

Central Valley Regional Water Quality Control Board

20 July 2018

CERTIFIED MAIL
7014 3490 0001 3008 1155

Roest Family Dairy
Attn: Arie Roest



CERTIFIED MAIL
7014 3490 0001 3008 1148

Dave Wheeler



OFFER TO SETTLE ADMINISTRATIVE CIVIL LIABILITY R5-2018-0520 ROEST FAMILY DAIRY

This letter contains an offer from the Central Valley Regional Water Quality Control Board (Central Valley Water Board) Prosecution Team to settle potential claims for administrative civil liability arising out of alleged violations by Roest Family Dairy (hereinafter Discharger) of the Revised General Order for Existing Milk Cow Dairies, Order No. R5-2013-0122 (General Order) at 2472 Gates Road in Modesto, California.

As the legally responsible persons enrolled in the General Order Mr. Arie Roest and Mr. Dave Wheeler, on behalf of Roest Family Dairy, are responsible for complying with all elements of the General Order and for penalties associated with non-compliance. Hereafter, this letter will be referred to as the "Settlement Offer."

This Settlement Offer provides the Discharger with an opportunity to resolve the alleged violations through payment of \$70,980 (seventy thousand nine-hundred eighty dollars).

Please read this letter carefully and respond no later than 20 August 2018.

Description of Violation

The Central Valley Water Board Prosecution Team (Prosecution Team) alleges the following violations of the General Order and the Porter-Cologne Water Quality Control Act (California Water Code). A description of these alleged violations are available for review, and found in the enclosed 16 November 2017 Inspection Report and Notice of Violation issued to the Discharger on 28 November 2017.

Violation: Discharge to Modesto Irrigation Main Drain which flows to Miller Lake

Miller Lake is located on private property. Modesto Irrigation District controls the water going into the lake and going out of the lake to the Stanislaus River. The lake is a tributary to the Stanislaus River.

Statutory Liability

Pursuant to Section 13385 of the California Water Code, the Discharger is liable for administrative civil liabilities of up to \$10,000 per violation for each day in which the violation occurs and \$10 per gallon discharged in excess of the first 1,000 gallons. The statutory minimum civil liability is the economic benefit resulting from the violations. The State Water Resources Control Board's *Water Quality Enforcement Policy* (Enforcement Policy) states that the minimum liability is to be the economic benefit (any savings or monetary gain derived from the violation) plus 10%. For the violations described in the attachments, the maximum potential liability for the violations is \$720,000 and the minimum liability is \$11,550.

Proposed Settlement Offer

The Central Valley Water Board Prosecution Team proposes to resolve the violation(s) with this Settlement Offer of \$70,980. This Settlement Offer was determined based on an assessment of the factors set forth in Water Code section 13385, subdivision (e) using the penalty methodology set forth in the Enforcement Policy. The enclosed "Penalty Calculation Methodology" describes in detail how the liability amount was calculated. The Prosecution Team believes that the proposed resolution of the alleged violation(s) is fair and reasonable, fulfills the Central Valley Water Board's enforcement objectives, and is in the best interest of the public.

Should the Discharger choose *not* to accept this Settlement Offer, please be advised that the Central Valley Water Board Prosecution Team reserves the right to seek a higher liability amount, up to the maximum allowed by statute, either through issuance of a formal administrative civil liability complaint or by referring the matter to the Attorney General's Office. The Central Valley Water Board Prosecution Team also reserves the right to conduct additional investigation, including issuance of investigation orders and/or subpoenas to determine the number of gallons discharged and whether additional violations occurred. Any additional violations and gallons of discharge subjecting the Discharger to liability may be included in a formal enforcement action. The Discharger can avoid the risks inherent in a formal enforcement action and settle the alleged violation(s) by accepting this Settlement Offer. Please note that the Settlement Offer does not address liability for any violation that is not specifically identified in the attached inspection reports.

Options for Responding to the Settlement Offer

Option A: Accept the Offer

If the Discharger chooses to accept this Settlement Offer, then the enclosed *Acceptance of Settlement Offer and Waiver of Right to Hearing (Acceptance and Waiver)* shall be completed and submitted no later than **20 August 2018** to the following address:

Central Valley Regional Water Quality Control Board
Attention: Charlene Herbst
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
Phone: 916 464 4724
email: Charlene.Herbst@waterboards.ca.gov

Important! - Upon receipt of the *Acceptance and Waiver*, this settlement will be publicly noticed for a 30-day comment period as required by federal regulations. If no substantive comments are received within the 30 days, the Prosecution Team will ask the Central Valley Water Board's Executive Officer to formally endorse the *Acceptance and Waiver* as an order of the Central Valley Water Board. An invoice will then be mailed to the Discharger requiring payment of the \$70,980 administrative civil liability within 30 days of the date of the invoice.

If, however, substantive comments are received in opposition to this settlement and/or the Executive Officer declines to formally endorse the *Acceptance and Waiver* as an order of the Central Valley Water Board, the Settlement Offer may be withdrawn. In this case, the Discharger will be notified and the Discharger's waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violation(s) will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued and the matter may be set for a hearing.

Option B: Contest the Alleged Violations

If the Discharger wishes to contest the violation(s) or the methodology used to calculate the proposed liability, it must submit a written response identifying the basis for the challenge, including any evidence to support its claims. The Discharger's response must be received by the Central Valley Water Board no later than **20 August 2018**. The Central Valley Water Board Prosecution Team will evaluate the Discharger's basis for a challenge and may seek clarifying information or schedule an in-person meeting. The Prosecution Team will inform the Discharger whether a reduction in the proposed liability amount is warranted, or whether the original proposed liability amount is appropriate. The Discharger will be provided a final opportunity to accept the revised/original settlement amount before proceeding to formal enforcement.

Option C: Reject Offer

If the Discharger chooses to reject this Settlement Offer and/or does not complete and return the *Acceptance and Waiver*, the Discharger should expect that the Prosecution Team will conduct further investigation of the violation(s), issue an administrative civil liability complaint, and schedule a hearing. The Discharger will receive notice of any deadlines associated with that action. As previously stated, in such an action, the liability amount sought and/or imposed may exceed the liability amount set forth in this Settlement Offer.

If you have any questions about this settlement offer, please contact:

Central Valley Regional Water Quality Control Board
Attention: Charlene Herbst
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
phone: 916 464 4724
email: Charlene.Herbst@waterboards.ca.gov

ANDREW ALTEVOGT
Assistant Executive Officer

Enclosures:

- Acceptance of Settlement Offer and Waiver of Right to a Hearing
- 16 November 2017 Inspection Report
- Penalty Calculation Methodology

cc: Patrick Pulupa, Executive Officer, Central Valley Water Board, Rancho Cordova
David Lancaster, Office of Chief Counsel, State Water Board, Sacramento
Mayumi Okamoto, Office of Enforcement, State Water Board, Sacramento
Catherine Hawe, Office of Enforcement, State Water Board, Sacramento

ORDER NO. R5-2018-0520
ACCEPTANCE OF SETTLEMENT OFFER AND WAIVER OF RIGHT TO A HEARING
FOR
ROEST FAMILY DAIRY
STANISLAUS COUNTY

By signing below and returning this *Acceptance of Settlement Offer and Waiver of Right to Hearing (Acceptance and Waiver)* to the Central Valley Water Board, Roest Family Dairy (Discharger) hereby accepts the Settlement Offer described in the letter dated **20 July 2018** and titled *Offer to settle Administrative Civil Liability, Roest Family Dairy* and waives the right to a hearing before the Central Valley Water Board to dispute the alleged violations described in the Settlement Offer and its enclosures.

The Discharger agrees that the Settlement Offer shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the Central Valley Water Board to assert jurisdiction over the alleged violations. The Discharger agrees to perform the following:

- Pay an administrative civil liability in the sum of \$70,980 (seventy thousand nine-hundred eighty dollars) by cashier's check or certified check made payable to the "State Water Resources Control Board Cleanup and Abatement Account". This payment shall be deemed payment in full of any civil liability pursuant to Water Code section 13385 that might otherwise be assessed for violations described in the Settlement Offer and its enclosures.
- Fully comply with the conditions of the Revised General Order for Existing Milk Cow Dairies, Order No. R5-2013-0122.

The Discharger understands that by signing this *Acceptance and Waiver*, the Discharger has waived its right to contest the allegations in the Settlement Offer and the civil liability amount for the alleged violation(s). The Discharger understands that this *Acceptance and Waiver* does not address or resolve any liability for any violation not specifically identified in the Settlement Offer and its enclosures.

Upon execution by the Discharger, the *Acceptance and Waiver* shall be returned to the following address:

Central Valley Regional Water Quality Control Board

Attention: Charlene Herbst
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
phone: 916 464 4724
email: Charlene.Herbst@waterboards.ca.gov

The Discharger understands that the Prosecution Team is required to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action. Accordingly, this *Acceptance and Waiver*, prior to being formally

endorsed by the Central Valley Water Board Executive Officer (acting as head of the Advisory Team), will be published as required by law for public comment.

If no comments are received within the notice period that cause the Prosecution Team to reconsider the Settlement Offer, then the Prosecution Team will present this *Acceptance and Waiver* to the Central Valley Water Board's Executive Officer for formal endorsement on behalf of the Central Valley Water Board.

The Discharger understands that if significant comments are received in opposition to the settlement, then the offer may be withdrawn by the Prosecution Team. If the Settlement Offer is withdrawn, then the Discharger will be notified and the Discharger's waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violation(s) will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued and the matter may be set for a hearing.

The Discharger understands that once this *Acceptance and Waiver* is formally endorsed, then the full payment is a condition of this *Acceptance and Waiver*. An invoice will be sent upon endorsement, and full payment will be due within 30 days of the date of the invoice.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Discharger in the making and giving of this *Acceptance and Waiver*.

By: Original signed by Discharger. Please see last two pages.

Roest Family Dairy

Title: _____

Date: _____

IT IS SO ORDERED, pursuant to California Water Code section 13385.

By: Original signed by

Patrick Pulupa, Executive Officer

Date: 21 October 2019

**PENALTY CALCULATION METHODOLOGY
FOR
ROEST FAMILY DAIRY
STANISLAUS COUNTY**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13385, subdivision (e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score.

The [Enforcement Policy](#)

(https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf) can be found on the State Water Boards' Adopted Orders page.

Violation 1 – Discharge to Modesto Irrigation Main Drain which flows to Miller Lake

On 11 November 2017, California Department of Fish and Wildlife (CDFW) wardens responded to a complaint from Modesto Irrigation District regarding the discharge of dairy wastewater to the Modesto Irrigation District Main Drain (Main Drain) which flows to Miller Creek. In response to this complaint, CDFW wardens conducted an inspection at Roest Family Dairy (Discharger) and observed a discharge of flush lane water (dairy wastewater) to the Modesto Irrigation District Main Drain (Main Drain) which flows to Miller Lake.

The discharge began on 11 November 2017 at approximately 02:00 and lasted approximately 90 minutes. According the Priority Reporting of Significant Events (PROSE) submitted by the Discharger, the total wastewater discharged in the Main Drain was 72,000 gallons.

Central Valley Water Board staff, accompanied by CDFW wardens, conducted an inspection of Discharger's dairy on 14 November 2017. Though Central Valley Water Board staff arrived after the discharge event, were able to observe dairy wastewater in Curtis Drain and accumulated dairy wastewater in the Main Drain.

During the inspection, the Discharger explained that the discharge was caused by the failure of dairy employees to close a slide-gate in Curtis Drain after irrigating fields and the malfunction of a lift pump designed to pump dairy wastewater to the storage lagoon.

Prohibition A2 in the General Order states that "except when authorized by a National Pollutant Discharge Elimination System (NPDES) permit, the direct or indirect discharge of waste and/or storm water from the production area to surface waters is prohibited." In addition, Prohibition A3 states that "the collection, treatment, storage, discharge or disposal of wastes an existing milk cow dairy shall not result in the creation of a condition of pollution or nuisance." Therefore, the 11 November 2017 discharge of dairy wastewater to the Main Drain is in violation of the General Order.

Table 1. Factors used in penalty calculation

PENALTY FACTOR	VALUE	DISCUSSION
Harm or potential for harm to beneficial uses	2	The dairy wastewater discharged from Roest Family Dairy to the Modesto Irrigation District main canal which flows into Miller Lake. The beneficial uses of Miller Lake include irrigation, preservation of wildlife ecology, and recreation; it is a tributary to the Stanislaus River. The discharge had a moderate harm to beneficial uses because the discharge was contained within the irrigation canal before reaching Miller Lake. However, the discharge did result in a fish kill. When the water level in the lake rises, Modesto Irrigation District discharges water from the lake into the Stanislaus River in which case the impact can be significant on the receiving water.
Physical, chemical, biological, or thermal characteristics of the discharge	3	Dairy wastewater contains high levels of suspended solids, pathogenic organisms, nutrients, oxygen-demanding organic compounds, and other pollutants. Untreated and undiluted dairy wastewater poses a direct threat to human and ecological receptors. The nutrients, oxygen demand, and bacteria in dairy wastewater can adversely affect aquatic organisms and impact other beneficial uses.
Susceptibility to cleanup or abatement	0	The dairy wastewater was contained in the Main Drain and prevented from entering Miller Lake. The Discharger cleaned up 100% of the discharged dairy wastewater by pumping the dairy wastewater out of the canal and applying it onto cropland at a neighboring property.
Per gallon and per day factor for discharge violations	0.15	The "Deviation from Requirement" is major because the Discharger disregarded the discharge prohibition. The value of 0.15 was determined from Table 1 of the Enforcement Policy.
Volume discharged	72,000	The volume of wastewater discharged was calculated based on a flow rate of 800 gallons per minute and 90 minutes of discharge as reported in the Discharger's PROSE.
Adjustment for high volume discharges	n/a	The discharge does not qualify as a high-volume discharge.
Days of discharge	1	The discharge occurred on 11 November 2017 and lasted approximately 90 minutes.
Initial Liability for Violation #1	\$108,000	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (\$10,000/day).
Adjustments for Discharger Conduct		

PENALTY FACTOR	VALUE	DISCUSSION
Culpability	1	The discharge occurred due to a slide gate that was left open by employees during field irrigation and the malfunction of the lift pump that pumps flush water to the storage lagoon.
Cleanup and Cooperation	.9	The Discharger's response was above what is expected of a reasonably prudent dairy operator in the same or similar circumstances. The Discharger removed 100% of the discharged dairy wastewater by negotiating with neighbors to apply to discharger dairy wastewater to adjacent fields. The Discharger completed the cleanup in a timely fashion and has installed an additional locking valve to prevent the flow of any lagoon water into the Main Canal.
History of Violations	1	The Discharger has no known history of violations for which the Central Valley Water Board has taken formal enforcement.
Total Base Liability for Violation #1	\$97,200	The base liability is calculated as the initial liability multiplied by each of the above three factors.

Table 2. The Enforcement Policy states that five other factors must be considered before obtaining the final liability amount.

Total Base Liability for all violations: \$97,200		
Other Factor Considerations		
Ability to pay and continue in business	No adjustment	Roest Family Dairy: Estimated value Dairy Facility = \$1,807,197 1. Cropland (104 acres) = \$595,836 2. Cows = 1,114 Milk cows; x\$1,000/cow = \$1,114,000
Economic benefit	\$10,500	Economic benefit: 1. Price of new flush lane pump \$10,000 2. Placing a cemented barrier in field valve \$500

Total Base Liability for all violations: \$97,200		
Other Factor Considerations		
Other factors as justice may require		The costs of investigation and enforcement are “other factors as justice may require”, and could be added to the liability amount. The Central Valley Water Board has incurred over \$3,061 in staff costs associated with the investigation and enforcement of the alleged violation. While this amount could be added to the penalty, it is not added at this time in consideration of settlement. In addition, the Prosecution Team notes that \$16,499.43 in penalties related to this discharge has been paid to the Modesto Irrigation District and has reduced the overall penalty by this amount. Lastly, in consideration of hearing and/or litigation risks and in the interest of settling this matter, the Prosecution Team has made a reduction of the total base liability in the amount of \$9,720.
Maximum liability	\$720,000	Based on California Water Code section 13385: \$10,000 per day per violation and \$10 per gallon.
Minimum liability	\$11,550	Based on California Water Code section 13385, civil liability must be at least the economic benefit of non-compliance. Per the Enforcement Policy, the minimum liability is to be the economic benefit plus 10%.
Final Liability	\$70,980	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability and less than the maximum liability.

Central Valley Regional Water Quality Control Board

28 November 2017



Arie Roest



Dave Wheeler



Certified Mail:
7014 3490 0001 3008 1094

Certified Mail:
7014 3490 0001 3008 1100

NOTICE OF VIOLATION, ROEST FAMILY DAIRY, 2472 GATES ROAD, STANISLAUS COUNTY

On 14 November 2017, Regional Water Quality Control Board received a complaint indicating that wastewater from a dairy was discharged into the Modesto Irrigation Main Drain that drains into Miller Lake. Staff inspected the area and noted the following violations of the Revised General Order for Existing Milk Cow Dairies:

1. The discharge of hazardous wastes, as that term is defined in California Code of Regulations, title 22, section 66261.1 *et seq.*, is prohibited. (Prohibition A1).
2. The collection, treatment, storage, discharge or disposal of wastes at an existing milk cow dairy shall not result in the creation of a condition of pollution or nuisance (Prohibition A4).

For details, please refer the attached inspection report.

The Regional Board has received a Priority Reporting of Significant Events (PROSE) form on 17 November 2017. The Board has also received photos dated 19 November 2017 showing wastewater in the Main Canal is in the process of being pumped out onto the cropland adjoining the Main Drain.

Please provide photos demonstrating that pumping has been completed and wastewater is no longer in the Drain.

If you have any questions, please contact Girma Getachew at (916) 464 4851 or email: girma.getachew@waterboards.ca.gov.

Charlene M. Herbst, CEG
Chief, Confined Animal Facilities Unit

Attachment: Inspection Report

SIGNED ACCEPTANCE OF SETTLEMENT OFFER AND WAIVER OF RIGHT TO A HEARING FOR ROEST FAMILY DAIRY, STANISLAUS COUNTY, ORDER NO. R5-2018-0520 (WHEELER)

If no comments are received within the notice period that cause the Prosecution Team to reconsider the Settlement Offer, then the Prosecution Team will present this *Acceptance and Waiver* to the Central Valley Water Board's Executive Officer for formal endorsement on behalf of the Central Valley Water Board.

The Discharger understands that if significant comments are received in opposition to the settlement, then the offer may be withdrawn by the Prosecution Team. If the Settlement Offer is withdrawn, then the Discharger will be notified and the Discharger's waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violation(s) will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued and the matter may be set for a hearing.

The Discharger understands that once this *Acceptance and Waiver* is formally endorsed, then the full payment is a condition of this *Acceptance and Waiver*. An invoice will be sent upon endorsement, and full payment will be due within 30 days of the date of the invoice.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Discharger in the making and giving of this *Acceptance and Waiver*.

Roest Family Dairy

By: _____

Title: _____

Date: _____

IT IS SO ORDERED, pursuant to California Water Code section 13385.

By: _____

Patrick Pulupa, Executive Officer

Date: _____

SIGNED ACCEPTANCE OF SETTLEMENT OFFER AND WAIVER OF RIGHT TO A HEARING FOR ROEST FAMILY DAIRY, STANISLAUS COUNTY, ORDER NO. R5-2018-0520 (ROEST)

If no comments are received within the notice period that cause the Prosecution Team to reconsider the Settlement Offer, then the Prosecution Team will present this *Acceptance and Waiver* to the Central Valley Water Board's Executive Officer for formal endorsement on behalf of the Central Valley Water Board.

The Discharger understands that if significant comments are received in opposition to the settlement, then the offer may be withdrawn by the Prosecution Team. If the Settlement Offer is withdrawn, then the Discharger will be notified and the Discharger's waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violation(s) will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued and the matter may be set for a hearing.

The Discharger understands that once this *Acceptance and Waiver* is formally endorsed, then the full payment is a condition of this *Acceptance and Waiver*. An invoice will be sent upon endorsement, and full payment will be due within 30 days of the date of the invoice.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Discharger in the making and giving of this *Acceptance and Waiver*.

Roest Family Dairy
By: Marian Roest
Title: owner
Date: 9.5.19

IT IS SO ORDERED, pursuant to California Water Code section 13385.

By: _____
Patrick Pulupa, Executive Officer

Date: _____