

Lahontan Regional Water Quality Control Board

August 29, 2013

**TO: LAHONTAN WATER BOARD ADVISORY TEAM
AND ALL INTERESTED PARTIES**

REQUEST FOR REVIEW AND COMMENT OF PROPOSED SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ORDER FOR THE N&M DAIRY AND NEIL AND MARY DE VRIES, HELENDALE, SAN BERNARDINO COUNTY – WDID NO. 6B368010004

The enclosed documents regarding N&M Dairy are being provided for your consideration. The documents include: 1) a proposed Settlement Agreement and Stipulation for Entry of Order, Order No. R6T-2013-0075, (Settlement) for the N&M Dairy Facility, 2) the Settlement Exhibits, and 3) a proposed Cleanup and Abatement Order (CAO). The proposed Settlement is a result of negotiations between the N&M Dairy (Neil and Mary de Vries, owners) and the Lahontan Regional Water Quality Control Board's (Water Board) Prosecution Team (Prosecution Team) to resolve alleged violations of various Orders issued to Neil and Mary de Vries for the N&M Dairy. The proposed CAO would consolidate groundwater monitoring requirements at both the former Dairy site and nearby residential supply wells and continue to require Neil and Mary de Vries to provide replacement drinking water to persons living at affected properties.

The proposed Settlement contains three exhibits.

- Exhibit A: Facility Map
- Exhibit B: Administrative Civil Liability Methodology for Violation Nos. 1, 2, and 3
- Exhibit C: Supplemental Environmental Project (SEP) Description and Schedule for Performance

This letter provides an overview of the regulatory background and a discussion of the proposed actions and alternatives available to the Water Board.

Facility Description and Regulatory Background

Neil and Mary de Vries, as the operators of N&M Dairy (Dairy) and the trustees of the Neil and Mary de Vries Family Trust, own a 909-acre property adjacent to the Mojave River, located at 18200 and 36001 Lords Road, and on Indian Trails and Wild Road, in Helendale, San Bernardino County. A portion of the property is within and along the floodplain of the Mojave River. Waste discharges from the Dairy (e.g., cow manure and urine in corral areas, dairy wash water discharged to unlined lagoons, feed, and storm water runoff discharged to unlined depressions/basins) have been regulated by Waste Discharge Requirements contained in Water Board Order No. 6-01-38.

Water Board staff sampled residential wells in the vicinity of several dairy facilities, including four near N&M Dairy, between January 7, 2010 and March 9, 2010. Sampling results indicate that N&M Dairy is a source of nitrate and Total Dissolved Solids (TDS, or salts) contaminants that polluted area groundwater and adversely affected local residential drinking water wells.

Cleanup and Abatement Order No. R6V-2010-0029 (CAO No. 29) was issued to Neil and Mary de Vries on July 2, 2010 to correct nuisance conditions (odor and flies) resulting from wash water discharges and poor manure management practices. It requires Neil and Mary de Vries to remove excess manure and develop a Nutrient Management Plan and a Best Management Practices Plan for the Dairy. It also requires Neil and Mary de Vries to remove all excess manure by October 22, 2010, which was subsequently extended to January 17, 2012 with an added requirement to submit monthly manure removal status reports. Neil and Mary de Vries failed to fully comply with CAO No. 29 because the March through September, 2012 monthly reports were not submitted until October 26, 2012, and because a minor amount of excess manure remained onsite until December, 2012.

Cleanup and Abatement Order No. RV6-2011-0055 (CAO No. 55) was issued to Neil and Mary de Vries on August 2, 2011 to address nitrate and TDS contamination of the area groundwater. It requires Neil and Mary de Vries to sample residential wells in a specified Study Area, provide replacement water to affected residents, and provide status reports to the Water Board on a quarterly basis. CAO No. 55 was amended on January 19, 2012 to (1) revise the sampling/reporting frequency and constituents to be analyzed, (2) revise the nitrate as N and TDS concentration action limits for providing replacement water, (3) revise the monitoring sites; (4) revise the response time for providing replacement water; and (5) revise the study area boundaries. Neil and Mary de Vries are currently complying with CAO No. 55 and its amendment.

Cleanup and Abatement Order No. R6V-2011-0056 (CAO No. 56) was issued to Neil and Mary de Vries on August 8, 2011 to address continued fly and odor nuisance conditions from wash water discharges and poor manure management practices. It required Neil and Mary de Vries to address groundwater pollution originating from its unlined wastewater ponds. It also requires Neil and Mary de Vries to completely grade all drainage systems and corrals to convey storm water from the corrals and eliminate ponding within the corrals by December 15, 2012. Neil and Mary de Vries failed to fully comply with CAO No. 56 because they did not grade the drainage and corral areas by December 15, 2012 to eliminate ponding in the corrals.

Potential Maximum and Proposed Liability

On November 17, 2009, the State Water Resources Control Board (State Water Board) adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy provides a methodology for determining administrative civil liability. The methodology includes an analysis of the factors in Water Code section 13327, and it enables fair and consistent implementation of the Water Code's liability provisions.

The potential maximum liability for all of the alleged violations is \$2,625,000. Evaluating the factors provided in the Enforcement Policy, the Prosecution Team calculated an initial base liability of \$267,350. Additional factors were evaluated to calculate a final proposed liability amount of \$376,850.

The Prosecution Team gave particular consideration to the removal of a majority of the manure prior to the compliance date and to the removal of future waste discharges resulting from closing dairy operations. These, along with additional considerations using the Enforcement

Policy methodology outlined in Exhibit B to the proposed Settlement, resulted in a proposed base liability amount that is substantially less than the potential maximum liability.

The following table outlines the proposed base liability for each violation after applying the Enforcement Policy's methodology.

Alleged Violation Description	CAO No.	Days of Alleged Violation	Maximum Liability	Proposed Base Liability
Failure to remove all excess manure by January 17, 2012.	29, as amended	349	\$1,745,000	\$230,340
Failure to submit March through September 2012 monthly manure reports.	29, as amended	800	\$800,000	\$28,210
Failure to complete drainage and corral grading.	56	16	\$80,000	\$8,800
			SUB TOTAL	\$2,625,000
				\$267,350
TOTAL PROPOSED BASE LIABILITY				\$376,850

Proposed Settlement

The Prosecution Team and Neil and Mary de Vries engaged in settlement negotiations and agreed to settle the matter without administrative or civil litigation and by presenting the attached proposed Settlement to the Water Board for adoption as an Order by settlement. The amount of administrative civil liability imposed pursuant to the proposed Settlement is the amount calculated by the Prosecution Team using the State Water Board's Enforcement Policy.

Key considerations of the proposed Settlement include:

1. The Prosecution Team's acknowledgement that the Dairy will no longer be a future threat to water quality because Neil and Mary de Vries' have closed the Dairy. All cows and milking equipment have been removed from the Dairy and the Dairy is in the process of final closure measures, including the composting and removal of all remaining manure. Considerations related to the Dairy closing include:
 - a) the cost of approximately \$250,000 to close the Dairy,
 - b) the removal of a potential income-stream from Neil and Mary de Vries,
 - c) the removal of all manure and its beneficial reuse as compost,
 - d) the elimination of a source of nitrate and salts to soil and groundwater, and
 - e) the elimination of potential wastewater discharges to groundwater and to the nearby Mojave River from the Dairy operations.

2. Neil and Mary de Vries have also proposed the completion of a Supplemental Environmental Project (SEP). The proposed SEP consists of creating a conservation easement designation for the portion of the Dairy property located within and adjacent to the Mojave River's active channel. The conservation easement designation will allow this portion of the land to naturally return to a fully functioning river floodplain and adjacent habitat area, thereby extinguishing the easement's development rights. Over time, the conservation easement designation will improve floodplain function, water quality, and associated beneficial uses.
3. The Prosecution Team has proposed a consolidation and modification of the ongoing monitoring requirements presently required of Neil and Mary de Vries (See proposed CAO enclosed).
4. Water Board staff will consider a reduction of the area of study for replacement water, otherwise known as the Revised Affected Area or Study Area, as appropriate, based on information to be provided by Neil and Mary de Vries or their consultant representatives. In the meantime, Neil and Mary de Vries will continue to provide replacement drinking water as required under CAO No. 55 and its amendment.
5. The Prosecution Team will propose for the Water Board's consideration and adoption rescission of the Dairy's existing Waste Discharge Requirements No. 6-01-38 following completion of Dairy closure activities (anticipated for consideration by the Water Board in early 2014).
6. The Prosecution Team will rescind existing enforcement orders upon adoption by the Water Board of the Settlement, the proposed CAO and order rescinding the Waste Discharge Requirements.
7. The total adjusted monetary assessment is \$376,850. Of this amount, \$188,425 would be paid to the Waste Discharge Permit Fund, and the remainder would be suspended pending completion of the proposed SEP.

Water Board Options

The Water Board has several enforcement options at its disposal. It is the Prosecution Team's recommendation that the Water Board adopt the Settlement Agreement and Stipulation for Entry of Order, Order No. R6T-2013-0075, and CAO, as proposed. Alternatively, the Water Board may: (1) reject the proposed Settlement and/or CAO; (2) request that the Prosecution Team and the Discharger make specific changes to the proposed Settlement and/or CAO; or (3) request that this item be scheduled for an adjudicatory hearing at an upcoming Board Meeting.

The Prosecution Team recommends the Water Board adopt the Settlement Agreement and Stipulation for Entry of Order, Order No. R6T-2013-0075 and CAO to resolve this matter. As outlined above, the proposed Settlement is in the best interest of the public where the agreement assesses a penalty amount in accordance with the State Water Board's Enforcement Policy that is fair and appropriate in light of the alleged violations. This penalty amount offers some assurance of equity between those who choose to comply with requirements and those who violate them. In addition, the proposed Settlement acknowledges the Discharger's efforts to cease any further discharge of waste to waters of the State including the proper closure and cleanup of the Dairy. The proposed Settlement memorializes agreed upon terms including the rescission of past cleanup orders and the reissuance of updated

cleanup orders all the while ensuring that the Discharger continues to abate the affected groundwater that is no longer suitable for domestic and municipal beneficial uses.

If the Water Board needs clarification from the parties regarding the proposed Settlement, the Prosecution Team encourages the Water Board to send its inquiries to both the Prosecution Team and the Discharger prior to rejecting or requesting that the item be heard at a Board Meeting. If the Water Board determines a public hearing is to be held, the Water Board will post the agenda containing the description of the item before its consideration at least 10 days before the Board Meeting.

Interested parties should submit written comments for the proposed Settlement and/or proposed Cleanup and Abatement Order no later than **September 30, 2013** to the Water Board at:

California Regional Water Quality Control Board, Lahontan Region
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150
ATTN: Patty Z. Kouyoumdjian

You may contact Eric Taxer at (530) 542-5434, or Scott Ferguson at (530) 542-5432, if you have any questions regarding this matter.


LAURI KEMPER, P.E.
ASSISTANT EXECUTIVE OFFICER

Enclosures:

1. Settlement Agreement and Stipulation for Entry of Order, Order No. R6T-2013-0075
2. Exhibits to Settlement Agreement and Stipulated Order
3. Proposed Cleanup and Abatement Order No. R6V-2013-(PROPOSED)