

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ORDER NO. R5-2006-0025

RATIFYING THE 16 MARCH 2006 SETTLEMENT AGREEMENT
BETWEEN
CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD
AND
HILMAR CHEESE COMPANY, INC., AND HILMAR WHEY PROTEIN, INC.
MERCED COUNTY

Pursuant to California Water Code (CWC) Section 13323, 13350 and California Government Code Section 11415.60, the California Regional Water Quality Control Board, Central Valley Region (Regional Board) finds:

1. The Regional Water Quality Control Board, Central Valley Region, (Regional Board) has been presented with a revised version of the proposed settlement of Administrative Civil Liability Complaint No. R5-2005-0501 (See Attachment I) negotiated between Regional Board's prosecution staff and Hilmar Cheese Company, Inc., and Hilmar Whey Protein, Inc (hereafter collectively "Discharger"); and
2. The 16 March 2006 Settlement Agreement supersedes both the 10 February 2006 Settlement Agreement and the Settlement Agreement of 24 October 2005, and is intended to address the concerns raised by this Regional Board and the public at the Regional Board's public meeting on 29 November 2005; and
3. The Regional Board does not necessarily accept any of the assertions made in the 16 March 2006 Settlement Agreement, but wishes to finally resolve the matters covered therein; and
4. The Regional Board desires to conclude all existing disputes between the Discharger and the Regional Board; and
5. The Discharger has agreed to dismiss without prejudice the pending challenge to the validity of the Water Quality Control Plan for the Sacramento and San Joaquin River Basin, Hilmar Cheese Company v. California Regional Water Quality Control Board, Central Valley Region, Merced County Superior Court No. 148824. The Regional Board's acceptance of this settlement is contingent upon, and does not take effect until, the case is dismissed according to the terms in the "Dismissal and Tolling Agreement" presented to the Board by the discharger at the meeting.

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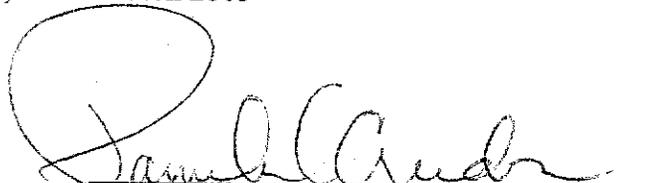
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6. This action to adopt an Order ratifying the 16 March 2006 Settlement Agreement which resolves the ACL Complaint is exempt from the provisions of the California Environmental Quality Act, in accordance with Title 14, California Code of Regulations (CCR) (Enforcement Actions by Regulatory Agencies), Section 15321(a)(2), and in accordance with Title 14, CCR (Existing Facilities), Section 15301, because there is no expansion of an existing discharge; and
7. Any aggrieved person may petition the State Water Resources Control Board (State Board) to review the action in accordance with Water Code section 13320 and the State Board's regulations. The petition must be received by the State Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions are available at http://www.swrcb.ca.gov/water_laws/cawtrcde/wqpetition_instr.html and will also be provided upon request.

IT IS HEREBY ORDERED THAT:

1. The Regional Board hereby ratifies the 16 March 2006 Settlement Agreement, Attachment II, to be enforced according to its own terms.
2. The Regional Board ratification of the 16 March 2006 settlement, Attachment II, is contingent upon, and does not take effect until, the case Hilmar Cheese Company v. California Regional Water Quality Control Board, Central Valley Region, Merced County Superior Court No. 148824, is dismissed according to the terms in the "Dismissal and Tolling Agreement".

I, PAMELA C. CREEDON, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 16 March 2005


PAMELA C. CREEDON, Executive Officer

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MERCED COUNTY

ATTACHMENT I.

**Administrative Civil Liability Complaint
No. R5-2005-0501**

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ACL COMPLAINT NO. R5-2005-0501
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
IN THE MATTER
OF
HILMAR CHEESE COMPANY, INC.
HILMAR WHEY, INC.
AND
KATHY AND DELTON NYMAN
CHEESE PROCESSING PLANT
MERCED COUNTY

This complaint for Administrative Civil Liability (Complaint) is issued by the Executive Officer of the Regional Water Quality Control Board, Central Valley Region (Regional Board) to Hilmar Cheese Company, Inc.; Hilmar Whey, Inc.; Hilmar Cheese Company Properties Partnership; and Kathy and Delton Nyman, dba Delton Nyman's Farm (Collectively HCC or Discharger) pursuant to California Water Code section 13323. The proposed administrative civil liability is based on findings that HCC has violated Waste Discharge Requirements Order No. 97-206 (WDRs) and has discharged waste or has caused or permitted waste to be deposited where it is discharged into the waters of the state. Imposition of Administrative Civil Liability is authorized pursuant to California Water Code section 13350.

The Executive Officer of the Regional Board finds, with respect to the Discharger's acts and/or failures to act, the following:

1. The Discharger operates the subject Cheese Processing Plant (hereafter Plant) and discharges waste onto land and into groundwaters of the State one-half mile north of the unincorporated community of Hilmar.
2. WDRs Order No. 97-206 regulates the discharge of waste from the Plant and states, in Discharge Specification B.2, that "Effective 15 March 1999, the EC of the discharge shall not exceed 900 $\mu\text{mhos/cm}$."
3. The Discharger conducted daily measurements to determine compliance with the EC effluent limit. Monthly discharger self-monitoring reports (SMRs) covering the period from 27 January 2002 through 30 November 2004 contain daily measurement of conductivity at 25°C (EC). The daily measurements exceeded 900 $\mu\text{mhos/cm}$ for 1,039 days. These SMRs document that the wastewater discharged averaged about 2,750 $\mu\text{mhos/cm}$ and ranged from 1,750 to 4,160 $\mu\text{mhos/cm}$ on a monthly basis during this period. Wastewater discharged that exceeds an EC of 900 $\mu\text{mhos/cm}$ violates Discharge Specification B.2. On those 1,039 days, HCC discharged 821,000,000 gallons of wastewater to land.
4. Monthly groundwater monitoring data from SMRs covering the period from 27 January 2002 through February 2004 show that groundwater in wells within the influence of HCC's wastewater discharge contain an EC ranging from 1,500 to 2,700 $\mu\text{mhos/cm}$ compared to a background groundwater quality of 510 $\mu\text{mhos/cm}$ (Cleanup and Abatement Order No. 5F-2004-0722).

Comparison of the data from HCC's groundwater well network as reported by HCC in the SMRs demonstrates that HCC discharged waste or deposited waste where it was discharged to waters of the state.

5. As shown and described in Findings 2 through 4, above, the Discharger has violated the WDRs and has discharged waste to waters of the state (groundwater) and/or has caused or permitted waste to be deposited where it is discharged to waters of the state (groundwater).

6. California Water Code section 13323(a) provides:

Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

7. California Water Code section 13350(a) provides:

Any person who . . . (2) in violation of any waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state . . . shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

8. California Water Code section 13350(e) provides in relevant part:

The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both.

- (1) The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs.
- (2) The civil liability on a per gallon basis may not exceed ten dollars (\$10) for each gallon of waste discharged.

9. California Water Code section 13350(j) provides:

Remedies under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal, except that no liability shall be recoverable under subdivision (b) for any discharge for which liability is recovered under Section 13385.

10. Pursuant to California Water Code section 13350(e)(1), the maximum liability for the discharges of waste with EC in excess of 900 $\mu\text{mhos/cm}$ for a total of 1,039 days is \$5,195,000.

11. Pursuant to California Water Code section 13350(e)(2), the maximum liability amount for the 821,000,000 gallons discharged with EC in excess of 900 $\mu\text{mhos/cm}$ is \$8.21 billion.

12. The issuance of this Complaint is an enforcement action taken by a regulatory agency and is exempt for the provisions of the California Environmental Quality Act, pursuant to Section 15321(a)(2), Title 14, California Code of Regulations.

HCC IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Regional Board proposes that Administrative Civil Liability be imposed in the amount of **\$4,000,000 (four million dollars)**, based upon the above findings and in consideration of the factors set forth in California Water Code section 13327.
2. A hearing will be scheduled within ninety days from the date of this complaint unless HCC agrees to waive the hearing and pay the **\$4,000,000** Administrative Civil Liability in full.
3. If a hearing is held, the Regional Board will consider whether to affirm the proposed Administrative Civil Liability, or whether to impose a different amount after consideration of evidence and the factors set forth in CWC Section 13327. The Regional Board may impose a greater amount not to exceed the maximum civil liability identified above.
4. HCC may waive the right to a hearing. If waiver of the hearing is intended, the Discharger must have an appropriate representative sign the waiver and return it with a certified check made payable to the *State Water Resources Control Board Cleanup and Abatement Account* in the amount of **\$4,000,000 (four million dollars)** to the Regional Board at 11020 Sun Center Drive, #200, Rancho Cordova, CA 95670-6114 by 26 February 2005, as set forth below.

ORIGINAL SIGNED

THOMAS R. PINKOS
Executive Officer

26 January 2005

**WAIVER OF HEARING FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent of Hilmar Cheese Company (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R5-2005- 0501 (hereinafter the "Complaint");
2. I am informed of the right provided by Water Code section 13323, subdivision (b), to a hearing within ninety (90) days of issuance of the Complaint;
3. I hereby waive the Discharger's right to a hearing before the California Regional Water Quality Control Board, Central Valley Region, within ninety (90) days of the date of issuance of the Complaint; and
4. Without admitting liability for the matters alleged in the Complaint, I otherwise agree to remit payment for the civil liability imposed in the amount of \$4,000,000 (four million dollars) by check, made payable to the "State Water Resources Control Board Cleanup and Abatement Account." The check shall have written upon it the number of this Complaint (Administrative Civil Liability Complaint No. R5-2005-0501) and it and the signed waiver shall be mailed to the attention of Janice Tanaka, at the Regional Board office at 11020 Sun Center Drive, #200, Rancho Cordova, CA 95670-6114.
5. I understand the payment of the above amount constitutes a settlement of the Complaint that will not become final until after a public comment period.
6. I understand that the Executive Officer has complete discretion to modify or terminate this settlement during the 30-day public comment period, which began on the date of the Complaint.
7. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

(Name)

(Title)

(Date)

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ATTACHMENT II.

**Settlement Agreement,
16 March 2006**

REVISED SETTLEMENT AGREEMENT

KOR
March 16, This Revised Settlement Agreement ("Settlement Agreement") is made as of ~~February 10,~~ 2006, by and between the Staff of the California Regional Water Quality Control Board, Central Valley Region ("Regional Board Staff" or "Staff"), on the one hand, and Hilmar Cheese Company, Inc. and Hilmar Whey Protein, Inc. (collectively "Hilmar"), on the other. At times, the Regional Board Staff and Hilmar are referred to herein individually as a "Party" or collectively as the "Parties." This Settlement Agreement modifies and supersedes the Settlement Agreement between the Parties that was made as of October 24, 2005, in order to address concerns raised by members of the California Regional Water Quality Control Board, Central Valley Region ("Regional Board"), the Regional Board's advisory team and members of the public at the public meeting held November 29, 2005, regarding the October 24, 2005, Settlement Agreement.

RECITALS

A. The Regional Board is a state agency, and is part of the California Environmental Protection Agency. (Water Code, §§ 175, 13100.) The Regional Board is one of nine such boards created to establish and enforce water quality control plans, policies, and regulations to ensure the protection of beneficial uses of the waters of the state within nine designated regions in the State of California. (Water Code, §§ 13200, 13201, 13240, *et seq.*) The Regional Board has primary enforcement authority, including power to remedy unlawful discharges, and to achieve cleanup and abatement of water pollution and nuisance. (Water Code, § 13300, *et seq.*)

B. The summaries of arguments contained in this Paragraph B are the Parties' respective allegations only. Neither Party necessarily ascribes to or agrees with the allegations of the other. These allegations are not evidence and no hearing has occurred. Based on the timing of this Settlement Agreement, Staff has not had the opportunity to respond to Hilmar's prepared testimony and expert reports, and reserves the right to do so if this Settlement Agreement is not approved.

1. Staff's Allegations:

On January 26, 2005, Regional Board Executive Officer Thomas R. Pinkos issued Administrative Civil Liability Complaint No. R5-2005-0501 to Hilmar ("ACL Complaint") pursuant to Water Code section 13323. The ACL Complaint alleged that Hilmar violated its discharge permit, Waste Discharge Requirements Order No. 97-206 (the "Permit"), by discharging wastewater containing salt, as measured by Electrical Conductivity ("EC"), in excess of the Permit's limit for EC of 900 μ mhos/cm. The ACL Complaint more specifically alleged, among other things: that monthly discharger self-monitoring reports ("SMRs") covering the period January 27, 2002 through November 30, 2004 contain daily measurements for EC exceeding 900 μ mhos/cm for 1,039 days; that the EC in the wastewater discharged during this period ranged from 1,750 to 4,160 μ mhos/cm on a monthly basis; and that the wastewater was discharged where salt in the wastewater discharged or would discharge to waters of the state (specifically groundwater). Based on these allegations, Executive Officer Pinkos proposed that administrative civil liability in the amount of \$4,000,000 (four million dollars) be imposed

against Hilmar. Copies of the ACL Complaint, the subsequently issued Regional Board Staff Report supporting the ACL Complaint (both of which were previously provided to the interested persons list for the Hilmar facility), and further related information are publicly available at the Regional Board's office at 1685 E Street, Fresno, California, and on the Regional Board's web-site: <http://www.waterboards.ca.gov/centralvalley>.

2. Hilmar's Allegations:

Hilmar has vigorously disputed the proposed administrative civil liability. Hilmar has submitted prepared testimony and expert reports that Hilmar contends demonstrate, among other things: that for the past eight years Hilmar has fully cooperated with Regional Board Staff in an attempt to meet the EC discharge limit of 900 $\mu\text{mhos/cm}$ in the Permit, which Hilmar contends is an unprecedented standard; that Hilmar has made every reasonable effort in its innovative attempts to meet this limit, including expending over \$85 million in an attempt to do so; that this limit never should have been imposed on Hilmar in the first instance and has proven to be unachievable for all of Hilmar's wastewater; that this limit has resulted in Hilmar's being required not only to treat its wastewater to a salinity level lower than is present in its incoming potable water supply, but also to treat its wastewater to a quality better than the drinking water that community water providers actually supply to the consuming public at the tap; that, at the current state of research and development, there is no proven, reliable technology to treat food processing wastewater like Hilmar's to the 900 $\mu\text{mhos/cm}$ EC limit that is economically or environmentally sustainable; that Hilmar's wastewater is not toxic; that impacts to groundwater as a result of Hilmar's wastewater discharge are limited, do not pose a threat to public health, and are susceptible to cleanup and abatement; that Hilmar has not derived any economic benefit from non-compliance with the EC limit in the Permit; and that for all of these, as well as other reasons, the proposed administrative civil liability is grossly excessive and should be eliminated or significantly reduced. Copies of Hilmar's prepared testimony and expert reports are publicly available at the Regional Board's office at 1685 E Street, Fresno, California, and on the Regional Board's web-site (excluding voluminous supporting documents that are present in the Regional Board's public file in Fresno): <http://www.waterboards.ca.gov/centralvalley>.

C. After arms-length negotiations, the Regional Board Staff and Hilmar have reached and entered into this Settlement Agreement in a good faith effort to avoid the uncertainty and expense of protracted litigation, and for Hilmar to focus its resources and efforts instead on seeking solutions to salinity issues confronting the Central Valley and other areas of the State of California. The "Matters Covered," as defined below, having been thoroughly investigated and diligently prosecuted, the Regional Board Staff recommends approval of this Settlement Agreement by the Regional Board as being appropriate, proper and in the public interest. This Settlement Agreement is authorized by Government Code section 11415.60, which provides: "(a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c) [which provides that "[a] settlement is subject to any necessary agency approval."], the settlement may be on any terms the parties determine are appropriate."

AGREEMENT

THEREFORE, the Parties agree as follows:

1. Regional Board Approval Required

This Settlement Agreement shall be of no force or effect unless unconditionally approved and adopted by the Regional Board in an Order Ratifying Settlement Agreement after consideration at a public meeting.

2. No Admission of Liability

The Parties expressly acknowledge that this Settlement Agreement reflects the compromise of disputed civil claims and that there has been no adjudication of any fact, issue or claim. This Settlement Agreement shall not constitute, and no action taken pursuant to this Settlement Agreement shall constitute, any admission of liability by Hilmar.

3. Payments by Hilmar

(a) In compromise of the proposed administrative civil liability and in consideration of the terms of this Settlement Agreement, Hilmar shall pay the following sums by the methods specified within ten (10) business days of "Final Approval" of this Settlement Agreement as defined in Paragraph 7 below:

\$ 1,000,000

(1) ~~\$1,850,000 (one million eight hundred fifty thousand~~  dollars) made payable to the State Water Resources Control Board, Waste Discharge Permit Fund, pursuant to Water Code section 13350(k). This payment shall be by certified or cashier's check mailed within ten (10) business days of Final Approval to Richard Loncarovich, Central Valley Regional Water Quality Control Board, 11020 Sun Center Drive, Suite 200, Rancho Cordova, 95670-6114, with a copy to M. Catherine George, Senior Staff Counsel, State Water Resources Control Board, Office of Chief Counsel, 9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340.

\$ 1,850,000

(2) ~~\$1,000,000 (one million dollars)~~  made payable to an escrow account ("SEP Account"), to be established at a financial institution mutually agreed upon by the Parties, for the purpose of funding the "Supplemental Environmental Project" defined and described below. This payment shall be by certified or cashier's check mailed within ten (10) business days of Final Approval to the financial institution that is the holder of the SEP Account, or within ten (10) business days of the establishment of the SEP Account if the SEP Account has not yet been established as of the time of Final Approval, with a copy to M. Catherine George, Senior Staff Counsel, State Water Resources Control Board, Office of Chief Counsel, 9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340.

(3) \$150,000 (one hundred fifty thousand dollars) made payable to the California Attorney General's Office to reimburse the Office of the Attorney General for its costs and attorneys' fees incurred in assisting Regional Board Staff in prosecuting the ACL Complaint. This payment shall be by certified or cashier's check mailed within ten (10) business days of Final Approval to Tracy Winsor, Deputy Attorney General, Office of the

Attorney General, 1300 I St., Ste 125, Sacramento, CA 95814.

(b) In the event Hilmar fails timely to pay in full the amounts specified in this Paragraph 3, interest on the amount(s) remaining unpaid shall accrue at the rate provided in Code of Civil Procedure section 685.010 and shall be added to the amount(s) remaining unpaid. If enforcement of this Settlement Agreement for failure timely to pay is necessary, Hilmar agrees not to oppose the issuance of a clerk's judgment pursuant to Water Code section 13328 for the amount(s) remaining unpaid, and further agrees that Regional Board Staff and the Regional Board shall be entitled to their reasonable attorneys fees' and costs for such enforcement.

4. Supplemental Environmental Project

(a) The payment to the SEP Account shall be used to fund a Supplemental Environmental Project ("SEP"), which shall consist of the Revised Proposal to Study the Management of Salinity in Wastewater in the California Food Processing Industry attached to this Settlement Agreement as Exhibit A ("SEP Study").

(b) On February 19, 2002, the State Water Resources Control Board ("State Board") adopted Resolution No. 2002-0040 amending the Water Quality Enforcement Policy ("Enforcement Policy"). The Enforcement Policy was approved by the Office of Administrative Law and became effective on July 30, 2002. The Parties agree that the SEP Study proposed by Hilmar satisfies the general conditions and criteria for SEPs set forth in Section IX of the Enforcement Policy. The SEP Study meets the General SEP Qualification Criteria set forth in the Enforcement Policy, including that "The SEP should directly benefit or study groundwater or surface water quality, and the beneficial uses of waters of the State. Examples include . . . (ii) studies or investigations (e.g., pollutant impact characterization, pollutant source identification, etc.)". The SEP Study is not otherwise required of Hilmar, will include a study of aspects of groundwater quality and beneficial uses of waters of the state, and will not directly benefit the State Board or Regional Board functions or staff. In addition, the Parties believe the SEP Study will provide the State Board and/or Regional Board with "added value," and thus is the type of project which is "encouraged" according to the Additional SEP Qualification Criteria set forth in the Enforcement Policy.

(c) The SEP Study also satisfies the Nexus Criteria set forth in the Enforcement Policy. The SEP Study proposes to study and offer possible solutions for management (including source control, treatment and disposal) of salinity in food processing wastewater discharges within the Central Valley. The SEP Study has a geographic nexus to the violations alleged in the ACL Complaint because the area to be studied in the SEP Study includes the area in which Hilmar's alleged violations occurred.

(d) A copy of all correspondence between Hilmar and the SEP Study directors (~~Professor David Sunding and Dr. Mark Berkman~~) regarding SEP Study activities shall be sent to the attention of the Assistant Executive Officer, Fresno Office, Central Valley Regional Water Quality Control Board, via fax at (559) 445-5910 or via mail at 1685 E Street, Fresno, CA 93706. 

(e) Hilmar, or the SEP Study directors, shall provide the Regional Board with quarterly progress reports regarding SEP Study activities. Such quarterly progress reports shall be sent to the attention of Regional Board Staff as indicated in Paragraph (4)(d) above.

(f) Hilmar shall hire, payable from the SEP Account, an independent third-party auditor of SEP Study expenditures. The independent third-party auditor shall be a certified public accountant and shall report solely to the Regional Board to independently audit SEP Account expenditures. The independent auditor shall provide the Regional Board with quarterly accountings of SEP Study expenditures. In addition, within thirty (30) days of completion of all SEP Study activities, the independent third-party auditor shall provide the Regional Board with a post-project accounting of all SEP Study expenditures. Such quarterly accountings, and the post-project accounting, shall be sent to the attention of Regional Board Staff as indicated in Paragraph (4)(d) above, with a copy to Hilmar. Hilmar shall retain copies of all records and files regarding the SEP Study, and shall make them available to the independent third-party auditor and/or Regional Board Staff for inspection upon reasonable notice.

(g) The Parties contemplate that Regional Board Staff, and/or the Peer Review Panel and/or Stakeholder Review Panel specified in the SEP Study, will oversee the implementation of the SEP Study to ensure that it reasonably follows the approved project and achieves the project objectives. In the event that the Regional Board determines that this oversight is inadequate, the Regional Board may require Hilmar to hire, payable from the SEP Account, an independent third-party to reasonably evaluate compliance with the SEP Study's objectives and milestones, and to periodically report to the Regional Board regarding timely and successful completion of the SEP Study. As directed by the Regional Board, Hilmar shall meet periodically with the independent third-party and/or Regional Board Staff to ensure that the SEP Study, as implemented, reasonably follows the approved project and achieves the project objectives.

(h) Regional Board Staff, by entering into this Settlement Agreement, assumes no liability for any injuries or damages to persons or property resulting from acts or omissions by Hilmar, or Hilmar directors, officers, employees, agents, representatives, successors, assigns, contractors or consultants in carrying out any action or activity pursuant to this Settlement Agreement. Neither the Regional Board nor the State of California may be deemed to be a party to any contract entered into by Hilmar, its directors, officers, employees, agents, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Settlement Agreement.

(i) Hilmar agrees that, notwithstanding participation by Regional Board or State of California employees, agents or representatives in any manner and at any stage of the SEP process, Hilmar will not argue or imply, nor will Hilmar encourage third-parties to argue or imply, that the Regional Board participated in drafting recommendation(s), or proposed outcome(s) or use(s), of the SEP Study. This agreement by Hilmar not to attempt to impute SEP Study recommendations, outcomes or uses to the Regional Board and the State of California, as an admission by either of them, applies to any challenge by Hilmar or any third-party against the Regional Board or the State of California, including without limitation any challenge to basin plans, regulations or statutes. Consistent with the foregoing, Hilmar shall direct that the following disclaimer be prominently stated in all versions of the SEP Study submitted to the

Regional Board or otherwise publicized: "The opinions, conclusions, and recommendations expressed herein are not binding on the Regional Board or any other entity. This study was undertaken as part of a settlement of an enforcement action by the Regional Board against Hilmar." If Hilmar publicizes the SEP Study or the results of the SEP Study, Hilmar must include the same disclaimer in a prominent manner.

or selection of The Second SEP Study director.

the later of (j) The SEP Study shall commence no later than thirty (30) days following Final Approval of this Settlement Agreement. Hilmar may request in writing an extension of the ~~timeline~~ provided for in Exhibit A for completion of the SEP Study or any of its milestones. The Executive Officer shall grant in writing a reasonable extension of time for completion of any milestone for any matter beyond Hilmar's reasonable control or for good cause. If any SEP milestone is not completed to the satisfaction of the Executive Officer by the date of the milestone and the Executive Officer has not granted an extension of time for completion of that milestone, the Executive Officer shall provide Hilmar with a notice of noncompliance. If Hilmar fails to cure the noncompliance within thirty (30) days from the date of mailing of any such notice, the funds then remaining in the SEP Account shall become immediately due and payable to the State Water Resources Control Board's Waste Discharge Permit Fund. It shall be Hilmar's responsibility to pay the amount then due regardless of any agreements between Hilmar and any third-party contracted to implement the SEP Study. Should Hilmar continue to dispute the Executive Officer's noncompliance determination, Hilmar's remedy is to file a petition for review of the Executive Officer's determination as provided in the Water Code.

subsequently developed

78 weeks

(k) In the event any funds remain in the SEP Account after the post-project accounting of SEP Study expenditures is completed, such funds shall be immediately paid to the State Water Resources Control Board's Waste Discharge Permit Fund.

5. Regional Board's Specific Releases

(a) The releases given in this Paragraph are for certain civil liability only. Upon unconditional approval of this Settlement Agreement by the Regional Board, and provided Hilmar thereafter makes the monetary payments specified in Paragraph 3 above, the Regional Board Staff and the Regional Board shall and do release and covenant not to sue or take administrative action against Hilmar, including its officers, directors, shareholders, employees, consultants, attorneys, predecessors-in-interest, successors and assigns, for civil liability with respect to the "Matters Covered" by this Settlement Agreement. The Matters Covered by this Settlement Agreement are:

(1) Past Matters. All violations of Hilmar's Permit, the Water Code, or the federal Clean Water Act, occurring on or before the date this Settlement Agreement is made, of which Regional Board Staff had actual knowledge of the alleged facts as of the date this Settlement Agreement is made. These violations consist of (i) the violations alleged in the ACL Complaint, (ii) the violations alleged in the Regional Board Staff Report supporting the ACL Complaint, including in the Notices of Violation referred to therein, (iii) the alleged violations that were investigated in the criminal investigation concluded by the Office of the Attorney General in July 2005, and (iv) any other violations that Regional Board Staff had actual knowledge of the alleged facts as of the date this Settlement Agreement is made.

(2) Prospective Matters During Interim Operating Period Only.

Any and all violations of the following provisions in Hilmar's Permit (or of provisions of the Water Code or the federal Clean Water Act predicated upon such violations), after the date this Settlement Agreement is made and through the date the Regional Board adopts updated, revised Waste Discharge Requirements as set forth in Paragraph 6 below ("the Interim Operating Period"), provided that Hilmar is in compliance with the "Interim Operating Limits" as set forth below and timely submits the "Progress Reports" and "Report of Waste Discharge" as set forth below. The provisions in Hilmar's Permit that are covered by the release in this Paragraph 5(a)(2) are Discharge Specifications B.1, B.2 (with respect to discharges to Primary Fields only), B.4, B.5, and B.6 (with regard to subsurface flow only), Discharge Prohibitions A.3, A.4 (with respect to discharges of any "designated" waste to Primary Fields only), and A.5, and Groundwater Limitation D. The pages from Hilmar's permit containing the text of these specifications, prohibitions and limitation are attached to this Settlement Agreement as Exhibit B. The specifications, prohibitions, and limitation identified in this Paragraph 5(a)(2) are included in the Matters Covered, on a prospective basis during the Interim Operating Period only, because the Interim Operating Limits reflect the status quo and Hilmar's existing discharge is or may be inconsistent with these provisions.

(b) Nothing in this Paragraph 5, or elsewhere in this Agreement, in any way restricts the Regional Board Staff's or the Regional Board's ability to seek relief for any violation or matter not included within the Matters Covered as defined above. This includes, without limitation, the Regional Board Staff's or the Regional Board's ability:

(1) to seek civil liability for any violations of provisions in Hilmar's Permit after the date this Settlement Agreement is made, that are not included within the Matters Covered as defined above;

(2) to seek injunctive relief or issue administrative orders to address any conditions of nuisance, pollution, odors or vectors that may be created by Hilmar's wastewater discharge after the date this Settlement Agreement is made; or

(3) to take enforcement action, including seeking civil liability, to ensure compliance by Hilmar with Cleanup and Abatement Order No. R5-2004-0722 or other administrative orders that may be issued by the Regional Board.

Thus, nothing in this Settlement Agreement precludes the Regional Board from seeking to require Hilmar to cleanup and abate, or otherwise address, in accordance with applicable law the effects of any waste discharged at the Hilmar facility at any time, including during the Interim Operating Period.

(c) It is the Parties' understanding and intent that Hilmar's payment of the sums specified in Paragraph 3, above, will constitute a full and final satisfaction of any civil liability that may be owed by Hilmar for the Matters Covered, and that upon unconditional approval of this Settlement Agreement by the Regional Board, and provided Hilmar thereafter pays the sums specified in Paragraph 3 above, no other or further civil liability will be imposed on Hilmar (including its officers, directors, shareholders, employees, consultants, attorneys, predecessors-in-interest, successors and assigns) for the Matters Covered. The Regional Board

Staff covenants not to request, directly or through the Regional Board or any other agency, that any law enforcement agency consider criminal charges associated with the Matters Covered.

(d) Effective November 1, 2005, and through the Interim Operating Period, Hilmar shall comply with the following Interim Operating Limits (all of which are monthly averages for daily discharge to land):

Maximum ^{Monthly Average} Total Non-RO Discharge To Primary Fields	1.2 mgd
Maximum ^{Monthly Average} EC to Primary Fields	3700 μ mhos/cm ¹
Minimum ^{Monthly Average} RO Permeate Discharge	0.6 mgd ²
Maximum ^{Monthly Average} EC of RO Permeate	900 μ mhos/cm ³
Maximum ^{Monthly Average} Total Discharge to Land	1.9 mgd

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These Interim Operating Limits reflect Hilmar's existing discharge and do not permit an increase in either the quantity of that discharge or the level of EC in that discharge. As such, these Interim Operating Limits are lawful and appropriate for the Interim Operating Period to allow for the development of additional information necessary for Hilmar to submit a revised/new Report of Waste Discharge, for Regional Board Staff to issue tentative new Waste Discharge Requirements, and for the Regional Board to adopt updated, revised Waste Discharge Requirements as provided below.⁴ Any failure by Hilmar to comply with these Interim Operating Limits, except in the circumstances or events that Hilmar demonstrates fall within the defenses found in Water Code section 13350(c), shall invalidate the release in Paragraph 5(a)(2) above only for the period of such non-compliance. In order to maintain the existing discharge during the Interim Operating Period, Hilmar shall not increase its total discharge as a result of any deep well injection. Hilmar is seeking an injection control permit from the United States Environmental Protection Agency ("EPA") for deep well injection. If Hilmar receives such a permit followed by an "Authorization to Inject" letter, Hilmar agrees to reduce its allowed

¹ Based upon 24-hour composite samples collected at least weekly and analyzed by a certified third-party laboratory.

² This minimum does not require any land discharge, but applies if the total discharge to land exceeds 0.6 mgd.

³ Based upon 24-hour composite samples collected at least weekly and analyzed by a certified third-party laboratory. This limit applies to the entire discharge to land if the total land discharge is 0.6 mgd or less.

⁴ These Interim Operating Limits acknowledge the status quo and are established for purposes of resolving the ACL Complaint only. Revised or new Waste Discharge Requirements for Hilmar's discharge will be developed based on Hilmar's new Report of Waste Discharge together with consideration of applicable regulatory authority and requirements. Inclusion of these Interim Operating Limits in this Settlement Agreement shall not be interpreted to limit the Regional Board's regulatory authority in any way in adopting revised or new Waste Discharge Requirements.

Maximum Total Discharge to Land during the Interim Operating Period by an amount equal to the amount that it is injecting into the well(s).

(e) Separate from the progress reports required concerning the SEP Study as provided in Paragraph 4 above, Hilmar shall prepare and submit the following Progress Reports and Report of Waste Discharge ("ROWD") in accordance with the following schedule, which may be extended in writing by the Executive Officer for good cause:

Progress Reports

Monthly progress reports regarding completion of the following tasks necessary for submission of a revised/new ROWD:

- identification of additional land suitable for irrigation/percolation;
- investigation of the alteration of SBR decant quality to minimize sodium and alkalinity (including investigation of the effects of substituting potassium hydroxide for sodium hydroxide, and of reducing and mitigating bicarbonate alkalinity);
- investigation of calcium removal technology;
- identification and characterization of land suitable for direct discharge of treated wastewater;
- development of distribution/storage systems;
- hydrogeologic studies of areas for land disposal and percolation ponds;
- antidegradation study of land based disposal/percolation ponds to poor background water quality;
- investigation of long-term running of reverse osmosis units at greater concentration (including investigation of single pass reverse osmosis for concentrating minerals); and
- investigation of the feasibility of deep well injection for discharge of mineral containing wastewater.

These monthly progress reports shall be due within ten days following the last day of each month beginning December 10, 2005 (covering the month of November 2005), and continuing until Hilmar submits its revised/new ROWD.

Report of Waste Discharge; Tentative New Waste Discharge Requirements

Revised/new ROWD – Without regard to whether this Settlement Agreement has yet to receive Final Approval under Paragraph 7 below, Hilmar shall submit a revised/new ROWD within ninety (90) days after any issuance by the EPA of an “Authorization to Inject” letter, or by October 31, 2006, whichever is earlier. Regional Board Staff shall only thereafter issue tentative new Waste Discharge Requirements to Hilmar.

Any failure by Hilmar timely to submit these reports shall invalidate the release in Paragraph 5(a)(2) above only for the period during which a report is late.

6. Updated, Revised Waste Discharge Requirements

After submittal of the ROWD in accordance with the schedule provided for in Paragraph 5(e) above, Hilmar shall exercise good faith and best efforts to work with Regional Board Staff to bring agreed upon updated, revised Waste Discharge Requirements, along with a reasonable time schedule for compliance, to the Regional Board for consideration and adoption. Regional Board Staff likewise shall exercise good faith to work with Hilmar toward the same end. This Settlement Agreement is in no way contingent upon agreement between Hilmar and Regional Board Staff on the terms of the updated, revised Waste Discharge Requirements or time schedule, or upon Regional Board approval of the same.

7. Final Approval of Settlement Agreement; Conditions Subsequent

(a) “Final Approval” of this Settlement Agreement shall be when the Regional Board’s unconditional approval of the Settlement Agreement as provided in Paragraph 1 above, has become final after the later of both of the following: (1) resolution of any and all appeals of the Regional Board’s unconditional approval taken by third-parties, or after the time for any such appeal has expired without any appeal having been taken; and (2) resolution of any State Board review of the Regional Board’s unconditional approval as provided in Paragraph 7(b) below.⁵ In the event a third-party successfully challenges the Regional Board’s unconditional approval of this Settlement Agreement, the Settlement Agreement shall be null and void ab initio at the election of either Hilmar or the Regional Board, provided that such election is made within ten (10) business days following service of any of the following: an order issued by the State Board reflecting the third-party’s successful challenge of the Regional Board’s unconditional approval; an order of the Superior Court reflecting the third-party’s successful challenge of the Regional Board’s unconditional approval; or a remittitur or mandate

⁵ As used in this Settlement Agreement, the word “appeal” refers to any legal challenge to a ruling of the Regional Board and/or the State Board and/or a California court, including but not limited to a petition for review by the State Board, a petition for a writ of mandamus or administrative mandamus filed in a California Superior court, and a petition or appeal to a higher California court.

of an appellate court reflecting such successful challenge.

(b) The Water Code provides in part: "The state board may, on its own motion, *at any time*, review the regional board's action . . ." Water Code §13320(a) (emphasis added). Because of the potentially open-ended nature of State Board review of Regional Board actions, including of settlement agreements such as this one, Hilmar may elect to petition the State Board for its unconditional approval of this Settlement Agreement. Hilmar shall file any such petition within thirty (30) days following the Regional Board's unconditional approval of this Settlement Agreement. In the event the State Board disapproves this Settlement Agreement, or a third-party successfully challenges the State Board's unconditional approval or dismissal of review of this Settlement Agreement, the Settlement Agreement shall be null and void ab initio at the election of either Hilmar or the Regional Board, provided that such election is made within ten (10) business days following service of any of the following: the State Board's order disapproving the Settlement Agreement; an order of the Superior Court reflecting the third-party's successful challenge of the State Board's unconditional approval or dismissal of review of the Settlement Agreement; or a remittitur or mandate of an appellate court reflecting such successful challenge.

8. Reservation of Rights

The Regional Board Staff and the Regional Board, on the one hand, and Hilmar, on the other, each reserve their respective rights to initiate or maintain judicial or administrative action against the other for any matter not released by this Settlement Agreement. Without limitation, nothing in this Settlement Agreement shall constitute or be construed as: a release by the Regional Board Staff or Regional Board of anything other than civil liability with respect to the Matters Covered; a release by the Regional Board Staff or the Regional Board of the ability to seek relief for any violation or matter not included within the Matters Covered, including for the matters specified in Paragraph 5(b) above; a release by Hilmar of its claims and right to litigate the issues in *Hilmar Cheese Company v. California Regional Water Quality Control Board, Central Valley Region*, Merced Superior Court No. 148824 (the "Basin Plan Litigation"); a release by Hilmar of its ability to challenge and/or seek a stay of any new Waste Discharge Requirements or order of the Regional Board except as provided in Paragraph 16 below; or a release of the Regional Board's or Hilmar's right to institute an action to enforce the terms of this Settlement Agreement or to declare rights hereunder. Resolution of the Basin Plan Litigation is beyond the scope of this Settlement Agreement inasmuch as Regional Board Staff is not a party to that litigation. However, Hilmar is amenable to discussing a negotiated resolution of that litigation with the Regional Board's counsel.

9. Interpretation; Venue

This Settlement Agreement shall be deemed to have been drafted equally by the Parties, and shall not be interpreted for or against either Party on the ground that any such Party drafted it. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of California. The Parties agree that Merced County Superior Court is the proper venue for any action to enforce the terms of this Settlement Agreement or to declare rights hereunder, and for any action challenging the updated, revised Waste Discharge Requirements or time schedule discussed in Paragraphs 5 and 6 above.

10. Enforcement of Order Ratifying Settlement Agreement

Hilmar recognizes that the Order Ratifying Settlement Agreement is not a formal administrative civil liability order pursuant to Water Code section 13350. Notwithstanding this fact, Hilmar agrees that the Order Ratifying Settlement Agreement may be enforced in the manner provided in Water Code section 13328.

11. Integration; Amendment

This Settlement Agreement contains all of the terms and conditions agreed upon by the Parties relating to the matters addressed in this Settlement Agreement, and supersedes any and all prior and contemporaneous agreements, negotiations, correspondence, understandings, and communications of the Parties, whether oral or written, respecting the matters addressed in this Settlement Agreement. This Settlement Agreement may be amended or modified only by a writing signed by the Parties or their authorized representatives.

12. Knowing, Voluntary Agreement

Each Party acknowledges that it has been represented by legal counsel in connection with this Settlement Agreement, and that each Party has reviewed, and has had the benefit of legal counsel's advice concerning, all of the terms of this Settlement Agreement.

13. Authority to Execute

Each Party represents and warrants that the person who signs this Settlement Agreement on its behalf is duly authorized to execute this Settlement Agreement on its behalf, and to bind that Party to the terms of this Settlement Agreement.

14. Costs and Attorneys' Fees

Except as otherwise provided in Paragraphs 3(a)(3) and 3(b) above, Regional Board Staff and the Regional Board, on the one hand, and Hilmar, on the other, each shall bear its own costs and attorneys' fees in connection with the administrative proceeding initiated by the ACL Complaint, including costs and fees associated with negotiating and securing Final Approval of this Settlement Agreement, and any costs and fees associated with any action brought to enforce the terms of this Settlement Agreement or to declare rights hereunder.

15. Counterparts

This Settlement Agreement may be executed by the Parties in counterpart originals with the same force and effect as if fully and simultaneously executed as a single, original document.

16. Appeal Rights

The Parties agree to support this Settlement Agreement and any order of the Regional Board unconditionally approving the Settlement Agreement as provided in