

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of Administrative Civil Liability
Complaint No. R5-2013-0539 (Sweeney Dairy)

Prosecution Team Rebuttal Argument and
Rebuttal Evidence

**PROSECUTION TEAM REBUTTAL ARGUMENT AND REBUTTAL EVIDENCE;
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2013-0539**

TO ALL PARTIES HEREIN;

PLEASE TAKE NOTICE that on July 1 or as soon thereafter as the matter may be heard, a Designated Party in the above-captioned matter, the Prosecution Team for the California Regional Water Quality Control Board, Central Valley Region (“Prosecution Team”) hereby submits a response to Evidence and Policy Statements submitted by Sweeney Dairy, and James Sweeney and Amelia Sweeney (collectively referred to as “the Discharger”) on June 20, 2013.

The Prosecution Team continues to recommend a discretionary penalty in the amount of \$20,400 for the violations alleged in Administrative Civil Liability Complaint (“ACLC”) No. R5-013-0539. Furthermore, the Prosecution Team asserts that the Discharger’s arguments challenging the legality of the underlying Order No. R5-2007-0035, the Waste Discharge Requirements General Order for Existing Milk Cow Dairies and the failure of the Central Valley Water Board to grant relief from the reporting requirements at this juncture in an enforcement proceeding are improper, untimely, and should not be considered at the 25/26 July 2013 hearing. The Discharger has also alleged that the Central Valley Regional Water Board has failed to show the value of joining a Groundwater Monitoring Program. Lastly, the Dischargers argument that the Prosecution and the Advisory Teams have a conflict of interest is meritless and should be rejected.

I. Background on Order No. R5-2007-0035 (Dairy General Order)

The Central Valley Regional Water Quality Control Board (“Central Valley Water Board”) adopted Order No. R5-2007-0035, the Waste Discharge Requirements General Order for Existing Milk Cow Dairies (“Dairy General Order”) on 3 May 2007. Part of the Dairy General Order includes a Monitoring and Reporting Program No. R5-2007-0035 (MRP), issued pursuant to the Central Valley Water Board’s authority under California Water Code (CWC) § 13267. The MRP requires the submission of, among other things, annual monitoring reports every first of July. The Annual Report is comprised of three main reporting components; information detailing the crops planted and harvested during the calendar year, groundwater monitoring results for those dischargers that monitor supply wells and subsurface drainage systems, and stormwater monitoring results during the wet season. This information must be collected throughout the calendar year and cannot be recreated after-the-fact. The Prosecution Team is aware that the reporting requirements of the Dairy General Order, including the Annual Report, represent a cost burden on dairy producers in the Region. The Prosecution Team is also aware that the increased reporting requirements place a higher per-cow cost on small dairies in the region as opposed to large dairies. To offset this disparity and help reduce costs, the Central Valley Water Board has taken steps to assist dairy producers to undertake self-reporting whenever possible.

The Central Valley Water Board contracted with Merced County Division of Environmental Health to develop software available to assist dairy producers in the creation of the Annual Report. Development of this software was subsidized by money from a Proposition 13 Nonpoint Source Pollution Control Grant, and the software continues to be supported by contract funding from the Central Valley Water Board. It is available to dairy producers for free over the internet. The Central Valley Board engaged with several dairy interest groups, including the California Dairy Quality Assurance Program, to provide free training to producers on how to use the program. The software is a web-based computer program that is fairly simple to use, where

data are entered by filling in the appropriate boxes. Producers are asked to input groundwater monitoring results and information about their annual crop production including the acreage and type of crops grown; results of wastewater and solid manure analyses; amounts of wastewater, manure, and chemical fertilizer applied to crops; plant tissue analysis; and the amount of manure exported off-site. This information is collated by the software, which generates a completed Annual Report ready for submittal to the Central Valley Water Board. Dairy producers are still required to collect the necessary information for the report, and perform water quality testing, but the software reduces the need for small producers to hire outside consultants to complete the Annual Report on their behalf.

In his evidentiary submission, the Discharger references two Waste Discharge Requirement waiver programs enacted by other Regional Water Boards (*see June 20 Evidence and Policy Statements*, p.22, referring to R1-2012-003 and R2-2003-0094). The Discharger argues that both the San Francisco and North Coast Regional Water Quality Control Boards have made a factual finding that small dairies do not pose a threat to water quality. While this argument is not on point to the issues in the current proceeding, the Prosecution Team would like to address the arguments made by the Discharger.

When the Dairy General Order was adopted in 2007, the Central Valley Water Board considered exempting small dairies from monitoring requirements, but eventually rejected this approach. In 2007 evidence existed to show that small dairies pose a threat to water quality. In comparison to the Central Valley Region, the North Coast and San Francisco Bay Regions have very different climatic, geologic, and land use conditions that justify different permitting conditions for small dairies. Those regions have fewer dairies and the spacing between individual dairies is greater. The overwhelming majority of dairy cattle in California are in the Central Valley Region, and are concentrated in areas surrounded by intensive agricultural use that presents a significant threat to groundwater quality, of which dairies are a contributor. Unlike the North Coast and San Francisco Bay Regions, the Central Valley receives

comparatively little precipitation and groundwater recharge of an aquifer that it is extensively used for drinking water, industrial supply, agricultural supply, and other uses.

The Central Valley Water Board decided that it was necessary to regulate small dairies in order to identify water quality problems. Collection of information through the Dairy General Order allows the Board to determine what improvements are necessary to improve water quality. It also allows necessary improvements to be planned so they can be implemented in an effective and efficient manner that protects water quality throughout the Region.

II. The Central Valley Water Board Already Made a Factual Determination About Many Issues Raised by the Discharger in its Evidence Submission.

The Central Valley Water Board has already determined that Sweeney Dairy is subject to the reporting requirements of the Dairy General Order, and has previously voted to adopt administrative civil liability against it for a failure to file the 2009 Annual Report and a Waste Management Plan (ACLO R5-2011-0068) and failure to file the 2010 Annual Report (ACLO R5-2012-0070). In its 20 June 2013 evidence submission for the present matter, the Discharger raises many of the exact same issues previously raised in its briefs and evidence submissions for ACLC R5-2011-0562, and for ACLC R5-2012-0542. In 2011, these issues were considered and addressed in adjudicative proceedings by the Central Valley Water Board. The Board found Mr. Sweeney's arguments to be unpersuasive, and imposed administrative civil liability based on Sweeney Dairy's failure to comply with the reporting requirements of the Dairy General Order. Likewise, in 2012 the same issues were considered and addressed in adjudicative proceeding by the Board and came to the same result.

The Prosecution Team believes that many of the Discharger's arguments in its 20 June 2013 evidence submission are duplicative to arguments raised during the adjudicative proceedings for ACLO R5-2011-0068 and ACLO R5-2012-0070. As such, they should be barred for reconsideration by collateral estoppel (*People v. Sims* (1982) 32 Cal.3d 468, 489). Collateral estoppel bars the relitigation of issues of fact or law that have already been necessarily

determined as part of an earlier case. It promotes judicial economy, preservation of the integrity of the judicial system by avoiding inconsistent judgments, and protection of litigants from harassment by repeated litigation (*Lucido v. Superior Court*, supra, 51 Cal.3d at pp. 342-343).

Collateral estoppel extends to agency determinations of legal issues (*Guild Wineries and Distilleries v. Whitehall Co., LTD* (9th Cir. 1988) 853 F.2d 755, 758-759, citing *United States v. Utah Construction Company* (1966) 384 U.S. 394) Collateral estoppel applies in claims brought in future administrative proceedings if the agency met the prerequisite requirements when arriving at its decision in the first instance: (1) the issue decided in a prior proceeding is identical to the issue sought to be relitigated, (2) the issue was actually litigated in the prior proceeding, (3) the issue was necessarily decided in the prior proceeding, (4) the prior proceeding resulted in a final judgment on the merits, and (5) the party against whom collateral estoppel is asserted is the same as, or in privity with, a party to the prior proceeding (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341). In addition, in evaluating whether to apply collateral estoppel, an agency must consider the public policies underlying the doctrine. (*Id.* at 342-343).

The Discharger should be barred from relitigating the issues that have been previously resolved by this Board. All of the prerequisites to the application of collateral have been satisfied. First, the Discharger's current evidentiary submission essentially repeats verbatim the same contentions and arguments that were made in evidence submissions for the previous enforcement action. Second and Third, the Discharger seeks to relitigate issues that were properly raised during the administrative proceedings for ACLC R5-2011-0562 and ACLC R5-2012-0542 and decided by the Central Valley Water Board. Fourth, the previous proceedings resulted in a final judgment on the merits, which was memorialized in ACLO R5-2011-0068 and ACLO R5-2012-0070. Fifth, the Discharger is the same party involved in both the present issue and ACLC R5-2011-0562 ACLC R5-2012-0542. Finally, public policy supports the application of the collateral estoppel doctrine, as precluding the Discharger from raising the

same issues in successive petitions will promote judicial economy and protect the Central Valley Water Board from being harassed by repeated litigation.

A. ACLC R5-2013-0539 is not premature and does not result in a deprivation of Sweeney Dairy's Due Process

1. The Discharger's arguments are duplicative and should be barred for reconsideration by collateral estoppel

The Discharger argues that the Central Valley Water Board cannot take enforcement action against Sweeney Dairy under ACLC R5-2013-0539 until it has:

“heard our arguments for the appropriateness of a modification of the 2007 reporting requirements, and have voted to deny the same, and until we have exhausted our appeal and all other legal remedies afforded us under the Water Code with regard to this issue.” (*June 20 Evidence and Policy Statements*, p.6).

This argument is identical to an argument raised by the Discharger during the adjudicative proceeding for ACLC R5-2011-0562 on 14 July 2011, and ACLC R5-2012-0542 on 26 August 2012. In both instances the Central Valley Water Board rejected Mr. Sweeney's arguments and determined that Discharger was legally obligated to submit Annual Reports under the Dairy General Order. (see ACLO R5-2011-0068, ACLO-2012-0070). There is no need to revisit this issue in the current proceeding.

2. There is no statutory obligation to grant a full adjudicative hearing in response to an application for review of WDRs under CWC § 13263(e)

The Discharger's arguments were unpersuasive in 2011 and 2012, and are unpersuasive now. Neither the Water Code nor the California Code of Regulations requires that the Central Valley Water Board grant a full adjudicative hearing to address the Discharger's request for review and revision of the waste discharge requirements in the Dairy General Order¹ pursuant to CWC §

¹ The Dairy General Order MRP is a Waste Discharge Requirement (WDR) that was adopted by the Central Valley Water Board under authority of CWC § 13263. CWC § 13263(a) allows a Regional Board to adopt waste discharge requirements “after any necessary hearing,” while CWC § 13263(i) allows a Regional Board to prescribe general waste discharge requirements for a category of discharges, such as discharges from dairy farms. The Central Valley Water Board adopted the Dairy General Order under authority of CWC § 13263(a) and (i).

13263. The Discharger's request for a waiver from the Dairy General Order requirements should have been raised to the full Board during the public forum and comment period.

a. Central Valley Water Board Staff may make recommendations about which items should be included on the Board's Agenda

The Discharger correctly points out that CWC § 13263(e) allows an affected person to *apply* to a Regional Board to review and revise Waste Discharge Requirements. However, there is no affirmative statutory requirement for a Regional Board to hold a hearing to contemplate modification of WDRs as they apply to an affected person. A hearing is required before a Regional Board *adopts* a WDR under CWC § 13263(a), but § 13263(e) does not require a Regional Board to hold a hearing upon a *request for modification* of WDRs. The decision to place a matter on the Board's agenda remains within the discretion of Central Valley Water Board management in consultation with the Executive Officer as the gatekeeper.

In its evidence submission, the Discharger argues that:

“Section 13223(a) of the Water Code specifies that the Central Valley Board may not delegate modification of Waste Discharge Requirements...We have a right to appear before the Central Valley Board to ask for a modification or waiver from any of the Order's general Waste Discharge Requirements. Even a decision to not hear our request for relief would have to be made by the Central Valley Board, not by its staff.” (*June 20 Evidence and Policy Statements*, p.13).

Mr. Sweeney correctly points out that § 13223(a) prohibits the delegation of the issuance, modification or revocation of any waste discharge requirement, but his claim is somewhat incomplete. Nothing in this Section of the CWC requires a Regional Board to hold a hearing to discuss the modification of a waste discharge requirement.

b. Mr. Sweeney could have requested full Board consideration of an application for waiver from WDRs at Public Forum

Mr. Sweeney submitted a request for an extension for reporting requirements to Central Valley Water Board staff on April 7, 2010. Central Valley Water Board staff correctly informed Mr. Sweeney that they had no authority to modify the reporting requirements (*Transcript from 14*

July 2011 Panel Hearing, p. 35). They reviewed Mr. Sweeney's request but did not schedule the item to be considered before the full Board. Data that are collected for the Annual Reports must be gathered in a timely manner and cannot be recreated. Given the time sensitive nature of this data collection process, Board staff did not feel an extension of the Annual Reports would be appropriate, and did not feel comfortable making that recommendation for consideration by the full Board at a future meeting (*Transcript from 14 July 2011 Panel Hearing*, p. 50-51). Instead, Board Staff advised Mr. Sweeney that he was free to address the issue during the public forum section at a future meeting of the Central Valley Water Board (*Id.* at p. 35).

Mr. Sweeney argues that it was not fair for the Central Valley Water Board to consider his application for an extension from the Dairy General Order reporting requirements during Public Forum because he would be limited to a 3 minute presentation. At the July 14 proceeding, Mr. Sweeney admitted that he never appeared before the Central Valley Water Board during public forum as recommended by the Board staff. Panel Chairman Longley contemplated Mr. Sweeney's arguments and Board staff's recommendations during the July 14 Panel Hearing adjudication, and noted that:

"If the Board deems that they want to hear more [during public forum], they can ask for more. So you have three minutes to show why you should be allowed to present more...If I had been in your shoes, I certainly would have taken the opportunity of that three minutes to come and talk to the Board. People do, and they find it was time well spent." (*Transcript from 14 July 2011 Panel Hearing*, p. 48).

At the 2 August 2012 proceeding (Hearing for ACLC-R5-2012-0542), Mr. Sweeney made a request for a hearing to present additional evidence for his modification request, and his request was rejected by the Board. As noted above, CWC § 13263(e) does not require a Regional Board to hold a hearing upon a *request for modification* of WDRs.

The record shows that both Central Valley Water Board staff and the Board members contemplated Mr. Sweeney's requests and offered him a forum in which to make his requests. Contrary to Mr. Sweeney's claims, there is absolutely no evidence in the record that suggests the

Prosecution Team, Former Board Chair Hart, or the current Board prevented Sweeney Dairy from requesting a hearing for modification of the 2007 Dairy General Order. Mr. Sweeney was not deprived of his due process because he has been afforded the opportunity to request a hearing, and the Board considered his request, and rejected it.

3. An application for modification of WDRs under § 13263(e) does not result in an automatic stay of reporting requirements.

In its evidence submission, Sweeney Dairy argues that, “[h]ad the Regional Board granted us a full hearing prior to the issuance of the 2010, 2011, and 2012 Complaints...there is the possibility that the Board could have granted us relief from some or all of those reporting requirements due by July 1, 2010, July 1, 2011, and July 1, 2012.” (*June 20 Evidence and Policy Statements*, p.6). A request for a modification of waste discharge requirements does not create an automatic procedural right to a hearing before the Central Valley Water Board (*Transcript from 14 July 2011 Panel Hearing*, p. 25).

a. This Issue has been previously considered by the Board and should be barred by collateral estoppel

Like the previous issues discussed, this issue was raised by Sweeney Dairy during the proceedings for ACLO R5-2011-0068 and ACLO R5-2012-0079 and addressed by the Prosecution Team Counsel. The Central Valley Water Board has already considered Mr. Sweeney’s request for extension or waiver of the Dairy General Order reporting requirements, and has determined that it will not grant Mr. Sweeney a hearing on the matter or an extension (*Transcript from 14 July 2011 Panel Hearing*, p. 48-52). It is inappropriate for Mr. Sweeney to raise the exact same issue a third time and argue that the Central Valley Water Board denied his request in an attempt to seek a different result.

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b. Sweeney Dairy is required to comply with the reporting requirements of the Dairy General order while it seeks administrative and judicial remedies

The act of submitting an application to the Central Valley Water Board for review and revision of WDRs by a discharger under CWC § 13263(e) does not eliminate the requirement to comply with monitoring and reporting requirements. The Standard Provisions and Reporting Requirements B.8. of the Dairy General Order state, “[t]he filing of a request by the Discharger for modification, revocation and reissuance, or termination of the Order, or notification of planned changes or anticipated noncompliance, does not stay any condition of the Order.” To date, Sweeney Dairy has not been granted a waiver or modification from the monitoring and reporting requirements of the Dairy General Order by the Central Valley Water Board. The facility continues to be regulated by the Central Valley Water Board as an existing milk cow dairy under Order R5-2007-0035 and is required to comply with all reporting requirements.

The State Water Board is the only regulatory body that has the authority to grant a stay under CWC §13321 and 23 CCR § 2053. The stay requirements are discussed in *In the Matter of the Petition of the Department of the Navy*, WQ 2009-0013 (emphasis added):

The State Water Board recognizes the extraordinary nature of a stay remedy and places a heavy burden on the petitioner seeking a stay. (Order WQ 86-01 (City of Colton).) A stay may be granted only if the Navy alleges facts and produces proof of all of the following: (1) substantial harm to the Navy or to the public interest if a stay is not granted; (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted; and (3) substantial questions of law or fact regarding the disputed action. (Cal Code Regs., tit. 23, § 2053.) It is incumbent upon the Navy to meet all three prongs of the test **before a stay may be granted**. (Order WQ 2002-0007 (County of Los Angeles).) In addition, the issue of whether a stay is appropriate is not whether the Navy might prevail on any of the merits of its claims, or whether the Navy will suffer harm over the term of the permit. Rather, the issue must be judged in the temporal sense—the Navy must prove that it will suffer substantial harm if a stay is not granted for the period of time pending resolution of the petition on the merits...(*Id.*)

Sweeney Dairy has not been issued a stay by the State Board. It must comply with the reporting requirements of the Dairy General Order until which time a stay is granted by the State Board.

Practically speaking, Mr. Sweeney argues that his application for review or modification of the WDRs by the Central Valley Water Board, which could potentially eliminate the requirement to submit the Annual Report, should automatically grant him the exact relief he requested from the Board. This surely cannot be the appropriate outcome. The obligation to continue to comply with the Dairy General Order becomes even more apparent where a requirement of the Dairy General Order, submission of the Annual Report, hinges on information that cannot be re-created after-the-fact. The CWC § does not contemplate the dismissal of waste discharge requirements during a Regional Board's review of a modification or waiver. Moreover, a resulting stay would be unfair to the other dairy producers enrolled under the Dairy General Order and would diminish the Order's purpose of ensuring ongoing protection of water quality.

III. Mr. Sweeney's attempts to challenge the propriety of the underlying general order are improper during This enforcement proceeding

A. Mr. Sweeney's attack on the dairy general order is untimely

In his 20 June 2013 submission, Mr. Sweeney argues that the Dairy General Order is invalid for a number of reasons detailed in Section E.2. of his evidence submission. Some of the evidence submitted by Mr. Sweeney is new to this proceeding. However, the underlying basis for the challenge remains the same. Mr. Sweeney is attempting to challenge the validity of the Dairy General Order in an enforcement proceeding. This is a collateral attack on the Order itself (*Transcript from 14 July 2011 Panel Hearing*, p. 24). The Central Valley Water Board contemplated this argument both in October 2011, and August 2012, and rejected it each time.

The appropriate window of time to challenge the reporting requirements in Monitoring and Reporting Program No. R5-2007-0035 has passed. If Mr. Sweeney felt aggrieved by either the reporting requirements or the deadlines in which to submit the reporting requirements as established in Table 1 of the MRP, these issues should have been raised within the appropriate time period subsequent to the Dairy General Order's adoption. Pursuant to CWC § 13320, Mr.

Sweeney had 30 days following 3 May 2007 to petition the Central Valley Water Board's action in adopting the Dairy General Order. This subsequent attempt to challenge the legality of the reporting requirements in the Dairy General Order in the present enforcement proceeding is merely a collateral attack on the Dairy General Order and should not be permitted.

Moreover, challenging the legality of the underlying requirement in the MRP, specifically the requirement to submit the 2010 Annual Report, at this juncture is also improper based on the Discharger's previous acquiescence to the very requirements he is now challenging.

Previously, the 2007 and 2008 Annual Reports were timely submitted by the Discharger. (Attachment 1 with date stamp received.) Subsequent arguments in this proceeding challenging the annual reporting requirements should be deemed waived based on the Discharger's previous compliance with those very same requirements in the MRP. It was not until the Administrative Civil Liability Complaint was issued did the Discharger challenge the propriety of the underlying General Order.

B. Mr. Sweeney's conclusions about the impact of the Dairy General Order on small dairy attrition rates are not based in fact

Mr. Sweeney makes several statements arguing that the cost of complying with the Dairy General Order led to the decline in small dairies in the Central Valley. These arguments are oversimplified and rely upon a very loose interpretation of fact. First, Mr. Sweeney's references several cost estimates from the Administrative Record² that are not accurate. Central Valley Water Board staff estimates that the costs associated with complying with the Dairy General Order Annual Reporting Requirements are approximately \$2,500 (See R5-2012-0542, Attachment A.) Second, Mr. Sweeney references attrition data for small dairies submitting Annual Reports to the Fresno Office since 2007 in an attempt to show that the cost associated

² Mr. Sweeney references testimony from Paul Souza from 2007 estimating that the cost to comply with the Dairy General Order would be "as high as \$89,000 initially and \$58,000 annually per dairy. This estimate has not proven to be accurate.

with complying with the Dairy General Order resulted in many small dairies closing down. This conclusion ignores many key facts. Like other small businesses in the economic downturn, small dairies are declining for a variety of economic reasons. As Mr. Sweeney points out, since 2008 “a combination of low milk prices and high feed costs that were unprecedented in recent memory” took a tremendous toll on the Dairy industry (*June 20 Evidence and Policy Statements*, p.2). Much of the attrition suffered by small dairies resulted from economic conditions unrelated to adoption of the Dairy General Order, and not from the cost associated with complying with the Dairy General Order. Mr. Sweeney’s claims are unsubstantiated without additional data or analysis.

IV. The Central Valley Water Board staff provided Sweeney Dairy with all necessary information pertaining to the Representative Groundwater Monitoring Program

To satisfy the monitoring requirements of the Dairy General Order, permittees may perform individual monitoring, or may join a representative groundwater monitoring program. The Discharger asserts that the Regional Board has failed to demonstrate the value of or need for joining a representative groundwater monitoring program.

Contrary to the Discharger’s assertion, the Regional Board does not have an obligation to convince dairy farms to join a representative groundwater monitoring program, but only to provide the information to be able to do so. Dairy farms may also satisfy the monitoring requirements of the Dairy General Order by individual monitoring.

On 5 May 2012 the Executive Officer of the Central Valley Water Board issued an Order, pursuant to CWC § 13267 Order (“13267 Order”) that directed the Discharger to implement groundwater monitoring at the Dairy. Specifically, the 13267 Order directed the Discharger to submit either written notification, by 25 May 2012, that the Discharger has joined a coalition group that will develop a representative groundwater monitoring program as an alternative to implementing an individual groundwater monitoring program at the Dairy; or, 2) an acceptable

groundwater monitoring well installation and sampling plan (MWISP) to the Central Valley Water Board by 29 June 2012. On 19 July 2012, Central Valley Water Board staff issued a Notice of Violation notifying the Discharger that the MWISP had not been received for the Dairy. The Notice of Violation also requested that the delinquent MWISP be submitted as soon as possible to avoid incurring any additional liability. To date, the Discharger has not joined a coalition or submitted the required MWISP.

In its *June 20 Evidence and Policy Statements* the Discharger states that on 27 May 2012 the Regional Board provided the relevant contact information for the representative groundwater monitoring program. The Discharger states that it contacted the program and was told that the Sweeney Dairy would be accepted. In addition, the Regional Board staff provided further information about the representative groundwater monitoring program in an email on 20 June 2013, in which the Regional Board staff advised the Discharger regarding where to obtain the locations of the proposed wells for the monitoring program.

Contrary to the assertions of the Discharger, the Regional Board has responded to inquiries regarding the representative groundwater monitoring program.

V. No conflict of interest exists between the Prosecution Team and Advisory Team

The Discharger incorrectly asserts that the attorneys for Prosecution and Advisory Teams have a conflict of interest, as both are employed by the State Water Resources Control Board. The Hearing Procedures clearly state:

“[t]o help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Board (the “Prosecution”) have been separated from those who will provide legal and technical advice to the Board (the “Advisory Team”).” *Hearing Procedure*, p. 3.

Moreover the Hearing Procedure provide further assurance of fairness and impartiality by forbidding designated parties and interested persons from engaging in ex parte communications regarding this matter. (*Id.*)³

VI. Conclusion

The Discharger has submitted legal arguments in this proceeding that are nearly identical to the arguments presented to the Board during the proceedings for ACLC R5-2011-0562 and ACLC R5-2012-0542. The Discharger did not timely challenge the Dairy General Order's requirement to submit a 2010 Annual Report, and arguments against these requirements should be rejected on jurisdictional grounds in this proceeding. Additionally, any evidence submitted by the Sweeney Dairy in support of these arguments should be excluded from the record on the basis of relevance. The only issues of this administrative civil liability hearing are whether the Discharger submitted the 2011 Annual Report by 1 July 2012 as required by the MRP, as amended, and whether the Discharger joined a representative groundwater monitoring program or failed to submit a monitoring well installation and sampling plan (MWISP) as required by CWC § 13267 and the MRP. The Prosecution Team contends that it is clear that both the report and MWISP were not submitted by the required deadlines and recommends to the Board the imposition of an administrative civil liability penalty of \$20,400 as proposed.

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³ In any event, assuming, *arguendo*, that the Prosecution and Advisory Teams' attorneys have collaborated on unrelated matters, the Supreme Court has held that there is no conflict of interest in those circumstances. (*See Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal.4th 731 (2009), [no conflict of interest where attorney prosecuting matter before State Water Resources Control Board simultaneously serves as advisor to Board in unrelated matter].)

Dated: 1 July 2013

Respectfully submitted,

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD, CENTRAL VALLEY
REGION PROSECUTION TEAM

By:

James Ralph