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11 Attorneys for Petitioners
12 Henry J. Tosta (dba Henry Tosta Dairy),
13 Henry J. Tosta Jr. Family Limited Partnership,
14 and Henry J. Tosta Trust

15 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

16 In the Matter of Henry J. Tosta (dba Henry) **Case No.**
17 Tosta Dairy), Henry J. Tosta Jr. Family)
18 Limited Partnership, and Henry J. Tosta)
19 Trust’s Petition for Review of Action by the) **PETITION FOR REVIEW; REQUEST**
20 California Regional Water Quality Control) **FOR HEARING**
21 Board, Central Valley Region, in Issuing) **California Water Code § 13320**
22 Administrative Civil Liability Order No. R5-)
23 2013-0095) **(Adopted February 6, 2014)**

24 **I. INTRODUCTION**

25 Pursuant to California Water Code § 13320 and Section 2050 of Title 23 of the California
26 Code of Regulations, Henry J. Tosta (dba Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited
27 Partnership, and Henry J. Tosta Trust (collectively “Petitioners”) hereby respectfully petition the
28 California State Water Resources Control Board (the “State Board”) to review and either set
aside Administrative Civil Liability Order No. R5-2014-0009 (the “ACL Order”) adopted by the
Regional Water Quality Control Board, Central Valley Region (the “Regional Board”) on
February 6, 2014, or reduce the penalty; further, Petitioners request an opportunity to be heard on
this matter. A true and correct copy of the ACL Order is attached hereto as **Exhibit A**.

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II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Petitioners submit this Petition in compliance with Water Code § 13320. Petitioners each fully participated in the review process for the ACL Order. Throughout the process, Petitioners challenged the Regional Board’s authority to adopt the ACL Order by submitting written evidence and oral testimony prior to and at the hearing held on February 6, 2014.

III. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF PETITIONERS

Henry J. Tosta (dba Henry Tosta Dairy),
Henry J. Tosta Jr. Family Limited Partnership,
and Henry J. Tosta Trust
20662 San Jose Road
Tracy, California 95304
Telephone: (209) 814-0139
Facsimile: (209) 836-1286

Petitioners request that all materials in connection with the Petition and administrative record be provided to Petitioners’ counsel as follows:

Thomas H. Terpstra
LAW OFFICE OF THOMAS H. TERPSTRA
578 N. Wilma Avenue, Suite A
Ripon, California 95366
Telephone: (209) 599-5003
Facsimile: (209) 599-5008
Email: tterpstra@thtlaw.com

IV. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH PETITIONERS REQUEST THE STATE BOARD TO REVIEW

Petitioners seek review of the Regional Board’s Administrative Civil Liability Order No. R5-2014-0009; in particular, the penalty amount is excessive and not supported by any evidence.

V. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT

The Regional Board adopted the ACL Order on February 6, 2014.

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1 any and all regulatory actions that will implement the ACL Order or, in the alternative, after
2 hearing before the Board, reduce the penalties to levels that take into account regulatory
3 guidance. Petitioners request a hearing before the Board to be allowed to fairly argue their case.

4 **IX. A STATEMENT OF POINTS AND AUTHORITIES IN
5 SUPPORT OF LEGAL ISSUES RAISED IN THIS PETITION**

6 As required by Title 23, section 2050(a)(7) of the California Code of Regulations,
7 Petitioners include herein a Statement of Points and Authorities in support of this Petition.
8 Petitioners request the opportunity to file supplemental points and authorities in support of this
9 Petition once the administrative record becomes available. Petitioners also reserve the right to
10 submit additional argument and evidence in reply to the Regional Board's or other interested
11 parties' responses to this Petition filed in accordance with Title 23, Section 2050.5(a) of the
12 California Code of Regulations.

13 **X. A STATEMENT THAT THIS PETITION WAS
14 SENT TO THE REGIONAL WATER BOARD**

15 In accordance with Title 23, Section 2050(a)(8) of the California Code of Regulations,
16 Petitioners emailed and mailed a true and correct copy of this Petition by First Class Mail on
17 March 10, 2014, to the Regional Board. The address to which Petitioners mailed the copy is:

18 Kenneth D. Landau, Assistant Executive Officer
19 Central Valley Regional Water Quality Control Board
20 11020 Sun Center Drive, Suite 200
21 Rancho Cordova, California 95670
22 Email: Ken.Landau@waterboards.ca.gov

23 **XI. A STATEMENT AS TO WHETHER THE PETITIONERS
24 RAISED THE SUBSTANTIVE ISSUES OR OBJECTIONS
25 IN THE PETITION TO THE REGIONAL BOARD**

26 Petitioners have fully exhausted all administrative remedies by submitting written and
27 oral comments on the ACL Order. All issues raised in this Petition were raised before the
28 Regional Board by Petitioners, such that the Regional Board was fully apprised of the legal
deficiencies of the ACL Order. Any issues not raised to the Board were due to unavailability of

1 evidence or fact that the issues arose after the hearing was closed or they are constitutional issues
2 that are not subject to the exhaustion doctrine.

3 **XII. REQUEST FOR HEARING TO PRESENT ADDITIONAL EVIDENCE**

4 Petitioners hereby request that the State Board conduct a hearing on this matter for the
5 purpose of oral argument and to receive additional evidence.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. PROCEDURAL BACKGROUND**

8 The Regional Board adopted Administrative Civil Liability Order No. R5-2014-009 on
9 February 6, 2014. This Petition challenges the ACL Order for the reasons set forth herein.

10 **II. FACTUAL BACKGROUND**

11 Mr. Henry Tosta has operated a dairy on a site in Tracy since 1994. He also operates a
12 heifer facility of the subject (Reeve Road) site pursuant to a lease arrangement with the
13 Echeverria Brothers Dairy General Partnership. On or about November 19, 2012, Administrative
14 Civil Liability Complaint R5-2012-0564 was issued against Tosta and the Echeverria Brothers
15 Dairy General Partnership, jointly and severally. Thereafter, Tosta and Echeverria Brothers
16 Dairy General Partnership entered into an agreement, which was later memorialized in a written
17 contract, under which Echeverria Brothers Dairy General Partnership would respond to the
18 requirements of Cleanup and Abatement Order referenced in the ACLC. Despite numerous
19 good faith efforts to comply in a timely fashion, a revised Administrative Civil Liability
20 Complaint (R5-2013-0592) was issued on November 21, 2013. For reasons which remain
21 unclear, the Revised ACLC was issued to Mr. Tosta only, and all allegations against Echeverria
22 Brothers Dairy General Partnership were apparently dismissed. At the hearing, without clear
23 evidence that he had contributed to any contamination and despite evidence that he had no ability
24 to pay and had not profited from the violations, he was fined \$310,775 without sufficient basis.
25 We are appealing that Order.

26 **III. ARGUMENT**

27 The Regional Board failed to proceed in the manner required by law and abused its
28 discretion by adopting the ACL Order with all of the following legal deficiencies.

1 **A. Petitioners Were Denied Due Process of Law and Statutory Rights.**

2 It is undisputed that Petitioner, a dairy farmer, has a property interest at stake in this
3 matter and, as such, is entitled to due process of law in any proceeding affecting its property
4 interest.¹ Yet from the issuance of the CAO and the Administrative Civil Liability Complaint
5 through the February 6, 2014, Regional Board hearing, this proceeding has been replete with
6 violations of due process and statutory and regulatory procedure to the great prejudice of
7 Petitioners.

8 Prior to the hearing on this matter, all parties were furnished with the “Hearing Procedure
9 for ACL Complaint R5-2013-0592,” a document which describes in considerable detail the rules
10 and procedures under which the hearing was to be held. Notably, the Hearing Procedure
11 included important assurances that even though members of the Prosecution Team and the
12 Advisory Team are employed by the same agency, interact routinely, and in the case of the
13 Advisory Team staff (Assistant Executive Officer) is the immediate subordinate of the Chief of
14 the Prosecution team, this would (theoretically) not interfere with the separation of their
15 functions in this case. Specifically, the Hearing Procedure provided as follows:

16 **Separation of Prosecutorial and Advisory Functions**

17 To help ensure the fairness and impartiality of this proceeding, the functions of
18 those who will act in a prosecutorial role by presenting evidence for consideration
19 by the Board (the “Prosecution Team”) have been separated from those who will
20 provide legal and technical advice to the Board (the “Advisory Team”). Members
21 of the Advisory Team are: Ken Landau, Assistant Executive Officer, and Alex
22 Mayer, Staff Counsel. Members of the Prosecution Team are: Pamela Creedon,
23 Executive Officer, Robert Busby, Supervising Engineering Geologist, Charlene
Herbst, Senior Engineering Geologist, Sean Walsh, Environmental Scientist,
Gilberto Corral, Water Resources Control Engineer, Ellen Howard, Staff Counsel,
and Vanessa Young, Staff Counsel.²

24 _____
25 ¹ One court recently observed: “In fact, the broad applicability of administrative hearings to the
26 various rights and responsibilities of citizens and businesses, and the undeniable public interest
in fair hearings in the administrative adjudication arena, militate in favor of assuring that such
hearings are fair. (*Night Life Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81.)

27 ² It should also be noted for completeness, that all of the engineers/staff on the Compliance
28 Team – charged with helping Mr. Tosta get into compliance; are on the Prosecution team,
loading the dice from the outset. How can Mr. Tosta be expected to come into compliance when
those persons intent on prosecuting him are supposed to be helping him comply.

1 Any members of the Advisory Team who normally supervise any members of the
2 Prosecution Team are not acting as their supervisors in this proceeding, and vice
3 versa. Pamela Creedon regularly advises the Central Valley Water Board in
4 other, unrelated matters, but is not advising the Central Valley Water Board in
5 this proceeding. Other members of the Prosecution Team act or have acted as
6 advisors to the Central Valley Water Board in other, unrelated matters, but they
7 are not advising the Central Valley Water Board in this proceeding. Members of
8 the Prosecution Team have not had any ex parte communications with the
9 members of the Central Valley Water Board or the Advisory Team regarding this
10 proceeding.

11 The attempt to separate the prosecutorial and advisory functions is founded on
12 considerations of fundamental fairness and due process. Recent case law, indeed an emerging
13 judicial trend, acknowledges the difficulties associated with attorneys in the same office
14 providing both prosecutorial and advisory functions before the same body. (*Sabey v. City of*
15 *Pomona* (2013) 215 Cal.App.4th 452.) The situation is fraught with potential and actual
16 conflicts of interest--a young attorney representing the Advisory Team who must render advice
17 which is contrary to the Prosecution Team's case, an Assistant Executive Officer who must
18 disagree publicly with his immediate supervisor, or an Executive Officer who normally advises
19 the Board on matters within its jurisdiction, but in this case, is acting as a prosecutor before the
20 same Board. Clearly, in these instances, a mere prohibition on "ex parte" communications is
21 hardly sufficient to resolve the inherent and fundamental conflicts of interest.

22 A review of the transcript of this hearing reveals that the attempt to separate the
23 prosecutorial and advisory functions was an abject failure. Most notably, the "Advisory Team",
24 including Mr. Landau, consistently failed to advise the Board that the primary alleged violations
25 (that is, the alleged violations triggering the highest monetary liability) had nothing to do with
26 the alleged practice of burying large numbers of dead animals, but instead, stemmed from
27 untimely submittal(s) of a "Groundwater Remediation Plan" and a report on the removal of
28 stockpiled manure. The prejudice to Petitioners was immediate and obvious from Board member
29 comments which focused almost exclusively on buried animals.

30 Individuals in an in-house environment are subject to the same personal and pecuniary
31 interests that attend those in private practice. Anyone in-house junior to the Agency Attorney
32 has promotions, compensation and employment on the line at all times, and so has every

1 incentive to do what they believe the “boss” wants. And the boss has every incentive to make
2 sure his or her subordinates get the results that make the boss look good so the boss’s job is safe.
3 There is simply no practical difference between that and the circumstances in a private law firm,
4 as was the case in *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 452. Clearly, considerations
5 of fundamental fairness and due process require the State Board to overturn the Regional Board’s
6 decision and order a new hearing in which the advisory and prosecution functions are truly
7 separated.

8 **B. The Penalty Scheme Creates Inherent and Unavoidable Bias.**

9 Petitioners request that the Board take notice of the order in *Blue Diamond Growers v.*
10 *Sacramento Environmental Management*, Sacramento County Superior Court Case No. 34-2011-
11 80000940-CU-WM-GDS. (Attached hereto as **Exhibit B** to this brief.) In this case, Judge
12 Michael P. Kenny found that the process Sacramento County used for ordering penalties violated
13 due process because it did not guarantee an impartial ultimate decision-maker. The bias was
14 created because the County retains a significant portion of enforcement penalties it received, and
15 uses those funds to support its activities. The Court then held that this system violated the
16 petitioner’s due process right to an impartial adjudicator. (See Exh. B, p. 2.) The appropriate
17 remedy, as indicated in that case, is to provide Petitioners with a fair hearing. (See *Clark v. City*
18 *of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1174.)

19 As requested here, the Superior Court in *Blue Diamond* followed the federal case of
20 *Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley* (9th Cir. 1997) 114 F.3d
21 840. The *Alpha Epsilon* case held that because the percentage of the money that was collected in
22 penalties was such a small portion of the budget there was no prejudice. However where the
23 penalties constitute a higher percentage there was potential for bias. Here, in 2011, \$10 million
24 was used by the State Board from the fund
25 (http://www.waterboards.ca.gov/water_issues/programs/grants_loans/caa/) in which ACL fines
26 are held.

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1 **C. Mr. Tostas' Attempts to Comply With the CAO Were Ignored.**

2 Finally, Mr. Tosta did attempt to comply with the CAO by entering into an agreement
3 with his landlord under which the landlord would attain compliance with the ACLC and Mr.
4 Tosta would subsequently reimburse his landlord. This agreement, provided to all parties in
5 advance of the hearing, was completely dismissed and ignored the Prosecution Team and the
6 Board and thus, it was improperly concluded that Mr. Tosta was not engaging in attempts to
7 comply.

8 **D. The Administrative Civil Penalties Are Arbitrary and Capricious.**

9 As set forth herein, Board members were thoroughly confused by the relationship
10 between the ability to pay, the economic benefit of noncompliance, and the application of the
11 factors set forth in the Enforcement Policy, and their confusion was only exacerbated by the
12 inconsistent and halting advice of their Counsel. As a result of their confusion, Board Members
13 failed to properly apply the factors set forth in the Enforcement Policy and in their confusion,
14 imposed the full ACL Complaint amount.

15 **E. Under the circumstances, any penalty should have been predicated on**
16 **Petitioners' Ability to Pay and on Petitioners' Ability to Remain in Business.**

17 Water Code section 13327 states that in assessing a penalty, the Regional Board "shall"
18 take into account enumerated factors, including the ability to pay. Thus, it was incumbent upon
19 the Regional Board affirmatively to explore and apply these factors to the evidence before it.

20 The Prosecution Team submitted a report by Mr. Gerald L. Horner which contained no
21 meaningful analysis of Petitioners' ability to pay or to continue in business. Horner's only
22 evidence in support of his conclusion that Petitioners were sufficiently able to pay a large civil
23 penalty came in the form of a one-time capital gain in 2009 from the sale of Petitioners'
24 replacement heifer stock.

25 Under section 13327, the "Ability to Pay" and "Ability to Continue in Business" are
26 separate factors and need to be addressed separately. In this case, Petitioners' perennial losses,
27 together with the excessive amount of a fine grossly disproportionate to the "Economic Benefit"
28 or avoided cost, demonstrated that the Board failed to apply a standard (or fair) economic or

1 accounting analysis. Moreover, the “Ability to Continue in Business” factor by itself is
2 sufficient to negate other factors. It is obviously part of the public policy behind section 13327
3 that, absent some egregious quasi-criminal conduct or exceptional circumstances not present
4 here, the purpose of the statutory construct is not to run legitimate small enterprises out of
5 business.

6 In summary, Petitioners submit that the penalty should have been predicated on
7 competent evidence of Petitioners’ ability to pay and to continue in business. It was not.

8 Virtually every factor enumerated in Section 13327 either warranted only a modest fine
9 based on these facts, or it was inapplicable, leading to the conclusion that any fine should have
10 been modest. The factors are: (1) “nature, circumstance, extent, and gravity of the violation or
11 violations” (a generalized factor that was applicable); (2) “whether the discharge is susceptible to
12 cleanup or abatement” (3) “the degree of toxicity of the discharge” (4) “with respect to the
13 violator, the ability to pay” (a specific factor that militated in favor of reducing the fine); (5) “the
14 effect on ability to continue in business” (a second economic factor that militated in favor of
15 reducing the fine); (6) “any voluntary cleanup efforts undertaken”; (7) “any prior history of
16 violations” (again a specific but mitigating factor); (8) “the degree of culpability” (a relevant,
17 potentially non-mitigating factor); and (9) “economic benefit or savings, if any, resulting from
18 the violation.” Here, the application of each of these factors strongly militated in favor of a
19 significantly reduced penalty.

20 Thus, the assessed penalty (\$310,775) is excessive, particularly in light of the
21 circumstances under which it was imposed and in view of the testimony at the hearing regarding
22 the financial condition of Petitioner and its ability to pay. The penalty therefore is
23 unconstitutional as an excessive fine. The imposition of an excessive fine is viewed as a
24 constitutional violation. (*See* U.S. Const., 8th Amend.; Cal. Const., Art. I, § 17; *see, also, Hale*
25 *v. Morgan* (1978) 22 Cal.3d 388 (\$17,300 fine, accrued at \$100 per day, imposed on landlord for
26 shutting off tenant utilities, found to be constitutionally excessive and violative of due process).

27 Accordingly, Petitioners respectfully request that if the Board ultimately elects to affirm a
28 penalty assessment against Petitioners, any such assessment should be limited to the minimal

1 injury incurred, as described herein, and not calculated based upon a daily accrual or any other
2 unreasonable arbitrary and capricious template.

3 **PRAYER**

4 Petitioners request that the State Board order the Regional Board to set aside its decision
5 to issue the ACL Order and to suspend all activities in furtherance of the ACL Order, including
6 any and all regulatory actions that will implement the ACL Order. Petitioners request a hearing
7 before the State Board to be allowed to fairly argue their case; or in the alternative that the State
8 Board reduce the fine to a level commensurate with Mr. Tosta's economic benefit.

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10 Dated: March 16, 2014

THOMAS H. TERPSTRA
A Professional Corporation

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By 

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THOMAS H. TERPSTRA
Attorneys for Petitioners

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EXHIBIT “A”



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Central Valley Regional Water Quality Control Board

12 February 2014

Henry J. Tosta
20662 San Jose Road
Tracy, CA 95304

FINAL ADMINISTRATIVE CIVIL LIABILITY ORDER, REEVE ROAD HEIFER RANCH

The Administrative Civil Liability Order has been finalized and your copy is enclosed. The payment of **\$310,775** required under the Administrative Civil Liability Order is to be paid no later than 30 days from the date of issuance of this Order, or by **10 March 2014**. Send the check to:

California Regional Water Quality Control Board, Central Valley Region
Attn: Della Kramer
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Make the check payable to the *State Water Resources Control Board Waste Discharge Permit Fund*, and indicate the Order number, R5-2014-0009, on the check. Please send a copy of the check to:

State Water Resources Control Board, Office of Enforcement, Attn: David Boyers
1001 "I" Street, 16th Floor
Sacramento, CA 95314

If you have questions about the Order, please contact David Boyers at (916) 341-5276 or at david.boyers@waterboards.ca.gov. You can also contact me at (916) 464-4724 or at charlene.herbst@waterboards.ca.gov.

A handwritten signature in cursive script that reads "Charlene Herbst".

Charlene Herbst
Senior Engineering Geologist
Confined Animal Facilities Regulatory Unit

Enclosure: Final Administrative Civil Liability Order
cc w/encl: Mr. Thomas H. Terpstra, Esq.
Mr. David Boyers, Esq., Office of Enforcement, SWRCB, Sacramento

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2014-0009

IN THE MATTER OF

HENRY J. TOSTA
REEVE ROAD HEIFER RANCH
SAN JOAQUIN COUNTY

This Administrative Civil Liability Order (hereafter Order) is issued to Henry J. Tosta (hereafter referred to as Discharger) based on findings that the Discharger violated Cleanup and Abatement Order (CAO) No. R5-2012-0709 and provisions of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (Dairy General Order). Water Code Sections 13268 and 13350 authorize the imposition of Administrative Civil Liability.

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:

BACKGROUND

1. Henry J. Tosta operates the Reeve Road Heifer Ranch (Heifer Ranch) located at 21070 Reeve Road, Tracy, San Joaquin County. The Heifer Ranch is enrolled under the Dairy General Order, which was adopted by the Central Valley Water Board on 3 May 2007 and updated on 3 October 2013. The Heifer Ranch has operated since 2006 as a heifer ranch and currently houses approximately 800 heifers. The Heifer Ranch's production area occupies approximately 18 acres, with support stock housed in corrals. Solid manure is stockpiled in an area south of the unused wastewater storage lagoon. As an enrolled facility, the Heifer Ranch is subject to the requirements of the Dairy General Order for regulatory purposes.

CHRONOLOGY OF EVENTS

2. On 1 May 2012 the Central Valley Water Board performed a closure inspection of the Heifer Ranch. During the 1 May 2012 inspection, Board staff identified violations of the Dairy General Order, including the burial of two dead cows in cropland immediately adjacent to the Main Drain canal of the Naglee-Burke Irrigation District, the burial of animal remains within the area south of the wastewater lagoon (within the production area), and the improper maintenance of well pads.
3. On 11 June 2012 the Executive Officer for the Central Valley Water Board issued Cleanup and Abatement Order R5-2012-0709 (CAO) to the Discharger to address the violations identified during the 1 May 2012 inspection. The CAO required that the Discharger cease any further on-site burials of dead animals, cleanup the dead cows buried in groundwater, collect groundwater samples in the vicinity where the dead cows were buried in groundwater, and submit a plan for remediation of the groundwater if samples indicated that waste disposal had caused pollution.

4. Staff conducted four inspections of the Heifer Ranch between the date of issuance of the CAO and 14 September 2012, the date the Assistant Executive Officer issued a letter notifying the Discharger of his failure to comply with deadlines and directives in the CAO. The four inspections identified late and incomplete responses to the CAO and an ongoing failure to comply with certain deadlines in the CAO, including the failure to remove manure mixed with animal remains from the area south of the wastewater lagoon by 29 June 2012.
5. Staff conducted an inspection of the Heifer Ranch on 10 October 2012, and identified an ongoing failure to comply with the CAO requirement to remove the pile of manure and animal remains from the area south of the wastewater lagoon.
6. Staff conducted an additional seven inspections between 19 November 2012 and 15 November 2013 to monitor the Discharger's progress with the directives of the CAO and compliance with the Dairy General Order.
7. On 21 November 2013, the Assistant Executive Officer issued Complaint No. R5-2013-0592 to the Discharger, recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$310,775.
8. On 19 December 2013, Regional Board staff received a report from the Reeve Road Heifer Ranch property owner, the Echeverria Brothers Dairy General Partnership, confirming that the manure mixed with animal remains from the area south of the wastewater lagoon was removed.

REGULATORY CONSIDERATIONS

9. On 3 May 2007, the Central Valley Water Board adopted the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035 (hereinafter Dairy General Order) and a Monitoring and Reporting Program (hereinafter MRP) that accompanies the Dairy General Order. The Dairy General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007. The Dairy General Order is a set of general waste discharge requirements that apply to owners and operators of existing milk cow dairies that (1) submitted a Report of Waste Discharge in response to the Central Valley Water Board's 5 August 8, 2005 request and (2) have not expanded operations since 17 October 2005.
10. Water Code Section 13268 states, in part: (a)(1) [a]ny person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
11. Water Code section 13268(b)(1) provides that "civil liability may be administratively imposed by a regional board in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs."
12. Water Code section 13350 states, in part: (a) [a] person who (1) violates a cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of a waste discharge requirement,

waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other actions or provisions of this division, shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

13. Water Code section 13350(e)(1) provides that "civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs."
14. Water Code section 13350(e)(1)(B) provides that "when there is no discharge, but an order issued by the regional board is violated, except as provided in subdivision (f), the civil liability shall not be less than one hundred dollars (\$100) for each day in which the violation occurs."

VIOLATIONS

15. Violation A: The Discharger violated Prohibition A.6 of the Dairy General Order and Water Code section 13350(a)(2) by burying dead cows causing waste to be deposited where it discharged to groundwater, a water of the state from at least 1 May 2012, the date of the initial discovery inspection, through 25 June 2012, the date the carcasses were removed and hauled to a landfill for disposal, for a total of 56 days.
16. Violation B: The Discharger violated directive 2 of CAO R5-2012-0709 and Water Code section 13267 by failing to timely submit proof of legal disposal of animal carcasses from 2 July 2012, the deadline for submittal in the CAO, through 20 July 2012, the date that proof of legal disposal was received, for a total of 18 days.
17. Violation C: The Discharger violated directive 4A of CAO R5-2012-0709 and Water Code section 13267 by failing to timely submit a Groundwater Remediation Plan from 28 August 2012, the day after the deadline for submittal in the CAO, through 12 April 2013, the date that a groundwater remediation plan was received, for a total of 228 days.
18. Violation D: The Discharger violated directive 4B of CAO R5-2012-0709 and Water Code section 13350(a)(1) by failing to timely remove manure containing animal remains from the area south of the wastewater lagoon from 30 June 2012, the day after the deadline for removal in the CAO through 15 November 2013, the date of the last inspection by staff prior to issuance of the Complaint, for a total of 504 days.
19. In determining the amount of any civil liability imposed, Water Code section 13327 provides that the Regional Board must consider the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on the violator's ability to continue business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.

20. On 17 November 2009 the State Water Resources Control 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 discretionary administrative civil liability. Use of the methodology addresses the factors used to assess a penalty under Water Code section 13327. The required factors under Water Code section 13327 have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A to this Order and shown in the civil liability penalty calculation spreadsheet in Attachment B of this Order. Attachments A and B are attached hereto and incorporated herein by reference.
21. Maximum Civil Liability: The maximum administrative civil liability that may be assessed pursuant to Water Code sections 13350 and 13268 for the violations described above is \$3,047,000.
22. Minimum Civil Liability: The minimum administrative civil liability for the violations described above according to the Enforcement Policy is equal to the economic benefit plus 10%, which is estimated to be \$5,274. The minimum administrative civil liability for the liability assessment for Violation D pursuant to Water Code section 13350(e)(1)(B) is \$50,400.
23. Issuance of this Administrative Civil Liability Order to enforce Water Code Division 7 is exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) in accordance with title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).
24. This Order is effective and final upon issuance by the Central Valley Water Board. Payment must be received by the Central Valley Water Board no later than thirty (30) days from the date on which this Order is issued.
25. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegatee is authorized to refer this matter to the Attorney General's Office for Enforcement.
26. Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED THAT:

1. Henry J. Tosta shall be assessed an Administrative Civil Liability in the amount of three hundred ten thousand and seven hundred seventy-five dollars (\$310,775).

2. Payment shall be made no later than thirty days from the date of issuance of this Order. Payment shall be made in the form of a check made payable to the State Water Resources Control Board Waste Discharge Permit Fund, and shall have the number of this Order written upon it.

I, Kenneth D. Landau, Assistant Executive Officer, do hereby certify that the foregoing is a full, true, correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 6 February 2014.



KENNETH D. LANDAU, Assistant Executive Officer

Attachment A: Administrative Civil Liability Penalty Methodology

Attachment B: Administrative Civil Liability Penalty Methodology Matrix

Attachment A – ACL Order No. R5-2014-0009
Specific Factors Considered for Administrative Civil Liability
HENRY J. TOSTA
SAN JOAQUIN COUNTY

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code sections 13350, subdivision (a) and 13327. Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at: http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

A. Factors Considered Relating to Dead Cow Discharge to Groundwater

The following steps are used in determining administrative civil liability for the discharge of dead cows to groundwater.

Step 1 – Potential for Harm for Discharge Violations

The "potential harm to beneficial uses" factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5). The designated beneficial uses of groundwater for this region are municipal and domestic water supply, agricultural supply, industrial service supply, and industrial process supply. Impacts to beneficial uses are reasonably expected to occur from the discharge of dead cows to groundwater. The decomposition of a dead mature cow releases approximately 63 gallons of fluid¹; a 1,200 pound cow carcass contains from 24 to 36 pounds of organic nitrogen²³. The U.S. Environmental Protection Agency in the National Primary Drinking Water Regulations has set a maximum contaminant level (MCL) in drinking water for nitrogen in the form of nitrate-nitrogen of 10 mg/l. Infants below the age of six months who drink water containing nitrate in excess of the MCL could become seriously ill and, if untreated, may die. Symptoms include shortness of breath and blue-baby syndrome. The Water Quality Control Plan for the Sacramento and San Joaquin River Basins, 4th Edition (Basin Plan), for drinking water the Most Probable Number (MPN) of coliform organisms over any seven-day period shall not exceed 2.2/100 mL. While not a health threat in itself, coliform is used to indicate whether other potentially harmful bacteria may be present. Any positive result for the coliform bacteria *E.coli* is a cause for concern according to the U.S. Environmental Protection Agency's Primary Drinking Water Regulations, because *E.coli* only comes from human and animal fecal waste. Groundwater

¹ Nutsch, N. and M. Spire. 2004. Carcass Disposal: A Comprehensive Review

² Payne, J. On-Farm Mortality Composting of Livestock (Oklahoma Cooperative Extension Service BAE-1749)

³ Glanville, T. Planning Considerations for Dairy Cattle Disposal by On-Farm Burial, Department of Agricultural and Bio-systems Engineering.

samples collected from the excavation when some of the dead cows were removed contained nitrate-nitrogen at 21.9 and 30 mg/l, and total coliform greater than 2419.6 MPN/100/mL, well in excess of the MCL for nitrate-nitrogen and the Basin Plan standard for coliform. In addition, both samples contained E.coli, at 68.9 and 156.5 MPN/100mL. These concentrations are cause for serious concern, and while bacteria can attenuate as they move through soil, attenuation of nitrate-nitrogen is unpredictable. However, based on available data on the location and construction of existing supply wells in the area, staff would expect that the nitrate and bacteria in groundwater would attenuate or dilute over time without appreciable effects on local receptors. Because the nitrate-nitrogen and bacteria concentrations exceed the limits that are protective of water quality, the Regional Board has identified the burial of dead cows in shallow groundwater as a moderate threat to beneficial uses, where impacts are reasonably expected without appreciable or chronic effects. A score of 3 is assigned for this factor.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways. The Discharger illegally buried dead cows in several feet of groundwater, which results in the direct discharge of decomposing flesh to waters of the state. The decomposition of a dead cow releases many chemicals, including nitrogen and chloride⁴, and potential pathogens such as E.coli, salmonellae, campylobacter spp., and prions. If the cows were treated with antibiotics or other pharmaceuticals, these chemicals are released into the groundwater as well via the decomposing flesh⁵. The chemicals discharged into groundwater as a result of the illegal burial of dead cows has the potential to pose a significant threat to environmental and human health. Because the release of nitrogen, chloride, and pathogens from decomposing cow carcasses poses "a significant risk or threat to potential receptors", a score of 4 was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, more than 50% of the discharge was susceptible to abatement. Once the source of the discharge (the dead cow carcasses) was removed from groundwater, the ongoing discharge of decomposing carcass materials would have stopped. In addition, the Discharger could have abated at least some of the impacts of the discharge of its waste if it pumped the underlying groundwater and applied it to cropland. Therefore, a factor of 0 is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a final score of 7 was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

⁴ Freedman, R. and R. Fleming. 2003. Water Quality Impacts of Burying Livestock Mortalities.

⁵ Watanabe et al.. 2010. Use and Environmental Occurrence of Antibiotics in Free Stall Dairy Farms with Manured Forage Fields, Environ. Sci 44:6591-6600.

This step addresses administrative civil liabilities for the discharge based on a per-day basis.

Per Day Assessments for Discharge Violations

The "per day" factor (determined from Table 2 of the Enforcement Policy) is 0.31 based on the total score from Step 1 and the deviation from requirements. The deviation from requirements was determined to be major where the requirement was rendered ineffective. The burial of dead cows is a violation of Prohibition A.6 of the Dairy General Order which prohibits the burial of animal carcasses at a facility enrolled under the Dairy General Order.

The days of violation for the buried dead cows that are the subject of this enforcement action have been calculated from 1 May 2012, the date of the inspection when dead cows were first observed buried in groundwater, to 25 June 2012, the date the carcasses were hauled off to a landfill, or a total of 56 days. Therefore, the Per Day Assessment is calculated as: (0.31 factor from Table 2) x (56 days) x (\$5,000 per day). The Initial Liability value is \$86,800.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Central Valley Water Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violations are related to the discharge of pollutants via dead animals, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

The Enforcement Policy describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of 1.5. The Discharger was notified in 30 June 2007 of the Dairy's enrollment under the Dairy General Order and was provided with a copy of the Dairy General Order. Additionally, the Discharger's Waste Management Plan for the Dairy identifies a renderer for the disposal of dead cows from the Dairy. Nonetheless the Discharger buried dead cows from the Dairy at the Reeve Road Heifer Ranch. Prohibition A6 of the Dairy General Order prohibits the disposal of dead animals on property except in certain very limited emergency circumstances. The Discharger disposed of his cattle in a manner in violation of the Dairy General Order.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger did cooperate with the Cleanup and Abatement Order R5-2012-0709 (CAO) directive where the Discharger removed between eight and twelve cows and properly disposed of them by the

required deadline. However, the Discharger did not cleanup the dead cows voluntarily and was ordered to do so under the CAO. Additionally, the Discharger has not taken actions to clean up or remediate the contaminated soil and water. On balance, the cleanup and cooperation multiplier factor has been set at 1.0, which neither increases nor decreases the proposed liability.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger Henry Tosta has a history of violations of water quality laws. On 25 July 2013 the Central Valley Water Board adopted Order No. R5-2013-0095 imposing an administrative civil liability in the amount of \$685,000 for the Discharger's noncompliance at the Henry Tosta Dairy for the discharge of manure to groundwater and violations of a cleanup and abatement order. The Regional Board, therefore, assessed a multiplier value of 1.1.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$86,800) X Adjustment Factors (1.5) (1.0) (1.1) and is equal to \$143,220.

B. Factors Considered Relating to Violation of CAO Directive 2: Submittal of Legal Proof of Disposal of Animal Carcasses

The following steps are used in determining administrative civil liability for the failure to timely submit proof of legal disposal of illegally buried carcasses by 2 July 2012. A report with narrative and photographs documenting removal of animal remains was received by the Central Valley Water Board on 20 July 2012.

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.35. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The purpose of the proof of legal disposal via a comprehensive report is to document that the illegally buried animals have indeed been removed and do not pose an ongoing threat to water quality. Delay in the submittal of the report results in ongoing questions about the method and thoroughness of removal activities and whether the discharge has ceased and the waste properly hauled to the appropriate landfill.

b. The Deviation from Applicable Requirements is moderate. The Discharger's submission was 18 days late; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from 3 July 2012 (the day after the report was due) to 20 July 2012 (the date the Central Valley Board received from the Discharger a report and receipt from the landfill) for a total of 18 days date. Therefore the Per Day Assessment is calculated as (0.35 factor from Table 3) x (18 days) x (\$1,000 per day). The Initial Liability value is \$6,300.

Step 4 – Adjustment Factors

The Enforcement Policy describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of 1.3. Evidence does not support a finding of negligent or intentional behavior, justifying a 1.5; or of inadvertent behavior, justifying a lower multiplier. The Discharger was aware of the need for the timely submittal of the comprehensive report but failed to submit the report on time in accordance with the deadlines in the CAO.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. A report was submitted by representatives of the Echeverria General Partnership, although it was not timely. The report was ultimately submitted not long after the deadline. The Discharger was assessed a neutral multiplier value of 1.0.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, a multiplier value of 1.1 was assessed.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$6,300) X Adjustment Factors (1.3) (1.0) (1.1) and is equal to \$9,009.

C. Factors Considered Relating to Violation of CAO Directive 4: Failure to Submit a Groundwater Remediation Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is **0.40**. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The CAO directed the discharger to collect groundwater samples and determine if the illegal burial of dead animals has caused pollution of groundwater. Groundwater samples collected after the excavation of the dead cows indicated pollution as described above. Therefore a groundwater remediation plan was required under the CAO. For the period of time the plan had not been submitted, the plan could not be approved or implemented, and groundwater impacts were not remediated.

b. The Deviation from Applicable Requirements is moderate. The Discharger submitted the Groundwater Remediation Plan approximately eight months late; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from 28 August 2012 (the date the groundwater remediation plan was due) through 12 April 2013 (the date that a groundwater remediation plan was received), a total of 228 days. Therefore, the Per Day Assessment is calculated as (0.4 factor from Table 3) x (228 days) x (\$1,000 per day). **The Initial Liability value is \$91,200.**

Step 4 – Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation.

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Regional Board has applied the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the

first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

$$\text{Revised Initial Liability} = (.4) \times (13 \text{ days of violation}) \times (\$1,000) = \$5,200$$

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of 1.4. The CAO clearly stated the requirement to submit the groundwater remediation plan if groundwater sampling indicated groundwater pollution. The Status letter issued by staff on 14 September 2012 stated that staff's evaluation of groundwater data received from the Discharger's consultant on 20 July 2012 indicated negative impacts to groundwater from dairy operations and stated that a plan for the remediation of the groundwater was required by 27 August 2012. The plan was not received until 12 April 2013, approximately eight months after the due date in the CAO.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the remediation plan was not submitted until 12 April 2013, the Discharger was given a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of 1.1.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, a multiplier value of 1.1 was assessed.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$5,200) X Adjustment Factors (1.4) (1.1) (1.1) and is equal to \$8,808.80.

D. Factors Considered Relating to Violation of CAO Directive 4: Failure to Remove and Properly Dispose of the Manure Containing Animal Remains from the Area South of the Wastewater Lagoon

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The Discharger placed dead cows in an area south of the lagoon at the Heifer Ranch and covered the cows with manure. When the lagoon at the Heifer Ranch was cleaned out, as required by the CAO, the removed manure, which also contained animal remains, was added to the pile of manure containing animal remains south of the wastewater lagoon. Land application of manure containing residues from mammalian tissue is not allowed because pathogens that are resistant to decomposition may be present, including prions responsible for Transmissible Spongiform Encephalopathy (TSE). Prions are very resistant to degradation, heat, and normal sterilization processes. While TSE is rare, should prions be present in a cow placed in the manure, prions could be transferred to the soil when the manure is land applied. The disease can be transmitted at very low exposure levels⁶ and is fatal to humans. Because of the severity of the impacts of TSE, should the disease-causing prions be present, this material must be discharged to a landfill that is permitted to accept this material.

b. The Deviation from Applicable Requirements is major. The Discharger has failed to remove the manure containing animal remains. By adding manure from the lagoon to the piled manure containing animal remains, the total volume of material requiring landfill disposal has actually increased from the amount at the time of issuance of the CAO. The Discharger has been repeatedly informed of the requirement to haul this material to an appropriate landfill; this requirement was reiterated in letters dated 14 September 2012, 26 August 2013, and 29 October 2013. The Discharger rendered the requirement ineffective, therefore warranting a major deviation from requirements.

The length of the violation is alleged from 30 June 2012 (the day after the manure and animal remains were to be removed per the CAO) through 15 November 2013, the date of the last inspection by staff, for a total of 504 days late. Therefore the Per Day Assessment is calculated as (0.55 factor from Table 3) x (504 days) x (\$5,000 per day). The Initial Liability value is \$1,386,000.

Step 4 – Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

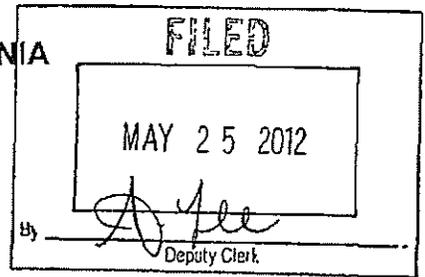
Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if

⁶ Federal Register 21 CFR 589, 25 April 2008, p 22725, Department of Health and Human Services, Food and Drug Administration, Substances Prohibited From Use in Animal Food or Feed.

EXHIBIT “B”

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO



WARD CONNERLY, a citizen and taxpayer,
and AMERICAN CIVIL RIGHTS FOUNDATION,
a nonprofit public benefit corporation,

Plaintiffs and Petitioners,

vs.

STATE OF CALIFORNIA, ELAINE M. HOWLE,
in her official capacity as the STATE AUDITOR
OF CALIFORNIA, and the CALIFORNIA
CITIZENS REDISTRICTING COMMISSION,

Defendants and Respondents.

ORDER POSTPONING
HEARING ON
DEMURRER TO
HEARING ON MERITS OF
PETITION FOR WRIT OF
MANDATE

Case No. 34-2011-80000966-
CU-WM-GDS

A hearing on demurrers to the petition for writ of mandate is scheduled for Friday, June 1, 2012 at 9:00 a.m. in Department 31. A hearing on an application for leave to file an amicus brief has been calendared for the same date and time.

The Court's "Guide to the Procedures for Prosecuting Petitions for Prerogative Writs", page 6, states:

"Motions addressing the merits of the petition in whole or in part should be calendared for a hearing at the same time as the hearing on the merits. Motions directed at resolving issues preliminary to and distinct from the issues related to the merits of the petition, such as untimeliness of the petition under an applicable statute of limitations, should be calendared before the hearing on the merits of a writ petition. The court, in the exercise of its discretion to control the order of litigation before it, may advance the hearing on a motion to a date before the hearing on the merits or may postpone a motion to the hearing on the merits when such advancement or postponement will promote the efficient conduct and disposition of the proceeding."

In this case, the petition asserts a facial challenge to a statute, Government Code section 8252(g), on the ground that it is in conflict with Article I, Section 31 of the California Constitution. The demurrers address the merits of the petition, i.e., whether the challenged statute is facially valid, rather than issues preliminary to and distinct from the merits, such as the timeliness of the petition.

The Court therefore finds this to be an appropriate case to exercise its discretion to postpone the hearing on the demurrers to the hearing on the merits.

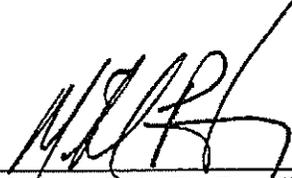
Case Number: 34-2011-80000966-CU-WM-GDS

Case Title: WARD CONNERLY, et al., v. STATE OF CALIFORNIA, et al.

A postponement will promote the efficient conduct and disposition of the proceeding by avoiding the potential for multiple hearings on the same or similar issues.

The hearing on the demurrers is therefore postponed to the hearing on the merits of the petition. Counsel for the parties are directed to meet and confer and contact the Clerk of this Department regarding a hearing date for the demurrers and the merits of the petition. The application for leave to file an amicus brief will remain on calendar for June 1, 2012, as scheduled.

DATED: May 25, 2012



HON. MICHAEL P. KENNY
Judge of the Superior Court of California,
County of Sacramento

Case Number: 34-2011-80000966-CU-WM-GDS

Case Title: WARD CONNERLY, et al., v. STATE OF CALIFORNIA, et al.

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **ORDER POSTPONING HEARING ON DEMURRER TO HEARING ON MERITS OF PETITION FOR WRIT OF MANDATE** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

ADAM R. POMEROY, ESQ.
Pacific Legal Foundation
930 G Street
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Deputy Attorney General
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EVA PATERSON, ESQ.
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FABIAN RENTERIA
Equal Justice Society
260 California Street, Suite 700
San Francisco, CA 94111

OREN SELLSTROM, ESQ.
Lawyers' Committee for Civil Rights
131 Steuart Street, Suite 400
San Francisco, CA 94105

Dated: May 25, 2012

Superior Court of California,
County of Sacramento

By: 
S. LEE,
Deputy Clerk

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PROOF OF SERVICE

I, Kay Konopaske, certify and declare:

I am over the age of 18 years and not a party to this action. My business address is: 578 N. Wilma Avenue, Suite A, Ripon, California 95366. On the date set forth below, I served the following document(s):

PETITION FOR REVIEW; REQUEST FOR HEARING

BY U.S. MAIL. By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY FACSIMILE. By use of facsimile machine, telephone number (209) 599-5008, to the person(s) at the facsimile number(s) listed below. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2.301 and 2.306]

BY OVERNIGHT DELIVERY. By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.] The envelope(s) were addressed to the person(s) as set forth below.

BY ELECTRONIC MAIL (EMAIL). By sending the document(s) to the person(s) at the email address(es) listed below.

BY PERSONAL SERVICE. I personally served the following person(s) at the address(es) listed below:

Kenneth D. Landau, Assistant Executive Officer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670
Email: ken.landau@waterboards.ca.gov

State Water Resources Control Board
Office of Chief Counsel
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Alex Mayer, Staff Counsel
Central Valley Regional Water Quality Control Board
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 10, 2014


KAY KONOPASKE