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June 17, 2016

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RE: **SUBMISSION OF EVIDENCE, LEGAL AND TECHNICAL ARGUMENTS AND
POLICY STATEMENTS REGARDING HEARING ON ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT R5-2016-0531**

To the Prosecution Team, Advisory Team, and the Honorable Members of the Central Valley
Regional Water Quality Control Board:

A. INTRODUCTION.

This office represents James G. Sweeney and Amelia M. Sweeney, who do business as Sweeney Dairy. Mr. and Mrs. Sweeney are referred to as the “Dischargers” under Administrative Civil Liability Complaint R5-2016-0531 (“2016 Complaint” or “ACLC”).

The Sweeneys’ address is 30712 Road 170, Visalia, CA 93292. Their telephone number is (559) 280-8233. Their email address is jimsweeneydairy@gmail.com. The Central Valley Regional Water Quality Control Board is referred to as the “Regional Board” or the “Board.” The State Water Resources Control Board is referred to as the “State Board.”

The Sweeneys are accused of violating a Board order requiring them to submit an annual report. The Sweeneys are not accused of actually discharging,¹ or threatening to discharge, any waste to the waters of the State, or of discharging any waste under circumstances that could affect the quality of the waters of the State. The Sweeneys are accused of failure to submit a report called for under a Board order that is stayed until the Court’s mandate is discharged in *Asociacion de Gente Unida por Agua, et al., v. Central Valley Regional Water Quality Control Board*, Sacramento County Superior Court Case No. 34-2008-00003604CU-WM-GDS. **See EXHIBITS A and B.** Under these circumstances the proposed liability prayed for in the 2016 Complaint cannot be imposed. The remedy for the Board is to obtain discharge of the writ prior to attempting enforcement proceedings.

¹The Porter-Cologne Water Quality Control Act of 1969 (the “Act”), Water Code §§ 13000 et seq., establishes the State Board and the nine Regional Boards, and sets forth their jurisdiction and competence. Section 13050 provides definitions of various terms used in the Act, but does not include a definition of the term “discharge.” This lack of definition makes its use vague and ambiguous under the facts of this case, if not void for vagueness, where there is no evidence that the Sweeneys have “discharged” or threatened to “discharge” anything to the waters of the State. There is no showing or evidence that anything the Sweeneys have done, or have not done, has impaired the quality of waters of the State. This proceeding reverses the normal order of proof, and the assumption is that the Sweeneys are subject to liability, and they have to prove that they are not.

B. STATEMENT OF FACTS AND BACKGROUND OF PRESENT PROCEEDING.

1. Mr. and Mrs. Sweeney operate a small dairy at 30712 Road 170, Visalia, CA. They milk around 260 cows on a site where a dairy has continuously operated for over eighty years.
2. The Regional Board's Order No. R5-2007-0035 (2007 Dairy Order or 2007 Order) ordered the Sweeneys, along with all other dairymen, to prepare and file Annual Reports with the Regional Board by July 1 of the year following the year to which the Reports applied, commencing with July 1, 2010.
3. Because of their financial inability and other legal grounds, the Sweeneys asked the Regional Board for relief from the obligation to file the 2009 Annual Report due on July 1, 2010. But these requests were ignored by the Board. The Sweeneys did not file the Report due on July 1, 2010.
4. On May 5, 2011 an Administrative Civil Liability Complaint, R5-2011-0562, (2011 Complaint) was mailed to the Sweeneys for failing to file the 2009 Annual Report due on July 1, 2010. The 2011 Complaint sought to assess a civil liability against the Sweeneys in the amount of \$11,400.00.
5. On July 1, 2011, the 2010 Annual Report became due, but the Sweeneys did not file it because they were still seeking a hearing before the Regional Board to obtain relief from having to file these Annual Reports.
6. The Sweeneys appeared at the hearing on the 2011 Complaint before the Regional Board on October 13, 2011. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2011-0068, assessing an administrative civil liability of \$11,400.00 on the Sweeneys for failing to file the Report due July 1, 2010.
7. On November 9, 2011, the Sweeneys appealed the Regional Board's October 13, 2011 decision by filing a Petition for Review with the State Board (A-2190). Said petition remains pending before the State Board.
8. On May 4, 2012, the Regional Board mailed the Sweeneys a "Groundwater Monitoring Directive," ordering the Sweeneys to install either (a) an individual groundwater monitoring well system at their dairy, or (b) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities. The attempt to force persons into a representative monitoring program, under threat of imposing the more onerous and expensive requirements of an individual groundwater monitoring program and individual waste discharge requirement violates the First Amendment rights of associational freedom and represents compelled speech. The fact that an operator can avoid the individual requirements by joining a RMP or coalition militates against the efficacy and legitimacy of

the regulatory effort. If it were true that all dairies posed unacceptable threats to water quality they would all be subject to individual WDRs, constantly monitored and enforced.

9. On May 9, 2012, an Administrative Civil Liability Complaint, R5-2012-0542 (2012 Complaint), was mailed to the Sweeneys for failing to file the 2010 Annual Report due on July 1, 2011. The 2012 Complaint sought to assess a civil liability against the Sweeneys in the amount of \$7,650.00.
10. On May 30, 2012, the Sweeneys filed a Petition for Review with the State Board appealing the Regional Board's adoption of the foregoing Groundwater Monitoring Directive. (A-2213) Said petition remains pending before the State Board.
11. The Regional Board held its hearing on the 2012 Complaint on August 2, 2012. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2012-0070, assessing an administrative civil liability of \$7,650.00 on the Sweeneys for failing to file the 2010 Annual Report due July 1, 2011.
12. On August 26, 2012, the Sweeneys appealed the Regional Board's August 2, 2012 decision, including its Order No. R5-2012-0070, by filing a Petition for Review with the State Board. (A-2225)
13. On November 6, 2012, the Court of Appeal for the Third Appellate District reversed the trial court's decision regarding a challenge to the 2007 Dairy Order, and remanded it back to the trial court.² On April 16, 2013, the Trial Court ordered the 2007 Dairy Order set aside.³
14. On May 9, 2013, an Administrative Civil Liability Complaint, R5-2013-0539 (2013 Complaint), was mailed to the Sweeneys for failing to file the 2011 Annual Report due July 1, 2012. The Complaint sought to assess a civil liability against the Sweeneys in the amount of \$20,400.00.
15. On July 25, 2013, the Regional Board held a hearing on the 2013 Complaint. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2013-0091, assessing a civil liability of \$15,000.00 on the Sweeneys for failing to file the 2011 Annual Report due July 1, 2012.

² *Asociacion de Gente Unida por el Agua, et al., v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal. App. 4th 1255.

³ *Asociacion de Gente Unida por Agua, et al., v. Central Valley Regional Water Quality Control Board*, Sacramento County Superior Court Case No. 34-2008-00003604CU-WM-GDS. See **EXHIBIT A hereto.**

16. On August 21, 2013, the Sweeneys appealed the Regional Board's July 25, 2013 decisions, including its Order No. R5-2013-0091, by filing a Petition for Review with the State Board. (A-2267). Said petition remains still pending before the State Board.
17. On October 29, 2013, the Sweeneys filed their petition under Water Code § 13320 challenging the Board's adoption of the 2013 Order, also known as the 2013 Reissued Order, No. R5-2013-0122, to the State Board. Said petition remains still pending before the State Board. This appeal was filed prior to the petition filed November 3, 2013 by Petitioners in *Asociation de Gente Unita por el Agua*.
18. On July 17, 2014, an Administrative Civil Liability Complaint, R5-2014-0543 (2014 Complaint), was mailed to the Sweeneys for failing to file the 2012 Annual Report due July 1, 2013. The 2014 Complaint asked to assess a civil liability against the Sweeneys in the amount of \$ 18,564.00.
19. On October 9, 2014, the Board adopted Administrative Liability Order R5-2014-0119 imposing administrative civil liability on the Sweeneys and fining them \$18,564.00.
20. On November 7, 2014, the Sweeneys filed their Petition under California Water Code § 13320 for Review by the State Board of the Regional Board's action on Administrative Civil Liability Complaint No. R5-2014-0543 and adoption of Administrative Liability Order No. R5-2014-0119. (A-2338). Said petition remains still pending before the State Board.
21. On March 11, 2015, an Administrative Civil Liability Complaint, R5-2015-0506 (2015 Complaint), was mailed to the Sweeneys for failing to file the 2013 Annual Report due July 1, 2014. The 2015 Complaint seeks to assess a civil liability against the Sweeneys in the amount of \$34,650.00.
22. On June 4, 2015, the Regional Board without deliberation adopted Administrative Civil Liability Order No. R5-2015-0065 imposing a fine of \$34,650 on Petitioners for alleged violations of the 2007 Order and/or the 2013 Order. This fine was imposed without any proof, or indeed any evidence, that Petitioners had harmed the quality of the waters of the State or the groundwater beneath their dairy property or that Petitioners had discharged, discharges, or were suspected of having discharged or discharging, or who proposed to discharge waste within the Central Valley region, or had discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within the Central Valley region. Petitioners cannot be punished on mere suspicion.
23. On July 6, 2015, Petitioners filed their petition under Water Code § 13320 with the State Board (docket no. A-2406) seeking review of the Regional Board action.

24. On September 21, 2015, the State Board through one of its counsel sent a letter to Petitioners which stated that:

Please note that, unless one of the following events occurs, this petition will be dismissed pursuant to State Water Board regulations on the 91st day following receipt of the petition. This petition will be deemed dismissed on the 91st day **unless**: (emphasis added)

- (1) the State Water Board has notified the petitioner, the regional water quality control board, and interested persons that they have 30 days to respond to the petition;
- (2) the State Water Board has received a written request from the petitioner to hold this petition in abeyance; or
- (3) the State Water Board has notified the petitioner prior to the 91st day that the petition is dismissed.

If none of these events occurs prior to 5:00 p.m. on the last business day before the 91st day, this petition will be automatically dismissed without further action by the State Water Board. Dismissal of a petition, whether by operation of law or by a letter issued by the State Water Board, is a final agency action for purposes of seeking judicial review of the regional water quality control board's action or inaction.

If this petition challenges the assessment of administrative civil liability or penalties, the State Water Board must also receive written agreement from the regional water quality control board that this petition be held in abeyance prior to 5:00 p.m. on the last business day before the 91st day, or this petition will be automatically dismissed without further action by the State Water Board. (Cal. Code Regs, tit.23, § 2050, subd. (e).) . . . You will be notified of any further action on this petition by the State Water Board.

25. Petitioners were never notified “of any further action on this petition by the State Water Board.”
26. “Cal. Code Regs, tit.23, § 2050, subd. (e)” does not exist. See 23 Cal. Code Regs. § 2050. Section 2050 does not have a subdivision or subsection (e).
27. There is no evidence that the State Board ever acted on its docket no. A-2406, or that docket no. A-2406 was ever placed on the agenda of the State Board for action by the State Board. The “deemed dismissal” of State Board docket no. A-2406 was purely at the staff level of the State Board and was taken without any substantial evidence, or any evidence. The “deemed dismissal” itself is unclear, vague, and ambiguous and without any authority under Water Code § 13320 or other statutory authority.

28. The “deemed dismissal” of State Board docket no. A-2406 violated, and continues to violate, Petitioners’ rights under Water Code § 13320, which provides Petitioners the right to have the State Board review the action the Regional Board took against the Petitioners.
29. The Sweeneys’ appeals of the decisions/orders taken by the Regional Board in connection with the 2011 Complaint, 2012 Complaint, 2013 Complaint, 2014 Complaint, the 2015 Complaint, and the “Groundwater Monitoring Directive” (A-2213), are now pending in Fresno County Superior Court.

C. DOCUMENTS AND EVIDENCE.

The Sweeneys are required to identify and provide all documents and other evidence that they intend to use or rely upon at the hearing. At the present time they intend to use or rely upon the following, which they identify and submit by reference because they are already in the files and records or otherwise in possession of the Regional Board in the records of prior administrative proceedings:

1. All documents and evidence identified in the letter dated April 22, 2016 from Susan Loscutt, SWRCB Office of Enforcement regarding “Submission of Evidence for Administrative Civil Liability Complaint R5-2016-0531 for Sweeney Dairy, WDID 5D545155N01, 30712 Road 170, Visalia, Tulare County.”
2. Regional Board’s Report of Compliance Inspection for Sweeney Dairy, dated December 31, 1998.
3. Regional Board’s Inspection Report letter for Sweeney Dairy, dated April 7, 2003.
4. Letter from the Regional Board to the Sweeneys, dated October 15, 2003, regarding their groundwater supply well test results:

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

5. Certificate of Analysis from BSK Laboratories to the Sweeneys, dated November 6, 2007, regarding their 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

6. Reports from FGL Environmental to the Sweeneys, dated July 14, 2010, regarding their 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

7. Dairy Inventory Worksheet, dated December 12, 2009, prepared by the Sweeneys for Farm Credit West.
8. Jim Sweeney's letter to the Regional Board, dated March 28, 2010.
9. Jim Sweeney's letter to the Regional Board, dated April 7, 2010.
10. Regional Board's letter to the Sweeneys, dated June 15, 2010.
11. Jim Sweeney's letter to the Regional Board, dated June 27, 2010.
12. Regional Board's Notice of Violation sent to the Sweeneys on August 16, 2010.
13. Jim Sweeney's letter to the Regional Board dated August 22, 2010.
14. Regional Board's letter to the Sweeneys from Clay Rodgers dated May 5, 2011, regarding Administrative Civil Liability Complaint R5-2011-0562.
15. Administrative Civil Liability Complaint, R5-2011-0562, (2012 Complaint) against James G. and Amelia M. Sweeney, dated May 5, 2011 (together with attachments, including hearing procedures).
16. Jim Sweeney's letter to the Regional Board, dated May 15, 2011.
17. Jim Sweeney's letter to the Regional Board, dated May 31, 2011.
18. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 8, 2011, regarding 2011 Complaint.
19. Transcript of July 14, 2011 hearing before the Hearing Panel regarding the 2011 Complaint.
20. Jim Sweeney's letter to Alex Mayer (Regional Board's legal counsel) dated September 5, 2011.
21. Email from Alex Mayer to Jim Sweeney, dated September 20, 2011.
22. Jim Sweeney's 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's letter to Alex Mayer, dated September 30, 2011.
26. Sweeneys' Written Testimony and Arguments to the Regional Board, dated October 2, 2011.
27. Transcript of hearing held on October 13, 2011, before the Regional Board regarding the 2011 Complaint.
28. Email from Ken Landau to Jim Sweeney, dated October 25, 2011.
29. Sweeneys' Petition for Review to the State Board regarding the Regional Board's decisions at the October 13, 2011, hearing on the 2011 Complaint.
30. Groundwater Monitoring Directive from the Regional Board to Sweeneys, dated May 4, 2012.
31. Letter from Douglas Patteson to Sweeneys, dated May 23, 2012.
32. Email from Clay Rodgers to Jim Sweeney, dated May 27, 2012.
33. Sweeneys' Petition for Review to the State Board, dated May 30, 2012, regarding the Groundwater Monitoring Directive.
34. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 20, 2012, regarding the 2012 Complaint.
35. Transcript of hearing held on August 2, 2012, before the Regional Board regarding the 2012 Complaint.
36. The Sweeneys' Petition for Review to State Board, dated August 26, 2012, regarding the Regional Board's decision at the August 2, 2012, hearing on the 2012 Complaint.
37. The Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 6, 2013, regarding the 2013 Complaint.
38. The Sweeneys' Petition for Review to the State Board, dated August 21, 2013, regarding an appeal of the Regional Board's decision at the July 25, 2013, hearing on the 2013 Complaint.

39. Order No. R5-2007-0035, "Waste Discharge Requirements General Order for Existing Milk Cow Dairies," (2007 Dairy Order)
40. Order No. R5-2013- 0122, "Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies." (2013 Dairy Order)
41. The Administrative Record of all Public Hearings and Public Input, upon which Order Nos. R5-2007-0035 and R5-2013- 0122 were based and adopted.
42. Water Quality Control Plan for the Tulare Lake Basin (2nd ed., 1995) and subsequent amendments thereto and editions.
43. State Board Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California."
44. Final Report of Brown, Vence & Associates, "Review of Animal Waste Management Regulations – Task 4 Report (November 2004)."
45. 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).
46. 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.
47. "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. The Sweeneys believe this report is in the possession of the Regional Board, and if it is not, it is **attached as Exhibit F**.
48. "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. The Sweeneys believe this report is in the possession of the Regional Board, and if it is not, it is **attached hereto as Exhibit G**.
49. Jorge Bacca's (Regional Board) reporting data by herd size for both 2007 and 2010.

[The documents listed as 50 through 54 below were attached as exhibits to the Sweeneys' Submission of Evidence and Policy Statement submitted to the Regional Board on June 19, 2012 in connection with ACLC R5-2012-0542]

50. California Dairy Herd Improvement Association (DHIA) dairy herd size and numbers, Central Valley, 2011. (As Exhibit 1)
51. San Francisco Bay Regional Water Quality Control Board Resolution No. R2-2003-0094. (As Exhibit 2)
52. San Francisco Bay Regional Water Quality Control Board, Annual Certification Reporting Form, Dairy Waiver Compliance Documentation (As Exhibit 3)
53. North Coast Regional Water Quality Control Board Order No. R1-2012-0002. (As Exhibit 4).
54. North Coast Regional Water Quality Control Board Order No. R1-2012-0003. (As Exhibit 5)

[The documents listed as 55 through 68 below were attached as exhibits to the Sweeneys Petition for Review to the State Board, dated May 30, 2012. A copy of the same was mailed to the Regional Board on the same date.]

55. Letter to the Sweeneys from Dale Essary, dated August 22, 2011 (As Exhibit 1).
56. Letter from the Sweeneys to Dale Essary, dated September 30, 2011 (As Exhibit 2).
57. Letter to the Sweeneys from Douglas Patteson, dated November 9, 2011 (As Exhibit 3).
58. Letter from the Sweeneys to Dale Essary, Douglas Patteson, and Clay Rodgers, dated November 29, 2011 (As Exhibit 4).
59. Letter to the Sweeneys from Douglas Patteson, dated December 7, 2011 (As Exhibit 5).
60. Letter from the Sweeneys to Douglas Patteson, Dale Essary, and Clay Rodgers, dated January 17, 2012 (As Exhibit 6).
61. Certified letter to the Sweeneys from the Regional Board (Groundwater Monitoring Directive) (Pamela C. Creedon) dated May 4, 2012 (As Exhibit 7).
62. Letter from the Sweeneys to Clay Rodgers, dated May 11, 2012 (As Exhibit 8).
63. Letter to the Sweeneys from Douglas Patteson, dated May 23, 2012 (As Exhibit 9).
64. Email from Clay Rodgers to the Sweeneys, dated May 27, 2012 (As Exhibit 10).

65. Webpage of Dairy Cares Central Valley Dairy Representative Monitoring Program and Fact Sheet (<http://www.dairycares.com/CVDRMP>) (As Exhibit 11).
 66. Letter from the Sweeneys to Douglas Patteson and Dale Essary, dated May 29, 2012 (As Exhibit 12).
 67. Email to the Sweeneys from J. P. Cativiela of the Central Valley Dairy Representative Monitoring Program, dated May 29, 2012 (As Exhibit 13).
 68. Letter to the Sweeneys from Dale Essary, dated July 19, 2012.
 69. Opinion dated November 6, 2012 of the Court of Appeal in *Asociacion de Gente Unida por el Agua, et al. v. Central Valley Regional Water Quality Control Board*, (2012) 210 Cal. App. 4th 1255.
 70. Letter from the Sweeneys to the Regional Board, dated March 26, 2013.
 71. Order granting Writ of Mandate filed April 17, 2013 in *Asociacion de Gente Unida por el Agua, et al. v. Central Valley Regional Water Quality Control Board*, dated April 16, 2013, Case No. 34-2008-00003604CU-WM-GDS. **[Attached hereto as Exhibit A]** This Order granted a writ of mandate against the Regional Board setting aside in its entirety the 2007 Order. See Court Order at ¶ 1, p. 2:3-17.
 72. Letter to the Sweeneys from the Regional Board, dated April 19, 2013.
 73. Letter from the Sweeneys to the Regional Board, dated August 26, 2013.
 74. Order to Stay Proceedings filed November 6, 2014, in Case No. No. 34-2008-00003604CU-WM-GDS. **[Attached hereto as Exhibit B]**. In this Order the Court stayed all proceedings: "IT IS ORDERED that this case and its proceedings to determine the adequacy of the Regional Board's Return to Writ of Mandate [the 2013 Reissued Order] be stayed until such time as the State Board has issued a decision or an order of dismissal on the petition filed before the State Board by Petitioners, or until further order of this Court." Court Order at 3:13-16. The Regional Board's Return to Writ of Mandate was nothing less than the 2013 Reissued Order, formally known as "Order No. R5-2013-0122, Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies." See Court Order at 2:1-2. The 2013 Reissued Order cannot be enforced since its validity is at issue under the Petition pending before the State Board filed on November 5, 2013 (and also the Sweeneys prior filed Petition challenging the 2013 Order).
- [Document # 75 was attached as Exhibit A to the Sweeneys' Petition for Review to the State Board, dated August 21, 2013; also mailed to the Board on the same date.]
75. A peer-reviewed paper entitled, "When Does Nitrate Become a Risk for Humans?," authored by David S. Powlson, Tom M. Addicott, Nigel Benjamin, Kenneth G. Cassman, Theo M. de Kok, Hans van Grinsvin, Jean-Louis L'hirondel, Alex A. Avery and Chris Van Kessel, and published in the *Journal of Environmental Quality* 37:291-295 (2008). **[Attached hereto as Exhibit C]**

76. A peer-reviewed paper entitled, "Saturated Zone Denitrification: Potential for Natural Attenuation of Nitrate Contamination in Shallow Groundwater Under Dairy Operations." The paper was prepared by Lawrence Livermore National Laboratory and the University of California, Davis, and was published in *Environmental Science and Technology*, 41:759-765 (2007). The Sweeneys sent the Regional Board a copy of this paper on October 29, 2013. **[Attached hereto as Exhibit D]**
77. "Water Quality Regulations for Dairy Operators in California's Central Valley—Overview and Cost Analysis," November 2010, prepared by California Department of Food and Agriculture. **[Attached hereto as Exhibit E]**
78. Letter from Brian Pacheco dated April 23, 2015. Mr. Pacheco is a member of the Fresno County Board of Supervisors. **[Attached hereto as Exhibit H]**
79. Letter from John van Curen dated April 24, 2015. **[Attached hereto as Exhibit I]**
80. Letter from Jim Sullins dated April 29, 2015. **[Attached hereto as Exhibit J]**
81. "Model for Sustainability," Hoard's Dairyman, April 10, 2015. **[Attached hereto as Exhibit K]**
82. "Two Major Dairy States Aren't Ag Friendly," Hoard's Dairyman, May 27, 2014. **[Attached hereto as Exhibit L]**

D. WITNESSES.

The Sweeneys may call the following witnesses.

1. Jim Sweeney. His arguments are set forth herein. He will take approximately 20 minutes.
2. All witnesses listed as disclosed by the Prosecution Team.

The Sweeneys reserve the right to cross-examine all witnesses called or disclosed by Board staff. The Sweeneys object to de facto testimony by attorneys and other non-designated witnesses.

The Sweeneys also reserve their right to use other evidence and witnesses not listed above who come to light during the course of continuing to develop their case. They will notify you when such evidence or witnesses become known.

E. LEGAL ARGUMENT AND ANALYSIS.

INTRODUCTION: THE BOARD PROCEDURE IS FUNDAMENTALLY FLAWED BECAUSE IT UNCONSTITUTIONALLY REVERSES THE BURDEN OF PROOF AND DEPRIVES THE SWEENEYS OF THE PRESUMPTION OF INNOCENCE.

The presumption of innocence is a fundamental basis of our jurisprudence in any proceeding by which the State proposes to deprive one of its citizens of life, liberty or property. The United States Supreme Court has long recognized the presumption of innocence which, traces from its decision in *Coffin vs. U.S.*, 156 U.S. 432, 432-463 (1894). There, the Supreme Court stated, "The

principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law.” Emphasis added. The present proceeding is in the nature of a criminal one in that it seeks to levy a fine on the Sweeneys, to deprive them of property.

The presumption of innocence is a matter of Federal Due Process. “The Federal Due Process Clause imposes constraints on governmental decisions that deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments.” *Mathews v. Eldridge* (1976) 424 US 319, 331.

In California, the presumption of innocence has been explicitly recognized as early as *People v. Moran* (1904) 144 Cal. 48, 59, which states the “presumption of innocence” maxim:

“It is true that law writers and judges in discussing the foundation of the doctrine that persons accused of crime are presumed to be innocent until proven guilty, have sometimes said that the presumption is in the nature of evidence, or an instrument of proof, but it has never been deemed necessary to go into a disquisition upon the foundation of the doctrine in instructing a jury. In the case of *Coffin v. United States*, 156 U.S. 432, the language cited from the opinion at page 460 was merely a portion of the court's comment upon the ruling of the trial judge refusing to instruct the jury that the law presumes an accused person to be innocent until proven guilty.”

The concept is codified in California Evidence Code § 520 that “The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.”

Analogous is Penal Code § 1096: “A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal.”

The presumption of innocence applies in administrative proceedings. 1 Witkin, Cal. Evidence (5th ed. 2012) § 63, Burden of Proof, states:

“The commonly declared rule that the burden is on the party having “the affirmative of the issue” applies in administrative proceedings”. See *La Prade v. Department of Water & Power of Los Angeles* (1945) 27 Cal.2d 47, 51; *Loew's v. California Emp. Stabilization Com.* (1946) 76 Cal App. 2d 231, 238; *Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 271; 2 Am. Jur. 2d (2004 ed.), Administrative Law section 354, et seq.

The California Constitution's due process safeguards are in Article 1, Section 7. California due process includes a liberty interest in “freedom from arbitrary adjudicative procedures.” *People v. Ramirez* (1979) 25 Cal.3d 260, 268-69.

California's Constitution requires fairness in all administrative hearing procedures, irrespective of whether the hearings involve deprivation of a property or a liberty interest.

Further, Code of Civil Procedure § 1094.5(b) creates a statutory right to a fair hearing, which must be conducted before an impartial tribunal. *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-71.

The California Administrative Procedures Act (“APA”), provides detailed requirements that apply to adjudicative proceedings of state agencies. Govt Code §§ 11400 et seq.) Under the APA, adjudicative proceedings are evidentiary hearings to determine facts and issue a decision regarding a legal right, duty, privilege, immunity or other legal interest of a particular person. Gov’t Code §§ 11405.20 and 11405.50

Finally, the Board’s own “Administrative Civil Liability Fact Sheet” states “The Prosecution Team has the burden of proving the allegations and must present competent evidence to the Board regarding the allegations.”

Here the Prosecution Team cites no evidence, produces no evidence and has not proven a discharge of waste or any other act by the Sweeneys that violates the Porter-Cologne Act. Under the Board’s hearing instructions, the Prosecution Team was required by April 22, 2106, to submit all materials required under “IV. Submittal of Evidence, Legal and Technical Arguments or Analysis, and Policy Statements.” The Board through its Prosecution Team has not complied with this requirement. The Board’s April 22, 2016 letter submitted only a witness list, and exhibit list, and an Exhibit entitled “Compliance by Dairy Size for Submission of 2014 Annual Report,” to which the Sweeneys object because it lacks foundation and is irrelevant.

The April 22, 2016 letter presents no “Legal and Technical Arguments or Analysis, and Policy Statements.” The ACLC should be denied simply because the Board’s Prosecution Team has not complied with its Board’s own hearing requirement. The ACLC is merely a pleading, proof of nothing, and cannot be construed to comply with the hearing requirements. The ACLC also illegally attempts a reversal of proof, and is in violation of Water Code § 13267(b)(a) for the chronic, continual, failure of the Board to “provide the person [from whom a technical report is demanded] 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.**” Emphasis added.

- 1. The 2007 and 2013 Orders at Present are Invalid and Unenforceable because the Sacramento Superior Court ordered the 2007 Order set aside in its entirety on April 6, 2013 and stayed all proceedings involving both the 2007 and 2013 Orders on November 6, 2014.**

The 2014 Complaint alleged in paragraph 8 “that the Court’s decision did not affect the reporting requirements of the 2007 General Order” The Sweeneys disagree. As of July 1, 2014, the deadline specified by the 2007 Dairy Order for submission of the 2013 Annual Report to the Regional Board, the Trial Court had already ordered that the 2007 Order be set aside. The Trial Court’s order was occasioned by the Third District Court of Appeal finding on November 6, 2012, that “The 2007 Order’s monitoring plan upon which the order relies to enforce its no degradation directive is inadequate” because “there is not substantial evidence to support the findings.”⁴ Hence, many of the elements to be reported in the Annual Report were based upon a monitoring plan in the 2007 Order that the Appellate Court determined was flawed and unlawful.

However, suppose a court were to conclude that the April 6, 2013 order of the Trial Court to the Regional Board to set aside the 2007 Order did not have the effect of barring the Regional

⁴ *Asociacion*, p. 1287.

Board from seeking a civil liability assessment for the Sweeneys failure to file the 2012 and later Annual Reports required under said Order. In such event, the Sweeneys contend that the 2007 and 2013 Orders are still unlawful and unenforceable for all of the following reasons:

2. The 2007 Order and 2013 Order are unlawful and unenforceable against the Sweeneys because they failed to comply with applicable law, including provisions of the Water Code and Government Code.

(a) The need for the 2007 and 2013 Dairy Order is not supported by substantial evidence.

It is fundamental administrative law that no rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by substantial evidence. The Appellate Court in the *Asociacion* case confirmed the applicability of the foregoing precept.⁵ Part of the reason the Appellate Court overturned the Trial Court's original decision was because "the Regional Board must ensure that sufficient evidence is analyzed to support its decision [to adopt the 2007 Dairy Order] and that the evidence is summarized in an appropriate finding."⁶ It went on to add that "An administrative agency abuses its discretion where its order is not supported by the findings or where the findings are not supported by the evidence. (citation)."⁷ It concluded that "The 2007 Order's monitoring plan upon which the order relies to enforce its no degradation directive is inadequate" because "there is not substantial evidence to support the findings."⁸

Mr. Sweeney reviewed all 34,000 pages of the administrative record of the hearings held in connection with the adoption of the 2007 Dairy Order. He found no substantial evidence in the administrative record – in fact, no evidence whatsoever – that supports the need to replace the pre-2007 Order reporting requirements with the new reporting requirements adopted in the 2007 Order.

The Sweeneys found no substantial evidence in the record that the data, reports and information that the Regional Board staff obtained from or about dairies **prior** to its adoption of the 2007 Order were inadequate, insufficient, unreliable or otherwise flawed. And they have found no substantial evidence in the record that claimed or demonstrated that the new reporting requirements were necessary or needed to replace the pre-2007 Order requirements. They have made this argument to the Regional Board in connection with the 2011, 2012, 2013 and 2014 Complaints. This argument stands unchallenged and uncontroverted because, in each instance, the Regional Board staff has failed to argue or show otherwise.

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⁵ Ibid, p. 1282.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid., p. 1287.

(b) The Regional Board did not show the need for the reports specified in the 2007 Order or 2013 Order and did not justify their burden, as required under Water Code section 13267 (b)(1).

The “Monitoring and Reporting Program” of the 2007 Order recites that it is issued pursuant to Water Code § 13267. (2007 Dairy 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.”

Section 13267 (b) (1) further provides 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 and 2013 Reissued Order do not contain “a written explanation with regard for the need for the reports,” and it fails to “identify the evidence that supports requiring [the Sweeneys and parties similarly situated] to provide the reports.” In addition, the Regional Board never provided the Sweeneys with “a written explanation with regard for the need for the reports,” and it did not “identify the evidence that supports requiring [the Sweeneys] to provide the reports.”

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

A dairy has been continuously operating on the site for over eighty years. The Regional Board required the Sweeneys to provide it with water supply well test results. Indeed, its 2007 Order orders dairymen, on page MRP-7, to “sample each domestic and agricultural supply well” and to submit the test results for Nitrate-nitrogen to it on an annual basis.

In accordance with the Regional Board’s requests, the Sweeneys submitted test results from water samples taken from each of their supply wells in 2003, 2007 and 2010. The results ranged between .2 and 3.4 mg/L, all extremely low levels. All well results were and are substantially below the state’s maximum contaminant levels (MCL); in fact, they are substantially lower.

The Sweeneys argued to the Regional Board staff that these test results are compelling evidence that their dairy was and is not adversely impacting ground water, and therefore the cost of filing these reports 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.”

Despite the Regional Board's prior requests for supply well test results and despite the 2007 Order requiring them, the Board's staff brushed off these results by telling the Sweeneys 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." If this was the case, why did the Regional Board require them?

(c) The 2007 Order and 2013 Order fail 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, the above section imposes on the Regional Board a mandatory statutory duty to review such issues and revise its requirements accordingly. In fact, the Appellate Court in the *Asociacion* case confirmed that "the agency [the Regional Board] should consider current technologies and costs"⁹

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.

At various times in the past, the Sweeneys provided the Regional Board with relevant research papers to consider. For example, Lawrence Livermore National Laboratory published two papers in *Environmental Science and Technology* (2007) 41:753-765 (**Exhibit D hereto**). The authors state they discovered that soil bacteria break down and eliminate nitrates in dairy waste water in a substantial if not complete degree. They 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 and 2013 Orders contain a "one-size-fits-all" approach, and generally require reports that provide little to no meaningful information. Indeed, some of these reports are questionable, to say the least. One example is that the Sweeneys were required to provide monthly photos of their lagoons to show that the water level was not too high during the month. This is as ineffectual as requiring a person to photograph his speedometer once each month to prove he didn't drive over the speed limit during the month.

The Sweeneys have read all 34,000 pages of the administrative record compiled after the adoption of the 2007 Dairy Order. They found no substantial evidence in the record that supports or justifies the need to regulate nitrates, considering the levels found in the groundwater of the Central Valley. Indeed, a peer-reviewed paper entitled "When Does Nitrate Become a Risk for Humans?" (**Exhibit C hereto**), co-authored by nine scientists from the U.S., the UK, France, Germany and the Netherlands, and published in 2008 in the *Journal of Environmental Quality*, have evaluated all the old studies done about the health impacts of nitrates on humans and it suggests that nitrates at the levels found in groundwater are not the health threat once believed. The paper further

⁹ Ibid., p. 1283.

suggests that current nitrate limits should be significantly raised because the health risks may be overstated.

In short, the 2007 Order's reporting requirements are excessive, unnecessary, overly burdensome, primitive, antiquated, obsolete, and provide nothing of value, except fees paid to engineers, consultants and laboratories. The Regional Board did not sufficiently examine and consider recent research results and advanced testing technologies, and it did not modify its 2007 Order accordingly. The Sweeneys have made these arguments to the Regional Board during the hearings on the 2011 Complaint, the 2012 Complaint and on the 2013 Complaint. In each instance, these arguments were never challenged, disputed or rebutted by the Regional Board staff or their counsel.

(d) The 2007 and 2013 Orders failed to take into account economic considerations.

The 2007 Order's (and 2013 Order's) waste discharge requirements as they relate to water quality objectives must take into account economic considerations.¹⁰ (Water Code §§ 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.

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 and 2013 Orders' reporting requirements.

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. (See AR 002089, AR 000384, AR 000444, AR 007297, AR 02397, AR 019632, AR 002163, and AR 000583).

As an example of how the 2007 Order adversely affected 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. This means that the costs, on a per cow basis, are dramatically higher for small dairies, and contribute to small dairies being at a competitive disadvantage. Section 13241 of the Water Code requires the Regional Boards to take into account "economic considerations" in connection with its water quality objectives.

¹⁰Hoard's Dairyman reports that although American agriculture has among the lowest input of pesticide and fertilizer per acre compared to the EU and other countries, but California rates an "F" grade on the Agribusiness Friendliness Index of Colorado State University professors Greg Perry and James Pritchett. See Hoard's Dairyman, "Model for Sustainability," April 10, 2015; "Two Major Dairy States Aren't Ag Friendly," May 27, 2014. See **Exhibits K and L**, respectively.

The AR contains no economic analysis or evidence that disputed the abundant testimony that the proposed 2007 Order would be harmful, even fatal, to smaller dairies.

The Sweeneys 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 their request, Jorge Baca, from the Regional Board, provided the Sweeneys 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 groundwater quality. California DHIA data shows that DHIA dairies in the San Joaquin Valley of the Sweeneys 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."

The relative number of cows on different sized dairies in different regions is instructive. In 2012, Mr. Sweeney gathered information showing¹¹ that 69.8% of the total cows in the North Coast Region reside on dairies which milk less than 700 cows; 8.2% of the cows in the Central Valley Region reside on dairies with less than 700 cows, and 2.5% of the cows in Tulare County reside on dairies with less than 700 cows. 24.2% of the North Coast Region cows are on dairies with less than

¹¹Information received from Tulare Dairy Herd Improvement Association April 13, 2012; CDFA 2011 California DHIA Member Herd Data April 2012.

300 cows, .87% of the Central Region's cows are milked on dairies with less than 300 cows, and .27% of the cows in Tulare County reside on these same, small, less than 300 cow dairies. Thus under the North Coast Region's Order the majority of cows are on less than 700 cow dairies, and these may obtain a waiver from the local Order.

The San Francisco Bay Region requires smaller dairies to complete and file a two-page "Reporting Form" which does not require the involvement or expense of hiring engineers.

The EPA likewise uses a 700 cow threshold. 40 C.F.R. § 122.23 (b)(4) defines a large dairy as an operation that stables or confines as many as, or more than, 700 mature dairy cows, whether milked or dry, or 10,000 sheep or lambs. In addition, the San Joaquin Valley Air Pollution Control District exempts smaller dairies from many of its requirements.

Significantly, the Regional Board adopted such an approach when it adopted its Irrigated Lands Orders in 2013. It put smaller farms into a special category.

Despite all of the foregoing, the Regional Board has refused to adopt any waivers, or make any special provisions for, or grant any reporting relief to smaller dairies, and none appeared in its 2007 Order or in the 2013 Order (the "Reissued Order"). Its refusal not only violated the law, but it put 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.

(e) The Regional Board has failed to show the "need" for the Sweeneys to install an individual groundwater monitoring system on their dairy site, or to join a Representative Monitoring Program.

1. The 2016 Complaint alleges in paragraph 12 that "The Discharger is alleged to have violated the following sections of the Reissued General Order [2013 Dairy Order] and of the MRP:
 - A) Provision G. 3 of the Reissued General Order, which states:

"The Discharger shall comply with the attached Monitoring and Reporting Program R5-2013-0122 which is part of this Order, and future revisions thereto, or with an individual monitoring and reporting program,"
 - B) Provision G.13 of the Reissued General Order, which states in part:

"The Discharger must comply with all conditions of this Order, including timely submittal of technical and monitoring reports as directed by the Executive Officer."
 - C) The MRP, which states in part:

"An annual monitoring report is due by 1 July of each year [T]he annual report shall cover information on crops harvested during the previous calendar year"

Although the allegation is ambiguous, it appears that the 2016 Complaint is charging the Sweeneys with failure to either comply with the MRP or install an individual groundwater

monitoring and reporting system on their dairy site, or (2) to join a “Representative Monitoring Program.” The Sweeneys’ prior history of dealing with the Board and its representatives is important for an understanding of the illegitimacy of the Board’s allegations in the 2016 Complaint.

2. The Regional Board’s staff first informed the Sweeneys by letter dated August 22, 2011 that they would need to either install their own individual groundwater monitoring system at their dairy, or they would have to join a representative monitoring program (RMP) that would monitor groundwater at a set of representative facilities. In a letter they sent to staff on September 30, 2011, they pointed out that Water Code § 13267 obligates a regional board to “provide a person with a written explanation with regard to the need for the reports,” and that “these reports shall bear a reasonable relationship to the need for the reports.” In order to determine the “need” for these groundwater monitoring well test reports, the Sweeneys wanted to ascertain how meaningful they needed to be in order for them to be acceptable. For this reason, they asked, “Where are their [Central Valley Representative Monitoring Program – CVRMP] monitoring wells located that would serve as the basis of information for the Sweeneys site?”
3. The Board’s staff responded to the Sweeneys’ letter by letter dated November 9, 2011, but the letter never answered the Sweeneys’ question about the locations of the CVRMP groundwater wells. They had to ask again in a letter they sent Mr. Essary on November 29, 2011 as to the location of these CVRMP wells. Yet, the responding letter to the Sweeneys dated December 7, 2011, again failed to answer this very specific and direct question. They sent Clay Rodgers a letter, dated May 11, 2012, which again called to his attention the obligations imposed by section 13267. In reply, the Sweeneys were sent yet another letter, this one dated May 23, 2012, that again failed to provide them with the locations of the CVRMP groundwater wells.
4. On May 4, 2012, the Regional Board issued a Directive, ordering the Sweeneys to implement groundwater monitoring at their dairy. The Directive claimed that it had the authority under Water Code § 13267 and under the 2007 Dairy Order (R5-2007-0035) to require them to do so. This Directive was communicated to the Sweeneys by letter dated, May 23, 2012. One of the allegations of this Complaint is that they have violated this Directive and the 2007 Dairy Order by failing to install a groundwater monitoring system.

The relevant language of section 13267 of the Water Code reads in relevant part: “the regional board may require that any person ... who ... discharges ... within its region ... shall furnish ... monitoring program reports which the regional board requires. The burden, including costs, shall bear a reasonable relationship for the need for the report 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 the person to provide the reports.”

The Regional Board also cited the following language found on page MRP-16 of the 2007 Order: “Pursuant to Section 13267, the Executive Officer will order Dischargers to install monitoring wells to comply with Monitoring and Reporting Program Order No. R5-2007-0035 based on an evaluation of the threat to water quality *at each dairy*. It is anticipated that this will occur in phases of 100 to 200 dairies per year.” See also provisions in 2013 Order

at MRP-17 [Groundwater Monitoring] and MRP-18 Table 6 [Additional Groundwater Monitoring].

Both provisions indicate that the determination of whether to require a given dairy to provide monitoring well reports is to be made on a dairy-by-dairy, individual basis. Before a dairy can be required to implement a monitoring well program, the Regional Board must be aware of specific and compelling evidence that there is a need for such a costly program, and it must inform the dairyman of what specific evidence regarding his/her dairy supports the requiring of such reports.

Despite the foregoing, the Regional Board expressed the position in its May 23, 2012, letter that the foregoing language in the 2007 Order gave it the right to require *all dairies*, in phases of "100 to 200 dairies," to install monitoring well systems. Indeed, the letter states that the Regional Board has issued directives to 260 dairymen to implement monitoring well programs, and that 1000 dairies have already joined "Representative Monitoring Programs." This statement implies that *all dairies* in the Central Valley region either already participate or are being ordered to do so, without any effort being made by the Regional Board to evaluate each dairy individually. Thus, it appears that the Regional Board engaged in a direct violation of the plain language of section 13267 and the 2007 Order, and violated its statutory duties and obligations under applicable law.

Section 13263 of the Water Code provides that a Regional Board may prescribe requirements for dischargers, which it did in adopting the 2007 Order and the 2013 Order. However, section 13269 states that the Regional Board can waive any of these requirements, including the monitoring requirements, as it applies to "an individual" by considering "relevant factors."

The Sweeneys have consistently called to Board staff's attention that their dairy has been continuously operating on the same site for over 80 years. They pointed out to the Regional Board's staff that the nitrate-nitrogen test results from their domestic and agricultural supply wells, which they began submitting in 2003. The results have ranged between .2 and 3.4 mg/L, all extremely low levels. Yet, the Regional Board brushed off these results by stating 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 made this groundless statement after demanding for ten years that the Sweeneys test their supply wells and send the Board the results. The Board had the audacity to reject the Sweeney test results despite the 2007 Order, on page MRP-7, actually ordering dairymen to "sample each domestic and agricultural supply well," and submit the laboratory analysis for nitrate-nitrogen to it on an annual basis. After demanding these costly reports for over ten years they now tell the Sweeneys that they are meaningless. This behavior is arbitrary and capricious.

To make matters worse, the Regional Board has been advising dairymen, including the Sweeneys, that as an alternative, they can join a "Representative Monitoring Program," and the results from monitoring wells that are not even close to a particular individual dairy can be submitted and these results will be treated as satisfying the monitoring well requirement.

Mr. Sweeney wrote Douglas Patteson on May 27, 2012, and asked him what representative monitoring program the Regional Board would accept for his dairy. Clay Rodgers emailed Mr. Sweeney the same day and advised him that the Central Valley Dairy Representative Monitoring Program (CVDRMP), administered by Dairy CARES in Sacramento, covered Tulare County and that it would be an acceptable RMP for his dairy. Mr. Sweeney checked with Dairy CARES/CVDRMP and was advised by email dated May 29, 2012 that it would accept his application to join the program. Mr. Sweeney also discovered that the nearest CVDRMP monitoring wells were about 45 miles from his dairy. And this was going to be treated by the Regional Board as meaningful information for the Sweeney dairy?

5. Mr. Essary sent the Sweeneys a letter dated July 19, 2012 reminding the Sweeneys of their need to install groundwater monitoring wells on their dairy or join an RMP. He threatened the Sweeneys with action if they did not comply, and he completely ignored their previous request for the locations of the RMP wells. The Sweeneys responded with a letter dated March, 26, 2013, in which they again asked for the location of the CVRMP groundwater wells. He sent the Sweeneys a letter dated April 19, 2013, which completely ignored their question, but warned the Sweeneys that the Regional Board would issue a Complaint against them if they did not install a monitoring well system on their dairy or join an RMP. The Sweeneys petitioned the State Board for review of the Groundwater Monitoring Directive. (A-2213). This matter remains pending before the State Board.
 6. The Regional Board's inconsistent behavior undermines its position. On the one hand, it has demanded supply well test results for over ten years, then rejects them as meaningless. It then demands that the Sweeneys install monitoring wells on their dairy because these results would be more "meaningful." Then it says that if the Sweeneys (and 1200 other dairymen) join an RMP, whose closest monitoring wells are many miles from their dairy, this would be an acceptable substitute and would satisfy the Board's monitoring well requirements.
 7. The way in which the Regional Board's staff continuously dodged answering the Sweeneys' requests for the location of the CVRMP monitoring wells would make anyone suspicious. The reason they refused to answer questions about the location of the CVRMP groundwater wells is transparent: because these RMP wells are so far removed from most dairies they provide no meaningful information about what is going on at the dairy in question. In other words, the RMP with Dairy CARES is a fraud and a sham. Most significantly, however, by accepting enrollment in an RMP as a substitute for an individual groundwater monitoring well system on a dairy (as they have for over 1200 dairies), the Regional Board has revealed that it does not have the "need" required under Water Code § 13267(b)(1) for individual groundwater monitoring wells on the dairy site itself.
- F. THE ASSESSMENT ANALYSIS IS FLAWED AND IMPROPER, AND THE 2015 COMPLAINT IS IN EXCESS OF THE BOARD'S JURISDICTION, A DENIAL OF DUE PROCESS AND A VIOLATION OF THE SWEENEY'S CIVIL RIGHTS.**

The Board staff is asking that the civil liability assessment in the 2016 Complaint be enhanced because this is the fifth year the Sweeneys have failed to file an Annual Report. The

Complaint seeks imposition of liability¹² of \$549,850.00, based upon the Sweeneys' failure to file the earlier Annual Reports required under the 2013 "Reissued" Order¹³ and the now-invalidated 2007 Order.

The Board staff knows that the Sweeneys opposed the earlier Complaints (2011, 2012, 2013, 2014 and 2015) — as they have every right to do, and it knows that the Sweeneys have appealed each of the Board's decisions to the State Board and to the Court — as they have every right to do — by filing Petitions for Review, a recourse expressly afforded the Sweeneys under Water Code § 13320. Yet the attempt is made to punish the Sweeneys for exercising their rights, by enhancing the monetary penalty on the basis of prior violations, not one of which has reached a final adjudication.

It is important to recognize that in 2013 the Trial Court's order in the *Asociacion* case set aside the *entire* 2007 Order. The 2013 Court Order stayed all proceedings involving the 2013 Order, which purported to "replace" the 2007 Order. Therefore, the Board remains subject to the Court's writ mandate. Until the Board makes a satisfactory return on this writ, and the Court discharges the writ, it remains in effect and the Board may not engage in proceedings which purport to enforce and impose liability for alleged violations of either the 2007 Order or the 2014 Order. If one claims the Sweeneys derive a benefit from that state of affairs, that is the fault of the Board for not diligently working to make a return on the writ and to obtain a discharge of the writ.

G. THE REGIONAL BOARD'S ATTORNEYS ARE ENGAGED IN A PROHIBITED CONFLICT OF INTEREST WHICH COMPROMISES THE LEGITIMACY OF THESE ADMINISTRATIVE PROCEEDINGS.

The attorney advising the Advisory Team and the attorneys advising the Prosecuting Team are all employees of the State Water Resources Control Board. In addition, the State Board is the public agency to which the Sweeneys must appeal any adverse ruling by the Regional Board. Such a situation constitutes a clear conflict of interest. Under the State Bar's Rules of Professional Conduct, attorneys employed by the same public agency are treated the same as attorneys working for the same private law firm. The Rules proscribe attorneys from the same "firm" representing and advising adverse interests.¹⁴ Here attorneys from the same "firm" are representing and advising the complaining party (Board staff), the court (the Board), and the appeals court (the State Board).

This alignment of counsel and court is common in continental inquisitorial procedure with origins in Roman and Civil Law. It is in sharp contrast to Anglo-American adversarial procedure where the Court is an "umpire" adjudicating competing interests. Such conflicts of interest must

¹²Letter to the Sweeneys from Dale Essary dated December 5, 2014, p. 2, regarding "Forthcoming Assessment of Civil Liability for Failure to Submit the Annual Report for 2013."

¹³At this point it is important to recall and recognize that the 2013 "Reissued Order" is stayed as a result of the Court's Order to Stay Proceedings filed November 6, 2014. This stay is in effect until "The State Board has issued a decision or an order of dismissal of the petition filed before the State Board by Petitioners, or until further order of this Court." See November 6, 2014 Order at 3:14-16. **SEE EXHIBIT B HERETO.** Also recognize the the 2013 "Reissued Order" was adopted by the Board and then proffered to the Court as the Board's Return on the Court's Writ of Mandate filed April 17, 2013. See November 6, 2014 Order at 1:23 to 2:2.

¹⁴California State Bar Rules of Professional Conduct, Rules 1-100, 3-310 and 3-320.

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be fully disclosed to all parties and are not permitted unless all parties to the matter expressly waive the conflict. The Sweeneys have not had this conflict disclosed to them, and do not waive it.

H. CONCLUSION.

In view of all of the circumstances shown above, the 2016 Complaint is in excess of the Board's jurisdiction, and constitutes an abuse of power and denial of due process and equal protection, and violates the Sweeneys'¹⁵ civil rights including their rights under the fifth, sixth and eighth amendments to the U.S. Constitution. The Regional Board is violating their civil rights by instituting "administrative civil liability" proceedings in excess of its authority and in violation of the presumption of innocence. The State's deprivation of a citizen's property is the greatest intrusion the State can make on its citizens, other than deprivation of life and liberty itself. The Sweeneys therefore request that the Board deny the relief sought in the 2016 Complaint.

Very truly yours,

GRISWOLD, LaSALLE, COBB,
DOWD & GIN, L.L.P.

By: _____

RAYMOND L. CARLSON

¹⁵The Sweeneys' bona fides are attested by the letters of reference attached as **EXHIBITS H-J** attached hereto.

LIST OF ATTACHED EXHIBITS

- EXHIBIT A Order granting Writ of Mandate in Asociacion de Gente Unida por el Agua. et al. v. Central Valley Regional Water Quality Control Board, filed April 16, 2013, Sacramento County Superior Court Case No. 34-2008-00003604-CU-WM-GDS
<https://services.saccourt.ca.gov/PublicCaseAccess/Civil/SearchByCaseNumber>
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<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1102&context=agronomyfacpub>
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http://www.waterboards.ca.gov/centralvalley/water_issues/dairies/historical_dairy_program_info/reissue_dairy/sweeny/sweeney_ltr_att_f.pdf
- EXHIBIT E “Water Quality Regulations for Dairy Operators in California’s Central Valley–Overview and Cost Analysis,” November 2010, prepared by California Department of Food and Agriculture, available at:
<https://www.cdffa.ca.gov/dairy/pdf/notices/WDR-CostOfCompliance.pdf>
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- EXHIBIT G California GAMA Program: Fate and Transport of Wastewater Indicators: Results from ambient Groundwater and from Groundwater Directly Influenced by Wastewater, dated June 2006, available at:
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- EXHIBIT H Letter from Brian Pacheco, dated April 23, 2015
- EXHIBIT I Letter from John van Curen, dated April 24, 2015
- EXHIBIT J Letter from Jim Sullins, dated April 29, 2015
- EXHIBIT K “Model for Sustainability,” Hoard’s Dairyman, April 10, 2015
- EXHIBIT L “Two Major Dairy States Aren’t Ag Friendly,” Hoard’s Dairyman, May 27, 2014

PROOF OF SERVICE
CCP §§ 1011, 1013, 1013a; FRCP 5(b)

I am employed in the County of Kings, State of California. I am over the age of 18 years and not a party to the within action. My business address is 111 E. 7th St., Hanford, CA 93230.

On June 17, 2016, I served the following document(s): SUBMISSION OF EVIDENCE AND POLICY STATEMENT REGARDING HEARING ON ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2016-0531 on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

(By Mail) I deposited such envelope in the United States mail at Hanford, California. The envelope was mailed with postage thereon fully prepaid.

(By Mail) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Hanford, California, in the ordinary course of business.

(By Overnight Delivery) I deposited such envelope in the Federal Express/UPS Next Day Air/U.S. Mail Express Mail depository at Hanford, California. The envelope was sent with delivery charges thereon fully prepaid.

(By Personal Service) I caused such envelope to be hand delivered to the offices of the addressee(s) shown above.

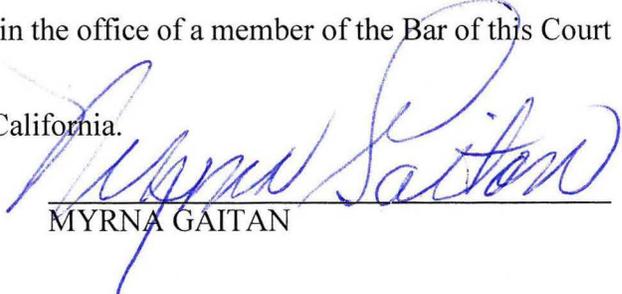
(By Electronic Mail) I caused such documents to be sent to the indicated recipients via electronic mail to the e-mail address(es) as stated herein.

(By Facsimile) I caused each document to be delivered by electronic facsimile to the offices listed above.

(State) I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on June 17, 2016, at Hanford, California.


MYRNA GAITAN

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