

To:

State Water Resources Control Board

Office of Chief Counsel

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Date: August 15, 2013



**Petition Under California Water Code Section 13320 for Review by the State Water Resources Control Board of Various Actions by the Central Valley Regional Water Quality Control Board Regarding Sweeney Dairy and Administrative Civil Liability Complaint No. R5-2013-0539.**

**A. Introduction.**

We are James G. Sweeney and Amelia M. Sweeney, doing business as Sweeney Dairy, and are the "Dischargers" named under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2013-00539 (2013 Complaint). Our address is 30712 Road 170, Visalia, CA 93292. Our telephone number is (559) 280-8233 and our email address is [japlus3@aol.com](mailto:japlus3@aol.com).

Pursuant to Section 13320 of the California Water Code, we hereby appeal to the State Water Resources Control Board (State Board) regarding the following decisions and actions and failure to act by the Central Valley Regional Water Quality Control Board (Regional Board) and petition the State Board to review the same and to grant us the relief we hereinafter request.

**B. Statement of Facts.**

We hereby incorporate herein by reference the Statement of Facts set forth on pages 1 through 6, inclusive, of our Written Testimony dated July 6, 2013, which is attached hereto as Exhibit A. This Written Testimony was submitted to the Regional Board nineteen days prior to the July 25, 2013 hearing on the herein 2013 Complaint. The only supplement to these facts is that at the

conclusion of the July 25, 2013 hearing, the Regional Board voted to adopt Administrative Civil Liability order R5-2013-0091, imposing a \$15,000.00 penalty upon us.<sup>1</sup>

### C. Legal Arguments and Analysis.

1. **The Regional Board failed to show that we are legally obligated to join a Representative Groundwater Monitoring Program or, in the alternative, install a groundwater monitoring system on our dairy site.**

The 2013 Complaint alleged that an administrative civil liability penalty should be imposed on us because we failed to either (1) install an approved individual groundwater monitoring well system at our dairy site, or (2) join an approved Representative Monitoring Program (RMP).

While we have admitted that we failed to do either, we have explained in more detail why we did not in our July 6, 2013 Written Testimony.<sup>2</sup> The Regional Board's staff first informed us by letter dated August 22, 2011 that by virtue of the authority granted to the Regional Board under the MRP section of the 2007 Order and pursuant to Water Code section 13267, it was requiring us to either install our own individual groundwater monitoring system at our dairy, or join an RMP that would monitor groundwater at a set of representative facilities.<sup>3</sup>

The Regional Board had cited in its August 22 letter the following language found in the groundwater monitoring part of the Monitoring and Reporting Program (MRP) section of the 2007 Order (page MRP-16): "Pursuant to Section 13267, the Executive Officer will order Dischargers to install monitoring wells to comply with Monitoring and Reporting Program Order No. R5-2007-0035 based on an evaluation of the threat to water quality *at each dairy.*" (Emphasis added)

We looked at this section of the MRP in more detail and found that the determination of whether to require a given dairy to install an individual groundwater monitoring well system was to be made on a individual, dairy-by-dairy, basis. We also found that MRP required the Regional Board's Executive Director to give priority to those dairies where the nitrate-nitrogen levels in any of their *domestic or agricultural wells equaled or exceeded 10 mg/l.*<sup>4</sup> (Emphasis added) Therefore, before a dairyman could be required to install a monitoring well system on his dairy, the staff must look at specific evidence suggesting that there is a need for such a costly program, and, under section 13267, they must inform the dairyman of the specific evidence regarding his/her dairy that supports requiring him to install a groundwater monitoring well system at his site.

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<sup>1</sup> Exhibit B

<sup>2</sup> Exhibit A, pp. 7-12.

<sup>3</sup> Exhibit 16 of Exhibit A

<sup>4</sup> 2007 Order, p. MRP-16

We also noticed that the provisions of the 2007 Order's MRP contained specific requirements as to the design of a groundwater monitoring well system. One was that it must measure groundwater quality immediately upgradient and downgradient of a dairy's operation, since this was necessary to ascertain the effect that the dairy operation was having on the first encountered water beneath it.<sup>5</sup>

We also carefully looked at section 13267 of the Water Code, which provided in part: "... the regional board may require that any person ... who ... discharges ... within its region ... shall furnish ... monitoring program reports which the regional board requires. The burden, including costs, shall bear a reasonable relationship for the need for the report and the benefits to be obtained from the reports. In requiring these reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring the person to provide the reports."

We sent a letter to the staff on September 30, 2011,<sup>6</sup> pointing out that section 13267 obligates a regional board to "provide a person with a written explanation with regard to the need for the [monitoring well] reports," and that "these reports shall bear a reasonable relationship to the need for the reports." We asked the staff why we needed to install monitoring wells at our dairy. We asked this particularly because we have provided them with test results of especially low nitrate-nitrogen levels (between .2 and 3.4 mg/l) found in our domestic and agricultural well water samples – yes, the very same wells that the 2007 Order requires all of us dairymen to test. It is also these wells that the 2007 Order specified must be looked at to decide whether a dairy should be required to install groundwater monitoring wells at their dairy.

Mr. Patteson responded with a letter dated November 9, 2011 that explained the Board was justified in requiring these reports simply because dairy waste is a threat to groundwater. He provided no reasons specific to our dairy.<sup>7</sup> His letter informed us that "Groundwater monitoring is being required of all dairies covered by the General Order [2007 Order] in accordance with the MRP." He continued, "We sent you a letter dated 22 August 2011 to inform you that to satisfy the requirements for additional groundwater monitoring, you had two options: 1) install an individual groundwater monitoring system at the Dairy; or 2) join a representative monitoring program that will monitor groundwater at a set of representative facilities."

In view of the MRP requirements for monitoring well design, the fact that the Regional Board staff was requiring us to install an individual groundwater monitoring well system on our dairy, they were in effect telling us that we were required to install one that would

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<sup>5</sup> 2007 Order, pp. MRP-16

<sup>6</sup> Exhibit 17 of Exhibit A

<sup>7</sup> Exhibit 18 of Exhibit A

comply with these MRP requirements, namely, that it had to provide data immediately upgradient and downgradient from our operation in order to reveal whether our dairy was contaminating first encountered groundwater beneath our dairy.

But, by offering us the option of joining an RMP as a substitute, the Regional Board staff seemed to be suggesting that the data from this RMP would come from locations immediately upgradient and downgradient from our dairy, so that this data would also reveal whether our dairy was adversely impacting our underground water.

This all seemed terribly strange to us. It was why we asked the staff in a series of letters as to what evidence the staff possessed that would justify the “need” for us installing groundwater monitoring wells at our dairy, and, in the alternative, why joining an RMP would provide them with a meaningful substitute set of data that was immediately upgradient and downgradient from our dairy operations.<sup>8</sup> They would never answer these questions. We decided to look into the RMP matter ourselves and discovered that the closest RMP wells at that time were more than 100 miles from our dairy. So much for wells that were “immediately upgradient and downgradient.”

Since the staff continued to not provide us with sufficient facts to justify us installing either an expensive monitoring well system at our dairy, or the value or need of joining the RMP, and in light of what we learned on our own, we refused to do either.

In a letter dated December 7, 2011, Mr. Patteson threatened us that “if you choose to not participate in an RMP, the Executive Officer will issue an order pursuant to California Water Code section 13267 that will require you to perform individual groundwater testing.”<sup>9</sup>

On May 4, 2012, the Regional Board mailed us a “Groundwater Monitoring Directive,” ordering us to install either (a) an individual groundwater monitoring system at our dairy, or (b) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities.<sup>10</sup> The Directive claimed that it had the authority under section 13267 of the Water Code and under the 2007 Dairy Order (R5-2007-0035) to require us to do so. This Directive was communicated to us by letter dated May 23, 2012.

Section 648 (a) of Title 23 of the California Code of Regulations defines an “adjudicative proceeding” as a proceeding by which facts are determined pursuant to which a regional board issues a decision. The Regional Board’s May 4, 2012 Directive to us was such a decision, and the deliberation leading up to the decision to issue the Directive comes under the purview of these adjudicative proceedings requirements. However, the Regional Board never afforded us the procedural rights to which we were entitled. We

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<sup>8</sup> Exhibits 17, 19, and 21 of Exhibit A

<sup>9</sup> Exhibit 20 of Exhibit A

<sup>10</sup> Exhibit 23 of Exhibit A

were not provided with an opportunity to confront or cross-examine any witnesses, allegations and evidence, and we were not allowed to present direct or rebuttal evidence or argument during its deliberations. Even if it is determined that the proceedings are not considered “adjudicative proceedings” under these regulations, the Regional Board’s conduct in its decision to issue this Directive violated fundamental constitutional principles of due process.

On May 30, 2012, we filed a Petition for Review with the State Board appealing the Regional Board’s adoption of the foregoing Directive. Over a year later, the appeal of this Directive is still pending decision by the State Board.

At the July 25, 2013 hearing, we heard testimony from Mr. Landau and Mr. Cativiela that, in effect, this RMP is nothing more than a scientific research project; it is intended to collect scientific data from representative soil areas and properties and groundwater conditions.<sup>11</sup> This was the first time we heard the RMP being characterized as a research project. Even so, no testimony or evidence was presented during the hearing that established that the RMP data would show what is going on upgradient and downgradient at any specific dairy site, let alone our own.

In looking at all of the correspondence that the Regional Board staff sent us regarding the RMP issue over the last two years, we are a little skeptical of their recent characterization that this was nothing more than a research project. Is it because we brought to light the fact that this RMP program does not provide any direct information about what impact individual dairies are having on the groundwater under their dairies? If this new characterization of the RMP program had any validity, why was it never explained or communicated to us as such during all of our inquiries prior to the hearing of July 25, 2013?

While we are not going to dispute that the RMP program may have some research value, the issue in this proceeding, however, is whether we violated any law, order or regulation by refusing to join or participate in it. As we stated earlier, there is nothing in the groundwater monitoring section of the 2007 Order that deals with RMPs, or that authorizes RMPs, or that authorizes the Executive Officer to order any dairyman to join an RMP.

Furthermore, the Regional Board staff cannot rely on section 13267 as authority for their demand that we join the RMP. One reason is that the Regional Board staff never provided us with its “research project” explanation at any time prior to the filing of the Complaint against us and prior to the July 25 hearing. Another reason is that section 13267 requires that a discharger must “furnish, under penalty of perjury,” any required reports. As the

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<sup>11</sup> Exhibit C, pp. 41-42, 65-66

applicable discharger under section 13267, we would have been the party obligated to sign the RMP reports under penalty of perjury. Since we would have had no control over the validity or accuracy of RMP-supplied reports, we would have been unable to assest to the same, and would have been unable and unwilling to sign them “under penalty of perjury.”

The Regional Board is taking the position that if we were unwilling to join the RMP, then we were obligated to install our own individual groundwater monitoring system. We have testified that this option would cost us \$30,000.00 initially, and thousands annually thereafter. In contrast, it would only cost \$1500.00 to join the RMP, plus a recurrent cost of \$81.00 per month thereafter. The Regional Board claims that there are 1300 dairymen in their Central Valley region, and that over 1200 of them have joined the RMP. This is not surprising, assuming these dairymen were sent the same or similar letters to the ones we were receiving. Reduced to its essentials, the Regional Board was threatening: either join the RMP at a reasonable cost, or we will compel you to go the exorbitantly expensive route. Such behavior by the Regional Board is not only extortion, it also reveals that is has very little interest in, and therefore “need” for, getting dairymen to install monitoring wells at their own individual dairy sites. The fact that the Regional Board has apparently excused 1200 dairymen from installing individual monitoring well systems on their own dairies because they joined this RMP is pretty clear evidence that the Board feels no compelling “need” to have individual systems installed on this vast number of individual dairies. In short, not only has the Regional Board entirely failed to establish the “need” requirements of 13267 with respect to its demand that we install an individual groundwater monitoring well system immediately upgradient and downgradient of our dairy operation, their behavior instead establishes the opposite.

While the RMP program may or may not be a valid research project, the Regional Board staff has not established that the RMP can be used as a substitute for the individual groundwater monitoring mandates of the 2007 Order. The staff is ignoring and violating these provisions of the Order when it is coercing dairyman to join the RMP, while giving to all those who join it a blanket exemption from these specific MRP requirements.

**2. Order R5-2007-0035 is unlawful and unenforceable against us because it fails to comply with applicable law, including provisions of the Water Code.**

**(a) The need for the 2007 Order is not supported by substantial evidence.**

No rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by substantial evidence. We have reviewed all 34,000 pages of the administrative record of the hearings held in connection with the adoption of the 2007 Order, and we found no substantial evidence – in fact, no evidence whatsoever – that supports the need to replace the

former reporting requirements with the new reporting requirements adopted in the 2007 Order. We have encountered no evidence in the record that the data, reports and information that the Regional Board staff obtained from or about dairies prior to the 2007 Order were inadequate, insufficient, unreliable or otherwise flawed. And we have encountered no evidence in the record that claimed or demonstrated that the new reporting requirements were necessary or needed to replace the former. We have made this argument in our Written Testimony in connection with the 2011 and 2012 Complaints. However, during the 2011, 2012 and this 2013 hearings, the Regional Board's staff has never submitted evidence showing otherwise.

**(b) The Regional Board has not shown the need for the reports specified in the 2007 Order and has not justified their burden.**

As mentioned before, the MRP of the 2007 Order recites that it is issued pursuant to Water Code Section 13267. (2007 Order, p. MRP-1) As also mentioned before, section 13267 states that "the regional board may require that any person who ... discharges ... waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. ... The burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports. In requiring these reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

The Regional Board failed to comply with Section 13267 in that the 2007 Order does not contain "a written explanation with regard for the need for the reports," and it fails to "identify the evidence that supports requiring [us] to provide the reports." In addition, the Regional Board never provided us with "a written explanation with regard for the need for the reports," and it did not "identify the evidence that supports requiring [us] to provide the reports."

Section 13263 of the Water Code provides that a Regional Board may prescribe requirements for dischargers, which it did in adopting the 2007 Order. However, section 13269 states that the Regional Board can waive any of these requirements, including the monitoring requirements, as it applies to "an individual" by considering "relevant factors."

We have consistently called to the staff's attention that our dairy has continuously been the site of a dairy for over 80 years. The Regional Board's staff has visited our dairy site over the years to inspect and obtain information about it. We have submitted test results to the Regional Board staff from water samples taken from each of our supply wells in 2003, 2007 and 2010. Our well results have ranged between .2 and 3.4 mg/L, all incredibly low levels. All these well results were and are substantially below the state's maximum contaminant levels (MCL) of 10 mg/l.

We argued to the Regional Board staff that these facts and test results are compelling evidence that our operation was and is not adversely impacting groundwater, and therefore the cost of filing these annual reports due July 1 of 2010, 2011 and 2012 did not and do not, in the words of Section 13267, “bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.” But the Regional Board staff brushed off these well test results by telling us that “Groundwater supply wells are typically screened in deeper aquifer zones ... groundwater quality data collected from the Dairy’s on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy.”<sup>12</sup>

The Regional Board’s 2007 Order, at page MRP-7, actually orders that dairymen “shall sample each domestic and agricultural supply well,” and shall submit the laboratory analysis for nitrate-nitrogen on an annual basis.<sup>13</sup> After both demanding and ordering these costly well tests and reports for years, they now tell us that they are meaningless. Absolutely outrageous!

**(d) The 2007 Order fails to implement the most modern and meaningful scientific findings and technologies.**

Section 13263 (e) of the Water Code provides that “any affected person may apply to the regional board to review and revise its waste discharge requirements. *All requirements shall be reviewed periodically.*” (Emphasis added) If new research questions the need for certain requirements, or reveals that there are more cost effective ways can accomplish the same purpose, we contend that the above section imposes on the Regional Board a legal duty to review such issues and revise its requirements accordingly. We hereby incorporate by reference the details of this argument, as set forth on pages 12 and 13 of our July 6, 2013 Written Testimony.<sup>14</sup>

In short, it would appear that the 2007 Order’s reporting requirements are unjustifiably excessive, unnecessary, overly burdensome, primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants, laboratories and Dairy CARES. The Regional Board has not sufficiently examined and considered recent research results and advanced testing technologies, and it has not modified its Order accordingly. This is a violation of the requirements of Water Code section 13263 (e).

We have made and tried to make this argument to the Regional Board during the hearings on the 2011 Complaint, the 2012 Complaint and this 2013 Complaint. At the hearings on each of the prior Complaints, the Regional Board staff has never challenged, rebutted or disputed this argument.

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<sup>12</sup> Exhibit 24 of Exhibit A

<sup>13</sup> 2007 Order, p. MRP-7

<sup>14</sup> Exhibit A, pp. 12-13

**(e) The 2007 Order fails to take into account economic considerations.**

The 2007 Order's waste discharge requirements as they relate to water quality objectives must take into account economic considerations. (Water Code Sections 13241 and 13263 (a)) The 2007 Order does not do this. It specifically fails to set or implement water quality objectives that are within the economic means of smaller dairies – operations that have to deal with disproportionately higher per cow reporting costs. Indeed, the Order fails to address the special economic circumstances of smaller dairies in any way whatsoever.

We hereby incorporate herein by reference the details of this argument, as more particularly set forth on pages 13 through 15, inclusive, of our July 6, 2013 Written Testimony.<sup>15</sup>

In summary, no economic analysis or evidence was presented into the record that disputed the considerable weight of testimony that the proposed 2007 Order would be harmful, even fatal, to smaller dairies. Because no economic relief whatsoever was incorporated into the Order for smaller dairies, the Order violates Water Code sections 13241 and 13263 (a), and it is thereby unlawful and unenforceable.

**3. We were deprived of due process and a fair hearing at the July 25, 2013 hearing before the Regional Board.**

In previous hearings before the Regional Board, we were reminded by the Advisory Team's counsel and by the Prosecution Team's counsel of the provisions set forth in section 648.4 of Title 23 of the California Code of Regulations, which are designed to prevent "surprise" witnesses and evidence. Nevertheless, at the hearing on July 25, 2013, the Prosecution Team produced Mr. Essary as a witness, who testified by presenting and commenting on a Power Point slide about dairy herd sizes and their rate of compliance with filing Annual Reports.<sup>16</sup> His testimony and slide were never disclosed in the Prosecution Team's Statement of Evidence or otherwise presented to us in any other manner prior to the hearing.<sup>17</sup>

The Executive Director, Ms. Creedon was allowed to testify even though she and the subject of her testimony were not identified in the Prosecution Team's list of witnesses.<sup>18</sup> In addition, Mr. J. P. Cativiela was called upon by the Chair, Mr. Longley, to testify. The Chair described him as an "interested party."<sup>19</sup> Again, the Regional Board's List of Deadlines in its Hearing Procedures required that all "Interested Persons" and their comments be identified and communicated to all Designated Parties, which includes us, no later than June 24, 2013.<sup>20</sup> Mr. Cativiela's comments were in rebuttal to evidence and

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<sup>15</sup> Exhibit A, p. 13-15

<sup>16</sup> Exhibit C, p. 7

<sup>17</sup> Exhibit D

<sup>18</sup> Exhibit C, p. 69-70; Exhibit F

<sup>19</sup> Exhibit C, p. 63

<sup>20</sup> Exhibits E and F

arguments that we had set forth in both our Statement of Evidence and in our Written Testimony of July 6, 2013. Yet, we had never been advised in any form whatsoever before the hearing that Mr. Cativiela would be a witness or what his testimony/comments would be.

Therefore, two “surprise” witnesses and “surprise” evidence and testimony was presented at the July 25 hearing, which deprived us of due process and a fair opportunity to prepare an adequate response, to cross-examine and to rebut this testimony and evidence. For these reasons, all of this evidence and testimony should be disregarded.

The Chair asked Mr. Ken Landau and Mr. Cativiela a few questions about the Representative Monitoring Program (RMP). A number of these questions were leading seemed to inappropriately suggest to the witnesses what their testimony should be.<sup>21</sup> The Chair’s conduct suggested a lack of open-minded impartiality. Rather, his conduct seemed more like the Prosecution Team’s counsel, and we were made to feel as if we were not being afforded a fair hearing by a Chair of the Regional Board who should be an impartial adjudicator.

The Prosecution Team’s counsel made a number of claims and assertions in his Rebuttal Statement that only qualified witnesses could have testified to, and been subject to cross-examination or rebuttal. Yet, no qualified witnesses were produced and questioned by the Prosecution to establish these various claims and assertions. As just one example, counsel claimed on page 3 of his Rebuttal Statement that “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.” Yet, his claim was never testified to at the July 25 hearing by any Prosecution witness. As a result, in this instance, and in many other instances, the Prosecution failed to prove their case.

**4. The Administrative Civil Liability Complaint (R5-2013-0539) is legally defective because it is the result of us being deprived of due process.**

The 2007 Order declares that it “serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes.” (2007 Order, p.1) The Order describes the procedures where a Discharger makes a request for a modification of the Order or of any of its general waste discharge requirements. (2007 Order, SPRR-2) The reporting requirements, including the filing deadlines for annual and technical reports, are part of the Order’s general waste discharge requirements for which someone like us may seek modification, exemption or other similar relief.

Addressing waste discharge requirements, Section 13263 (e) provides that “(e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements ...” Therefore, we, as affected persons, have the right to apply to the Regional Board for a *modification* or *revision* of the general waste discharge requirements, including the reporting requirements contained in the 2007 Order.

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<sup>21</sup> Exhibit C, pp. 41-42, 65-66

Section 13269 (a) (1) and (2) of the Water Code goes on to say that a regional board may *waive* waste discharge requirements (dealt with in section 13263) as they apply to the performance of an individual, such as ourselves.

Section 13223 (a) of the Water Code specifies that the regional board may not delegate modification of waste discharge requirements. It is the regional board's undelegable duty and responsibility to hear and decide our request for relief from these waste discharge requirements. We have a right to appear before the Regional 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 Regional Board - not by its staff. The evidence in the record is that in 2011 our formal written request for such a hearing was never communicated to the Regional Board by the staff. (Transcript, October 13, 2011 hearing) Rather, when we made the request at the hearing orally, the Board did not vote to deny us a hearing on this request; rather the Chair unilaterally told us that we would have to present it to the Board during a future "public forum" session, which are limited to three-minute presentations. (Transcript, October 13, 2011 hearing, pp. 18-19) During the August 2, 2012 hearing, the record shows that our comprehensive written arguments and evidence supporting our written request for such a hearing were not provided to the Board members, and the decision to deny our oral request at the 2012 hearing was again unilaterally made by the Chair without any Board vote on the issue. Again, all that was offered to us was three minutes of "public comment" time. (Transcript, August 2, 2012 hearing, pp. 28-29) Such a time limit would have prevented us from presenting all of the evidence and arguments needed to sufficiently support and justify such a modification request. By not giving us a fair opportunity to fully present all of our evidence and arguments, and by not giving the Board members an opportunity to vote on our request for a hearing to make a request for modification of the reporting requirements, the Chairs acted unlawfully and beyond their statutory authority. They have deprived us of procedural due process and violated our civil rights. The Prosecution has not and cannot show that our request for a waiver/modification has ever been denied by a formal vote of the Regional Board, as required by sections 13269 and 13223 of the Water Code.

Had the Regional Board granted us a full hearing in 2011, 2012, or 2013, as we had requested over and over, and heard and read with an open mind the full extent of our evidence and argument in support of our request, there is the possibility that the Board would have granted us relief from some or all of those reporting requirements, including the July 1, 2012 deadline. In such case, we would not be in violation of these annual reporting requirements. The Regional Board cannot contend that we have violated the 2007 Order's reporting requirements due on July 1, 2012 until such time as the Regional Board members have fully heard our request for modification and denied it, and after we have exhausted our appeal and all other legal remedies afforded us under the Water Code. (Water Code Sections 13320, 13325, and 13330) Thus, the filing and serving of the 2013 Complaint was premature.

**5. Collateral estoppel does not apply in this matter.**

Counsel for the Prosecution Team tries to argue that collateral estoppel bars us from making the arguments contained herein because they have already been rejected and denied by the Regional Board. Counsel cannot make the collateral estoppel argument because the Regional Board's actions/decisions are not yet final. Pursuant to the provisions of Water Code sections 13320 and 13330, they are subject to review and appeal, and can be overturned by the State Board and/or the Superior Court. These issues have been appealed and are still pending decision by the State Board and, if necessary, by the Superior Court.

**6. Water Code Section 13320 does not bar us from attacking the legality of the 2007 Order.**

The Prosecution Team's counsel argued at the July 25, 2013 hearing that we were barred from attacking the legality and enforceability of the 2007 Order because of section 13320 of the Water Code. This section says an aggrieved person may petition the state board within 30 days of a regional board's action, in this case the adoption of the 2007 Order.

However, the landmark U. S. Supreme Court case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), held that, under the protections afforded by the 14<sup>th</sup> Amendment of the U. S. Constitution, all persons are entitled to receive notice that is "reasonably calculated" to inform them of proceedings that will affect them. The Regional Board has a list of mailing addresses for each dairy subject to their jurisdiction and purview, including us, who they knew would be affected by the adoption of the 2007 Order. Yet, we were never mailed any notice by the Regional Board immediately after the adoption of the 2007 Order advising us of its adoption and that we had 30 days to petition for its review with the State Board. The Regional Board produced no evidence that such a notice was ever sent to us. As a result, under the doctrine of the *Mullane* case, the Regional Board cannot argue that we are barred from challenging the 2007 Order, which we have been doing since 2011.

In addition, counsel has cited no legal authority that establishes that a person cannot defend himself against enforcement of any order, or any punishment thereunder, if the order, as adopted, violates specific provisions of the statutes that authorize it. We have established that the 2007 Order violates a number of these Water Code sections. Hence, the Regional Board has no legal right to enforce or punish under an order that violates these applicable statutes. Nothing can be more fundamental and logical than that.

**7. Our filing of the 2007 and 2008 Annual Reports do not constitute a waiver of our objections to the filing of the 2010 Annual Report.**

The Prosecution's counsel argued on page 11 of her rebuttal statement that when we filed the 2007 and 2008 reports, we waived our objection to the filing of the 2010 Annual Report. (Exhibit 28) This is not true. The information we submitted to the Regional Board on June 25, 2008 (2007 Report) and on June 26, 2009 (2008 Report) was herd size

and nutrient management information, the very same information the Board has been requiring for many years prior to its adoption of the 2007 Order. This information did not need to be developed or certified by a “registered professional” (engineer), and was not costly to produce. In sharp contrast, the 2007 Order imposed an entirely new category of expensive reports that had to be prepared by licensed engineers. These are the reports that were unnecessary, and which we, as small dairymen, could not afford and did not file. To repeat, the Regional Board acknowledged in its 2009 Order that these reports were very expensive, and because of that, postponed their filing deadline by one year. In light of this, it cannot be argued that what we filed in 2008 and 2009 waived our objections to the new burdens imposed by the 2007 Order.

**D. Appeal and Petition for Review/ Actions Requested of State Board.**

Pursuant to Section 13320 of the California Water Code, we hereby appeal to the State Board regarding the following decisions, actions, and failures to act by the Regional Board, and we petition the State Board to review the same and grant us the relief we hereinafter request:

1. We argued at the July 25, 2013 hearing that the 2007 Order is illegal, invalid, and unenforceable, a position that the Regional Board refused to agree with and declare. We petition the State Board to review our evidence and legal arguments in support of this contention. We petition the State Board to determine and declare that the 2007 Order is indeed illegal, invalid and unenforceable, and that the Regional Board’s adoption of the order of civil liability against us on July 25, 2013 is therefore illegal, invalid and unenforceable against us, as well as against all other Dischargers, and that the 2007 Order be set aside.
2. We argued at the July 25, 2013 hearing that the filing of the 2013 Complaint against us was premature. We had asked the Board for a full, more-than-three-minute hearing in which we could present the basis for being granted a modification and/or waiver of the reporting requirements. Since the Board has not formally voted to deny us such a hearing and since our request is still pending, we petition the State Board to determine and declare that the filing of the 2013 Complaint against us is premature and invalid.
3. We argued at the July 25, 2013 hearing, that the Regional Board had established no legal grounds or basis for requiring us to install an individual groundwater monitoring well system on our dairy site, and had no authority to order us, in the alternative, to join its approved RMP.

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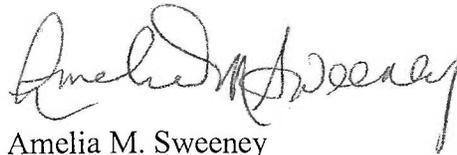
4. In light of the above, we appeal the Regional Board's action on July 25, 2013 of adopting an order imposing administrative civil liability against us in the amount of \$15,000.00. We also petition the State Board to determine and declare that the enforcement of the civil liability order against us in the amount of \$15,000.00 is illegal, invalid, and should be set aside. Also, that the order be stayed pursuant to the powers granted it by section 13321 of the Water Code.

A copy of this Petition, together with all exhibits, has been mailed to the Central Valley Regional Board.

Respectfully submitted,



James G. Sweeney



Amelia M. Sweeney

**Date: July 6, 2013**

**To: A. Central Valley Regional Water Quality Control Board Members**

**B. Advisory Team**

**Kenneth Landau** [klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)

**Alex Mayer** [amayer@waterboards.ca.gov](mailto:amayer@waterboards.ca.gov)

**C. Prosecution Team**

**Pamela Creedon**

**Clay Rodgers**

**Doug Patteson**

**Dale Essary** [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

**James Ralph** [jralph@waterboards.ca.gov](mailto:jralph@waterboards.ca.gov)

**Vanessa Young** [vyoung@waterboards.ca.gov](mailto:vyoung@waterboards.ca.gov)

**Written Testimony submitted to the Central Valley Regional Water Quality Control Board Members for consideration at the July 24/25, 2013 Hearing on Administrative Civil Liability Complaint R5-2013-0539**

**A. Introduction.**

We are James G. Sweeney and Amelia M. Sweeney, doing business as Sweeney Dairy, and are the "Dischargers" named under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2013-0539 (Complaint). Our address is 30712 Road 170, Visalia, CA 93292. Our telephone number is (559) 280-8233 and our email address is [japlus3@aol.com](mailto:japlus3@aol.com). The Central Valley Regional Water Quality Control Board shall hereinafter be referred to as the "Regional Board," and the State Water Resources Control Board shall hereinafter be referred to as the "State Board."

**B. Statement of Facts.**

1. We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 300 cows on a site where a dairy has continuously been conducted for over eighty years.
2. The Regional Board's Order No. R5-2007-0035 (2007 Order) compelled us, along with all other dairymen, to prepare and file all of the following reports with the Regional Board by July 1, 2009. The Regional Board amended the 2007 Order in 2009 with Order

No. R5-2009-0029 (2009 Order) in which the filing date for these reports was extended for one year, to July 1, 2010. The 2009 Order cited financial distress in the dairy industry as the justification for the extension.

The 2009 Annual Report, due on July 1, 2010, consisted of an Annual Dairy Facility Assessment for 2009, and a Waste Management Plan (WMP), consisting of the following reports:

- (a) Retrofitting Plan for needed improvement to storage capacity, flood protection or design of the production area.
- (b) Dairy site and Cropland maps.
- (c) Wastewater lagoon capacity evaluation.
- (d) Flood protection evaluation.
- (e) Dairy and cropland design and construction evaluation.
- (f) Cross-connection assessment report.

The 2010 and 2011 Annual Reports, due on July 1, 2011 and July 1, 2012, respectively, consisted of the following reports:

- (a) Nutrient Monitoring Element:
  - i. Waste Water, amounts and test results
  - ii. Manure, amounts and test results
  - iii. Crop, amounts and test results
- (b) Groundwater Monitoring Element (domestic and ag wells), test results.
- (c) Certification of Nutrient Monitoring Program "retrofitting."
- (d) Certification of storage capacity "retrofitting."
- (e) Certification of flood protection "retrofitting."
- (f) Certification of housing and manure storage area "retrofitting."

The 2007 Order required most of the 2009, 2010 and 2011 reports, technical and otherwise, to be prepared by licensed professionals/engineers and consultants, with all of the sample testing to be done by licensed laboratories, all of which were very expensive.

3. Since 2008, the dairy industry has suffered through a number of periods characterized by a combination of low milk prices and high feed costs that have been unprecedented in recent memory. Virtually all dairies, large and small, have had to borrow substantially in order to remain in business. Most dairymen have not yet financially recovered from these challenges. Indeed, the Regional Board's 2009 Order acknowledged the seriousness of the situation by postponing for a year the filing date for most of the 2009 reports.
4. In adopting the 2007 Order, the Regional Board imposed very costly monitoring and reporting requirements that are pretty much the same for all dairies, regardless of size. Because smaller dairies have fewer cows over which to spread these fixed regulatory costs, it is much more burdensome, and puts them at an even greater competitive disadvantage. In some cases it is even fatal, for we know of a number of small dairies who told us that they sold out because they could not afford the costs of complying with the new reporting requirements adopted in the 2007 Order.

5. As a result of the financial situation in which we found ourselves in 2009 and 2010, we wrote a letter dated March 28, 2010 to the Regional Board's staff – more than three months before the July 1, 2010 filing deadline - in which we asked for a waiver from submitting these reports.<sup>1</sup> We wrote a follow-up letter dated April 7, 2010 to the Regional Board staff in which we requested a one-year suspension of filing the reports.<sup>2</sup> Anticipating that the staff would refuse to grant said relief, we stated in both of these letters that if they were unable to grant our request, to please schedule the matter for a face-to-face hearing before the Regional Board at a future meeting so that we could present our request for relief to the Board.
6. The Regional Board's staff replied to our March 28 and April 7 letters by a letter dated June 15, 2010.<sup>3</sup> They did not agree to our request to a one-year suspension, and they refused to schedule a hearing before the Regional Board, as we had asked. Instead, they advised us that we could address the Board during the "Public Forum" section of their agenda. Such presentations are limited to three (3) minutes.
7. In a letter dated June 27, 2010, we again asked the staff to schedule a hearing before the Regional Board, and it was ignored.<sup>4</sup>
8. In a letter to the Regional Board's staff dated August 22, 2010 we again mentioned our request for a hearing before the Regional Board.<sup>5</sup> The staff continued to ignore our request. We later found out why. At the July 14, 2011 hearing before the Hearing Panel, Mayumi Okamoto, one of the Regional Board's legal counsel, stated that "the decision to place a matter on the agenda remains with the discretion of your [Regional Board's] management in consultation with the Executive Officer as the *gatekeeper*." Regional Board staff member, Clay Rodgers, also testified that "Mr. Sweeney did approach us to ask for an extension. We decided that an extension, as the *gatekeepers* to the Board, that the extension of the Waste Management Plan had already been granted. ... And we did not feel that the extension of the annual report would be appropriate."<sup>6</sup>
9. On May 10, 2011 an Administrative Civil Liability Complaint, R5-2011-0562, (2011 Complaint) was served on us for failing to file the July 1, 2010 reports, and seeking civil penalties against us in the amount of \$11,400.00. Oddly, the Complaint prejudicially failed to mention our multiple efforts to schedule a hearing before the Regional Board to seek relief.
10. On July 1, 2011, the 2010 Annual Reports became due, but we did not file them as we were still seeking a hearing before the Regional Board to obtain relief from having to file them.

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<sup>1</sup> Exhibit 1

<sup>2</sup> Exhibit 2

<sup>3</sup> Exhibit 3

<sup>4</sup> Exhibit 4

<sup>5</sup> Exhibit 5

<sup>6</sup> Exhibit 6

11. On September 21, 2011, we emailed Alex Mayer, the Regional Board's legal counsel, wherein we again asked that a hearing be scheduled before the Regional Board where we could ask the Board for a modification of the reporting requirements of the 2007 Order.<sup>7</sup>
12. We were advised by Mr. Mayer's email dated September 29, 2011 that he had no authority to schedule the hearing we requested before the Board, but that we could appear before the Board as "a member of the public" and would be allowed three minutes to speak during their "public forum" section of their agenda.<sup>8</sup>
13. We sent six copies of our "Written Testimony," dated October 2, 2011, to Mr. Mayer. We requested that he supply a copy to each Board member before the hearing. It included another written request for a hearing before the Regional Board where we could request a modification of the reporting requirements. The document included all of our evidence and arguments, including those in support of the request for a special hearing for a modification.
14. We appeared at the hearing on the 2011 Complaint before the Regional Board on October 13, 2011. Mr. Mayer mentioned our October 2 Written Testimony, but recommended that it not be accepted into the record. Chair Hart, without asking us for our response, immediately ruled that it would not be accepted. She then informed us that we would only be given five minutes and that it would be limited to evidence regarding dairy herd size data (not a particularly significant issue). I began reading a two-page presentation, beginning with an introduction. One minute into the presentation, just as I was about to request a hearing for a modification of the 2007 Order's reporting requirements, Board legal counsel Okamoto interrupted me and objected to what I was requesting. Chair Hart responded by telling me the following untrue statement: "We are fully advised what your position is." She then ordered me to limit my comments to just the herd size data.<sup>9</sup>

I began commenting on the herd size data. However, during that time, the Chair, Mr. Landau and both legal counsel interrupted me, debated the herd size issue, and ended up taking up much of my five minutes. Then Chair Hart stopped me and said "Thank you Mr. Sweeney and your time is up."<sup>10</sup> The Regional Board then went ahead and adopted the proposed order for civil liability against us in the amount of \$11,400.00.

15. We were sent an email on October 25, 2011 by Ken Landau, Assistant Executive Officer of the Regional Board in which he listed the documents that had been "made available to the Board members for their consideration at the 13 October hearing."<sup>11</sup> Our Written Testimony of October 2 was not on that list. Therefore, it seems clear that our request for a modification hearing was not read or considered by the Regional Board members in connection with the actions it took at the October 13 hearing.

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<sup>7</sup> Exhibit 7

<sup>8</sup> Exhibit 8

<sup>9</sup> Exhibit 9

<sup>10</sup> Exhibit 10

<sup>11</sup> Exhibit 11

16. On November 9, 2011, we appealed all of the Regional Board's decisions at its October 13, 2011 hearing by filing a Petition for Review with the State Water Resources Control Board (A-2190). Almost two years later, said petition/appeal is still pending decision before the State Board.
17. On May 9, 2012 an Administrative Civil Liability Complaint, R5-2012-0542 (2012 Complaint), was mailed to us for failing to file the July 1, 2011 reports. The Complaint sought civil penalties against us in the amount of \$7,650.00.
18. On May 4, 2012, the Regional Board mailed us a "Groundwater Monitoring Directive," ordering us to install either (a) an individual groundwater monitoring system at our dairy, or (b) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities.
19. On May 30, 2012, we filed a Petition for Review with the State Board appealing the Regional Board's adoption of the foregoing Directive. Over a year later, said petition/appeal is still pending decision by the State Board.
20. Because of the short time allowed us for oral presentation during the hearing, we sent six copies of our 16-page Written Testimony (not counting attached Exhibits) to Mr. Mayer on July 20, 2012, together with our request that he provide a copy to each Board member before the hearing.<sup>12</sup>
21. The Regional Board held their hearing on the 2012 Administrative Civil Liability Complaint on August 2, 2012. During my oral presentation at the August 2 hearing, I asked the Board if it would grant us a hearing in the future wherein we could fully present all of our evidence and arguments in support of modifying the 2007 Order's reporting requirements as it applied to us. Without giving me an opportunity to further explain why the granting of such a hearing would be justified, and without discussing it with the other board members, or having the board vote on it, Chair Longley simply declared "My answer to that would be no," and then he moved on.<sup>13</sup>
22. The hearing transcript also shows that I asked the Board members if they had been given the Written Testimony we sent to Mr. Mayer on July 20, 2012. Board member Hart responded that "I will say that I have read each and every piece of paper," and Chair Longley added, "And I have, too, but I think it's inappropriate for you to be examining the Board." I then submitted a copy of my Written Testimony and said, "I'd like to present this you know to make sure it gets into the record. This is my testimony and argument."<sup>14</sup>
23. A list of the documents submitted to the Board prior to and at the hearing was thereafter posted on the Regional Board's website. Our "Written Testimony" dated July 20, 2012,

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<sup>12</sup> Exhibit 12

<sup>13</sup> Exhibit 13

<sup>14</sup> Exhibit 14

was not listed as one of the documents submitted to the Board members for review.<sup>15</sup> Hence, the record indicates that the Board members were never provided with, nor read and considered all of our evidence and arguments.

24. At the conclusion of the August 2, 2012 hearing, the Regional Board immediately voted to adopt Order no. R5-2012-0070, imposing an administrative civil liability penalty of \$7,650.00 on us for failing to file the Annual Reports due July 1, 2011.
25. On August 26, 2012, we appealed all of the Regional Board's decisions at its October 13, 2011 hearing, including its order no. R5-2012-0070, by filing a Petition for Review with the State Water Resources Control Board. Almost a year later, said petition/appeal is still pending decision before the State Board.

### **C. Legal Arguments and Analysis.**

#### **1. Order R5-2007-0035 is unlawful and unenforceable against us because it fails to comply with applicable law, including provisions of the Water Code.**

##### **(a) The need for the 2007 Order is not supported by substantial evidence.**

No rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by substantial evidence. We have reviewed all 34,000 pages of the administrative record of the hearings held in connection with the adoption of the 2007 Order, and we found no substantial evidence – in fact, no evidence whatsoever – that supports the need to replace the former reporting requirements with the new reporting requirements adopted in the 2007 Order. We have encountered no evidence in the record that the data, reports and information that the Regional Board staff obtained from or about dairies prior to the 2007 Order were inadequate, insufficient, unreliable or otherwise flawed. And we have encountered no evidence in the record that claimed or demonstrated that the new reporting requirements were necessary or needed to replace the former. We have made this argument in our Written Testimony in connection with the 2011 and 2012 Complaints. However, the Regional Board's staff has never submitted evidence showing otherwise.

##### **(b) The Regional Board has not shown the need for the reports specified in the 2007 Order and has not justified their burden.**

The "Monitoring and Reporting Program" of the 2007 Order recites that it is issued pursuant to Water Code Section 13267. (2007 Order, p. MRP-1) Section 13267 (b) (1) states that "the regional board may require that any person who ... discharges ... waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

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<sup>15</sup> Exhibit 15

But Section 13267 (b) (1) goes on to say that “The burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports. In requiring these reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.”

The Regional Board failed to comply with Section 13267 in that the 2007 Order does not contain “a written explanation with regard for the need for the reports,” and it fails to “identify the evidence that supports requiring [us] to provide the reports.” In addition, the Regional Board never provided us with “a written explanation with regard for the need for the reports,” and it did not “identify the evidence that supports requiring [us] to provide the reports.”

Over the years, the Regional Board’s staff visited our dairy site to inspect and obtain information about it. For example, staff member Ken Jones visited our dairy in 2003 and spent one day gathering information. He measured and calculated the storage capacity of our three waste water lagoons and concluded that our storage capacity exceeded what the Regional Board required. In fact, it was 128% of what was required. He also concluded that we had sufficient cropland for application of waste water. His letter dated April 17, 2003 confirmed that our dairy was in full compliance with all Regional Board requirements. We are prepared to submit evidence that our dairy has essentially the same number of animals, the same lagoon capacity and even more cropland now than we had in 2003.

A dairy has been continuously operating on our site for over eighty years. We have submitted to the Regional Board staff test results from water samples taken from each of our supply wells in 2003, 2007 and 2010. The results have ranged between .2 and 3.4 mg/L, all incredibly low levels. All well results were and are substantially below the state’s maximum contaminant levels (MCL).

We have argued to the Regional Board staff that these test results are compelling evidence that our operation was and is not adversely impacting groundwater, and therefore the cost of filing these reports due July 1 of 2010, 2011 and 2012 did not and do not, in the words of Section 13267, “bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.” But the Regional Board staff brushed off these results by telling us that “Groundwater supply wells are typically screened in deeper aquifer zones ... groundwater quality data collected from the Dairy’s on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy.”

**(c) The Regional Board has failed to show the value of or need for us joining a Representative Groundwater Monitoring Program.**

The Complaint which is the subject of this hearing alleges, among other things, that a civil liability penalty should be imposed on us because we have failed to either (1)

install an approved individual groundwater monitoring system at our dairy site or (2) join an approved Representative Monitoring Program (RMP).

The Regional Board's staff first informed us by letter dated August 22, 2011 that we would need to either install our own individual groundwater monitoring system at our dairy, or we would have to join an RMP that would monitor groundwater at a set of representative facilities.<sup>16</sup> We sent a letter to the staff on September 30, 2011,<sup>17</sup> in which we pointed out that Water Code section 13267 obligates a regional board to "provide a person with a written explanation with regard to the need for the reports," and that "these reports shall bear a reasonable relationship to the need for the reports." In order to determine the "need" for these groundwater monitoring wells, and how meaningful they needed to be in order for them to be acceptable, we asked about the location of the Central Valley Representative Monitoring Program monitoring wells that would serve as the basis of information for our dairy site.

The Board's staff responded with a letter dated November 9, 2011, but the letter never answered our question about the locations of the CVRMP groundwater wells.<sup>18</sup> We asked again in a letter we sent to Mr. Essary on November 29, 2011 as to the location of these CVRMP wells.<sup>19</sup> Yet, the responding letter to us dated December 7, 2011 again failed to answer this very specific and direct question.<sup>20</sup> We sent Clay Rodgers a letter dated May 11, 2012, which again called to his attention the obligations imposed by section 13267.<sup>21</sup> Yet, we were sent another letter, this one dated May 23, 2012, that again failed to provide us with the locations of the CVRMP groundwater wells.<sup>22</sup>

On May 4, 2012, the Regional Board issued a Directive that ordered us to implement groundwater monitoring at our dairy.<sup>23</sup> The Directive claimed that it had the authority under section 13267 of the Water Code and under the 2007 Dairy Order (R5-2007-0035) to require us to do so. This Directive was communicated to us by letter dated May 23, 2012.

The relevant language of section 13267 of the Water Code reads: "the regional board may require that any person ... who ... discharges ... within its region ... shall furnish ... monitoring program reports which the regional board requires. The burden, including costs, shall bear a reasonable relationship for the need for the report and the benefits to be obtained from the reports. In requiring these reports, the regional board shall provide the person with a written explanation with regard to the need for the

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<sup>16</sup> Exhibit 16

<sup>17</sup> Exhibit 17

<sup>18</sup> Exhibit 18

<sup>19</sup> Exhibit 19

<sup>20</sup> Exhibit 20

<sup>21</sup> Exhibit 21

<sup>22</sup> Exhibit 22

<sup>23</sup> Exhibit 23

reports, and shall identify the evidence that supports requiring the person to provide the reports.”

The Regional Board also cited the following language found on page MRP-16 of the 2007 Order: “Pursuant to Section 13267, the Executive Officer will order Dischargers to install monitoring wells to comply with Monitoring and Reporting Program Order No. R5-2007-0035 based on an evaluation of the threat to water quality *at each dairy*. It is anticipated that this will occur in phases of 100 to 200 dairies per year.”

Both provisions indicate that the determination of whether to require a given dairy to provide monitoring well reports is to be made on a dairy-by-dairy, individual basis. Before a dairy can be required to implement a monitoring well program, the Regional Board must be aware of specific and compelling evidence that there is a need for such a costly program, and it must inform the dairyman of what specific evidence regarding his/her dairy supports the requiring of such reports.

Despite the foregoing, the Regional Board expressed the position in its May 23, 2012 letter that the foregoing language in the 2007 Order gave it the right to require *all dairies*, in phases of “100 to 200 dairies,” to install monitoring well systems. Indeed, the letter states that the Regional Board has issued directives to 260 dairymen to implement monitoring well programs, and that 1000 dairies have already joined “Representative Monitoring Programs.” This statement implies that *all dairies* in the Central Valley region either already participate or are being ordered to do so, without any effort being made by the Regional Board to evaluate each dairy individually. Thus, it appears that the Regional Board has engaged in a direct violation of the plain language of section 13267 and of the 2007 Order, and has flagrantly violated its duties and obligations under the applicable laws.

Section 13263 of the Water Code provides that a Regional Board may prescribe requirements for dischargers, which it did in adopting the 2007 Order. However, section 13269 states that the Regional Board can waive any of these requirements, including the monitoring requirements, as it applies to “an individual” by considering “relevant factors.”

We have consistently called to the staff’s attention that our dairy has continuously been the site of a dairy for over 80 years. We have pointed out to the Regional Board’s staff that the nitrate-nitrogen test results from our domestic and agricultural supply wells, which we began submitting in 2003. The results have ranged between .2 and 3.4 mg/L, all incredibly low levels. Yet, the Regional Board staff has dismissed these results by stating that “Groundwater supply wells are typically screened in deeper aquifer zones ... groundwater quality data collected from the Dairy’s on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy.”<sup>24</sup>

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<sup>24</sup> Exhibit 24

The Regional Board staff had the audacity to say this after demanding for ten years that we test our supply wells and send them the results. Indeed, their 2007 Order, at page MRP-7, actually orders dairymen to “sample each domestic and agricultural supply well,” and submit the laboratory analysis for nitrate-nitrogen to it on an annual basis.<sup>25</sup> For ten years they have been demanding these costly reports and now tell us that they are meaningless. Absolutely outrageous!

To make matters worse, the Regional Board has been advising dairymen, including us, that as an alternative, we can join a “Representative Monitoring Program,” and the results from monitoring wells that are not even close to a dairy can be submitted and they will be treated as satisfying the monitoring well requirement. I wrote Douglas Patteson on May 27, 2012, and asked him what representative monitoring program the Regional Board would accept for my dairy.<sup>26</sup> Clay Rodgers emailed me the same day and advised me that the Central Valley Dairy Representative Monitoring Program (CVDRMP), administered by Dairy CARES in Sacramento, covered Tulare County and that it would be an acceptable RMP for my dairy.<sup>27</sup> I checked with Dairy CARES/CVDRMP and was advised by email dated May 29, 2012 that it would accept my application to join the program.<sup>28</sup> It would cost \$1500 up front, and \$81 per month thereafter to join and belong to the CVRMP. I also discovered that the nearest CVDRMP monitoring wells were more than 100 miles from my dairy. How could these wells, at such a distance, be accepted as representing the quality of our dairy’s first encountered groundwater?

Section 648 (a) of Title 23 of the California Code of Regulations defines an “adjudicative proceeding” as a proceeding by which facts are determined pursuant to which a regional board issues a decision. Clearly, the Regional Board’s May 4, 2012 Directive to us was such a decision, and the deliberation leading up to the decision to issue the Directive comes under the purview of these adjudicative proceedings requirements. However, the Regional Board never afforded us the procedural rights to which we were entitled. We were not provided with an opportunity to confront or cross-examine any witnesses, allegations and evidence, and we were not allowed to present direct or rebuttal evidence or argument during its deliberations.

Even if it is determined that the proceedings are not considered “adjudicative proceedings” under these regulations, the Regional Board’s conduct in connection with reaching its decision to issue this Directive violated fundamental constitutional principles of due process.

Mr. Essary sent us a letter dated July 19, 2012 reminding us of our need to install groundwater monitoring wells on our dairy or join an RMP.<sup>29</sup> He threatened us with action if we did not comply, and he continued to ignore our previous requests for the

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<sup>25</sup> Exhibit 25

<sup>26</sup> Exhibit 26

<sup>27</sup> Exhibit 27

<sup>28</sup> Exhibit 28

<sup>29</sup> Exhibit 29

locations of the CVRMP wells. We responded with a letter dated March, 26, 2013, in which we again asked for the location of the CVRMP groundwater wells.<sup>30</sup> He sent us a letter dated April 19, 2013, which ignored our question, but warned us that the Regional Board would issue a Complaint against us if we did not install a monitoring well system on our dairy or join an RMP.<sup>31</sup> On May 9, 2013, the Regional Board staff mailed us this Administrative Civil Liability Complaint, alleging our failure to comply with their monitoring well demands, and seeking a penalty against us for failing to comply.

Two weeks ago, on June 20, 2013, Mr. Essary sent us an email, informing us to look at the RMP Designs and Plans posted on the Regional Board's website.<sup>32</sup> What one finds is a Phase 1 Representative Groundwater Monitoring Design and Monitoring Program dated January 1, 2012, although it states that it is only for Stanislaus and Merced County. It confirmed that the closest monitoring wells to our dairy were over 100 miles away.<sup>33</sup> Phase 2, dated June 6, 2012, was also posted. It lists *proposed* monitoring wells to be located at 48 dairies located in other counties, including Tulare County. It claims that as of June, 2012, 1200 dairies belonged to the Dairy CARES CVRMP, and it only states that these well sites are *proposed*. It does not say when the program would begin collecting groundwater samples from them. In reviewing the dairies listed in Phase 2, I noticed a number of them that I know have recently gone out of business and are no longer in operation. But the most significant aspect is that the closest Phase 2 monitoring wells would be 10 miles from my dairy. I have continued to ask, and the staff continues to refuse to explain, how the results from such wells could possibly reveal the quality of first encountered groundwater at my dairy site.

To put it bluntly: The Regional Board's staff has been very much aware of our ongoing requests for this RMP information over the last two years. The reason they have dodged answering our requests as to the locations of the CVRMP groundwater monitoring wells until just a few weeks ago is clearly evident; it is because they would be admitting that its Representative Monitoring Program with Dairy CARES is a reprehensible fraud, joke, and sham, and that many, if not most, of the 1200 dairymen are being compelled to spend considerable money on a program that will produce no relevant information regarding first encountered groundwater under their dairies.

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<sup>30</sup> Exhibit 30

<sup>31</sup> Exhibit 31

<sup>32</sup> Exhibit 32

<sup>33</sup> Exhibit 33

We are looking forward to examining the Board members at the upcoming hearing on this Complaint about this out-of-control RMP program. We will ask whether the Board has been fully and accurately informed about it, and whether the Board feels this program will provide meaningful information about the effect our dairy may be having on the groundwater beneath our dairy. If the Board concludes that joining the CVRMP will not provide meaningful data, then there is no way that it can possibly justify imposing a civil liability penalty against us for refusing to join it. And if the Regional Board staff will encourage and allow over 1000 dairies to join the CVRMP, then it would be unreasonable, punitive and discriminatory to demand instead that we must install our own monitoring wells at our dairy.

**(d) The 2007 Order fails to implement the most modern and meaningful scientific findings and technologies.**

Section 13263 (e) of the Water Code provides that “any affected person may apply to the regional board to review and revise its waste discharge requirements. *All requirements shall be reviewed periodically.*” (Emphasis added) If new research questions to need for certain requirements, or reveals that there are more cost effective ways can accomplish the same purpose, we contend that the above section imposes on the Regional Board a legal duty to review such issues and revise its requirements accordingly. New and old research and advanced technologies presently exist which may provide less expensive means for evaluating groundwater contamination risk, of determining non-contamination of groundwater, and of using less expensive practices that can still prevent such contamination.

We have read all 34,000 pages of the administrative record leading up to the adoption of the 2007 Order. We have found no evidence in the record that supports or justifies the need to regulate nitrates, considering the levels found in the groundwaters of the Central Valley. Indeed, a peer-reviewed paper entitled “When Does Nitrate Become a Risk for Humans?”, co-authored by nine scientists from the U.S., the UK, France, Germany and the Netherlands, and published in 2008 in the *Journal of Environmental Quality*, have evaluated all the old studies done about the health impacts of nitrates on humans. The scientists suggest that nitrates at the levels found in our groundwater are not the health threat once believed.<sup>34</sup> They further suggest that perhaps the current nitrate limits should be significantly raised because the health risks may be overstated.

Lawrence Livermore National Laboratory published two papers in *Environmental Science Technology*, (2007) 41, 753-765, (these papers are in the possession of the Regional Board staff) in which they stated that they discovered that soil bacteria break down and eliminate nitrates in dairy waste water in a substantial if not complete degree. They have also ascertained that there are certain compounds and gasses in manure water that can be used to determine whether water from dairy lagoons or from waste applied in irrigation water has infiltrated into first encountered groundwater. There are also simple and inexpensive ways to show the amount of highly compacted

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<sup>34</sup> Exhibit 34

clay layers sitting beneath a dairy site and whether they constitute an impervious barrier between the dairy and the groundwater. Yet, the 2007 Order contains a “one-size-fits-all” approach, and generally requires reports that provide little to no meaningful information. Indeed, some of these reports are ludicrous and unnecessary. One example is that we are required to provide monthly photos of our lagoons to show that the water level was not too high during the month. This is as absurd as requiring us to photograph our speedometer to prove we didn’t drive over the speed limit during the month.

In short, it would appear that the Order’s reporting requirements are excessive, unnecessary, overly burdensome, primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants, laboratories and Dairy CARES. The Regional Board has not sufficiently examined and considered recent research results and advanced testing technologies, and it has not modified its Order accordingly. This is a violation of the requirements of Water Code section 13263 (e). We have tried to make these arguments to the Regional Board during the hearings on the 2011 Complaint and on the 2012 Complaint. At the hearings on each of the prior Complaints, the Regional Board staff has never challenged, rebutted or disputed this argument.

**(e) The 2007 Order fails to take into account economic considerations.**

The 2007 Order’s waste discharge requirements as they relate to water quality objectives must take into account economic considerations. (Water Code Sections 13241 and 13263 (a)) The 2007 Order does not do so. It specifically fails to set or implement water quality objectives that are within the economic means of smaller dairies – operations that have to deal with disproportionately higher per cow reporting costs. Indeed, the Order fails to address the special economic circumstances of smaller dairies in any way whatsoever.

As stated before, the administrative record (AR) of the 2007 Order consists of 34,000 pages of documents and testimony. A great deal of testimony was presented concerning how expensive the new reporting requirements would be, and how especially unbearable it would be for smaller dairies:

(1) There was testimony that the cost would be “as high as \$89,000.00 initially and \$58,000.00 annually per dairy.” (AR 002089) Mr. Souza testified that “some dairies will be out of business as a result of this waste discharge requirement ... (AR 000384).”

(2) Ms Asgill, an agricultural economist, testified that because of these regulations, “we are probably looking at the smaller dairies going under. Probably those dairies that we [are] usually fond of protecting – dairies under 500 milking cows - will be going out.” (AR 000444)

(3) A letter from the State Department of Food and Agriculture Board mentioned that Governor Schwarzenegger “made a commitment to reject new

regulations that unfairly impact small business. ... It is expected that new and existing regulations will be reviewed for economic impact to small business. ... we encourage the RWQCB to review your proposal ... propose alternatives that are less burdensome.” (AR 007297)

(4) The Federal government presented input: The EPA’s Small Business Advocacy Panel submitted its recommendation to streamline the reporting requirements and that operations under 1000 animal units should be exempted from certain requirements. (AR 02397)

(5) The State Water Board expressed concern in its submission during the hearings that the proposed requirements “may have significant adverse economic impact on small business.” The State Board went on to recommend “different compliance or reporting requirements ... which would take into account the resources available to small business ... [and] exemption or partial exemption from regulatory requirements for small business.” (AR 019632)

(6) Even Regional Board member Dr. Longley expressed concern: “Whereas larger dairies, a 10,000 cow dairy, would be able to absorb the costs, a 100 cow dairy is going to be faced with possible disaster.” (AR 002163)

(7) In response to a written question submitted by Baywatch, Sierra Club, California Sportfishing Protection Alliance and Waterkeeper Alliance, the Regional Board staff gave them assurances that “the Board has the option of limiting the application of this order based on the *size of herd*,” and that “waste discharge requirements or a *waiver* of waste discharge requirements would be adopted for facilities that are not covered by the order.” (AR 000583)

Small dairies are under much greater economic stress than larger, more efficient dairies and, therefore, are less able to handle the high costs of complying with the 2007 Order’s reporting requirements.

The cost of monitoring well programs, both the installation and the periodic reporting costs, are for the most part the same for large dairies as they are for small dairies. This means that the costs, on a per cow basis, are dramatically higher for small dairies, and contribute to small dairies being at a competitive disadvantage.

Not only are small dairies less able to deal with the high regulatory costs, they pose a dramatically smaller threat to the groundwater. California DHIA data shows that DHIA dairies in the San Joaquin Valley of our size or smaller represent less than 1/10 of 1% (.09%) of all DHIA cows in the San Joaquin Valley. Counsel claims that smaller dairies also pose a pollution threat. But that is not the issue. The issue is whether the Regional Board adequately weighed the economic considerations for small dairies, as required by Water Code sections 13241 and 13263 (a).

Other agencies recognized this. Both the North Coast Regional Water Quality Control Board and the San Francisco Bay Regional Water Quality Control Board have

recognized how smaller dairies have a much smaller impact on groundwater, and how they are less able to bear the same regulatory expenses and burdens that larger dairies can. These Regional Boards saw fit to adopt special performance and reporting relief for dairies under 700 cows (See Orders R1-2012-003 and R2-2003-0094, respectively).

In the case of the North Coast Region's Order R1-2012-0003, it declares that "this Order applies to dairies that pose a low or insignificant risk to surface water or groundwater." The Order goes on to say that "economics were considered, *as required by law*, during the development of these objectives," and "that a waiver of WDRs [waste discharge requirements] for a specific type of discharge is in the public best interest."

In the case of the San Francisco Bay Region, it requires smaller dairies to complete and file a two-page "Reporting Form" which does not require the involvement of expensive engineers.

In addition, the SJ Valley Air Pollution Control District exempts smaller dairies from many of its requirements.

The initial drafts of the 2007 Dairy Order did provide relief and exemptions for smaller dairies such as ours. Yet, without any evidence justifying it, the Regional Board staff removed these elements at the last minute, and the Board adopted the final Order without adopting any waivers, making any special provisions for, or granting any reporting relief to smaller dairies. Its refusal to do so not only violates the law, but puts smaller dairies in the Central Valley region at a greater competitive disadvantage with larger dairies in the Central Valley, and at a competitive disadvantage with small dairies in the North Coast and San Francisco Bay regions.

No economic analysis or evidence was presented into the record that disputed the testimony that the proposed 2007 Order would be harmful, even fatal, to smaller dairies. Because no economic relief whatsoever was incorporated into the Order for smaller dairies, the Order violates Water Code sections 13241 and 13263 (a), and it is thereby unlawful and unenforceable.

**2. The Administrative Civil Liability Complaint (R5-2013-0539) is legally defective because it is the result of us being deprived of due process.**

The 2007 Order declares that it "serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes." (2007 Order, p.1) The Order describes the procedures where a Discharger makes a request for a modification of the Order or of any of its general waste discharge requirements. (2007 Order, SPRR-2) The reporting requirements, including the filing deadlines for annual and technical reports, are part of the Order's general waste discharge requirements for which someone like us may seek modification, exemption or other similar relief.

Addressing waste discharge requirements, Section 13263 (e) provides that “(e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements ...” Therefore, we, as affected persons, have the right to apply to the Regional Board for a *modification* or *revision* of the general waste discharge requirements, including the reporting requirements contained in the 2007 Order.

Section 13269 (a) (1) and (2) of the Water Code goes on to say that a regional board may *wave* waste discharge requirements (dealt with in section 13263) as they apply to the performance of an individual, such as ourselves.

Section 13223 (a) of the Water Code specifies that the regional board may not delegate modification of waste discharge requirements. It is the regional board’s undelegable duty and responsibility to hear and decide our request for relief from these waste discharge requirements. The staff cannot appoint itself as the “gatekeepers” in these matters, and the board is prohibited under section 13223 (a) and other applicable law to appoint the staff as “gatekeepers.” We have a right to appear before the Regional 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 Regional Board - not by its staff. The evidence in the record is that in 2011 our requests for such a hearing were never communicated to the Board by the staff. There is also no evidence in the record that the Board members deliberated and voted on whether to grant us such a hearing. In 2012, the record shows that our comprehensive written arguments and evidence supporting our written request for such a hearing were again not provided to the Board members, and that the decision to deny our oral request at the 2012 hearing was unilaterally made by the Chair without any Board vote on the issue. By not giving us a fair opportunity to fully present our evidence and arguments, and by keeping the Board members from hearing and considering this evidence and arguments, and from voting on it, the staff, the attorneys and the Chair acted unlawfully and beyond their statutory authority. They also deprived us of due process and violated our civil rights.

Had the Regional Board granted us a full hearing, as we had requested over and over, and heard and read with an open mind the full extent of our evidence and argument in support of our request, there is the possibility that the Board would have granted us relief from some or all of those reporting requirements, including the July 1, 2012 deadline. In such case, we would not be in violation of the 2011 annual reporting requirements. The Regional Board cannot contend that we have violated the 2007 Order’s reporting requirements due on July 1, 2012 until such time as the Regional Board members have fully heard our request and denied it, and after we have exhausted our appeal and all other legal remedies afforded us under the Water Code. (Water Code Sections 13320, 13325, and 13330) Thus, the filing and serving of the 2013 Complaint is premature.

Based upon all of the evidence and argument contained in this document, we again renew our request to be granted a full hearing before the Board at a future separate date to present our request for a modification of the reporting requirements contained in the 2007 Order as it applies to us and our dairy.

**3. Collateral estoppel does not apply in this matter.**

Counsel for the Prosecution Team tries to argue that collateral estoppels bars us from making the arguments contained herein because they have already been rejected and denied by the Regional Board. Counsel cannot make the collateral estoppel argument in light of the facts set forth in paragraphs 13, 14, 15, 20, 21, 22, 23 and 24 of the above Statement of Facts. The staff and the attorneys refused to give the Board members our written testimony containing our evidence and arguments. The Chair made a unilateral decision to not allow us to present the same orally, without having the Board members deliberate and vote on the issue. Hence, our evidence and arguments in these matters were never read, heard, considered and decided by the Board itself. Of equal importance, the Regional Board's actions/decisions were not final. Pursuant to the provisions of Water Code sections 13320 and 13330, they are subject to review and appeal, and can be overturned by the State Board and/or the Superior Court.

**4. Regional Board's Attorneys.**

The attorney for the Advisory Team and the attorneys for the Prosecuting Team are all employees of the same employer - the State Water Resources Control Board. Moreover, the State Board is the agency to which we must appeal any adverse ruling by the Regional Board. Such a situation constitutes a clear conflict of interest, and we object to it. Counsel for the Prosecution Team argues that the arrangement is acceptable because the attorneys do not communicate or confer with each other. Such self-serving language does not insulate these attorneys from censure or discipline by the State Bar. The only way such an arrangement would be allowed would be if all parties to the proceeding signed a waiver, which we have not and will not. We will watch with interest whether the attorneys involved in this proceeding are willing to proceed, given this risk.

Respectfully submitted,

James G. Sweeney

Amelia M. Sweeney

March 28, 2010

California Regional Water Quality Control Board

Central Valley Region

1685 E Street

Fresno, CA 93706

Attention: David A Sholes

Mr. Sholes,

We operate a small dairy in Visalia, California milking about 300 cows. The financial burden placed on us to comply with the requirements of the Regional Water Quality Board is tremendous. The current economic conditions of the dairy industry compound our problems. We are unable to pay the bills which we have and are asking for a reprieve from your office.

If you check the previous reports from our dairy the water quality of is excellent. We do an outstanding job with our farming practices and export much of the manure generated to other farms. The amount of waste water is minimal as we do not flush. The only water is from washing the cows and washing the barn.

I would welcome a visit from you so that you can personally see our operation. A dairy has been operated on these premises for at least 75-80 years. If there was a problem with water contamination it would show up in the testing.

I grew up in San Francisco and have a deep appreciation for nature and protecting our environment. I, like most farmers, value the resources that we are blessed with. It seems unfair that a court decision that was directed at mega dairies should have such a devastating effect on our livelihood.

If you are unable to grant a waiver for this year I would like to ask to present my case to the Regional Water Quality Board at their next meeting.

Sincerely,

Jim Sweeney

Sweeney Dairy

30712 Road 170

Visalia, CA 93292

April 7, 2010

California Regional Water Quality Control Board

Central Valley Region

1685 E Street

Fresno, CA 93706

Attention: Ken Jones

Mr. Jones,

We operate a small dairy in Visalia, California milking about 300 cows. The financial burden placed on us to comply with the requirements of the Regional Water Quality Board is tremendous. The current economic conditions of the dairy industry compound our problems. We are unable to pay the bills which we have and are asking for a reprieve from your office that you suspend our reporting requirements for one year.

If you check the previous reports from our dairy the water quality is excellent. We do an outstanding job with our farming practices and export much of the manure generated to other farms. The amount of waste water is minimal as we do not flush. The only water is from washing the cows and washing the barn.

I would welcome a visit from you so that you can personally see our operation. A dairy has been operated on these premises for at least 75-80 years. If there was a problem with water contamination it would show up in the testing.

I grew up in San Francisco and have a deep appreciation for nature and protecting our environment. I, like most farmers, value the resources that we are blessed with. It seems unfair that a court decision that was directed at mega dairies should have such a devastating effect on our livelihood.

If you are unable to grant our request I would like to appeal your decision and request the opportunity to present my case to your board at some future meeting.

Sincerely,

Jim Sweeney

Sweeney Dairy

30712 Road 170

Visalia, CA 93292

cc. Mike Lasalle



Linda S. Adams  
Secretary for  
Environmental  
Protection

# California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair



Arnold  
Schwarzenegger  
Governor

1685 E Street, Fresno, California 93706  
(559) 445-5116 • Fax (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>

15 June 2010

Mr. James Sweeney  
30712 Road 170  
Visalia, CA 93292

**INFORMATION REVIEW, SWEENEY DAIRY, WDI# #5D545155N01, 30712 ROAD 170,  
VISALIA, TULARE COUNTY**

On 12 April 2010, Central Valley Regional Water Quality Control Board (Central Valley Water Board) staff received a letter from you regarding the subject facility (Dairy). In your letter, you requested that we "suspend" your reporting requirements for one year. Your letter also requested the opportunity to present your case to the Central Valley Water Board.

Your Dairy is enrolled under Order No. R5-2007-0035, Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order). The General Order requires reporting as outlined in section H, Required Reports and Notices. The schedule for submitting the required reports is outlined in section J, Schedule of Tasks. Central Valley Water Board staff has no authority to suspend or otherwise modify the reporting requirements specified in the General Order.

The next meeting of the Central Valley Water Board is scheduled for 28, 29, and 30 July 2010 at our Sacramento Office, 11020 Sun Center Drive, #200, Rancho Cordova, CA 95670. Any member of the public may address the Board on any matter within the Board's jurisdiction and not scheduled for consideration at the meeting. Certain time limits and schedule restrictions for a public forum apply. An agenda of for the July meeting is not yet available. The agenda for the May Meeting with an outline of the meeting rules are attached. Additional information can be found on our website [www.waterboards.ca.gov/centralvalley](http://www.waterboards.ca.gov/centralvalley).

If you have any questions regarding this matter, please contact Ken Jones at [kjones@waterboards.ca.gov](mailto:kjones@waterboards.ca.gov) or (559) 488-4391.

  
DALE E. ESSARY, PE  
RCE No. 53216  
Lead Associate  
Confined Animals Unit

Enclosure

cc: Tulare County Resource Management Department, Visalia  
Tulare County Health & Human Services Agency, Visalia

California Environmental Protection Agency

June 27, 2010

California Regional Water Quality Control Board

1685 E Street

Fresno, CA 93706

Attention: Dale E. Essary, PE

Mr. Essary,

This letter is in response to your letter dated June 15, 2010.

As you know the dairy business continues to suffer unprecedented financial hardship. Our dairy has had our loans put into distress and we have had to spend quite a bit of money protecting ourselves from Farm Credit West. We are doing our best to improve our financial position by my wife accepting a full time position at College of the Sequoias and by getting a part time job myself.

As I read paragraph 13 of Section E of your Order R5-2007-0035, I have the right to inform you of my anticipated noncompliance, but I must give you the date when I can be in compliance. I would hope that I could submit the 2010 Annual Report in one year, namely, on or before July 1, 2011.

If you have reviewed my prior reports, you can see that our dairy operation has a history of compliance and of protecting the underground water. I am unsure as if the authors of this policy ever considered the financial strain that it would place on smaller dairy farms regardless of the economic situation. Even if the dairy is in complete compliance the costs of hiring engineers and specialists to comply with current regulations places an undue stress on the operator.

If your agency suffered a drastic cut in state funding, it would have no choice but to curtail and/or suspend many of its current functions and everyone would understand. It is no different with us.

We would welcome if a member of your staff would come to the dairy and assist us filling out the reports needed and doing the engineering work required to bring us into compliance.

If you are unwilling to accept our proposal for a modification of the filing date for the 2010 Annual Report, then we appeal your determination to the Board. In such an event, I believe that we are entitled to a full hearing before the Board as a scheduled and properly noticed Agenda item. Because I cannot be away from the dairy for very long, I request that the matter be scheduled for a board meeting when it sits in Fresno.

Sincerely,

3

4

August 22, 2010

Central Regional Water Quality Control Board

1685 E Street

Fresno, CA 93706

Attention: Dale Essary

Mr. Essary,

This letter is in response to letters dated August 16, 2010 from your office.

I am appealing your decision to the Regional Board. It is my understanding that I have the right to appear as a separate agenda item before the Board when it sits in Fresno.

As I stated in an earlier letter dated June 27, 2010 the dairy industry continues to suffer unprecedented financial hardship. If your agency suffered a drastic cut in state funding, it would have no choice but to curtail and/or suspend many of its current functions and everyone would understand. It is no different with us.

I do not believe that the intention of the original ruling of the Court was to eliminate small dairies by burdening them with excessive regulations and expense. The original lawsuit was filed against construction of large dairies. It seems to be that actions initiated by the Regional Water Quality Board favor large operations.

There has been a dairy present at this location for eighty years. If you review our reports filed previously you will see that the water quality is excellent. How long does it take for a dairy to contaminate the ground water? How many dairies our size was included in the testing prior to the writing of these regulations?

Please advise us when you have scheduled the hearing on our appeal before the Regional Board, as well as the address where the hearing will be held. Please ensure that I am given at least 20 days advance notice so that I can make the necessary arrangements at the dairy. As I have said before I need to have the hearing held when the Board meets in Fresno since I cannot be away from the dairy for an extended period of time.

Thank you for your cooperation.

Sincerely,

1           And finally, the procedures for administrative  
2 regulations and rulemaking under chapter 3.5 of the APA do  
3 not apply to the adoption of waste discharge requirements.  
4 And that's explained in Section 11352 of the Government  
5 Code.

6                           --o0o--

7           STAFF COUNSEL OKAMOTO: Secondly, you'll hear Mr.  
8 Sweeney argue that the complaint is premature because he  
9 hasn't had the opportunity to have his request to modify  
10 the reporting deadlines heard by the Regional Board  
11 because the staff refused to place this matter on a Board  
12 meeting agenda. Though Mr. Sweeney requested the staff  
13 provide relief from the reporting deadlines, staff itself  
14 does not have the ability to modify the monitoring and  
15 reporting requirements. Only you, as the Regional Board,  
16 or the Executive Officer to whom you delegated authority  
17 would have the ability to modify the requirements.

18           A request for modification of requirements does  
19 not necessarily create an automatic procedural right to a  
20 hearing before the Regional Board. If it did, I would  
21 imagine that the Board -- you, as the Board, would be  
22 inundated with hearings and items on your agenda. Rather,  
23 the decision to place a matter on the agenda remains  
24 within the discretion of your management in consultation  
25 with the Executive Officer as the gatekeeper.

1 Executive Officer in the Fresno office. I'll make the  
2 closing statement.

3 I think the issue at hand here is the fact that  
4 the reports were not submitted in a timely basis. The  
5 large percentage of dairies that were in this  
6 classification did do that.

7 Mr. Sweeney did approach us to ask for an  
8 extension. We decided an extension as the gatekeepers  
9 to the Board, that the extension of the Waste Management  
10 Plan had already been granted. And that was granted in  
11 such a manner that the implementation date did not change.  
12 So that we would be ensured that water quality was  
13 protected. Additional extensions of the Waste Management  
14 Plan would have threatened that if there are is pes like  
15 cross connection, if there are issues like drainage

16 As Mr. Sweeney stated, that inspection report  
17 that staff did was from 2003. It was a cursory  
18 approximation of what was done. And we needed more  
19 definitive answers.

20 Other issues, he is near surface water. So we  
21 also have surface water protection issues in addition to  
22 the groundwater protection issues that needed to be  
23 addressed by the Waste Management Plan. The Annual  
24 Reports, it is critical that that information be collected  
25 annually, submitted in a timely manner. So if issues are

Date: September 21, 2011

Re: Response to email of September 20, 2011 - Complaint R5-2011-0562 - Sweeney Dairy

Dear Mr. Meyer:

This letter is to respond to your email of September 20, 2011. As you know, commencing in April, 2010 and many times thereafter, my wife and I requested a hearing before the regional board in order to seek relief from some of the waste discharge requirements set forth in Order R5-2007-0035. When we informed you that we wish to make that request while we are appearing before the board during the October hearing, you have informed us that such a "request would not be appropriate at that time. In light of your position, then please schedule such a hearing at a future meeting of the regional board, and please promptly inform us of the date of such hearing. We do not believe it is within your authority or discretion to deny us that opportunity. We think the Water Code is clear that only the regional board has the non-delegable authority to modify or refuse to modify waste discharge requirements. How can the board make that decision if the staff intervenes to act as a barrier to the making of such a request? In his testimony before the Hearing Panel, your fellow employee, Mr. Clay Rodgers, freely boasted that your staff acts as the board's "gatekeeper."

While we are disappointed in most of the "Chair's" rulings, we are not surprised by the contents of your recent email. It was a predictable and shameful continuation of your Agency's transparently self-created deadlines, cut-off dates and decisions that are clearly designed to impede a party's ability to properly prepare his defenses and to thwart a fair hearing.

The record will show that we have made numerous requests for more time and for continuances, the most critical of which you denied. In light of all circumstances - representing ourselves, needing time to study to lay of the land, the law, determining what documents to request, reviewing over 34,000 pages of documents - we think a judge will view your denials of our requests for more time as a terrible abuse of discretion. As you well know, judges often deal with continuance requests and are quite sensitive to the need for all parties to have ample time to prepare.

You try to make it sound as if we have not shown the relevance of the administrative record to Order R5-2007-0035, or to your Complaint against us. We are still going through the 34,000 pages of administrative record. At this juncture, we have found that no evidence was introduced that the reporting requirements that existed before the adoption of the 2007 Order were insufficient, inadequate, unreliable or otherwise unsatisfactory. Moreover, there has been no showing of the need of the new reporting requirements adopted in the 2007 Order. We believe that the law is well settled that administrative rules and regulations are invalid and unenforceable unless supported by substantial evidence. If, upon completion of our review of the administrative record, we have found no substantial evidence, we intend to raise that as an additional defense to your Complaint against us. Your denial of additional time to complete our review of such a vast amount of documents and your unwillingness to let us introduce the results of our findings is an egregious abuse of discretion that deprives us of a fair hearing.

We intend to be present at the hearing on your proposed order regarding the Complaint against us. We intend to enter all relevant evidence into the record at that hearing.

Sincerely,

Jim Sweeney

**From:** Alex Mayer <AMayer@waterboards.ca.gov>  
**To:** Japlus3 <japlus3@aol.com>  
**Cc:** Dale Essary <dessary@waterboards.ca.gov>; Ken Landau <klandau@waterboards.ca.gov>; Mayumi Okamoto <MOkamoto@waterboards.ca.gov>  
**Subject:** Re: Sweeney  
**Date:** Thu, Sep 29, 2011 4:36 pm

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Mr. Sweeney,

In your letter to me dated September 21, 2011, you asked to me to schedule a hearing of the Central Valley Water Board to modify Order R5-2007-0035 (Dairy General Order). As staff counsel to the Advisory Team on Administrative Civil Liability Complaint R5-2011-0562, I do not have the authority to schedule such a hearing. You made a similar request in a letter dated September 5, 2011. In response to your September 5, 2011 letter, the Advisory Team consulted with the Chair of the Central Valley Water Board. On September 20, 2011, the Advisory Team reported the Chair's ruling to you and the Prosecution Team. That ruling explained that a request to modify the Dairy General Order would not be appropriate during the Board's upcoming agenda item to consider a proposed Administrative Civil Liability Order against your dairy for violation of the Dairy General Order. It also explained that you, as a member of the public, would be allowed to speak about that topic during the public forum portion of the Board meeting, or otherwise direct your request to the Board's staff, which includes its Executive Officer.

Sincerely,

Alex Mayer  
Staff Counsel, Central Valley Regional Water Quality Control Board

>>> Japlus3 <japlus3@aol.com> 9/22/2011 1:05 PM >>>

so then when I went last night, there was nothing on there again. So it was just on the website, you know. And it's in his e-mail. And it was to all you guys. It had just all your stuff, but none of my evidence.

CHAIRPERSON HART: Mr. Sweeney, I understand your concern, but I assure you that each and every Board member sitting here right now has read and reviewed all of the documentation that you have submitted. We have listened to the hearing tapes. We are fully advised of what your position is.

And in the interest of moving forward and dealing with this matter, please assume and know -- actually, you would be presuming that we understand what your concerns are with respect to the process. And we are essentially giving you a second chance that actually no one else has even requested with respect to presenting evidence on the size of dairies that may have been impacted.

So we are completely -- we understand the financial situation that you and your wife are in, and we actually are very sorry about that. We do need you to present the evidence on the limited scope that you have before us though. So do you understand?

MR. SWEENEY: Okay. I understand.

CHAIRPERSON HART: Excellent.

MR. SWEENEY: Okay. Could you put that slide

1 minutes to cross-examine Mr. Sweeney on his rebuttal  
2 evidence or comment on the evidence. The prosecution team  
3 will not present any new evidence.

4 Mr. Sweeney may then use any remaining time of  
5 his five minutes for a closing statement. The prosecution  
6 may use any remaining time for a closing statement.

7 All persons expecting to testify, please stand at  
8 this time, raise your right hand, and take the following  
9 oath.

10 (Whereupon all prospective witnesses were sworn.)

11 CHAIRPERSON HART: Thank you.

12 Please state your name, address and affiliation  
13 and whether you've taken the oath before testifying.

14 Does the Board Advisory Counsel have any legal  
15 issues to discuss? Mr. Mayer?

16 STAFF COUNSEL MAYER: My microphone is not  
17 working. That's better.

18 Yes, Madam Chair. I had four procedural issues  
19 that I'd like to discuss with you and the Board before we  
20 get started with this matter.

21 The first is to clarify that there were a number  
22 of written -- there was a number of written correspondence  
23 between the advisory team and the designated parties in  
24 this matter and that that written correspondence is being  
25 added into the record along with the associated

MEETING  
STATE OF CALIFORNIA  
CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD  
PARTIAL TRANSCRIPT  
AGENDA ITEM 10

CENTRAL VALLEY REGIONAL  
WATER QUALITY CONTROL BOARD  
11020 SUN CENTER DRIVE, #200  
RANCHO CORDOVA, CALIFORNIA

THURSDAY, OCTOBER 13, 2011

9:44 A.M.

TIFFANY C. KRAFT, CSR  
CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 12277

CALIFORNIA REPORTING, LLC  
52 LONGWOOD DRIVE  
SAN RAFAEL, CA 94901  
(415) 457-4417

1 of itself does not require you to change the ACL. But you  
2 have the discretion to do that.

3 And with that, I would like to enter this  
4 presentation and the Power Point into the record of this.  
5 And I'll be happy to answer any questions. And then we  
6 would proceed with Mr. Sweeney's testimony.

7 CHAIRPERSON HART: Thank you, Ken.

8 Do we have any Board questions right now?

9 Seeing none, Mr. Sweeney, would you like to come  
10 forward to testify?

11 MR. SWEENEY: My name is Jim Sweeney, and my wife  
12 and I are the persons with which this complaint has been  
13 brought. I'm here not because I'm charged with being a  
14 polluter; I'm here because I'm charged with not filing the  
15 annual reports that were due on July 1st, 2010. In other  
16 words, I'm a paper violator.

17 You probably have not been told by your staff  
18 that three months before these reports were due on July  
19 1st, 2010, I asked them to schedule a hearing before you  
20 so that I could ask a one-year extension of your filing  
21 deadline due to financial necessity.

22 As probably learned, the dairy industry suffered  
23 through a dreadful period during 2008 and 2009 when,  
24 because of low milk prices and high feed costs, dairies  
25 were losing money at an enormous rate and had to depend on

1 their bank to loan money to make up the shortfall.

2 My wife and I operate a dairy in which we milk  
3 less than 200 cows. Our bank loans -- less than 300 cows.  
4 Our bank loans were classified as distressed. We were  
5 forced to hire an attorney just so we could stay in  
6 business.

7 STAFF COUNSEL OKAMOTO: Madam Chair, if I can  
8 object.

9 My understanding that the scope of Mr. Sweeney's  
10 testimony today would be limited to the documents that he  
11 submitted on September 30th. So I --

12 CHAIRPERSON HART: With respect to the size of  
13 the dairy.

14 STAFF COUNSEL OKAMOTO: Correct. With respect to  
15 compliance rates and herd size data. That was also  
16 submitted by him on September 30th.

17 CHAIRPERSON HART: That's duly noted.

18 Mr. Sweeney, do you understand --

19 MR. SWEENEY: Can I make an objection to her  
20 objection? Because on the website that you have, all your  
21 stuff was presented, but none of mine was. And I brought  
22 that to the attention of Mr. Landau. And he corrected it  
23 for a day. And then I had contacted him and said, you  
24 know, that some of the stuff that was on there was  
25 actually dismissed earlier, that it wasn't allowed. And

1 so then when I went last night, there was nothing on there  
2 again. So it was just on the website, you know. And it's  
3 in his e-mail. And it was to all you guys. It had just  
4 all your stuff, but none of my evidence.

5 CHAIRPERSON HART: Mr. Sweeney, I understand your  
6 concern, but I assure you that each and every Board member  
7 sitting here right now has read and reviewed all of the  
8 documentation that you have submitted. We have listened  
9 to the hearing tapes. We are fully advised of what your  
10 position is.

11 And in the interest of moving forward and dealing  
12 with this matter, please assume and know -- actually, you  
13 would be presuming that we understand what your concerns  
14 are with respect to the process. And we are essentially  
15 giving you a second chance that actually no one else has  
16 even requested with respect to presenting evidence on the  
17 size of dairies that may have been impacted.

18 So we are completely -- we understand the  
19 financial situation that you and your wife are in, and we  
20 actually are very sorry about that. We do need you to  
21 present the evidence on the limited scope that you have  
22 before us though. So do you understand?

23 MR. SWEENEY: Okay. I understand.

24 CHAIRPERSON HART: Excellent.

25 MR. SWEENEY: Okay. Could you put that slide

1 back up for me?

2 CHAIRPERSON HART: Yes. We will get a slide back  
3 up.

4 MR. SWEENEY: Okay. As you can see from these  
5 slides, you know, the herd size -- and the reason I only  
6 used the data from the Fresno office, that was the only  
7 data that was provided by me as per my request from Jorge  
8 Baca.

9 And you know, as you can see, dairies below 400  
10 cows, 46 percent of them went out of business or did not  
11 file reports. And between 400 and 700 cow dairies, 32  
12 percent either went out of business between 2007 and 2010  
13 or did not file the report. But if the dairy was above  
14 700 cows, it was only .6 percent. So there is a big  
15 discrepancy between what the big dairies and what the  
16 small dairies could afford.

17 And in the EPA thing, they had -- you know the  
18 water quality thing that they have, they have all the  
19 dairies under 700 cows exempted. And in those things, the  
20 little -- in the information that was provided to me, it's  
21 34,000 pages of documents. They have a thing in there  
22 that the EPA does the financial analysis of that. And  
23 they found that the dairies under 700 cows could not  
24 comply. And I don't think it was ever done for this, for  
25 the dairies in California.

1 CHAIRPERSON HART: I'm sorry. Proceed if you --

2 MR. SWEENEY: No. If you have something --

3 CHAIRPERSON HART: I understand the information  
4 that you're presenting to us. And when this Board -- I  
5 think what you're referencing back to is the general dairy  
6 Order. And during the hearings that we had on that Order,  
7 this Board was advised. The staff did do a financial  
8 analysis. We were well aware of the impacts on the small  
9 dairies and understood that there would be a larger impact  
10 on smaller dairies than on -- a larger impact on smaller  
11 dairies than on the large dairies, for obvious reasons.  
12 You have different economic situations going on.

13 And there was a policy determination that was  
14 made with respect to water quality. And while many of us  
15 were extremely concerned about the impacts on smaller  
16 dairies, we were concerned with respect to the nitrate  
17 problems that we have in the Central Valley and the water  
18 quality problems that we have. So there was a policy  
19 determination made sometime ago. So we do understand that  
20 analysis that you're presenting to us again.

21 MR. SWEENEY: But through the Office of  
22 Administrative law, weren't you guys required to do an  
23 economic feasibility thing?

24 CHAIRPERSON HART: Yes. And we did it.

25 Correct me if I'm wrong, staff.

1           STAFF COUNSEL MAYER: The 2007 general waste  
2 discharge requirements is a quasi -- the action of  
3 adopting that permit is called a quasi-adjudicative  
4 action. And those actions that the Board may take are not  
5 submitted to the Office of Administrative Law. The Office  
6 of Administrative Law reviews regulations that the --  
7 quasi legislative acts like regulations that the Board may  
8 adopt. So that review did not occur for the general waste  
9 discharge --

10           CHAIRPERSON HART: I think what Mr. Sweeney is  
11 getting at is there was a financial analysis that was  
12 undertaken at some point in time by this Board on the  
13 dairy Order, was there not? A limited analysis done at a  
14 minimum?

15           ASSISTANT EXECUTIVE OFFICER LANDAU: Yes. There  
16 was definitely discussion of the impact of the regulations  
17 on the dairy industry. And as you've said, full  
18 recognition that there would be a disproportionately large  
19 economic impact on the smaller dairies.

20           MR. SWEENEY: Okay. Can I read a couple of  
21 quotes?

22           CHAIRPERSON HART: Sure.

23           MR. SWEENEY: Ms. Asgil, an agricultural  
24 economist, testified, "Because of these regulations, we're  
25 probably looking at the smaller dairies going under.

1 Probably those dairies that we're usually fond of  
2 protecting, dairies under 500 milking cows will be going  
3 out."

4 And then a quote from Dr. Longley expressed  
5 concerns: "Whereas, larger dairies, a 10,000 cow dairy  
6 would be able to absorb the cost; a 100 cow dairy is going  
7 to be faced with possible disaster."

8 And then a letter from the State Department of  
9 Food and Agriculture mentioned that Governor  
10 Schwarzenegger made a commitment to reject new regulations  
11 that unfairly impacts small business. "It is expected  
12 that new and existing regulations were reviewed for  
13 economic impact to small business. We encourage the  
14 Regional Water Board to review your proposal, propose  
15 alternatives that are less burdensome."

16 And you know -- and I don't know if you saw the  
17 letters that I submitted --

18 CHAIRPERSON HART: We did.

19 MR. SWEENEY: Okay. Well, I want to -- during  
20 our July 14th hearing before the hearing panel, your staff  
21 member Clay Rodgers testified that he acted as a  
22 gatekeeper. That's the exact term he used. It was his  
23 decision, he suggested, whether we should be granted any  
24 relief from the 2007 Order. But his behavior is unlawful  
25 under Water Code Section 13223, which says that only the

1 Regional Board has the authority to modify waste discharge  
2 requirements. The staff has no authority to make these  
3 decisions. And I was never allowed to talk to you guys.

4 CHAIRPERSON HART: Thank you, Mr. Sweeney. And  
5 your time is up.

6 You are always welcome to come before this Board  
7 at the public session, the public forum, to request that  
8 an item be put on the agenda. So I want you to understand  
9 that, first of all.

10 MR. SWEENEY: Well, I asked that specifically,  
11 you know. And I have written documentation that at least  
12 three times I asked for a Board -- I asked to appear  
13 before the Board. And one time they said that I could  
14 have three minutes.

15 CHAIRPERSON HART: Correct. Under the public  
16 forum.

17 MR. SWEENEY: All the other times, they ignored  
18 my request.

19 CHAIRPERSON HART: Okay. We apologize for that.  
20 So in the future going forward, my understanding is your  
21 concern is with the requirements that are in the waste  
22 discharge Order.

23 MR. SWEENEY: It's going to put all the little  
24 dairies out of business. And you know, this shows -- just  
25 look what it did in those three years.

**From:** Ken Landau <klandau@waterboards.ca.gov>

**To:** Japlus3 <japlus3@aol.com>

**Cc:** Alex Mayer <AMayer@waterboards.ca.gov>; Dale Essary <dessary@waterboards.ca.gov>; Kiran Lanfranchi-Rizzardi <klanfranchi@waterboards.ca.gov>; Mayumi Okamoto <MOkamoto@waterboards.ca.gov>

**Subject:** Re: Sweeney

**Date:** Tue, Oct 25, 2011 2:02 pm

**Attachments:** Sweeney\_Oct\_2011\_Board\_Meeting\_PowerPoint.pdf (150K), longley\_confirmation\_Aug\_2006.pdf (440K), hart\_confirmation\_-\_Sept\_2009.pdf (267K), odenweller\_appointment\_Jan\_2008.pdf (81K), odenweller\_confirmation\_Sept\_2008.pdf (168K), hoag\_appointment\_december\_2010.pdf (114K), meraz\_confirmation\_aug\_2011.pdf (165K)

Mr. Sweeney,

I am responding to your email to Kiran Lanfranchi dated 13 October 2011.

- 1) The written testimony sent with your email cannot be entered into the record of the hearing, as the date for submittal of written evidence had passed prior to the hearing and the Chair did not specifically approve the late submission. Only what you actually said during the hearing is part of the record.
- 2) The court reporter is being asked to prepare a written transcript of the hearing, but that document is not usually available from the court reporter for a few weeks. I will inform you when the transcript becomes available. In the meantime, we can mail you an audio recording of the Board meeting (saved to a compact disk) if you would like. If you would like a copy of the recording, please let me know.
- 3) The documents made available to Board members for their consideration at the 13 October hearing include the following. Except for the attached files, you should already have all of these documents.
  - a. All agenda materials from the 14 July Panel Hearing in Fresno
  - b. The court reporter transcript of the 14 July Panel hearing, which was sent to Board members Hart and Hoag, who were not at the 14 July Panel hearing.
  - c. Your 8 July 2011 Written Testimony prepared for the July 14 Panel Hearing
  - d. Items (a)( 15), (a)(16), and (a)(1) through (a)(13) as referenced in your June 13, 2011 letter to the Advisory Team (accepted into the record by Hearing Panel Chair Longley as documented in Alex Mayer's June 30, 2011 email)
  - e. Your June 30 evidentiary submission (accepted into the record as documented by Ken Landau's July 7, 2011 email).
  - f. Your 30 September 2011 Written Testimony prepared for the October 13 Board meeting
  - g. Your 30 September 2011 comment letter to Alex Mayer (accepted into the record by the Board Chair at the October 13 board meeting)
  - h. All agenda materials for the 13 October Board meeting in Rancho Cordova
  - i. The Advisory Team Power Point slides from the October 14 Panel Hearing (copy attached)
  - j. Documents related to the legal status of individual Board members handed out at the Board meeting (copies of which are attached),
  - k. Board meeting handouts of the PowerPoint slides of dairy compliance rates by the Prosecution and dairy attrition rates from you (given to you at Board meeting)

Ken Landau

**ATTACHMENTS:**

Advisory Team PowerPoint slides from 12 October 2011 Board meeting [item 3) i., above]

Documents on legal status of individual Board members [item 3) j., above]

Kenneth D. Landau  
Assistant Executive Officer

Sweeney - written testimony 2  
7/20/12

FINAL

Date: July 20, 2012

To: Central Valley Regional Water Quality Control Board

Advisory Team

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Vanessa Young [vyoung@waterboards.ca.gov](mailto:vyoung@waterboards.ca.gov)

**Re: Written Testimony submitted to the Central Valley Regional Water Quality Control Board for consideration at the August 2/3, 2012 Hearing on Administrative Civil Liability Complaint R5-2012-0542**

**A. Introduction.**

We are James G. Sweeney and Amelia M. Sweeney, doing business as Sweeney Dairy, and are the "Dischargers" named under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2012-0542 (Complaint). Our address is 30712 Road 170, Visalia, CA 93292. Our telephone number is (559) 280-8233 and our email address is [japlus3@aol.com](mailto:japlus3@aol.com).

**B. Statement of Facts/Background.**

1. We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 300 cows on a site where a dairy has continuously been conducted for over eighty years.

that, postponed their filing deadline by one year. In light of this, it cannot be argued that what we filed in 2008 and 2009 waived in any way our objections to the new burdens imposed by the 2007 Order.

We are sending enough extra copies of this document, including our attached Exhibits 1 through 24, inclusive, to be delivered by you to each Regional Board member. Please get it to them sufficiently ahead of the August hearing so that they may read it beforehand. And we ask that a copy also be introduced into the record of this proceeding. X

Respectfully submitted,

James G. Sweeney

Amelia M. Sweeney

1           So I ask you now will you grant my wife and I a  
2 hearing where we can fully present our evidence supporting  
3 the need and appropriateness of granting us a waiver for  
4 the filing of these excessively costly reports that were  
5 due on July 1st, 2010, and July 1st, 2011?

6           Thank you. That's a question.

7           CHAIRPERSON LONGLEY: I think the prosecution  
8 team covered that very well. That would have to be --  
9 that should have happened previously during the time that  
10 the General Order was being formulated, and certainly it  
11 cannot be part of this proceeding.

12           MR. SWEENEY: I'm not asking for one today. I'm  
13 asking for one in the future.

14           CHAIRPERSON LONGLEY: Part of the General  
15 Order -- my answer to that would be no. When we revisit  
16 that General Order, it can be considered at that time.

17           VICE CHAIRPERSON COSTANTINO: I just had a  
18 question.

19           what is the estimate that has been given to you  
20 for the cost of this report?

21           MR. SWEENEY: 30,000.

22           VICE CHAIRPERSON COSTANTINO: So I will -- when  
23 the prosecution team comes back up, I'll ask them -- or  
24 you could. You had an economic benefit of 2500. I think  
25 this is a key point to understand.

1 has read --

2 MR. SWEENEY: Has read through all my -- you  
3 know, this paper, you know, that you were presented and  
4 the booklet.

5 LEGAL COUNSEL MAYER: Just for the record, when  
6 you're pointing to this paper, are you talking about the  
7 tabbed submission or the --

8 MR. SWEENEY: It's dated July 20th that I sent to  
9 you to distribute to everybody. Has everybody got this  
10 and this paper here and read them?

11 MS. SWEENEY: we would like to know for the  
12 record if everybody actually read it.

13 BOARD MEMBER HART: Yes, we understand. The  
14 question I believe pending from the dischargers is whether  
15 or not each member of this Board has read their agenda  
16 packet and their submittals. And I will say I have read  
17 each and every piece of paper.

18 CHAIRPERSON LONGLEY: And I have, too. But I  
19 don't think it's appropriate for you to be examining this  
20 Board. It is inappropriate.

21 would you go on with your testimony, please?

22 MR. SWEENEY: Okay. I'd like to present this,  
23 you know, just to make sure it gets into the record. This  
24 is my written testimony and argument and then, you know,



25 all the attached exhibits. So who should I give this to?

♀

33

1 LEGAL COUNSEL MAYER: We already have that in the  
2 record.

3 MR. SWEENEY: Okay. Then that's all my  
4 testimony.

5 CHAIRPERSON LONGLEY: Any questions by members of  
6 the Board?

7 Does staff wish to cross-examine?

8 MS. HOWARD: Mr. Sweeney, you testified that the  
9 annual report is required to be submitted by a certified  
10 engineer, yet you, yourself, submitted both the 2008 and  
11 2007 annual reports. Doesn't that indicate that you, as  
12 an individual dairyman, can submit the annual reports on  
13 your own without help of a certified engineer?

14 MR. SWEENEY: That's not -- I think you  
15 misunderstood what I said or I misstated it. The reports  
16 themselves are required to be done by an engineer, you  
17 know. But I can submit the reports. You know, the  
18 measuring of the lagoon and the Waste Management Plans,  
19 they have to be done by a professional. I can't do those  
20 myself.

21 MS. HOWARD: I'd like to ask Mr. Patteson to  
22 speak more to the requirements.

23 SUPERVISING ENGINEER PATTESON: What Mr. Sweeney

Home » Board Decisions » Tentative Orders » 1208

## Tentative Orders - 2/3 August 2012 Regional Board Meeting

THURSDAY, AUGUST 2, 2012 – 8:30 A.M.  
 Central Valley Regional Water Quality Control Board  
 11020 Sun Center Drive, #200  
 Rancho Cordova, CA 95670

(REVISED JULY 31, 2012)

Items to be considered by the Board at the 2/3 August 2012 Central Valley Regional Water Quality Control Board Meeting, organized by agenda item number.

Board Meeting Agenda, 69 KB, PDF ([PDF Info](#)) -(revised 07/26/2012)

Executive Officer's Report, 570 KB, PDF ([PDF Info](#))

### ENFORCEMENT

6. Del Mar Farms, Jon Maring, Lee Del Don and Bernard N. & Barbara C. O'Neill Trust – *Consideration of Administrative Civil Liability Order*  
*(This item has been moved to Friday, August 3, 2012)*
7. James G. and Amelia M. Sweeney, Sweeney Dairy, Tulare County – *Consideration of Administrative Civil Liability Complaint R5-2012-0542 and Recommended Administrative Civil Liability Order*

Buff Sheet, 8 KB, PDF ([PDF Info](#))

Administrative Civil Liability Complaint, 4.02 MB\*, PDF ([PDF Info](#))

Administrative Civil Liability Order, 84 KB, PDF ([PDF Info](#))

Hearing Procedures, 131 KB, PDF ([PDF Info](#))

Witness List, 6 KB, PDF ([PDF Info](#))

Evidence List, 9 KB, PDF ([PDF Info](#))

Discharger's Evidence List/Arguments, 1 MB\*, PDF ([PDF Info](#))

Response to Discharger's Evidence/Arguments, 79 KB, PDF ([PDF Info](#))

Attachment 1a, 194 KB, PDF ([PDF Info](#))

Attachment 1b, 42 KB, PDF ([PDF Info](#))

Comments Received:

2011 Administrative Civil Liability Order, 31 KB, PDF ([PDF Info](#))

2011 PowerPoint Presentation, 111 KB, PDF ([PDF Info](#))

Compliance by Dairy Size Table, 13 KB, PDF ([PDF Info](#))

Certified Mail Receipt of ACL Complaint, 43 KB, PDF ([PDF Info](#))

**(AGENDA ITEMS 19 THROUGH 21, BELOW, HAVE BEEN MOVED FROM FRIDAY, AUGUST 3, 2012)**



# California Regional Water Quality Control Board

## Central Valley Region

Katherine Hart, Chair



Matthew Rodriguez  
Secretary for  
Environmental Protection

1685 E Street, Fresno, California 93706  
(559) 445-5116 • FAX (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>

Edmund G. Brown Jr.  
Governor

22 August 2011

James G. & Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

### **GROUNDWATER MONITORING AT SWEENEY DAIRY, WDID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

The subject Dairy is regulated by Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board) on 3 May 2007. Monitoring and Reporting Program R5-2007-0035, revised 23 February 2011 (MRP), accompanies the General Order and contains requirements for implementing additional groundwater monitoring. Under the MRP, the Executive Officer has the authority pursuant to California Water Code (CWC) section (§) 13267 to order the installation of individual groundwater monitoring wells at the Dairy. **Based on results of site assessment and monitoring data reported to our office, your facility is on a list to receive a directive pursuant to CWC §13267 that requires the installation of an individual groundwater monitoring system.**

To satisfy the requirement for additional groundwater monitoring, you have two options. You may install an individual groundwater monitoring system at the Dairy, or you may elect to join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities. Central Valley Water Board staff has been informed that the Central Valley Dairy Representative Monitoring Program intends to close membership by 1 November 2011. If an RMP is not available, your only option will be individual groundwater monitoring and the installation and sampling of groundwater monitoring wells on your Dairy.

If you intend to satisfy the groundwater monitoring requirement by joining an RMP, or if you have already joined an RMP, provide documentation that you have joined an RMP to the Central Valley Water Board **by 30 September 2011**. While participating in an approved RMP does not guarantee you will not be required to perform individual groundwater monitoring in the future, it will remove your name from the current list of dairy owners and operators to receive an order from the Executive Officer to implement individual groundwater monitoring.

If you have questions regarding this matter, please contact me at (559) 445-5093.

DALE E. ESSARY  
Senior Engineer  
Confined Animals Unit

*California Environmental Protection Agency*

**Date:** September 30, 2011

**To:** A. Meyer, counsel for Central Valley Regional Water Quality Control Board

**Cc:** [klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)

[MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov)

[dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

**Re:** Response to Mayer email of September 29, 2011

**Complaint R5-2011-0562 – Sweeney Dairy**

Dear Mr. Meyer:

We have looked at Water Code section 13228.14, which states, in part, “The regional board, after making an independent review of the record, and taking additional evidence as may be necessary, may adopt, with or without revision, or reject, the proposed decision and order of the panel.”

We have made a number of reasonable and compelling arguments as to why (1) the hearing before the Hearing Panel and (2) the final hearing before the regional board should be continued. Basically it was because the deadlines set forth in your original Hearing Procedures were unconscionably short and did not allow us sufficient time to complete our discovery and properly prepare for the hearing.

On June 1, we made our timely request for a continuance of the July 14 hearing, and on June 13, you advised us that our request was denied. Hence, the presentation we were forced to submit for the July 14 hearing before the Hearing Panel was not all that we had hoped for.

We went on to ask that the October hearing before the regional board be continued and rescheduled at their next meeting. We needed to complete our review of the 34,000 page administrative record of the 2007 Order, which your agency did not provide us until after the July 14 hearing. We also needed time to develop and present whatever additional evidence and arguments we felt was fit and proper based on an adequate review of all documents.

Unfortunately, your email of September 29 advises us that the Chair of the regional board has decided (1) to not continue the hearing, and (2) and to not allow us to introduce anything new beyond that which we introduced at the July 14 hearing (except as to herd size data).

From our reading of the above section 13228.14, we do not see where it grants the Chair the sole authority to make these decisions. Rather, it would seem that these are decisions that a duly qualified and informed board must make after hearing arguments by both parties.

This brings us to our next point. Water Code section 13201 (b) provides that “All persons appointed to a regional board shall be subject to Senate confirmation, ...”

On June 26, 2011, we asked Mayumi Okamoto, counsel for the Prosecution Team, whether each of the current CVRWQCB members have had their appointment to the board confirmed by the State Senate, and asked for copies of documents reflecting such confirmation.

On June 30, Ms. Okamoto responded by saying that “Please find attached the documents reflecting the confirmation of Chair Hart. We are still in the process of searching for the other documents responsive to this request for the remaining four members.”

We have never received any documents indicating that these other four members were confirmed by the State Senate. In the absence of such proof, we contend that the regional board does not possess a quorum of members qualified to make any decisions. And, it seems, your position to not admit any new evidence will similarly bar your agency from now introducing evidence into the record that the other members have been confirmed by the Senate.

Your email of September 29 also informed us that you do not have the authority to schedule a hearing before the regional board in connection with the request for relief that we have been making ever since April, 2010. Despite our repeated requests, such a hearing has never been scheduled, and no one has informed us that there is a particular person to whom we must direct this request. So we ask you: to whom should we direct our request, keeping in mind that it can be scheduled for some time after the regional board’s October meeting? We look forward to your answer.

Sincerely,

Jim Sweeney



Matthew Rodriguez  
Secretary for  
Environmental Protection

California Regional Water Quality Control Board  
Central Valley Region  
Katherine Hart, Chair

1685 E Street, Fresno, California 93706  
(559) 445-5116 • FAX (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>



Edmund G. Brown Jr.  
Governor

9 November 2011

James G. and Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

**RESPONSE TO GROUNDWATER MONITORING AT SWEENEY DAIRY, WDID  
5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

The subject Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) on 3 May 2007. Monitoring and Reporting Program (MRP) R5-2007-0035, revised 23 February 2011, accompanies the General Order and contains requirements for implementing groundwater monitoring. Under the MRP, the Executive Officer has the authority pursuant to California Water Code (CWC) section 13267 to order the installation of individual groundwater monitoring wells at the Dairy.

Groundwater monitoring is being required of all dairies covered by the General Order in accordance with the MRP. We sent you a letter dated 22 August 2011 to inform you that to satisfy the requirement for additional groundwater monitoring, you had two options: 1) install an individual groundwater monitoring system at the Dairy; or, 2) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities. The letter also informed you that the Central Valley Dairy Representative Monitoring Program intends to close membership. The letter was sent as a courtesy so that dairy owners and operators would be aware of this option to avoid having to install and monitor an individual groundwater monitoring system at their facility. If an RMP is not available, the only option would be individual groundwater monitoring and the installation and sampling of groundwater monitoring wells on the Dairy. The letter was not an order to initiate individual groundwater monitoring.

Subsequent to the issuance of the 22 August 2011 letter, Central Valley Water Board staff received your 30 September 2011 response via email requesting clarification. Specifically, your letter requests that staff provide you with a written explanation of the need for putting in a monitoring well system.

The General Order and accompanying MRP were issued pursuant to California Water Code section 13267, which states, in relevant part:

- (a) A regional board ... may investigate the quality of any waters of the state within its region.

(b)(1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

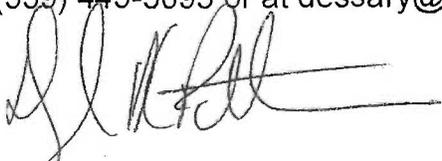
A cost/benefit evaluation of the burden associated with the submission of technical reports required by the General Order, including those associated with the implementation of groundwater monitoring at dairy facilities, was performed during the process of adoption and issuance of the General Order.

The Board adopted the Water Quality Control Plan for the Tulare Lake Basin, Second Edition, revised January 2004, which designates beneficial uses of water. Groundwater within the vicinity of the Dairy is designated as having a beneficial use of municipal and domestic water supply (MUN) and agricultural supply (AGR). Dairy waste constituents (particularly nitrogen and salts), when released to groundwater, are a significant threat to the beneficial uses of MUN and AGR. An investigation to assess whether the Dairy has impacted groundwater quality is reasonable and appropriate. The cost of the technical reports is justified by the fact that these reports will allow the Central Valley Water Board to assess whether current management practices are protective of groundwater beneath your Dairy.

Attachment A of the MRP explains that the Executive Officer will order all dischargers covered under the General Order to install monitoring wells to comply with the MRP. It was anticipated that this effort would occur in phases of approximately 100 to 200 dairies per year. The first group of dairies ordered to install wells included those dairies where nitrate was detected above water quality objectives in any one production well or subsurface (tile) drain in the vicinity of the dairy. The remaining dairies (including yours) have been approached in order of a ranking system that prioritized dairies based on the factors in Table 5 of Attachment A.

If you choose not to participate in an RMP, the Executive Officer will issue an order pursuant to CWC 13267 (13267 Order) that will require you to perform individual groundwater monitoring and that will include a formal explanation for the 13267 Order's justification.

If you have questions regarding this matter, please contact Dale Essary of this office at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).



DOUGLAS K. PATTESON  
Supervising Engineer

November 29, 2011

**To: Dale Essary, Central Valley Regional Water Quality Control Board**

**1685 E. Street**

**Fresno, CA 93706**

**Re: Sweeney Dairy, Groundwater Monitoring**

Dear Mr. Eassry:

We received Mr. Patteson's letter dated November 9, 2011, which was a response to our letter to you dated September 30, 2011. While our letter posed a number of questions, Mr. Patteson's letter either failed to answer them satisfactorily or ignored them altogether. These questions were:

**1. What is your explanation for the need to put in monitoring wells?**

Patteson's letter stated that you need monitoring well sample results to "assess whether current management practices are protective of groundwater beneath your dairy." This is odd in light of the fact that your agency has been prescribing management practices for dairies for over thirty years (Title 27 of Calif. Code of Regulations and other agency requirements). We have followed all of your requirements while operating our dairy. Your staff inspected us in 1998 and in 2003, and after each visit, you sent us letters confirming that our dairy was in full compliance with your groundwater protection requirements.

Your agency has been collecting monitoring well data from a large number of dairies for at least fifteen years. I should hope by now that your agency has been able to assess whether your required management practices are useful and effective. You have never informed us that, on the basis of this collected data, you have found your required practices to be inadequate, flawed, or needed to be changed.

While your agency has required other dairies to put in monitoring well systems in the past, you had never required us to do so until now. Please explain what specific information you have regarding our dairy that has prompted you to impose them on us now.

Mr. Patteson's letter pointed out that Water Code section 13267 provides that "In requiring these [monitoring program] reports, the regional boards shall provide the person

with a written explanation with regard to the need for the reports, ..." While Mr. Patterson made the general assertion that "An investigation to assess whether the dairy has impacted groundwater quality is reasonable and appropriate," he did not cite any specific facts that would give support a concern that our dairy was causing a problem.

Water Code section 13267 goes on to say that "these reports shall bear a reasonable relationship to the need for the reports," and that the regional boards "shall identify the evidence that supports requiring that person to provide the reports." Mr. Pattenon failed to provide us with any specific evidence about our dairy that supports the need for us to install monitoring wells and to submit reports of test results from them.

Indeed, as you should know, our dairy has provided your agency with a number of well water test results in 2003 and 2007. The results showed nitrate-nitrogen levels ranging from 1.1 to 3.4 mg/l, which are remarkably low. We had these same wells tested again in 2010 and the nitrate-nitrogen ranged from .2 to 1.4 mg/l, our lowest yet (If you want copies of these results, let us know). All of the 2003, 2007 and 2010 well test results come from a dairy site that has had a dairy operating on it for over eighty years.

Mr. Pattenon mentioned that Attachment A of the MRP of the General Order provides that "the Executive Officer will order all dischargers covered under the General Order to install monitoring wells." He went on to explain that "It was anticipated that this effort would occur in phases of approximately 100 to 200 dairies per year. The first group of dairies ordered to install wells included those dairies where nitrate was detected above water quality objectives in any one production well in the vicinity of the dairy. The remaining dairies (including yours) have been approached in order of a ranking system that prioritized dairies based on the factors in Table 5 of Attachment A."

We noticed that Attachment A also sets forth a score card that is to be used to rank the priority for a dairy. Please send us a copy of the scorecard you used to score our dairy and tell us where our dairy ranked with respect to other dairies. In comparison to the other approximately 1500 dairies in your jurisdiction, where does our dairy's nitrate levels rank? What other information did you rely on to conclude that our dairy needed to spend considerable money to install one of these systems and to pay the engineers and laboratories to pull and test water sample on an ongoing basis?

- 2. What would an individual monitoring well system on our dairy cost, both as to initial and recurring costs?**

Since the costs would depend on the number of wells you would require, their depth, their location, the frequency that samples would have to be taken, who would take them

and how many different components would have to be tested for, you need to provide us with answers to these questions so that we can contact some firms to get cost estimates.

3. **Where are the monitoring wells at “representative facilities” located in reference to our dairy? Why do you feel information from these remote wells would be meaningful? Executive Secretary**

Your original letter mentioned that we had the option to enroll in the Central Valley Representative Monitoring Program as an acceptable “representative monitoring program.” When we asked where these monitoring wells were located with reference to our dairy, and why you would feel that test results from these wells would be meaningful, Mr. Patteson entirely failed to respond.

We look forward to you satisfactorily responding to our questions and requests.

Sincerely,

Jim Sweeney

Cc: Douglas K. Patteson  
Clay Rogers



Matthew Rodriguez  
Secretary for  
Environmental Protection

**California Regional Water Quality Control Board**  
**Central Valley Region**  
**Katherine Hart, Chair**

1685 E Street, Fresno, California 93706  
(559) 445-5116 • FAX (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>



Edmund G. Brown Jr.  
Governor

7 December 2011

James G. and Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

**RESPONSE TO LETTER REGARDING GROUNDWATER MONITORING AT SWEENEY DAIRY, WDID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

Central Valley Water Board staff issued you a courtesy letter dated 22 August 2011 to inform you that to satisfy the requirement for additional groundwater monitoring, you had two options: 1) install an individual groundwater monitoring system at the Dairy; or, 2) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities. Subsequent to the issuance of the 22 August 2011 letter, staff received your 30 September 2011 response via email requesting clarification. Staff's letter dated 9 November 2011 provided the requested clarification.

Subsequent to the 9 November 2011 letter, staff received your 29 November 2011 response via email requesting further clarification. Specifically, your letter requested an explanation for the need to install wells at the Dairy and an estimate for the cost of installing the wells, and contained questions regarding the representativeness of the Central Valley Representative Monitoring Program (CVDRMP).

A completed Table 5 for the Dairy, which is a tool contained in the MRP that is used by staff to assess the threat that a dairy poses to groundwater, is enclosed, along with the ranking priority scores.

As stated in staff's 22 August 2011 letter, if you choose not to participate in an RMP, the Executive Officer will issue an order pursuant to California Water Code (CWC) section 13267 that will require you to perform individual groundwater monitoring. This order will contain an explanation of how the 13267 Order's burden, including costs, is justified.

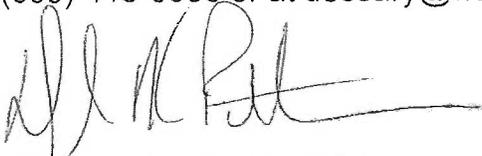
The CVDRMP developed a work plan for the first phase of representative monitoring, which involves the installation of wells in areas of Merced and Stanislaus counties that exhibit shallow groundwater and relatively permeable soils. Phase II of the program, which has yet to be submitted, will need to include sites that represent a cross-section of site conditions and management practices for member dairies located in all San Joaquin Valley Counties and selected counties in the Sacramento Valley. The burden is on the CVDRMP to demonstrate that the representative monitoring program is applicable to all its members. If a dairy is in such a unique situation that it cannot be represented by the CVDRMP, that dairy will need to implement individual groundwater monitoring. Details regarding the locations of the proposed

**California Environmental Protection Agency**

wells, the rationale for representative monitoring, and the drilling schedule are included in the approved Phase I work plan, which is available at

[http://www.waterboards.ca.gov/centralvalley/water\\_issues/dairies/general\\_order\\_guidance/represent\\_monitoring/cafo\\_ph\\_1\\_rmp\\_wrkpln.pdf](http://www.waterboards.ca.gov/centralvalley/water_issues/dairies/general_order_guidance/represent_monitoring/cafo_ph_1_rmp_wrkpln.pdf).

If you have questions regarding this matter, please contact Dale Essary of this office at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).

A handwritten signature in black ink, appearing to read 'Douglas K. Patteson', with a long horizontal flourish extending to the right.

DOUGLAS K. PATTESON  
Supervising Engineer

*Sweeney Dairy, 30712 Rd. 170, Visalia*

TABLE 5. GROUNDWATER MONITORING FACTORS FOR RANKING PRIORITY <sup>1</sup>			
FACTOR	SITE CONDITION	POINTS	SCORE
Highest nitrate concentration (nitrate-nitrogen in mg/l) in any existing domestic well, agricultural supply well, or subsurface (tile) drainage system at the dairy or associated land application area.*	< 10	0	∅
	10 - 20	10	
	>20	20	
Location of production area or land application area relative to a Department of Pesticide Groundwater Protection Area <sup>2</sup> (GWPA).	Outside GWPA	0	∅
	In GWPA	20	
Distance (feet) of production area or land application area from an artificial recharge area <sup>3</sup> as identified in the California Department of Water Resources Bulletin 118 or by the Executive Officer.	> 1,500	0	∅
	601 to 1,500'	10	
	0 to 600	20	
Nitrate concentration (nitrate-nitrogen in mg/l) in domestic well on property adjacent to the dairy production area or land application area (detected two or more times).	< 10 or unknown	0	∅
	10 or greater	20	
Distance (feet) from dairy production area or land application area and the nearest off-property domestic well.*	> 600	0	1∅
	301 to 600	10	
	0 to 300	20	
Distance (feet) from dairy production area or land application area and the nearest off-property municipal well.*	> 1,500	0	∅
	601 to 1,500	10	
	0 to 600	20	
Number of crops grown per year per field.*	1	5	1∅
	2	10	
	3	15	
Nutrient Management Plan completed by 1 July 2009*	Yes	0	∅
	No	100	
Whole Farm Nitrogen Balance. <sup>4*</sup>	<1.65	0	∅
	1.65 to 3	10	
	>3	20	

Total Score: 20

\*This information will be provided by the Discharger. All other information will be obtained by the Executive Officer.

1 Information on each factor may not be available for each facility. Total scores will be the ratio of the points accumulated to the total points possible for each facility. Dairies with higher total scores will be directed to install monitoring wells first.

2 The Department of Pesticide Regulation (DPR) defines a Groundwater Protection Area (GWPA) as an area of land that is vulnerable to the movement of pesticides to groundwater according to either leaching or runoff processes. These areas include areas where the depth to groundwater is 70 feet or less. The DPR GWPA's can be seen on DPR's website at <http://www.cdpr.ca.gov/docs/gwp/gwpamaps.htm>.

3 An artificial recharge area is defined as an area where the addition of water to an aquifer is by human activity, such as putting surface water into dug or constructed spreading basins or injecting water through wells.

4 The Whole Farm Nitrogen Balance is to be determined as the ratio of (total nitrogen in storage - total nitrogen exported + nitrogen imported + irrigation nitrogen + atmospheric nitrogen)/(total nitrogen removed by crops) as reported in the Preliminary Dairy Facility Assessment in the Existing Conditions Report (Attachment A).

May 11, 2012

**Clay L. Rodgers**

**Central Valley Regional Water Quality Control Board**

**1685 E. Street**

**Fresno, CA 93706**

**Re: Sweeney Dairy**

**30712 Road 170**

**Visalia, CA 93292**

Dear Mr. Rodgers:

This letter is in response to your letter of May 4, 2012, which orders us to (1) submit to you a Monitoring Well Installation and Sampling Plan, (2) to install monitoring wells, (3) to submit to you a Monitoring Well Installation Completion Report, and (4) to submit reports from these wells in accordance with your various requirements.

As you know our appeal is pending with the State Water Resources Board and this is a form of intimidation. Until our appeal is decided we are under no legal obligation to comply with this order. Our dairy has a history of excellent water quality. We are members of the Kaweah River Sub Watershed and they have a series of monitoring wells. The information provided by these wells would more adequately reflect the water quality in our area rather than depending on wells provided by some coalition of dairymen in other areas.

You claim that "the Executive Officer has the authority to order the installation of monitoring wells based upon the threat that individual dairies pose to water quality," yet you fail to explain how you concluded that our dairy posed such a threat. This appears to be part of a continuing quest in which the Central Valley Regional Water Quality Control Board is driving the small dairies out of business. You already have access to the results of the test wells. How would our joining a coalition add any valuable information? This is just an unnecessary expense.

Your letter points out that Water Code section 13267 (a) requires you to "provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

You fail in your own obligation in that you have no evidence that would justify the need for monitoring wells. A dairy has been in existence at this site for over eighty years and if it has not contaminated the groundwater up to this point, how can you conclude that it will in the future?

The staff of the CVRWQB has failed to inform the regional board as to the real "potential threat" that small dairies pose. According to data provided by DHIA only .27% of the cows in Tulare County reside on dairies less than 300 cows while an additional 2.23% reside on dairies milking between 300-700 cows. In fact, according to the US Department of Agriculture, 2.9% of the nation's dairies produce over half of the nation's milk. It could be concluded that these same dairies produce over half of the waste as well.

Both the Bay Area Water Board and the North Coast Regional Water Quality Control Board chose to exempt the dairies which milk less than 700 cows. These dairies contain the majority of animals within their respective regions. I welcome the opportunity to testify before the regional board to make them aware of these facts. In our previous hearing the staff claimed that we received an "economic advantage" by not filing required reports but in fact the CVRWQCB has violated our civil rights by not guaranteeing us equal protection under the law.

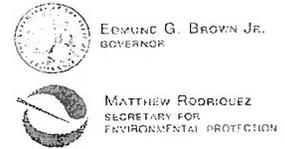
As I testified at our earlier hearing, the CVRWQCB makes the rules, picks the jury, and changes the rules when it meets their needs. I intend to show that the board has no ACCOUNTABILITY. They have never done the economic studies required by law.

You adopted this Order without notifying us in advance of your intentions or of your evidence. It seems like standard procedure that you do not give us an opportunity to rebut your evidence and to submit our own evidence. The CVRWQB continues to deny us due process.

Therefore, we will do nothing until you have first satisfied your obligations under section 13267 (a). We welcome the opportunity to have our case heard before the Regional Board as we will be much more prepared this time. The board's decision may have to be appealed to the State Water Resources Control Board and ultimately a judge may have to rule on this matter.

Sincerely,

Jim Sweeney



## Central Valley Regional Water Quality Control Board

James G. & Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

23 May 2012

### **RESPONSE TO GROUNDWATER MONITORING DIRECTIVE, ISSUED PURSUANT TO REVISED MONITORING AND REPORTING PROGRAM NO. R5-2007-0035, SWEENEY DAIRY, WDID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

The subject Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) on 3 May 2007. Monitoring and Reporting Program Order R5-2007-0035, revised 23 February 2011 (MRP), accompanies the General Order and contains requirements for implementing groundwater monitoring. Under the MRP, the Executive Officer has the authority to order the installation of individual groundwater monitoring wells at the Dairy.

On 4 May 2012, the Executive Officer issued you a groundwater monitoring directive (the directive) pursuant to the MRP. The directive notifies you that your Dairy is now required to obtain compliance with the groundwater monitoring requirements of the MRP. The directive informs you that to satisfy the requirement for additional groundwater monitoring, you have two options: 1) install an individual groundwater monitoring system at the Dairy; or, 2) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities.

Subsequent to the issuance of the directive, staff received a letter from you via email dated 11 May 2012 in response to the directive. Specifically, the letter requested an explanation for the need to install wells at the Dairy.

The directive issued to you on 4 May 2012 provides you with an explanation of the need for conducting a water quality investigation, and identifies the evidence that supports requiring the investigation. It also explains how the burden of implementing the MRP, including costs, is justified. The directive also informs you of your right to petition the directive to the State Water Resources Control Board within 30 days of its issuance to review the action in accordance with California Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following.

Attachment A to the MRP informs dairy owners/operators of the ongoing monitoring well installation and sampling plan (MWISP) process at existing milk cow dairies in the Central Valley. It specifies, "Dischargers choosing not to participate in a Representative Monitoring Program or those failing to notify the Central Valley Water Board of their decision to participate in a Representative Monitoring Program, will continue to be subject to the groundwater monitoring requirements of the Order and Monitoring and Reporting Program No. R5-2007-0035

(MRP). If necessary, the Executive Officer will prioritize these groundwater monitoring requirements based on the factors in Table 5 below.”

The Central Valley Water Board has prioritized the order that these groundwater monitoring requirements are imposed based on the factors in Table 5 of Attachment A, titled “Groundwater Monitoring Factors for Ranking Priority.” Groundwater monitoring directives have been issued to dairy farmers in phases of 100-200 dairies each year. To date, the Board has issued approximately 260 directives requiring installation of Monitoring Well Installation and Sampling Plans in six rounds. Most of the dairies that received directives have joined an approved Representative Monitoring Program. In addition, approximately 1,000 other dairies have voluntarily joined a Representative Monitoring Program. This was the final round of directives being issued by the Board. The dairy farms receiving directives in Round 6 all received comparable total scores based on the factors described in Table 5.

On 23 February 2011, the Central Valley Water Board issued a Revised MRP to allow dairymen to enroll in a Representative Monitoring Program as an alternative to submitting a site-specific MWISP. Membership in a Representative Monitoring Program is an alternative to achieve compliance with this directive without installing monitoring wells on an individual basis. The Central Valley Dairy Representative Monitoring Program is currently available to dairy farmers at a cost of \$1,500 plus \$81 per month.

The purpose of implementing groundwater monitoring at the subject Dairy is to monitor first encountered groundwater beneath the facility to determine whether the facility’s waste management practices have impacted groundwater quality. Groundwater supply wells are typically screened in deeper aquifer zones and do not necessarily reflect conditions in shallower zones. In particular, and as mentioned in your 11 May 2012 letter, any supply wells used by the Kaweah River Sub-Watershed for the purpose of monitoring groundwater quality may not be reflective of first encountered groundwater within the study area. In fact, the Kaweah River Sub-Watershed has not applied for or received approval to implement an RMP pursuant to the terms of the MRP. Likewise, groundwater quality data collected from the Dairy’s on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy.

Central Valley Water Board staff acknowledges that you have petitioned the State Water Resources Control Board to invalidate Administrative Civil Liability Order R5-2011-0068 that was adopted by the Central Valley Water Board and issued to you on 13 October 2011 for your failure to submit past due technical reports. However, your petition was not a factor in issuance of the 13267 Order and does not absolve you from continued compliance with the General Order or from potential liability for failure to do so.

If you have questions regarding this matter or would like to schedule a meeting to discuss the matter further, please contact Dale Essary of this office at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).



DOUGLAS K. PATTESON  
Supervising Engineer

cc: Alex Mayer, Office of Chief Counsel, State Water Resources Control Board, Sacramento  
(via email)



Central Valley Regional Water Quality Control Board

FILE

4 May 2012

James G. & Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

CERTIFIED MAIL  
7011 2000 0001 1769 1428

**GROUNDWATER MONITORING DIRECTIVE, ISSUED PURSUANT TO REVISED MONITORING AND REPORTING PROGRAM NO. R5-2007-0035, SWEENEY DAIRY, W DID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

**You are legally obligated to respond to this directive. Please read this letter carefully.**

The subject facility (Dairy) is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), which was adopted by the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) on 3 May 2007. Monitoring and Reporting Program Order R5-2007-0035, revised 23 February 2011 (MRP), accompanies the General Order and contains requirements for implementing individual groundwater monitoring at the Dairy. Under the MRP, the Executive Officer has the authority to prioritize the order that dairies must comply with the individual monitoring requirements of the MRP. Prioritization is done as necessary based on ranking scheme found in Table 5 of Attachment A of the MRP.

As the owner and/or operator of a dairy, you are being notified that, based on the factors listed in the MRP, Attachment A (Groundwater Monitoring, Monitoring Well Installation and Sampling Plan and Monitoring Well Installation Completion Report for Existing Milk Cow Dairies), Table 5 (Groundwater Monitoring Factors for Ranking Priority), it is now a priority for your Dairy to obtain compliance with the Monitoring Requirements of the MRP. The information required by this letter is required by section 13267 of the Water Code.

**The Executive Officer finds that:**

1. You are the owner and/or operator of a dairy regulated under the General Order.
2. The MRP, and this subsequent directive, are issued pursuant to California Water Code (CWC) section 13267, which states, in relevant part:

KARL E. LONGLEY SCD, P.E., CHAIR      PAMELA C. GREEDON P.E., BOEC EXECUTIVE OFFICER

1685 F Street, Fresno, CA 93701      www.waterboards.ca.gov/cvra/visalia

APPROVED  
**DJP**  
Supervising Engineer

- (a) A regional board ... may investigate the quality of any waters of the state within its region.
- (b)(1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.
3. The Central Valley Water Board adopted the Water Quality Control Plans for the Tulare Lake Basin, Second Edition, revised January 2004, and the Sacramento River and San Joaquin River Basins, Fourth Edition, revised October 2011, which designate beneficial uses of water. All groundwater within the vicinity of the site is designated as having a beneficial use of municipal and domestic water supply (MUN) and agricultural supply (AGR).
  4. Groundwater monitoring shows that many dairies in the Central Valley Region have impacted groundwater quality. A study of several dairies in a high-risk groundwater area in the Region found that groundwater beneath dairies that were thought to have good waste management and land application practices had elevated levels of salts and nitrates beneath the production and land application areas. Groundwater monitoring has also shown groundwater pollution under many of the dairies, including where groundwater is as deep as 120 feet and in areas underlain by fine-grained sediments. Dairy waste constituents (primarily nitrogen and salts), when released to groundwater, are a significant threat to the beneficial uses of MUN and AGR.
  5. No set of waste management practices has been demonstrated to be protective of groundwater quality in all circumstances. Since groundwater monitoring is the most direct way to determine if management practices at a dairy are protective of groundwater, the MRP requires groundwater monitoring to determine if a dairy is in compliance with the groundwater limitations of the General Order.
  6. Attachment A to the MRP informs dairy owners/operators of the ongoing monitoring well installation and sampling plan (MWISP) process at existing milk cow dairies in the Central Valley. It specifies, "Dischargers choosing not to participate in a Representative Monitoring Program or those failing to notify the Central Valley Water Board of their decision to participate in a Representative Monitoring Program, will continue to be subject to the groundwater monitoring requirements of the Order and Monitoring and Reporting Program No. R5-2007-0035 (MRP). If necessary, the Executive Officer will prioritize these groundwater monitoring requirements based on the factors in Table 5 below."

7. The Central Valley Water Board has prioritized the order that these groundwater monitoring requirements are imposed based on the factors in Table 5 of Attachment A, titled "Groundwater Monitoring Factors for Ranking Priority." Groundwater monitoring directives have been issued to dairy farmers in phases of 100-200 dairies each year. To date, the Board has issued approximately 260 directives requiring installation of Monitoring Well Installation and Sampling Plans in six Rounds. Most of the dairies that received directives have joined a Representative Monitoring Program. In addition, approximately 1,000 other dairies have voluntarily joined a Representative Monitoring Program (see Finding 8, below). This is the final round of directives being issued by the Board. The dairy farms receiving directives in Round 6 all received comparable total scores based on the factors described in Table 5.
8. On 23 February 2011, the Central Valley Water Board issued a Revised MRP to allow dairymen to enroll in a Representative Monitoring Program as an alternative to submitting a site-specific MWISP. Membership in a Representative Monitoring Program is an alternative to achieve compliance with this directive without installing monitoring wells on an individual basis. The Central Valley Dairy Representative Monitoring Program is currently available to dairy farmers at a cost of \$1,500 plus \$81 per month.
9. In revising the MRP in 2011, the Central Valley Water Board concluded that it is reasonable and appropriate to require all existing milk cow dairies regulated by the General Order to enroll in a representative monitoring program or be subject to the individual monitoring requirements specified in the MRP.
10. The MRP states, in relevant part, the following:

**II: Individual Monitoring Program Requirements**

1. The Discharger shall install sufficient monitoring wells to:
  - a. Characterize groundwater flow direction and gradient beneath the site;
  - b. Characterize natural background (unaffected by the Discharger or others) groundwater quality upgradient of the facility; and
  - c. Characterize groundwater quality downgradient of the corrals, downgradient of the wastewater retention ponds, and downgradient of the land application areas.
  
3. Prior to installation of wells, the Discharger shall submit to the Executive Officer a Monitoring Well Installation and Sampling Plan (MWISP) (see [MRP Attachment A, Subsection IV: Monitoring Well Installation and Sampling Plan]) and schedule prepared by, or under the direct supervision of, and certified by, a California registered civil engineer or a California registered geologist with experience in hydrogeology. Installation of monitoring wells

shall not begin until the Executive Officer notifies the Discharger in writing that the MWISP is acceptable.

7. Within 45 days after completion of any monitoring well, the Discharger shall submit to the Executive Officer a Monitoring Well Installation Completion Report (MWICR) (see [MRP Attachment A, Subsection V: Monitoring Well Installation Completion Report]) prepared by, or under the direct supervision of, and certified by, a California registered civil engineer or a California registered geologist with experience in hydrogeology.

11. Following installation of the groundwater monitoring wells, groundwater data must be collected and groundwater monitoring reports submitted in accordance with the MRP.

**You are hereby notified that, pursuant to CWC section 13267,**

You are required to comply with the MRP according to the time schedule listed below. If you do not enroll in a representative monitoring program, you must submit a Monitoring Well Installation Completion Report (MWICR). The MWICR must contain the information required by Attachment A of the MRP.

In order to submit an MWICR that meets the requirements of this Order, there are a number of preliminary steps that are required.

You must submit an acceptable Monitoring Well Installation and Sampling Plan (MWISP) that contains the minimum information required by Section IV, Attachment A of the MRP to allow the collection of data that will identify whether the Dairy is impacting groundwater quality. Installation of the monitoring wells shall not begin until the Executive Officer notifies you in writing that the MWISP is acceptable.

Compliance with the MRP may be satisfied in accordance with either of the following schedules:

1. **By 25 May 2012**, provide written notification to the Central Valley Water Board that you have joined a coalition group that has developed or will develop a representative groundwater monitoring program pursuant to the General Order. Such notification must include a copy of your letter of intent to join a coalition or other certification of your participation and intent to comply with the conditions and terms of the coalition's efforts; **or**,
2. **By 29 June 2012**, submit an acceptable site-specific MWISP.
  - A.) An acceptable MWISP must include a schedule designed to result in submittal of an acceptable MWICR within **135 calendar days** after notification that the site-specific MWISP is acceptable. The MWICR must confirm that you have installed the accepted monitoring well system,

which must contain, at a minimum, the information required by Section V in Attachment A of the MRP.

- B.) Each well within the monitoring well system must be sampled semi-annually (twice per year) for field measurements of electrical conductivity, temperature, and pH, and laboratory analysis must be conducted for nitrate and ammonia. Depth to groundwater is to be measured in each monitoring well quarterly (four times per year) and prior to purging the well for each sampling event. During the first semi-annual event, and every two years thereafter, groundwater samples from each well shall also be analyzed in the laboratory for calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, and chloride. As specified in Attachment A of the MRP, groundwater monitoring reports are submitted annually by 1 July of each year. The groundwater monitoring reports are to contain a detailed description of how the data were collected, copies of laboratory reports, a tabulated summary of the data, and an evaluation of whether the Dairy has impacted groundwater.
- C.) All technical reports are to be signed and stamped by a California Professional Engineer (Registered as a Civil Engineer) or Professional Geologist experienced in performing groundwater assessments. All laboratory analyses are to be performed by an analytical laboratory certified by the State of California for the analyses performed.

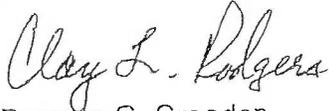
The failure to furnish any of the required reports, or the submittal of substantially incomplete reports or false information, is a misdemeanor, and may result in additional enforcement actions being taken against you, including issuance of an Administrative Civil Liability (ACL) Complaint pursuant to CWC section 13268. **Liability may be imposed pursuant to CWC section 13268 in an amount not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.**

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Resources Control Board (State Water Board) to review the action in accordance with CWC 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., within 30 days after the date of this Order, except that if the thirtieth day following the date of this Order 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:

[www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality](http://www.waterboards.ca.gov/public_notices/petitions/water_quality)

or will be provided upon request.

If you have questions regarding this matter, please contact Dale Essary of this office at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).



*for* Pamela C. Creedon  
Executive Officer

cc: Mr. John Menke, State Water Resources Control Board, Sacramento  
Tulare County Health & Human Services Agency, Environmental Health, Visalia  
Tulare County Resource Management Agency, Code Compliance, Visalia



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
PROFESSIONAL PROMOTION

Central Valley Regional Water Quality Control Board

James G. & Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

23 May 2012

**RESPONSE TO GROUNDWATER MONITORING DIRECTIVE, ISSUED PURSUANT TO REVISED MONITORING AND REPORTING PROGRAM NO. R5-2007-0035, SWEENEY DAIRY, WDID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

The subject Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) on 3 May 2007. Monitoring and Reporting Program Order R5-2007-0035, revised 23 February 2011 (MRP), accompanies the General Order and contains requirements for implementing groundwater monitoring. Under the MRP, the Executive Officer has the authority to order the installation of individual groundwater monitoring wells at the Dairy.

On 4 May 2012, the Executive Officer issued you a groundwater monitoring directive (the directive) pursuant to the MRP. The directive notifies you that your Dairy is now required to obtain compliance with the groundwater monitoring requirements of the MRP. The directive informs you that to satisfy the requirement for additional groundwater monitoring, you have two options: 1) install an individual groundwater monitoring system at the Dairy; or, 2) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities.

Subsequent to the issuance of the directive, staff received a letter from you via email dated 11 May 2012 in response to the directive. Specifically, the letter requested an explanation for the need to install wells at the Dairy.

The directive issued to you on 4 May 2012 provides you with an explanation of the need for conducting a water quality investigation, and identifies the evidence that supports requiring the investigation. It also explains how the burden of implementing the MRP, including costs, is justified. The directive also informs you of your right to petition the directive to the State Water Resources Control Board within 30 days of its issuance to review the action in accordance with California Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following.

Attachment A to the MRP informs dairy owners/operators of the ongoing monitoring well installation and sampling plan (MWISP) process at existing milk cow dairies in the Central Valley. It specifies, "Dischargers choosing not to participate in a Representative Monitoring Program or those failing to notify the Central Valley Water Board of their decision to participate in a Representative Monitoring Program, will continue to be subject to the groundwater monitoring requirements of the Order and Monitoring and Reporting Program No. R5-2007-0035

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(MRP). If necessary, the Executive Officer will prioritize these groundwater monitoring requirements based on the factors in Table 5 below."

The Central Valley Water Board has prioritized the order that these groundwater monitoring requirements are imposed based on the factors in Table 5 of Attachment A, titled "Groundwater Monitoring Factors for Ranking Priority." Groundwater monitoring directives have been issued to dairy farmers in phases of 100-200 dairies each year. To date, the Board has issued approximately 260 directives requiring installation of Monitoring Well Installation and Sampling Plans in six rounds. Most of the dairies that received directives have joined an approved Representative Monitoring Program. In addition, approximately 1,000 other dairies have voluntarily joined a Representative Monitoring Program. This was the final round of directives being issued by the Board. The dairy farms receiving directives in Round 6 all received comparable total scores based on the factors described in Table 5.

On 23 February 2011, the Central Valley Water Board issued a Revised MRP to allow dairymen to enroll in a Representative Monitoring Program as an alternative to submitting a site-specific MWISP. Membership in a Representative Monitoring Program is an alternative to achieve compliance with this directive without installing monitoring wells on an individual basis. The Central Valley Dairy Representative Monitoring Program is currently available to dairy farmers at a cost of \$1,500 plus \$81 per month.

The purpose of implementing groundwater monitoring at the subject Dairy is to monitor first encountered groundwater beneath the facility to determine whether the facility's waste management practices have impacted groundwater quality. Groundwater supply wells are typically screened in deeper aquifer zones and do not necessarily reflect conditions in shallower zones. In particular, and as mentioned in your 11 May 2012 letter, any supply wells used by the Kaweah River Sub-Watershed for the purpose of monitoring groundwater quality may not be reflective of first encountered groundwater within the study area. In fact, the Kaweah River Sub-Watershed has not applied for or received approval to implement an RMP pursuant to the terms of the MRP. Likewise, groundwater quality data collected from the Dairy's on-site supply wells do not necessarily represent the quality of first encountered groundwater beneath the Dairy.

Central Valley Water Board staff acknowledges that you have petitioned the State Water Resources Control Board to invalidate Administrative Civil Liability Order R5-2011-0068 that was adopted by the Central Valley Water Board and issued to you on 13 October 2011 for your failure to submit past due technical reports. However, your petition was not a factor in issuance of the 13267 Order and does not absolve you from continued compliance with the General Order or from potential liability for failure to do so.

If you have questions regarding this matter or would like to schedule a meeting to discuss the matter further, please contact Dale Essary of this office at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).

  
DOUGLAS K. PATTESON  
Supervising Engineer

cc: Alex Mayer, Office of Chief Counsel, State Water Resources Control Board, Sacramento  
(via email)

### Groundwater Monitoring

Beginning within six months of adoption of the Order, the Discharger shall sample each domestic and agricultural supply well and subsurface (tile) drainage system present in the production and/or land application areas to characterize existing groundwater quality. This monitoring shall be conducted at the frequency and for the parameters specified in Table 4 below.

Table 4. GROUNDWATER MONITORING
<b><i>Domestic and Agricultural Supply Wells</i></b> Annually: Field measurements of electrical conductivity.  Laboratory analyses of nitrate-nitrogen.
<b><i>Subsurface (Tile) Drainage System</i></b> Annually: Field measurements of electrical conductivity.  Laboratory analyses of nitrate-nitrogen and total phosphorus.

1. Groundwater samples from domestic wells shall be collected from the tap nearest to the pressure tank (and before the pressure tank if possible) after water has been pumped from this tap for 10 to 20 minutes. Groundwater samples from agricultural supply wells shall be collected after the pump has run for a minimum of 30 minutes or after at least three well volumes have been purged from the well. Samples from subsurface (tile) drains shall be collected at the discharge point into a canal or drain.

### General Monitoring Requirements

1. The Discharger shall comply with all the "Requirements Specifically for Monitoring Programs and Monitoring Reports" as specified in the Standard Provisions and Reporting Requirements.
2. Approved sampling procedures are listed on the Central Valley Water Board's web site at [http://www.waterboards.ca.gov/centralvalley/available\\_documents/index.html#confined](http://www.waterboards.ca.gov/centralvalley/available_documents/index.html#confined). When special procedures appear to be necessary at an individual dairy, the Discharger may request approval of alternative sampling procedures for nutrient management. The Executive Officer will review such requests and if adequate justification is provided, may approve the requested alternative sampling procedures.
3. The Discharger shall use clean sample containers and sample handling, storage, and preservation methods that are accepted or recommended by the selected analytical laboratory or, as appropriate, in accordance with approved United States Environmental Protection Agency analytical methods.

May 27, 2012

To: Douglas K. Patteson

[dpatteson@waterboards.ca.gov](mailto:dpatteson@waterboards.ca.gov)

Dale Essary

[dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

Central Valley Regional Water Quality Control Board

1685 E. Street

Fresno, CA 93706

Re: Jim and Amelia Sweeney, dba Sweeney Dairy

30712 Road 170

Visalia, CA 93292

Dear Mr. Patteson:

Your letter of May 23, 2012 says that we may comply with your directive if we join a “representative monitoring program (RMP) to monitor groundwater at a set of representative facilities.” Since we are facing a short deadline, please provide us by May 30, 2012 with the name(s) and contact information of those RMPs whose results your agency would accept as meeting your requirements for our dairy.

We await your prompt reply.

Sincerely,

Jim Sweeny

-----Original Message-----

From: Clay Rodgers <[CRodgers@waterboards.ca.gov](mailto:CRodgers@waterboards.ca.gov)>

To: Japlus3 <[japlus3@aol.com](mailto:japlus3@aol.com)>

Cc: jpc <[jpc@dolphingroup.org](mailto:jpc@dolphingroup.org)>; Alex Mayer <[AMayer@waterboards.ca.gov](mailto:AMayer@waterboards.ca.gov)>; Doug Patteson <[dpatteson@waterboards.ca.gov](mailto:dpatteson@waterboards.ca.gov)>

Sent: Sun, May 27, 2012 9:04 am

Subject: Re: Sweeney Dairy

Dear Mr. Sweeney:

The approved representative monitoring program that covers Tulare County is the Central Valley Dairy Representative monitoring program. Their address is

CVDRMP  
915 L Street, C-431  
Sacramento, CA 95814

Detailed information can be viewed on the Dairy CARES website at <http://www.dairycares.com/CVDRMP/>. I have copied this e-mail to J. P. Cataviela of Dairy CARES, who can provide additional assistance if needed.

If you have any questions or need additional information, please contact me or Doug Patteson.

>>> Japlus3 <[japlus3@aol.com](mailto:japlus3@aol.com)> 5/26/2012 4:48 PM >>>

**From:** J.P. Cativiela <jpc@dolphingroup.org>  
**To:** japlus3 <japlus3@aol.com>  
**Cc:** Laura Kistner <laurak@dolphingroup.org>  
**Subject:** RE: Sweeney Dairy  
**Date:** Tue, May 29, 2012 10:39 am  
**Attachments:** 4.Letterof\_Intent.pdf (35K), 5.CVDRMP.Deduction.assignment.REVISED.12.13.11.pdf (28K),  
3.Participation\_Agrmnt.pdf (182K)

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Dear Mr. Sweeney:

To join the Central Valley Dairy Representative Dairy Monitoring Program (CVDRMP), please submit a completed participation agreement and letter of intent (attached and also available at [www.dairycares.com/CVDRMP](http://www.dairycares.com/CVDRMP))

Both of these documents need to be signed by the landowner and dairy operator if they are not the same person. A check for \$2,472 must be enclosed with the application. This covers the \$1,500 application fee and \$81/month dues from July 1, 2011 to June 30, 2012 (the deadline for joining the program was January 2011, and all late joiners are required to pay dues back to the first month of collection).

Both the Participation Agreement and Letter of Intent and payment should be mailed to:

CVDRMP

915 L Street C-438

Sacramento, CA 95814

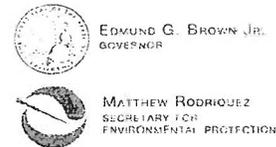
Once your application is complete, we will notify the Central Valley Regional Water Quality Control Board that you are a CVDRMP member. To continue as a member you agree to pay monthly fees of \$81 after July 1, 2012. You have the option to be invoiced for these quarterly or to pay by Milk Check Deduction if your creamery participates in that. CDI, DFA and LOL all participate – if you ship milk elsewhere and want to check if they participate, let me know.

I strongly advise you to act promptly as the CVDRMP Board has raised the application fee as of July 1, 2012 to \$6,500.

-J.P. Cativiela

For CVDRMP

(916) 441-3318



Central Valley Regional Water Quality Control Board

## NOTICE OF VIOLATION

19 July 2012

James G. and Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

**CERTIFIED MAIL**  
701 2970 0003 2756 8435

### **FAILURE TO SUBMIT GROUNDWATER MONITORING WELL INSTALLATION AND SAMPLING PLAN, SWEENEY DAIRY, WDID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

The subject facility (Dairy) is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), which was issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) on 3 May 2007. Monitoring and Reporting Program R5-2007-0035 (MRP) accompanies the General Order, and contains requirements for implementing groundwater monitoring at the Dairy. Under the MRP, the Executive Officer has the authority to require groundwater monitoring at dairies that pose a threat to water quality.

By letter dated 4 May 2012 (copy enclosed), the Executive Officer directed operator(s) and owner(s) of the Dairy to submit either written notification that you have joined a coalition that will develop a representative groundwater monitoring program by 25 May 2012, or an acceptable site-specific groundwater monitoring well installation and sampling plan (MWISP) by 29 June 2012. The Executive Officer's 4 May 2012 Groundwater Monitoring Directive (Directive) was issued pursuant to California Water Code (CWC) section 13267, which authorizes the Board to require the submittal of technical reports. To date, the Board has not received either an MWISP or the written notification for the Dairy.

Your failure to complete and submit the MWISP or the written notification for the Dairy is a violation of CWC section 13267(b), and subjects you to potential administrative civil liability that is growing every day that the requested information is not submitted to the Board. The Board may impose administrative civil liability (monetary penalties) of up to \$1,000 for each day the submittal is late under CWC section 13268. Failure to comply with the Executive Officer's 4 May 2012 Directive may also subject you to termination of the authorization to discharge, pursuant to General Order Provision E.10.

KARL E. LONGLEY ScD, P.E., CHAIR | PAMELA C. CREEDON P.E., BCEE, EXECUTIVE OFFICER

1685 E Street, Fresno, CA 93706 | [www.waterboards.ca.gov/centralvalley](http://www.waterboards.ca.gov/centralvalley)

As soon as possible, but no later than **17 August 2012**, you must submit either an MWISP or written notification that you have joined a coalition to avoid incurring additional potential liability. In developing an MWISP, you should consult Attachment A of the MRP, which describes the minimum information that must be included. A well-designed MWISP will allow you to collect data that will identify whether the Dairy is impacting groundwater quality. In addition, the Executive Officer's 4 May 2012 Directive provides details regarding the protocol by which the MWISP is to be implemented at the Dairy.

The submittal date stated above is for administrative purposes only, and does not change any due dates required by the Executive Officer's 4 May 2012 Directive. If you have any questions regarding this matter, please contact me at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).



DALE E. ESSARY, PE  
RCE No. 53216  
Senior Engineer  
Dairy Compliance Unit

Enclosure: 4 May 2012 Directive

cc: (w/o enclosure)

Tulare County Health & Human Services Agency, Environmental Health, Visalia  
Tulare County Resource Management Agency, Code Compliance, Visalia

March 26, 2013

Douglas K. Patteson

Supervising WRC Engineer

Central Valley Regional Water Quality Control Board

1685 E Street

Fresno, CA 93706

Re: Sweeney Dairy

Dear Mr. Patteson:

My wife and I acknowledge receipt of your letter dated February 15, 2013. Your letter advised us that your agency would be serving us with an Administrative Civil Liability Complaint for failing to file an Annual Report for 2011.

As you well know, you have sought civil liabilities against us for failing to file the 2009 and 2010 reports which were specified by your General Dairy Order, R5-2007-0035 (2007 Order). We opposed both of these proceedings on various legal grounds. For the most part, our defense has been that your 2007 Order is illegal and unenforceable. Although your Regional Board ruled against us in each case, the California Water Code gives us the right to appeal the Regional Board's decisions by way of filing a petition for review with the State Water Resources Control Board (SWRCB). We have done so both cases, and, as you also know, we are still waiting on the SWRCB to decide these appeals.

If the SWRCB supports our position, then it will be established that the 2007 Order is indeed unlawful and unenforceable, and you will have no legal basis to seek civil liabilities against us for not filing your 2011 Annual Report, or for not filing the 2009 and 2010 reports. If, on the other hand, the SWRCB rules against us, the Water Code then gives us the right to petition the Superior Court for a Writ of Administrative Mandate.

As long as these matters and issues have not been adjudicated by the appellate processes afforded us by law, it would be prejudicial, unjust, and would cause irreparable harm to us if we spent the money necessary to prepare, complete and file this 2011 report and it is later determined that the 2007 Order is illegal and unenforceable.

We should have been afforded a prompt determination of our appeals by now. It is not our fault that the SWRCB has failed to hear and decide our petitions for review. What is the point of the law providing an appellate process if the appeals are never heard and decided? It would clearly

deprive us of these statutory rights and would be a denial of due process. I think the burden is on your agency to press the SWRCB to hear and decide these matters, and you have no right to blame us for this inexcusable delay.

You also called to our attention that your letter of May 25, 2012 ordered us to either install groundwater monitoring wells or join a representative groundwater monitoring program (RMP). You had advised us earlier that the Central Valley Dairy Representative Monitoring Program would be an acceptable RMP. So we sent you a letter dated September 30, 2011 in which we asked you to "inform us why you think their program would provide you with meaningful information" as to our dairy. We also asked you to specify where their monitoring wells were located relative to the location of our dairy. You have never responded to or otherwise answered these legitimate questions. Please do so now so that we can assess whether this RMP is a suitable avenue.

Finally, your letter invited us to meet with you regarding a solution to these matters. We remain open to discussions, and suggest that you present us with some dates and times when you can meet us here at our dairy.

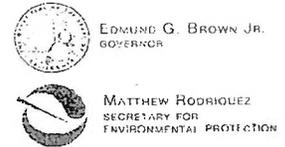
Sincerely,

Jim Sweeney

Cc:

Dale Essary (email)

Pamela Creedon (email)



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

Central Valley Regional Water Quality Control Board

19 April 2013

James G. and Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

**CERTIFIED MAIL**  
**7011 0110 0001 2272 4366**

**RESPONSE TO PRE-FILING SETTLEMENT LETTER, SWEENEY DAIRY, WDID  
5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

The subject facility (Dairy) is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), which was issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board) on 3 May 2007. Monitoring and Reporting Program R5-2007-0035 (MRP) accompanies the General Order. The General Order and the MRP contain reporting requirements pursuant to section 13267 of the California Water Code, which authorizes the Central Valley Water Board to require dairies to furnish technical reports.

The General Order and the MRP required, pursuant to section 13267 of the California Water Code, that an Annual Report for the calendar year 2011 (2011 Annual Report) be submitted for regulated facilities by 1 July 2012. On 16 August 2012, Central Valley Water Board staff issued a Notice of Violation notifying you that the 2011 Annual Report had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to avoid incurring any additional liability. To date, the required 2011 Annual Report has not been received.

In addition to the violation described above, on 29 June 2012 the Executive Officer issued a California Water Code section 13267 Order (13267 Order) that directed you to implement groundwater monitoring at the Dairy. Specifically, the 13267 Order directed you to submit either: 1) written notification, by 25 May 2012, that you have 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 you 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 required MWISP has not been received.

KARL E. LONGLEY SCD, P.E., CHAIR | PAMELA C. CREEDON P.E., BCEE, EXECUTIVE OFFICER

1685 E Street, Fresno, CA 93706 | [www.waterboards.ca.gov/centralvalley](http://www.waterboards.ca.gov/centralvalley)

On 14 February 2013, Central Valley Water Board staff issued a pre-filing settlement letter notifying you that staff was in the process of assessing civil liability for your failure to submit the 2011 Annual Report and the MWISP. The letter included a calculation of the maximum penalty (\$418,000) and a recommended penalty amount (\$13,050) as of 25 January 2013 for your failure to submit the missing reports. You were provided an opportunity to meet with Central Valley Water Board staff to discuss the alleged violations and submit any information regarding the factors listed in CWC section 13327 that would be deemed relevant to determining an appropriate monetary penalty. The letter requested that all responses be received by 15 March 2013. The letter also indicated that if staff did not receive a response from you by 15 March 2013, the Executive Officer would issue a Complaint to you in the proposed penalty amount (\$13,050).

Subsequent to the issuance of the 14 February 2013 letter, Central Valley Water Board staff received your 26 March 2013 response. The response did not indicate an interest on your part to enter into settlement negotiations. A phone conversation held on 5 April 2013 between you and staff confirmed your position. In addition, the response refers to a letter you sent us, dated 30 September 2011, in which you asked staff to inform you why joining the Central Valley Dairy Representative Monitoring Program (CVDRMP) would provide meaningful information at the Dairy. Staff had responded to your request by letter of 9 November 2011, a copy of which is enclosed.

Central Valley Water Board staff is aware that you have petitioned the 13267 Order to the State Water Resources Control Board (State Board) for review of the Order in accordance with California Water Code section 13320 and California Code of Regulations, title 23, sections 2050 following et seq. However, the filing of a petition to the State Board does not stay your ongoing obligation to comply with the General Order, nor does it relieve staff of its obligation to pursue formal enforcement for your failure to comply with the General Order.

If you have questions regarding this matter, please contact Dale Essary of this office at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).



DOUGLAS K. PATTESON  
Supervising Engineer

Enclosure: 9 November 2011 letter



Matthew Rodriguez  
Secretary for  
Environmental Protection

California Regional Water Quality Control Board  
Central Valley Region  
Katherine Hart, Chair

1685 E Street, Fresno, California 93706  
(559) 445-5116 • FAX (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>



Edmund G. Brown Jr.  
Governor

9 November 2011

James G. and Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

**RESPONSE TO GROUNDWATER MONITORING AT SWEENEY DAIRY, W DID  
5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

The subject Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) on 3 May 2007. Monitoring and Reporting Program (MRP) R5-2007-0035, revised 23 February 2011, accompanies the General Order and contains requirements for implementing groundwater monitoring. Under the MRP, the Executive Officer has the authority pursuant to California Water Code (CWC) section 13267 to order the installation of individual groundwater monitoring wells at the Dairy.

Groundwater monitoring is being required of all dairies covered by the General Order in accordance with the MRP. We sent you a letter dated 22 August 2011 to inform you that to satisfy the requirement for additional groundwater monitoring, you had two options: 1) install an individual groundwater monitoring system at the Dairy; or, 2) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities. The letter also informed you that the Central Valley Dairy Representative Monitoring Program intends to close membership. The letter was sent as a courtesy so that dairy owners and operators would be aware of this option to avoid having to install and monitor an individual groundwater monitoring system at their facility. If an RMP is not available, the only option would be individual groundwater monitoring and the installation and sampling of groundwater monitoring wells on the Dairy. The letter was not an order to initiate individual groundwater monitoring.

Subsequent to the issuance of the 22 August 2011 letter, Central Valley Water Board staff received your 30 September 2011 response via email requesting clarification. Specifically, your letter requests that staff provide you with a written explanation of the need for putting in a monitoring well system.

The General Order and accompanying MRP were issued pursuant to California Water Code section 13267, which states, in relevant part:

- (a) A regional board ... may investigate the quality of any waters of the state within its region.

*California Environmental Protection Agency*

(b)(1) In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

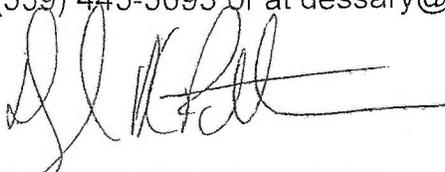
A cost/benefit evaluation of the burden associated with the submission of technical reports required by the General Order, including those associated with the implementation of groundwater monitoring at dairy facilities, was performed during the process of adoption and issuance of the General Order.

The Board adopted the Water Quality Control Plan for the Tulare Lake Basin, Second Edition, revised January 2004, which designates beneficial uses of water. Groundwater within the vicinity of the Dairy is designated as having a beneficial use of municipal and domestic water supply (MUN) and agricultural supply (AGR). Dairy waste constituents (particularly nitrogen and salts), when released to groundwater, are a significant threat to the beneficial uses of MUN and AGR. An investigation to assess whether the Dairy has impacted groundwater quality is reasonable and appropriate. The cost of the technical reports is justified by the fact that these reports will allow the Central Valley Water Board to assess whether current management practices are protective of groundwater beneath your Dairy.

Attachment A of the MRP explains that the Executive Officer will order all dischargers covered under the General Order to install monitoring wells to comply with the MRP. It was anticipated that this effort would occur in phases of approximately 100 to 200 dairies per year. The first group of dairies ordered to install wells included those dairies where nitrate was detected above water quality objectives in any one production well or subsurface (tile) drain in the vicinity of the dairy. The remaining dairies (including yours) have been approached in order of a ranking system that prioritized dairies based on the factors in Table 5 of Attachment A.

If you choose not to participate in an RMP, the Executive Officer will issue an order pursuant to CWC 13267 (13267 Order) that will require you to perform individual groundwater monitoring and that will include a formal explanation for the 13267 Order's justification.

If you have questions regarding this matter, please contact Dale Essary of this office at (559) 445-5093 or at [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).



DOUGLAS K. PATTESON  
Supervising Engineer

**From:** Essary, Dale@Waterboards <Dale.Essary@waterboards.ca.gov>  
**To:** japlus3 <japlus3@aol.com>  
**Cc:** Patteson, Doug@Waterboards <Doug.Patteson@waterboards.ca.gov>; Rodgers, Clay@Waterboards <Clay.Rodgers@waterboards.ca.gov>; Young, Vanessa@Waterboards <Vanessa.Young@waterboards.ca.gov>  
**Subject:** Response to your 6 June 2013 letter  
**Date:** Thu, Jun 20, 2013 12:38 pm

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Good day, Mr. Sweeney,

We are in receipt of your 6 June 2013 letter, requesting information pertaining to the locations of monitoring wells installed and monitored by the Central Valley Dairy Representative Monitoring Program (CVDRMP). To review, our 7 December 2011 response to your 29 November 2011 letter provided you with a link to the CVDRMP's Phase 1 work plan, which provided details as to the proposed locations of the wells to be installed in Merced and Stanislaus counties. At the time, the Phase 2 work plan had not been submitted. The Phase 2 work plan has now been submitted, and provides the proposed locations of wells to be installed in the counties of San Joaquin, Madera, Fresno, Kings, Tulare, Kern, Tehama, and Glenn. The link below will take you to the Phase 2 work plan.

[http://www.swrcb.ca.gov/rwqcb5/water\\_issues/dairies/general\\_order\\_guidance/represent\\_monitoring/cafo\\_ph2\\_rmp\\_wkpln\\_2012jun6.pdf](http://www.swrcb.ca.gov/rwqcb5/water_issues/dairies/general_order_guidance/represent_monitoring/cafo_ph2_rmp_wkpln_2012jun6.pdf)

Please contact me should you have further questions in this regard.

Dale Essary

Senior Engineer

Dairy Compliance Unit

MONITORING AND REPORTING WORKPLAN  
AND  
MONITORING WELL INSTALLATION AND SAMPLING PLAN

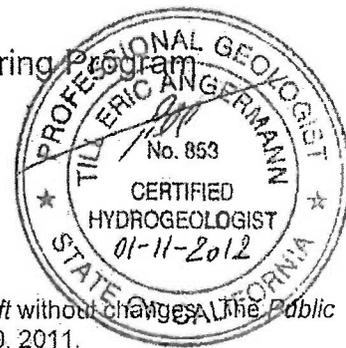
PHASE 1:  
INITIATION OF REPRESENTATIVE GROUNDWATER MONITORING NETWORK DESIGN &  
MONITORING PROGRAM  
EXISTING MILK COW DAIRIES – STANISLAUS AND MERCED COUNTIES, CALIFORNIA

Prepared for

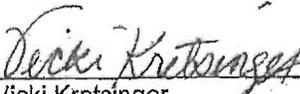
Central Valley Dairy Representative Monitoring Program

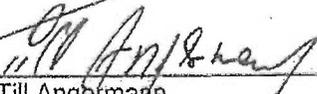
January 11, 2012

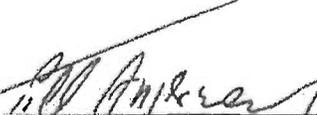
FINAL



This document is the finalized version of the June 16, 2011 *Public Review Draft* without changes. The *Public Review Draft* was conditionally approved by the Executive Officer September 9, 2011.

  
Vicki Kretsinger  
Principal Hydrologist

  
Till Angermann  
Senior Hydrogeologist

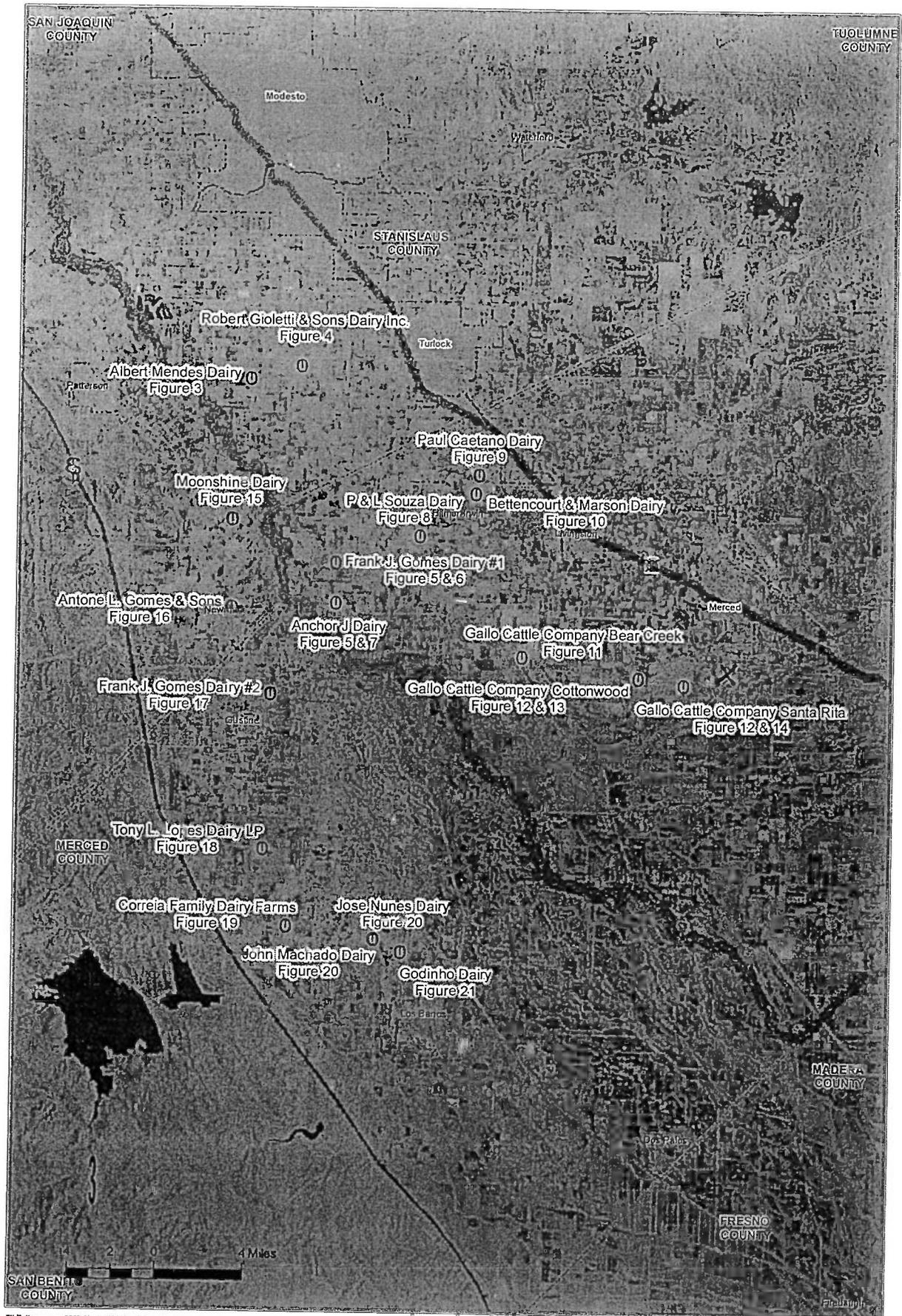
  
FOR  
Barbara Dalgish  
Project Hydrogeologist

LSCE FILE No. 09-1-075

**Table 1**  
**Dairy Farm Selection for Monitoring Well Installation**  
**Phase 1 Representative Groundwater Monitoring Workplan**

Dairy Farm	Address	City, State, Zip Code	Facility Detail
<b>East Side</b>			
Albert Mendes Dairy	1100 Ruble Rd	Crows Landing, CA 95313	Figure 3
Anchor J. Dairy	24507 First Ave	Stevinson, CA 95374	Figures 5 and 7
Bettencourt and Marson Dairy	18128 American Ave	Hilmar, CA 95324	Figure 10
Frank J. Gomes Dairy #1	5301 N. DeAngelis Road	Stevinson, CA 95374-9726	Figures 5 and 6
Gallo Cattle Company Bear Creek	15751 W. Hwy. 140	Livingston, CA 95334	Figure 11
Gallo Cattle Company Cottonwood	10561 Hwy. 140	Atwater, CA 95301	Figures 12 and 13
X Gallo Cattle Company Santa Rita	91 S. Bert Crane	Atwater, CA 95301	Figures 12 and 14
P. & L. Souza Dairy	20633 Crane Ave	Hilmar, CA 95324	Figure 8
Paul Caetano Dairy	9436 Griffith Ave	Delhi, CA 95315	Figure 9
Robert Gioletti and Sons Dairy	118 N. Blaker Road	Turlock, CA 95380	Figure 4
<b>West Side</b>			
Antone L. Gomes and Sons Dairy	515 E. Stuhr Rd	Newman, CA 95360	Figure 16
Correia Family Dairy Farms	26380 W. Fahey Rd	Gustine, CA 95322	Figure 19
Frank J. Gomes Dairy #2	890 Kniebes Rd	Gustine, CA 95322	Figure 17
Godinho Dairy	12710 S. Wilson Rd	Los Banos, CA 93635	Figure 21
John Machado Dairy	22495 W. China Camp	Los Banos, CA 93635	Figure 20
Jose Nunes Dairy	22484 W. China Camp Rd.	Los Banos, CA 93635	Figure 20
Moonshine Dairy	22922 Kilburn Rd	Crows Landing, CA 95313	Figure 15
Tony L. Lopes Dairy LP	27500 Bunker Road	Gustine, CA 95322	Figure 18

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**Figure 2**  
**Index Map - Selected Dairy Farms**  
**Phase 1 Representative Groundwater Monitoring Program**

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## When Does Nitrate Become a Risk for Humans

David S. Powlson  
*Rothamsted Research*

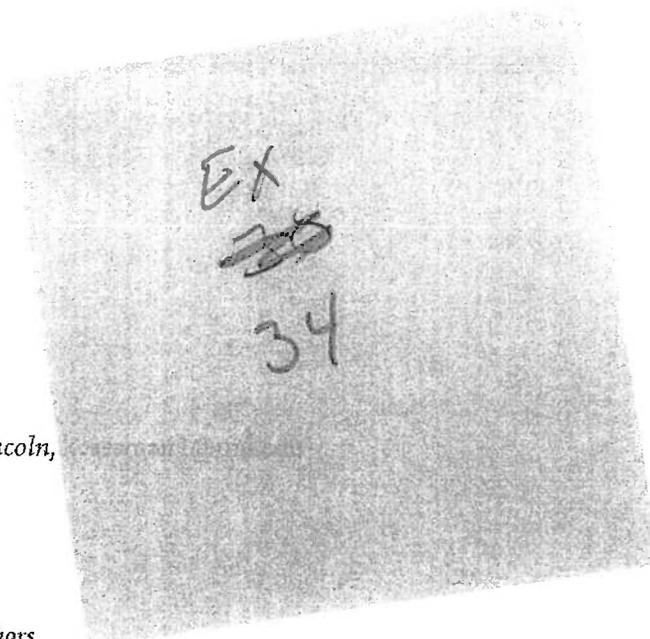
Tom M. Addiscott  
*Rothamsted Research*

Nigel Benjamin  
*Derriford Hospital*

Kenneth G. Cassman  
*University of Nebraska - Lincoln,*

Theo M. de Kok  
*University Maastricht*

*See next page for additional authors*



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Powlson, David S.; Addiscott, Tom M.; Benjamin, Nigel; Cassman, Kenneth G.; de Kok, Theo M.; van Grinsven, Hans; L'hir Jean-Louis; Avery, Alex A.; and Van Kessel, Chris, "When Does Nitrate Become a Risk for Humans?" (2008). *Agronomy -- Faculty Publications*. Paper 102.

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Authors

David S. Powlson, Tom M. Addiscott, Nigel Benjamin, Kenneth G. Cassman, Theo M. de Kok, Hans v Grinsven, Jean-Louis L'hirondel, Alex A. Avery, and Chris Van Kessel

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# When Does Nitrate Become a Risk for Humans?

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Is nitrate harmful to humans? Are the current limits for nitrate concentration in drinking water justified by science? There is substantial disagreement among scientists over the interpretation of evidence on the issue. There are two main health issues: the linkage between nitrate and (i) infant methaemoglobinaemia, also known as blue baby syndrome, and (ii) cancers of the digestive tract. The evidence for nitrate as a cause of these serious diseases remains controversial. On one hand there is evidence that shows there is no clear association between nitrate in drinking water and the two main health issues with which it has been linked, and there is even evidence emerging of a possible benefit of nitrate in cardiovascular health. There is also evidence of nitrate intake giving protection against infections such as gastroenteritis. Some scientists suggest that there is sufficient evidence for increasing the permitted concentration of nitrate in drinking water without increasing risks to human health. However, subgroups within a population may be more susceptible than others to the adverse health effects of nitrate. Moreover, individuals with increased rates of endogenous formation of carcinogenic N-nitroso compounds are likely to be susceptible to the development of cancers in the digestive system. Given the lack of consensus, there is an urgent need for a comprehensive, independent study to determine whether the current nitrate limit for drinking water is scientifically justified or whether it could safely be raised.

Is nitrate harmful to humans? Are the current concentration in drinking water justified by science? These questions were addressed at a symposium on “Nitrate Cycle and Human Health” held at the annual meeting of the Science Society of America (SSSA). Although the two questions, it became clear there is still substantial disagreement among scientists over the interpretation of evidence on this issue—disagreement that has lasted for more than 50 years.

This article is based on the discussion at the symposium and subsequent email exchanges between some of the authors. It does not present a consensus view because some authors hold strongly divergent views, drawing different conclusions from the same data. Instead, it is an attempt to summarise current thinking and the points of contentions. The article concludes with some proposals for research and the divergent views among the authors, each author necessarily agree with every statement in the article.

## Present Regulatory Situation

In many countries there are strict limits on the concentration of nitrate in drinking water and surface waters. The limit is 50 mg of nitrate L<sup>-1</sup> in the UK and 10 mg L<sup>-1</sup> in the USA (equivalent to 11.3 and 10 mg N L<sup>-1</sup> respectively). These limits are in accord with WHO recommendations established in 1970 and recently reaffirmed (WHO, 2004). The limits were originally based on human health considerations, although environmental concerns, such as nutrient enrichment and eutrophication of waters, are now seen as being similarly relevant.

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issues that are the main cause of disagreement; the contrasting views are set out in the following two sections.

## Nitrate and Health

There are two main health issues: the linkage between nitrate and (i) infant methaemoglobinaemia, also known as blue baby syndrome, and (ii) cancers of the digestive tract. The evidence for nitrate as a cause of these serious diseases remains controversial and is considered below.

### An Over-Stated Problem?

The link between nitrate and the occurrence of methaemoglobinaemia was based on studies conducted in the 1940s in the midwest of the USA. In part, these studies related the incidence of methaemoglobinaemia in babies to nitrate concentrations in rural well water used for making up formula milk replacement. Comly (1945), who first investigated what he called "well-water methaemoglobinaemia," found that the wells that provided water for bottle feeding infants contained bacteria as well as nitrate. He also noted that "In every one of the instances in which cyanosis (the clinical symptom of methaemoglobinaemia) developed in infants, the wells were situated near barnyards and pit privies." There was an absence of methaemoglobinaemia when formula milk replacements were made with tap water. Re-evaluation of these original studies indicate that cases of methaemoglobinaemia always occurred when wells were contaminated with human or animal excrement and that the well water contained appreciable numbers of bacteria and high concentrations of nitrate (Avery, 1999). This strongly suggests that methaemoglobinaemia, induced by well water, resulted from the presence of bacteria in the water rather than nitrate per se. A recent interpretation of these early studies is that gastroenteritis resulting from bacteria in the well water stimulated nitric oxide production in the gut and that this reacted with oxyhaemoglobin in blood, converting it into methaemoglobin (Addiscott, 2005).

The nearest equivalent to a present-day toxicological test of nitrate on infants was made by Cornblath and Hartmann (1948). These authors administered oral doses of 175 to 700 mg of nitrate per day to infants and older people. None of the doses to infants caused the proportion of haemoglobin converted to methaemoglobin to exceed 7.5%, strongly suggesting that nitrate alone did not cause methaemoglobinaemia. Furthermore, Hegesh and Shiloah (1982) reported another common cause of infant methaemoglobinaemia: an increase in the endogenous production of nitric oxide due to infective enteritis. This strongly suggests that many early cases of

recognized that it was compromise and methodological bias. For example, water from wells were only taken months after the occurrence of infant

About 50 epidemiological studies testing the link between nitrate and mortality in humans, including the National Academy of Sciences (1981), the Food in Britain (Acheson, 1985), the Food in Europe (European Union, 1995) all concluded that no convincing link between nitrate and stomach cancer incidence and mortality

A study reported by Al-Dabbag (1995) found no significant difference in cancer incidence between workers using nitrate fertilizer (and exposed through dust) and workers in the same jobs but without the exposure to nitrate.

Based on the above findings showing no link between nitrate in drinking water and stomach cancer, some is now sufficient evidence for increased nitrate in drinking water and human health (L'hirondel et al., 2002).

Space does not permit here to discuss other health concerns expressed about dietary nitrate, such as effects on the fetus, genotoxicity, congenital malformations, early onset of hypertension, and increased incidence of cancer. For a review of other possible health concerns, see L'hirondel (2002) and Ward et al. (2005).

Nitrate is made in the human body, the rate of production being influenced by diet (Allen et al., 2005). In recent years it has been found that cells produce nitric oxide from the same enzyme that produces nitrate, and that this production is vital to maintain health (Richardson et al., 2002) and prevent disease (Benjamin, 2000). Nitric oxide is released from nitrate, which is conserved by the kidneys in the saliva. Nitrate can also be chemically reduced in the stomach, where it can aid in the killing of pathogens that can cause gastroenteritis.

Evidence is emerging of a possible link between nitrate and vascular health. For example, the coronaries of rats for 18 months that contained sodium nitrate dilated that the coronaries of the rats in control (Cannon, 1977). Nitrate levels in

infant methaemoglobinaemia attributed at that time to nitrate in well water were in fact caused by gastroenteritis. Many scientists now interpret the available data as evidence that the condition is caused by the presence of bacteria rather than nitrate (Addiscott, 2005; L'hirondel and L'hirondel, 2002). The report of the American Public Health Association (APHA, 1950) formed the main basis of the current recommended 50 mg L<sup>-1</sup> nitrate limit, but even the authors of the report

and Gruener, 1977). Nitrate levels in correlation coefficient with the standard all cardiovascular diseases (Pocock et al. volunteers, a short-term increase in diastolic blood pressure (Larsen et al., 2006). We hypothesize that nitrate might also play a health benefit of vegetable consumption (high concentrations of nitrate) (Lund



are, is a logical response to the scientific evidence.

Given the criticisms of the scientific foundation of present drinking water standards and the associated cost-benefits of prevention or removal of nitrate in drinking water, we propose the need to consider the following issues in discussing an adjustment of the nitrate standards for drinking water:

- Nitrogen intake by humans has increased via drinking water and eating food such as vegetables.

whether it could safely be raised. Meta- for generating conclusions about specific (e.g., stomach cancer, colon cancer, bladder cancer, etc.). Unfortunately, the risk for any particular health effect is likely to be underestimated by meta-analyses (Van Grinsven et al., 2002) which are often focused on susceptible subgroups, developed for demonstration of endogenous nitrosamines.

## The Need for Caution

Although there is little doubt that normal physiological levels of nitric oxide play a functional role in vascular endothelial function and the defense against infections (Dykhuizen et al., 1996), chronic exposure to nitric oxide as a result of chronic inflammation has also been implicated, though not unequivocally identified, as a critical factor to explain the association between inflammation and cancer (Sawa and Oshima, 2006; Dincer et al., 2007; Kawanishi et al., 2006). Nitric oxide and NO-synthase are known to be involved in cancer-related events (angiogenesis, apoptosis, cell cycle, invasion, and metastasis) and are linked to increased oxidative stress and DNA damage (Ying and Hofseth, 2007). Rather than nitrate, the presence of numerous classes of antioxidants is generally accepted as the explanation for the beneficial health effects of vegetable consumption (Nishino et al., 2005; Potter and Steinmetz, 1996).

A recent review of the literature suggests that certain subgroups within a population may be more susceptible than others to the adverse health effects of nitrate (Ward et al., 2005). Although there is evidence showing the carcinogenicity of N-nitroso compounds in animals, data obtained from studies that were focused on humans are not definitive, with the exception of the tobacco-specific nitrosamines (Grosse et al., 2006). The formation of N-nitroso compounds in the stomach has been connected with drinking water nitrate, and excretion of N-nitroso compounds by humans has been associated with nitrate intake at the acceptable daily intake level through drinking water (Vermeer et al., 1998). The metabolism of nitrate and nitrite, the formation of N-nitroso compounds, and the development of cancers in the digestive system are complex processes mediated by several factors. Individuals with increased rates of endogenous formation of carcinogenic N-nitroso compounds are likely to be susceptible. Known factors altering susceptibility to the development of cancers in the digestive system are inflammatory bowel diseases, high red meat consumption, amine-rich diets, smoking, and dietary intake of inhibitors of endogenous nitrosation (e.g., polyphenols and vitamin C) (de Kok et al., 2005; De Roos et al., 2003; Vermeer et al., 1998). In 1995, when the Subcommittee on Nitrate and Nitrate in Drinking Water reported that the evidence to link nitrate to gastric cancer was rather weak (NRC, 1995), the stomach was still thought to be the most relevant site for endogenous nitrosation. Previous studies, such as those reviewed in the NRC (1995) report, which found no link between nitrate and stomach cancer, concentrated on the formation of nitrosamines in the stomach. Recent work indicates that larger amounts of N-nitroso compounds can be formed in the large intestine (Cross et al., 2003; De Kok et al., 2005).

Some scientists argue that there are plausible explanations for

studies (e.g., Van Loon et al., 1998) in general do not provide statistically significant evidence for an association between nitrate intake and gastric, colon, or rectum cancer. The design of most of these studies may not have allowed for the determination of such a relationship.

Population studies have the problem that confounding factors in living health tend to be confounded with exposure to nitrate. This complicates molecular epidemiological studies. Alternative methods for assessing exposure in susceptible populations. This approach requires the development of biomarkers for the quantification of individual levels of nitrate and N-nitroso compounds exposure. More accurate quantification of exposure-mediated health effects.

## Nitrate, Food Security, and the Environment

It is beyond dispute that levels of nitrate in the environment are increasing. Nitrate-containing species have increased in many parts of the world due to increased use of fertilizers and combustion of fossil fuels. At present, 2 to 3% of the population in the European Union are potentially exposed to public or private drinking water exceeding the present WHO (and USA) guideline for nitrate in drinking water. The proportion of the population in the emerging and developing countries is larger and increasing (Van Grinsven et al., 2005).

The environmental impacts of reactive nitrogen are significant, and continued research on agricultural nitrogen management practices that decrease losses and improve utilization efficiency of N throughout the food system is needed. In the future, the central role of N in world agriculture. Agriculture without N fertilizer is not an option for the 9 billion people currently in the world and the 9 billion people to be fed (Cassman et al., 2003). Losses of reactive nitrogen compounds to the environment are not restricted to agricultural systems. From manures and the residues from legume crops (Cassman, 2005). Research indicates that simplification of N fertilizer application rates does not reduce N losses because there is typically a poor relationship between the amount of N fertilizer applied by farmers and the efficiency by the crops (Cassman et al., 2002). Instead, an integrated systems management approach that better match the amount and timing of N fertilizer to the actual crop N demand in time and space would lead to decreased losses of reactive N without decreasing crop yields. Many of the losses of reactive N between the agricultural need for N and the environmental impact are caused by too much in the wrong place are being lost. The International Nitrogen Initiative (INI; h

the apparent contradictory absence of adverse health effects of nitrate from dietary sources (Van Grinsven et al., 2006; Ward et al., 2006). Individuals with increased rates of endogenous formation of carcinogenic N-nitroso compounds are more likely to be at risk, and such susceptible subpopulations should be taken into account when trying to make a risk-benefit analysis for the intake of nitrate. In view of these complex dose-response mechanisms, it can be argued that it is not surprising that ecological and cohort

networking activity sponsored by several int

The adverse environmental impact of re all N-containing molecules other than the gas that comprises 78% of the atmosphere. Some of these molecules, such as nitrogen combustion of fossil fuels in automobiles a culture, however, is the dominant source th of  $N_2$ -fixing crops and the manufacture an (Turner and Rabalais, 2003). Both have in

Powlson et al.: When Does Nitrate Become a Risk for Humans?

accurate quantification of mediating factors may provide part of the answers. Moreover, there is also a separate need for determining water quality standards for environmental integrity of aquatic ecosystems. It is time to end 50 yr of uncertainty and move forward in a timely fashion toward science-based standards.

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2013-0091

IN THE MATTER OF

JAMES G. AND AMELIA M. SWEENEY  
SWEENEY DAIRY  
TULARE COUNTY

This Order is issued to the James G. and Amelia M. Sweeney (hereafter Discharger) pursuant to California Water Code (CWC) section 13268, which authorizes the imposition of Administrative Civil Liability. This Order is based on findings that the Discharger violated provisions of Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order).

The Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds the following:

1. The Discharger owns and operates the Sweeney Dairy (Dairy) located at 30712 Road 170, Visalia, California, County of Tulare.
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007. Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order. The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. CWC section 13267 authorizes the Regional Water Boards to require the submittal of technical and monitoring reports from any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge to waters of the state.
4. The General Order and the MRP required the Discharger to submit the 2011 Annual Report by 1 July 2012 pursuant to the Central Valley Water Board's authority in accordance with CWC section 13267.
5. The Discharger violated CWC section 13267 by failing to submit the 2011 Annual Report required by the General Order and Monitoring and Reporting Program by the required deadline of 1 July 2012.
6. Under the MRP, the Executive Officer has authority pursuant to Water Code section 13267 to order the installation of monitoring wells based on

the threat that an individual dairy or dairies pose to water quality. On 4 May 2012, the Executive Officer issued a Water Code section 13267 Order to the Discharger that directed the Discharger to implement groundwater monitoring at the Dairy. Specifically, the 13267 Order directed the Discharger to submit either: 1) 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.

7. On 16 August 2012, the Central Valley Water Board staff issued a Notice of Violation pertaining to the missing report notifying the Discharger that the 2011 Annual Report had not been received. The Notice of Violation requested that the delinquent report be submitted as soon as possible to minimize potential liability.
8. On 19 July 2012, the Central Valley Water Board staff issued a Notice of Violation notifying the Discharger that the MWISP had not been received by 29 June 2012. The Notice of Violation also requested that the delinquent MWISP be submitted as soon as possible to avoid incurring any additional liability.
9. On 15 February 2013, the Central Valley Water Board staff issued a courtesy pre-filing settlement letter notifying the Discharger that staff was in the process of assessing civil liability for failure to submit the 2011 Annual Report and the MWISP.
10. On 9 May 2013, the Executive Officer issued Administrative Civil Liability Complaint (Complaint) No. R5-2013-0539 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$20,400 pursuant to CWC section 13268 for the failure to submit the 2011 Annual Report and failure to submit an MWISP.
11. On 17 November 2008 the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). 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 sections 13327 and 13385 subdivision (e) including the Discharger's culpability, history of violations, ability to pay and continue in business, economic benefit, and other factors as justice may require. The required factors under Water Code sections 13327 and 13385 subdivision (e) have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A to this Order and shown in

the Penalty Calculation for Civil Liability spreadsheets in Attachment B of this Order. Attachments A and B are attached hereto and incorporated herein by reference.

12. Issuance of this Administrative Civil Liability Order to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).
13. 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.
14. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegee is authorized to refer this matter to the Attorney General's Office for enforcement.
15. 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 CWC 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](http://www.waterboards.ca.gov/public_notices/petitions/water_quality) or will be provided upon request.

**IT IS HEREBY ORDERED** that pursuant to section 13323 of the CWC, the Discharger shall make a cash payment of \$15,000 (check payable to the State Water Pollution Cleanup and Abatement Account) no later than thirty days from the date of issuance of this Order. I, Kenneth D. Landau, Assistant Executive Officer, do hereby certify that the foregoing is a full, true, correct copy of an Order issued by the California Regional Water Quality Control Board, Central Valley Region, and that such action occurred on 25 July 2013.

Original Signed by:

Kenneth D. Landau  
Assistant Executive Officer

PUBLIC MEETING  
STATE OF CALIFORNIA  
CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD  
PARTIAL TRANSCRIPT  
AGENDA ITEM NO. 7

CENTRAL VALLEY REGIONAL  
WATER QUALITY CONTROL BOARD  
11020 SUN CENTER DRIVE, SUITE 200  
RANCHO CORDOVA, CALIFORNIA

THURSDAY, JULY 25, 2013

1:52 P.M.

 COPY

Jacqueline Toliver  
Certified Shorthand  
Reporter No. 4808

California Reporting, LLC  
52 Longwood Drive  
San Rafael, CA 94901  
(415) 457-4417

1           The letter also indicated that if staff did  
2 not receive a response a civil liability complaint would  
3 be issued. The Discharger did submit a written response  
4 to the pre-filing settlement letter; however, the  
5 Discharger declined to enter into settlement  
6 negotiations.

7                               --oOo--

8           MR. ESSARY: This slide shows compliance rates  
9 for the submittal of the 2011 annual report relative to  
10 size of dairy as of February 2013 when assessments of  
11 civil liability were initiated. The size categories  
12 listed in the first column are based on the State filing  
13 fee schedule for mature cow dairy cattle.

14           The Sweeney dairy's maximum allowable herd  
15 size of 334 mature cows places the dairy in the  
16 medium-size category.

17           The slide features the following: The second  
18 column lists the number of dairies for each size  
19 category shown in the first column. The next column  
20 lists how many of those dairies submitted an annual  
21 report. The last column lists compliance rates as a  
22 percentage.

23           This chart shows that more than 96 percent of  
24 even the smallest dairies were able to comply with the  
25 requirement to submit an annual report. Besides the

1 the representative monitoring program, the regional  
2 monitoring program. Is that program designed for  
3 typical-type wells based upon soil type, or is it based  
4 upon geographical coverage, or both? What is the basis  
5 of that program?

6 MR. LANDAU: The program is not an attempt to  
7 put a well every square mile or on every township to get  
8 complete geographic coverage. It is designed to look at  
9 representative-type areas, high-risk areas, lower-risk  
10 areas, different types of groundwater. So the intent is  
11 to not put thousands of wells all over the valley. It  
12 is an attempt to ascertain what management practices at  
13 what sites are protective of groundwater, and then those  
14 management practices would be used to evaluate the sites  
15 where the monitoring isn't conducted.

16 CHAIRMAN LONGLEY: And amongst those are soil  
17 properties one of the factors that's considered?

18 MR. LANDAU: I'm sorry?

19 CHAIRMAN LONGLEY: Soil properties?

20 MR. LANDAU: Yes.

21 CHAIRMAN LONGLEY: Sandy soils and clay and so  
22 forth. And so if I understand what you're saying is  
23 that particular sites have been selected -- from what I  
24 understand from the testimony a minimal number of wells  
25 -- so that you can make recommendations on a larger

1 scale, depending upon the kinds of factors that are  
2 present at those individual dairies as to what  
3 management practices should be in place. Is that  
4 correct?

5 MR. LANDAU: Correct. The fact that the  
6 representative wells may be at some geographic distance  
7 from Mr. Sweeney's or any other dairy does not mean that  
8 the ground and soil and groundwater conditions at those  
9 other locations wouldn't be representative. You have to  
10 select the sites that are representative for  
11 Mr. Sweeney's conditions.

12 CHAIRMAN LONGLEY: Thank you very much. Any  
13 questions of members of the board? Yes, Jon.

14 BOARD MEMBER COSTANTINO: So is the list of  
15 where the wells are located, is that public record?

16 MR. LANDAU: To the best of my knowledge, yes.  
17 The exact details of that, I'd have to refer to the  
18 prosecution because they're the ones actually operating  
19 that. To the best of my knowledge, that is all public  
20 record information.

21 BOARD MEMBER COSTANTINO: And therefore there  
22 would be no reason not to share it?

23 MR. LANDAU: Yes, if it's public record. To  
24 the best of my knowledge it is.

25 BOARD MEMBER COSTANTINO: Okay.

1           It is entirely voluntary. No one is required  
2 to join our program in any way, shape or form. It was  
3 created by dairymen as an alternative to the requirement  
4 to do individual monitoring.

5           So, you know, we don't expect everyone to like  
6 our program or want to join our program. No one needs  
7 to join our program. It's just there as an alternative  
8 for folks that want to save money on their costs and be  
9 part of a collaborative effort to solve the same issues  
10 that you would have to do on your own through individual  
11 monitoring.

12           CHAIRMAN LONGLEY: And do I understand that  
13 without this program more than likely each dairy would  
14 have to do its own monitoring?

15           MR. CATIVIELA: Well, your 2007 General Order  
16 requires all dairies to install monitoring wells. And,  
17 unfortunately, at the time -- at the same time that  
18 order was adopted, the Board had a separate action where  
19 they authorized folks -- because of the huge expense of  
20 individual monitoring, they authorized a program where  
21 the workshops were held and we could try to develop  
22 alternatives. We didn't know what the alternatives  
23 might be then, but those were developed, and that  
24 ultimately led to representative monitoring.

25           CHAIRMAN LONGLEY: And so am I to understand

1 that this program provides the science that we need to  
2 properly administer best management practices for  
3 dairies at a greatly reduced cost to individual  
4 dairymen, both large and small? Would that be a correct  
5 statement?

6 MR. CATIVIELA: I think that is exactly right.

7 CHAIRMAN LONGLEY: Thank you very much.

8 Any further questions?

9 Thank you.

10 At this point in time -- Mr. Sweeney, do you  
11 have any closing statement?

12 MR. SWEENEY: Yes. Is it okay for my wife to  
13 talk?

14 CHAIRMAN LONGLEY: Yes. Yes.

15 MS. SWEENEY: The prosecution states on page  
16 11 of their rebuttal evidence, quote, "Mr. Sweeney  
17 argues that his application for review or modification  
18 of the WDRs by the Central Valley Water Board which  
19 could potentially eliminate the requirements to submit  
20 its annual report should automatically grant him the  
21 exact relief he requested from the Board. This surely  
22 cannot be the appropriate outcome." End quote.

23 This is the appropriate outcome. The failure  
24 of the State Board to hear and act on our appeal is not  
25 our responsibility. The actions of the Central Valley

1 previous hearings.

2 Thank you.

3 CHAIRMAN LONGLEY: Thank you.

4 Closing statement by prosecution?

5 MS. CREEDON: This is not an issue about  
6 whether the underlying order was appropriate or not.  
7 The Sweeneys did not file a petition on that one, and in  
8 doing so they waived their right to challenge it at this  
9 point. And they did comply for the first couple of  
10 years and had subsequently stopped complying with the  
11 order.

12 Every order that this Board has heard on this  
13 case has been about non-submittals, and we will begin  
14 probably further enforcement for this failing to comply  
15 and the impacts it could have to the environment because  
16 of that.

17 But keep in mind while the dairy industry,  
18 like others throughout California, have been up and  
19 down -- some have closed; some have stayed; some have  
20 consolidated -- we have not lost the total number of  
21 cows in California, milking cows; they've just been  
22 redistributed. But over 95 percent of our dairy  
23 producers have complied, regardless of the size. Over  
24 95 percent. So we are seeing some significant  
25 compliance rates here. And without the other data,

1 without the reports, without the commitment to comply,  
2 that we may see further noncompliance from the Sweeneys.  
3 They are in Tulare County. Tulare County is one of our  
4 heaviest-hit counties for pollutions caused by dairies  
5 for nitrates in groundwater, so it is a concern for us  
6 to have a dairy in that location not complying with our  
7 Dairy Order.

8           The Board did discuss and rejected removing or  
9 giving any kind of exceptions to small dairies at the  
10 time it adopted this order. It deliberated on that and  
11 it chose not to. So the Board spoke; we're implementing  
12 it.

13           And so for those reasons I recommend on the  
14 part of prosecution that you move forward with the  
15 penalty as proposed, the \$15,000.

16           CHAIRMAN LONGLEY: Thank you, Ms. Creedon.

17           We'll close the hearing at this time, and  
18 deliberation will be conducted solely by the Board, with  
19 advice as we desire from our advisors.

20           What's your pleasure? Anyone have comments?  
21 Go ahead.

22           BOARD MEMBER RAMIREZ: All right. Well, you  
23 know, this is a hard case because it's hard and it's  
24 not. It's hard because, as people -- I care about the  
25 Sweeneys and I care about their business, but the law is

### PROSECUTION TEAM EVIDENCE LIST

The following items are evidence for the Central Valley Regional Water Quality Control Board hearing regarding Administrative Civil Liability Complaint No. R5-2013-0539, Sweeney Dairy, Tulare County. This matter is scheduled to be heard at the 25/26 July 2013 Central Valley Water Board hearing in Rancho Cordova. This list consists of evidence not already attached or included in Administrative Civil Liability Complaint No. R5-2013-0539.

Item	Title of Document	Location
1	ACLO R5-2011-0068	Sweeney Dairy public file, available at: <a href="http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml">http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml</a>
2	ACLO R5-2012-0070	Sweeney Dairy public file, available at: <a href="http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml">http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml</a>
3	Signed certified mail return receipt of ACLC R5-2013-0539 to Discharger	Sweeney Dairy public file
4	Signed certified mail return receipt of 13267 Order to Discharger	Sweeney Dairy public file
5	Signed certified mail return receipt of NOV for failure to submit 2011 Annual Report to Discharger	Sweeney Dairy public file
6	Signed certified mail return receipt of NOV for failure to submit Monitoring Well Installation and Sampling Plan to Discharger	Sweeney Dairy public file
7	Signed certified mail return receipt of pre-filing settlement letter to Discharger	Sweeney Dairy public file

D

## IMPORTANT DEADLINES

*All required submissions must be received by 5:00 p.m. on the respective due date.*

May 9, 2013	<ul style="list-style-type: none"> <li>▪ Prosecution Team issues ACL Complaint, Hearing Procedure, and other related materials.</li> </ul>
May 16, 2013	<ul style="list-style-type: none"> <li>▪ Objections due on Hearing Procedure.</li> <li>▪ Deadline to request "Designated Party" status.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
May 21, 2013	<ul style="list-style-type: none"> <li>▪ Deadline to submit opposition to requests for Designated Party status.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
May 24, 2013	<ul style="list-style-type: none"> <li>▪ Discharger's deadline to submit <i>90-Day Hearing Waiver Form</i>.</li> </ul> <p><u>Electronic or Hard Copy to:</u> Prosecution Team Primary Contact</p>
May 28, 2013*	<ul style="list-style-type: none"> <li>▪ Advisory Team issues decision on requests for designated party status.</li> <li>▪ Advisory Team issues decision on Hearing Procedure objections.</li> </ul>
June 4, 2013*	<ul style="list-style-type: none"> <li>▪ Prosecution Team's deadline for submission of information required under "Submission of Evidence and Policy Statements," above.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
June 24, 2013*	<ul style="list-style-type: none"> <li>▪ Remaining Designated Parties' (including the Discharger's) deadline to submit all information required under "Submission of Evidence and Policy Statements" above. This includes all written comments regarding the ACL Complaint.</li> <li>▪ Interested Persons' comments are due.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
July 1, 2013*	<ul style="list-style-type: none"> <li>▪ All Designated Parties shall submit any rebuttal evidence, any rebuttal to legal arguments and/or policy statements, and all evidentiary objections.</li> <li>▪ Deadline to submit requests for additional time.</li> <li>▪ If rebuttal evidence is submitted, all requests for additional time (to respond to the rebuttal at the hearing) must be made within 3 working days of <i>this</i> deadline.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons, Prosecution Team Attorney, Advisory Team Attorney</p> <p><u>Electronic and Hard Copies to:</u> Prosecution Team Primary Contact, Advisory Team Primary Contact</p>
July 3, 2013* <sup>†</sup>	<ul style="list-style-type: none"> <li>▪ Prosecution Team submits Summary Sheet and responses to comments.</li> </ul> <p><u>Electronic or Hard Copies to:</u> All other Designated Parties, All known Interested Persons</p> <p><u>Electronic and Hard Copies to:</u> Advisory Team Primary Contact, Advisory Team Attorney</p>
July 25/26, 2013*	<ul style="list-style-type: none"> <li>▪ Hearing</li> </ul>

\* Dischargers have the right to a hearing before the Board within 90 days of receiving the Complaint, but this right can be waived (to facilitate settlement discussions, for example). By submitting the waiver form, the Discharger is not waiving the right to a hearing; unless a settlement is reached, the Board will hold a hearing prior to imposing civil liability. However, if the Board accepts the waiver, all deadlines marked with an "\*" will be revised if a settlement cannot be reached.

<sup>†</sup> This deadline is set based on the date that the Board compiles the Board Members' agenda packages. Any material received after this deadline will not be included in the Board Members' agenda packages.

SWEENEY DAIRY  
Witness List

- a. Clay Rodgers, (5 minutes)  
*Assistant Executive Officer, Central Valley Water Board (Fresno)*  
Testimony on regulatory program generally and details of the proposed order.
- b. Dale Essary, (10 minutes)  
*Senior Water Resources Control Engineer, Central Valley Water Board*  
Testimony regarding the Dairy General Order requirements, calculation of the proposed penalty, compliance history, and details of proposed order.
- c. Doug Patteson, (5 minutes)  
*Supervising Water Resources Control Engineer, Central Valley Water Board*  
Testimony regarding the Dairy General Order requirements, calculation of the proposed penalty, and details of proposed order.

Ex F