



Central Valley Regional Water Quality Control Board

25 February 2020

CERTIFIED MAIL
7013 1090 0000 6372 4649

Mr. John Brasil
Diamond B Dairy
2613 S. Mitchell Rd.
Turlock, CA 95380-9340

CERTIFIED MAIL
7013 1090 0000 6372 4656

Ms. Adeline Meneses
Diamond B Dairy
615 N Hopper Rd.
Modesto, CA 95357-1820

OFFER TO SETTLE ADMINISTRATIVE CIVIL LIABILITY R5-2019-0518, DIAMOND B DAIRY, CERES, STANISLAUS COUNTY

This letter contains a revised 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 of the *Revised General Order for Existing Milk Cow Dairies, Order R5-2013-0122* (General Order) at the Diamond B Dairy located at 3149 E. Tuolumne Road in Ceres.

As the legally responsible persons enrolled in the General Order, Mr. John Brasil (operator) and Ms. Adeline Meneses (owner) (jointly referred to as Discharger), are responsible for complying with all elements of the General Order and are responsible 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 \$57,024 (fifty-seven thousand twenty-four dollars). Please read this letter carefully and respond no later than 28 February 2020.**

Description of Alleged Violations

On 13 February 2019, Central Valley Water Board staff inspected the Discharger's dairy in response to a complaint. As described in the enclosed 19 February 2019 Inspection Report and 24 April 2019 Notice of Violation, staff found that the Discharger violated multiple sections of the reissued General Order:

KARL E. LONGLEY ScD, P.E., CHAIR | PATRICK PULUPA, ESQ., EXECUTIVE OFFICER

11020 Sun Center Drive #200, Rancho Cordova, CA 95670 | www.waterboards.ca.gov/centralvalley



- Wastewater had been applied to cropland at a time when it was not needed for crop irrigation or nutrient recycling, and at a time when the soil was already saturated by rainfall (violations of Prohibition A.9; Attachment C, Technical Specification V.C.2; and Attachment C, Technical Specification V.C.1).
- Rainwater mixed with silage leachate and manure was draining from the dairy to a neighbor's orchard property (violation of Prohibition A.8).
- Rainwater was ponding in the corrals. The corrals were not graded and had no drainage system to direct corral runoff to the storage lagoon (violation of Production Area Specification D.6).
- Manure was stored partly on concrete and partly on bare ground. Manure leachate was draining to cropland instead of a storage lagoon (violation of Production Area Specification D.6).
- The 2017 Annual Report shows that the Discharger had not exported nor land applied solid manure, in contrast to the Nutrient Management Plan which states solid manure, equivalent to 157,699 pounds of nitrogen, will be exported annually (violation of Land Application Specification E.2 and 5.a).
- The application of wastewater to saturated cropland is contrary to the Discharger's Nutrient Management Plan.

The Discharger submitted a Priority Reporting of Significant Events (PROSE) report stating that during an irrigation event on 5 February 2019, a dairy employee mistakenly turned on the bottom lagoon pump instead of the top lagoon pump. A large slug of lagoon solids was discharged to cropland in addition to the wastewater. The Discharger estimates that 216,000 gallons of wastewater/solids was applied to the field. The Discharger's PROSE report includes weather data showing that in the seven days prior to the discharge, there was rainfall every day of those seven days, for a total of 0.95" of rain. Although the Discharger states that the 5 February 2019 discharge was an irrigation event, the rainfall records show otherwise. The Discharger had a similar discharge event in February 2018 and at the time assured Water Board staff that he would take steps to prevent a recurrence.

Statutory Liability

Pursuant to Section 13350 of the California Water Code, the Discharger is liable for administrative civil liabilities of up to \$5,000 per violation for each day in which the violation occurs or up to \$10 per gallon discharged. The statutory minimum civil liability is \$100 per day. The State Water Resources Control Board's *Water Quality Enforcement Policy* (Enforcement Policy) states that the minimum penalty is to be the economic benefit plus 10%. For the violations described in the attachments, the maximum potential liability for the violations is \$2,160,000 and the minimum liability is \$33,674.

Proposed Settlement Offer

The Central Valley Water Board's Prosecution Team proposes to resolve the violation(s) with this Settlement Offer of \$57,024. This Settlement Offer was determined based on an assessment of the factors set forth in Water Code section 13327 using the penalty methodology set forth in the Enforcement Policy. The enclosed "Penalty Calculation Methodology" describes in detail how the penalty amount was calculated. The penalty has been adjusted based on information provided through the course of settlement negotiations due to consideration of evidentiary issues and equitable factors. The Prosecution Team believes that the proposed resolution of the alleged violations 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 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 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 violations 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 report.

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 **28 February 2020** to the following address:

Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
Attention: Robert Busby

Important! - Upon receipt of the *Acceptance and Waiver*, this settlement will be publicly noticed for a 30-day comment period. 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 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 accept the settlement, then 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 violations 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 violations 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 **28 February 2020**. The 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 settlement amount is warranted, or whether the original settlement 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* by the due date, the Discharger should expect that the Prosecution Team will conduct further investigation of the violations, 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 Catherine Hawe at Catherine.Hawe@waterboards.ca.gov or 916-322-3538.

ORIGINAL SIGNED BY

Clay Rodgers
Assistant Executive Officer

Enclosures:

- Acceptance of Settlement Offer and Waiver of Right to a Hearing
- Penalty Calculation Methodology
- 19 February 2019 Inspection Report, 24 April 2019 Notice of Violation, and PROSE submitted by Discharger

ORDER NO. R5-2019-0518
ACCEPTANCE OF SETTLEMENT OFFER AND WAIVER OF RIGHT TO A HEARING
FOR
JOHN BRASIL AND ADELINE MENESSES
DIAMOND B 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, John Brasil and Adeline Meneses (referred to jointly as Discharger) hereby accept the Settlement Offer described in the letter dated 21 February 2020 and titled *Offer to Settle Administrative Civil Liability, Diamond B Dairy, Ceres, Stanislaus County* 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 **\$57,024** (fifty-seven thousand twenty-four dollars) by cashier's check or certified check made payable to the "*State Water Resources Control Board Waste Discharge Permit Fund*". This payment shall be deemed payment in full of any civil liability pursuant to Water Code section 13350 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 R5-2013-0122* (General Order) at the dairy located at 3149 E. Tuolumne Road in Ceres.

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
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
Attention: Robert Busby

The Discharger understands that the Prosecution Team will publish notice of and provide at least 30 days for public comment on this 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 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 and an Order Number is inserted, 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*.

Diamond B Dairy

By: **ORIGINAL SIGNED BY JOHN BRASIL**

Title: Owner Lessee

Date: 3-6-20

IT IS SO ORDERED, pursuant to California Water Code section 13350.

By: **ORIGINAL ELECTRONICALLY SIGNED BY PATRICK PULUPA**
Patrick Pulupa, Executive Officer

Date: 2020.04.17

**PENALTY CALCULATION METHODOLOGY
FOR
DIAMOND B DAIRY, CERES
STANISLAUS COUNTY**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy), adopted in April 2017, establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. [The Enforcement Policy](#) can be found at:

(https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf).

On 13 February 2019, Central Valley Water Board staff inspected the Diamond B Dairy (Discharger) in response to a complaint. As described in the 19 February 2019 Inspection Report and 24 April 2019 Notice of Violation, staff found that the Discharger violated multiple sections of the reissued General Order:

- Wastewater had been applied to cropland at a time when it was not needed for crop irrigation or nutrient recycling, and at a time when the soil was already saturated by rainfall (violations of Prohibition A.9, Attachment C, Technical Specification V.C.2, and Attachment C, Technical Specification V.C.1).
- Rainwater mixed with silage leachate and manure was draining from the dairy to a neighbor's orchard property (violation of Prohibition A.8).
- Rainwater was ponding in the corrals. The corrals were not graded and had no drainage system to direct corral runoff to the storage lagoon (violation of Production Area Specification D.6).
- Manure was stored partly on concrete and partly on bare ground. Manure leachate was draining to cropland instead of a storage lagoon (violation of Production Area Specification D.6).
- The 2017 Annual Report shows that the Discharger had not exported nor land applied solid manure, in contrast to the Nutrient Management Plan which states solid manure, equivalent to 157,699 pounds of nitrogen, will be exported annually (violation of Land Application Specification E.2 and 5.a).
- The application of wastewater to saturated cropland is contrary to the Discharger's Nutrient Management Plan.

The Discharger submitted a Priority Reporting of Significant Events (PROSE) report stating that during an irrigation event on 5 February 2019, a dairy employee mistakenly turned on the bottom lagoon pump instead of the top lagoon pump. A large slug of lagoon solids was discharged to cropland in addition to the wastewater. The Discharger

estimates that 216,000 gallons of wastewater/solids was applied to the field. The Discharger’s PROSE report includes weather data showing that in the seven days prior to the discharge, there was rainfall every day of those seven days, for a total of 0.95” of rain. Although the Discharger states that the 5 February discharge was an irrigation event, the rainfall records show otherwise.

The Discharger had a similar discharge event in February 2018 and at the time assured Water Board staff that he would take steps to prevent a recurrence.

For purposes of settlement, the Prosecution Team has elected to combine all violations of the reissued Dairy General Order into one penalty assessment: the discharge of wastewater to saturated cropland. However, if this matter proceeds to a Board hearing, the Prosecution Team reserves the right to evaluate each violation separately.

PENALTY FACTOR	VALUE	DISCUSSION
Degree of toxicity 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 can adversely impact groundwater quality. This material poses an above-moderate risk of direct threat to potential receptors.
Actual harm or potential for harm to beneficial uses	2	This discharge ponded on cropland. The soil was already saturated from recent rains (0.95” during the previous week) and therefore it is expected that the nutrients in waste migrated through the soil profile toward or into groundwater. If this matter is not settled and proceeds to a Hearing, then staff will reevaluate the potential for harm. For purposes of settlement, staff will use a “below moderate” harm, with a factor of 2.
Susceptibility to cleanup or abatement	1	The wastewater ponded in the field. Cleanup or abatement of 50% or more of the material was not be possible.
Per gallon and per day factor for discharge violations	0.15	The “Deviation from Requirement” is Moderate because wastewater was pumped to one field and the majority remained in the storage lagoons. The value of 0.15 was determined from Table 1 of the Enforcement Policy.
Volume discharged	216,000 gallons	The Discharger reported that this volume was discharged to cropland.

PENALTY FACTOR	VALUE	DISCUSSION
Adjustment for high volume discharges	\$2/gallon	The maximum per-gallon penalty is \$10/gallon. However, the 2017 Enforcement Policy allows a "high volume discount" between \$2/gallon and \$10/gallon when more than 100,000 gallons is discharged. For settlement purposes, it is appropriate to use a value of \$2. If this matter were to proceed to Hearing, then the Prosecution Team may revise the high volume discount.
Days of discharge	8	According to the Discharger's PROSE report, the discharge occurred on 5 February 2019. Water Board staff found that the manure/wastewater was still ponded during the inspection on 13 February 2019, and due to the weather, it is expected that the ponded manure/wastewater remained on the field for some additional time. If this matter goes to Hearing, then the days of violation may be revised. However, Water Code section 13350 states that the penalty is based on gallons discharged or days of discharge, but not both. At this time, the Prosecution Team has elected to use the gallons discharged.
Initial Liability	\$64,800	The liability is calculated as per gallon factor (0.15) multiplied by the number of gallons (216,000) multiplied by the liability per gallon (\$2/gallon).

Adjustments for Discharger Conduct		
PENALTY FACTOR	VALUE	DISCUSSION
Culpability	1.1	The Discharger had been contacted by Water Board staff in February 2018 for the same issue: application of an excessive amount of wastewater and manure to saturated cropland. The Discharger assured staff that he would implement steps to permanently fix the problem. A reasonable and prudent discharger would have implemented the steps and managed his lagoon to prevent the need to discharge during the winter. A Culpability factor of at least 1.1 is appropriate; however, if this matter proceeds to Hearing then staff will reevaluate the Discharger's culpability and may increase it.
Cleanup and Cooperation	1.0	It was not possible to clean up the manure which had ponded on the cropland. The Discharger submitted the required PROSE.

Adjustments for Discharger Conduct		
PENALTY FACTOR	VALUE	DISCUSSION
History of Violations	1.0	There is no known history of violations for which the Central Valley Water Board has taken formal enforcement.
Total Base Liability	\$71,280	The base liability is calculated as the initial liability multiplied by each of the above three factors.

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

Other Factor Considerations		
Ability to pay and continue in business	No adjustment	The Discharger owns at least two dairies and operates at least three dairies in Stanislaus County. According to the Discharger's 2017 Annual Report, the Diamond B Dairy contains an average of 687 milk cows and 393 heifers. Wastewater is applied to 93 acres of cropland. The value of the milk cows alone is approximately \$687,000 (687 milk cows x \$1,000/cow). The dairy is an on-going business which generates profits. Absent other information, the Prosecution Team finds that the Discharger has an ability to pay the penalty and continue in business.
Economic benefit	\$30,613	The violation occurred because the dairy lagoon was pumped to cropland at a time when irrigation was not necessary for crop health. The Discharger should have cleaned out the lagoon the previous summer or fall, in order to ensure adequate storage during the winter. The Discharger's lagoon holds 7,755,361 gallons of wastewater. Assuming that 50% of the manure slurry in the lagoon should have been pumped out, and assuming the cost of a tanker is \$75 per 9,500 gallons applied, the Discharger avoided a cost of at least \$30,613 by failing to empty the lagoon prior to the rainy season. If this matter goes to Hearing, the Prosecution Team may request additional information and may revise the economic benefit.

Other Factor Considerations		
Other factors as justice may require	Reduction of \$14,256	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 \$3,000 in staff costs associated with the investigation and enforcement of the alleged violations. While this amount could be added to the penalty, it is not added at this time. Throughout the course of settlement negotiations, the Parties have identified equitable factors and evidentiary issues that merit a reduction to this settlement offer. The Parties have stipulated to a reduction of \$14,256, given these considerations.
Maximum liability	\$2,160,000	Per California Water Code section 13350, the maximum liability is \$10 per gallon discharged.
Minimum liability	\$33,674	Per the 2017 Enforcement Policy, the minimum liability is to be the economic benefit plus 10%.
Final Liability	\$57,024	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.