

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:)
)
)
)
Bob McCune (operator)) **Order No. R5-2011-0600 (Final)**
dba Fahey Dairy)
)
) **Settlement Agreement and Stipulation**
) **for Entry of Order; Order (Final)**
)
_____)

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulated Order" or "Order") is entered into by and between the Executive Officer of the Regional Water Quality Control Board, Central Valley Region ("Central Valley Water Board"), on behalf of the Central Valley Water Board Prosecution Staff ("Prosecution Staff"), and Bob McCune (the "Discharger") (Prosecution Team and Discharger are collectively, the "Parties") and is presented to the Central Valley Water Board, or its delegee, for adoption as an order by settlement, pursuant to Government Code section 11415.60.

Section II: RECITALS

1. Bob McCune operates Fahey Dairy located at [REDACTED], Gustine, California in Merced County. On 3 May 2007, the Central Valley Water Board issued the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order) and the General Order's corresponding Monitoring and Reporting Program. The General Order became effective on 9 May 2007. Fahey Dairy is regulated by the General Order and the General Order names both the owner and operator as "the Discharger."
2. On September 28, 2011, the Central Valley Water Board issued a letter detailing Forthcoming Assessment of Civil Liability for Failure to Comply with Water Code 13267 to the Discharger (hereinafter "Prefiling Letter")(Attachment A). The Prefiling Letter notified the dairy that a 2009 Annual Report required under the Dairy General Order had not been submitted as of 1 September 2011, which is a violation of California Water Code (CWC) section 13267. The Prefiling Letter also informed the Discharger that the Executive Officer of the Central Valley Water Board recommended imposing an administrative civil liability totaling seven thousand eight hundred dollars (\$7,800.00) for the alleged violations of the General Order.

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3. The Prosecution Staff and Discharger (hereinafter "Parties") engaged in settlement negotiations and agree to settle the violations cited in the Complaint without administrative or civil litigation and by presenting this Stipulated Order to the Central Valley Water Board, or its delegee, for adoption as an order by settlement pursuant to Government Code section 11415.60. The Prosecution Staff believes that the resolution of the alleged violations is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the violations alleged in the Complaint except as provided in this Stipulated Order and that this Stipulated Order is in the best interest of the public.

4. To resolve the violations of CWC 13267 by consent and without further administrative proceedings, the Parties have agreed to the imposition of four thousand three hundred dollars (\$4,300.00) in liability. The reduction in liability from the amount proposed in the Prefiling Letter is based on an adjustment in the Cleanup and Cooperation factor as the missing 2009 Annual Report was submitted to the Central Valley Water Board on 14 October 2011 and the operator has demonstrated its ongoing efforts to comply with the General Order. Additionally, the liability amount represents an adjusted liability amount consisting of a two thousand dollar (\$2,000.00) reduction of the proposed penalty described in the Prefiling Letter. The reduction in liability is based on several factors. The liability amount of \$4,300.00 more than adequately recoups the economic benefit derived from the violations, plus 10%, which is the lowest amount permissible pursuant to the State Water Resources Control Board's Water Quality Enforcement Policy.

Section III: STIPULATIONS

The Parties stipulate to the following:

5. **Administrative Civil Liability:** The Discharger hereby agrees to the imposition of an administrative civil liability totaling four thousand three hundred dollars (\$4,300.00). Within thirty (30) days of the effective date of this Order, the Discharger agrees to remit, by check for FOUR THOUSAND THREE HUNDRED DOLLARS (\$4,300.00), payable to the *State Water Pollution Cleanup and Abatement Account*, and shall indicate on the check the number of this Order. The Discharger shall send the original signed check to Rick Moss, Central Valley Water Board 11020 Sun Center Drive, Suite 200 Rancho Cordova, California 95670 and shall send a copy to Ellen Howard, Office of Enforcement, State Water Resources Control Board (State Water Board), 1001 "I" Street, 16th Floor, Sacramento, California 95814.

6. **Compliance with Applicable Laws:** The Discharger understands that payment of administrative civil liability in accordance with the terms of this Stipulated Order and or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in the Complaint may subject it to further enforcement, including additional administrative civil liability.

7. **Party Contacts for Communications related to Stipulated Order:**

For the Central Valley Water Board:

Frederick S. Moss
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670

For the Respondents:

Bob Fahey
[REDACTED]
Gustine, California 95322

- 8. Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
- 9. Matters Addressed by Stipulation:** Upon the Central Valley Water Board's adoption of this Stipulated Order, this Order represents a final and binding resolution and settlement of the violations alleged in the Complaint, and all claims, violations or causes of action that could have been asserted against the owner or operator as of the effective date of this Stipulated Order based on the specific facts alleged in the Complaint or this Order ("Covered Matters"). The provisions of this Paragraph are expressly conditioned on the full payment of the administrative civil liability, in accordance with Paragraph 5.
- 10. Public Notice:** The Discharger understands that this Stipulated Order will be noticed for a 30-day public review and comment period prior to consideration by the Central Valley Water Board, or its delegee. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Central Valley Water Board, or its delegee, for adoption, the Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the Central Valley Water Board, or its delegee. The Discharger agrees that they may not rescind or otherwise withdraw their approval of this proposed Stipulated Order.
- 11. Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for the Central Valley Water Board's adoption of the settlement by the Parties and review by the public, as reflected in this Stipulated Order, will be adequate. In the event procedural objections are raised prior to the Stipulated Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
- 12. No Waiver of Right to Enforce:** The failure of the Prosecution Staff or Central Valley Water Board to enforce any provision of this Stipulated Order shall in no way be

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deemed a waiver of such provision, or in any way affect the validity of the Order. The failure of the Prosecution Staff or Central Valley Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order.

13. Interpretation: This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.

14. Modification: This Stipulated Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Central Valley Water Board.

15. If Order Does Not Take Effect: In the event that this Stipulated Order does not take effect because it is not approved by the Central Valley Water Board, or its delegee, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Central Valley Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing.

Notwithstanding objections on the admissibility of settlement discussions as evidence in a hearing, the Parties agree to waive any and all objections related to their efforts to settle this matter including, but not limited to:

- a. Objections related to prejudice or bias of any of the Central Valley Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Central Valley Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the Complaint in this matter; or
- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

16. Admission of Liability: In settling this matter, the Discharger admits to the findings in the Complaint, and recognize that this Order may be used as evidence of a prior enforcement action consistent with California Water Code (CWC) section 13327.

17. Waiver of Hearing: The Discharger has been informed of the rights provided by CWC section 13323(b), and hereby waive their right to a hearing before the Central Valley Water Board prior to the adoption of the Stipulated Order.

18. Waiver of Right to Petition: The Discharger hereby waives their right to petition the Central Valley Water Board's adoption of the Stipulated Order as written for review

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by the State Water Board, and further waive their rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

19. Covenant Not to Sue: The Discharger agrees to a covenant not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any Covered Matter.

20. Central Valley Water Board is Not Liable: Neither the Central Valley Water Board members nor the Central Valley Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Discharger, their directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Stipulated Order.

21. Authority to Bind: Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of and to bind the entity on whose behalf he or she executes the Order.

22. No Third Party Beneficiaries. This Stipulated Order is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.

23. Effective Date: This Stipulated Order shall be effective and binding on the Parties upon the date the Central Valley Water Board, or its delegee, enters the Order.

24. Counterpart Signatures: This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

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IT IS SO STIPULATED.

California Regional Water Quality Control Board Prosecution Staff
Central Valley Region

By: *Fredrick L. Rose*
for Pamela Creedon
Executive Officer

Date: 31 October 2011

By: *Bob McCune*
Bob McCune, operator, Fahey Dairy

Date: 10-31-2011


Order of the Central Valley Water Board

25. In adopting this Stipulated Order, the Central Valley Water Board or its delegee has considered, where applicable, each of the factors prescribed in CWC section 13327. The consideration of these factors is based upon information and comments obtained by the Central Valley Water Board's staff in investigating the allegations in the Complaint or otherwise provided to the Central Valley Water Board or its delegee by the Parties and members of the public. In addition to these factors, this settlement recovers the costs incurred by the staff of the Central Valley Water Board for this matter.

26. This is an action to enforce the laws and regulations administered by the Central Valley Water Board. The Central Valley Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

27. The terms of the foregoing Stipulation are fully incorporated herein and made part of this Order of the Central Valley Water Board.

Pursuant to CWC section 13323 and Government Code section 11415.60, **IT IS HEREBY ORDERED** by the ~~California Regional Water Quality Control Board, Central Valley Region.~~



(Signature)

KENNETH D. LANDAU, ASSISTANT EXECUTIVE OFFICER
(Print Name and Title)

Date: 12-19-2011

ATTACHMENT A

FORTHCOMING ASSESSMENT OF CIVIL LIABILITY (Prefiling Letter)



California Regional Water Quality Control Board

Central Valley Region

Katherine Hart, Chair



11020 Sun Center Drive, #200, Rancho Cordova, California 95670-6114
(916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>

Matthew Rodriguez
Secretary for
Environmental Protection

Edmund G. Brown Jr.
Governor

30 September 2011

CERTIFIED MAIL NO.
[REDACTED]

Bob McCune
[REDACTED]

Hilmar, CA 95324

FORTHCOMING ASSESSMENT OF CIVIL LIABILITY FOR FAILURE TO COMPLY WITH CALIFORNIA WATER CODE SECTION 13267, FAHEY DAIRY, [REDACTED] GUSTINE, MERCED COUNTY, W DID 5B24NC00072

The purpose of this letter is to inform you of a forthcoming Administrative Civil Liability Complaint (Complaint) and to notify you of your opportunity to negotiate and settle the assessment of monetary penalties for your failure to comply with the California Water Code. **Please read this notice carefully.**

The subject facility (Dairy) is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), which was issued by the Central Valley Regional Water Quality Control Board (Central Valley Water Board) on 3 May 2007. Monitoring and Reporting Program (MRP) R5-2007-0035 accompanies the General Order. The General Order and the MRP contain reporting requirements pursuant to section 13267 of the California Water Code, which authorizes the Central Valley Water Board to require dairies to furnish technical reports under penalty of perjury. Anyone failing to comply with section 13267 is guilty of a misdemeanor and liable civilly in accordance with section 13268 of the California Water Code in an amount up to one thousand dollars (\$1,000) for each day the violation occurs.

The General Order and the MRP required, pursuant to section 13267 of the California Water Code, that an Annual Report for the calendar year 2009 (2009 Annual Report) be submitted for regulated facilities by 1 July 2010.

On 2 September 2010, Central Valley Water Board staff issued a Notice of Violation, notifying you that the 2009 Annual Report had not been received for the Dairy. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to avoid incurring any additional liability. To date, the required 2009 Annual Report has not been received.

As of 1 September 2011, the 2009 Annual Report is 427 days overdue. The maximum penalty for the violation described above is four hundred twenty-seven dollars (\$427,000) based on a calculation of the total number of per-day violations times the statutory maximum penalty (427 total days of violation X \$1,000). Based on the use of the State Water Resources Control Board's Water Quality Enforcement Policy, the Executive Officer of the Central Valley Water Board intends

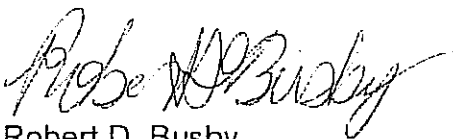
to issue you a Complaint in the amount of seven thousand eight hundred dollars (\$7,800) for this violation. This recommended penalty amount is based on information contained in the Central Valley Water Board's files and takes into account such factors as your culpability, cleanup and cooperation, history of violations, ability to pay and continue in business, and other factors as justice may require.

By way of this letter, you are being notified of the opportunity to meet with Central Valley Water Board staff prior to the issuance of the Complaint to discuss the alleged violation and proposed penalty amount. This meeting affords you the opportunity to potentially reduce the recommended penalty amount if you present new information to the Central Valley Water Board staff regarding the factors listed above or other information you believe is relevant to determining an appropriate monetary penalty.

If you intend to argue that you have an inability to pay the proposed penalty amount, you must bring documentation with you to the meeting to demonstrate such an inability. Appropriate documentation **must include** the last three years of signed federal income tax returns including schedules **and may also include** credit card or line of credit statements, mortgage loan statements, bank account statements, or any other document that explains the special circumstances regarding past, current, or future financial conditions. This information may be used in determining an appropriate monetary penalty assessment to resolve this matter without a hearing. ~~If a settlement is reached at this meeting, the Executive Officer will forego issuing the Complaint.~~ To avoid further liability, you are urged to submit the outstanding report.

In order to initiate any discussions to settle this matter, you must contact Charlene Herbst at (916) 464-4724 by **14 October 2011** to schedule a day and time to meet with Central Valley Water Board staff. If we do not receive a response from you by this date, the Executive Officer will issue you a Complaint in the proposed penalty amount and this matter will proceed to a formal enforcement hearing before the Central Valley Water Board or will refer the matter to the Attorney General's Office or other prosecution agency.

If you have any questions regarding this notice, please contact Charlene Herbst by phone at (916) 464-4724 or by email at cherbst@waterboards.ca.gov.



Robert D. Busby
Supervising Engineering Geologist

cc: Ms. Pamela Creedon, Central Valley Water Board, Rancho Cordova
Mr. David Boyers, Office of Enforcement, SWRCB, Sacramento