



California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair



Matthew Rodriguez
Secretary for
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Edmund G. Brown Jr.
Governor

10 January 2012

CERTIFIED MAIL
7011 0470 0002 9936 2490

Stanley and Vernal Gomes
M. F. Gomes Dairy (owner/operator)
20509 Road 28
Tulare, CA 93274

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2012-0510 FOR M. F. GOMES DAIRY, WDID 5D545097N01, 20433 ROAD 28, TULARE, TULARE COUNTY

Enclosed is an Administrative Civil Liability Complaint (Complaint), issued pursuant to California Water Code (CWC) section 13268, for violations of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), which was issued by the Regional Water Quality Control Board, Central valley Region (hereinafter Central Valley Water Board) on 3 May 2007. The Complaint charges Stanley and Vernal Gomes (hereinafter Discharger) with administrative civil liability in the amount of **nine thousand dollars (\$9,000)**, which represents a penalty assessment that is based on a consideration of several factors for the Discharger's failure to submit a required technical report as required by the General Order pursuant to CWC section 13267(b).

Pursuant to CWC section 13323, the Discharger may:

- Waive its right to a hearing by signing the enclosed waiver and submitting it to this office by **8 February 2012 and one of the following options** (these options are explained in full in item #3 in the attached waiver form):
 1. It may accept the proposed liability amount and submit payment of the full amount of \$9,000 by **8 February 2012**; or
 2. It has the ability to reduce the full amount of the proposed administrative liability provided that it also submits the required technical report along with the adjusted payment by **24 February 2012**; or
- Ask that the hearing be postponed to facilitate settlement discussion or for other reasons (items #4 and #5 on the attached waiver form); or
- Contest the Complaint and/or enter into settlement discussions with the Central Valley Water Board without signing the enclosed waiver.

If the Central Valley Water Board does not receive a signed waiver by **8 February 2012 and** either 1) payment of the full liability amount by **8 February 2012** or 2) payment of the adjusted liability amount and the required report by **24 February 2012**, a hearing on this matter will be

California Environmental Protection Agency



scheduled for the **29/30 March 2012** regular meeting of the Central Valley Water Board to be held at 11020 Sun Center Drive, Suite 200, in the City of Rancho Cordova, California. If a hearing on this matter is held, this hearing will be governed by the attached Hearing Procedures. Any objections to the Hearing Procedures must be received by Alex Mayer, whose contact information is listed in the Hearing Procedures, by **5 p.m. on 20 January 2012**. If the Central Valley Water Board holds a hearing, it may choose to impose an administrative civil liability in the amount proposed, in a higher or lower amount, or it may decline to seek civil liability, or it may refer the matter to the Attorney General for recovery of judicial civil liability.

If the Discharger chooses to sign the waiver and pay the assessed civil liability, this will be considered a tentative settlement of the violations in the Complaint. This settlement will be considered final pending a 30-day period of public notice, during which time interested parties may comment on this action by submitting information to the Central Valley Water Board staff person listed below. Should the Central Valley Water Board receive new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the Complaint, return payment, and issue a new complaint.

Any comments or evidence concerning the enclosed Complaint must be submitted to this office, attention Dale Essary, **no later than 5 p.m. on 27 February 2012**. This includes material submitted by the Discharger to be considered at a hearing and material submitted by interested parties, including members of the public, who wish to comment on the proposed settlement. If the Central Valley Water Board does not hold a hearing on the matter, and the terms of the final settlement are not significantly different from those proposed in the enclosed Complaint, then there will not be additional opportunities for public comment on the proposed settlement. Written materials received after **5 p.m. on 27 February 2012** will not be accepted and will not be incorporated into the administrative record if doing so would prejudice any party.

Payment of this assessed civil liability amount (\$9,000) does not absolve the Discharger from complying with the General Order and the MRP, the terms of which remain in effect. Additional civil liability may be assessed in the future if the Discharger fails to comply with the General Order and the MRP in a timely manner.

If you have any questions or comments regarding the Administrative Civil Liability Complaint, please contact Dale Essary at (559) 445-5093.

Original Signed by:

CLAY L. RODGERS
Assistant Executive Officer

Enclosure: Administrative Civil Liability Complaint R5-2012-0510
Administrative Civil Liability Fact Sheet
Hearing Procedures for Administrative Civil Liability Complaint R5-2012-0510

cc: see next page

cc w/encl: Ms. Pamela Creedon, Central Valley Water Board, Rancho Cordova
Mr. Cris Carrigan, Office of Enforcement, SWRCB, Sacramento
Mr. Alex Mayer, Office of Chief Counsel, SWRCB, Sacramento
Tulare County Resource Management Department, Visalia
Tulare County Health & Human Services Agency, Visalia

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2012-0510

IN THE MATTER OF

STANLEY AND VERNAL GOMES
M. F. GOMES DAIRY
TULARE COUNTY

This Complaint is issued to Stanley and Vernal Gomes (hereinafter Discharger) pursuant to California Water Code (CWC) section 13268, which authorizes the imposition of Administrative Civil Liability (ACL) and CWC section 13323, which authorizes the Executive Officer to issue this Complaint, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Complaint is based on findings that indicate that the Discharger failed to submit a technical report pursuant to an Order issued by the Regional Water Quality Control Board, Central Valley Region under the authority of CWC section 13267.

The Assistant Executive Officer of the Regional Water Quality Control Board, Central Valley Region (hereinafter Central Valley Water Board) finds, with respect to the Discharger's acts, or failure to act, the following:

1. The Discharger owns and operates the M. F. Gomes Dairy located at 20433 Road 28, Tulare, California, County of Tulare.
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007. (Exhibit A.) Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order. (Exhibit B.) The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. The General Order and the MRP required that an Annual Report for the calendar year 2009 be submitted for regulated facilities by 1 July 2010 (2009 Annual Report), including the following components: a revised Annual Dairy Facility Assessment, with facility modifications implemented to date; and a status on facility retrofitting completed as proposed in the Nutrient Management Plan submittal that was due 1 July 2009.

STATEMENT OF WATER CODE SECTIONS UPON WHICH LIABILITY IS BEING ASSESSED

4. An administrative civil liability may be imposed pursuant to the procedures described in CWC section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.

5. Pursuant to CWC section 13267, subdivision (b), a regional board may require that any person who has discharged, discharges, or is suspected of having discharge or discharging, or who proposes to discharge waste within its region, shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those 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.
6. Pursuant to CWC section 13268, subdivision (a), any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of section 13267, or failing or refusing to furnish a statement of compliance as required by subdivision (b) of section 13399.2, or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
7. Pursuant to CWC section 13268, subdivision (b)(1), civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with section 13323) of Chapter 5 for a violation or subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

ALLEGED VIOLATION

8. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the 2009 Annual Report with appurtenant components had not been received. (Exhibit C.) The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
9. On 28 September 2011, the Central Valley Water Board staff issued a pre-filing settlement letter notifying the Discharger that staff was in the process of assessing civil liability for failure to submit the 2009 Annual Report. (Exhibit D.) The letter included a calculation of the maximum penalty and a recommended penalty amount as of 1 September 2011 for the failure to submit the missing report. The Discharger was provided an opportunity to meet with the Central Valley Water Board staff to discuss the alleged violation and submit any information regarding the factors listed in CWC section 13327 that would be deemed relevant to determining an appropriate monetary penalty. The letter requested that all responses be received by 14 October 2011. As of the date of issuance of this Complaint, the Central Valley Water Board staff has not received any response to the 28 September 2011 pre-filing settlement letter.
10. Central Valley Water Board's compliance tracking system and case files indicate that the Board has not received the 2009 Annual Report to date.
11. The Discharger is alleged to have violated the following sections of the General Order and the MRP:

A) Provision E.3 of the General Order, which states:

“The Discharger shall comply with the attached Monitoring and Reporting Program No. R5-2007-0035 which is part of this Order, and future revisions thereto or with an individual monitoring and reporting program, as specified by the Central Valley Water Board or the Executive Officer.”

B) Provision E.13 of the 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”

12. The Discharger violated both the General Order and the MRP by failing to submit the 2009 Annual Report as directed by the MRP that accompanies the General Order, which contain reporting requirements for dairies regulated by the General Order.

SUMMARY OF ALLEGED VIOLATIONS

1. **Violation No. 1:** The Discharger failed to submit an annual report for 2009 by 1 July 2010 as required by the General Order and the MRP. As of the date of this Complaint this report is now 558 days late.

The Discharger has been out of compliance for a total of 558 days.

FACTORS CONSIDERED IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY

13. On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability. This policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final_111709.pdf.

14. The administrative civil liability was derived from the use of the penalty methodology in the Policy. In summary, this penalty assessment is based on a consideration of the failure to respond to requests made pursuant to CWC section 13267, subdivision (b), for the violation. The proposed civil liability takes into account such factors as the Discharger's

culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Violations under Water Code section 13267 are assessed on a per day basis. However, the violation at issue is primarily a reporting violation and therefore qualifies for the alternative approach to penalty calculation under the Enforcement Policy. The failure to submit an annual report does not cause daily detrimental impacts to the environment or the regulatory program. It is appropriate to assess daily penalties for the first thirty (30) days, plus one violation for each additional thirty-day period. For Violation 1, the days fined is reduced to 24 days (Attachment B).

The required factors have been considered using the methodology in the Enforcement Policy, as explained in detail in Attachment A and shown in the Penalty Calculation for Civil Liability (Attachment B).

15. The maximum penalty for the violation described above is \$558,000 based on a calculation of the total number of per-day violations times the statutory maximum penalty (558 total days of violation X \$1,000). However, based on consideration of the above facts and after applying the penalty methodology, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **nine thousand dollars (\$9,000)** for the violation cited above. The specific factors considered in this penalty are detailed in Attachment A. The Discharger's culpability, history of violations, and ability to pay and continue in business were considered, but did not change the amount of liability. Other factors as justice may require were considered, but circumstances warranting an adjustment under this step were not identified by staff or provided by the Discharger.

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

The Assistant Executive Officer proposes that the Discharger be assessed an administrative civil liability pursuant to Water Code sections 13323 and 13268 in the amount of **nine thousand dollars (\$9,000)** for failure to submit the 2009 Annual Report by the 1 July 2010 deadline as required by the General Order and the MRP.

The Executive Officer proposes that the amount of the assessed administrative liability (\$9,000) be reduced provided the Discharger submits a complete 2009 Annual Report. The amount of the assessed civil liability shall be reduced by \$2,000 if the 2009 Annual Report is received by **24 February 2012** and which the Executive Officer finds complete. The total adjustment to the liability amount will not exceed \$2,000.

If the Central Valley Water Board holds a hearing, it may choose to impose an administrative civil liability in the amount proposed, in a higher or lower amount, or it may decline to seek civil liability, or it may refer the matter to the Attorney General to have a Superior Court consider enforcement. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this administrative civil liability complaint through hearing.

There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations that refer to “actions” and “special proceedings” and are contained in the California Code of Civil Procedure apply to judicial proceedings, not an administrative proceeding. See *City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.

Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of the requirements of the Discharger’s waste discharge requirements for which penalties have not yet been assessed or for violations that may subsequently occur.

Issuance of this Complaint is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) pursuant to title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).

Payment of the assessed liability amount does not absolve the Discharger from complying with the General Order or the MRP, the terms of which remain in effect. Additional civil liability may be assessed in the future if the Discharger fails to comply with the General Order, the MRP, and/or future orders issued by the Central Valley Water Board.

1/10/2012

Date

Original Signed by: Clay L. Rodgers for

Pamela C. Creedon
Executive Officer
Central Valley Water Board Prosecution Team

**WAIVER OF 90-DAY HEARING REQUIREMENT FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent Stanley and Vernal Gomes (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2012-0510 (hereinafter the "Complaint");
2. I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served" with the Complaint;
3. **(Check one of the boxes below if the Discharger will waive its right to a hearing and either [Box 1] accept the proposed liability amount of nine thousand dollars (\$9,000) in full or [Box 2] accept an adjusted amount of proposed liability subject to timely submission of the required report)** I hereby waive any right the Discharger may have to a hearing before the Central Valley Regional Water Quality Control Board (Central Valley Water Board) within ninety (90) days of service of the Complaint;
 - [Box 1]** I certify that the Discharger will be liable for **nine thousand dollars (\$9,000) in full** and will submit this signed waiver and full payment by check, which will contain a reference to "ACL Complaint R5-2012-0510" and will be made payable to the "*State Water Resources Control Board Cleanup and Abatement Account*" by **8 February 2012**.
 - [Box 2]** I certify that the Discharger will be liable for the adjusted amount of proposed liability if the Discharger submits a complete 2009 Annual Report by **24 February 2012**:

The amount of the assessed civil liability shall be reduced by two thousand dollars (\$2,000) for the report described above that is received by **24 February 2012** and which the Executive Officer finds complete.

In addition to the report, the Discharger shall also remit payment of the adjusted liability amount, by check, which will contain a reference to "ACL Complaint R5-2012-0510" and will be made payable to the "*State Water Resources Control Board Cleanup and Abatement Account*". Payment must be received by the Central Valley Water Board along with the report described above by **24 February 2012** or this matter will be placed on the Central Valley Water Board's agenda for consideration at the **29/30 March 2012** Hearing.

I understand that payment of the liability amount either in full or in the adjusted amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

-or-

4. **(Check here if the Discharger will waive the 90-day hearing requirement, but wishes to engage in settlement negotiations. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted.)** I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board staff in discussions to resolve the outstanding violation(s). By checking this box, the Discharger is *not* waiving its right to a hearing on this matter. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and Central Valley Water Board staff can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. A hearing on the matter may be held before the Central Valley Water Board if these discussions do not resolve the liability proposed in the Complaint. The Discharger agrees that this hearing may be held after the 90-day period referenced in California Water Code section 13323 has elapsed.
5. **(Check here if the Discharger will waive the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted. Attach a separate sheet with the amount of additional time requested and the rationale.)** I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. By checking this box, the Discharger requests that the Central Valley Water Board

delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

6. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify the proposed Administrative Civil Liability Order, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability.

(Print Name and Title)

(Signature)

(Date)

EXHIBIT A

Waste Discharge Requirements General Order for Existing Milk Cow Dairies
Order R5-2007-0035

and

EXHIBIT B

Monitoring and Reporting Program R5-2007-0035

can be viewed at:

http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf

EXHIBIT C

Notice of Violation Issued 16 August 2010
For Failure to Submit 2009 Annual Report

EXHIBIT D

Letter Issued 28 September 2011

Forthcoming Assessment of Civil Liability for Failure to Submit 2009 Annual Report