the Board's monitoring requirements. The analytical results of both soils and ground water were reviewed Davis' private third party laboratory, Agronomist and PCA to develop a farm management plan. Davis requested assistance from its consultants to submit its findings to the Board to comply with the Individual General

[2] B. Davis Declaration ¶ 2

[3] Id ¶ 3

[4] Id ¶ 4

[5] Id ¶ 5

Order.[6]

Davis sought guidance from Board staff to determine how to self report the data; however, it was discouraged by the ambiguities, higher fees and potential greater scrutiny as an individual.[7]

Although Davis received multiple letters from the Board staff, it believed it was acting in good faith in collecting data in an attempt to meet the Board's requirements. Compilation of the data and individual reporting as an individual grower was confusing and resulted in its indecision on how to proceed[8].

Davis filed an Electric Notice of Intent (eNOI) to obtain Regulatory Coverage and Comply with Order No. R5-201-0116 and paid the appropriate administrative fee on June 1. 2014[9] after receipt of the May 10, 2014 ACL Complaint, R5-2014-0501. The Coalition, on June 3, 2014, confirmed regulatory coverage for the Davis properties. [10]

On June 12, 2014, Davis executed a waiver of hearing and submitted payment of the proposed settlement amount.[11] During the 30 day comment period, the Coalition objected to multiple ACL complaints including that of member Davis[12]. The Advisory Team rejected the proposed waiver of hearing and ACL settlement agreement and instructed the Prosecution to reevaluate the penalty calculation.

On August 28, 2014, Davis agreed without admitting any violation of law or fact to a Settlement Agreement and Stipulation for Entry of ACL Order, Order R5-2014-0548 based upon a re-evaluation and calculation of the proposed settlement amount pursuant to the Advisory Team letter[13].

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[6] Id at ¶¶5,6 &7

[7] Id ¶ 8

[8] Id ¶ 9

[9] Prosecution Team Exhibit 13

[10] Prosecution Team Exhibit 16, B. Davis Declaration 10

[11] Prosecution Exhibit 19

[12] Prosecution Exhibit 18.

[13] Prosecution Exhibit 22

On September 26, 2014, the Advisory Team after consultation with the Board Chair, rejected the revised Settlement Agreement and instructed the Prosecution Team to schedule the matter for Board consideration.[14]

III.
LEGAL BACKGROUND

The Water Code in Section 13261 (a) and (b)(1) provides the authority for the Board to issue administrative liability for failure to file a report. Section 13261 (a) and (b) are as follows:

> (a) *A person who fails to furnish a report or pay a fee under Section 13260 when so requested by a regional board is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b). (Emphasis Added)*
>
> *(b)(1) Civil liability may be administratively imposed by a regional or the state board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount not exceeding one thousand dollars ($1,000) for each day in which the violation occurs. Civil liability shall not be imposed by the regional board pursuant to this section if the state board has imposed liability against the same person for the same violation.*

The Water Code in Section 13327 provides the criteria for the Board to consider in determining the amount of any civil liability for failure to comply with CWC 13261 (a). Section 13327 is as follows:

> "In determining the amount of civil liability, the regional board, and the state board upon review of any order pursuant to Section 13320, shall take into consideration the nature, circumstance, extent, and gravity of the violation or violation, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of volitions, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.

IV.
LEGAL ANALYSIS:

The proposed penalty consideration by the Board is based upon CWC Section

[14] Prosecution Exhibit 35

13261 (a) and (b)(1) for failing to furnish a report when requested by Regional Board and is not a *discharge violation.*

The State Water Resources Control Board adopted the Water Quality Enforcement Policy (Enforcement Policy) on May 20, 2010 to provide guidance in determining penalty assessments pursuant to California Water Code Section 13327. The Enforcement Policy in *Section VI, Monetary Assessments in Administrative Civil Liability (ACL) Actions* provides a *Penalty Calculation Methodology.*

The *Penalty Calculation Methodology* (Methodology) contains a complex array of factors to consider when determining the appropriate penalty amount. In non discharge violations such as the failure to submit reports, an *Initial Penalty Assessment* is determined by calculating the total number of days reports are late and utilizing Table 3 factors that are determined from discretionary categories defined as *Potential for Harm* and *Deviation from Requirements* to determine the number of days that are subject to the statutory maximum penalty of $1,000/day.

The *Initial Penalty Assessment* is modified by other various discretionary adjustment factors such as: *Conduct Factors; Multiple Violations from the Same Incident; and Multiple Day Violations* to calculate a *Total Base Liability Amount.*

The Methodology utilizes a ten step process to determine the final liability amount. Since the issue before the Board is the failure to submit reports, a non discharge violation, the process commences at Step 3 and continues through Step 10 to determine a final liability.

The following analysis uses the Methodology to demonstrate the application of the Enforcement Policy as applied to Davis.

A. Enforcement Policy Penalty Calculation Methodology Analysis

1. Steps 3 through 5

As described above, steps 3 though 5 contain a complex array of factors to consider when determining the appropriate penalty. Steps 3 through 5 include various discretionary adjustment factors such as: Conduct Factors and Multiple Day Violations.

a. Step 3. Per Day Assessment for Non-discharge Violations

The Prosecution analysis concludes that the "Per Day Factor" pursuant to Table 3 of the Enforcement Policy should be 0.4 due to a major deviation from requirements category and a moderate potential for harm. The analysis concluded that the deviation was major since the irrigated lands program is ineffective when growers do not seek coverage. Since considerable discretion is afforded within the Enforcement Policy, the value is within a reasonable range of interpretation.

b. Step 4. Adjustment Factors

Table 4 of the Enforcement Policy identifies three conduct factors for adjusting the per day assessment based upon factors including Culpability, Cleanup and Cooperation, and History of Violations. The Prosecution Team in making its factor assessment were not aware of the mitigating factors as detailed in Brian Davis's Declaration. The following evaluation contains considers additional information unavailable to the Prosecution Team.

> **i.** *Culpability.* The Prosecution Team assigned a factor of 1.3 for willful and intentional failure to file reports. Davis failure was at worst inadvertent or negligent. Davis had sought advice of experts on how to file data individually and became confused although it acted in good faith to obtain the monitoring required under the individual order. A culpability factor of 1.1 would enhance the assessment but recognize Davis's efforts.
>
> **ii.** *Cleanup and Cooperation.* The Prosecution Team assigned a score of 1.1 based upon its perceived lack of cooperation in getting regulatory coverage. Davis has paid all fees to the Coalition including "late fees" to ensure it did not obtain a economic benefit from joining late and completed the Farm Evaluation Template. Davis on two separate occasions waived its right to a hearing to resolve the proposed penalty assessments. A neutral score of 1.0 would be appropriate.
>
> **iii.** *History of Violations.* Davis concurs with the Prosecution Team that it has no prior history of violations and a neutral score of 1.0 is appropriate.
>
> **iv.** *Multiple Day Violations.* Davis concurs with the Prosecution Team that calculated days (16) is an appropriate since Davis did not have an economic benefit that could be measured on a daily basis.

In a July 11, 2014 letter, the Advisory Team questioned the reduction of the days due to the "daily detrimental impacts to the environment or the regulatory program by the non-

participation of the not only the named violators but of the many other similarly situated parties, does result in daily detrimental impacts".[15] The imposition of civil penalties must be determined based upon the conduct of the individual discharger's conduct pursuant to the factors contained within CWC 13327.

c. Step 5. Determination of Total Base Liability Amount.

The total base liability amount = $1,000 X 0.4 (Step 3 per day assessment) X 1.1 (Step 4, Culpability) X 1.0 (Step 4, Cooperation) X 1.0 (Step 4, History of Violations) X 16 (Step 4, Multiple Day calculations) = **$7,040**

2. Step 6: Ability to Pay and Continue in Business

The Enforcement Policy at Page 19 states:

> "It *is in the public interest for discharger to continue in business and bring its operation into compliance. If there is strong evidence that an ACL would hardship to the population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay."*

Davis has previously submitted payment of $8,600 on June 12, 2014 and does not dispute its ability to pay the assessment proposed by Prosecution Team.

3. Step 7. Other Factors as Justice May Require:

The Enforcement Policy at page 19 identifies three examples of circumstances warranting an adjustment to the penalty calculations:

> *"a. The discharger has provided or Water Board staff has identified, other pertinent information not previously considered that a higher of lower amount is justified.*
>
> *b. A consideration of issues of environmental justice indicates the amount would have an impropriate impact on a particular disadvantaged group.*
>
> *c. The calculated amount is entirely disproportionate to assessment for similar conduct made in the recent past using the same Enforcement Policy."*

Many of the concerns identified by the Advisory Team regarding e.g., integrity of the program, whether the grower has joined a Coalition or the proposed penalty will not be simply

[15] Prosecution Exhibit 21 at page 2

the cost of doing business[16] is appropriately addressed in item a.

a. Information Not Previously Considered in applying adjustment factors for Davis

As noted above, Davis has filed a notice of intent, joined the Coalition and waived the right to a hearing and has paid the initial penalty assessment. Although, initially late Davis has cooperated with the Prosecution Team and has complied with Board directives.

b. The calculated amount is entirely disproportionate to assessment for similar conduct made in the recent past using the same Enforcement Policy.

The October 17, 2014 Prosecution Team's Policy Statement indicates a lack of prior cases or precedence in utilizing the Enforcement Policy. The Board has considered many civil liability complaints in an analogous situations such as Agricultural dischargers covered under the Dairy General Order. Although the complaints were issued for failure to submit reports pursuant to CWC Section 13267, the maximum Civil Liability amount pursuant to CWC Section 13268 (b)(1) is $1,000 per day. The Waste Management Plans and Annual Reports are integral to success of the entire Dairy General Order and protection of water quality.

This Board has previously settle ACL's for failure to submit reports. The following are examples of two complaints and settlements.

In the Matter of Joe Enos, Antonio and Maria Brasil Living Trust, Five Star Dairy # 2, Stanislaus County (ACL Complaint R5-2011-0552)

Under requirements of the Central Valley Regional Board, two separate and unrelated reports were to be submitted: a Waste Management Plan and an Annual Report detailing the prior year's activities.

The two reports were each 318 days late or a total of 616 days. The maximum combined penalty was $616,000. A proposed ACL penalty was issued for $11,400.

The proposed ACL complaint was settled for **$1,037.50**.

[16] Prosecution Exhibit 21 at page 2 &3

In the Matter of Johnnie L., Bruce A. and John L. Fagundes, Fagundes Agribusiness Dairy, Kings County (ACL Compliant R5-2011-0558

Under requirements of the Central Valley Regional Board, three separate and unrelated reports were to be submitted: a Waste Management Plan, an Annual Report and a Groundwater Monitoring Well Installation and Sampling Plan (MWISP) Report.

The Annual Report was late 308 days. The Waste Management Plan was late by 308 days. The MWISP report was 217 days late. The total number of days late was 833.

The maximum combined penalty was $833,000. A proposed ACL penalty was issued for $15,300.

The proposed ACL complaint was settled for **$7,200**.

The Total Base Liability as calculated by Davis falls within the range of other ACLs issued and resolved by the Board for failure to submit reports. Davis has joined the Coalition and completed its Farm Evaluation Template and operates an efficient farming operation.

4. Step 8. Economic Benefit.

The Enforcement Policy defines economic benefit as any savings or monetary gain derived by any act or omission that constitutes the violation. Davis has joined the Coalition, paid current and past fees and completed the Farm Evaluation Template. Any economic benefit Davis received was de minimis.

5. Step 9. Maximum and Minimum Liability Amounts.

CWC Section 13261 (b) (1) establishes the maximum liability for failure to submit reports when requested by the Board. However, the Minimum Liability cannot be below the economic benefit plus 10% unless specific findings are made.

Since the economic benefit Davis received was minimal or de-minimis, there is no minimum liability amount.

6. Step 10- Final Liability Amount

The final liability amount consists of the added amounts for each violation, with

any allowed adjustments. As described above, the Final Liability Amount as applied to Davis was calculated to be $7,040.

V.
CONCLUSION

In summary, Davis believes that the penalty proposed by the Prosecution Team for late filing of reports is the maximum assessment that should be imposed. In application of the Enforcement Penalty Methodology as applied to Davis the calculated penalty amount is $7,040. Davis has cooperated with the Prosecution Team and submitted all the required reports, joined the Coalition and has complied with the Board's directives. This ACL should be a significant deterrent to other growers. In addition, The Board has discretion under CWC 13327 and the Enforcement Policy, including Step 7. *Other Factors As Justice May Require* to individually evaluate growers or dischargers conduct to determine an appropriate penalty amount.

DATED: October 24, 2014

Respectfully submitted,

BAKER MANOCK & JENSEN, PC

By: Loren J. Harlow

Loren J. Harlow
Attorneys for David L.& Linda M. Davis Trust

DECLARATION OF BRIAN DAVIS

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Attorneys for David L. & Linda M. Davis Trust

BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD FOR THE CENTRAL VALLEY REGION

In the Matter of: Consideration of Administrative Civil Liability, David L. & Linda M. Davis Trust	**DECLARATION OF BRIAN DAVIS**

I, Brian Davis, declare the following:

1. I am the son of David and Linda Davis, I make this declaration regarding the Consideration of Administrative Civil Liability for the David L. & Linda M. Davis Trust (Davis). This declaration is based upon my personal knowledge and information and belief. If called upon to testify, I could and would competently testify to the matters contained herein.

2. Davis is a family operated farming business growing both grapes and almonds in Madera County, California.

3. Davis implements water conservation measures and no tail or runoff leaves its property. All irrigation delivery systems have flow meters to monitor water use and efficiency. By the Spring of 2015, 85 % of all the Davis acreage will have micro-irrigation techniques. For the last two years, a private third party consultant has monitored soil moisture probes to provide input for irrigation scheduling.

4. Davis works with multiple Pest Control Advisors (PCAs) and Certified Crop Advisors (CCAs) including family member Nick Davis (former PCA and CCA) to perform plant tissue analysis, soil and ground water nutrient levels to manage and control nutrient or fertilizer applications.

5. It was Davis's understanding that Growers had the option of either enrolling in the East San Joaquin Water Coalition (Coalition) or performing the required monitoring as an individual. Davis not only understands the importance of monitoring both soil and groundwater to ensure proper farming operations but also to protect water quality.

6. Although joining the Coalition appeared to be a simpler approach, Davis intended to collect and report the soil and ground water data as a individual grower since it would be more beneficial to assist it in being better stewards of the land.

7. In February 2013, Davis began testing its ground water wells to gain a general knowledge of representative ground water quality. By February 2014, Davis had tested 95% of all of its wells and obtained representative soil samples pursuant to Board monitoring requirements. The analytical results of both soils and ground water were reviewed by our private third party laboratory, our Agronomist and PCA to develop a farm management plan. Davis requested assistance from its consultants to submit its findings to the Board to comply with the Individual General Order.

8. In an attempt to seek guidance in reporting our data, I contacted Board staff to determine how to self report to the Board. I was discouraged from doing so and was made aware that Davis would be subject to higher fees and greater scrutiny by staff and the Coalition if Davis were to report as a individual.

9. Although Davis received multiple letters from the Board staff, Davis believed it was acting in good faith in collecting data in an attempt to meet the Board's requirements. Compilation of the data and individual reporting as an individual grower was confusing and resulted in our indecision on how to proceed.

10. Davis enrolled in the East San Joaquin Water Coalition in May 2014 and supports it efforts to coordinate monitoring reports and farm management practices. Davis has

completed its Farm Evaluation Template and will continue to perform self monitoring of its wells and soil characteristics to guide its stewardship of the land and water.

11. Davis operates a highly efficient farming operation. It practices water conservation measures and controls nitrogen application based upon plant requirements. Both practices recognized by the State Board's Agricultural Expert Panel as the most critical components of protecting water quality in farming operations.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed this 24 day of October, 2014 in Madera County, California

Brian Davis

BRIAN DAVIS, Declarant