

Central Valley Regional Water Quality Control Board
25/26 July 2013 Board Meeting

**Prosecution Team's
Response to Comments and
Rebuttal**

Administrative Civil Liability Complaint R5-2012-0561
For

Henry J. Tosta (dba Henry Tosta Dairy), Henry J Tosta Jr. Family Limited Partnership, and
Henry J. Tosta Trust
Henry Tosta Dairy
San Joaquin County

The following are the Central Valley Regional Water Quality Control Board (Central Valley Water Board) Prosecution Team's rebuttal and response to comments submitted by the representatives of the Designated Party regarding the subject Administrative Civil Liability (ACL) Complaint R5-2012-0561 (hereafter Complaint). No comments were received from any other Interested Persons regarding the Complaint.

Comments were received from:

1. Thomas H. Terpstra, legal counsel for Henry J. Tosta, dba Henry Tosta Dairy, Henry J. Tosta Jr. Family Limited Partnership, and Henry J. Tosta Trust (hereafter Discharger) on **14 December 2012**;
2. Thomas H. Terpstra on **14 June 2013**, and
3. Lee N. Smith, legal counsel for the Discharger on **21 June 2013**.

The **14 December 2012** letter from Thomas H. Terpstra transmitted a signed waiver of the Discharger's 90-day hearing requirement and also made the general statement that "my client vigorously disputes the factual and legal bases upon which the Complaints are predicated, and further, without limitation, alleges that the proposed penalty(s) are both unwarranted and improperly calculated."

Prosecution Team Response 1: Detailed responses to the allegations in the 14 December 2012 letter are contained in the response to comments below.

The **14 June 2013** letter from Thomas H. Terpstra transmitted an evidence list with four exhibits: Exhibit 1 - Declarations of Farmers re: manure disposal, Exhibit 2 - Sedona Geologic Limited Groundwater Assessment Report, Exhibit 3 - Tax Returns and related financial information, and Exhibit 4 - Ability to Pay forms and supporting documentation. The Declarations of Exhibit 1 have not yet been provided. Exhibit 2, the Sedona report, is a groundwater assessment report of the dead animal burial area at the Reeve Road Heifer Ranch operated by the Discharger. Because the assessed area is not part of the Henry Tosta Dairy, no response to contentions made in the report is provided.

I. Analysis of the Discharger's Ability to Pay

Comment: The Discharger has an inability to pay the proposed civil liability.

Prosecution Team Response 2: As noted above, the Discharger provided a number of financial documents in support of his contention that he had an inability to pay the proposed civil liability of \$1,140,713. In addition, the Discharger provided a document labeled "Discharger's Ability to Pay and Continue in Business" which summarized the adjusted gross income for Tax Years 2009, 2010, and 2011 for both Henry J. Tosta and Henry J. Tosta Family Limited Partnership.

It appears the basis for the Discharger's claim regarding inability to pay focuses on the adjusted gross income of the Discharger as an individual and of the Tosta Family Limited Partnership. The ability to pay analysis conducted by the State Board economist, Gerald Horner, reflects a more comprehensive review of the Discharger's financial situation, including the consideration of the Discharger's assets and liabilities.

See Attachment 1 for an analysis of the Discharger's ability to pay the proposed civil liability.

II. Analysis of the Assessments and Adjustment Factors Used in the Penalty Methodology

Note – Throughout the analysis of the Assessment and Adjustment Factors used in the Penalty Methodology, the Discharger raises two points:

1. *The Discharger was financially unable to comply; and*
2. *The 2002 violation for which the Discharger was fined should not be used in setting the multiplier for the "History of Violations" factor.*

The following Prosecution Team Responses apply to all cases within the analysis where these two points are raised:

Comment: The Discharger was financially unable to comply.

Prosecution Team Response 3: The Discharger claims that the deviation from requirements should incorporate the Discharger's financial inability to comply with the requirements of the Dairy General Order or the CAO. The claim of financial hardship does not excuse the Discharger's inability to comply with the laws and regulations to which it is subject and is not a basis for reducing the deviation from requirements for the violations.

Comment: The 2002 violation for which the Discharger was fined should not be used in setting the multiplier for the "History of Violations" factor. The violation was remediated more than 10 years ago and is unrelated to the current violations.

Prosecution Team Response 4: The 'history of violations' adjustment takes into consideration factors including the frequency of repeat violations along with the similarity in the nature of past violations. In this case, the Discharger has former violations, which are closely related to the violations in this Complaint.

On 1 March 2002, the Discharger was identified by Department of Fish and Game (now Department of Fish and Wildlife) and Regional Board staff as the source of an off-property discharge of dairy wastewater from cropland into the Naglee-Burk Canal. The Naglee-Burk Canal discharges into the Old River, which is tributary to the San Joaquin River. Per the inspection report prepared by Board staff, wastewater from the Dairy was ponded in a small unplanted field east of the dairy, and was then flowing from the field in several locations into the drain on the east side of the field. The drain discharged into the Naglee-Burk Canal at the southeast corner of the dairy. The Board staff inspection report contained the following explanation for the discharge:

“Mr. Tosta explained that he had been pumping wastewater out onto approximately 15 acres for approximately one year instead of using his waste pond. The reason given for not using the waste pond was the lack of a pump and distribution system.”

The Discharger was notified by letter from Board staff dated 7 March 2002 that the discharge needed to be abated. On 28 March 2002, Department of Fish and Game and Regional Board staff reinspected the site of the discharge to determine what steps had been taken to abate the discharge. The 28 March 2002 inspection revealed at least seven discharges of wastewater from the same field into the eastern ditch and thence into the Naglee-Burk Canal. To quote from the inspection report:

“Other than a few shovels full of soil that had been placed in a futile effort to stop the discharges observed on 1 March, no work had been done to abate the discharges or to prevent them. On 1 March, Mr. Tosta stated that he would bring in soil and build up a bank between the field and the drain. This had not been done. On 1 March, Mr. Tosta stated that he would pump wastewater into the new waste pond, which was not being used. Even though some wastewater was being pumped into the new waste pond, wastewater was still being pumped onto the field.”

The San Joaquin County District Attorney’s office prosecuted the Discharger for the violation. The fine assessed was \$141,730; the size of the fine was due to the duration of the discharge and the lack of responsiveness of the Discharger to the direction from regulatory authorities to abate the discharge.

There are similarities between the 2002 violation and the violations at issue in this Complaint. In both cases violations continued without remediation even after the Discharger was directed to fix the problem. In both cases, the Discharger promised to take steps to correct the violations but failed to follow through. An underlying cause of the violations for both the 2002 violation and the violations in this Complaint is the Discharger’s failure to provide an adequate waste management infrastructure. The lack of adequate waste management infrastructure belies the Discharger’s claim that the 2002 violation was “remediated over 10 years ago”, as the 2002 remediation measures (construction of Lagoons 1 – 5) did not prevent the current situation due to a lack of maintenance and a lack of permanent pumps to move waste within the production area. Instead, Staff observations during inspections suggest that waste from the freestall barn either flowed or was pushed by a loader into the center of the production area, rather than being pumped into the lagoon system.

The Enforcement Policy requires a minimum multiplier of 1.1 where the Discharger has a history of violations of water quality laws. This Complaint was drafted conservatively, assessing a minimum multiplier of 1.1. Therefore, it is appropriate to consider the 2002 violation in the adjustment for the “history of violations”.

Comment: For Violation 1, the “Per Day” factor should be calculated at 0.060 or less because the deviation from requirements was not major but minor, because the Discharger did not disregard the requirement but had a general intent to follow the requirement.

Prosecution Team Response 5: Violation 1 is the discharge or disposal of waste resulting in the pollution of groundwater, a violation of Dairy General Order Prohibition A4. Prohibition A4 prohibits the “collection, treatment, storage, discharge, or disposal of wastes at an existing milk cow dairy that results in (1) discharge of waste constituents in a manner which could cause degradation of surface water or groundwater except as allowed by this order, (2) contamination or pollution of surface water, or (3) a condition of nuisance (as defined by the California Water Code Section 13050)”.

For a deviation from requirements to be rated as “Minor”, the intended effectiveness of the requirement (in this case, Prohibition A4) must remain generally intact. However, at the Dairy manure was placed in the production area in locations that were never designed to contain waste, and was allowed to accumulate and overflow containment structures within the production area. There is no indication that manure management practices were modified in any way to protect the very shallow (less than 7 feet below ground surface) groundwater which the Discharger knew existed below the site. (26 October 1994 letter from Louis Pratt to San Joaquin County, Evidence List Exhibit 29; Nitrate Loading study done for Henry Tosta dated 1 March 1999, Evidence List Exhibit 33).

The Discharger did not have a general intent to follow the requirements of the Dairy General Order where inadequate waste management persisted at the Dairy since at least the 2002 violations and continued despite the issuance of the CAO. *The Discharger’s failure to modify the waste management practices at the Dairy rendered the requirement of Prohibition A4 in the Dairy General Order ineffective in its essential function of protecting groundwater quality, which is the basis for existing classification of the deviation as “major”.*

Comment: For Violation 1, the “Adjustment” factors should be reduced to a neutral score of 1.0 for ‘culpability’ because the actions were not intentional and 0.75 for ‘cleanup and cooperation’ because the Discharger is currently in the process of correcting the violations and cleaning the site.

Prosecution Team Response 6: The culpability of the Discharger can be assessed by comparing practices at the subject Dairy and either performance standards or prevailing industry practices in the context of the violation. A higher multiplier is used for intentional or negligent behavior. Manure management practices at the Dairy did not meet the requirements of the Dairy General Order, which require the placement of manure within defined containment structures, the maintenance of freeboard within containment structures to prevent overflows, and prevention of accumulations of manure or wastewater beyond the capacity of containment structures. Manure management practices at the Dairy were far below prevailing industry practices, based on staff inspections of the 740+ dairies regulated out of the Sacramento Regional Board office

over the past five years. *These conditions justify the existing 'culpability' multiplier for Violation 1 of 1.5.*

The test for determining the 'cleanup and cooperation' adjustment is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. The Discharger showed minimal cooperation in complying with Cleanup and Abatement Order No. R5-2012-0708 (CAO), continuing to place slurry manure outside of containment structures and filling the two settling basins to overflowing, a condition observed during staff inspections in October and December 2012, inspections conducted after issuance of the CAO.

In all, Board staff has inspected the Dairy a total of 14 times to assess compliance with the Dairy General Order and the directives of the CAO. Subsequent to the initial inspection of 1 May 2012 and issuance of the CAO on 11 June 2012, staff inspected the dairy four times during the month of July 2012. Because of the lack of progress in manure removal and the inadequate cleanup plan provided by the Discharger, a letter was sent to the Discharger on 10 August 2012, discussing the inadequacy of the cleanup plan, denying requests for extensions of the CAO deadlines, and reminding the Discharger of upcoming CAO deadlines. Staff conducted an additional four inspections in September and October 2012 and, because of the lack of progress in complying with the majority of the directives of the CAO, the ACLC was issued on 19 November 2012. Additional inspections were conducted in December 2012, and January, March, and May of 2013. Due to the lack of progress in both settlement negotiations and manure removal at the site, the decision was made to take the case to hearing at the July 2013 Board meeting. The most recent inspection, on 26 June 2013, has shown some progress in manure removal at the Dairy, although the Dairy is not yet in compliance with the Dairy General Order.

One of the primary drivers for issuance of Administrative Civil Liability Complaint R5-2012-0561 was the lack of substantive progress in complying with the CAO. *These conditions justify the existing 'cleanup and cooperation' multiplier for Violation 1 of 1.5.*

Comment: For Violation 2, the "Per Day" factor should be calculated at 0.35 or less because the deviation from requirements was not major but moderate at most, because the Discharger did not disregard the requirement but had a general intent to follow the requirement; and because the Discharger relied on a consultant to accurately depict/characterize the Waste Management Plan and had no intent to deceive.

Prosecution Team Response 7: Violation 2 is the failure to submit an adequate Waste Management Plan (WMP) as detailed in Section H of the Dairy General Order. The purpose of the WMP is to ensure that the production area of the dairy facility is designed, constructed, operated and maintained so that dairy wastes generated at a dairy are managed in compliance with the Dairy General Order in order to prevent adverse impacts to groundwater and surface water quality. The WMP prepared for the Dairy and submitted in September 2010 to satisfy the requirements of the Dairy General Order (1) does not accurately describe the dimensions of the lagoons and settling basins, thus leading to an incorrect conclusion that the storage capacity for waste at the Dairy is more than adequate; (2) lists a critical storage period that is much less than the actual amount of time that waste is stored in the production area, leading to an incorrect evaluation of the storage capacity as more than adequate; and (3) includes a Production

area Design & Construction Report and a Waste Management Plan Modification Progress Status Report stating that the entire production area drains into ponds and that no modifications of the production area are needed to comply with the Dairy General Order. The discharger was directed in the CAO to provide a revised WMP that accurately describes how the settling basins and the lagoons in the production area will be operated in conformance with the Dairy General Order; the revised WMP has not yet been received.

For a deviation from requirements to be rated as “moderate”, the intended effectiveness of the requirement must be only partially compromised, with the requirement not met and the effectiveness of the requirement only partially achieved. In this case, the WMP submitted in September 2010 deviates so substantially from the actual waste management practices at the Dairy as to have limited usefulness. The submitted WMP is deceptive in asserting that no waste storage issues exist when a cursory visit to the site reveals numerous serious shortcomings that threaten water quality. Although the Discharger claims that he relied on a consultant to accurately depict the production area in the WMP, the Discharger should have known on reviewing his WMP that the document was defective. For example, the WMP states that “Lagoon 1” (Settling Basin 1) is 12 feet deep and “Lagoon 2” (Settling Basin 2) is 17 feet deep; the Discharger has told staff that the two settling basins are approximately 5 feet deep. Inaccurate information such as this results in calculated storage capacities that are much larger than the actual storage capacity. If the Discharger had the general intent to follow the requirement of submitting an adequate WMP, the Discharger would have demanded revisions to the WMP to make it accurate, and switched to a different consultant if necessary to resolve such matters. *Because of the magnitude of the inadequacies in the WMP and because of the misleading characterization of the Production Area as devoid of problems when in fact serious waste management problems existed, the requirement for a WMP has been rendered ineffective, and the existing categorization of the deviation as “major” is warranted.*

Comment: For Violation 2, the “Adjustment” factors should be reduced to a neutral score of 1.0 for ‘culpability’ because the actions were not intentional and 0.75 for ‘cleanup and cooperation’ because the Discharger is currently in the process of correcting the violations and cleaning the site.

Prosecution Team Response 8: The ‘culpability’ adjustment reflects the extent to which a violation is intentional or the result of negligence. In this case, the Discharger, in signing the WMP submitted in September 2010, certified under penalty of law that he had personally examined and was familiar with the information contained in the document. The Discharger was therefore aware that it was important that the information in the WMP be accurate in reflecting the operation and maintenance of the Production Area of the Tosta Dairy. The flaws in the WMP are such that the Discharger should have been aware that the WMP was inaccurate. *The behavior of the Discharger with respect to the requirement for an accurate WMP justifies the existing ‘culpability’ multiplier of 1.5 for Violation 2.*

The test for determining the ‘cleanup and cooperation’ adjustment is the extent to which the discharger voluntarily cooperated in returning to compliance. To date, the Discharger has not submitted a revision to the 2010 WMP, even though the Discharger was required to do so under the CAO. A reasonable dairy owner and operator who is currently managing and running a dairy could have recognized that there were serious

problems with manure management in the Production Area that merited a review of the WMP provisions and would have complied with the CAO directive requiring submittal of a revised WMP. *These facts justify the existing 'cleanup and cooperation' multiplier of 1.5 for Violation 2.*

Comment: For Violation 3A, the "Per Day" factor should be calculated at 0.35 or less because the deviation from requirements was not major but were a moderate/minor deviation at most, because the Discharger did not disregard the requirement but had a general intent to follow the requirement. The Discharger submitted a cleanup plan in July 2012 and had no intent to deceive. Prosecution Team note: the "Per Day" factor for deviation from requirements was assessed as moderate, not major, in the ACLC.

Prosecution Team Response 9: Violation 3A (CAO Directive 1) is the failure to submit a Production Area Cleanup Plan (Cleanup Plan). On 5 July 2012, 10 days late, the Discharger's consultant, Western Dairy Design Associates, electronically submitted a Cleanup Plan in response to Directive 1. However, the Discharger was notified on 10 August 2012 that the submitted plan was incomplete because it did not include a specific schedule for the cleanup of the manure and did not include an estimate of the total volume of manure and wastewater to be removed. In addition, the land identified in the plan for application of the removed manure was not large enough to use all the manure, given that manure needs to be applied at no more than agronomic rates.

For a deviation from requirements to be rated as "minor", the intended effectiveness of the requirement must remain generally intact; in other words, while the requirement was not met, there is a general intent by the discharger to follow the requirement. In this case, the Discharger was informed by letter from the Regional Board dated 10 August 2012 that the Cleanup Plan was inadequate and the reasons for that determination. The same letter stated that inspections by staff documented the lack of systematic progress in cleanup of the Production Area; the purpose of a Cleanup Plan is to provide a framework for timely cleanup including schedules and locations for the placement of removed manure. The Discharger has not, to date, provided an amended Cleanup Plan or any written schedule for the removal of manure in the Production Area. *The lack of an adequate cleanup plan resulted in compromising of the effectiveness of the cleanup directive and the requirement to clean up the production area has not yet been met, justifying the existing classification of the deviation as "moderate".*

Comment: For Violation 3A, the "Adjustment" factors should be reduced to a neutral score of 1.0 for 'culpability' because the actions were not intentional and 0.75 for 'cleanup and cooperation' because the Discharger is currently in the process of correcting the violations and cleaning the site

Prosecution Team Response 10: The 'culpability' adjustment reflects the extent to which a violation is intentional or the result of negligence. The Discharger submitted the plan 10 days late and was informed by letter dated 10 August 2012 that the Cleanup Plan he submitted was inadequate, but a revised plan was never submitted. Lack of an adequate cleanup plan has contributed to the very slow progress in cleanup of the production area. While it is not possible for staff to determine why an amended cleanup plan was not prepared and submitted by the Discharger, a reasonable and prudent person would have complied with the requirement in the CAO and, later, the request by Regional Board staff, for a complete cleanup plan. *Therefore the existing 'culpability' multiplier of 1.2 for Violation 3A is appropriate.*

The test for determining the 'cleanup and cooperation' adjustment is the extent to which the discharger voluntarily cooperated in returning to compliance. The Cleanup Plan submitted initially was deemed inadequate, but the Discharger never submitted an amended cleanup plan to remedy the deficiencies identified by Regional Board staff in the 10 August 2012 letter. While the Discharger claims to be currently in the process of correcting the violation, the Discharger's current compliance efforts do not obviate the need to assess a penalty where the Discharger has failed to comply with this requirement. Moreover, this factor in the Complaint was drafted conservatively, assessing a 1.1, a factor of 0.1 over a neutral multiplier of 1.0. *The Discharger has not submitted evidence to rebut the Prosecution Team's assessment. The Discharger's lack of responsiveness justifies the 'cleanup and cooperation' multiplier of 1.1 for Violation 3A.*

Comment: For Violation 3B, the "Per Day" factor should be calculated at 0.35 or less because the deviation from requirements was not major but was a moderate deviation at most, because the Discharger did not disregard the requirement but had a general intent to follow the requirement. The Discharger initiated efforts in September 2012 to remove the manure and continues to do so today. To date, approximately _____ tons of manure have been hauled off.

Prosecution Team Response 11: Violation 3B (CAO Directive 1A) is the failure to remove manure in a 2 to 4 acre central portion of the Production Area. The Discharger's claims are inaccurate. The area in question was never designed or constructed to contain waste. Therefore the placement of waste in this area is a violation of the Dairy General Order, Prohibition 4 (see Response 4). Although periodic efforts to remove waste and refrain from the placement of newly-generated waste in this area were observed by Regional Board staff, staff also observed the renewed placement in this area of newly-generated waste from the operating dairy (30 October 2012 inspection). *Placement of waste in an area not designed to contain it renders the Dairy General Order ineffective in its essential function of the protection of water quality, justifying the existing classification of the deviation as 'major'.*

The Discharger fails to quantify the claim that the Discharger has removed "approximately ____ tons of manure". The Regional Board relies on the submitted Annual Reports to assess the amount of manure generated, hauled, and/or applied to crops every year. Exhibit 10 of the CAO (attached as Attachment 2 to this Response to Comments and revised to correct a calculation error for the net manure left on site in 2008) provides a summary of those amounts of manure as submitted by the Discharger in its Annual Reports. Exhibit 10 illustrates that, during the period 2007 through 2011, 142,660 tons of manure were generated by the existing herd, but only 3,332 tons were land applied and only 10,445 tons were manifested as shipped off-site. Based on these figures provided by the Discharger in its Annual Report submittals, 128,883 tons of manure were left in the Production Area of the Dairy as of the end of 2011.

Comment: For Violation 3B, the "Adjustment" factors should be reduced to a neutral score of 1.0 for 'culpability' because the actions were not intentional and 0.75 for 'cleanup and cooperation' because the Discharger is currently in the process of correcting the violations and cleaning the site.

Prosecution Team Response 12: The 'culpability' multiplier reflects the extent to which a violation is intentional or the result of negligence. This violation was scored with a high

multiplier because the Discharger knew that the area in question was not identified as a waste storage area in the WMP he signed and submitted in September 2010. Even though the CAO dated 11 June 2012 stated that the slurry manure in this area needed to be removed, placement of newly-generated waste from the active dairy continued to be placed in this area, as observed in inspections conducted by staff throughout July 2012. While placement of newly-generated manure in the 3 to 4 acre area ceased briefly in August and September 2012, it was resumed based on Board staff's inspection on 30 October 2012. *The Discharger was aware of the requirements of the Dairy General Order, but chose to manage his waste in violation of the Dairy General Order, which warrants the existing 'culpability' multiplier of 1.5 for Violation 3B.*

The test for determining the 'cleanup and cooperation' multiplier is the extent to which the discharger voluntarily cooperated in returning to compliance. The Discharger has delayed removal of waste from the area in question, and even resumed the placement of newly-generated waste in the area. *This lack of responsiveness justifies the existing 'cleanup and cooperation' multiplier of 1.5 for Violation 3B.*

Comment: For Violation 3C, the "Per Day" factor should be calculated at 0.35 or less because the deviation from requirements was not major but was a moderate deviation at most, because the Discharger did not disregard the requirement but had a general intent to follow the requirement. The Discharger has continually made efforts to remove the manure from both settling basins. To date, approximately _____ tons of manure have been hauled off.

Prosecution Team Response 13: Violation 3C (CAO Directive 1B) is the failure to remove all manure within the two settling basins by 27 September 2012. Settling basins are to be maintained and regularly cleaned so that they can function to separate solid and liquid fractions of waste. Freeboard is to be maintained to ensure that embankments are not overtopped by waste and subsequent loss of containment and embankment integrity. At the time of the 1 May 2012 inspection, which led to issuance of the CAO, neither of the settling basins (labeled "Lagoon 1" and "Lagoon 2" in that report) had freeboard. Subsequent to issuance of the CAO, periodic attempts to clean the settling basins were made, but cleanout was never complete, and the basins were refilled with waste to the point that the basins either had no freeboard or were overflowing (inspections on 9/5/12, 10/10/12, 10/22/12, 10/30/12, 12/7/12, and 5/7/13). When one settling basin was lowered, the level of waste in the other settling basin would rise, often to the point where the settling basin would overflow.

There is a lack of permanent conveyances between the settling basins and the lagoons that would allow the settling basins to operate in a conventional way, retaining solids and decanting liquids to flow into the lagoons. Instead, the settling basins frequently overflowed into the 3 to 4 acre slurry area. *These operational practices are in violation of the General Order requirements for the maintenance of freeboard (General Specification B10) and warrant the existing classification of the 'deviation from requirements' as 'major'.*

See Response 11 regarding the failure of the Discharger in this comment to quantify the amount of manure removed from the site.

Comment: For Violation 3C, the "Adjustment" factors should be reduced to a neutral score of 1.0 for 'culpability' because the actions were not intentional and 0.75 for 'cleanup and

cooperation' because the Discharger is currently in the process of correcting the violations and cleaning the site.

Prosecution Team Response 14: The 'culpability' multiplier reflects the extent to which a violation is intentional or the result of negligence. The Discharger was notified on 30 June 2007 of the Tosta Dairy's enrollment under the Dairy General Order and was provided with a copy of the Dairy General Order. On 21 September 2010, the Discharger submitted a signed WMP to the Board describing, among other things, his manure management practices. The Discharger was therefore aware of the need to regularly maintain his settling basins. In his submission dated 26 July 2012, the Discharger submitted photographs purporting to show that all manure had been removed from the settling basins. However, the photographs indicate manure remained in the settling basins and no documentation of the destination of removed manure was provided. Moreover, as elaborated below, the settling basins continued to have freeboard issues.

Under the Dairy General Order (General Specification B10), an in-ground pond must have a minimum of 1 foot of freeboard at all times. This was not the case with the settling basins at the Dairy. For example, on 1 May 2012, neither settling basin had any freeboard. On 5 September 2012, Settling Basin #1 had no freeboard. On 10 October 2012, Settling Basin #1 was overtopping and flooding a road inside the production area. On 22 October 2012, staff noted that a small manure berm had been constructed along Settling Basin #1 to prevent manure and wastewater from discharging across an access road and into the Naglee-Burk Canal. During the 7 December 2012 inspection, it appeared that a notch had been cut in Settling Basin #1 to allow waste to flow from Basin #1 into the 3 to 4 acre area. The table below summarizes the freeboard conditions observed at the Settling Basins during some of the Staff inspections:

Date	Condition of Settling Basin #1	Condition of Settling Basin #2
5/1/12	No freeboard	No freeboard
9/5/12	No freeboard	1 to 2 feet of freeboard
10/10/12	No freeboard	2 to 3 feet of freeboard
10/30/12	0.5 to 1 foot of freeboard	No freeboard
12/7/12	1 foot of freeboard	Less than 1 foot of freeboard
5/7/13	No freeboard	1 to 2 feet of freeboard

The purpose of the directive in the CAO to clean out the two settling basins was to ensure that both settling basins had at least the minimum required freeboard in compliance with the Dairy General Order. . However, the operational practices of the Discharger resulted in ongoing violations of the freeboard requirements of General Specification 10B. *The Discharger was aware of the requirements of the Dairy General Order, and staff communicated those requirements directly to the Discharger but chose to manage his waste in violation of the Dairy General Order, which warrants the existing 'culpability' multiplier of 1.5 for Violation 3C.*

The test for determining the 'cleanup and cooperation' multiplier is the extent to which the discharger voluntarily cooperated in returning to compliance. Board staff observed manure removal activities in Settling Basins #1 and #2, but the ineffectiveness of the Discharger's activities and conduct resulted in an ongoing failure to meet the freeboard requirements of General Specification B10. *The Discharger has not presented evidence*

warranting a reduction of this multiplier of 1.2 for 'cleanup and cooperation' for Violation 3C.

Comment: For Violation 3D, the "Per Day" factor should be calculated at 0.35 or less because the deviation from requirements was not major but was a moderate deviation at most, because the Discharger did not disregard the requirement but had a general intent to follow the requirement. The Discharger has engaged Provost & Pritchard Consulting Group to meet this requirement by preparing a revised WMP.

Prosecution Team Response 15: Violation 3D (CAO Directive 6) is the failure to submit a revised WMP. As noted above under the discussion of Violation 2, the WMP submitted for the Dairy in September 2010 was inadequate and misleading. It failed to identify areas of the production area requiring improvement to ensure that storage of waste is protective of water quality. Although the Discharger claims that a consultant has now been engaged to develop a revised WMP, a revised WMP has not yet been submitted (the due date for the revised WMP in the CAO was 27 August 2012, or over 10 months ago). Moreover, the Discharger's noncompliance is an indication of the Discharger's refusal to recognize the importance of regulatory programs protecting water quality. *The Discharger's argument does not compel modifying this factor.*

Comment: For Violation 3D, the "Adjustment" factors should be reduced to a neutral score of 1.0 for 'culpability' because the actions were not intentional and 0.75 for 'cleanup and cooperation' because the Discharger is currently in the process of correcting the violations and cleaning the site.

Prosecution Team Response 16: The 'culpability' multiplier reflects the extent to which a violation is intentional or the result of negligence. The CAO issued to the Discharger clearly stated the requirement to submit the revised WMP. The Status letter sent to the Discharger on 10 August 2012 reminded the Discharger of the upcoming deadline to submit the revised WMP. As noted in Response 6, staff has spent considerable time in inspecting the facility to determine progress in cleanup, and also has spent considerable time in reviewing submittals made on behalf of the Discharger that purport to address requirements of the CAO but, in fact, do not. Although manure removal efforts by the Discharger continue, without a revised WMP that provides a roadmap for management of newly-generated manure at the Dairy, manure management problems will likely recur, requiring additional staff time for inspection and progressive enforcement. The revised WMP is vital to the future operation of the Dairy in conformance with the Dairy General Order. *The revised WMP has not yet been submitted, which warrants the existing 'culpability' multiplier of 1.5 for Violation 3D.*

The test for determining the 'cleanup and cooperation' multiplier is the extent to which the discharger voluntarily cooperated in returning to compliance. *The revised WMP has not been submitted, which warrants the existing 'cleanup and cooperation' multiplier of 1.2 for Violation 3D.*

Comment: For Violation 3E, the "Per Day" factor should be calculated at 0.35 or less because the deviation from requirements was a moderate deviation at most, because the Discharger had a general intent to follow the requirement. The Discharger has engaged Provost & Pritchard Consulting Group to meet this requirement by preparing a Remediation Groundwater Plan.

Prosecution Team Response 17: Violation 3E (CAO Directive 7) is the failure to submit a groundwater remediation plan. A plan is a pre-requisite before steps can be taken to remediate groundwater impacts from waste. The Discharger failed to submit the groundwater remediation plan and, in effect, disregarded the requirement of the CAO. A groundwater remediation plan has not yet been received. *This lack of response to the CAO directive justifies the classification of the deviation from requirements as major.*

Comment: For Violation 3E, the "Adjustment" factors should be reduced to a neutral score of 1.0 for 'culpability' because the actions were not intentional and 0.75 for 'cleanup and cooperation' because the Discharger is currently in the process of correcting the violations and cleaning the site.

Prosecution Team Response 18: The 'culpability' multiplier reflects the extent to which a violation is intentional or the result of negligence. The CAO issued to the Discharger clearly stated the requirement to submit the groundwater remediation plan if certain results were received from sampling of existing groundwater monitoring wells on site. The status letter of 10 August 2012 stated that the well data from the monitoring wells indicated that the groundwater underneath the production area had been negatively impacted by waste management practices at the dairy and therefore a groundwater remediation plan was due by 27 September 2012. *This lack of response to the CAO directive and subsequent 10 August 2012 staff letter justifies the existing 'culpability' multiplier of 1.5 for Violation 3E where the Discharger has been aware of the requirement but yet, to date, has failed to comply.*

The test for determining the 'cleanup and cooperation' multiplier is the extent to which the discharger voluntarily cooperated in returning to compliance. *The groundwater remediation plan has not been submitted, which warrants the existing 'cleanup and cooperation' multiplier of an amount above a neutral multiplier of 1.0. The Regional Board has not received evidence from the Discharger warranting a reduction from a multiplier of 1.2 for Violation 3E.*

Comment: The minimum liability according to the Enforcement Policy is equal to the economic benefit plus 10%, which estimated (sic) to be \$826,991. [\$751,810 + 75,181 (10%)] Since the Adjusted Total Base Liability Amount (\$1,125,713) is greater than 110% of the economic benefit of non-compliance (\$751,810), no adjustment is necessary based on the economic benefit analysis.

Prosecution Team Response 19: The calculated economic benefit of non-compliance plus 10% is \$826,991. According to the Enforcement Policy, economic benefit plus 10% is the minimum amount that can be assessed for the violations and that the amount of the ACL should exceed this amount so that liabilities are "not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations." (Enforcement Policy 20 May 2010, p.20).

The 21 June 2013 letter from Lee N. Smith requested a continuance of the Board hearing scheduled for 25/26 July 2013 and contained several comments.

Comment: The Discharger is working to comply and, according to manure manifest records, removed approximately 5000-6000 tons of manure before October 12, 2012 and another 900 tons since that time.

Prosecution Team Response 20: The Discharger has an operating dairy with an average herd size during the period of 2007 through 2011 of approximately 1,124 cows. Each Holstein cow generates an average of 105 pounds of manure per day, for a daily total generation of manure from the entire herd of 118,020 pounds or 59 tons of manure. Since the Dairy is generating approximately 59 tons of manure per day, the removal of even 6000 tons of manure is equivalent to less than 102 days-worth of manure or less than one-third 1/3 of the manure produced during a single year. At this rate of removal, the Discharger's efforts have not kept up with the daily output of manure generated by the existing herd.

Reference for manure generation rate: Hubbard, R.K. and R. R. Lawrence.
"Management of Dairy Cattle Manure",
www.ars.usda.gov/is/np/agbyproducts/agbychap5.pdf

Comment: The Dairy General Order is in flux in the process of being revised, and this may not be the opportune time to try and enforce the Order.

Prosecution Team Response 21: Challenges to the Dairy General Order have not invalidated the Regional Board's regulatory authority over the requirements and prohibitions that still remain in effect despite the recent litigation. Timely enforcement to require the mitigation and remediation of threats to water quality is vital to meet the mandate of the Porter-Cologne Water Quality Control Act for the protection of water quality.

Comment: The Discharger's limited funds are better spent complying with the orders than in defending himself before the Board.

Prosecution Team Response 22: The Discharger has had numerous opportunities to comply with the requirements of the CAO since its issuance in June 2012; the lack of progress in compliance with the directives of the CAO led to the issuance of the ACL Complaint in November 2012. Enforcement can be a tool to achieve compliance, in particular for facilities that have prior offenses or that are dilatory in complying with legal requirements.

In this case, the imminent threat of a Board hearing appears to be the most powerful inducement to date to increase efforts by the Discharger to move towards compliance. Cleanup progress, although minimal, was made subsequent to the postponement of the originally scheduled 31 January/1 February 2013 meeting of the Board, as documented by Board staff inspections on 15 March 2013 and 7 May 2013. As the 25/26 July 2013 deadline approaches, Board staff has noted increased efforts at the Dairy to remove

manure, as documented by the Board staff inspection of 26 June 2013. However, as noted in prior responses and in Staff's inspection of 26 June 2013, any progress on manure removal at the site is still not keeping up with current manure production, improvements required under the Dairy General Order have not been substantially implemented, and the Dairy remains out of compliance with the CAO.

Comment: The CAO required Mr. Tosta who, along with the rest of the dairy industry, is facing severe economic strains, to comply with unreasonable timelines.

Prosecution Team Response 23: The timelines in the CAO were not unreasonable. The Discharger was given over three months to complete manure removal activities. The timelines were set as they were to ensure that manure removal activities were completed by 1 October 2012, before the commencement of winter rains. The CAO required the Discharger to first come up with a plan to remove manure within the production area, and then to implement the removal plan. From the date of the letter, the Discharger had two weeks to prepare a plan stating how the cleanup of the Production Area would be done. He then had an additional week to hire equipment and arrange for a location for manure delivery, so that manure removal could begin by the deadline of 2 July 2012. The Discharger then had eight weeks to remove the manure in the 3 to 4 acre central portion of the production area, and an additional month (until 27 September 2012) to remove manure from the settling basins and clean up the lagoons. This timeline was set to ensure that remediation of the production area was complete before winter rains.

The Discharger did not comply with the timelines in the CAO as documented by Board staff inspections over the winter (10 October 2012, 22 October 2012, and 7 December 2012). Because the manure removal was not complete before winter rains, settling basins overtopped, manure and water accumulated to a greater depth in the three to four acre area, and staff observed evidence of discharges from the northern part of the Production Area to the bordering drainage ditch.

If the Discharger had and followed an accurate WMP as required under the Dairy General Order, the accumulation of manure in the production area that led to issuance of the CAO would not have occurred. By 1 July 2012, all dairies covered under the Dairy General Order were required to have completely implemented the provisions of the Dairy General Order.

Comment: Even per the Board's own inspection records, the site is improving.

Prosecution Team Response 24: Board staff acknowledges that conditions in the production area of the Dairy have improved. However, as documented in staff's 26 June 2013 inspection, significant manure remains in the production area, permanent improvements such as pumps to move manure between settling basins have not been installed, and manure/weed removal at the lagoons appears to have compromised the embankments of some of the lagoons. The Dairy has not yet reached compliance with the Dairy General Order and the requirements of the CAO issued on 11 June 2012. The ACLC stated that a hearing on this matter would be scheduled for the 31 January/1 February 2013 meeting of the Board; the hearing was delayed at the request of the Discharger. Minimal progress in cleanup of the site was made subsequent to the postponement, as documented by Board staff inspections on 15 March 2013 and 7 May 2013. As the 25/26 July 2013 deadline approaches, Board staff has noted increased

efforts at the Dairy to remove manure, as documented by the Board staff inspection of 26 June 2013.

Attachment 1 – Analysis of Discharger’s Ability to Pay

Attachment 2 – Exhibit 10 to the CAO, revised 5/10/13

Attachment 3 – 26 June 2013 Regional Board staff inspection