

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of:)

Luis T. Bento)

dba Bento Dairy)

Order No. R5-2014-0582 (Final)

**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 Luis T. Bento (Bento 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. Luis T. Bento (dba Bento Dairy) owns and operates Bento Dairy located at [REDACTED]. 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. Bento Dairy is regulated by the General Order and the General Order names the owner/operator as "the Discharger."
2. On 25 August 2011, Regional Board staff issued an NOV for failing to submit the 2010 Annual Report by 1 July 2011. On 15 February 2012 Regional Board staff sent a Pre-Complaint letter for failing to submit the 2010 Annual Report. The Discharger finally submitted the report on 17 July 2014.
3. On 22 August 2012, Regional Board staff issued an NOV for failing to submit the 2011 Annual Report by 1 July 2012. On 24 January 2013, Regional Board staff sent a Pre-Complaint letter for failing to submit the 2011 Annual Report. The Discharger finally submitted the report on 17 July 2014.

4. On 18 September 2013, Regional Board staff issued an NOV for failing to submit the 2012 Annual Report by 1 July 2013. On 19 June 2014 Regional Board staff sent a Pre-Complaint letter for failing to submit the 2012 Annual Report. The Discharger finally submitted the report on 17 July 2014.

5. The Prosecution Team and owner (hereinafter "Parties") engaged in settlement negotiations and agreed to settle the violations cited in the 15 February 2012, 24 January 2013, and 19 June 2014 Pre-Complaint letters without administrative or civil litigation and by presenting this Stipulated Order to the Central Valley Water Board, or its delegate, for adoption as an order by settlement pursuant to Government Code section 11415.60. The Prosecution Team 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 Pre-Complaint Letters except as provided in this Stipulated Order and that this Stipulated Order is in the best interest of the public.

6. To resolve the violations alleged in the Pre-Complaint Letters by consent and without further administrative proceedings, the Parties have agreed to the imposition of \$2,571 in liability against the owner/operator. This liability represents a discretionary reduction from the total liability of \$25,023 proposed in the Pre-Complaint letters and is based on staff's determination of the Discharger's inability to pay the proposed liability and the requirement in the State Water Board's Enforcement Policy that the liability imposed be at least ten percent higher than the economic benefit of noncompliance

Section III: STIPULATIONS

The Parties stipulate to the following:

7. **Administrative Civil Liability:** The Discharger hereby agrees to the imposition of an administrative civil liability totaling \$2,571. Within thirty (30) days of the effective date of this Order, the Discharger agrees to remit, by check, TWO THOUSAND FIVE HUNDRED SEVENTY-ONE DOLLARS (\$2,571), 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 the State Water Resources Control Board, Division of Administrative Services, Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento, CA 95812-1888, and shall send a copy to Attn: Della Kramer, Central Valley Water Board, 11020 Sun Center Drive, Suite 200, Rancho Cordova, California 95670.

8. **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 herein may subject it to further enforcement, including additional administrative civil liability.

9. Party Contacts for Communications related to Stipulated Order:

For the Central Valley Water Board:

Andrew Altevogt
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670

For the Respondents:

Joe Bento for Luis T. Bento


10. 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.

11. 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 herein, 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 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 7.

12. 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.

13. 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.

14. No Waiver of Right to Enforce: The failure of the Prosecution Team 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 Order. The failure of the Prosecution Team 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.

15. 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.

16. 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.

17. 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 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. The Parties agree to waive any and all objections based on settlement communications in 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.

18. Admission of Liability: In settling this matter, the Discharger admits to the allegations of violation of the General Order in the Pre-Complaint Letter, and recognizes that this Stipulated Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327.

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

- 20. Waiver of Right to Petition:** The Discharger hereby waives his right to petition the Central Valley Water Board's adoption of the Stipulated Order as written for review by the State Water Board, and further waives his rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
- 21. Covenant Not to Sue:** The Discharger covenants 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.
- 22. 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.
- 23. 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.
- 24. 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.
- 25. 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.
- 26. 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.

Order R5-2014-XXXX
Stipulated Administrative Civil Liability Order
Luis T. Bento – Bento Dairy

IT IS SO STIPULATED.

California Regional Water Quality Control Board Prosecution Staff
Central Valley Region

By: Andrew Altevogt
Andrew Altevogt
Assistant Executive Officer
Lead Prosecutor

Date: 11/5/2014

By: Luis T. Bento
Luis T. Bento

Date: 11-4-2014

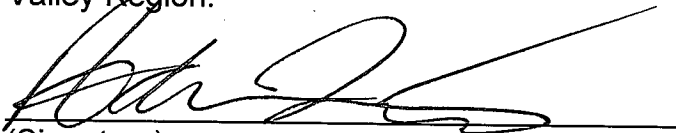
Order of the Central Valley Water Board

27. In adopting this Stipulated Order, the Central Valley Water Board or its delegee has considered, where applicable, each of the factors prescribed in Water Code 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.

28. 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.

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

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


(Signature)

ADAM LAPUSZ
(Print Name and Title)

Date: 12-23-14

**Attachment A – Failure to Submit 2010 Annual Report
Specific Factors Considered – Civil Liability
Luis Bento
Bento Dairy**

The Central Valley Water Board alleges that the Discharger failed to submit the 2010 Annual Report by 1 July 2011 as required by the 2007 General Order, R5-2007-0035. For the purpose of applying the Enforcement Policy's administrative civil liability methodology, the alleged violation is a non-discharge violation. Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

Violation (Failure to submit 2010 Annual Report): In accordance with the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (2007 General Order) and the accompanying Monitoring and Reporting Program (MRP), a 2010 Annual Report must be submitted for regulated facilities by 1 July 2011. The Owner and/or Operator (hereinafter the Discharger) submitted this report for the Bento Dairy on 17 July 2014, 1,112 days late.

Calculation of Penalty for Failure to Submit 2010 Annual Report

Step 1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.35.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2010 Annual Report did not increase the amount of pollution discharged or threatened to discharge into waters of the State. The submission of an Annual Report is a means through which the Central Valley Water Board can evaluate a Discharger's compliance with the 2007 General Order. Failing to timely submit the Annual Report to the Central Valley Water Board hinders the Board's ability to follow-up with noncompliance and such circumstances present at least a minor potential for harm. The deviation from requirements was determined to be major, as the requirement to submit the Annual Report has been rendered ineffective. The failure to submit the required technical report undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the 2007 General Order.

Attachment A – Failure to Submit 2010 Annual Report Bento Dairy

Initial Liability

A failure to submit annual reports is punishable under Water Code section 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2010 Annual Report by 1 July 2011 as required by the 2007 General Order and the MRP. The report was submitted on 17 July 2014, 1,112 days late. Therefore, the Per Day Assessment is calculated as (0.35 factor from Table 3) x (1,112 days) x (\$1,000 per day). The Initial Liability value is \$389,200.

Step 4. Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the Discharger's conduct that should be considered for modification of the initial liability amount: the Discharger's culpability, the Discharger's efforts to clean up or cooperate with regulatory authorities after the violation, and the Discharger's history of violations. After each of these factors is considered for the violation alleged, the applicable factor should be multiplied by the proposed liability amount for the violation.

a) *Multiple Day Violations*

The Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation.

The failure to submit the annual report does not result in an economic benefit that can be measured on a daily basis. The continuance of this violation does not result in an economic benefit that can be measured on a daily basis. The economic benefit is the one-time cost of submitting the report to the Central Valley Water Board, and not a per-day benefit during the entire period of violation.

The Prosecution Team recommends applying this alternative approach. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period. Using this approach, the total number of days of violation is revised to 42. The calculation of initial liability is revised to \$14,700 (0.35 per day factor X 42 adjusted days of violation X \$1,000 per day penalty).

**Attachment A – Failure to Submit 2010 Annual Report
Bento Dairy**

b) *Culpability*: 1.2

Discussion: The Discharger was assessed a score of 1.2, which increases the fine. The Discharger is responsible for failing to submit the annual report alleged herein. The requirement to submit a 2010 Annual Report was detailed in the 2007 General Order. The Discharger was issued a Notice of Violation on 25 August 2011, which requested that the report be submitted as soon as possible to minimize liability. Thus, the Discharger had knowledge of the requirement to submit the Annual Report and failed to meet the reasonable standard of care in that regard.

c) *Cleanup and Cooperation*: 1.1

Discussion: The Discharger was assessed a score of 1.1, which increases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the 2007 General Order, the Discharger failed to submit the Annual Report by the due date. The Discharger did submit the Annual Report on 17 July 2014. The violation of Water Code section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

d) *History of Violations*: 1

Discussion: The Discharger has no history of prior formally adjudicated matters before the Central Valley Water Board and was therefore assessed a score of 1 which neither increases nor decreases the fine.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount*: **\$19,404** [Initial Liability (\$14,700) x Adjustments (1.2)(1.1)(1)].

Step 6. Ability to Pay and Continue in Business

The Enforcement Policy provides that if the Central Valley Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward.

Discussion: The Discharger does not have the ability to pay the Total Base Liability amount based on an analysis of financial information provided by the

Attachment A – Failure to Submit 2010 Annual Report Bento Dairy

Discharger. The Discharger's assets include the dairy facilities valued at \$1.5 million that are mortgaged for \$1.68 million. Additionally, the Discharger has a negative net worth and does not have a subsistence level of income.

Step 7. Other Factors as Justice May Require

Discussion: No adjustment to the Total Base Liability Amount has been made based on "other factors as justice may require."

Step 8. Economic Benefit

a) *Estimated Economic Benefit: \$882*

Discussion: The Discharger has received an economic benefit from the costs saved in not collecting the samples needed to prepare a complete 2010 Annual Report and from delaying the preparation and submittal of the 2010 Annual Report. This is based on the current consulting costs of collecting samples (\$1,000) and producing (\$1,500) an Annual Report

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$970*

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not fall below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the alleged violation is \$882.

b) *Maximum Liability Amount: \$1,112,000*

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (1,112 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2010 Annual Report is **\$970**, which represents the economic benefit plus ten percent.

**Attachment A – Failure to Submit 2011 Annual Report
Specific Factors Considered – Civil Liability
Luis Bento
Bento Dairy**

The Central Valley Water Board alleges that the Discharger failed to submit the 2011 Annual Report by 1 July 2012 as required by the 2007 General Order, R5-2007-0035. For the purpose of applying the Enforcement Policy's administrative civil liability methodology, the alleged violation is a non-discharge violation. Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

Violation (Failure to submit 2011 Annual Report): In accordance with the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (2007 General Order) and the accompanying Monitoring and Reporting Program (MRP), a 2011 Annual Report must be submitted for regulated facilities by 1 July 2012. The Owner and/or Operator (hereinafter the Discharger) submitted this report for the Bento Dairy on 17 July 2014, 746 days late.

Calculation of Penalty for Failure to Submit 2011 Annual Report

Step 1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.35.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2011 Annual Report did not increase the amount of pollution discharged or threatened to discharge into waters of the State. The submission of an Annual Report is a means through which the Central Valley Water Board can evaluate a Discharger's compliance with the 2007 General Order. Failing to timely submit the Annual Report to the Central Valley Water Board hinders the Board's ability to follow-up with noncompliance and such circumstances present at least a minor potential for harm. The deviation from requirements was determined to be major, as the requirement to submit the Annual Report has been rendered ineffective. The failure to submit the required technical report undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the 2007 General Order.

Attachment A – Failure to Submit 2011 Annual Report Bento Dairy

Initial Liability

A failure to submit annual reports is punishable under Water Code section 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2011 Annual Report by 1 July 2012 as required by the 2007 General Order and the MRP. The report was submitted on 17 July 2014, 746 days late. Therefore, the Per Day Assessment is calculated as (0.35 factor from Table 3) x (746 days) x (\$1,000 per day). The Initial Liability value is \$261,100.

Step 4. Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the Discharger's conduct that should be considered for modification of the initial liability amount: the Discharger's culpability, the Discharger's efforts to clean up or cooperate with regulatory authorities after the violation, and the Discharger's history of violations. After each of these factors is considered for the violation alleged, the applicable factor should be multiplied by the proposed liability amount for the violation.

a) *Multiple Day Violations*

The Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation.

The failure to submit the annual report does not result in an economic benefit that can be measured on a daily basis. The continuance of this violation does not result in an economic benefit that can be measured on a daily basis. The economic benefit is the one-time cost of submitting the report to the Central Valley Water Board, and not a per-day benefit during the entire period of violation.

The Prosecution Team recommends applying this alternative approach. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period. Using this approach, the total number of days of violation is revised to 30. The calculation of initial liability is revised to \$10,500 (0.35 per day factor X 30 adjusted days of violation X \$1,000 per day penalty).

**Attachment A – Failure to Submit 2011 Annual Report
Bento Dairy**

b) *Culpability: 1.2*

Discussion: The Discharger was assessed a score of 1.2, which increases the fine. The Discharger is responsible for failing to submit the annual report alleged herein. The requirement to submit a 2011 Annual Report was detailed in the 2007 General Order. The Discharger was issued a Notice of Violation on 22 August 2012, which requested that the report be submitted as soon as possible to minimize liability. Thus, the Discharger had knowledge of the requirement to submit the Annual Report and failed to meet the reasonable standard of care in that regard.

c) *Cleanup and Cooperation: 1.1*

Discussion: The Discharger was assessed a score of 1.1, which increases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the 2007 General Order, the Discharger failed to submit the Annual Report by the due date. The Discharger did submit the Annual Report on 17 July 2014. The violation of Water Code section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

d) *History of Violations: 1.0*

Discussion: The Discharger was assessed the score of 1.0. There is no formally adjudicated action against the Discharger, so a factor of 1.0 is appropriate.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$13,860* [Initial Liability (\$10,500) x Adjustments (1.2)(1.1)(1.0)].

Step 6. Ability to Pay and Continue in Business

The Enforcement Policy provides that if the Central Valley Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward.

Discussion: The Discharger does not have the ability to pay the Total Base Liability amount based on an analysis of financial information provided by the Discharger. The Discharger's assets include the dairy facilities valued at

**Attachment A – Failure to Submit 2011 Annual Report
Bento Dairy**

\$1.5 million that are mortgaged for \$1.68 million. Additionally, the Discharger has a negative net worth and does not have a subsistence level of income.

Step 7. Other Factors as Justice May Require

Discussion: No adjustment to the Total Base Liability Amount has been made based on “other factors as justice may require.”

Step 8. Economic Benefit

a) *Estimated Economic Benefit: \$788*

Discussion: The Discharger has received an economic benefit from the costs saved in not collecting the samples needed to prepare a complete 2011 Annual Report and from delaying the preparation and submittal of the 2011 Annual Report. This is based on the current consulting costs of collecting samples (\$1,000) and producing (\$1,500) an Annual Report.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$867*

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not fall below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team’s estimate of the Discharger’s economic benefit obtained from the alleged violation is \$788.

b) *Maximum Liability Amount: \$746,000*

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (746 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2011 Annual Report is **\$867**, which represents the economic benefit plus ten percent.

**Attachment A – Failure to Submit 2012 Annual Report
Specific Factors Considered – Civil Liability
Luis Bento
Bento Dairy**

The Central Valley Water Board alleges that the Discharger failed to submit the 2012 Annual Report by 1 July 2013 as required by the 2007 General Order, R5-2007-0035. For the purpose of applying the Enforcement Policy's administrative civil liability methodology, the alleged violation is a non-discharge violation. Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

Violation (Failure to submit 2012 Annual Report): In accordance with the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (2007 General Order) and the accompanying Monitoring and Reporting Program (MRP), a 2012 Annual Report must be submitted for regulated facilities by 1 July 2013. The Owner and/or Operator (hereinafter the Discharger) submitted this report for the Bento Dairy on 17 July 2014, 381 days late.

Calculation of Penalty for Failure to Submit 2012 Annual Report

Step 1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.35.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2012 Annual Report did not increase the amount of pollution discharged or threatened to discharge into waters of the State. The submission of an Annual Report is a means through which the Central Valley Water Board can evaluate a Discharger's compliance with the 2007 General Order. Failing to timely submit the Annual Report to the Central Valley Water Board hinders the Board's ability to follow-up with noncompliance and such circumstances present at least a minor potential for harm. The deviation from requirements was determined to be major, as the requirement to submit the Annual Report has been rendered ineffective. The failure to submit the required technical report undermines the Central Valley Water Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the 2007 General Order.

Attachment A – Failure to Submit 2012 Annual Report Bento Dairy

Initial Liability

A failure to submit annual reports is punishable under Water Code section 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The Discharger failed to submit a 2012 Annual Report by 1 July 2013 as required by the 2007 General Order and the MRP. The report was submitted on 17 July 2014, 381 days late. Therefore, the Per Day Assessment is calculated as (0.35 factor from Table 3) x (381 days) x (\$1,000 per day). The Initial Liability value is \$133,350.

Step 4. Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the Discharger's conduct that should be considered for modification of the initial liability amount: the Discharger's culpability, the Discharger's efforts to clean up or cooperate with regulatory authorities after the violation, and the Discharger's history of violations. After each of these factors is considered for the violation alleged, the applicable factor should be multiplied by the proposed liability amount for the violation.

a) *Multiple Day Violations*

The Enforcement Policy provides that, for violations lasting more than 30 days, the Central Valley Water Board may adjust the per-day basis for civil liability if certain findings are made and provided that the adjusted per-day basis is no less than the per-day economic benefit, if any, resulting from the violation.

The failure to submit the annual report does not result in an economic benefit that can be measured on a daily basis. The continuance of this violation does not result in an economic benefit that can be measured on a daily basis. The economic benefit is the one-time cost of submitting the report to the Central Valley Water Board, and not a per-day benefit during the entire period of violation.

The Prosecution Team recommends applying this alternative approach. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period. Using this approach, the total number of days of violation is revised to 18. The calculation of initial liability is revised to \$6,300 (0.35 per day factor X 18 adjusted days of violation X \$1,000 per day penalty).

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b) *Culpability: 1.2*

Discussion: The Discharger was assessed a score of 1.2, which increases the fine. The Discharger is responsible for failing to submit the annual report alleged herein. The requirement to submit a 2012 Annual Report was detailed in the 2007 General Order. The Discharger was issued a Notice of Violation on 18 September 2013, which requested that the report be submitted as soon as possible to minimize liability. Thus, the Discharger had knowledge of the requirement to submit the Annual Report and failed to meet the reasonable standard of care in that regard.

c) *Cleanup and Cooperation: 1.1*

Discussion: The Discharger was assessed a score of 1.1, which increases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the 2007 General Order, the Discharger failed to submit the Annual Report by the due date. The Discharger did submit the Annual Report on 17 July 2014. The violation of Water Code section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

d) *History of Violations: 1.0*

Discussion: The Discharger was assessed the score of 1.0 There is no formally adjudicated action against the Discharger, so a factor of 1.0 is appropriate.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

a) *Total Base Liability Amount: \$8,316* [Initial Liability (\$6,300) x Adjustments (1.2)(1.1)(1.0)].

Step 6. Ability to Pay and Continue in Business

The Enforcement Policy provides that if the Central Valley Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward.

Discussion: The Discharger does not have the ability to pay the Total Base Liability amount based on an analysis of financial information provided by the Discharger. The Discharger's assets include the dairy facilities valued at

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\$1.5 million that are mortgaged for \$1.68 million. Additionally, the Discharger has a negative net worth and does not have a subsistence level of income.

Step 7. Other Factors as Justice May Require

Discussion: No adjustment to the Total Base Liability Amount has been made based on “other factors as justice may require.”

Step 8. Economic Benefit

a) *Estimated Economic Benefit:* **\$667**

Discussion: The Discharger has received an economic benefit from the costs saved in not collecting the samples needed to prepare a complete 2012 Annual Report and from delaying the preparation and submittal of the 2012 Annual Report. This is based on the current consulting costs of collecting samples (\$1,000) and producing (\$500) an Annual Report.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount:* **\$734**

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not fall below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team’s estimate of the Discharger’s economic benefit obtained from the alleged violation is \$667.

b) *Maximum Liability Amount:* **\$381,000**

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (381 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2012 Annual Report is **\$734**, which represents the economic benefit plus ten percent.