

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

| | | |
|---------------------------------------|---|---|
| In the matter of: |) | |
| |) | |
| Mervin Souza (formerly |) | |
| Paul Souza Company) and |) | Order No. R5-2012-0509 |
| Dimas Valadao dba |) | |
| Two Star Dairy |) | |
| |) | |
| Administrative Civil Liability |) | Settlement Agreement and Stipulation |
| Complaint No. R5-2011-0564 |) | for Entry of Order; Order |
| |) | |

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order ("Stipulated 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 Mervin Souza (formerly Paul Souza Company) and Dimas Valadao dba Two Star Dairy (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. Mervin Souza ("owner") operated a dairy facility formerly known as Paul Souza Company located at [REDACTED] Tulare CA. Subsequently, owner leased the dairy facility to Two Star Dairy which is operated by Dimas Valadao ("operator") ("owner" and "operator" are sometimes referred to as "Respondents"). 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. Two Star Dairy is regulated by the General Order and the General Order names both the owner and operator as "the Discharger." Because both owner and operator are named Dischargers, each is responsible for complying with the terms of the General Order and administrative civil liability may be imposed against both the owner and operator, if they are distinct parties, equally for noncompliance with the General Order.

2. On 5 May 2011, the Executive Officer of the Central Valley Water Board issued Administrative Civil Liability Complaint No. R5-2011-0564 ("Complaint") to both owner and operator (Attachment A). The Complaint recommends imposing an administrative civil liability totaling \$6,600 for an alleged violation of the General Order.

3. The Prosecution Staff and owner (hereinafter "Parties") engaged in settlement negotiations and agree to settle the violation 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 settlement between the Parties by Stipulated Order also constitutes settlement of alleged violation in the Complaint as to the operator, Dimas Valadao. The Prosecution Staff believes that the resolution of the alleged violation is fair and reasonable and fulfills its enforcement objectives, that no further action is warranted concerning the violation 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 violation alleged in the Complaint by consent and without further administrative proceedings, the Parties have agreed to the imposition of \$4,600 in liability against Respondents. This represents an adjusted liability amount consisting of a \$2,000 reduction as described in the Complaint. The reduction in liability is based on documentation submitted to the Prosecution Staff evidencing the owner and operator's enrollment in the Central Valley Dairy Representative Monitoring Program (CVDRMP) in lieu of submitting a Monitoring Well Installation and Sampling Plan as provided in Attachment A of the Revised Monitoring and Reporting Plan No. R5-2007-0035. The CVDRMP is a coalition group that is developing a representative groundwater monitoring program as a suitable substitute for installation of individual groundwater monitoring systems.

Section III: STIPULATIONS

The Parties stipulate to the following:

5. **Administrative Civil Liability:** The owner and operator hereby agree to the imposition of an administrative civil liability totaling \$4,600. Within thirty (30) days of the effective date of this Stipulated Order, the owner and operator agree to remit, by check, FOUR THOUSAND SIX HUNDRED DOLLARS (\$4,600.00), payable to the *State Water Pollution Cleanup and Abatement Account*, and shall indicate on the check the number of this Stipulated Order. The Discharger shall send the original signed check to Clay Rodgers, Central Valley Water Board 1685 "E" Street Fresno, California 93706-2007, and shall send a copy to Mayumi Okamoto, Office of Enforcement, State Water Resources Control Board, 1001 "I" Street, 16th Floor Sacramento, California 95814.

6. **Compliance with Applicable Laws:** The Respondents understand 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:

Clay Rodgers
Regional Water Quality Control Board
Central Valley Region
1685 "E" Street
Fresno, CA 93706-2007

For the Respondents:

Joseph Soares
Horswill, Meneros & Soares
[REDACTED]
Tulare, CA 93274

Dimas Valadao
Two Star Dairy
[REDACTED]
Tulare, CA 93274

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, this Stipulated 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 Stipulated 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 Respondents understand 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 Respondents agree 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 deemed a waiver of such provision, or in any way affect the validity of the Stipulated 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 Stipulated 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 Resources Control 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 violation, 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 Respondents admit to the findings in the Complaint, and recognize that this Stipulated Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327.

17. Waiver of Hearing: The Respondents have 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 Respondents hereby waive their right to petition the Central Valley Water Board's adoption of the Stipulated Order as written for review by the State Water Resources Control 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 Respondents 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 Respondents, 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.

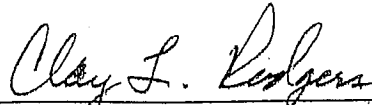
23. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Central Valley Water Board, or its delegee, enters the Order.

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.

IT IS SO STIPULATED.

California Regional Water Quality Control Board Prosecution Staff
Central Valley Region.

By:



for Pamela Creedon
Executive Officer

Date:

11/22/11

By: Mervin Souza
Mervin Souza, Owner

Date: 11-17-11

By: Dimas Valadao
Dimas Valadao dba Two Star Dairy, Operator

Date: 11-17-11

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 sections 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.

Kenneth D. Landau
Kenneth D. Landau, Assistant Executive Officer

Date: 10 JANUARY 2012

ATTACHMENT A
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2011-0564

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2011-0564

IN THE MATTER OF

PAUL SOUZA COMPANY AND DIMAS VALADAO
TWO STAR DAIRY
TULARE COUNTY

This Complaint is issued to Paul Souza Company and Dimas Valadao (hereinafter Discharger) pursuant to California Water Code (CWC) section 13268, which authorizes the imposition of Administrative Civil Liability (ACL) and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that indicate that the Discharger failed to submit a technical report pursuant to an Order issued by the Board under the authority of CWC section 13267.

The Executive Officer of the Regional Water Quality Control Board, Central Valley Region (hereinafter Central Valley Water Board) finds, with respect to the Discharger's acts, or failure to act, the following:

1. Discharger Paul Souza Company owns Two Star Dairy (Dairy) and Discharger Dimas Valadao operates the Dairy located at [REDACTED] Tulare, California, County of Tulare.
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007. (Exhibit A.) Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order. (Exhibit B.) The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. Under the MRP, the Executive Officer has authority pursuant to California Water Code section 13267 to order the installation of monitoring wells based on the threat that an individual dairy or dairies pose to water quality. On 29 January 2010, the Executive Officer issued a California Water Code section 13267 Order (13267 Order) to the Discharger that directed the Discharger to install groundwater monitoring wells, and to implement groundwater monitoring at the Dairy. (Exhibit C.) Specifically, the 13267 Order directed the Discharger to submit an acceptable groundwater monitoring well installation and sampling plan (MWISP) to the Central Valley Water Board by 30 April 2010.

STATEMENT OF WATER CODE SECTIONS UPON WHICH LIABILITY IS BEING ASSESSED

4. An administrative civil liability may be imposed pursuant to the procedures described in CWC section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.

Paul Souza Company
And Dimas Valadao
Two Star Dairy
Tulare County

5. Pursuant to CWC section 13267, subdivision (b), a regional board may require that any person who has discharged, discharges, or is suspected of having discharge or discharging, or who proposes to discharge waste within its region..., shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.
6. Pursuant to CWC section 13268, subdivision (a), any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of section 13267, or failing or refusing to furnish a statement of compliance as required by subdivision (b) of section 13399.2, or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
7. Pursuant to CWC section 13268, subdivision (b)(1), civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with section 13323) of Chapter 5 for a violation or subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

ALLEGED VIOLATION

8. The 13267 Order notified the Discharger that failure to submit the MWISP could constitute a misdemeanor and may result in additional enforcement actions being taken against the Discharger, including the issuance of an Administrative Civil Liability Complaint pursuant to CWC section 13268.
9. On 2 March 2011, the Central Valley Water Board staff contacted Ms. Kim Simmons, a representative of the Discharger, and informed Ms. Simmons that the MWISP was due 30 April 2010. Details of staff's conversation with Ms. Simmons have been documented in a Record of Communication. (Exhibit D.)
10. On 15 April 2010, the Central Valley Water Board staff received a letter from the Discharger requesting that an extension of time be granted for compliance with the 13267 Order issued to the Discharger on 29 January 2010. The stated reason for the extension request was that the operator failed under contract to perform the monitoring required by the MRP. On 12 May 2010, the Executive Officer issued a letter granting the Discharger's request for submission of the MWISP to 30 June 2010. All other terms and conditions of the 13267 Order issued to the Discharger remained in effect. (Exhibit E.)
11. On 30 September 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the MWISP had not been received by 30 June 2010. (Exhibit

E.) The Notice of Violation also requested that the delinquent MWISP be submitted as soon as possible to avoid incurring any additional liability.

12. Central Valley Water Board's compliance tracking system and case files indicate that the Board has not received the MWISP to date.

13. The Discharger is alleged to have violated the following sections of the General Order:

A) Provision E.3 of the General Order, which states:

"The Discharger shall comply with the attached Monitoring and Reporting Program No. R5-2007-0035 which is part of this Order, and future revisions thereto or with an individual monitoring and reporting program, as specified by the Central Valley Water Board or the Executive Officer."

B) Provision E.13, which states in part:

"The Discharge must comply with all conditions of this Order, including timely submittal of technical and monitoring reports as directed by the Executive Officer."

14. The Discharger violated both the General Order and the 13267 Order issued by the Executive Officer on 29 January 2010 by failing to submit the MWISP as required by the 13267 Order and as directed by the MRP that accompanies the General Order, which contains the requirements for implementing groundwater monitoring at dairies regulated by the General Order.

SUMMARY OF ALLEGED VIOLATIONS

1. **Violation No. 1:** The Discharger failed to submit an MWISP by 30 June 2010 as required by the 13267 Order, the 12 May 2010 extension letter, and the MRP. As of the date of this Complaint this report is now 309 days late.

FACTORS CONSIDERED IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY

15. On 17 November 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability. This policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

Paul Souza Company
And Dimas Valadao
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Tulare County

16. The administrative civil liability was derived from the use of the penalty methodology in the Policy. In summary, this penalty assessment is based on a consideration of the failure to respond to a request made pursuant to CWC section 13267, subdivision (b), for Violation 1. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Violations under Water Code section 13267 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy. The failure to submit an MWISP does not cause daily detrimental impacts to the environment or the regulatory program. It is appropriate to assess daily penalties for the first thirty (30) days, plus one violation for each additional thirty-day period. For Violation 1, the days fined is reduced to 16 days (Attachment B).

The required factors have been considered using the methodology in the Enforcement Policy, as explained in detail in Attachment A and shown in the Penalty Calculation for Civil Liability (Attachment B).

17. The maximum penalty for the violations described above is \$309,000 based on a calculation of the total number of per-day violations times the statutory maximum penalty (309 total days of violation X \$1000). However, based on consideration of the above facts and after applying the penalty methodology, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **six thousand six hundred dollars (\$6,600)** for the violation cited above. The specific factors considered in this penalty are detailed in Attachment A. The Discharger's culpability, history of violations, and ability to pay and continue in business were considered, but did not change the amount of liability. Other factors as justice may require were considered, but circumstances warranting an adjustment under this step were not identified by staff or provided by the Discharger.

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

The Executive Officer proposes that the Discharger be assessed an administrative civil liability pursuant to Water Code sections 13323 and 13268 in the amount of **six thousand six hundred dollars (\$6,600)** for failure to submit an MWISP by the 30 June 2010 deadline as required by the 13267 Order and the 12 May 2010 extension letter.

The Executive Officer proposes that the amount of the assessed administrative liability (\$6,600) may be reduced provided the Discharger submits a complete MWISP. The amount of the assessed civil liability shall be reduced by \$2,000 if the MWISP is received by 20 June 2011 and which the Executive Officer finds complete. The total adjustment to the liability amount will not exceed \$2,000.

Paul Souza Company
And Dimas Valadao
Two Star Dairy
Tulare County

If a panel of the Central Valley Water Board holds a hearing, it may choose to recommend to the Central Valley Water Board the imposition of administrative civil liability in the amount proposed, in a higher or lower amount, or it may decline to seek civil liability, or it may recommend referral of the matter to the Attorney General for enforcement. If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this administrative civil liability complaint through hearing.

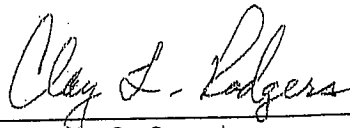
There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not an administrative proceeding. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.)

Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of the requirements of the Discharger's waste discharge requirements for which penalties have not yet been assessed or for violations that may subsequently occur.

Issuance of this Complaint is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) pursuant to title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).

Payment of the assessed liability amount does not absolve the Discharger from complying with the General Order or the MRP, the terms of which remain in effect. Additional civil liability may be assessed in the future if the Discharger fails to comply with the General Order, the MRP, the 13267 Order, the 12 May 2010 extension letter, and/or future orders issued by the Central Valley Water Board.

5/5/11
Date


for Pamela C. Creedon
Executive Officer
Central Valley Water Board Prosecution Team