

November 7, 2014



BY UPS NEXT DAY AIR
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State Water Resources Control Board
Office of Chief Counsel
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PETITION UNDER CALIFORNIA WATER CODE § 13320 FOR REVIEW BY THE STATE WATER RESOURCES CONTROL BOARD OF ACTIONS BY THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD REGARDING SWEENEY DAIRY AND ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2014-0543

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 R5-2014-00543 (2014 Complaint). Our address is 30712 Road 170, Visalia, CA 93292. Our telephone number is (559) 280-8233. Our email address is jimsweeneydairy@gmail.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 failures 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 incorporate by reference the Statement of Facts set forth on pages 1 through 2, inclusive, of our Written Testimony dated September 26, 2014 (See **Exhibit A** attached). This Written Testimony was submitted to the Regional Board thirteen days prior to the October 9, 2014 hearing on the 2014 Complaint.

We also incorporate the statement of facts set out in our previously submitted "Submission of Evidence and Policy Statement regarding Hearing on Administrative Civil Liability Complaint R5-2014-0543" (incl. Exhibits 1-74 (also previously submitted), dated September 3, 2014 (See **Exhibit C** attached).

The only supplement to these facts is that at the conclusion of the October 9, 2014 hearing, the Regional Board voted to adopt Administrative Civil Liability Order R5-2014-0119, imposing a \$18,564.00 penalty upon us (See **Exhibit B** attached). We received a signed or official copy of Order R5-2014-0119 by certified mail on Saturday, November 1, 2014. The Order we received contains the signature only of the Executive Officer. There is no reference to the actual Board action, the motion made and seconded, or the Board's vote.

C. LEGAL ARGUMENT AND ANALYSIS.

- 1. The Regional Board lacks jurisdiction to issue Administrative Civil Liability Order R5-2014-0119 and impose a fine of \$18,564.00 on us because the 2007 Order was not in**

effect at the time of the enforcement action, and the 2013 Order did not exist and was not in effect at the time of the claimed violation.

There is an ambiguity regarding the applicable Order involved in this case. The staff's "Buff Sheet" linked to the October 9/10, 2014 Board meeting Agenda states that our dairy is regulated by Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (2007 Order).

Administrative Liability Order R5-2014-0119, the July 17, 2014 letter from Mr. Rodgers regarding the Administrative Liability Complaint, and Administrative Liability Complaint R5-2014-0543, state that our dairy is regulated by the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (2013 Order).

The 2013 Order was adopted by the Regional Board on October 3, 2013. The 2013 Order states that it "rescinds and replaces" the 2007 Order. 2013 Order ¶ 1, p. 1.

We are accused of failing to submit the Annual Report for the 2012 calendar year which was due by July 1, 2013. July 1, 2013 was before the 2013 Order was adopted. Since the 2013 Order cannot be retroactive, the operable Order on July 1, 2013, the due date for the 2012 Annual Report, was the 2007 Order. Therefore, the 2007 Order is referred in the discussions below because it was the order that was in effect on July 1, 2013. Where possible we also refer to the 2013 Order. The 2013 Order suffers from the same defects as the 2007 Order.

Also note that we appealed the 2013 Order to the State Board on October 29, 2013. We believe this is designated as State Water Board File No. A-2213.

The 2007 Order cannot be enforced due to court action. The 2007 Order was set aside by a writ of mandate filed April 17, 2013. This writ of mandate has not been discharged, and the proceedings involving the 2007 Order are ongoing.

The writ of mandate issued on April 17, 2013 against the Regional Board over the 2007 Order in the case of Asociacion de Gente Unida Por el Agua v. Central Valley Regional Water Quality Control Board, Sacramento County Superior Court Case no. 34-2008-00003604-CU-WM-GDS, has not yet been discharged. The conditions of the writ have not been met, and the Regional Board has not been released from the writ.

The writ requires the Regional Board to "set aside" the 2007 Order and to reissue the Order only after application of and compliance with the anti-degradation policy of State Board Resolution No. 68-16, as interpreted by the Court of Appeal of the Third Appellate District in its opinion in Asociacion de Gente Unida Por el Agua, et al. v. Central Valley Regional Water Quality Control Board, et al. (2012) 210 Cal. App. 4th 1255.

At the October 9, 2014 hearing Regional Board counsel somehow muddied the waters over what the April 17, 2013 order means. See Transcript p. 44, line 20 to p. 48, l. 5 (claiming that the writ of mandate did not set aside the 2007 Order "in its entirety"). The meaning of the writ or order is clear: that the Regional Board "set aside" the 2007 Order and comply with the Court of Appeal's published opinion. The Court did not mandate that the Regional Board "set aside" the 2007 Order only "in part."

It is simply quibbling to claim that the writ did not order the Regional Board to set aside the 2007 Order "in its entirety." See our testimony at Transcript p. 31, l. 6, to p. 32, l. 14, where we state that the writ must be taken on its face as setting aside the 2007 Order. We also point out the

Regional Board never sought clarification from the Court over the scope of the writ. Therefore, the Regional Board cannot now quibble over the meaning of the writ which is set out in plain judicial language and is subscribed to by all the attorneys in the case including the attorney for the Regional Board.

Looking at the 2013 Order it is not clear that the 2013 Order is intended to meet the requirements of the Court of Appeal's decision, which is not referenced that we could find. In any case, we have challenged the 2013 Order in our appeal, File No. A-2213, referred to above.

We understand the parties argued the return on the writ on October 10, 2014 but that no ruling has yet been issued by the trial court. Therefore, the 2013 Order is not in force until the Court approves it and discharges the writ against the Regional Board, and until the discharge of the writ is final after any appeal(s) that may be made from the trial court's ruling.

The above reasons are among the reasons the Complaint against us is premature. There currently is no operable order in effect, nor was there an operable order in effect at the time of the alleged violation of the Order, whether the 2007 Order or the 2013 Order. The Regional Board could not proceed under either the 2007 Order or the 2013 Order, the former being barred from enforcement and the latter not being in existence at the time the alleged violation occurred.

To address the confusion created by Regional Board staff regarding which Order (2007 or 2013) we will direct the presentation below to both Orders.

2. The 2007 and 2013 Orders are unlawful and unenforceable against us because they fail to comply with applicable law, including provisions of the Water Code.

(a) The need for the 2007 and 2013 Orders 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, 2013 and 2014 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 and 2013 Orders and has not justified their burden.

As mentioned before, the MRP of the 2007 Order recites that it is issued pursuant to Water Code § 13267. (See, e.g., 2007 Order, p. MRP-1) The MRP of the 2007 Order is essentially the same as the corresponding MRP in the 2013 Order. Water Code § 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 and 2013 Orders do 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 claimed it did in adopting the 2007 and 2013 Orders (assuming its validity as being adopted by due and legal process instead of administrative legerdemain). 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 level (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, 2012 and 2013 did not, cannot, and do not, in the words of § 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."

The Regional Board's 2007 and 2013 Orders, at pp. MRP -6 and -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. After both demanding and ordering these costly well tests and reports for years, they now tell us that they are meaningless. This is irrational, and arbitrary and capricious.

(c) The 2007 and 2013 Orders fail 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 that 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 stated on pp. 6-7 of our September 26, 2014 Written Testimony (Exhibit A).

In short, the 2007 (and 2013) Order's reporting requirements are unjustifiably excessive, unnecessary, overly burdensome, primitive, antiquated, obsolete, and provide nothing of real value. 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 § 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, the 2013 Complaint, and this 2014 Complaint. At the hearings on each of the prior Complaints, the Regional Board staff has never challenged, rebutted or disputed this argument.

(d) The 2007 and 2013 Orders fail to take into account economic considerations.

The 2007 (and 2013) Order's waste discharge requirements as they relate to water quality objectives must take into account economic considerations. (Water Code §§ 13241 and 13263(a)) The 2007 and 2013 Orders do 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 Orders fail to address the special economic circumstances of smaller dairies in any way whatsoever.

We hereby incorporate by reference the details of this argument, as more particularly set forth on pages 7-10 of our September 26, 2014 Written Testimony (see **Exhibit A**). In addition, in our testimony at Transcript p. 34, l. 21, to p. 36, l. 15 we presented concrete evidence of the prohibitive cost of the reports the Orders require.

In summary, no economic analysis or evidence was presented into the record that disputed the considerable weight of testimony that the 2007 Order and the 2013 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 §§ 13241 and 13263 (a), and it is thereby unlawful and unenforceable.

3. We were deprived due process and a fair hearing at the October 9, 2014 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 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 October 9, 2014, 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. See Transcript, pp. 65-67. In addition, I was not allowed to cross-examine Ms. Creedon.

Ms. Creedon claimed that the 2007 Order was in effect when it was not, and that "any subsequent Order now stands and the need to comply with it." As shown above the 2007 Order was not in effect as of the Court's writ issued April 2013, and the 2013 Order did not even exist at the time the claimed violations occurred.

Therefore, a "surprise" witness and "surprise" evidence and testimony was presented at the October 9 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's conduct in allowing this testimony suggested a lack of open-minded impartiality. Rather, it 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 conduct of the hearing was such that the hearing was pro forma. There was no deliberation, or weighing of evidence, testimony or argument by the Board. The few comments offered prior to the vote were made apologetically, on account of their taking up time. The Board would have reached the decision already written out in Order R5-2014-0119 regardless of the evidence, testimony or argument presented.

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

The 2007 and 2013 Orders each declares that it "serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes." (See, e.g., 2007 Order, p.1) The 2007 Order, for example, 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 and 2013 Orders.

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 not to 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 Water Code §§ 13269 and 13223.

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, 2013 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 or the 2013 Order's reporting requirements due on July 1, 2013 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 §§ 13320, 13325, and 13330) Thus, the filing and serving of the 2014 Complaint was premature.

5. Collateral estoppel does not apply in this matter because the Orders are not final.

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 §§ 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 and Appellate Courts. Finally, collateral estoppel does not apply in these proceedings.

6. Water Code § 13320 does not bar us from attacking the legality of the 2007 and 2013 Orders because of lack of notice meeting the Constitutional requirements of due process.

The Prosecution Team's counsel argued at the October 9, 2014 hearing that we were barred from attacking the legality and enforceability of the 2007 and 2013 Orders because of Water Code § 13320. 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. We met the 30 day requirement in the case of the 2013 Order.

However, the U. S. Supreme Court case Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950), held that, under the protections afforded by the 14th Amendment of the U. S. Constitution, all persons are entitled to receive such 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 relevant Water Code sections. Hence, the Regional Board has no legal right to enforce or punish us under an order that violates the applicable statutes.

7. The amount of the fine is punitive and unjust.

The Regional Board seeks to punish us. It has increased the fine each time it has attempted an enforcement action against us. The 2014 Administrative Civil Liability Order seeks to impose a fine on us of \$18,564.00. Attachment A to the "pre-complaint" letter (part of the Agenda Board packet) clearly states that it is using our "history of violations" to increase the fine against us. This is simply punitive, and amounts to an illegal forfeiture. In fact, none of the alleged "violations" is has been finally adjudicated in either the administrative or the legal realm.

8. The Regional Board seeks to punish us because we exercise our rights under the administrative procedure established by the State Board.

In the hearing transcript it is clear that we are being singled out because we have chosen to exercise our rights, rather than submit to what we honestly believe to be illegal orders. See, e.g., Transcript, p. 19, ll. 13-16 (observation of prejudice to us for wanting a hearing); p. 20, l. 23, to p. 21, l. 21 (punishment for our "frame of mind"); p. 42, l. 15, to p. 43, l. 7 (refusing to take into record recently received evidence of financial impact far greater than claimed by Board staff). See also Prosecution Team Rebuttal p. 6 (claiming previous proceedings resulted "final judgments on the merits" even though the Board is not a court of law). It is pointed out that the Orders have been acquiesced in by a large number of dairies. See Transcript, p. 57, ll. 9-20; p. 58, ll. 5-13. This is like saying Jim Crow is valid and legitimate because only a few Black Americans like Jackie Robinson and Rosa Parks refused to go to the back of the bus.

D. APPEAL AND PETITION FOR REVIEW AND ACTIONS REQUESTED OF STATE BOARD.

Pursuant to Water Code § 13320, 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:

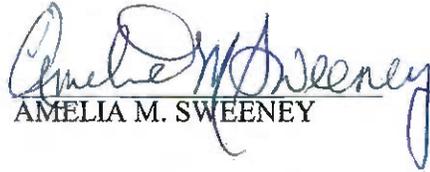
1. We argued at the October 9, 2014 hearing that the 2007 Order is illegal, invalid, and unenforceable, a position that the Regional Board refused to agree with and declare. We petition the State Board to review our evidence and legal arguments in support of this contention. We petition the State Board 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 October 9, 2014 is therefore illegal, invalid and unenforceable against us, as well as against all other Dischargers, and that the 2007 Order be set aside in conformity with the Court's writ of mandate of April 17, 2013 (see **Exhibit E**). Enforcement of the 2013 Order against us is illegal because the 2013 Order was not adopted until after the alleged violations occurred. Any attempt to enforce the 2013 Order retroactively violates the constitutional bar against ex post facto laws. Whether the 2013 Order is sufficient to discharge the Court's writ of mandate is still being litigated. The legal standing of the 2013 Order is not established.
2. In light of the above, we appeal the Regional Board's action on October 9, 2014 of adopting an order imposing administrative civil liability against us in the amount of \$18,564.00. We also petition the State Board to determine and declare that the enforcement of the civil liability order against us in the amount of \$18,564.00 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.

An Exhibit list with the Exhibits is attached.

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

Respectfully submitted,


JAMES G. SWEENEY


AMELIA M. SWEENEY

DATED: November 7, 2014.

EXHIBIT LIST

- EXHIBIT A Written Testimony submitted to the Central Valley Regional Water Quality Control Board Members for consideration at the October 9/10, 2014 Hearing on Administrative Civil Liability Complaint R5-2014-0543
DATED SEPTEMBER 26, 2014
- EXHIBIT B Administrative Liability Order R5-2014-0119, received November 1, 2014
DATED OCTOBER 9, 2014
- EXHIBIT C Submission of Evidence and Policy Statement regarding Hearing on Administrative Civil Liability Complaint R5-2014-0543 (incl. Exhibits 1-74 submitted previously)
DATED SEPTEMBER 3, 2014
- EXHIBIT D Transcript of Hearing of October 9, 2014
DATED CERTIFIED OCTOBER 14, 2014
- EXHIBIT E Writ of Mandate filed April 17, 2013 in Asociacion de Gente Unida por el Agua, et al. v. Central Valley Regional Water Quality Control Board, Sacramento County Superior Court Case No. 34-2008-00003604-CU-WM-GDS

EXHIBIT A

James G. Sweeney and Amelia M. Sweeney
Appeal to Petition Under California Water Code Section 13320 for
Review by the State Resources Control Board of
Various Actions by the Central Valley Regional Water Quality
Control Board Regarding Sweeney Dairy and
Administrative Civil Liability Complaint No. R5-2014-0543

EXHIBIT "A"

**Written Testimony Submitted to the Central Valley Regional Water Quality Control
Board Members for consideration at the October 9/10, 2014 Hearing on
Administrative Civil Liability Complaint R5-2014-0543
DATED SEPTEMBER 26, 2014**

Date: September 26, 2014

To: Central Valley Regional Water Quality Control Board

Advisory Team

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Written Testimony submitted to the Central Valley Regional Water Quality Control Board Members for consideration at the October 9/10, 2014 Hearing on Administrative Civil Liability Complaint R5-2014-0543

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 R5-2014-0543(2014 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. The Central Valley Regional Water Quality Control Board shall hereinafter be referred to as the “Regional Board,” and the “Board.” The State Water Resources Control Board shall hereinafter be referred to as the “State Board.”

B. Statement of Facts/Background.

1. We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 260 cows on a site where a dairy has continuously been conducted for over eighty years.

2. In the past, we did not file the Annual Reports due on July 1, 2010, July 1, 2011, and July 1, 2012. In each case, the Regional Board served Complaints for Administrative Civil Liability on us, each of which we challenged and opposed. Hearings were held before the Regional Board with respect to each Complaint and at each hearing the Regional Board imposed civil liability assessments against us. However, in each case we timely filed Petitions for Review with the State Board, an appellate right conferred upon us by Water Code section 13330. We also filed a Petition for Review with the State Board challenging the Regional Board's adoption of the Groundwater Monitoring Directive. Each of our Petitions raised a multitude of legal and factual arguments as to why the 2007 Dairy Order was unlawful and unenforceable, and therefore, why each of the prior civil liability assessments imposed upon us were also unlawful and unenforceable. Yet, these appeals languish with the State Board, as the State Board has still not acted upon them.
3. On July 17, 2014, an Administrative Civil Liability Complaint, R5-2014-0543 (2014 Complaint), was mailed to us for failing to file the 2012 Annual Report due on July 1, 2013. The 2014 Complaint seeks to assess a civil liability against us in the amount of \$18,564.00.
4. As already stated, our appeals of the decisions made and orders adopted by the Regional Board in connection with the 2011 Complaint, 2012 Complaint, 2013 Complaint and of the Groundwater Monitoring Directive are still pending before the State Board. We have been waiting the exhaustion of our appeal rights to determine whether the Regional Board's 2007 Order and the civil liability assessments imposed upon us were lawful and enforceable. It has been our position that if the completion of the appeal process concluded with a determination that we had no legal grounds upon which to not file the Annual Reports due in 2010, 2011, 2012 and 2013, then we would file them. We should not be treated as responsible for the State Board sitting on these appeals. Indeed, we have seen no evidence that the Regional Board has pressed the State Board to act on them. Thus, it is the State Board (and perhaps the Regional Board as well) that is denying us a resolution of these issues and is denying us due process.

C. Legal Arguments and Analysis.

All of the letters, emails and other documents that we mention in the following arguments have been identified in our earlier Statement of Evidence. They are in the possession of the Regional Board (in connection with the earlier Complaints), and are incorporated herein by these references. They are quite voluminous, and rather than attach them as Exhibits hereto, Board Members who wish to read them in full can either request copies from us or from the Regional Board staff.

1. The Regional Board's Order No. R5-2007-0035 (hereinafter "2007 Dairy Order") is presently invalid and unenforceable because the Sacramento Superior Court ordered the entire 2007 Dairy Order set aside on April 6, 2013.

The 2014 Complaint alleges in paragraph 8 "that the Court's decision did not affect the reporting requirements of the 2007 General Order" We disagree. As of July 1, 2014, the deadline specified by the 2007 Dairy Order for submission of the 2013 Annual Report, the Superior Court had already ordered that the 2007 Order be set aside. The Superior Court's order was occasioned by the Third District Court of Appeal finding on November 6, 2012 that "The 2007 Order's monitoring plan upon which the order relies to enforce its no degradation directive is inadequate" because "there is not substantial evidence to support the findings."¹ Hence, many of the elements to be reported in the Annual Report were based upon a monitoring plan in the 2007 Order that the Appellate Court determined was flawed and unlawful.

In her Rebuttal Statement, counsel admits that the Superior Court ordered the Regional Board to "set aside the [2007] Dairy General Order." Yet, she then asserts that we are mistakenly treating it as if it had the force of nullifying it. We must adopt the plain meaning of the Superior Court's words. With the Court not providing any more explanation, the plain words of its directive was that this 2007 Dairy Order can no longer stand. It did not order only parts of it be set aside – it ordered that it was to be set aside *in its entirety*. Ordering that the entire 2007 Order be set aside means that the Court was not interested in saving any of it. Neither did the Court declare that the 2007 Dairy Order was not null and void, as counsel tries to suggest. If counsel believes that the Court was declaring that the 2007 Dairy order was not null and void, where is counsel's evidence of that? The Regional Board had every opportunity to seek a clarification from the Court or to appeal the Court's order, but where is evidence of that?

Notwithstanding all of the above, suppose a court eventually concluded that the April 6, 2013 order of the Superior Court to set aside the 2007 Dairy Order did not have the effect of barring the Regional Board from seeking a civil liability assessment for our failure to file the 2014 Annual Report required under said Order. In such event, we would still contend that the 2007 Dairy Order was unlawful and unenforceable for all of the following reasons:

2. The 2007 Dairy Order is unlawful and unenforceable against us because it failed to comply with applicable law, including provisions of the Water Code.

(a) The need for the 2007 Dairy Order was not supported by substantial evidence.

It is fundamental administrative law that no rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by

¹ *Asociacion de Gente Unida por el Agua, et al., v. Central Valley Regional Water Quality Control Board*, (2012) 210 Cal. App. 4th 1255, 1287.

substantial evidence. The Appellate Court in the *Asociacion* case, cited herein, confirmed the applicability of the foregoing precept.² Part of the reason the Appellate Court overturned the Trial Court's original decision was because "the Regional Board must ensure that sufficient evidence is analyzed to support its decision [to adopt the 2007 Dairy Order] and that the evidence is summarized in an appropriate finding."³ It went on to add that "An administrative agency abuses its discretion where its order is not supported by the findings or where the findings are not supported by the evidence. (citation)."⁴ It concluded that "The 2007 Order's monitoring plan upon which the order relies to enforce its no degradation directive is inadequate" because "there is not substantial evidence to support the findings."⁵

We have reviewed all 34,000 pages of the administrative record of the hearings held in connection with the adoption of the 2007 Dairy Order, and we found no substantial evidence in the administrative record – in fact, no evidence whatsoever – that supports the need to replace the pre-2007 Order reporting requirements with the new reporting requirements adopted in the 2007 Order. We found no substantial evidence in the record that the data, reports and information that the Regional Board staff obtained from or about dairies prior to its adoption of the 2007 Dairy Order were inadequate, insufficient, unreliable or otherwise flawed. And we have found no substantial evidence in the record that claimed or demonstrated that the new reporting requirements were necessary or needed to replace the pre-2007 Order requirements.

We have made this argument to the Regional Board in connection with the 2011, 2012 and 2013 Complaints, and we are again making this argument in connection with this 2014 Complaint. This argument remains unchallenged and uncontroverted because, in connection with each case, including this one, the Regional Board staff and its counsel have failed to argue or show otherwise by pointing to specific evidence or testimony in the administrative record for the 2007 Dairy Order.

(b) The Regional Board did not show the need for the reports specified in the 2007 Dairy Order and did not justify their burden, as required under Water Code section 13267 (b)(1).

The "Monitoring and Reporting Program" of the 2007 Dairy Order recites that it is issued pursuant to Water Code Section 13267. (2007 Dairy 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."

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

² Ibid, p. 1282.

³ Ibid.

⁴ Ibid.

⁵ Ibid., p. 1287.

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 Dairy 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 two 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. We have his letter dated April 17, 2003, confirming 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. The Regional Board required us to provide it with supply well test results. Indeed, its 2007 Order compelled dairymen, on page MRP-7, to “sample each domestic and agricultural supply well” and to submit the test results for Nitrate-nitrogen to it on an annual basis.

In accordance with the Regional Board’s requests, we submitted test results from water samples taken from each of our supply wells in 2003, 2007 and 2010. The results 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); in fact, they are incredibly low.

We argued to the Regional Board staff that these test results were compelling evidence that our operation was and is not adversely impacting ground water, and therefore the cost of filing these reports 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.”

Despite the Regional Board’s prior requests for supply well test results and despite the 2007 Order requiring them, the Board’s 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.” If this was the case, why did the Regional Board require them?

(c)The 2007 Dairy Order failed 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.” If new and 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. In fact, the Appellate Court in the *Asociacion* case confirmed that “the agency [the Regional Board] should consider current technologies and costs”⁶

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.

At various times in the past, we have provided the Regional Board with relevant research papers to consider. For example, Lawrence Livermore National Laboratory published two papers in *Environmental Science Technology*, (2007) 41, 753-765. The Laboratory stated that they discovered that soil bacteria break down and eliminate nitrates in dairy waste water in a substantial if not complete degree. They 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 clay layers sitting beneath a dairy site and whether they constitute an impervious barrier between the dairy and the groundwater. Yet, the 2007 Dairy 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 were 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 once each month to prove we didn’t drive over the speed limit during the month.

We have read all 34,000 pages of the administrative record leading up to the adoption of the 2007 Dairy Order. We found no substantial evidence in the record that supports or justifies the need to regulate nitrates, considering the levels found in the groundwater 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 the *Journal of Environmental Quality*, (2008) 37:291-295, have evaluated all the old studies done about the health impacts of nitrates on humans and it suggests that nitrates at the

⁶ Ibid., p. 1283.

levels found in groundwater are not the health threat once believed. The paper further suggests that perhaps the current nitrate limits should be significantly raised because the health risks may be overstated.

In short, the 2007 Dairy Order's reporting requirements were excessive, unnecessary, overly burdensome, primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants and laboratories. The Regional Board did not sufficiently examine and consider recent research results and advanced testing technologies, and it did not modify its 2007 Order accordingly. We have made these arguments to the Regional Board during the hearings on the 2011 Complaint, the 2012 Complaint, the 2013 Complaint, and we are making these same arguments in connection with this 2014 Complaint. In each instance, including counsel's current Rebuttal Statement, these arguments have never been challenged, disputed or rebutted by the Regional Board staff or by their counsel.

(d) The 2007 Dairy Order failed 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.

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.

As already stated, the administrative record (AR) of the 2007 Dairy 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.⁷ For example:

(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)

⁷ This evidence was set forth in the documents we identified as Nos. 33 and 34 in our recently submitted Statement of Evidence.

(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) Even 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) Regional Board member Dr. Longley also 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)

As an example of how the 2007 Order adversely affected smaller dairies, Dairy Cares of Sacramento estimated the average cost for a dairy to install their own individual monitoring well system to be \$42,000.00, and thousands of dollars each year thereafter for ongoing sampling, testing and reporting. 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.

In contrast, the administrative record contained no economic analysis or evidence that disputed the foregoing testimony that the proposed 2007 Order would be harmful, even fatal, to smaller dairies.

We requested data from the Regional Board staff that would reveal the report filing compliance rate of dairies, broken down by herd size. In response to our request, Jorge Baca, from the Regional Board, provided us with data concerning the dairies

dealt with by its Fresno office. But the compliance rate is not what is most meaningful in this data. Rather it is the rate of loss of dairies, by herd size, since the adoption of the 2007 Order.

This data shows the following with respect to the dairies that provided reports to the Fresno office:

<u>Herd Size</u>	<u>2007</u>	<u>2010</u>	<u>Attrition</u>
Less than 400 cows	56	30	-26 = 46% attrition
400 to 700 cows	92	62	-30 = 32% attrition
Over 700 cows	485	455	-30 = .6% attrition
Total	633	547	-86 = 13% overall attrition

In other words, only about half the number of smaller dairies filed reports in 2010 as compared to the number of smaller dairies that filed reports in 2007.

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 showed 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.

Other agencies recognized these facts. 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 (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 required smaller dairies to complete and file a two-page "Reporting Form" which does not require the involvement of expensive engineers.

Interestingly, the Central Valley Regional Board adopted such an approach when it adopted its Irrigated Lands Orders in 2013 by defining smaller farms and conferring on them special status and treatment.

Despite all of the foregoing, the Regional Board refused, in its 2007 Dairy Order, to adopt any waivers, or make any special provisions for, or grant any reporting relief to

smaller dairies. But there is absolutely nothing in the administrative record supporting the Regional Board's refusal to accommodate the smaller dairies in some meaningful way. While counsel argues in her Rebuttal Statement that the Regional Board "considered" and then "rejected" exempting small dairies because "it was necessary to regulate small dairies," she fails to point out any specific evidence in the administrative record that supports a decision to not exempt them, or to not provide a lesser burden of reporting on them. In the absence of such evidence in the administrative record, that decision was an abuse of discretion and violated state law.

This flaw in the 2007 Dairy Order, not only violates state law, it also puts smaller dairies in the Central Valley region at a greater competitive disadvantage with larger dairies in the Central Valley, with small dairies in the North Coast and San Francisco Bay region, and has played a role in the elimination of smaller dairies.

(d) The Regional Board has failed to show the "need" for us to install an individual groundwater monitoring system on our dairy site, or to join a Representative Monitoring Program.

1. The 2014 Complaint alleges in paragraph 12 that "The Discharger [us] is alleged to have violated the following sections of the Reissued General Order [2013 Dairy Order] and of the MRP:

- A) Provision G. 3 of the Reissued General Order, which states:
'The Discharger shall comply with the attached Monitoring and Reporting Program R5-2013-122 which is part of this Order, and future revisions thereto, or with an individual monitoring and reporting program, ...'"

Although the allegation is ambiguous, it appears that the 2014 Complaint is charging us with failure to either (1) install an individual groundwater monitoring well system on our dairy site, or (2) to join a Representative Monitoring Program.

2. 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 a representative monitoring program (RMP) that would monitor groundwater at a set of representative facilities. In a letter we sent to the staff on September 30, 2011, 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 well test reports, we wanted to ascertain how meaningful they needed to be in order for them to be acceptable. For this reason, we asked, "Where are their [Central Valley Representative Monitoring Program – CVRMP] monitoring wells located that would serve as the basis of information for our site?"

3. The Board's staff responded to our letter by letter dated November 9, 2011, but the letter never answered our question about the locations of the CVRMP groundwater wells. We had to ask again in a letter we sent Mr. Essary on November 29, 2011 as to the location of these CVRMP wells. Yet, the responding letter to us dated December 7, 2011 again failed to answer this very specific and direct question. We sent Clay Rodgers a letter dated May 11, 2012, which again called to his attention the obligations imposed by section 13267. 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.

4. On May 4, 2012, the Regional Board issued a Directive, ordering us to implement groundwater monitoring at our dairy. 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. One of the allegations of this Complaint is that we have violated this Directive and the 2007 Dairy Order by failing to install a groundwater monitoring system.

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 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." [Find comparable language in 2013 Order]

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 dairyman 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 engaged in a direct violation of the plain language of section 13267 and the 2007 Dairy Order, and 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 Dairy 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 consistently called to the staff’s attention that our dairy has continuously been the site of a dairy for over 80 years. We 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 brushed off 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.”

The Regional Board had the audacity to say this after demanding for ten years that we test our supply wells and send them the results. And they had the audacity to say this despite their 2007 Dairy Order, on page MRP-7, actually ordering dairymen to “sample each domestic and agricultural supply well,” and to submit the laboratory analysis for nitrate-nitrogen to it on an annual basis. After demanding these costly reports for over ten years they then told us that they were 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 that 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. 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. I checked with Dairy CARS/CVDRMP and was advised by email dated May 29, 2012 that it would accept my application to join the program. I also discovered that the nearest CVDRMP monitoring wells were about 45 miles from my dairy. And this was going to be treated by the Regional Board as meaningful information for our dairy?

5. 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. He threatened us with action if we did not comply, and he completely ignored our previous request for the locations of the RMP wells. We responded with a letter dated March, 26, 2013, in which we again asked for the location of the CVRMP groundwater wells. He sent us a letter dated April 19, 2013, which completely 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.

6. The Regional Board's incoherent behavior undermines its position. On the one hand, it has demanded supply well test results for over ten years, then rejects them as meaningless. It then demands we install monitoring wells on our dairy because these results would be more meaningful. Then it says that if we (and 1200 other dairymen) join an RMP, whose closest monitoring wells are many miles from our dairy, this would be an acceptable substitute and would satisfy their monitoring well requirements.

7. In short:

- (a) The RMP would not provide the Regional Board with meaningful information about the effect of our dairy operation on the groundwater beneath our site. For that reason alone it had no lawful right to require us to join it.
- (b) By accepting enrollment in an RMP as a *substitute* for an individual groundwater monitoring well system on a dairy (as they have for over 1200 dairies), the Regional Board reveals that it does not have the "need," as required under Water Code section 13267(b)(1), to require us to install an individual groundwater monitoring well system on our dairy site. For that reason, it had no lawful right to require us to install one.

Hence, the Regional Board has no lawful right to impose any civil liability assessment against us for refusing to join an RMP or for refusing to install an individual system on our dairy.

D. Counsel's collateral estoppel argument is invalid and without merit.

In her Rebuttal Statement, counsel contends that the doctrine of collateral estoppel precludes us from reasserting in our opposition to the 2014 Complaint the arguments we made in opposition to the 2010, 2011 and 2012 Complaints. She contends that our arguments have already been heard and rejected by the Regional Board. While this is true, it is legally irrelevant. These decisions by the Regional Board are not final

determinations. Water Code section 13330 confers upon us the right to have the State Board review them, and if we are not satisfied with the State Board's rulings, we can file Petitions for Writ of Mandate with the Superior Court, which will make an independent determination. Since these appeal rights have not been exhausted, there has been no final determination regarding these arguments. Thus, collateral estoppel does not apply.

E. The assessment analysis is flawed and improper, and the 2014 Complaint is an abuse of power and process and a violation of our civil rights.

The Regional Board staff is asking that the civil liability assessment in the 2014 Complaint be enhanced because this is the fourth year that we have failed to file Annual Reports. Indeed, the 2014 Complaint seeks an initial liability of \$5,950.00, then adjusts it upward to \$18,564 based upon our failure to file these earlier Annual Reports required under the 2007 Dairy Order.

The Regional Board staff knows that we have opposed these earlier Complaints (2011, 2012, and 2013), and it knows that we have appealed each of the Regional Board's decisions to the State Board by filing Petitions for Review, a recourse expressly afforded us under Water Code section 13330.

If, after we had exhausted the appeal remedies afforded us by law, the 2007 Dairy Order had been upheld as lawful and enforceable, we were prepared to comply with its reporting requirements. We commenced the appeal process with the expectation that the State Board would decide our Petitions for Review in a punctual and timely manner. It has been almost three years since filing our first appeal, yet all of these prior appeals are still pending before the State Board.

It is improper to assign fault to us because of the State Board's inaction in deciding the merits of our appeals. The Regional Board should complain to the State Board for its inaction, rather than to trying to punish us for it.

It is ironic that the Superior Court's order to set aside the *entire* 2007 Dairy Order in the *Asociacion* case constitutes the very relief that we were seeking in our appeals. Rather than order limited parts of the Order to be set aside, it is significant that the Court ordered the *entire* 2007 Order be set aside. We believe that the Court's order has rendered our appeals moot. Hence, it is almost certain that the State Board will not be inclined to act upon these appeals now.

In view of these circumstances, we believe this 2014 Complaint constitutes a blatant abuse of power and process, and violates our civil rights. In schoolyard terms, it would be characterized as "bullying."

F. We object to the Regional Board's attorneys engaging in a conflict of adverse interests.

We are aware that the attorney advising the Advisory Team and the attorneys advising the Prosecuting Team are all employees of the State Water Resources Control Board. In addition, the State Board is the public agency to which we must appeal any adverse ruling by the Regional Board. Such a situation constitutes a clear conflict of adverse interests. Under the State Bar's Rules of Professional Conduct, attorneys employed by the same public agency are treated the same as attorneys working for the same private law firm. The Rules proscribe attorneys from the same "firm" representing and advising adverse interests.⁸ The situation in which State Board's attorneys are placing themselves is tantamount to attorneys from the same law firm advising the plaintiff, the judge and the appellate court to which the case is appealed. Such conflicts of adverse interests must be fully disclosed to the parties and are not permitted unless all parties to the matter expressly waive the conflict. We do not waive it. This is a situation that the State Bar vigilantly strives to prevent, and it has a robust history of imposing discipline on offending attorneys.

Counsel, in her Rebuttal Statement, argues that these conflicting interests are resolved by the attorneys' roles being separated. This response completely misses what is demanded by the State Bar. Rather, all potential conflicts of adverse interests must be disclosed and the parties must waive them. As already stated, we **DO NOT WAIVE THEM**, and we demand that they be properly addressed forthwith!

Respectfully submitted,

James G. Sweeney

Amelia M. Sweeney

cc.

Electronic copies to:

Patrick Pulupa

Naomi Kaplowitz

Hard copies to:

Each Regional Board Member

⁸ California State Bar Rules of Professional Conduct, Rules 1-100, 3-310 and 3-320.

Pamela Creedon

Andrew Altevogt

Clay Rodgers, Doug Patten, Dale Essary

EXHIBIT B

James G. Sweeney and Amelia M. Sweeney
Appeal to Petition Under California Water Code Section 13320 for
Review by the State Resources Control Board of
Various Actions by the Central Valley Regional Water Quality
Control Board Regarding Sweeney Dairy and
Administrative Civil Liability Complaint No. R5-2014-0543

EXHIBIT "B"

Administrative Liability Order R5-2014-0119, received November 1, 2014
DATED OCTOBER 9, 2014



Central Valley Regional Water Quality Control Board

30 October 2014

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

CERTIFIED MAIL
7013 2250 0002 0661 9082

TRANSMITTAL OF ADOPTED ADMINISTRATIVE CIVIL LIABILITY ORDER FOR SWEENEY DAIRY, WDDID 5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY

Enclosed is an official copy of Order No. R5-2014-0119, as adopted by the California Regional Water Quality Control Board, Central Valley Region, at its 9 October 2014 meeting.

An official copy of the above Order has been posted on the Central Valley Water Board's website at:

http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/

If you have any questions, please contact me at (559) 445-5093 or at dale.essary@waterboards.ca.gov.

DALE E. ESSARY
Senior Engineer
Confined Animals Unit

Enclosure: Order No. R5-2014-0119

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2014-0119

IN THE MATTER OF

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

This Order is issued to James G. and Amelia M. Sweeney (hereafter Discharger) pursuant to California Water Code (Water Code) 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 Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2013-0122 (Reissued General Order), which was adopted by the Central Valley Water Board on 3 October 2013. The Reissued General Order replaces 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.
3. Water Code 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 2012 Annual Report by 1 July 2013 pursuant to the Central Valley Water Board's authority in accordance with Water Code section 13267.

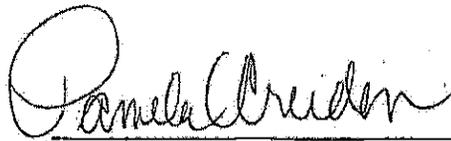
JAMES G. AND AMELIA M. SWEENEY
SWEENEY DAIRY
ACLO R5-2014-0119

5. The Discharger violated Water Code section 13267 by failing to submit the 2012 Annual Report required by the General Order and Monitoring and Reporting Program by the required deadline of 1 July 2013.
6. On 22 August 2013, the Central Valley Water Board staff issued a Notice of Violation pertaining to the missing report notifying the Discharger that the 2012 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.
7. On 8 July 2014, 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 2012 Annual Report.
8. On 17 July 2014, the Assistant Executive Officer, lead prosecutor for the Prosecution Team, issued Administrative Civil Liability Complaint (Complaint) No. R5-2014-0543 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$18,564 pursuant to Water Code section 13268 for the failure to submit the 2012 Annual Report.
9. Issuance of this Administrative Civil Liability Order to enforce Water Code 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).
10. 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.

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11. 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.
12. 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.
13. Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at:
http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED that pursuant to section 13323 of the Water Code, the Discharger shall make a cash payment of \$18,564 (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, Pamela Creedon, 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 9 October 2014.



Pamela C. Creedon Executive Officer

EXHIBIT C

James G. Sweeney and Amelia M. Sweeney
Appeal to Petition Under California Water Code Section 13320 for
Review by the State Resources Control Board of
Various Actions by the Central Valley Regional Water Quality
Control Board Regarding Sweeney Dairy and
Administrative Civil Liability Complaint No. R5-2014-0543

EXHIBIT "C"

**Submission of Evidence and Policy Statement regarding Hearing on Administrative
Civil Liability Complaint R5-2014-0543, including Exhibits nos. 1 through 74
DATED SEPTEMBER 3, 2014**

Date: September 3, 2014

To: Central Valley Regional Water Quality Control Board

Advisory Team

Pamela Creedon

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Prosecution Team

Clay Rodgers

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**Submission of Evidence and Policy Statement regarding Hearing on
Administrative Civil Liability Complaint R5-2014-0543**

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 R5-2014-0543(2014 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. The Central Valley Regional Water Quality Control Board shall hereinafter be referred to as the "Regional Board," and the "Board." The State Water Resources Control Board shall hereinafter be referred to as the "State Board."

B. Statement of Facts/Background.

1. We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 260 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 Dairy Order) ordered us, along with all other dairymen, to prepare and file Annual Reports with the Regional Board by

July 1 of the year following the year to which the Reports applied, commencing with July 1, 2010.

3. Because of our financial inability and other legal grounds, we asked the Regional Board for relief from the obligation to file the 2009 Annual Report due on July 1, 2010. But these requests were ignored by the Board. We did not file the Report due on July 1, 2010.
4. On May 5, 2011 an Administrative Civil Liability Complaint, R5-2011-0562, (2011 Complaint) was mailed to us for failing to file the 2009 Annual Report due on July 1, 2010. The 2011 Complaint sought to assess a civil liability against us in the amount of \$11,400.00.
5. On July 1, 2011, the 2010 Annual Report became due, but we did not file it because we were still seeking a hearing before the Regional Board to obtain relief from having to file these Annual Reports.
6. We appeared at the hearing on the 2011 Complaint before the Regional Board on October 13, 2011. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2011-0068, assessing an administrative civil liability of \$11,400.00 on us for failing to file the Report due July 1, 2010.
7. On November 9, 2011, we appealed the Regional Board's October 13, 2011 decision by filing a Petition for Review with the State Board (A-2190). Said petition/appeal is still pending decision before the State Board.
8. On May 4, 2012, the Regional Board mailed us a "Groundwater Monitoring Directive," ordering us to install either (a) an individual groundwater monitoring well system at our dairy, or (b) join a representative monitoring program (RMP) that will monitor groundwater at a set of representative facilities.
9. On May 9, 2012 an Administrative Civil Liability Complaint, R5-2012-0542 (2012 Complaint), was mailed to us for failing to file the 2010 Annual Report due on July 1, 2011. The 2012 Complaint sought to assess a civil liability against us in the amount of \$7,650.00.
10. On May 30, 2012, we filed a Petition for Review with the State Board appealing the Regional Board's adoption of the foregoing Groundwater Monitoring Directive. (A-2213) Said petition/appeal is still pending decision by the State Board.
11. The Regional Board held its hearing on the 2012 Complaint on August 2, 2012. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2012-0070, assessing an administrative civil liability of \$7,650.00 on us for failing to file the 2010 Annual Report due July 1, 2011.

12. On August 26, 2012, we appealed the Regional Board's August 2, 2012 decision, including its Order No. R5-2012-0070, by filing a Petition for Review with the State Board. (A-2225) Said petition/appeal is still pending decision before the State Board.
13. On November 6, 2012 the Court of Appeal for the Third Appellate District reversed the trial court's decision regarding a challenge to the 2007 Dairy Order, and remanded it back to the trial court.¹ On April 16, 2013, the Trial Court ordered the 2007 Dairy Order set aside.²
14. On May 9, 2013 an Administrative Civil Liability Complaint, R5-2013-0539 (2013 Complaint), was mailed to us for failing to file the 2011 Annual Report due July 1, 2012. The Complaint sought to assess a civil liability against us in the amount of \$20,400.
15. On July 25, 2013, the Regional Board held their hearing on the 2013 Complaint. At the end of the hearing, the Regional Board voted to adopt Order No. R5-2013-0091, assessing a civil liability of \$15,000.00 on us for failing to file the 2011 Annual Report due July 1, 2012.
16. On August 21, 2013, we appealed the Regional Board's July 25, 2013 decisions, including its Order No. R5-2013-0091, by filing a Petition for Review with the State Board. (A-2267) Said petition/appeal is still pending decision before the State Board.
17. On July 17, 2014, an Administrative Civil Liability Complaint, R5-2014-0543 (2014 Complaint), was mailed to us for failing to file the 2012 Annual Report due July 1, 2013. The 2014 Complaint seeks to assess a civil liability against us in the amount of \$ 18,564.00. This Statement is submitted in connection with our opposition to the 2014 Complaint.
18. As already stated, our appeals of the decisions/orders taken by the Regional Board in connection with the 2011 Complaint, 2012 Complaint, 2013 Complaint and of the Groundwater Monitoring Directive are still pending before the State Board. We had been waiting the exhaustion of our appeal rights to determine whether the Regional Board's 2007 Order was lawful and enforceable. It has been our position that if the completion of the appeal process concluded with a determination that we had no legal grounds upon which to not file the Annual Reports due in 2010, 2011, 2012 and 2013, then we would file them. We should not be treated as responsible for the State Board sitting on these appeals without acting upon them. It is the State Board that is depriving us of a resolution of these issues and is denying us due process.

¹ *Asociacion de Gente Unida por el Agua, et al., v. Central Valley Regional Water Quality Control Board*, (2012) 210 Cal. App. 4th 1255.

² *Asociacion de Gente Unida por Agua, et al., v. Central Valley Regional Water Quality Control Board*, Superior Court of the State of California, County of Sacramento, Case No. 34-2008-00003604CU-WM-GDS.

C. Documents/Evidence.

We are required to identify and provide all documents and other evidence that we intend to use or rely upon at the hearing. At the present time we intend to use or rely upon the following, which we identify and submit by reference because they are believed to already be in the files or otherwise in the possession of the Regional Board:

1. Regional Board's Report of Compliance Inspection for Sweeney Dairy, dated December 31, 1998.
2. Regional Board's Inspection Report letter for Sweeney Dairy, dated April 7, 2003.
3. Letter from the Regional Board to us, dated October 15, 2003, regarding our groundwater supply well test results:

Irrigation Well #1	Nitrate (NO3)	2.0 mg/L
Domestic Well	“ “	3.2 mg/L
4. Certificate of Analysis from BSK Laboratories to us, dated November 6, 2007, regarding our groundwater supply well test results:

Irrigation Well #1	Nitrate (NO3)	1.1 mg/L
Irrigation Well #2	“ “	1.2 mg/L
Domestic Well	“ “	3.2 mg/L
5. Reports from FGL Environmental to us, dated July 14, 2010, regarding our groundwater supply well test results:

Irrigation Well #1	Nitrate (NO3)	1.1 mg/L
Irrigation Well #2	“ “	.2 mg/L
Domestic Well	“ “	1.4 mg/L
6. Dairy Inventory Worksheet, dated December 12, 2009, prepared by us for Farm Credit West.
7. Jim Sweeney's letter to the Regional Board, dated March 28, 2010.
8. Jim Sweeney's letter to the Regional Board, dated April 7, 2010.
9. Regional Board's letter to the Sweeneys, dated June 15, 2010.
10. Jim Sweeney's letter to the Regional Board, dated June 27, 2010.

11. Regional Board's Notice of Violation sent to the Sweeneys on August 16, 2010.
12. Jim Sweeney's letter to the Regional Board dated August 22, 2010.
13. Regional Board's letter to Sweeneys from Clay Rodgers dated May 5, 2011 re Administrative Civil Liability Complaint R5-2011-0562.
14. Administrative Civil Liability Complaint, R5-20011-0562, (2012 Complaint) against James G. and Amelia M. Sweeney, dated May 5, 2011 (together with all attachments, including the Hearing Procedures).
15. Jim Sweeney's letter to the Regional Board, dated May 15, 2011.
16. Jim Sweeney's letter to the Regional Board, dated May 31, 2011.
17. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 8, 2011, regarding 2011 Complaint.
18. Transcript of July 14, 2011 hearing before the Hearing Panel regarding the 2011 Complaint.
19. Jim Sweeney's letter to Alex Mayer (Regional Board's legal counsel) dated September 5, 2011.
20. Email from Alex Mayer to Jim Sweeney, dated September 20, 2011.
21. Jim Sweeney's letter to Alex Mayer, dated September 21, 2011.
22. Email from Alex Mayer to Jim Sweeney, dated September 29, 2011
23. Second email from Alex Mayer to Jim Sweeney, dated September 29, 2011.
24. Jim Sweeney's letter to Alex Mayer, dated September 30, 2011.
25. Sweeneys' Written Testimony and Arguments to the Regional Board, dated October 2, 2011.
26. Transcript of hearing held on October 13, 2011 before Regional Board regarding the 2011 Complaint.

27. Email from Ken Landau to Jim Sweeney, dated October 25, 2011.
28. Sweeneys' Petition for Review to the State Board regarding the Regional Board's decisions at the October 13, 2011 hearing on the 2011 Complaint.
29. Groundwater Monitoring Directive from the Regional Board to Sweeneys, dated May 4, 2012.
30. Letter from Douglas Patteson to Sweeneys, dated May 23, 2012.
31. Email from Clay Rodgers to Jim Sweeney, dated May 27, 2012.
32. Sweeneys' Petition for Review to the State Board, dated May 30, 2012, regarding the Groundwater Monitoring Directive.
33. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 20, 2012, regarding the 2012 Complaint.
34. Transcript of hearing held on August 2, 2012 before the Regional Board regarding the 2012 Complaint.
35. Sweeneys' Petition for Review to State Board, dated August 26, 2012, regarding the Regional Board's decision at the August 2, 2012 hearing on the 2012 Complaint.
36. Sweeneys' Written Testimony and Arguments to the Regional Board, dated July 6, 2013, regarding the 2013 Complaint.
37. Sweeneys' Petition for Review to the State Board, dated August 21, 2013, regarding an appeal of the Regional Board's decision at the July 25, 2013 hearing on the 2013 Complaint.
38. Order No. R5-2007-0035, "Waste Discharge Requirements General Order for Existing Milk Cow Dairies," (2007 Dairy Order)
39. Order No. R5-2013- 0122, "Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies," (2013 Dairy Order)
40. The Administrative Record of all Public Hearings and Public Input, upon which Order No.s R5-2007-0035 and R5-2013- 0122 were based and adopted.

41. Water Quality Control Plan for the Tulare Lake Basin (2nd ed., 1995) and subsequent amendments thereto.
42. State Board Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California."
43. Final Report of Brown, Vence & Associates, "Review of Animal Waste Management Regulations – Task 4 Report (November, 2004)."
44. Study Findings, Recommendations, and Technical Report (Parts I & II) of the University of California Extension, entitled "Manure Waste Ponding and Field Application Rates (March, 1973).
45. NRCS Guidelines for Water Treatment Lagoons, Natural Resources Conservation Service Conservation Practice Standards, Code 359 (July, 2000). Please advise if your agency does not have a copy.
46. "Impact of Dairy Operations on Groundwater Quality," a research project conducted and a report prepared by the Lawrence Livermore National Laboratory in cooperation with the State Water Resources Control Board. The report was submitted to the State Board in August, 2009. We believe this report is in the possession of the Regional Board, and if it is not, please advise.
47. "Fate and Transport of Waste Water Indicators: Results from Ambient Groundwater and from Groundwater Directly Influenced by Wastewater," a report prepared by the Lawrence Livermore National Laboratory in connection with the State Water Resources Control Board. We believe this report is in the possession of the Regional Board, and if it is not, it is available at the State Board's website:
<http://www.swrcb.ca.gov/gamadocs.shtml>.
48. Jorge Bacca's (Regional Board) reporting data by herd size for both 2007 and 2010.

[The documents listed as 49 through 53 below were attached as exhibits to our Submission of Evidence and Policy Statement submitted to the Regional Board on June 19, 2012 in connection with ACLC R5-2012-0542]

49. California Dairy Herd Improvement Association (DHIA) dairy herd size and numbers, Central Valley, 2011. (As Exhibit 1)

50. San Francisco Bay Regional Water Quality Control Board Resolution No. R2-2003-0094, (As Exhibit 2)
51. San Francisco Bay Regional Water Quality Control Board, Annual Certification Reporting Form, Dairy Waiver Compliance Documentation (As Exhibit 3)
52. North Coast Regional Water Quality Control Board Order No. R1-2012-0002. (As Exhibit 4).
53. North Coast Regional Water Quality Control Board Order No. R1-2012-0003. (As Exhibit 5)

[The documents listed as 54 through 67 below were attached as exhibits to our Petition for Review to the State Board, dated May 30, 2012. A copy of the same was mailed to the Regional Board on the same date.]

54. Letter to Sweeneys from Dale Essary, dated August 22, 2011 (As Exhibit 1).
55. Letter from Sweeneys to Dale Essary, dated September 30, 2011 (As Exhibit 2).
56. Letter to Sweeneys from Douglas Patteson, dated November 9, 2011 (As Exhibit 3).
57. Letter from Sweeneys to Dale Essary, Douglas Patteson, and Clay Rodgers, dated November 29, 2011 (As Exhibit 4).
58. Letter to Sweeneys from Douglas Patteson, dated December 7, 2011 (As Exhibit 5).
59. Letter from Sweeneys to Douglas Patteson, Dale Essary, and Clay Rodgers, dated January 17, 2012 (As Exhibit 6).
60. Certified letter to Sweeneys from the Regional Board (Groundwater Monitoring Directive) (Pamela C. Creedon) dated May 4, 2012 (As Exhibit 7).
61. Letter from Sweeneys to Clay Rodgers, dated May 11, 2012 (As Exhibit 8).
62. Letter to Sweeneys from Douglas Patteson, dated May 23, 2012 (As Exhibit 9).
63. Email from Clay Rodgers to Sweeneys, dated May 27, 2012 (As Exhibit 10).
64. Webpage of Dairy Cares Central Valley Dairy Representative Monitoring Program and Fact Sheet (<http://www.dairycares.com/CVDRMP>) (As Exhibit 11).

65. Letter from Sweeneys to Douglas Patteson and Dale Essary, dated May 29, 2012 (As Exhibit 12).
66. Email to Sweeneys from J. P. Cativiela of the Central Valley Dairy Representative Monitoring Program, dated May 29, 2012 (As Exhibit 13).
67. Letter to Sweeneys from Dale Essary, dated July 19, 2012.
68. Letter from Sweeneys to the Regional Board, dated March 26, 2013.
69. Letter to Sweeneys from the Regional Board, dated April 19, 2013.
70. Opinion of the Court of Appeal for the Third Appellate District in the case of *Asociacion de Gente Unida por el Agua, et al. v. Central Valley Regional Water Quality Control Board*, (2012) 210 Cal. App. 4th 1255.
71. Order of the Superior Court of the State of California for the County of Sacramento in the case of *Asociacion de Gente Unida por el Agua, et al. v. Central Valley Regional Water Quality Control Board*, dated April 16, 2013, Case No. 34-2008-00003604CU-WM-GDS. **[Attached to this Statement as Exhibit A]**
72. Letter from us to the Regional Board, dated August 26, 2013.

[The document listed as 73 was attached as Exhibit A to our Petition for Review to the State Board, dated August 21, 2013. A copy of the same was mailed to the Regional Board on the same date.]

73. A peer-reviewed paper entitled, "When Does Nitrate Become a Risk for Humans?," authored by David S. Powlson, Tom M. Addicott, Nigel Benjamin, Kenneth G. Cassman, Theo M. de Kok, Hans van Grinsvin, Jean-Louis L'hirondel, Alex A. Avery and Chris Van Kessel, and published in the *Journal of Environmental Quality* 37:291-295 (2008).
74. A peer-reviewed paper entitled, "Saturated Zone Denitrification: Potential for Natural Attenuation of Nitrate Contamination in Shallow Groundwater Under Dairy Operations." The paper was prepared by Lawrence Livermore National Laboratory and the University of California, Davis, and was published in *Environmental Science and Technology*, 41:759-765 (2007). We sent the Regional Board a copy of this paper on October 29, 2013.

D. Witnesses.

1. Jim Sweeney. His arguments are set forth herein. He will take 20 minutes.
2. Matthew Sweeney, son of discharger. He may present some of the arguments set forth herein. He may take 10 minutes.

3. Clay L. Rodgers. He may be called to admit the facts regarding the Dairy Cares RMP. It will take 5 minutes.
4. Dale E. Essary. The same as above.
5. Douglas K. Patteson. The same as above.

We also reserve our right to use other evidence and witnesses not listed above if any come to light during the course of continuing to develop our case. We will notify you when such evidence or witnesses become known.

E. Legal Arguments and Analysis.

1. The 2007 Dairy Order is presently invalid and unenforceable because the Sacramento Superior Court ordered the Order set aside on April 6, 2013.

The 2014 Complaint alleges in paragraph 8 “that the Court’s decision did not affect the reporting requirements of the 2007 General Order” We disagree. As of July 1, 2014, the deadline specified by the 2007 Dairy Order for submission of the 2013 Annual Report to the Regional Board, the Trial Court had already ordered that the 2007 Order be set aside. The Trial Court’s order was occasioned by the Third District Court of Appeal finding on November 6, 2012 that “The 2007 Order’s monitoring plan upon which the order relies to enforce its no degradation directive is inadequate” because “there is not substantial evidence to support the findings.”³ Hence, many of the elements to be reported in the Annual Report were based upon a monitoring plan in the 2007 Order that the Appellate Court determined was flawed and unlawful.

However, suppose a court were to conclude that the April 6, 2013 order of the Trial Court to the Regional Board to set aside the 2007 Dairy Order did not have the effect of barring the Regional Board from seeking a civil liability assessment for our failure to file the 2012 Annual Report required under said Order. In such event, we would contend that the 2007 Dairy Order was still unlawful and unenforceable for all of the following reasons:

2. The 2007 Dairy Order is unlawful and unenforceable against us because it failed to comply with applicable law, including provisions of the Water Code and Government Code.

(a) The need for the 2007 Dairy Order was not supported by substantial evidence.

It is fundamental administrative law that no rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by substantial evidence. The Appellate Court in the *Asociacion* case cited herein confirmed the applicability of the foregoing precept.⁴ Part of the reason the Appellate Court overturned the Trial Court’s original decision was because “the Regional Board

³ *Asociacion*, p. 1287.

⁴ *Ibid*, p. 1282.

must ensure that sufficient evidence is analyzed to support its decision [to adopt the 2007 Dairy Order] and that the evidence is summarized in an appropriate finding.”⁵ It went on to add that “An administrative agency abuses its discretion where its order is not supported by the findings or where the findings are not supported by the evidence. (citation).⁶ It concluded that “The 2007 Order’s monitoring plan upon which the order relies to enforce its no degradation directive is inadequate” because “there is not substantial evidence to support the findings.”⁷

We have reviewed all 34,000 pages of the administrative record of the hearings held in connection with the adoption of the 2007 Dairy Order, and we found no substantial evidence in the administrative record – in fact, no evidence whatsoever – that supports the need to replace the pre-2007 Order reporting requirements with the new reporting requirements adopted in the 2007 Order. We found no substantial evidence in the record that the data, reports and information that the Regional Board staff obtained from or about dairies prior to its adoption of the 2007 Dairy Order were inadequate, insufficient, unreliable or otherwise flawed. And we have found no substantial evidence in the record that claimed or demonstrated that the new reporting requirements were necessary or needed to replace the pre-2007 Order requirements. We have made this argument to the Regional Board in connection with the 2011, 2012 and 2013 Complaints. This argument stands unchallenged and uncontroverted because, in each instance, the Regional Board staff has failed to argue or show otherwise.

(b) The Regional Board did not show the need for the reports specified in the 2007 Dairy Order and did not justify their burden, as required under Water Code section 13267 (b)(1).

The “Monitoring and Reporting Program” of the 2007 Dairy Order recites that it is issued pursuant to Water Code Section 13267. (2007 Dairy 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.”

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 Dairy 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

⁵ Ibid.

⁶ Ibid.

⁷ Ibid., p. 1287.

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. We have his letter dated April 17, 2003, confirming 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. The Regional Board required us to provide it with supply well test results. Indeed, its 2007 Order orders dairymen, on page MRP-7 to “sample each domestic and agricultural supply well” and to submit the test results for Nitrate-nitrogen to it on an annual basis.

In accordance with the Regional Board’s requests, we submitted test results from water samples taken from each of our supply wells in 2003, 2007 and 2010. The results 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); in fact, they are incredibly low.

We argued to the Regional Board staff that these test results are compelling evidence that our operation was and is not adversely impacting ground water, and therefore the cost of filing these reports 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.”

Despite the Regional Board’s prior requests for supply well test results and despite the 2007 Order requiring them, the Board’s 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.” If this was the case, why did the Regional Board require them?

(c)The 2007 Dairy Order failed 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.” If new and 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. In fact, the Appellate Court in the *Asociacion* case confirmed that “the agency [the Regional Board] should consider current technologies and costs”⁸

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.

At various times in the past, we have provided the Regional Board with relevant research papers to consider. For example, Lawrence Livermore National Laboratory published two papers in *Environmental Science Technology*, (2007) 41, 753-765. (The State Board has copies) 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 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 clay layers sitting beneath a dairy site and whether they constitute an impervious barrier between the dairy and the groundwater. Yet, the 2007 Dairy 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 were 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 once each month to prove we didn’t drive over the speed limit during the month.

We have read all 34,000 pages of the administrative record leading up to the adoption of the 2007 Dairy Order. We found no substantial evidence in the record that supports or justifies the need to regulate nitrates, considering the levels found in the groundwater 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 and it suggests that nitrates at the levels found in groundwater are not the health threat once believed. The paper further suggests that perhaps the current nitrate limits should be significantly raised because the health risks may be overstated.

⁸ Ibid., p. 1283.

In short, the 2007 Dairy Order's reporting requirements were excessive, unnecessary, overly burdensome, primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants and laboratories. The Regional Board did not sufficiently examine and consider recent research results and advanced testing technologies, and it did not modify its 2007 Order accordingly. We have made these arguments to the Regional Board during the hearings on the 2011 Complaint, the 2012 Complaint and on the 2013 Complaint. In each instance, these arguments were never challenged, disputed or rebutted by the Regional Board staff or their counsel.

(d) The 2007 Dairy Order failed 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.

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 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. (See AR 002089, AR 000384, AR 000444, AR 007297, AR 02397, AR 019632, AR 002163, and AR 000583)

As an example of how the 2007 Order adversely affected smaller dairies, Dairy Cares of Sacramento estimated the average cost for a dairy to install their own individual monitoring well system to be \$42,000.00, and thousands of dollars each year thereafter for ongoing sampling, testing and reporting. 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. Section 13241 of the Water Code requires the Regional Boards to take into account "economic considerations" in connection with its water quality objectives.

The administrative record contains no economic analysis or evidence that disputed the abundant testimony that the proposed 2007 Order would be harmful, even fatal, to smaller dairies.

We requested data from the Regional Board staff that would reveal the report filing compliance rate of dairies, broken down by herd size. In response to our request, Jorge Baca, from the Regional Board, provided us with data concerning the dairies

dealt with by its Fresno office. But the compliance rate is not what is most meaningful in this data. Rather it is the rate of loss of dairies, by herd size, since the adoption of the 2007 Order.

This data shows the following with respect to the dairies that provided reports to the Fresno office:

Herd Size	2007	2010	Attrition
Less than 400 cows	56	30	-26 = 46% attrition
400 to 700 cows	92	62	-30 = 32% attrition
Over 700 cows	485	455	-30 = .6% attrition
Total	633	547	-86 = 13% overall attrition

In other words, only about half the number of smaller dairies filed reports in 2010 as compared to the number of smaller dairies that filed reports in 2007.

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.

Other agencies recognize these facts. 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.

Significantly, the Regional Board adopted such an approach when it adopted its Irrigated Lands Orders in 2013. It put smaller farms into a special category.

Despite all of the foregoing, the Regional Board has refused to adopt any waivers, or make any special provisions for, or grant any reporting relief to smaller dairies, and none appeared in its 2007 Dairy Order or in its 2013 Dairy Order. Its refusal not only violated the law, but it put 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.

(c) The Regional Board has failed to show the “need” for us to install an individual groundwater monitoring system on our dairy site, or to join a Representative Monitoring Program.

1. The 2014 Complaint alleges in paragraph 12 that “The Discharger [us] is alleged to have violated the following sections of the Reissued General Order [2013 Dairy Order] and of the MRP:

- A) Provision G. 3 of the Reissued General Order, which states:
‘The Discharger shall comply with the attached Monitoring and Reporting Program R5-2013-122 which is part of this Order, and future revisions thereto, or with an individual monitoring and reporting program, ...’”

Although the allegation is ambiguous, it appears that the 2014 Complaint is charging us with failure to either (1) install an individual groundwater monitoring well system on our dairy site, or (2) to join a Representative Monitoring Program.

2. 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 a representative monitoring program (RMP) that would monitor groundwater at a set of representative facilities. In a letter we sent to the staff on September 30, 2011, 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 well test reports, we wanted to ascertain how meaningful they needed to be in order for them to be acceptable. For this reason, we asked, “Where are their [Central Valley Representative Monitoring Program – CVRMP] monitoring wells located that would serve as the basis of information for our site?”

3. The Board’s staff responded to our letter by letter dated November 9, 2011, but the letter never answered our question about the locations of the CVRMP groundwater wells. We had to ask again in a letter we sent Mr. Essary on November

29, 2011 as to the location of these CVRMP wells. Yet, the responding letter to us dated December 7, 2011 again failed to answer this very specific and direct question. We sent Clay Rodgers a letter dated May 11, 2012, which again called to his attention the obligations imposed by section 13267. 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.

4. On May 4, 2012, the Regional Board issued a Directive, ordering us to implement groundwater monitoring at our dairy. 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. One of the allegations of this Complaint is that we have violated this Directive and the 2007 Dairy Order by failing to install a groundwater monitoring system.

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 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.”[Find comparable language in 2013 Order]

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 engaged in a direct violation of the plain language of section 13267 and the 2007 Order, and 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 consistently called to the staff’s attention that our dairy has continuously been the site of a dairy for over 80 years. We 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 brushed off 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.”

The Regional Board had the audacity to say this after demanding for ten years that we test our supply wells and send them the results. And they had the audacity to say this despite their 2007 Order, on page MRP-7, actually ordering dairymen to “sample each domestic and agricultural supply well,” and submit the laboratory analysis for nitrate-nitrogen to it on an annual basis. After demanding these costly reports for over ten years they 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. 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. 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. I also discovered that the nearest CVDRMP monitoring wells were about 45 miles from my dairy. And this was going to be treated by the Regional Board as meaningful information for our dairy?

5. 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. He threatened us with action if we did not comply, and he completely ignored our previous request for the locations of the RMP wells. We responded with a letter dated March, 26, 2013, in

which we again asked for the location of the CVRMP groundwater wells. He sent us a letter dated April 19, 2013, which completely 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. [add allegation of filing appeal of Directive]

6. The Regional Board's incoherent behavior undermines its position. On the one hand, it has demanded supply well test results for over ten years, then rejects them as meaningless. It then demands we install monitoring wells on our dairy because these results would be more meaningful. Then it says that if we (and 1200 other dairymen) join an RMP, whose closest monitoring wells are many miles from our dairy, this would be an acceptable substitute and would satisfy their monitoring well requirements.

7. The way in which the Regional Board's staff continuously dodged answering our requests as to the location of the CVRMP monitoring wells would make anyone suspicious. The reason they refused to answer our questions about the location of the CVRMP groundwater wells is transparently clear; because these RMP wells that are so far removed from most dairies they provide no meaningful information about what is going on at the dairy in question. In other words, the RMP with Dairy CARES is a fraud and a sham. Most significantly, however, by accepting enrollment in an RMP as a substitute for an individual groundwater monitoring well system on a dairy (as they have for over 1200 dairies), the Regional Board has revealed that it does not have the "need" required under Water Code section 13267(b)(1) for individual groundwater monitoring wells on the dairy site itself.

F. The assessment analysis is flawed and improper, and the 2014 Complaint is an abuse of power and process and a violation of our civil rights.

The Regional Board staff is asking that the civil liability assessment in the 2014 Complaint be enhanced because this is the fourth year that we have failed to file Annual Reports. Indeed, the Complaint seeks an initial liability of \$5,950.00, then adjusts it upward to \$18,564 based upon our failure to file these earlier Annual Reports required under the 2007 Dairy Order.

The Regional Board staff knows that we have opposed these earlier Complaints (2011, 2012, and 2013), and it knows that we have appealed each of the Regional Board's decisions to the State Board by filing Petitions for Review, a recourse expressly afforded us under Water Code section 13320.

We were prepared to comply with these reporting requirements if, after we had exhausted the appeal remedies afforded us by law, the 2007 Order's provisions had been upheld as lawful and enforceable. We commenced the appeal process with the expectation that the State Board would decide our Petitions for Review in a punctual and timely manner. Yet, almost three years after filing our first appeal, all three of these prior appeals are still pending before the State Board.

It is improper to assign fault to us because of the State Board's inaction in deciding the merits of our appeals. The Regional Board should complain to the State Board for its inaction in these matters, rather than to trying to punish us for the inaction.

It is ironic that the Trial Court's order to set aside the *entire* 2007 Dairy Order in the *Asociacion* case constitutes the very relief that we were seeking in our appeals. Rather than order limited parts of the Order to be set aside, it seems significant that the Trial Court ordered the *entire* 2007 Order be set aside. We believe that the Trial Court's order has rendered our appeals moot. Hence, it is almost certain that the State Board will not act upon these appeals now.

In view of all of the circumstances outlined above, we believe this 2014 Complaint is entirely without merit, constitutes a blatant abuse of power and process, and violates our civil rights. In schoolyard terms, it would be characterized as "bullying."

G. We object to the Regional Board's attorneys engaging in a conflict of adverse interests.

We are aware that the attorney advising the Advisory Team and the attorneys advising the Prosecuting Team are all employees of the State Water Resources Control Board. In addition, the State Board is the public agency to which we must appeal any adverse ruling by the Regional Board. Such a situation constitutes a clear conflict of adverse interests. Under the State Bar's Rules of Professional Conduct, attorneys employed by the same public agency are treated the same as attorneys working for the same private law firm. The Rules proscribe attorneys from the same "firm" representing and advising adverse interests.⁹ The situation in which State Board's attorneys are placing themselves is tantamount to attorneys from the same law firm advising the plaintiff, the judge and the appellate court to which the case is appealed. Such conflicts of adverse interests must be fully disclosed to the parties and are not permitted unless all parties to the matter expressly waive the conflict. We do not waive it. This is a situation that the State Bar vigilantly strives to prevent, and it has a robust history of imposing discipline on offending attorneys.

⁹ California State Bar Rules of Professional Conduct, Rules 1-100, 3-310 and 3-320.

Respectfully submitted,

James G. Sweeney

Amelia M. Sweeney

cc.

Electronic copies only:

Patrick Pulupa

Naomi Kaplowitz

Hard copies only:

Pamela Creedon

Andrew Altevogt

Clay Rodgers and Doug Patteson

Electronic and hard copies:

Dale Essary

EXHIBIT D

James G. Sweeney and Amelia M. Sweeney
Appeal to Petition Under California Water Code Section 13320 for
Review by the State Resources Control Board of
Various Actions by the Central Valley Regional Water Quality
Control Board Regarding Sweeney Dairy and
Administrative Civil Liability Complaint No. R5-2014-0543

EXHIBIT "D"

Transcript of Hearing of October 9, 2014
DATED CERTIFIED OCTOBER 14, 2014

MEETING
STATE OF CALIFORNIA
CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD
PARTIAL TRANSCRIPT
AGENDA ITEM NO. 8

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

October 9, 2014, 9:00 a.m.

Reported by:
Kent Odell

 ORIGINAL

Item 8. James G. and Amelia M. Sweeney, Sweeney Dairy,
Tulare County - Consideration of Administrative
Civil Liability Complaint R5-2014-0543 and
Recommended Administrative Civil Liability
Order

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P R O C E E D I N G S

OCTOBER 9, 2014 2:42 P.M.

Item 8. James G. and Amelia M. Sweeney, Sweeney Dairy, Tulare County - Consideration of Administrative Civil Liability Complaint R5-2014-0543 and Recommended Administrative Civil Liability Order.

CHAIRMAN LONGLEY: We're back in session.

This is Agenda Item 8. This is the time and place for public hearing to consider an Administrative Civil Liability Order issued by the Executive Officer of the Sweeney Dairy in Tulare County. Is there anyone present who is contesting the proposed actions and wishes to present evidence or testimony on this matter?

Would those individuals who are present wishing to contest this item please stand at this time -- oh, I'm wrong, excuse me, there is no oath associated with this --

MR. ALTEVOGT: Yeah there is on the

second page. Look on the second page.

CHAIRMAN LONGLEY: Yeah.

(Swearing in)

Do you swear the testimony you are about to give is the truth? If so, answer "I do."

1 Thank you very much.

2 The designated parties for this
3 proceeding are as follows: the Board's
4 Prosecution Team and Sweeney Dairy. All those
5 parties are considered interested persons. The
6 Prosecution Team has a combined total of 30
7 minutes for direct testimony, cross examination,
8 and a closing statement. Sweeney Dairy shall
9 have a total of 30 minutes for the same.
10 Interested persons should limit their comments to
11 three minutes.

12 Pursuant to Government Code Section
13 11126C3, please note that the Board may meet in
14 closed session to deliberate on a decision to be
15 reached based upon evidence introduced in the
16 hearing.

17 At this time, evidence should be
18 introduced on whether Sweeney Dairy should be
19 assessed an Administrative Civil Liability Order
20 in the amount of any liability.

21 The order of this hearing is as follows:
22 testimony and cross examination of the
23 Prosecution Team, testimony and cross examination
24 of Sweeney Dairy, comments by interested persons,
25 and finally a closing statement by Sweeney Dairy,

1 followed by a closing statement from the
2 Prosecution Team.

3 Please state your name, address,
4 affiliation, and whether you have taken the oath
5 before testifying. If you have not submitted a
6 speaker card yet, now is the time to submit one
7 to Ms. Lanfranchi-Rizzardi, sitting at the table
8 over here.

9 Does Regional Board Advisory Team Counsel
10 have any legal issues to discuss at this time?

11 MR. COUPE: Not at this time.

12 CHAIRMAN LONGLEY: There you are, okay.
13 Are there any procedural issues that the
14 designated parties would like to raise?

15 I hear none, therefore we will proceed
16 with the Prosecution Team's testimony.

17 MR. ESSARY: Good afternoon, Chair
18 Longley and Board members. My name is Dale
19 Essary. I am a Senior Engineer for the Dairy
20 Compliance Unit in the Fresno Office, and I have
21 taken the oath.

22 I am presenting for the Board's
23 consideration today the recommended
24 Administrative Civil Liability against James G.
25 Sweeney and Amelia M. Sweeney for failure to

1 comply with the Dairy General Order.

2 Throughout this presentation, we will
3 refer to James and Amelia Sweeney collectively as
4 the Discharger.

5 I will provide an overview of the
6 penalties alleged by the Prosecution Team. Naomi
7 Kaplowitz, Staff Counsel with the State Water
8 Board Office of Enforcement, will provide the
9 Prosecution Team's rebuttal to the Discharger's
10 legal arguments.

11 The Dairy General Order was adopted in
12 May of 2007, following extensive interactions
13 with the Dairy industry and other interested
14 stakeholders. Care was taken during the
15 preparation of the General Order to ensure that
16 dairies would be protective of water quality and
17 would have a cost-effective monitoring program to
18 verify compliance.

19 The Board issued their Regional Order in
20 October of 2013, which replaces the 2007 Dairy
21 General Order and accompanying this monitoring
22 program.

23 Under the Dairy General Order, Annual
24 Reports are due the first day of July of each
25 year for activities conducted during the previous

1 calendar year. Annual Reports are critical to
2 confirm that monitoring has been conducted and
3 that the Dairy is operated in compliance with the
4 General Order.

5 Unlike other types of technical reports,
6 monitoring data must be collected in a timely
7 manner and cannot be recreated after the fact.

8 The Discharger owns and operates Sweeney
9 Dairy located near the City of Visalia in Tulare
10 County. The facility is in an area with
11 naturally occurring good groundwater quality and
12 shell dense (phonetic) up gradient from Visalia.

13 A Report of Waste Discharge was received
14 from the Discharger in October of 2005 and
15 coverage under the Dairy General Order began in
16 June of 2007 with the maximum allowable herd size
17 of 334 mature cows.

18 I will now provide an overview of the
19 Dischargers violation as alleged by the
20 Prosecution Team. The Complaint alleged one
21 violation that the Discharger failed to submit
22 the 2012 Annual Report.

23 On August 22nd of 2013, Central Valley
24 Water Board staff issued a Notice of Violation
25 that urged the Discharger to submit the

1 delinquent report as soon as possible to minimize
2 the potential liability. The Discharger
3 submitted a response which Ms. Kaplowitz will
4 discuss later in more detail.

5 To date the 2012 Annual Report has not
6 been submitted for this facility. On July 8th of
7 2014, Central Valley Water Board staff issued a
8 pre-filing settlement letter notifying the
9 Discharger that the Board was in the process of
10 assessing Civil Liability for this alleged
11 violation.

12 The Discharger was provided the
13 opportunity to meet with staff and submit any
14 other information that would be relevant to
15 determining an appropriate monetary amount. The
16 letter also indicated that since its staff did
17 not receive a response, a Civil Liability
18 Complaint would be issued. The Discharger did
19 not respond to the pre-filing settlement letter.

20 The Prosecution Team issued an
21 Administrative Civil Liability Complaint to the
22 Discharger on July 17, 2014 in the amount of
23 \$18,564 for failure to submit the 2012 Annual
24 Report. The Complaint included a waiver from
25 forms that provided the Discharger with an option

1 to waive their right to a 90-day hearing and
2 enter into settlement discussions with the
3 Prosecution Team. The Discharger declined to
4 submit the waiver.

5 The Monitoring and Reporting Program was
6 issued under authority of the California Water
7 Code, which allows the Central Valley Water Board
8 to require the submission of technical reports
9 including annual monitoring reports. Any person
10 failing to furnish such a technical report may be
11 civilly liable for a maximum of \$1,000 for each
12 day of violation. This would result in a maximum
13 penalty of \$353,000 in this case.

14 I will now give a general overview of how
15 civil liability is determined. The California
16 Water Code requires Regional Water Boards to
17 consider several factors in determining an
18 appropriate liability amount to ensure that
19 penalties are assessed in a fair and consistent
20 manner.

21 The methodology is described in the State
22 Water Board's Water Quality Enforcement Policy,
23 which incorporates the factors listed in the
24 Water Code. The penalty calculations are
25 provided in more detail in Attachments A and B of

1 the Complaint, hard copies of which have been
2 provided to you today.

3 Following the State Water Board
4 Enforcement Policy, an initial per day liability
5 factor of .35 was calculated based on the
6 potential for harm and the deviation from
7 requirements for non-discharge violations.

8 The penalty calculation methodology
9 provides a process that reduces the number of
10 days by using a multiple day approach for certain
11 violations that occurred over an extended period
12 of time.

13 Reporting violations that do not cause
14 daily impacts to the environment and do not
15 confer daily economic benefit to the Discharger
16 qualify for a collapsed day approach. Therefore,
17 the 353 total days of violation were reduced to
18 17 days for the calculation of liability for the
19 violation.

20 The methodology also considers adjustment
21 factors for culpability, cleanup and cooperation,
22 and history of violations. The adjustment factor
23 for culpability was assigned a value of 1.2
24 because the Discharger knowingly failed to submit
25 the Annual Report.

1 The adjustment factor for cleanup and
2 cooperation was assigned a value of 1.3 because
3 the Discharger was issued a Notice of Violation
4 and did not cooperate with the Water Board to
5 come back into compliance afterward. The
6 violation is a non-discharge violation and thus
7 cleanup is not applicable.

8 Based on its history of violations, the
9 Discharger was given a score of 2. The Central
10 Valley Water Board adopted Administrative Civil
11 Liability Orders in 2011, 2012, and 2013 for
12 failure to submit Annual Reports and a Waste
13 Management Plan and for failure to comply with
14 Section 13267 in the Groundwater Monitoring
15 Order.

16 The Discharger has petitioned all three
17 of these Orders and, to date, has failed to
18 comply with any of these requirements.

19 Central Valley Water Board staff
20 considered that the Discharger has the ability to
21 pay the total amount of liability because the
22 Discharger owns the dairy property and thus has a
23 significant asset and continues to offer the
24 dairy business.

25 The Discharger has not provided any

1 pertinent information that would demonstrate an
2 inability to pay the liability amount.

3 The Enforcement Policy states that
4 liability penalties should be at least 10 percent
5 higher than the economic benefit to the
6 Discharger. It is estimated that the Discharger
7 experienced an economic benefit of approximately
8 \$1,500. This represents the avoided cost of
9 completing the 2012 Annual Report.

10 By using the liability calculation
11 methodology, the Prosecution Team proposes a
12 total liability of \$18,564.

13 I will now turn the presentation over to
14 Prosecution Team Counsel, Naomi Kaplowitz.

15 MS. KAPLOWITZ: Good afternoon, Mr.
16 Chairman and members of the Board. My name is
17 Naomi Kaplowitz and I'm counsel for the
18 Prosecution Team. I will be presenting the
19 Prosecution Team's legal arguments and responses.
20 A copy of the Discharger's evidence and our
21 rebuttal have been provided in your agenda
22 materials.

23 I'd like to remind the Board at this time
24 that the only alleged violation before you today
25 is the Discharger's failure to submit the 2012

1 Annual Report. As Board members recall, this
2 Board imposed Administrative Civil Liability in
3 2011 for \$11,400; in 2012 for \$7,650; and in 2013
4 for \$15,000. The Discharger petitioned each of
5 these Orders, however, the State Board has not
6 yet ruled on the merits of those petitions and
7 the Discharger has not received a stay.

8 I will now summarize some of the
9 Prosecution Team's main points. The Discharger
10 first argues that the Dairy General Order was
11 invalidated by a Writ of Mandate following the
12 Association de Gente Unida por el Agua for
13 Central Valley Water Board Court Decision, which
14 I will hear after 2S, the Agua Decision
15 (phonetic.)

16 The Agua case held that the Central
17 Valley Water Board violated the State Anti-
18 Degradation Policy. Based on that ruling, a Writ
19 of Mandate was issued to the Central Valley Water
20 Board ordering the Board to set aside the Dairy
21 General Order in accordance with the Agua
22 Decision.

23 In response, the Central Valley Water
24 Board did set aside the Dairy General Order in
25 October 2013 when it adopted the reissued Dairy

1 General Order, which readdresses the deficiency
2 that was cited in Agua. Thus, the General Dairy
3 Order was still valid through the July 2013
4 period in which the subject Annual Report
5 violation occurred and is enforceable at present.

6 The Agua Court found that the Dairy
7 General Order was deficient in regard to
8 groundwater degradation prevention, yet the
9 Discharger attempts to extrapolate from Agua that
10 it is no longer required to monitor or otherwise
11 comply with the requirements of the Dairy General
12 Order. By asserting this, the Discharger fails
13 to recognize that the intent and effect of the
14 Agua Decision was to strengthen the requirements
15 of the Dairy General Order, not get rid of them.

16 Next, the Discharger argues that the
17 Dairy General Order is unlawful and unenforceable
18 for a variety of other reasons. These arguments
19 are virtually identical to those made by the
20 Discharger before this Board in 2011, 2012, and
21 again in 2013. They were rejected in the
22 adoption of the three Administrative Civil
23 Liability Orders, yet the Discharger attempts to
24 raise them again today, and asks that you reach a
25 contrary result.

1 This Board has already determined that
2 the Discharger is required to submit Annual
3 Reports. We ask that you maintain consistency
4 and reject these arguments today as you did in
5 previous proceedings.

6 Further, challenging the propriety of the
7 Dairy General Order in the context of an
8 enforcement proceeding is not appropriate, it is
9 a collateral attack on the order, meaning that
10 the Discharger is challenging the order outside
11 the proper appeals procedure in an attempt to
12 take a second bite of the apple.

13 The window to challenge the Dairy General
14 Order was the 30-day period following its
15 adoption on May 3, 2007. After that time, the
16 General Order was considered final. The
17 Discharger did file a timely petition challenging
18 the reissued General Order, but has not received
19 a stay in regard to that petition.

20 The Discharger's attack on the legality
21 of the order today should be dismissed as
22 untimely.

23 In addition to the procedural bases I
24 have discussed for dismissing the Discharger's
25 arguments, the arguments lack merit; first, the

1 Discharger argues that the Dairy General Order is
2 not supported by substantial evidence. The
3 Discharger raises Agua here again and argues that
4 the case supports its assertions regarding a lack
5 of substantial evidence. Once again, this is a
6 misconstruction of the Agua decision. The Agua
7 Court instead ruled that there was not enough
8 substantial evidence to support the contention
9 that the Dairy General Order complied with State
10 Anti-Degradation policy. The Agua Court did not
11 hold, as the Discharger contends, that the Dairy
12 General Order lacks substantial evidence to
13 support the need for a Monitoring and Reporting
14 Program.

15 Next, the Discharger argues that the
16 Board failed to provide a written explanation
17 regarding the need for the monitoring reports and
18 justifying the burden. This requirement,
19 however, is satisfied by the language in the
20 General Order and in the accompanying information
21 sheet, which describe why monitoring is needed,
22 and it was detailed in the previous proceeding.

23 The Discharger also raises arguments
24 regarding economics. This Board has been
25 sensitive to the hardship faced by the Dairy

1 industry and has acted to ameliorate it. For
2 example, reporting software provides dairies with
3 a means to produce Annual Reports without
4 consultants. In addition, revisions were made to
5 the Dairy General Order in 2009 and again in
6 2011, extending waste management handy dates and
7 providing for groundwater monitoring coalitions.
8 Those changes were made in response to economic
9 considerations.

10 The Discharger asserts that the Central
11 Valley Water Board staff did not provide inside
12 information regarding the representative
13 groundwater monitoring coalition to the
14 Discharger. This issue is not relevant to the
15 subject complaint, which only alleges a violation
16 for failing to submit the 2012 Annual Report.
17 Contrary to the Discharger's assertion, the
18 Central Valley Water Board staff does not have an
19 obligation to convince dairies to join a
20 representative groundwater monitoring program,
21 only to provide information to be able to do so.
22 Staff did, in fact, provide that information to
23 the Discharger, which is accounted in detail in
24 the Prosecution Team's rebuttal brief.

25 Next, the Discharger asserts that the

1 attorneys for the Advisory and Prosecution Teams
2 are both employed by the State Water Board, which
3 they assert creates a conflict of interest. The
4 hearing procedures which were provided to the
5 Discharger clearly state that the functions of
6 those who act in a prosecutorial role known as
7 the Prosecution Team are separated from those who
8 will provide legal and technical advice to the
9 Board, and are known as the Advisory Team.

10 Moreover the hearing procedures provide
11 further assurance of fairness and impartiality by
12 forbidding the designated parties and interested
13 persons from engaging in ex parte communications
14 regarding this matter. Accordingly, the
15 Discharger's accusation that the Advisory and
16 Prosecution Teams have a conflict of interest is
17 meritless and should be rejected.

18 The Discharger is asking you to treat its
19 Dairy differently from others in the region. The
20 Discharger does not believe that the requirement
21 to submit Annual Reports should apply.

22 The majority of dairymen in the Central
23 Valley work hard to produce quality products
24 while complying with environmental laws. They
25 expend time and money to submit the reports

1 required under the General Order. Dairymen that
2 do not comply with these requirements receive an
3 economic advantage over those that do. The
4 Central Valley Water Board Prosecution Team
5 perceives enforcement against non-compliers in
6 part to ensure that people are treated fairly and
7 consistently.

8 I will now turn the presentation back
9 over to Mr. Essary for our conclusion and
10 recommendations.

11 MR. ESSARY: By failing to provide the
12 Annual Report, the Discharger violated Section
13 13267 of the California Water Code. The maximum
14 penalty allowed under the Water Code is \$353,000.
15 Based on the methodology for liability
16 calculations defined in the enforcement policy,
17 the Prosecution Team recommends that the Board
18 make findings of fact and conclusions of law
19 confirming complaint no. R5-2014-0543 for a
20 liability of \$18,564.

21 A proposed Administrative Civil Liability
22 Order is included in your package. We recommend
23 that the Board adopt this Order.

24 I would like to submit this presentation,
25 the agenda package, and the Central Valley Water

1 Board files referenced in the Agenda package into
2 the record. This concludes our presentation and
3 we are available to answer any questions.

4 CHAIRMAN LONGLEY: Thank you, Mr. Essary.
5 Do the Board members have any questions at this
6 time?

7 MS. RAMIREZ: I do.

8 CHAIRMAN LONGLEY: Go ahead, Carmen.

9 MS. RAMIREZ: First thing is sort of just
10 a comment. I noticed it was mentioned in our
11 materials and also that the Sweeney's had an
12 opportunity to waive the hearing and enter in
13 negotiations. I don't know, I guess it almost
14 sounds like it's said to prejudice them for
15 wanting a hearing, I'm sure that's not the
16 intent, but it kind of sounds like that.

17 My question is, when you were going back
18 to slide 9, I may have misheard what you said
19 about what is required before a penalty can be
20 collapsed. I thought I heard you say that it
21 must not have an economic benefit? Is that --?

22 MR. ESSARY: Yes. I stated that
23 reporting violations that do not cause daily
24 impacts to the environment and do not confer a
25 daily economic benefit to the Discharger.

1 MS. RAMIREZ: Okay, so it has to have
2 both elements --

3 MR. ESSARY: Yes.

4 MS. RAMIREZ: -- before it can't be
5 combined. Okay. I was just going to state sort
6 of my position as to Slide 10, I guess I had a
7 question on the culpability factor of 1.2, I
8 guess that was elevated because staff pointed out
9 that there had been previous failures to submit
10 required reports. Was that the reason for the
11 multiplier?

12 MR. ESSARY: No, that would apply to the
13 history of violations. Culpability factor 1.2 is
14 explained in a little more detail in Attachment
15 A.

16 CHAIRMAN LONGLEY: Would you please --

17 MS. KAPLOWITZ: Summarize it?

18 CHAIRMAN LONGLEY: Yeah, summarize the
19 culpability factor, what basis --

20 MR. CONSTANTINO: And also, what is the
21 range of options? Is everything from 1 or 2 or
22 02?

23 MS. KAPLOWITZ: Yeah, so for culpability,
24 it can range anywhere from .5 to 1.5, and
25 culpability really speaks to kind of the

1 knowledge and frame of mind with which the
2 Discharger was acting in regard to conducting
3 whatever action that led to the violation. So
4 here we, the Prosecution Team, showed a
5 culpability factor of 1.2 based on the fact that
6 this violation was done knowingly and willfully.
7 The Discharger had knowledge of the requirements
8 and knowingly and willfully did not comply.

9 MR. CONSTANTINO: But with a discharger
10 who knowingly didn't comply three years in a row,
11 why wouldn't the culpability factor be 1.5?

12 MS. KAPLOWITZ: It could be.

13 MR. CONSTANTINO: But what was the logic?

14 MR. ESSARY: In the three assessments,
15 the culpability factor was 1.0, and legal counsel
16 advised us to increase that this time.

17 CHAIRMAN LONGLEY: Mr. Rodgers.

18 MR. RODGERS: Hi, this is Clay Rodgers,
19 Assistant Executive Officer. I mean, basically
20 we have been going through a progressive phase
21 where we increase it incrementally each time.
22 You know, we could have easily chosen to go to
23 1.5, we didn't. I believe we went from 1.1 to
24 1.2, and that's where we decided. Certainly in
25 this case we could have easily gone higher, but

1 we chose not to.

2 MS. RAMIREZ: And I appreciate that,
3 especially given that, as I recall from previous
4 hearings and today's evidence that I think that
5 their objection in this report is based on
6 principle, as opposed to just refusing. I think
7 that they said that there's a legal argument as
8 to why they don't have to submit this.

9 Counsel mentioned that the Sweeney's
10 don't have a stay and I was just wondering what
11 it takes to get a stay from these kinds of
12 proceedings.

13 MR. RODGERS: Well, my understanding,
14 counsel can correct me if I'm wrong, Clay Rodgers
15 again, is that when they filed their petition,
16 they could request a stay from the State Board
17 that basically would stay the implementation of
18 further requirements upon them. They have not
19 received a stay, to my knowledge I'm not sure
20 they requested a stay, but they continue since
21 they do not have a stay, to be obligated to
22 comply with the Order. And that was the nature
23 of that comment.

24 MR. PULUPA: If I could, we wouldn't want
25 to run the clock on some of these comments. For

1 legal advance, you probably want to direct it
2 over here because that's the Prosecution Team's
3 position on that. But, you know, I just want to
4 make sure that they're seen through a particular
5 lens and that's kind of the role that is set up
6 for them.

7 For a legal stay, for a traditional order
8 like a WDR, or perhaps a Monitoring and Reporting
9 Order, a Cleanup and Abatement Order, a stay is
10 usually a pretty big deal because that means that
11 -- and generally you compromise -- if abiding by
12 the terms of the Order would compromise your
13 position in more than just a financial manner, in
14 other words, you can't go back from complying
15 with the Order, then you can get a stay at the
16 State Board's level if the State Board finds that
17 there's merit to the arguments that you're making
18 in the context of a Petition.

19 With an Administrative Civil Liability
20 Order, it's a little different because
21 essentially the Water Code itself almost operates
22 as an automatic stay for the collection of the
23 financial penalty associated with the
24 Administrative Civil Liability Order, so while
25 that issue is brewing with the State Water Board,

1 we can't go where the State Water Board's Cleanup
2 and Abatement Account can't go and get a money
3 judgment and go forward with collection
4 proceedings, so a stay is less important in the
5 Administrative Civil Liability context, again,
6 because there's just dollars at stake and we
7 can't collect those dollars.

8 MS. RAMIREZ: Okay, I guess I'll just
9 reserve the rest of my thoughts until I hear from
10 the Sweeney's and other Board members. Thank
11 you.

12 CHAIRMAN LONGLEY: Any further questions?

13 MR. CONSTANTINO: Like Carmen, I think I
14 have a couple more questions for Patrick after we
15 hear both sides.

16 CHAIRMAN LONGLEY: Very good. Does
17 Sweeney Dairy wish to cross examine?

18 MR. SWEENEY: Yes, please. My name is
19 Jim Sweeney. My name is Jim Sweeney and this is
20 my wife, Amelia, and we have taken the oath. And
21 I'd like to know what date your letter for
22 settlement was dated.

23 CHAIRMAN LONGLEY: Mr. Essary. Mr.
24 Essary, state your name if you're going to
25 answer. Can you answer from there so people

1 aren't backing up?

2 MR. ESSARY: Dale Essary. I have a copy
3 here dated 8 July 2014.

4 MR. SWEENEY: And when did you give us
5 the time that we had to respond by?

6 MR. ESSARY: I gave you until 11 July
7 2014.

8 MR. SWEENEY: Okay, so you mailed this
9 letter on the 8th and we were supposed to respond
10 to it by the 11th. Is that normal policy?

11 MR. ESSARY: We also emailed it directly
12 to you on the same day.

13 MR. SWEENEY: Yes, you did and I --

14 MS. RAMIREZ: Would you answer the
15 question whether or not that's normal policy?

16 MR. PATTESON: I would say yes --

17 CHAIRMAN LONGLEY: Could you state your
18 name, please?

19 MR. PATTESON: Oh, sorry, Doug Patteson,
20 Supervising Engineer for the Regional Board, the
21 Fresno Office. And I will point out that the
22 date we requested a response by was for the
23 decision on whether or not they would like to
24 enter into settling the grievance, not any kind
25 of deadline for submitting evidence or anything

1 like that.

2 MS. RAMIREZ: Right, but I think the
3 question is, is that a normal turnaround time?

4 MR. PATTESON: I have enough experience
5 issuing ACLs that --

6 MR. RODGERS: May I weigh in on this?
7 Clay Rodgers, the Assistant Executive Officer.
8 And I would probably use the reality pretty quick
9 for how we normally do this, we were in a
10 situation where we had taken additional time to
11 do that in past efforts with no success of being
12 able to come to any kind of settlement. We
13 wanted to offer the Sweeney's the opportunity to
14 let us know, had they desired to do that, we were
15 coming up on the deadline in order to meet the
16 October issue that we have the 90-day hearings,
17 we try to preserve as much of that; again, we
18 certainly could have entered into settlement
19 negotiations if they had desired after that date,
20 and after the Administrative Civil Liability
21 Complaint was issued. And to my knowledge there
22 was no desire on the part of the Sweeney's to
23 enter into any type of settlement discussion. So
24 it was a little bit quick, but again we don't
25 have a standard timeframe, we do this on a case

1 by case basis, and because of the timeframes
2 involved, because of past history, we felt that
3 that was appropriate in this case.

4 MS. RAMIREZ: Okay, I guess just what I
5 found is just, you know, from the 8th to the 11th
6 is a little quick, I mean, even in civil
7 procedures --

8 MR. SWEENEY: Noon of the 11th.

9 MS. RAMIREZ: You know, in civil
10 procedure they add an extra five days for mailing
11 because sometimes it takes that long. So I guess
12 it's likely, I don't know if this actually
13 happened but it could have been likely that the
14 letter didn't even arrive until after the cutoff
15 date. But certainly that's not issue that makes
16 or breaks this case, but I wanted to make sure
17 Mr. Sweeney got an answer to his question.

18 MR. RODGERS: No, I agree, and also I do
19 want to clarify that, again, that was emailed
20 based upon our experience, Mr. Sweeney picks up
21 his email fairly quickly --

22 MR. SWEENEY: No, that's not true at all.

23 MS. RAMIREZ: Okay, thank you.

24 MR. RODGERS: -- and that was an ACL
25 settlement date, it was not something we're

1 obligated to do, it was a courtesy.

2 MS. RAMIREZ: Okay. All right, Mr.

3 Sweeney, continue to cross.

4 MR. SWEENEY: Okay, and I'd like to go
5 back to the slide that Dale had on the history of
6 violations. Okay, do we not have a legal right
7 to appeal this decision?

8 UNIDENTIFIED SPEAKER: You do have that
9 right.

10 MR. SWEENEY: Okay, but you can penalize
11 us for appealing the decisions.

12 MS. KAPLOWITZ: The penalization here as
13 determined is not because you have petitioned
14 those, it's based on the factors that are
15 outlined in our enforcement policy and based on
16 the history of violations, they are not based on
17 the petition.

18 CHAIRMAN LONGLEY: Ms. Kaplowitz,
19 obviously you're pretty to identify up there, but
20 this is on the record and being recorded. I
21 would greatly appreciate if when you folks are
22 replying that you identify who is saying what.

23 MS. KAPLOWITZ: Fine, Mr. Chairman.

24 CHAIRMAN LONGLEY: Thank you.

25 MR. SWEENEY: Okay, could you see where a

1 Judge might consider this obstruction of justice
2 by not allowing us, you know, by trying to make
3 it so that we do not appeal?

4 MS. KAPLOWITZ: This is Naomi Kaplowitz.
5 No, I do not see that.

6 MR. SWEENEY: Okay. Well, and I'd also
7 like to state that we have tried to go into a --
8 we met with Clay and these guys once before for a
9 settlement discussion, that we did not, you know,
10 completely ignore them every time. And we've
11 always responded before --

12 MS. RAMIREZ: Mr. Sweeney, sorry to
13 interrupt you, I guess this is the time for
14 questions, and you'll get a chance to testify.

15 CHAIRMAN LONGLEY: Okay, and you are
16 testifying, Mr. Sweeney, so you'll get your
17 opportunity.

18 MR. SWEENEY: Okay, then.

19 MS. RAMIREZ: Anymore questions for them?

20 CHAIRMAN LONGLEY: If you have no more
21 questions for them, Mr. Sweeney, now is your time
22 to testify.

23 MR. SWEENEY: Okay. Have each of you got
24 our written testimony? Okay, then I won't have
25 to go through the entire testimony, but I do want

1 to read this one thing and I hope you guys have
2 read through --

3 MR. RODGERS: Mr. Sweeney, can we take
4 the presentation off the screen? If you'll give
5 us just a moment.

6 CHAIRMAN LONGLEY: Thank you.

7 MR. SWEENEY: Okay, I hope that you've
8 taken the time to read our presentation because,
9 you know, we put a lot of time and effort into
10 these. You know, we've been doing this for
11 probably since 2005, the effects that this Order
12 has had on small dairies, okay, but I would like
13 to, on page 3, I would like to highlight: "The
14 2014 complaint alleges in paragraph 8 that the
15 court's decision did not affect the reporting
16 requirements of the 2007 General Order. We
17 disagree. As of July 1, 2014, the deadline
18 specified by the 2000 Dairy General Order for the
19 2013 Annual Report, the Superior Court had
20 already ordered the 2007 Order set aside. The
21 Superior Court's Order was occasioned by the
22 Third District Court of Appeal finding on
23 November 6, 2012, that the 2007 Order's
24 Monitoring Plan upon which the Order relies to
25 enforce it's no degradation directive is

1 inadequate because there is not substantial
2 evidence to support these findings; hence, many
3 of the elements to be reported on an Annual
4 Report were based on a Monitoring Plan in the
5 2007 Order that the Appellate Court deemed was
6 flawed and unlawful. In her rebuttal statement,
7 counsel admits that the Superior Court ordered
8 the Regional Board to set aside the 2007 Dairy
9 General Order, yet she then asserts that we are
10 mistakenly treating it as it had the force of
11 nullifying it. We must adopt the plain meaning
12 of the Superior Court's words. With the Court
13 not providing any more explanation, the plain
14 words of its directive was that the 2007 Dairy
15 General Order can no longer stand. It did not
16 order only parts of it to be set aside, it
17 ordered that it was to be set aside in its
18 entirety, ordering that the entire 2007 Order be
19 set aside, that the Court was not interested in
20 saving any of it. Neither did the Court declare
21 that the 2007 Dairy General Order was not null
22 and void, as counsel tries to suggest. If
23 counsel believes that the Court was declaring
24 that the 2007 Dairy Order was not null and void,
25 where is the counsel's evidence of that? The

1 Regional Board had every opportunity to seek a
2 clarification from the Court, or to appeal the
3 Court's order, but where is the evidence in that?
4 Notwithstanding all of the above, suppose a Court
5 eventually concluded that the April 6, 2013 Order
6 of the Superior Court to set aside the 2007 Dairy
7 Order did not have the effect of barring the
8 Regional Board from seeking a Civil Liability
9 assessment for our failure to file the 2014
10 Annual Report required under said Order. In such
11 event, we would still contend that the 2007 Dairy
12 Order was unlawful and unenforceable for all of
13 the following reasons." And then it reads their
14 list.

15 Okay, do you have any questions?

16 MS. RAMIREZ: So, as I understand it and,
17 you know, your peers (phonetic) are well written,
18 so you guys --

19 MR. SWEENEY: Thank you. We put a lot of
20 work into it.

21 MS. RAMIREZ: Well, it shows. So it
22 sounds like the beginning of your argument says
23 that the previous Orders that were based on the
24 2007 Order should not be valid because your
25 understanding of the Court's decision is that it

1 ordered the State to essentially --

2 MR. SWEENEY: It set aside the entire
3 Order.

4 MS. RAMIREZ: -- invalidate the entire
5 Order.

6 MR. SWEENEY: Right.

7 MS. RAMIREZ: But the issue was reordered
8 in 2013 and I don't hear an argument saying that
9 the 2013 Order has been set aside, so it seems
10 like the Water Board now is looking at a
11 violation based on the 2013 Order, so not on the
12 2007 one.

13 MR. SWEENEY: But they cannot go back in
14 time. You know if their Order, they adopted an
15 Order, I believe it was this year, right?

16 MS. RAMIREZ: October 2013.

17 MR. SWEENEY: Okay, so they cannot go
18 back in time and enforce an Order that was, you
19 know, you're wanting me to file reports for a
20 time when there was a six or eight-month period
21 there where there was no Order enforced.

22 MS. RAMIREZ: Okay, I see what you're
23 talking about.

24 MR. SWEENEY: Right.

25 MS. RAMIREZ: Thank you.

1 MR. SWEENEY: And we do have -- we did
2 appeal the new Order.

3 MS. RAMIREZ: Okay, the new Order as
4 well. Thank you.

5 CHAIRMAN LONGLEY: Any further questions?
6 Would you continue, please, with your testimony?

7 MR. SWEENEY: Well, not that, if you guys
8 read it, I'm not going to waste your time with...

9 CHAIRMAN LONGLEY: So you're concluding
10 your testimony --

11 MR. SWEENEY: Do I get to say a
12 conclusion later? Or do I do that now?

13 CHAIRMAN LONGLEY: You'll have the
14 opportunity to make a concluding statement. So
15 before you sit down, are there any other
16 questions by Board members of Mr. Sweeney? Yeah,
17 Jon.

18 MR. CONSTANTINO: I guess the question I
19 have is, do you intend to comply with the 2013
20 Order?

21 MR. SWEENEY: I'm still trying to get
22 that Order to be modified for small dairies so
23 that small dairies can comply. You know, because
24 since the 2007 Order, you know, if you take the
25 list of dairymen that filed reports in 2007, and

1 then looked at the ones that filed in 2014, I'll
2 bet that there's half of the people that aren't
3 on the list of the 2007 when they started. And
4 most of them are small dairies. You know, over
5 40 percent of the dairies have gone completely
6 out of business to where their facilities don't
7 have any animals, but then the production is only
8 off by like 1.5 percent. So, you know, it's
9 obvious that it's the small dairies that have
10 paid the price and, you know, the thing that
11 started this whole thing was that the lawsuit
12 against J.B. Boswell to build those 15,000 cow
13 dairies, and today there's more big dairies than
14 there's ever been in California. And the little
15 dairies are the ones that paid the price. And
16 that's, you know, my argument from day one of the
17 meetings that they held before they adopted the
18 Order was that small dairies can't afford to
19 comply. You know, and these guys have that it
20 costs the average dairy \$1,500. That's not true
21 at all. It costs at least 10 times that. And if
22 you guys just look at your, okay, just if you
23 look at the State Water Resources Control Board
24 fee schedule, just for the average dairy which
25 would be about a 1,400 cow dairy, would be \$2,719

1 just for the fee, and then it would be \$81.00 a
2 month to be on the Monitoring Well thing, and
3 that doesn't even start any of the monitoring
4 itself, or bookkeeping, or anything like that.
5 You know, I think that they exaggerate some of
6 their numbers. And if you guys would allow me, I
7 will enter this into evidence and then I've also
8 got another one that I got a quote about a week
9 ago, you know, for how much it would be for
10 monitoring just my dairy, which is a small dairy,
11 and it came out to \$7,826 for a year. And then
12 this letter, I mean this report by Mike
13 Francesconi, he's with the California Department
14 of Food and Agriculture, and his estimated cost
15 of compliance is \$14,136.

16 CHAIRMAN LONGLEY: Mr. Sweeney, you state
17 you have a small dairy, how many cows are you
18 milking?

19 MR. SWEENEY: Right now we milk about
20 260.

21 CHAIRMAN LONGLEY: And what do you
22 consider -- I know there's a threshold where
23 you're between larger and smaller, but where do
24 you think the threshold is?

25 MR. SWEENEY: You know, to be honest with

1 you, today it's probably 1,000 cows. You know, I
2 welcome for Farm Credit, when they appraise your
3 dairy, if it's less than a 1,000 cow dairy, they
4 give you a value of zero. So you know, you might
5 have a dairy that's worth \$2 million for the
6 buildings and the corrals and the free stalls and
7 everything, but Farm Credit won't lend you a dime
8 on it because you're a small dairy. But you
9 know, and EPA throughout the United States, you
10 know, they set the limit at 700 cows. Anybody
11 under 700 cows is exempt.

12 CHAIRMAN LONGLEY: Thank you.

13 MS. RAMIREZ: I had one more question.

14 CHAIRMAN LONGLEY: Yes, Carmen, go ahead.

15 MS. RAMIREZ: Do you know if you sought a
16 stay from --

17 MR. SWEENEY: I don't believe we did and,
18 you know, there is a reason why the attorney
19 didn't do that, but I don't know why he didn't do
20 that. Okay, and you know, we're small so we have
21 limited resources, so we can't have a lawyer go
22 do every time we want something because it's, you
23 know, ten, twenty, thirty grand like nothing to
24 those guys. So...

25 MRS. SWEENEY: I just have a comment, too.

1 On one of his slides he says that we have the
2 ability to pay because we own our property and we
3 own our property, but we have loans on our
4 property. We're not getting rich in the dairy
5 business.

6 MS. RAMIREZ: And I think that that was
7 maybe the kind of information that they would
8 have probably gotten if you had engaged in a
9 settlement agreement, but I understand why you
10 don't --

11 MR. SWEENEY: We tried.

12 MRS. SWEENEY: That didn't work out.

13 CHAIRMAN LONGLEY: Okay, any further
14 questions? Does staff wish to cross examine?

15 MR. ESSARY (presumed): Yes.

16 MS. KAPLOWITZ: Yes.

17 CHAIRMAN LONGLEY: The answer was yes and
18 we're waiting for Ms. Kaplowitz to come forward.

19 MS. KAPLOWITZ: This is Naomi Kaplowitz
20 and I just have one question for Mr. and Mrs.
21 Sweeney. In your submittal that was accepted
22 this last week, you say that it's been your
23 position that if the completion of the appeal
24 process concluded the determination that you had
25 no legal grounds upon which to not file the

1 Annual Reports that were due in 2010, 2011, 2012
2 and 2013, then you would file them. And my
3 question is, do you have the monitoring data and
4 information that is the underlying basis for
5 those reports available should those petitions
6 get denied?

7 MR. SWEENEY: We do have some of it.
8 And, you know, the monitoring well thing, you
9 guys already have that data, and it doesn't
10 matter if, you know, if there's one person or
11 1,000 people in that group, you guys have that
12 data anyway. But we do have some of the data
13 and, you know, we have some of the samples that
14 are stored. So if we lose, we'll either have to
15 go out of business, or we'll comply the best we
16 can.

17 MS. KAPLOWITZ: Just a follow-up question
18 on that. This is Naomi Kaplowitz again. For
19 which years do you have data? And if you could
20 be more specific about what data you have for
21 those years?

22 MS. RAMIREZ: Why do you need to know
23 that information?

24 MR. SWEENEY: Well, that doesn't have
25 anything to do with the case that's pending.

1 MS. RAMIREZ: I think it's a fair
2 question. In your response, you sort of opened
3 the door to suggesting you have data.

4 MR. SWEENEY: We have some of the well
5 monitoring data and, you know, we have a crop
6 production service does our field work, so they
7 take soil samples and we could just get their
8 soil samples. And from every crop we've grown, I
9 have a frozen sample of either corn or wheat.

10 MS. RAMIREZ: Okay, does that answer your
11 question, counsel?

12 MS. KAPLOWITZ: Yes, thank you.

13 MS. RAMIREZ: Thank you.

14 CHAIRMAN LONGLEY: Any further questions
15 by Prosecution Team? There was initially a
16 reluctance to allow you to give a late submittal,
17 and that reluctance was actually on my part
18 because the Advisory Team consults with me on
19 these kinds of matters, and I was very concerned
20 simply because I don't like to let the door open
21 on late submittals or the Board starts getting a
22 ton of material at the very last minute. But the
23 Prosecution -- excuse me, it wasn't the
24 Prosecution Team at all -- the Prosecution Team
25 is oftentimes very upset at what I rule, but it

1 was the Advisory Team, Mr. Pulupa in particular,
2 who explained to me that it was in the interest
3 of fairness that we allow your material into the
4 record late. So that's what was going on while
5 you were wondering what was happening.

6 MR. SWEENEY: Okay, well, I apologize
7 about that, but I'm not a public speaker and, you
8 know, when you're a dairyman, you're just out
9 there talking to cows, they don't care what you
10 say or how you say it.

11 CHAIRMAN LONGLEY: Mr. Sweeney, I know
12 cows and they do care.

13 MR. SWEENEY: But, you know, I can write
14 things well, but I don't articulate them the
15 best, so I --

16 CHAIRMAN LONGLEY: I understand, and it
17 was in the interest of fairness that it was
18 decided to be let into the record.

19 MR. SWEENEY: Okay, thank you.

20 MS. RAMIREZ: And Mr. Sweeney, you're a
21 good advocate for yourself, so don't sell
22 yourself short.

23 MS. KAPLOWITZ: I do have one more
24 question, I'm sorry. This is Naomi Kaplowitz
25 again. I believe that the documents you asked to

1 be submitted into the record, the financial
2 documents, I did not object to those being
3 entered at this time, although the Prosecution
4 Team, I believe, has not had a chance to look at
5 them. And I was wondering, are those the same
6 documents that were included in the previous
7 proceedings? Or are these from this year?

8 MR. SWEENEY: No, this would be something
9 that just came in a magazine like two or three
10 weeks ago.

11 MS. KAPLOWITZ: Okay, well, we haven't had
12 a chance to look at that or verify that.

13 MR. SWEENEY: Well, they haven't even
14 said if they wanted it or not.

15 CHAIRMAN LONGLEY: No, I don't think we
16 will take it into the record at this time.

17 MS. KAPLOWITZ: Okay, thank you. That's
18 all.

19 MR. SWEENEY: But that thing from Mike
20 Francesconi, or whatever his name is, that is in
21 evidence, it's one of the things that is --

22 MS. RAMIREZ: I think to the extent he
23 testified, it's in the record. But we're not
24 accepting the document.

25 CHAIRMAN LONGLEY: We're not accepting

1 the document. And you made statements regarding
2 the expense of preparing these reports. You
3 know, we're very interested in any detailed, not
4 as far as this proceeding, but in the future if
5 this comes up again, and I hope it doesn't, but
6 if it comes up again, detail on that would be
7 very beneficial.

8 MR. SWEENEY: Okay. Do you want a copy?

9 CHAIRMAN LONGLEY: With that said -- or
10 before I ask you to make a closing statement, Mr.
11 Pulupa, Counsel Pulupa, the Sweeney's make a
12 point, in fact, a major point that was made here
13 today, and has been made in the past, is really
14 the validity of the 2007 Dairy Order. Could you
15 address that, please?

16 MR. PULUPA: Absolutely, and you know, I
17 can certainly elaborate even more in
18 deliberations. Just to -- there is a complex
19 chronology that happened here, and I'll just go
20 over exactly what we're talking about. And I
21 think the crux of the issue is there has been a
22 monitoring review, 1 July, just about every year
23 since 2009. And how that came into being was, on
24 the 3rd of May of 2007, that's when this Board
25 adopted the Dairy General Order, it imposed those

1 monitoring requirements, started to become due 1
2 July 2009, and every year thereafter. Shortly
3 afterwards we started engaging with the dairy
4 community, in particular Dairy Cares and some
5 other representative groups, and they said that
6 individual monitoring just couldn't be up and
7 running at every single dairy, at least sinking
8 new groundwater monitoring wells at every single
9 dairy. That wasn't feasible not simply because
10 they didn't have the financial resources to do
11 it, but there weren't enough consultants, not to
12 mention not enough Board staff --

13 CHAIRMAN LONGLEY: I'm sorry to interrupt
14 you here, but it's very specifically, it has to
15 do with the validity based upon the Superior
16 Court ruling of the 2007 Dairy Order.

17 MR. PULUPA: Yeah, I promise I'm getting
18 to that.

19 CHAIRMAN LONGLEY: Okay.

20 MR. PULUPA: On 23 February of 2011, this
21 Board adopted a Monitoring and Reporting Program
22 that altered the 2007 Monitoring and Reporting
23 Program, that's the Monitoring and Reporting
24 Program that the 2012 Monitoring Report was
25 doing. Around that time, the Court itself

1 ordered that we redo that set aside, the 2007
2 Dairy General Order, and it was a Writ of Mandate
3 proceeding in which the Court ordered that we set
4 aside the Order. So the Court didn't set aside
5 the Order as of that date, we were ordered to set
6 aside.

7 With respect to why the language was the
8 way it was in the Court proceeding, that has a
9 lot to do with how these court cases conclude.
10 When you have a party that wins the case, and
11 essentially the Agua Petitioners did win that
12 case, they get the chance to write the Order as
13 it applies to us. They get the first stab at
14 editing it and they write it for the Court's
15 signature. The way they wrote the Court's
16 signature gave us the obligation to redo the
17 Order. It was the Dairy industry that was
18 charting this Order, whereas if it was another,
19 somebody who was regulated by the Order, I
20 imagine that they very well could have put
21 provisions in the Court's Order saying all of the
22 enforcement of the old Order is null and void, or
23 there's a stay for all enforcement proceedings
24 until the Board's actions commence. And
25 frequently we see that when we're on the losing

1 end of a petition by a discharger, but this
2 wasn't the case here; they didn't ask for any of
3 that because they were more interested in the
4 Regional Board expounding upon the conditions of
5 this General Order, not in reducing them, not
6 limiting any enforcement actions that were
7 ongoing, and not eliminating the monitoring
8 reports. In fact, they wanted to accelerate the
9 monitoring reports, they wanted more information
10 due at that 1 July date for every year, so that's
11 really why the Order from the Court was written
12 the way it was, that's why the cases weren't cut
13 off at that date, and that's why when we did
14 adopt a new 2013 Order, we adopted it with
15 language that specifically said the reissued
16 Dairy General Order is intended to set aside and
17 replace the 2007 General Order in compliance with
18 the Superior Court's Writ of Mandate. And that
19 occurred in October of 2013. There was no
20 language in that Order stating enforcement of
21 previous enforcement, that nullified the
22 violations of previous reporting Orders, you
23 know, certainly a point of contention, but that
24 was set by the Superior Court because the party
25 that won was an environmental coalition.

1 CHAIRMAN LONGLEY: So as I understand
2 what you're saying, part of that is that, in
3 effect, the 2007 Order was in effect up until the
4 time this Board adopted a new order. Is that
5 correct?

 MR. PULUPA: Absolutely. Both
6 the 2007 Order and the Monitoring and Reporting
7 Program has modified on 23 February 2011, that
8 was still in effect at the time the Board adopted
9 the 2013 General Order and changed some of those
10 requirements to make them even stronger.

 MS. RAMIREZ: I have a quick question on
11 that same subject. But did the Court Order, the
12 Order itself that the prevailing party wrote, did
13 it say that the Order was to be set aside in its
14 entirety? Or was that a statement from the
15 Court? Or is that an Order?

 MR. PULUPA: What the actual Order says,
16 "A preemptory Writ of Mandate shall issue under
17 seal of this Court commanding...", and the agency
18 is the Central Valley Water Board, "...to set aside
19 waste discharge requirement's General Order for
20 existing milk cow dairies, Order No. R5-2007-
21 0035, and reissue the permit only after
22 application of and in compliance with the State's
23 Anti-Degradation Policy Resolution No. 6816."

1 MS. RAMIREZ: So not in its entirety.

2 MR. PULUPA: "In its entirety" made it
3 into a few places, but this was what the Court
4 ordered us, this was the Writ of Mandate, what it
5 said.

6 MS. RAMIREZ: Okay.

7 MR. CONSTANTINO: So each time we dealt
8 with this issue, it's been petitioned to the
9 State Board, right? And in theory the State
10 Board is going to answer the question as to
11 whether we're right or the Discharger is right.

12 MR. PULUPA: I'm not sure if the 2007
13 Order was petitioned by Mr. Sweeney, but I do
14 believe the modified Monitoring Reporting Order
15 and all of the subsequent Administrative Civil
16 Liability Orders were petitioned by Mr. Sweeney.
17 The fact is, if the State Board overturns what we
18 did, or issues a judgment on any of those
19 Administrative Civil Liability proceedings, it
20 would certainly cast a cloud over what we do here
21 today. But as it stands, we haven't had any
22 issue like that come from an Order from the State
23 Water Board. The current schedule as it stands
24 right now is that State Water Board is
25 contemplating addressing many of the petitions

1 having to do with groundwater degradation from
2 irrigated agriculture and dairy facilities,
3 sometimes it's winter, I imagine that they will
4 issue a draft of that order, and should it be
5 favorable to the type of interpretation that Mr.
6 Sweeney is advocating for here today, I would
7 imagine that he would request the State Water
8 Board add provisions to that Order, or to their
9 Order dismissing his Administrative Civil
10 Liability Orders to do exactly what he's asking
11 here today. But before that, we can proceed
12 under the conclusion that what we have done in
13 adopting that Order is valid.

14 CHAIRMAN LONGLEY: Yeah, it's my
15 understanding the State Board yesterday had an
16 action item on their agenda that they're taking
17 up certain ones, but the rest of them will be
18 dismissed. Is that correct?

19 MR. PULUPA: That's in the broader sense,
20 and this is kind of commenting on what the State
21 Board is doing with petitions generally; they
22 recognize that they're taking far too long to
23 address petitions, they're adopting new petition
24 Regulations that will dismiss petitions by
25 operation of law in a very quick manner. They

1 don't have any timeline currently for which they
2 can address a petition, that's why you see some
3 petitions languishing for many many years, even
4 at the State Water Board level, in the future
5 that will be different, but at the current stage
6 they aren't under a timeline to address any of
7 Sweeney's petitions on any set timeline. Again,
8 I imagine that they will do that around the time
9 that they address the Dairy in your General
10 Orders.

11 MR. CONSTANTINO: And if it's dismissed,
12 that means -- how do I interpret that?

13 MR. PULUPA: And this is getting a little
14 far afield, so I'll answer this and then we might
15 redirect for a different conversation, but what
16 the State Board is doing and if they dismiss
17 petitions under a timeline by operation of law,
18 the Regional Board's Order stands and at that
19 point, you know, if the affected party is still
20 aggrieved, still considers himself aggrieved by
21 the Regional Board's action, they can take us to
22 court. So we might be even busier under those
23 Regulations. So that's kind of how things will
24 unwind in the future.

25 CHAIRMAN LONGLEY: Thank you very much.

1 Any further questions of counsel? Yes, sir, Mr.
2 Sweeney, it's all yours.

3 MR. SWEENEY: Okay. First, I'd like it
4 on the record that the Agua people got the exact
5 remedy that we were seeking, you know, that the
6 Judge did set aside that Order, and I disagree
7 with a lot of what he said and I think that it
8 will take a Court of Law to determine which of us
9 is right. But I want it on record that I don't
10 agree with what he said. And we were seeking the
11 exact same remedy that they got.

12 CHAIRMAN LONGLEY: By "he," you're
13 talking about Mr. Pulupa?

14 MR. SWEENEY: Right.

15 CHAIRMAN LONGLEY: Thank you.

16 MR. SWEENEY: Okay, closing statement.

17 CHAIRMAN LONGLEY: I'm asking for
18 identification because it's on the tape and --

19 MR. SWEENEY: This is Jim Sweeney again
20 and that was me talking just before also. Okay,
21 and for our closing statement: when the Dairy
22 General Order was adopted in 2007, the Central
23 Valley Water Board did not just consider
24 exempting small dairies. In all the drafts up to
25 the actual adopted Order, small dairies were

1 exempt. No evidence in the record was presented
2 with the exception of a letter dated April 23,
3 2007 from the Center on Race, Poverty, and
4 Environment, which states: "CRPE opposes any size
5 restrictions in the WDRs as it cumulatively poses
6 a risk to the valley's groundwater. The impact
7 from 1,000 dairy cows is the same whether or not
8 they are located on one dairy or five adjacent
9 dairies. Therefore, to protect groundwater
10 resources, each dairy should be treated the same.
11 Dairies must all be held accountable for their
12 contribution to the groundwater degradation."

13 This letter did not cite any scientific
14 studies. In fact, if small dairies were such a
15 high risk, why weren't they ever exempt? By
16 waiting until the last minute to remove this
17 exemption, the Board of the Central Valley
18 Regional Water Quality Control Board did not give
19 small dairymen a chance to act on the Order.

20 And in the response to the prosecution's
21 rebuttal about the cost of the compliance and the
22 claim that I ignore key facts, they seek to
23 ignore the most important fact: we are a small
24 dairy. All of the economic conditions which they
25 claim caused the demise of small dairies were

1 shared equally by us; in fact, they probably
2 affected us to a greater degree because we
3 started our dairy from scratch and we have three
4 children attending college during this ordeal,
5 Stanford, U.C. San Francisco, U.C.L.A. and
6 Cornell.

7 The Central Valley Regional Water Quality
8 Control Board was required by law to do an
9 economic analysis prior to the adoption of the
10 2007 Order. Alex Meyer admitted during the
11 previous hearing that this was never done.

12 The Prosecution claims that we did not
13 act within the appropriate time period are
14 completely false. The 2007 Dairy General Order
15 imposed a much different set of Regulations upon
16 dairymen, and for someone to be able to respond
17 within the 30-day period would have been
18 impossible.

19 I contacted Jim Sullins, County Director,
20 Cooperative Extension for Tulare and Kings
21 County, for assistance. We met with Pamela
22 Creedon and Clay Rodgers, along with two other
23 dairymen who are no longer in business to request
24 an appearance before the Board. We were told
25 that individuals were not allowed to appear

1 before the Board. We also had Soapy Tompkins, a
2 Central Valley Regional Water Quality Control
3 Board member, visit our dairy and we expressed
4 our concern that small dairies could not afford
5 to comply with the Order.

6 I also talked multiple times with Mike
7 Chrisman, Secretary of Resources, and contacted
8 Steven Schaefer, California Department of Food
9 and Agriculture, Denise Melanek, and Joseph
10 Chopinera of Sustainable Conservation. They
11 claim that the claim that much of the attrition
12 suffered by small dairies resulted from economic
13 conditions unrelated to the adoption of the Dairy
14 General Order, and not from the cost of complying
15 with the Dairy General Order, seemed to imply the
16 fact that the Board was very aware of the
17 economic situation that small dairies face and
18 chose to ignore the fact. The results of their
19 decisions have had disastrous results for small
20 dairies.

21 This also suggests that most small
22 dairies would have suffered a similar fate even
23 if they were exempted from the Order.

24 If we look to the Court Decision which
25 led to the 2007 Dairy General Order, how did the

1 decision not to allow J.B. Boswell to construct
2 mega-dairies end up putting almost every small
3 dairy out of business?

4 I find it ironic that in this proceeding
5 water quality has never been an issue. There has
6 been a dairy on our property for over 80 years,
7 continuously, and yet we still have one of the
8 lowest nitrate levels in the entire valley. Our
9 dairy has achieved the lowest somatic cell count
10 which is the highest milk quality in Tulare for
11 20 of the past 21 years. We have never been
12 cited for drug residue in either meat or milk.
13 It would seem to me that ours would be the type
14 of dairy that could serve as a model for others.
15 Thank you.

16 CHAIRMAN LONGLEY: Thank you very much.
17 Any questions from members of the Board? Thank
18 you very much for your testimony.

19 Closing statement by Prosecution Team?

20 MR. RODGERS: Hi, this is Clay Rodgers,
21 Assistant Executive Officer for the Fresno Office
22 of the Central Valley Water Board, Mr. Chairman,
23 and members of the Board.

24 Mr. Sweeney mentioned that water quality
25 had never been mentioned, and I want to reiterate

1 that water quality is the primary issue here,
2 that our interest is to ensure that dairies, both
3 large and small, protect water quality and data
4 are needed to do that and determine that best
5 practical treatment or control in compliance with
6 the Order is being done.

7 We get that information through annual
8 reports, which Mr. Sweeney has not submitted to
9 us for the last four years. He mentions that if
10 the Court Order is not upheld that he'll submit
11 all the data, or if it stays, he says he has
12 collected some of the data. We don't know which
13 data have been collected and which data have not,
14 but it certainly will probably impair his ability
15 to provide the appropriate report.

16 The biggest issue, and while we're here
17 and while I'm sympathetic to Mr. and Mrs. Sweeney
18 as small dairymen, small business people who are
19 making a living, is that dairies do have the
20 ability to impair water quality. They're
21 fortunate in some measures that they're very
22 close to the Kaweah Delta System, there's
23 typically in most years, and will certainly help
24 this year, a significant amount of surface water
25 which could supply some dilution, but they are

1 also up gradient of a major metropolitan area
2 that is dependent upon groundwater and there are
3 nitrate issues in the area, and their water
4 supply well is probably not a good measure of
5 their specific impact to water quality, and
6 either individual monitoring or cooperation in
7 the coalition doing regular groundwater
8 monitoring is.

9 With those things being said, the primary
10 issue here is in the issue of fairness and
11 integrity to the program. Staff believes that if
12 the Administrative Civil Liability is not issued,
13 it is not fair to the vast majority of dairymen
14 that have gone through the issues, prepared the
15 reports, been in compliance with the Order,
16 worked very diligently to do that. It sets an
17 unfair standard and we do not believe that
18 anything should be done to convince Dischargers
19 that there is an economic advantage with
20 noncompliance with the Order.

21 The second thing is that that goes along
22 with the integrity of the program. If
23 Dischargers are allowed not to have to comply
24 with the Order, even though it's not legally been
25 found that they have no obligation to do that,

1 again, it sets that unfair standard that
2 basically tells all dairymen that they probably
3 do not need to submit their Orders, petition the
4 Order, and give an argument.

5 Fortunately this is a very small portion
6 of the dairy population that has not complied
7 with the Order. But we believe it is important,
8 however sympathetic we are to Mr. and Mrs.
9 Sweeney, that the issue of fairness and integrity
10 of the program need to be upheld. For that
11 reason, the Prosecution Team recommends that the
12 Administrative Civil Liability be adopted in the
13 amount recommended in the Order. Thank you.

14 CHAIRMAN LONGLEY: Thank you. I'll close
15 the hearing at this point and I'll have
16 questions. Yeah, well, okay, do you want to ask
17 the Prosecution Team a question?

18 MR. CONSTANTINO: Yes.

19 CHAIRMAN LONGLEY: Go ahead. Have at it.

20 MR. CONSTANTINO: So the question on the
21 ability to pay issue, I just went back and reread
22 it, there's two points, one that they actually
23 own the property, and two, that they have a
24 business that I guess -- I don't know if it's
25 assumed they generate a profit or what the facts

1 are, but how do we make those determinations and
2 then, just because you own an asset doesn't
3 necessarily mean you have cash flow, so do we
4 assume that borrowing against an asset is an
5 ability to pay?

6 MR. RODGERS: Well, one of the things we
7 typically do when we make that offer to enter
8 into settlement negotiations, or in settlement
9 negotiations, even after the Administrative Civil
10 Liability, is we put that out there that says if
11 you do not have the ability to pay the penalty as
12 proposed that, you know, we need certain
13 information that comes in the form of tax returns
14 and whatnot, so that we can consider it in a
15 timely fashion and see if we can come to a
16 settlement. And now the enforcement policy, and
17 I'm sure somebody will correct me if I'm wrong,
18 says that we cannot settle for less than the
19 economic benefit plus 10 percent because, again,
20 that would provide an incentive to people to get
21 a settlement rather than to comply with the
22 Order. To my knowledge, within the time frame
23 that we could, and maybe Naomi will correct me,
24 I'm not sure exactly what economic information we
25 received.

1 MS. KAPLOWITZ: Yeah, I mean, we didn't
2 receive any economic information from the
3 Sweeney's. Had Mr. Sweeney or Mrs. Sweeney
4 provided us with economic information that would
5 have gone to the State Board Economist. Generally
6 the State Board Economist takes into account the
7 last three years of tax information. But beyond
8 that, we also have a Financial Data Request form
9 that looks at not only taxes, the debts and
10 assets, to try to get a full picture of ability
11 to pay, but we never received any financial
12 documents.

13 MR. SWEENEY: They never asked for any.

14 MR. CONSTANTINO: So the question I have,
15 then, is if we didn't receive any, how do we make
16 the note in the file that they're a profit-making
17 entity?

18 MR. RODGERS: Well, that is the reason why
19 we go with the fact that they own a dairy and
20 they have the business because we have no other
21 information to go by. Mr. Sweeney just
22 mentioned, I heard him in the background, that he
23 was never asked, but I believe in those offers to
24 settlement and the Administrative Civil Liability
25 complaints, there is standard language in there

1 that says if you do not have the ability to pay,
2 you need to submit certain information to us in
3 order to make that demonstration. That is
4 correct?

5 MS. KAPLOWITZ: That's correct.

6 MR. CONSTANTINO: Okay.

7 MS. RAMIREZ: I'm looking through here.
8 What is the financial benefit calculation?

9 MR. RODGERS: The financial benefit
10 calculation that we went through is actually a
11 very simple one for this. We did not go with the
12 larger numbers that some people have put out
13 there, you know, even like Mr. Sweeney during his
14 testimony mentioned that, you know, there were
15 very significant numbers. What we look at here
16 is a very basic what we believe it would cost to
17 procure the report, do a very minimal amount of
18 monitoring, and in this case I believe that
19 number was \$1,500, which if there had been a
20 demonstration of inability to pay, we could have
21 perhaps come to some settlement agreement of
22 \$1,500 plus \$150.00, or \$1,650 would have been
23 the minimum that we could have potentially
24 settled for.

25 MS. RAMIREZ: All right, thank you.

1 MR. CONSTANTINO: Not to belabor the
2 point, but do we believe the cost to not comply
3 is only \$1,500? Or is that just a number we use?

4 MS. KAPLOWITZ: That's based on an
5 average cost, so that could vary depending on the
6 size of the dairy. I think it's generally
7 cheaper for small dairies, would be my
8 inclination. We're always happy to take into
9 account if we have a discharger who says, "Hey,
10 that's not true, it's actually much lower than
11 that," or, "It's much higher," and they provide
12 us with information, we'd be happy to look at a
13 different number. This is based on average
14 consulting costs provided by our Economist.

15 CHAIRMAN LONGLEY: Any further questions
16 from members of the Board before I close the
17 hearing? Good, then consider the hearing closed
18 and we'll have deliberation by the Board. The
19 Chair is open to a motion and that will be
20 followed by a roll call vote.

21 MR. PULUPA: If I could, just a couple
22 matters before we launch into deliberation,
23 however long. First, a couple things, 1) Mr.
24 Sweeney contended that the petitions themselves
25 were being used against him. I want to dispel

1 that, I don't think that an Administrative Civil
2 Liability Complaint relies on the fact that he
3 filed petitions for his previous Administrative
4 Civil Liability Orders, I think that would be
5 problematic; rather, the Administrative Civil
6 Liability Orders and the violations connected
7 with them were evidence that he has committed
8 violations in the past and that went to its
9 history of violations. I just don't want to
10 express that we're punishing anybody for
11 exercising their due process rights if we adopted
12 the Order.

13 I think, I explained a little bit earlier
14 about the Court setting aside versus us setting
15 aside the General Order and the ramification of
16 that, I reiterate that's the process we went
17 through. There was a collateral estoppel
18 argument that was raised by the Prosecution Team
19 early in their materials. None of the findings
20 in the Final Administrative Civil Liability
21 Complaint or the Proposed Order for you rely on a
22 collateral estoppel. I would not go in that
23 direction, to entertain collateral estoppel
24 arguments, because as mentioned these Orders
25 aren't finally adjudicated until the Petition

1 process has run its course, potential litigation
2 has run its course, but it's not harmful to the
3 Proposed Order because none of them rely upon a
4 collateral estoppel argument.

5 A couple things, the cost of compliance,
6 generally speaking that's a double-edged sword
7 when somebody brings up the cost of compliance in
8 the context of an Administrative Civil Liability
9 hearing because if somebody brings up that, no,
10 it wasn't \$1,000 that I didn't submit in my
11 monitoring report, it was \$10,000 that I didn't
12 anticipate in my monitoring report, really
13 quickly you find the bottom of the Administrative
14 Civil Liability range gets raised on you. So
15 that's one of those issues where it's very
16 pertinent to be raised in the context of the
17 permitting, of the Monitoring and Reporting
18 development, that's not an issue that shows up by
19 the Discharger in the context of an
20 Administrative Civil Liability that much.

21 The last point is the ability to pay.
22 The ability to pay is addressed in the
23 enforcement policy. Basically the burden is on
24 the Prosecution Team to make a very initial
25 finding that there is an ability to pay, the

1 burden then becomes on the Discharger to show why
2 they didn't have an ability to pay by showing
3 that their lands are too heavily liened or
4 leveraged to generate any type of loan that could
5 be used to pay off the proposed Civil Liability,
6 that their cash flow is negative. If you don't
7 provide that information, the Board can't really
8 go to the State Board's Economist and ask him to
9 truth that out. And I think that was the case
10 that happened here. Certainly in the context of
11 settlement negotiations, that's frequently
12 something that the Board has to consider.

13 But those are kind of the main issues
14 that were still outstanding. I noticed in
15 addition to the cost figures that he talked about
16 was the cost of applying for a permit, and I
17 think that the State Water Board's regulation
18 pertaining to that fee schedule, that that can be
19 incorporated into the record by notice, and take
20 judicial administrative notice of that fee
21 schedule when we go into the deliberations.

22 MS. CREEDON: Dr. Longley, I'd like to
23 provide something, as well.

24 CHAIRMAN LONGLEY: Yes.

25 MS. CREEDON: Back when the Board adopted

1 the Dairy Order in 2007, this Board at the time,
2 the Board at the time, discussed the small dairy
3 issue and the Board chose not to provide an
4 exemption for small dairies. And in Mr.
5 Sweeney's closing statement, he continues to
6 challenge the whole underlying Order for which
7 the Prosecution has proposed their Order for the
8 Board to consider, but that's not the issue
9 before this Board now. The issue before the
10 Board is simply did they or did they not, and I
11 think the Advisory Team is in agreement, that the
12 2007 Order was in good standing and they failed
13 to comply with it, and any subsequent Order now
14 stands and they need to comply with it, so the
15 issue isn't whether or not the Order was good,
16 the issue is whether they did or did not submit
17 an Annual Report, and they chose not to submit
18 Annual Reports from the very beginning of the
19 Order.

20 So that is what is before you and I think
21 the Advisory Team is in agreement they are in
22 violation of the Order.

23 CHAIRMAN LONGLEY: That's a very good
24 point, Ms. Creedon.

25 MR. CONSTANTINO: I want to follow-up.

1 CHAIRMAN LONGLEY: Yes.

2 MR. CONSTANTINO: You brought it up,
3 Pamela. Can you verify the claim that there was
4 an exemption up until the last version of the --

5 MS. CREEDON: I have to remember because
6 it was such a lot of work to put that Order
7 together. And there was a lot of discussion and
8 I believe it was even presented to the Board
9 during the hearing, and I can't -- it's been a
10 long time. But at least I know with staff we did
11 have a lot of discussion on whether small dairies
12 should be in or out, and I think we presented to
13 the Board the opportunity for them to consider
14 it. I know there was discussion at the Board
15 meetings we must have at that point made that
16 option for the Board to consider and the Board
17 chose not to go with small dairies or to exempt
18 them, for whatever reason, this Board, including
19 under Ag Orders, have not been willing to pick a
20 size to which they say you're no longer part of
21 the Order.

22 CHAIRMAN LONGLEY: Exactly. That
23 discussion continued into the ILRP, and at this
24 point in time, or up to this point in time, at
25 any rate, the Board does not entertain the

1 exemption of small entities, whether they be
2 irrigated Ag or dairies. Any further questions
3 or discussion?

4 MR. SCHNEIDER: I'd like to say our job
5 and the Board's here is to protect water quality,
6 and I think it's clear here, if we don't have
7 these reports we can't measure our effectiveness
8 and it's not fair to the integrity of the
9 program, as was pointed out, and we have to have
10 a program that works. And I make a motion that
11 we adopt the ACL on the amount of \$18,564 --

12 CHAIRMAN LONGLEY: I have a motion --

13 MR. SCHNEIDER: -- as recommended by
14 staff.

15 CHAIRMAN LONGLEY: I have a motion. Do I
16 have a second?

17 MS. RAMIREZ: I have a little bit of
18 discussion, although I do anticipate making the
19 second. First, I think this has been discussed,
20 but I'd like to have it on the record that I
21 really would like to have some kind of resolution
22 from State Board. I mean, I think everybody is
23 in agreement that this has been languishing for
24 too long. It leaves too many people in limbo,
25 not only the Sweeney's, I'm sure that other

1 people have actions pending, it sort of doesn't
2 allow people to move on. So I'm glad to hear
3 that there might be something on the horizon that
4 gives us some kind of resolution, but you know,
5 doesn't erase the fact that it's been too long.
6 So I hope that there is some finality coming. My
7 decision is not going to change based on this
8 issue, but I would say that, just for staff, a
9 three-day notice, whether it's email or mail, I
10 don't think it's enough. I know that staff has a
11 lot of work and you guys try really hard to get
12 stuff to us on time because it has to be in, it
13 has to be noticed, and I understand it and I
14 appreciate it, but I don't want that notice, that
15 the compliance with our schedule, to come at the
16 expense of the public. So if it's necessary to
17 kick something out, then I'd be in favor of
18 having a more fair process and proper notice than
19 sort of rushing to make sure that the Board isn't
20 pleased. Number 3, I do civil litigation, so I'm
21 all about settlement, you know, I'd certainly
22 like to see whether or not there's any
23 possibility that staff might enter, if staff was
24 open to it, and the Sweeney's were open to it,
25 into some kind of confidential settlement

1 agreement where, you know, if the parties are
2 willing to waive the appeal and get a clean slate
3 in exchange for paying some kind of penalty, this
4 certainly meets statutory requirement. Whether
5 or not the parties are interested or staff is
6 interested, I'm just putting it out there in case
7 that's a solution for the State going forward.
8 And with that, I will second the motion to
9 support the motion made by Board member
10 Schneider.

11 MR. SCHNEIDER: Let me add, I think, as
12 in many many other cases that have come before
13 us, if our staff had been approached yesterday
14 about a settlement, that would have been on the
15 table and they would have talked about that,
16 that's what our staff does. If the Sweeney's had
17 come into the Board two weeks after the letter
18 and said, "You know, we've been thinking about
19 it, we weren't able to react quickly, can we
20 still talk about this," I'm 100 percent confident
21 our staff would have said, "Yes, let's talk about
22 it." So we go through a process, but over and
23 over and over again it's been demonstrated the
24 willingness of our staff to bend over backwards
25 to find an area of agreement and make this

1 happen. We're past that and thank you for
2 seconding the motion.

3 MS. RAMIREZ: Yeah, and I see member
4 Schneider's point and I agree with his point, and
5 I think given staff and the culture that we have
6 with staff right now, I know that that would
7 happen. I know that if people came in and wanted
8 to settle, it would. But given that this Board
9 will be around for 250 more years to oversee the
10 Aerojet matter, I want to make sure that in the
11 future, you know, three days is not considered
12 adequate on paper. So I appreciate current
13 staff's willingness to do that, I know that they
14 would, but just for procedurally going forward,
15 I'd like to just have that on the record.

16 CHAIRMAN LONGLEY: Thank you, Carmen. Go
17 ahead, Jon.

18 MR. CONSTANTINO: My closing thought on
19 this is I sort of agree with Bob that the rules
20 are there to follow and it's truly unfair to
21 everybody else that does follow them. But I am
22 sympathetic to the positions that the Sweeney's
23 have taken and the arguments they've made, and so
24 I'd like to follow up with Clay and staff on
25 diving a little more so I understand whether or

1 not those issues with costs and some of the
2 rationale was cleaned up at this point because
3 there's a lot of issues that predates me, to make
4 sure I follow-up on that, so nothing to do with
5 this because I agree that if you don't submit the
6 forms, then you didn't follow what everybody else
7 had to follow, and there's an economic issue
8 there, but some of the underlying issues I would
9 like to just follow-up on at a later date. Thank
10 you.

11 CHAIRMAN LONGLEY: Thank you. Any
12 further comments? Then we'll call for the roll
13 call vote.

14 MS. LANFRANCHI-RIZZARDI: Mr. Schneider -
15 Aye; Ms. Meraz - Aye; Mr. Constantino - Aye; Ms.
16 Ramirez - Yes; Chair Longley - Aye.

17 Motion carries.

18 CHAIRMAN LONGLEY: Thank you very much.

19 (Break at 4:14 p.m.)

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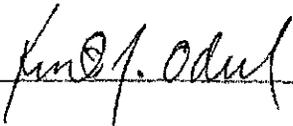
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REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of October 2014.



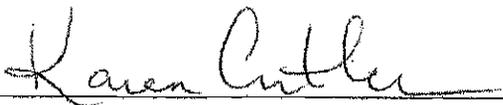
Kent Odell
CER**00548

TRANSCRIBER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of October, 2014.



Karen Cutler
Certified Transcriber
AAERT No. CET**D-723

EXHIBIT E

James G. Sweeney and Amelia M. Sweeney
Appeal to Petition Under California Water Code Section 13320 for
Review by the State Resources Control Board of
Various Actions by the Central Valley Regional Water Quality
Control Board Regarding Sweeney Dairy and
Administrative Civil Liability Complaint No. R5-2014-0543

EXHIBIT "E"

**Writ of Mandate filed April 17, 2013 in Asociacion de Gente Unida por el Agua, et
al. v. Central Valley Regional Water Quality Control Board, Sacramento County
Superior Court Case No. 34-2008-00003604-CU-WM-GDS**

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FILED
ENDORSED
APR 17 2013
Frank Timmerman
By FRANK TIMMERMAN
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

ASOCIACION DE GENTE UNIDA POR EL
AGUA, a California unincorporated association,
and ENVIRONMENTAL LAW FOUNDATION,
a California nonprofit organization,

Petitioners,

v.

CENTRAL VALLEY REGIONAL WATER
QUALITY CONTROL BOARD, a California
state agency,

Respondent.

COMMUNITY ALLIANCE FOR
RESPONSIBLE ENVIRONMENTAL
STEWARDSHIP, a California corporation,

Intervenor

Case No. 34-2008-00003604-CU-WM-
GDS
(Related Case No. 2008-00003603-CU-
WM-GDS)

~~PROPOSED~~ WRIT OF MANDATE

Honorable Timothy M. Frawley
Dept. 29

BY FAX

RECEIVED
APR 17 2013
39
CIVIL

[Proposed] Writ of Mandate

1 To Defendant/Respondent Central Valley Regional Water Quality Control Board:

2 YOU ARE HEREBY COMMANDED, under seal of this Court, to do the following:

- 3 1. Set aside the Waste Discharge Requirements General Order for Existing
4 Milk Cow Diaries (Order No. R5-2007-0035) and reissue the permit only after application of, and
5 compliance with, the State's anti-degradation policy (Resolution No. 68-16), as interpreted by the
6 Court of Appeal in its opinion, including, without limitation, adequate findings that any allowed
7 discharges to high quality water:
- 8 a. Will be consistent with maximum benefit to the people of the State;
 - 9 b. Will not unreasonably affect present and anticipated beneficial use of
10 the affected waters;
 - 11 c. Will not result in water quality less than that prescribed in applicable
12 water quality objectives; and
 - 13 d. That waste-discharging activities will be required to use the best
14 practicable treatment or control of the discharge necessary to assure that:
 - 15 i. A pollution or nuisance will not occur, and
 - 16 ii. The highest water quality consistent with the maximum benefit
17 to the people of the State will be maintained.
- 18 2. The writ further commands Defendant/Respondent to make and file a
19 Return within 180 days, setting forth what they have done to comply.
- 20 3. Plaintiffs/Petitioners shall recover their costs on appeal in the amount of
21 \$3,485.63, as reflected in the Notice of Amended Costs on Appeal, filed February 22, 2013.
- 22 4. The Court retains jurisdiction to consider any motions for an award of
23 attorneys' fees.
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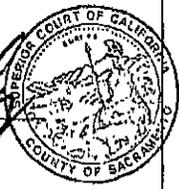
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IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: April 17, 2013



Timothy M. Frawley
Judge of the Superior Court of California
County of Sacramento



APPROVED AS TO FORM:

Date: _____



Laurel Firestone
Community Water Center
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation

Date: _____



Lynne Saxton
Saxton & Associates
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation

Date: _____

Teri Ashby
Office of the Attorney General of California
Attorney for Respondent Central Valley Regional
Water Quality Control Board

Date: _____

Theresa Dunham
Somach Simmons & Dunn
Attorney for Intervenor Community Alliance for
Responsible Environmental Stewardship

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IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: _____

Timothy M. Frawley
Judge of the Superior Court of California
County of Sacramento

APPROVED AS TO FORM:

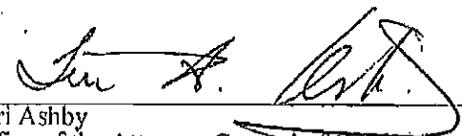
Date: _____

Laurel Firestone
Community Water Center
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation



Date: 4/8/2013

Lynne Saxton
Saxton & Associates
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation



Date: 4/9/13

Teri Ashby
Office of the Attorney General of California
Attorney for Respondent Central Valley Regional
Water Quality Control Board

Date: _____

Theresa Dunham
Somach Simmons & Dunn
Attorney for Intervenor Community Alliance for
Responsible Environmental Stewardship

Exhibit A



SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814
OFFICE: 916-448-7979 FAX: 916-448-8199
SOMACHLAW.COM

April 9, 2013

Via Email and First Class U.S. Mail

Lynne Saxton, Esq.
Saxton & Associates
912 Cole Street, Suite 140
San Francisco, CA 94117
lynne@saxtonlegal.com

Re: *Asociacion de Gente Unida Por El Agua, et al. v. Central Valley Regional Water Quality Control Bd.*, Sacramento Superior Court Case No. 34-2008-00003604-CU-WM-GDS
[Proposed] Writ of Mandate

Dear Ms. Saxton:

Thank you for providing the [Proposed] Writ of Mandate in the aforementioned case as directed by the Judgment After Remittitur issued by the Honorable Timothy M. Frawley on March 27, 2013. Pursuant to our conversation this afternoon, please consider this letter in response to the [Proposed] Writ of Mandate.

In accordance with Rule 3.1312 of the California Rules of Court, and on behalf of my client Community Alliance for Responsible Environmental Stewardship, I hereby provide my approval of the [Proposed] Writ of Mandate with the understanding that the reference to "discharges to high quality water" on page 2, line 7, is intended to qualify each of the following sub-paragraphs, including paragraph d with respect to reference to "waste-discharging activities" that "will be required to use best practicable treatment or control."

With that understanding, my signature page is enclosed for the Court. If my understanding is not correct, please consider this letter to constitute our disapproval. In that case, our disapproval would be based on the fact that the [Proposed] Writ of Mandate would then be inconsistent with Resolution No. 68-16, the Third Appellate District's opinion, and the Judgment After Remittitur. All findings in this matter need to be with respect to high quality waters, including findings regarding waste-discharging activities that will be required to use best practicable treatment or control. The [Proposed] Writ of Mandate must reflect this accordingly.

Lynne Saxton, Esq.
Re: AGUA v. RWQCB
April 9, 2013
Page 2

Thank you for your consideration.

Very truly yours,


Theresa A. Dunham

Enc.

cc (via email only): Teri H. Ashby, Esq. (Teri.Ashby@doj.ca.gov)
Laurel Firestone, Esq. (laurel.firestone@communitywatercenter.org)
Lori Okun, Esq. (lokun@waterboards.ca.gov)
Patrick Pulupa, Esq. (ppulupa@waterboards.ca.gov)
James Wheaton, Esq. (wheaton@envirolaw.org)

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IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: _____

Timothy M. Frawley
Judge of the Superior Court of California
County of Sacramento

APPROVED AS TO FORM:

Date: _____

Laurel Firestone
Community Water Center
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation

Date: 4/8/2013



Lynne Saxton
Saxton & Associates
Attorney for Petitioners Asociacion De Gente Unida
El Agua and Environmental Law Foundation

Date: _____

Teri Ashby
Office of the Attorney General of California
Attorney for Respondent Central Valley Regional
Water Quality Control Board

Date: 4-9-13



Theresa Dunham
Somach Simmons & Dunn
Attorney for Intervenor Community Alliance for
Responsible Environmental Stewardship

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PROOF OF SERVICE

I, Nicole Feliciano, hereby declare:

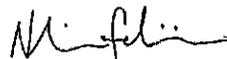
I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is Environmental Law Foundation, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

On April 11, 2013, I caused to be served the attached:

[PROPOSED] WRIT OF MANDATE

X **BY MAIL.** I caused the above identified document(s) addressed to the party(ies) listed below to be deposited for collection at the Public Interest Law Offices or a certified United States Postal Service box following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service on this day.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Oakland, California on April 11, 2013.



Nicole Feliciano
DECLARANT

Service List

<p>1 2 Lynne Saxton 3 Saxton & Associates 4 912 Cole Street, #140 5 San Francisco, California 94117 6 Telephone: (415) 317-6713 7 Email: lynne@saxtonlegal.com</p>	<p><i>Attorney for Petitioners AGUA, ELF</i></p>
<p>6 Teri H. Ashby 7 Attorney General of California 8 Office of the Attorney General 9 1300 "I" Street 10 Sacramento, CA 95814-2919 11 Tel: (916) 327-4254 12 Fax: (916) 327-2319 13 teri.ashby@doj.ca.gov</p>	<p><i>Attorney for Respondent California Regional Water Quality Control Board, Central Valley Region</i></p>
<p>12 Thomas Freeman 13 Eric E. Bronson 14 Gary S. Lincenberg 15 Bird, Marella, Boxer, Wolpert, Nessim, 16 Dooks & Lincenberg, P.C. 17 1875 Century Park East, 23rd Floor 18 Los Angeles, California 90067-2561 19 Tel: (310) 201-2100 20 Fax: (310) 201-2110 21 trf@birdmarella.com 22 eb@birdmarella.com 23 gsl@birdmarella.com</p>	<p><i>Attorney for Intervenor CARES</i></p>
<p>19 Theresa A. Dunham 20 Somach Simmons & Dunn 21 500 Capitol Mall, Suite 1000 22 Sacramento, CA 95814 23 Telephone: (916) 446-7979 24 Facsimile: (916)446-8199 25 tdunham@somachlaw.com</p>	<p><i>Attorney for Intervenor CARES</i></p>
<p>24 Laurel Firestone (SBN 234236) 25 Rose Francis (SBN 248521) 26 COMMUNITY WATER CENTER 27 311 W. Murray Ave. 28 Visalia, CA 93291 Tel: 559-733-0219 Fax: 559-733-8219 laurel.firestone@communitywatercenter.org rose.francis@communitywatercenter.org</p>	<p><i>Attorneys for Petitioners AGUA</i></p>