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11 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
12 CENTRAL VALLEY REGION

13 In the Matter of: ) ADMINISTRATIVE CIVIL LIABILITY  
14 CALIFORNIA SPROUTS, LLC ) COMPLAINT R5-2014-0561  
15 )  
16 ) PROSECUTION'S REBUTTAL BRIEF  
17 )  
18 ) HEARING DATE: DECEMBER 4/5, 2014  
19 \_\_\_\_\_)

20 **I. INTRODUCTION**

21 Administrative Civil Liability Complaint R9-2014-0561 (Complaint) alleges that  
22 California Sprouts, LLC (Discharger), failed to submit seven required quarterly reports  
23 since November 1, 2012, and is thus subject to mandatory minimum penalties for 70  
24 serious violations pursuant to California Water Code sections 13385, subdivision (h)(1),  
25 and 13385.1.

26 The Discharger applied for coverage under the *Waste Discharge Requirements for*  
27 *Limited Threat Discharges of Treated/Untreated Groundwater from Cleanup Sites,*  
28 *Wastewater from Superchlorination Projects, and Other Limited Threat Wastewaters to*  
*Surface Water* (Limited Threat General Order) R5-2008-0082 (NPDES Permit No.  
CAG995002) (Exhibit 5). A Notice of Applicability was issued May 3, 2012 (Exh. 15), and  
a revised Notice of Applicability issued August 22, 2012 (Discharger's Exhibit A). A new  
Limited Threat General Order was adopted May 31, 2013 (Prosecution Rebuttal Exhibit  
60), and amended on June 6, 2014, Order R5-2013-0073-01 (NPDES Permit No.

1 CAG995002) (Exh. 19). The Discharger was automatically enrolled in the new permit  
2 and the amended permit (Pros. Rebut. Exh. 58 and 60).

3 The Complaint proposes imposing \$210,000 pursuant to Water Code section  
4 13385, subdivision (h)(1), which is the mandatory minimum penalty of \$3,000 per  
5 violation. Section 13385.1, subdivision (a)(1), explains the rule that each complete period  
6 of 30 days after the due date that a report is still not submitted is its own serious violation.  
7 (Pros. Rebut. Exh. 55.) Attachment A to the Complaint demonstrates how the seven  
8 missing reports became 70 violations because of the 30-day periods where the reports  
9 remained overdue.

10 The Discharger submitted its evidence and policy statements on November 4,  
11 2014. In the materials, the Discharger argues that the violations prior to January 1, 2014  
12 should be subject to the modified mandatory minimum penalty assessment available in  
13 Water Code section 13385.1, subdivision (b), even though the section sunset on January  
14 1, 2014 and thus is no longer law.

15 The Central Valley Water Board also received comment letters from the California  
16 League of Food Processors, the California Association of Sanitation Agencies, and  
17 Western Growers. Many of the comments overlap and are addressed in this brief.

18 This rebuttal brief by the Prosecution contends that the Discharger could not avail  
19 itself to the modified penalty assessment in section 13385.1, subdivision (b), because it  
20 received several notices and actual notice of the requirements to submit the reports prior  
21 to the provision's sunset (even though the Central Valley Regional Water Board does not  
22 have an affirmative duty to provide notice), and because the provision no longer exists in  
23 law. For these reasons, in conjunction with the Prosecution's case-in-chief, the Central  
24 Valley Regional Water Board should impose the full penalty proposed by the Complaint.

25 **II. SECTION 13385.1(b) MODIFIED PENALTY ASSESSMENT DOES NOT APPLY**  
26 **BECAUSE THE DISCHARGER RECEIVED SEVERAL NOTICES AND KNEW**  
27 **QUARTERLY REPORTS WERE DUE TO THE CENTRAL VALLEY WATER**  
28 **BOARD UNDER THE LIMITED THREAT GENERAL ORDER**

1 From January 1, 2011 through January 1, 2014, Water Code section 13385.1,  
2 subdivision (b), allowed for a modified mandatory minimum penalty assessment for late  
3 reports that were more than 30 days overdue if all the conditions in subdivision (b) were  
4 met. It removed the serious violations for each additional 30-day time period in which a  
5 report was not submitted. The subdivision required that (a) the discharger did not  
6 previously receive notice that monitoring reports were required (discussed below), (b)  
7 there were no effluent limitation violations for the period covered by the report, (c) the  
8 discharger files the missing report within 30 days of receiving written notice, and (d) the  
9 discharger pays all assessed penalties within 30 days after an order is issued.

10 The Prosecution Team does not dispute that there were no effluent limitation  
11 violations for the seven late reports, or that the Discharger has demonstrated good faith  
12 that it will pay the penalties within 30 days of the Central Valley Water Board issuing an  
13 order. However, the Discharger received several notices of the required quarterly  
14 monitoring reports prior to the Complaint, and the General Manager admitted he knew the  
15 quarterly reports were required; thus, the Discharger *was never eligible* to take advantage  
16 of the reduced penalties in section 13385.1, subdivision (b) because it could not satisfy  
17 the first requirement.

18 Section 13385.1, subdivision (b)(1)(A), contains the condition to employing  
19 13385.1(b) that the “discharger did not on any occasion previously receive . . . a complaint  
20 to impose liability . . . , a notice of violation for failure to timely file a discharge monitoring  
21 report, or a *notice of the obligation to file a discharge monitoring report required pursuant*  
22 *to Section 13383, in connection with its corresponding waste discharge requirements.*”

23 (Emphasis added.) The Prosecution Team does not dispute that the Complaint and the  
24 two notices of violation were not issued until after the provision sunset; the Board had no  
25 affirmative duty to issue either at any point in time. The Discharger’s claim that it received  
26 no communication with the Central Valley Water Board regarding its obligation to file  
27 reports is incomplete and misleading. Notice was provided through several  
28 communications over the course of the Discharger’s permit coverage, and General

1 Manager Daniel Sholl admitted he knew the Discharger was required to submit reports.<sup>1</sup>  
2 (Exh. 31, p. 1 of 3.)

3 **a. Limited Threat General Order R5-2008-0082 (NPDES CAG995002) Itself**  
4 **Contained Notice of the Required Quarterly Reports**

5 The Central Valley Water Board received the Discharger's application for coverage  
6 under Limited Threat General Order R5-2008-0082 on January 27, 2012. (Exh. 12-13.)  
7 Limited Threat General Order R5-2008-0082 requires dischargers to comply with the  
8 Standard Provisions in its Attachment D, and the Monitoring and Reporting Program in its  
9 Attachment E. (Exh. 5, pp. 23, 27.) The Monitoring and Reporting Program in  
10 Attachment E opens with citing Title 40 of the Code of Federal Regulations, section  
11 122.48 that requires reports. (*Id.*, p. E-2.) The Monitoring and Reporting Program clearly  
12 states that monitoring results "shall be reported." (*Id.*) The specific reporting  
13 requirements are explained in detail in Section X of the Monitoring and Reporting Program  
14 and include Subsection B, Self Monitoring Reports (SMRs) where dischargers are advised  
15 that either the State Water Resources Control Board (State Board) or the Central Valley  
16 Water Board may at any time start requiring the reports to be submitted electronically on  
17 the California Integrated Water Quality System (CIWQS). (*Id.*, pp. E-12 to E-15.)  
18 Subsection B.1. specifically states that "[u]ntil such notification is given, each Discharger  
19 shall submit hard copy SMRs." (*Id.*, p. E-13.) Subsection B.2. goes on to state that

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21 <sup>1</sup> It is important to note that the Discharger also failed to adequately submit its reports under its prior Waste  
22 Discharge Requirements, Order R5-2005-0035. The August 11, 2010 Notice of Violation, addressed to Mr.  
23 Dan Sholl, identified the Discharger's failure to timely submit three quarterly reports and one annual report  
from 2008 to 2010. (Exh. 3.) This demonstrates a history of violations of the same nature as those alleged  
in the Complaint, and prior notice that quarterly and annual reports were due under the previous order.

24 Similarly, though the Discharger's Submission of Evidence and Policy Statement claims that the Discharger  
25 "has taken significant steps to improve its internal processes to ensure that all self-monitoring reports are  
26 timely filed" (p. 4), the Discharger's second quarter report for 2014 was due on August 1, but was not  
27 received until August 4, 2014, and it was incomplete. Flow data was reported as total flow, and pH as an  
average over the sample period; the Monitoring and Reporting Program (R5-2013-0073-01) states that flow  
and pH have 1/day sampling requirements. The Discharger responded August 15, 2014 with the additional  
required information. (Pros. Rebut. Exh. 61.)

1 dischargers shall submit quarterly reports containing monitoring results. (*Id.*) At the end  
2 of the Monitoring and Reporting Program, it contains directions on how to submit the  
3 reports, specifically to the Central Valley Water Board's physical address. (*Id.*, E-15.)

4 The Order is not ambiguous with its reporting requirements and clearly directs  
5 dischargers to submit hard copy quarterly reports to the Central Valley Water Board.

6 **b. eSMR Training Follow Up Electronic Correspondence Provided**  
7 **Additional Notice Outside of Typical Permit Correspondence.**

8 A month after the Discharger's coverage under the Limited Threat General Order  
9 Permit began, on February 24, 2012, Central Valley Water Board staff member Mr. Lucio  
10 Orellana sent General Manager Dan Sholl an e-mail message (to [dsholl@calsprouts.com](mailto:dsholl@calsprouts.com))  
11 following up after the eSMR (Electronic Self-Monitoring Report) training that Mr. Sholl  
12 attended. (Exh. 14.) This correspondence was obviously separate from the routine  
13 document flow for obtaining permit coverage. The message stated:

14 As we discussed during the training, you will continue to  
15 submit paper monitoring reports until you have been notified  
16 by staff that you have successfully transitions to electronic  
17 reports only. Because Pacific Coast Sprouts is only required  
18 to submit quarterly monitoring reports, beginning with the First  
19 Quarter 2012 quarterly SMR, due April 1, you are expected to  
20 submit SMRs both as a paper report and through eSMR.  
(Exh. 14, p.1.)

21 The list of reminders in the message started with "You must submit both a paper SMR  
22 and an eSMR." (*Id.*)

23 This correspondence completely separate from the general documents issued  
24 regarding permit coverage clearly informs the Discharger it is required to continue to  
25 submit hard copy quarterly reports to the Central Valley Water Board. The message is  
26 unequivocal in requiring hard copy submissions, just as the permit itself is unambiguous.

27 This e-mail message provided clear notice to the Discharger that it was obligated to  
28 provide hard copy quarterly reports to the Central Valley Water Board. This notice  
disqualifies the Discharger from employing the modified penalty assessment provided in

1 Water Code section 13385.1(b)(1)(A). Even if this provision were still an active law, the  
2 Discharger is ineligible to receive the modified penalty assessment.

3 **c. Notice of Applicability Provided Specific Notice of the Reporting**  
4 **Requirements**

5 The Discharger again received clear direction to submit quarterly self-monitoring  
6 reports in its Notice of Applicability, dated May 3, 2012.<sup>2,3</sup> (Exh. 15.) The very first page  
7 states, "The Limited Threat General Order prescribes mandatory discharge monitoring  
8 and reporting requirements." (*Id.*, p.1.) More notice to provide reports is given in the  
9 Monitoring and Reporting section that states:

10 Monitoring reports shall be submitted to the Central Valley  
11 Water Board on a quarterly basis, and shall begin with the third  
12 Quarter 2013 self-monitoring report (due by 1 November  
13 2012), which will include monitoring required as of the effective  
14 date of this NOA. Quarterly self-monitoring reports must be  
15 submitted until your coverage is formally terminated in  
accordance with the Limited Threat General Order, even if  
there is no discharge or receiving water flow during the  
reporting quarter. (*Id.*, p.3.)

16 The Notice of Applicability goes on to advise the Discharger that it could face  
17 mandatory minimum penalties of \$3,000 each, including for submitting late monitoring  
18 reports, and directs the Discharger to submit all report submittals and questions to Mr.  
19 Lucio Orellana. (*Id.*, p.4.)

22 <sup>2</sup> Note the first late report was due November 1, 2012, six months after the issuance of this Notice of  
23 Applicability.

24 <sup>3</sup> In its Submission of Evidence and Policy Statement, the Discharger claims that monitoring was to begin  
25 July 1, 2012 with the first report due November 1, 2012. This is in error. The Notice of Applicability states  
26 that:

25 The Limited Threat General Order shall become effective on 7 June 2012,  
26 when the existing individual NPDES permit for the Facility, Order R5-2005-  
27 0034 (NPDES No. CA0082961, originally issued to Pacific Coast Sprouts  
28 Farm) is rescinded by a separate action of the Central Valley Water Board  
at its regularly scheduled Board meeting. The second Quarter 2012  
monitoring report required by Order R5-2005-0034 shall contain monitoring  
results through 7 June 2012, and is due by 1 August 2012. (Exh. 15, p. 1.)

1           Once again, the Discharger was provided notice separate from the Limited Threat  
2 General Order itself of its obligation to submit monitoring reports and that it could face the  
3 very same mandatory minimum penalties now recommended before the Central Valley  
4 Water Board. Section 13385.1(b) does not apply since the Discharger received several  
5 notices of its reporting obligations.

6                           **d. Central Valley Water Board Adopted New Limited Threat General Order**  
7                           **in Which the Entire Process Provided Several Notices to the**  
8                           **Discharger**

9           The Discharger received additional reminders of its permit coverage when the  
10 Central Valley Water Board went through the process of adopting a new version of the  
11 Limited Threat General Order, R5-2013-0073, and its amendment the following year, R5-  
12 2013-0073-01. (Pros. Rebut. Exh. 56, and Exh. 19.) The Central Valley Water Board  
13 staff was quite diligent in its communications with the Discharger the entire duration of its  
14 permit coverage.

15                           **i. Notice of Public Hearing for Limited Threat General Order Permit**  
16                           **Renewal**

17           The first communication for the new permit adoption process was the Notice of  
18 Public Hearing and Proposed Water Discharge Requirements for the Limited Threat  
19 General Order issued on March 7, 2013. It contained a link to the proposed permit and  
20 welcomed comments or recommendations. (Pros. Rebut. Exh. 56.)

21                           **ii. Notice of Adoption**

22           The next letter was issued June 10, 2013, informing the Discharger that R5-2013-  
23 0073 was adopted by the Board at its May 31, 2013 hearing. It requested the Discharger  
24 to “[p]lease review the Order carefully to ensure that you understand all aspects of the  
25 waste discharge requirements.” (Pros. Rebut. Exh. 57.) The letter repeated the  
26 directions that monitoring reports were required quarterly, even if there was no discharge,  
27 and that Mr. Orellana was the compliance and enforcement contact for dischargers in  
28 Sacramento County. (*Id.*, p. 2.) Here is additional notice to the Discharger that it was

1 required to submit quarterly monitoring reports, supporting the Discharger's ineligibility to  
2 seek modified penalty assessment under Water Code section 13385.1(b).

3 **iii. Automatic Coverage Under New Order, R5-2013-0073**

4 The Discharger was sent another letter on July 18, 2013 indicating the Discharger  
5 was automatically enrolled in the new order, R5-2013-0073. It identified three major  
6 changes to the permit, none of which related to reporting. The letter again contained a  
7 link to the new general order, and Mr. Orellana's contact information for any questions  
8 about reports. (Pros. Rebut. Exh. 58.)

9 In considering the timeline of events, it is important to note that all six cited notices  
10 of permit obligations up through this point occurred *before* January 1, 2014, when section  
11 13385.1, subdivision (b), sunset. The Discharger had ample notice during the time the  
12 modified penalty assessment provision was in effect, supporting the contention that the  
13 Discharger fails to meet the no notice condition. Even at the time the provision was in  
14 effect, the Discharger was not able to avail itself of the modified penalty assessment  
15 provision.

16 **iv. Notice of Public Hearing for Tentative Order Amending the**  
17 **Limited Threat General Order**

18 The next communication was the Notice of Public Hearing and Tentative Order  
19 Amending the Limited Threat General Order issued on April 7, 2014.<sup>4</sup> It again contained a  
20 link to the proposed permit and welcomed comments or recommendations. (Pros. Rebut.  
21 Exh. 59.)

22 **v. Order R5-2014-0080 Amending Limited Threat General Order R5-**  
23 **2013-0073**

24 The April 7, 2014 documents linked to the Notice of Public hearing included Order  
25 R5-2014-0080 amending R5-2013-0073, and its Attachment A, a redline version showing  
26

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27 <sup>4</sup> The last quarterly report submitted late alleged in the Complaint was the 1<sup>st</sup> Quarter 2014 self-monitoring  
28 report due May 1, 2014.

1 the amendments to the Limited Threat General Order. (Pros. Rebut. Exh. 60.)  
2 Amendments include that dischargers were automatically covered under the permit, and  
3 explicitly stated that dischargers were responsible for submitting monitoring reports until  
4 they receive a Notice of Termination. (*Id.*, Attachment A, pp. 5-6.) The proposed  
5 amended order contained all the previous language regarding requiring monitoring  
6 reports, again citing the Code of Federal Regulations, Standard Provisions for reporting,  
7 and enforcement advisement. (*Id.*, pp. 12, 30, D-6 to D-10, E-2.) The Monitoring and  
8 Reporting Program was slightly amended to state even more clearly that “[i]f no  
9 discharge occurred during the reporting quarter, the monitoring report must still be  
10 submitted and shall document that there was no discharge.” (Underline contained in  
11 original redline document.) (*Id.*, p. E-15.) Finally, the Monitoring and Reporting Program  
12 required that the self-monitoring reports be submitted to the Central Valley Water Board’s  
13 physical address.

14 The amendment process creating Limited Threat General Order R5-2013-0073-01  
15 provided additional notice to the Discharger that it was still obligated to submit hard copy  
16 quarterly monitoring reports to the Central Valley Water Board. Even after the modified  
17 penalty assessment provision had sunset, the Discharger was notified of its reporting  
18 requirements.

19 The next correspondence from the Central Valley Water Board was the June 4,  
20 2014 e-mail to Mr. Sholl identifying the seven missing reports. (Exh. 23.) The seven  
21 missing reports were submitted June 9, 2014. (Exh. 25, p.2.) On July 25, 2014, Board  
22 staff issued two letters to the Discharger with the subjects “Self-Monitoring Report  
23 Reviews and Notice of Violation, California Sprouts, LLC, Sacramento, Sacramento  
24 County” and “Notice of Violation and Draft Record of Violations for Assessing Mandatory  
25 Minimum Penalties, California Sprouts, LLC, Sacramento, Sacramento County.” (Exhs.  
26 26, 27.) After several discussions and a meeting, the Complaint was issued September 8,  
27 2014. (Exh. 32.)

1                   **e. The Discharger had Actual Notice of its Obligation to Submit Quarterly**  
2                   **Self-Monitoring Reports**

3                   Prosecution staff issued to the Discharger a Notice of Violation for the seven  
4                   missing reports on July 25, 2014. (Exh. 27.) On August 20, 2014, Mr. Dan Sholl, General  
5                   Manager for the Discharger, sent a letter to Mr. Orellana via e-mail in response. (Exh.  
6                   31.) In it, Mr. Sholl explains that in 2012, he originally tried to submit the quarterly self-  
7                   monitoring reports through the CIWQS system. He then states:

8                                 After repeated failures, I, as General Manager of California  
9                                 Sprouts, must admit that I lost track of the responsibility to  
10                                follow up with Central Valley Regional Water Quality Control  
11                                Board (Central Valley Water Board) staff, and ultimately failed  
12                                to send in written Self-Monitoring Reports (SMRs) per the  
13                                order. (*Id.*, p. 1 of 3.)

14                   This evidences that the general manager for the Discharger *had actual notice since 2012*  
15                   that the Discharger was obligated to submit quarterly self-monitoring reports. This  
16                   statement is corroborated by the e-mail message Mr. Orellana sent to Mr. Sholl after the  
17                   eSMR training, along with all the other correspondence discussed earlier in this section.

18                   Both the Discharger's Notice of Violation response (*Id.*) and its Submission of  
19                   Evidence and Policy Statement (p. 4) describe that Mr. Sholl attempted to submit reports  
20                   via CIWQS. Enforcement staff contacted Ms. Jarma Bennett at the State Board to  
21                   determine to what extent the Discharger could access CIWQS to submit their reports. Ms.  
22                   Bennett is a Senior Water Resources Control Engineer for the Office of Information  
23                   Management and Analysis. Part of her duties includes managing the CIWQS system.

24                   Ms. Bennett explained that the while the Discharger would be able to log into the  
25                   CIWQS program, it would only be able to see that a self-monitoring report was due. The  
26                   Limited Threat permit is set up for "Level II" reporting, which means paper reports must be  
27                   sent to the Central Valley Water Board. The Discharger would not see a link to submit the  
28                   report as one would under a "Level I" permit set up to received electronic submittals. Ms.  
29                   Bennett prepared computer screen shots to demonstrate, included in Prosecution

1 Rebuttal Exhibit 62. Contact information for the CIWQS helpdesk is available through the  
2 "Contract Us" link from the CIWQS login webpage.

3 The Discharger had both the CIWQS helpdesk and Mr. Orellana available to assist  
4 with any difficulty with CIWQS. There is no evidence indicating Mr. Sholl contacted either  
5 resource for assistance.

6 In its Exhibit D, the Discharger included Senate Bill 1284 (Ducheny) Senate Third  
7 Reading analysis. In the fourth comment, it explains that the bill proponents have cited  
8 the Pico Water District case. In the Pico Water District case, because the District  
9 changed management, it was unaware of the requirement to submit reports. (Exh. D, SB  
10 1284 Senate Third Reading, p. 2.) That is completely opposite of the present situation.  
11 Mr. Sholl has been the contact person the entire duration of permit coverage, and he had  
12 actual knowledge before, during, and after the period the alleged violations occurred of  
13 the Discharger's obligations to file quarterly reports.

14 Discharger's Exhibit D explains that Senate Bill 1284 was for a narrow set of  
15 circumstances, and was never intended to permanently change the law. The matter  
16 presently before the Central Valley Water Board contains a very different set of  
17 circumstances, and the provision has sunset. Section 13385.1(b) is moot.

18 **f. Notice Condition Summary**

19 In comparing the time lines between all the notices provided to the Discharger  
20 about the reporting requirements under the Limited Threat General Order, when the  
21 Discharger accrued violations for failing to submit its quarterly reports, and Mr. Sholl's  
22 admission, it is unreasonable to conclude that the Discharger did not have notice of its  
23 obligation to file the reports. During the time that the Discharger failed to submit its  
24 reports (November 1, 2012 through May 1, 2014), the Limited Threat General Order went  
25 through both renewal and amendment processes; it was not a stagnant permit sitting on  
26 the proverbial shelf. This was not a case of issuing a permit and never contacting the  
27 discharger again, letting it figure out this regulatory path by itself. The Central Valley  
28 Water Board staff was diligent in educating its dischargers, seeking their input, and in

1 keeping in continuous communication. Even before the first quarterly report was due,  
2 staff made certain the Discharger was aware of its obligations not only in the Limited  
3 Threat General Order itself, but also through a subsequent e-mail and the Notice of  
4 Applicability in attempt to prevent any violations from ever occurring.

5 Having received ample notice via correspondence and actual notice throughout the  
6 period of the violations, the Discharger is thus not eligible for the modified mandatory  
7 minimum penalty assessment that were provided in Water Code section 13385.1(b) prior  
8 to January 1, 2014.

9  
10 **III. IT IS THE DISCHARGER'S OBLIGATION TO COMPLY WITH ITS PERMIT; THE**  
11 **SUNSET PROVISION WAS ADDED TO CONTINUE INCENTIVISING**  
12 **DISCHARGERS TO SUBMIT MONITORING REPORTS**

13 A continuous theme stated throughout all of the Discharger's Submission of  
14 Evidence and Policy Statement, its response to the Notice of Violation, and the comment  
15 letters is that a discharger is ultimately responsible for knowing its obligations under the  
16 permit including submitting its quarterly self-monitoring reports. In the Discharger's  
17 Exhibit D, Senate Committee on Environmental Quality bill analysis for SB 1284 (page 4)  
18 it states that "[i]t is the district's responsibility to know and understand all of the provisions  
19 of its permit." It goes on to describe a purpose of the bill is to reduce penalties when  
20 "inadvertent mistakes" are made and the Regional Boards do not catch them in a timely  
21 manner. In this case, the Discharger's failure to submit its quarterly reports was not an  
22 inadvertent mistake; rather, it was the Discharger's admitted lack of following through with  
23 a known requirement. (Exh. 31, p.1 of 3.) The Discharger is ultimately the party  
24 responsible for complying with the Limited Threat General Order.

25 On the first page of their comment letters, both California League of Food  
26 Processors and Western Growers state: "...we recognize that the discharger is ultimately  
27 responsible for submitting discharge monitoring reports,...." The California Association of  
28 Sanitation Agencies (CASA) states that "CASA recognizes that the discharger is

1 ultimately responsible for the timely submittal of self-monitoring reports, and that failure to  
2 do so is an enforceable violation.” (Page 2.)

3 It is incontrovertible that the Discharger is ultimately responsible for submitting its  
4 quarterly reports to the Central Valley Water Board on time.

5 In Discharger’s Exhibit D, State Board and California Environmental Protection  
6 Agency Enrolled Bill Report for Senate Bill 1284, page 5, the analysis explains the  
7 purpose of the sunset provision.

8 Additionally, this provision of the bill will sunset on January 1,  
9 2014. The sunset date to this provision allows for the  
10 continued incentive for dischargers to submit monitoring  
11 reports and continues to appropriately place the burden on the  
12 dischargers, rather than the Regional Water Boards, for  
submitting such reports in a timely manner by retaining MMPs  
for failing to file a report.

13 The intent was to continue to keep the dischargers responsible to submit their  
14 reports. This is consistent with the contention that the modified penalty assessment  
15 provision should not be applied retroactively in that it expired January 1, 2014 and should  
16 no longer be used as active law.

17 The Discharger is seeking to reduce its penalties by using a provision of law that is  
18 no longer valid. As stated above, Water Code section 13385.1, subdivision (b), was  
19 effective from January 1, 2011 through January 1, 2014.<sup>5</sup> Section 13385.1, subdivision  
20 (b)(4) clearly states, “This subdivision shall become inoperative on January 1, 2014.” This  
21 is what is commonly called a sunset provision by the state legislature.

22 The statute on its face is defunct as of January 1, 2014. There is no discussion of  
23 allowing future cases not yet commenced to employ this subdivision after its expiration.  
24 The Legislature clearly stated that the statute was inoperative as of January 1, 2014;  
25 there is no indication that the Central Valley Water Board may now retroactively apply the  
26 statute in an active enforcement case before the Board. (See Discharger’s Evidence

27 \_\_\_\_\_  
28 <sup>5</sup> A copy of the entire Water Code section 13385.1 is provided in Prosecution Rebuttal Exhibit 55.

1 Submission and Policy Statement, page 7; see also *Rio Linda Union School District v.*  
2 *Workers Compensation Appeals Board* (2005) 131 Cal.App.4th 517.)

3 The present matter is procedurally different from the case Discharger relies upon,  
4 *As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431 (*As You Sow*). In *As You*  
5 *Sow*, a regulation was repealed after a case was initiated in court. Here, the law to be  
6 applied to the matter should be the law in place at the time the Complaint was issued.  
7 Thus, the Discharger may not avail itself of the reduced penalties in Water Code section  
8 13385.1(b) since they no longer exist, consistent with why the sunset provision was  
9 incorporated into the subdivision.

#### 10 **IV. LOW THREAT GENERAL ORDER PROGRAM INFORMATION**

11 In response to the Discharger's claims of confusion about how to comply with the  
12 reporting components in the Low Threat General Order, and to counter claims of  
13 mandatory minimum penalty backlog lightly suggested in the Discharger's Exhibit D  
14 documents, enforcement staff have prepared an analysis of how dischargers under the  
15 Low Threat General Order and similar orders have fared with reporting compliance.  
16 (Pros. Rebut. Exh. 63.) The analysis describes how only two dischargers enrolled in the  
17 Low Threat General Order were subjected to mandatory minimum penalties for late  
18 submittals of reports. This evidences no programmatic confusion on how to submit self-  
19 monitoring reports or a backlog of mandatory minimum penalty cases.

#### 20 **V. PROPOSED ADMINISTRATIVE CIVIL LIABILITY ORDER**

21 The Prosecution Team has modified the Complaint into a proposed Administrative  
22 Civil Liability Order. The proposed order will be available on the Central Valley Water  
23 Board's website prior to the hearing.

24 In response to the Discharger's Evidence Submission and Policy Statement, page  
25 11, the Prosecution Team has modified three statements in the Order that differ from the  
26 Complaint.

27 First, the proposed Order reflects that it is addressing late report violations that  
28 occurred between 7 June 2012 and 1 May 2014 (page 1, paragraph 4). Per the Notice of

1 Applicability, the Discharger's coverage under the Limited Threat General Order began  
2 June 7, 2012. (Exh. 15.)

3 Second, the proposed Order changes references to a 4 June 2014 Notice of  
4 Violation to instead reflect a 4 June 2014 e-mail from staff (p. 2, para. 6; pp. 3-5, paras.  
5 11-17). The Prosecution Team agrees that the correspondence was an e-mail and not a  
6 Notice of Violation. (Exh. 23.) The two Notices of Violation were issued on July 25, 2014.

7 Finally, the proposed Order modifies the language on page 2, paragraph 7, of the  
8 Complaint "the Discharger agreed with the violations, but asked that a portion of the  
9 MMPs be waived" with the following:

10 On 8 August 2014, the Discharger agreed with the violations,  
11 but asked that Water Code section 13385.1(b) be applied  
12 towards violations that occurred prior to 1 January 2014.  
13 However, the Discharger had previously been notified of its  
14 obligation to submit monitoring reports and therefore Water  
15 Code section 13385.1(b) does not apply.

14 **VI. REQUEST FOR MORE TIME AT HEARING**

15 In light of the Discharger's request for 45 minutes at the hearing, the Prosecution  
16 would also like to request an additional 15 minutes to total 45 for its presentation and  
17 rebuttal. The additional 15 is in anticipation of rebutting the Discharger's evidence.

18 **VII. POTENTIAL REBUTTAL WITNESS**

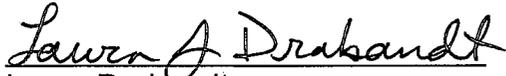
19 In connection with the CIWQS discussion contained in Section II.e. above, the  
20 Prosecution would like to add Ms. Jarma Bennett as a potential rebuttal witness at  
21 hearing.

22 **VIII. CONCLUSION**

23 The \$210,000 in mandatory minimum penalties proposed in the Complaint comply  
24 with the state of the present law. The alleged violations are not susceptible to the  
25 modified mandatory minimum penalty assessment that was previously contained in Water  
26 Code section 13385.1, subdivision (b), because the condition that the Discharger had not  
27 received any notice of its reporting obligations was not met. In fact, the Discharger  
28 received at least eight written documents notifying it of its permit obligations, and the

1 general manager himself acknowledge that he had actual notice of the quarterly reporting  
2 requirements since 2012. Even if the provision were still in effect today, the Discharger  
3 would not qualify to have its mandatory minimum penalties assessed in the modified  
4 manner. The provision sunset on January 1, 2014 and is no longer applicable.  
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6 DATE: November 10, 2014

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8 Laura Drabandt  
9 Staff Counsel for the Prosecution  
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