

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2012-0564

IN THE MATTER OF

HENRY J. TOSTA dba REEVE ROAD HEIFER RANCH  
AND  
ECHEVERRIA BROTHERS DAIRY GENERAL PARTNERSHIP  
SAN JOAQUIN COUNTY

**NOTICE OF HEARING TO ASSESS ADMINISTRATIVE CIVIL LIABILITY:**

The Executive Officer of the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board or Board), hereby gives notice that:

1. This Complaint is issued to Henry J. Tosta Trust (Henry J. Tosta, trustee) (owner and operator of the Henry Tosta Dairy) and Henry J. Tosta (operator of the Reeves Road Heifer Ranch) and the Echeverria Brothers Dairy General Partnership, (Rosemary Bidart, Javier Echeverria, Ricardo Echeverria, Pablo and Josefina Echeverria Trust (Eduardo Echeverria, Trustee) Juan and Dolores Echeverria Trust (Juan and Dolores Echeverria, Trustees)) (owner of the Reeves Road Heifer Ranch)(hereafter collectively referred to as “Discharger”), pursuant to California Water Code (Water Code) sections 13268, 13305, and 13350.
2. Unless waived, a hearing on this matter will be held before the Central Valley Water Board within 90 days following issuance of this Complaint. The Discharger, or its representative(s), will have an opportunity to be heard and to contest the allegations in this Complaint and the proposed imposition of administrative civil liability. Not less than 10 days before the hearing date, an agenda for the meeting of the Central Valley Water Board at which this matter will be heard will be available on the Board’s website: <http://www.waterboards.ca.gov/centralvalley/>
3. At the hearing, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed administrative civil liability (including an increase in the amount of the liability up to the statutory maximum) or whether to refer the matter to the Attorney General for assessment of judicial civil liability. The Discharger can waive its right to a hearing to contest the allegations contained in this Complaint by submitting a signed waiver and paying the civil liability in full or by taking other actions as described in the attached waiver form.
4. 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 Complaint through the close of the hearing. The Central Valley water Board has the discretion to award these additional enforcement costs as “other matters that justice may require” under §the State Water Resources Control Board’s Water Quality Enforcement Policy.

## BACKGROUND INFORMATION

5. Henry J. Tosta (hereinafter “operator”) operates the Reeves Road Heifer Ranch (WDID 5B39NC00152) located at 21070 Reeve Road, Tracy, San Joaquin County (hereafter “Reeve Road Heifer Ranch”). The Heifer Ranch and associated cropland are located on APN 209-300-015 and APN 209-300-016 and are owned by the Echeverria Brothers Dairy General Partnership. Rosemary Bidart, Javier Echeverria, Ricardo Echeverria, the Pablo and Josefina Echeverria Trust (Eduardo Echeverria, Trustee) and the Juan and Dolores Echeverria Trust (Juan and Dolores Echeverria, Trustees) are the General Partners of the Echeverria Brothers Dairy General Partnership.
6. On 3 May 2007, the Central Valley Water Board adopted the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035 (hereinafter “Dairy General Order”) (Exhibit 1) and a Monitoring and Reporting Program (hereinafter “MRP”) that accompanies the Dairy General Order (Exhibit 2). The Dairy General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007. The Dairy General Order is a set of general waste discharge requirements that apply to owners and operators of existing milk cow dairies that (1) submitted a Report of Waste Discharge in response to the Central Valley Water Board’s August 8, 2008 request and (2) have not expanded operations since October 17, 2005.
7. The Reeve Road Heifer Ranch has been owned by the Echeverria Brothers Dairy General Partnership since at least 1979. It has been operated by Henry Tosta since at least 1994. The Reeve Road Heifer Ranch is located to the west of the city of Tracy within the legal boundaries of the Sacramento-San Joaquin Delta (Exhibit 3). The property is comprised of a total of 118 acres of cropland and 18 acres of production area and is surrounded by cropland associated by Henry Tosta Dairy on the north and east, by Reeve Road on the west, and by West Middle Road on the south (Exhibit 4). Solid manure generated by cattle is stockpiled in an area south of the unused wastewater storage lagoon. The cropland is bisected by the Main Drain canal of the Naglee-Burk Irrigation District.
8. The Reeve Road Heifer Ranch is currently enrolled under the Dairy General Order as an existing milk cow dairy. The Discharger submitted a Report of Waste Discharge on 18 October 2005 (Exhibit 5) and has not expanded operations since 17 October 2005. The facility is permitted under the Dairy General Order to house up to 127 mature dairy cows, but currently houses 800 support stock. The Discharger paid annual fees to maintain enrollment under the Dairy General Order in 2008, 2009, 2010, and 2011. As an enrolled facility, the Reeve Road Heifer Ranch is subject to the requirements of the Dairy General Order for regulatory purposes.
9. Henry Tosta, operator of the Reeve Road Heifer Ranch, has a history of violations of water quality laws. On 1 March 2002, staff from the Central Valley Water Board and the Department of Fish and Game (DFG) investigated a discharge of wastewater from cropland operated by the Henry Tosta Dairy into a Naglee-Burk drain; this cropland is now part of the current Henry Tosta Dairy production area. Mr. Tosta explained to the investigators that he had been pumping wastewater out onto approximately 15 acres for

approximately one year instead of using his waste pond. The reason given for not using the waste pond was the lack of a pump and distribution system. No crop was growing in the field receiving the wastewater. In addition, manure scraped from the freestall barn had been deposited into the Main Drain canal of the Naglee-Burk Irrigation District south of the production area (Exhibit 6). On 28 March 2002, staff from the Central Valley Water Board and DFG conducted a follow-up inspection of the Henry Tosta Dairy to determine what steps had been taken to abate the discharge of 1 March 2002. The inspection revealed ongoing discharges of wastewater from the same field into the Naglee-Burk drain and no significant improvements (Exhibit 7). On 3 February 2003, a settlement agreement was reached between Henry Tosta and the Deputy District Attorney for San Joaquin County in the sum of \$141,730 for these discharges of manure wastewater (Exhibit 8). The stipulated agreement required Tosta to invest \$25,000 to build new wastewater facilities at the Henry Tosta Dairy by 1 December 2002 to improve environmental compliance.

- 10.** In August 2008 Henry Tosta indicated that he was interested in removing the Reeve Road Heifer Ranch from General Order Coverage in conversations with Central Valley Water Board Staff, but told staff he had to confirm any final decisions with the landowners. After two years of indecision, and contacts with Mr. Tosta on 11 August 2008, 22 September 2008, 15 July 2009, and 15 September 2010, the Central Valley Water Board mailed a Notice of Violation (NOV) on 26 September 2011 to the Discharger for its failure to submit the required reports. The Discharger received a NOV for its failure to submit the 2008 Annual Report, the 2009 Annual Report, the 2010 Annual Report, and the Waste Management Plan by the due dates required by the Dairy General Order (Exhibit 9). The NOV reminded the Discharger of the required steps necessary to remove a closed dairy from the General Order. On 25 October 2011 the Discharger responded to the NOV by submitting a letter indicating its intent to close the facility from the Dairy General Order along with the required Closure Plan (Exhibit 10). The Central Valley Water Board Prosecution Team decided not to take formal enforcement against the Discharger for missing reports at this time, since Reeve Road Heifer Ranch had not been operational as a dairy since 2005 and the Discharger cooperated with the NOV by submitting a closure plan.
- 11.** On 24 April 2012, Central Valley Water Board staff ("Staff") scheduled an appointment with Henry Tosta to conduct a closure inspection of the Reeve Road Heifer Ranch. On 1 May 2012, Central Valley Water Board staff conducted an inspection of the Reeve Road Heifer Ranch, as well as the Henry Tosta Dairy. Staff's findings were memorialized in an inspection report dated 8 May 2012 (Exhibit 11). The inspection of the Reeve Road Heifer Ranch focused primarily on areas that should be cleaned out in order to close out of the Dairy General Order. Staff initially noted that the old manure lagoon had not been cleaned out as required, and that it contained numerous cow bones indicating historic disposal of dead animals in the liquid manure system. Staff toured the rest of the facility and found additional evidence of the disposal of dead animals in the production area, including several dead calves and a decomposing cow skull, as well as numerous cow bones (Exhibit 12). On the north end of the Heifer Ranch cropland, staff observed and a large area of disturbed soil and two mature dairy cows buried in a shallow pit grave in land immediately adjacent to the Naglee Burk Irrigation District Main Canal (Exhibit 12, photos 4, 10-14). Land adjacent to the burial area was dry, but the burial pit itself was

full of groundwater (Exhibit 12, photo 6). During the inspection, Mr. Tosta told staff that the cows in the pit died on or around 25 April 2012 on the Henry Tosta Dairy. He admitted that 4-6 cows were buried in this way at this location each month for 5-6 years (Exhibit 11, page 2). Based on these admissions, Staff estimated that anywhere from 240 to 436 cows were buried on APN 209-300-016. Giving the shallow groundwater levels in this area, it is likely that most or all of these cows were buried directly in groundwater. Additional shallow depressions indicative of burial sites were seen throughout this area (Exhibit 12, photos 8, 9, 15 and 16)

- 12.** On 11 June, 2012 the Executive Officer of the Central Valley Water Board issued Cleanup and Abatement Order (CAO) R5-2012-0709 to the Discharger (Exhibit 13). The CAO identified several violations, including the illegal burial of dead cows at a dairy facility, a failure to maintain domestic and agricultural wells, and a failure to manage waste in compliance with the waste management practices required by the Dairy General Order. The CAO required the Discharger to clean up and abate the effects of waste discharges to surface water and groundwater at the Reeve Road Heifer Ranch in accordance with a specified time schedule, in five separate directives, including: 1) immediately stopping the burial of dead animals and proper disposal of dead animals as required by the Dairy General Order; 2) the removal and proper disposal of dead animals buried on the Reeve Road Heifer Ranch cropland; 3) the collection of groundwater samples in the vicinity of the dead cow burial area; 4a) the submission of a groundwater remediation plan for groundwater polluted by the improper burial of dead cows, 4b) the removal and proper disposal of comingled manure and cow remains from the Reeve Road manure lagoon and proper disposal at a landfill; and 5) repairs to the domestic and agricultural wells on the Reeve Road Heifer Ranch property.
- 13.** On 21 June 2012 the Discharger's consultant, David Avila of Western Dairy Design Associates, Inc. (Western Dairy Design), submitted a letter to the Regional Board requesting an extension under the CAO for the complete removal of the dead animal carcasses from 25 June 2012 to 29 June, 2012 (Exhibit 14). On 25 June 2012 the Executive Officer of the Central Valley Water Board issued a letter granting the extension (Exhibit 15). The Discharger remained subject to all other directives in the CAO at the original due dates.
- 14.** On 26 June 2012 the Central Valley Water Board received an email from an informant in response to a newspaper article in the Stockton Record about the CAO. The informant provided five historic photos of the Reeve Road Heifer Ranch showing dozens of dead cows buried in cropland (Exhibit 16). The informant noted that, "I feel it is important to note that when Mr. Tosta buries the cows over half of them are still alive...if you look in the correct places you will find 1000's of cow carcasses that have been buried over the years." Water Board staff responded to the informant by email on 29 June 2012, and received a detailed response on 2 July 2012, signed by Rebecca Hammond. Ms. Hammond stated that the photos were taken in 2003-2004 by a former employee of the Henry Tosta Dairy. The email also claimed that "[sic] Henry never had a cow properly removed (Talo)," and "he has buried the cows on the properties since the dairy was first put in to business. I am not trying to make this out of something it is not, but I'm telling you...there has got to be 1000's of buried cows out there. Mostly on the reeves road dairy." In response to these allegations, staff performed an inspection of APN 209-300-016. Staff was able to use horizon features in the 26 June photos to

identify the location that the photographs were taken (Exhibit 17), which was south of the burial area adjacent to the Naglee Burk Irrigation District Canal. On 3 July 2012 staff inspected the area and noted that the cropland in this vicinity was covered in weathered cow bones (Exhibit 18, pages 2 and 3).

- 15.** On 28 June 2012 Regional Board performed a quick inspection of the Reeve Road Heifer Ranch burial area. Directive 2 of the CAO was modified to require ALL animal carcasses buried on APN 209-300-016 to be removed by 29 June 2012 (Exhibit 15). Staff surveyed the burial area and noted that the mounds of dirt and pits with dead cows inside them had been leveled, but were surprised that the area of earthwork disturbed during the excavation was small in scale compared to the hundreds of dead cows Mr. Tosta told inspectors he had buried on the Reeve Road property during previous inspections (see Exhibit 11, page 2).
- 16.** On 3 July, 2012 staff conducted a second follow-up inspection of the Reeve Road Heifer Ranch to confirm the items ordered in Directive the CAO had been completed. The results of this inspection are documented in an inspection report dated 9 July 2012 (Exhibit 18). Directive 2 required the Discharger to submit proof of legal disposal of the dead cow carcasses buried in cropland (APN 209-300-016) by 2 July 2012. Staff reminded Mr. Tosta and his consultant that a proof of legal disposal of cow carcasses was required by Directive 2 of the CAO and was past due. In response, Western Dairy Design presented staff with an iPhone photograph of a receipt from Foothill Landfill (Exhibit 18, page 9), as well as a collection of rough notes to be included in a comprehensive dead animal removal report. Staff reviewed these materials, but informed Western Dairy Design and Mr. Tosta in the field that submission of an unverified receipt from a landfill in the field was not sufficient to verify legal disposal of dead cows and satisfy the requirements of the CAO.
- 17.** On 6 July 2012 Western Dairy Design submitted a report to the Regional Water Board by fax, backdated to 21 June 2012 (Exhibit 19). This report summarized the work that had been performed on the Reeve Road Heifer Ranch to date. The report described the excavation of the dead cows and collection of water quality samples from Reeve Road Heifer Ranch on 25 June 2012, but did not contain information about the number of dead cows removed and disposed of at the Foothill Landfill. Directive 4 of the CAO required the Discharger to remove all wastewater and comingled manure solids and animal remains from the Reeve Road manure lagoon, remove all manure and solids from areas south of the manure lagoon, and complete all actions required to remove the Heifer Ranch from the Dairy General Order by 29 June 2012. The 6 July 2012 report noted that "Mr. Tosta has verbally agreed to perform the cleanup (of the Reeve Road manure lagoon comingled manure and animal remains) as described by the CAO...I would estimate this work to be completed by the week of 23-27 July 2012."
- 18.** On 17 July 2012 Staff again performed a follow up inspection of the Reeve Road Heifer Ranch to assess compliance with the CAO. No progress had been made in an effort to comply with Directive 4's requirement to remove comingled manure and animal remains from the Reeve Road Heifer Ranch during either of these inspections. Staff reminded Mr. Tosta that the manure from this area must be removed as required by the CAO. Staff explained to Mr. Tosta that this manure, which was comingled with animal

remains, must be properly disposed of at a landfill in accordance with the Dairy General Order. Mr. Tosta was also reminded of the continuing accrual of potential civil penalties stemming from a failure to meet the requirements of the CAO.

- 19.** On 19 July 2012 Central Valley Water Board Staff and counsel had a conference call with Raymond Echeverria, one of the landowners of the Reeve Road Heifer Ranch. On 20 July 2012 staff sent Mr. Echeverria an email to memorialize this discussion (Exhibit 20). Water Board staff informed Mr. Echeverria of Mr. Tosta and Western Dairy Design's failure to meet the requirements of the CAO, as well as the potential outstanding liability to both the owner and the operator of the Reeve Road Heifer Ranch for a failure to meet the requirements of the CAO.
- 20.** On 20 July 2012 the Central Valley Water Board received a copy of the Comprehensive Dead Animal Removal Report, dated 18 July 2012, from Western Dairy Design (Exhibit 21). The Report detailed the removal of decomposed cow carcasses from "an area 35 feet wide, 425 feet long, and 7 to 8 feet deep...along the south bank road of the Naglee Burk Drain." The report estimated that "8 to 12 animals were recovered from this excavation." However, later in the report, a single receipt from Foothill Landfill is included in the report; the receipt has a handwritten note stating, "Henry Tosta CAO Reeve Road Heifer Ranch: Carcass bone and composted residue soil from 2 cows." The report also contained laboratory results from groundwater samples collected on 25 June 2012. The results showed pollution of groundwater in the vicinity of the dead cow burial area.<sup>1</sup> Water quality samples in this report confirmed that pollution of groundwater from the Discharger's activity, which triggered the requirement to submit a Groundwater Remediation Plan by 27 August 2012 in accordance with Directive 4 of the CAO.
- 21.** On 23 July 2012 the Central Valley Water Board received a request from Mr. Tosta for an extension of the deadlines under Directive 4 in the Cleanup and Abatement Order (Exhibit 22). Mr. Tosta requested an extension for work required to remove the facility from the General Order, including the removal of manure from the Reeve Road manure lagoon until October 15, 2012. The request stated "the reason is that there are no farmers willing to accept manure until they are able to apply it, which will be after the corn is harvested." The Executive Officer did not grant this request because disposal of comingled manure and animal remains on farm fields as proposed by Mr. Tosta would not meet the requirements of Directive 4 of the CAO.
- 22.** On 26 July 2012 Staff performed a follow-up inspection of the Reeve Road Heifer Ranch with Henry Tosta and Jim Avila. Staff noted that the comingled manure had been removed from the Reeve Road manure lagoon and stockpiled along its banks (Exhibit 23). Staff observed that much of this material was comprised of dirt and manure, but numerous cow bones were protruding out of the pile. This confirmed that the manure had been comingled with animal remains as was observed by inspectors on 1 May 2012. Staff explained to Mr. Tosta and Mr. Avila in the field that manure containing

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<sup>1</sup> Two water quality samples taken by the discharger on 6/24/2012 at approximately 18 feet below soil surface showed nitrate as nitrogen at 30mg/L and 21.9 mg/L, respectively. The maximum contaminant level (MCL) for nitrate as nitrogen in drinking water is 10mg/L. In addition, the samples contained total coliform greater than 2419.6 MPN/100mL, E.coli at 156.5 MPN/100mL, and ammonia at 5.2 mg/L.

animal remains must be disposed of at a landfill that accepts those materials and cannot be applied to land. Mr. Avila agreed to submit a plan for removal of this material at a landfill by 1 August 2012. A plan was never received by the Central Valley Water Board.

- 23.** On 31 July the Stockton Daily Record published an online article detailing a conversation between reporter Alex Breitler and Henry Tosta (Exhibit 24). In the article, Mr. Tosta claims that excavation of the Reeve Road property “revealed only three skulls and ‘maybe 89-90 pounds worth of bones... Three animals. That’s all there was.’” These statements contradict the 20 July 2012 Comprehensive Dead Animal Removal Report which claimed that 8 to 12 animals were recovered from the excavation of APN 209-300-016.
- 24.** On 31 July 2012 Staff received a phone call from David Avila regarding the comingled manure pile on the Reeve Road Heifer Ranch. Mr. Avila explained that Mr. Tosta wanted to land apply the comingled manure rather than sending it to a landfill. Staff again explained to Mr. Avila that land application would not meet the requirements of the CAO or the Dairy General Order since animal remains must be properly disposed of at a landfill.
- 25.** On 15 August 2012 Staff left a phone message with Western Dairy Design explaining that the 23 July 2012 request for extension of the CAO had not been granted and that manure that was comingled with animal remains must be properly disposed of at a landfill. On 16 August 2012 Raymond Echeverria contacted staff to discuss the manure removal at Reeve Road. Staff explained that the Discharger needed to dispose of all manure comingled with animal remains at a landfill. On 20 August 2012 Mr. Echeverria inquired if a manure sifter could be used to separate comingled animal remains from the manure, followed by land application of the sifted manure. Staff informed Mr. Echeverria that this would not meet the requirements of the CAO or the Dairy General Order since the sifter would not effectively separate manure that had been tainted with mammalian tissue.<sup>2</sup> On 3 September 2012 staff received a phone call from Mr. Echeverria indicating that Mr. Tosta had informed him that there were no landfills in the area that would accept the manure pile. Staff assured Mr. Echeverria that this was inaccurate, and that Mr. Tosta had been provided with a list of landfills that accepted animal waste on 19 June 2012.
- 26.** On 5 September 2012 Staff performed a follow-up inspection of the Reeve Road Heifer Ranch to assess compliance with the CAO. Staff identified numerous bones in the comingled manure pile, and pointed them out to Mr. Tosta. Staff again explained that comingled manure that has been exposed to mammalian tissue must go to a landfill.

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<sup>2</sup> There are many epidemiological reasons why soil and manure that has been tainted with mammalian tissue should not be land applied as fertilizer. Prions, the proteins associated with transmissible spongiform encephalopathies (TSEs) such as mad cow disease, may enter soil environments through decomposition of infected carcasses. Results from studies of prions in soil suggest that prions released into soil environments may be preserved in a bioavailable form, perpetuating prion disease epizootics and exposing other species to the infectious agent. (see Johnson CJ, Phillips KE, Schramm PT, McKenzie D, Aiken JM, et al. (2006) Prions Adhere to Soil Minerals and Remain Infectious. PLoS Pathog 2(4): e32.).

Mr. Tosta indicated that he understood this restriction and would comply with this requirement.

27. On 14 September 2012 the Central Valley Water Board issued a letter titled "Status of Compliance with Cleanup and Abatement Order R5-2012-0709 Reeve Road Heifer Ranch" to the Discharger (Exhibit 25). The letter detailed the outstanding requirements and lack of compliance with the CAO, including: (1) the failure to timely submit a proof of legal disposal of animal carcasses buried on APN 209-300-016; (2) failure to submit a Groundwater Remediation plan by 27 August 2012; and (3) failure to properly dispose of comingled manure and animal waste from the Reeve Road manure lagoon. The letter informed the discharger of the maximum potential penalty for violations to date, and requested immediate compliance with the CAO.
28. On 3 October 2012 Jeff Flemming of Western Dairy Design Associates submitted two emails on behalf of the Discharger. The first email requested replacement of certain pages of the 6 July 2012 Cleanup and Abatement Plan (Exhibit 26). The second email requested replacement of certain pages of the 18 July 2012 Comprehensive Dead Animal Removal Report (Exhibit 27). Staff reviewed these submissions in context of the original 6 July 2012 and 18 July 2012 reports but concluded that they did not impact the Discharger's compliance status with the CAO.
29. On 22 October 2012 Staff performed a follow up inspection of the Reeve Road Heifer Ranch. The pile of comingled manure and animal remains stacked next to the lagoon had not been moved.

## **STATEMENT OF WATER CODE SECTIONS UPON WHICH LIABILITY IS BEING ASSESSED**

30. Administrative civil liability may be imposed pursuant to the procedures described in Water Code sections 13323 and 13350. 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.
31. Pursuant to Water Code section 13350, subdivision (a), any person or entity who (1) violates a cleanup and abatement order hereafter issued by a Regional Water Board ; or (2) in violation of a Waste Discharge Requirement issued by a Regional Water Board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state, is subject to administrative civil liability pursuant to Water Code section 13350, subdivision (e), either (1) on a daily basis not to exceed five thousand dollars (\$5,000) for each day the violation occurs; or (2) on a per gallon basis in an amount not to exceed ten dollars (\$10) per gallon of waste discharged.
32. Pursuant to Water Code 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. Pursuant to Water Code section 13268 any person failing or refusing to furnish technical or monitoring program reports may be subject to an administrative

penalty imposed by a regional board in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

**33.** Pursuant to Water Code section 13243, a regional board, in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted. Water Code section 13263(a) allows a Regional Board to prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in discharge of waste to waters of the state. The Central Valley Water Board has determined that the discharge of nitrates, salts, and other waste from many dairies in the Central Valley region have impacted groundwater, a water of the state. The Central Valley Water Board may prescribe general waste discharge requirements to a category of discharges, such as those from ongoing dairy operations, if the discharges are produced by the same or similar operations, the discharges involve the same or similar types of waste, the discharges require the same or similar treatment standards, and the discharges are more appropriately regulated under general requirements than individual requirements. Dairy farms covered by the Dairy General Order are subject to the general waste discharge requirements for discharges of waste from existing milk cow dairies.

## **THE EXECUTIVE OFFICE OF THE CENTRAL VALLEY WATER BOARD ALLEGES:**

### **SUMMARY OF ALLEGED VIOLATIONS**

**34. Dead Cow Discharge to Ground Water:** The Discharger violated Water Code section 13350(a)(2) by burying dead cows in and/or within several feet of groundwater.

- a. Animal carcasses were disposed of at the dairy facility in violation of Dairy General Order Waste Discharge Requirement General Prohibition A.6.
- b. The Discharger causes or permitted waste to be discharged into waters of the state observed two dead cows in a burial pit filled with water, and concluded the cows were placed and buried in ground water, a Water of the State.
- c. The Discharger therefore violated Wat. Code section 13350(a)(2) by discharging waste or placing waste where it would be discharged into waters of the state in violation of Waste Discharge Requirements issued by the Regional Board. Evidence submitted to the Regional Board and information collected during staff inspections suggest that the Discharger has buried dead and dying dairy cows in the cropland on APN 209-300-016 for many years. However, there is affirmative evidence to show that waste, dead cow carcasses, was placed where it could be discharged to groundwater from 1 May 2012, the date of the first inspection, until 25 June 2012, a total of **56 days**.

**35. Violation of CAO Directives:** The Discharger violated Water Code sections 13350(a)(1) and 13267 by failing to comply with the directives of CAO R5-2012-0709 including:

- a. **Directive 2:** Failure to timely submit proof of legal disposal of animal carcasses in accordance with Wat. Code 13267.
  1. **Directive 2** required the Discharger to submit proof of legal disposal of animal carcasses from APN 209-300-016 by 2 July 2012 in accordance with Water Code Section 13267.
  2. The Discharger submitted a Comprehensive Dead Animal Removal Plan on 20 July 2012. Evidence in the record suggests that the excavation work performed by the Discharger between 18 June and 25 June 2012 did not remove all animal carcasses buried on APN 209-300-016, and therefore the Comprehensive Dead Animal Removal Report does not document the work required by Directive 2 of the CAO. However, the Prosecution Team believes there is affirmative evidence to show that the discharger failed to meet the requirement to submit proof of legal disposal of animal carcasses to the Regional Board from 3 July 2012 to 20 July 2012, a total of **18 days**.
  
- b. **Directive 4:** Failure to submit a Groundwater Remediation Plan in accordance with Wat. Code 13267.
  1. **Directive 4** of the CAO required the discharger to submit a Groundwater Remediation Plan by 27 August 2012 in accordance with Water Code Section 13267 if groundwater quality samples indicated that waste disposal has caused pollution of groundwater.
  2. Under the Central Valley Water Board Basin Plan, 4<sup>th</sup> Addition, groundwater in the vicinity of the Reeve Road Heifer Ranch has a designated beneficial use for municipal drinking water.
  3. The 20 July 2012 Comprehensive Dead Animal Removal Report included two water quality samples from the dead cow burial area. These water quality samples showed concentrations of nitrate as nitrogen at 30.0 mg/L and 21.9 mg/L respectively, more than 2 times the MCL for drinking water of 10 mg/L.
  4. Based on these results the Discharger was required to submit a Groundwater Remediation Plan to address high concentrations of nitrates and other constituents in groundwater near the Reeve Road Heifer Ranch. The Discharger has been repeatedly reminded about this requirement, but has remained out of compliance with the CAO from 28 August 2012 to 16 November 2012, a total of **82 days**.
  
- c. **Directive 4:** Failure to properly dispose of comingled manure and animal remains from the Reeve Road manure lagoon in accordance with Wat. Code 13304.
  1. **Directive 4** of the CAO required the discharger to remove all wastewater and manure from the Reeve Road manure lagoon and

properly dispose of animal remains comingled with manure by 29 June 2012.

2. The Discharger failed to take the appropriate steps to export comingled manure and animal remains from the Reeve Road Heifer Ranch and to a landfill that is certified to accept this waste. Central Valley Water Board Staff reminded the Discharger and its agents of the requirement to dispose of comingled manure and animal remains at a landfill by on at least six separate occasions. The Discharger has been out of compliance with this requirement of the CAO from 30 June 2012 to 16 November 2012, a total of **140 days**.

## **FACTORS CONSIDERED IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY**

36. On 17 November 2010, 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\\_fin\\_al111709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_fin_al111709.pdf).

Violations of of CWC section 13350(a)(2), including are assessed on a per day basis. The Discharger's disposal of dead cows to groundwater resulted in impact to water quality. Evidence submitted to the Regional Board and information collected during staff inspections suggest that the Discharger has buried dead and dying dairy cows in the cropland on APN 209-300-016 for many years. However, there is affirmative evidence to show that waste, dead cow carcasses, was placed where it could be discharged to groundwater from 1 May 2012, the date of the first inspection, until 25 June 2012, a total of **56 days**.

Violations of Wat. Code section 13267 including the failure to timely submit proof of legal disposal of cow carcasses and a failure to submit a groundwater remediation plan are assessed on a per day basis. However, the violations at issue are non-discharge reporting violations and qualify for the alternative approach to the penalty calculation under the Enforcement Policy, which reduces the overall penalty when applicable. The failure to timely submit proof of legal disposal of dead cow carcasses occurred from 3 July 2012 to 20 July 2012, a total of **18 days**. These violations do not qualify for the collapsed days approach under the Enforcement Policy because the duration of the violation is less than 30 days. The failure to submit a groundwater remediation plan does not result in an economic benefit to the discharger that can be measured on a daily basis, therefore this violation qualifies for the multiple day approach. Accordingly, the number of days of violation are collapsed from 82 days to **8 days**.

Violations of Wat. Code section 13350(a)(1), including the failure to properly dispose of comingled manure and animal remains are assessed on a per-day basis. The discharger violated Directive 4 of the CAO by failing to properly dispose of animal

remains comingled with manure by 29 June 2012. The failure to properly dispose of these materials does not result in an economic benefit to the discharger that can be measured on a daily basis, therefore this violation qualifies for the multiple day approach. Accordingly, the number of days of violation are collapsed from 140 days to **10 days**.

**37.** The maximum civil liability for violations of Wat. Code 13350(a)(1) and (a)(2) is \$5,000 per violation per day. The maximum penalty for violation of Wat. Code 13268 is \$1,000 for each day in which the violation occurs. The maximum penalty for the violations described above is **\$1,080,000.00** based on a calculation of the total number of per-day violations times the statutory maximum penalty (196 total days of violation x \$5,000 per day plus 100 total days of violation x \$1,000 per day). However, based on considerations 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 **\$239,563** for the violations 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 CWC sections 13323, 13261, 13268, and 13385 in the amount of **\$239,563** for the violations alleged above.

If the Central Valley Water Board holds a hearing, it may choose to impose the 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 under the Enforcement Policy.

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 the Discharger's waste discharge requirements and/or violations of requirements of the CAO for which penalties have not yet been assessed or for violations that may subsequently occur.

ACL Complaint R5-2012-0564

HENRY J. TOSTA, dba HENRY TOSTA DAIRY, REEVES ROAD HEIFER RANCH and  
ECHEVERRIA BROTHERS DAIRY GENERAL PARTNERSHIP  
SAN JOAQUIN COUNTY

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 CAO Order No. R5-2012-0709 or General Order R5-2007-0035 (Dairy General Order), the terms of which remain in effect. Additional civil liability may be assessed in the future if the Discharger fails to comply with these orders, and/or future orders issued by the Central Valley Water Board.

19 November 2012  
Date

*ORIGINAL SIGNED BY ROBERT D. BUSBY*  
FOR Pamela C. Creedon  
Executive Officer  
Central Valley Water Board Prosecution Team

**WAIVER OF 90-DAY HEARING REQUIREMENT FOR  
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent Henry J. Tosta (Operator) OR the Echeverria Brothers Dairy General Partnership (Owner), (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2012-0564 (hereinafter the "Complaint");
2. I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served" with the Complaint;
3.  **(Check here if the Discharger will waive its right to a hearing and accept the proposed liability amount of two hundred thirty nine thousand five hundred sixty three dollars (\$239,563).** I hereby waive any right the Discharger may have to a hearing before the Central Valley Regional Water Quality Control Board (Central Valley Water Board) within ninety (90) days of service of the Complaint; and

I certify that the Discharger will be liable for **\$239,563 in full**.

The Discharger shall remit payment, by check, which will contain a reference to "ACL Complaint R5-2012-0561" and will be made payable to the "State Water Resources Control Board Cleanup and Abatement Account". Payment must be received by the Central Valley Water Board by **14 December 2012** or this matter will be placed on the Central Valley Water Board's agenda for adoption at the **31 January/1 February 2013** Central Valley Water Board meeting.

I understand that payment of the **\$239,563** in full is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

-or-

4.  **(Check here if the Discharger will waive the 90-day hearing requirement, but wishes to engage in settlement negotiations. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted.)** I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board staff in discussions to resolve the outstanding violation(s). By checking this box, the Discharger is *not* waiving its right to a hearing on this matter. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and Central Valley Water Board staff can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. A hearing on the matter may be held before the Central Valley Water Board if these discussions do not resolve the liability proposed in the Complaint. The Discharger agrees that this hearing may be held after the 90-day period referenced in California Water Code section 13323 has elapsed.

-or-

5.  **(Check here if the Discharger will waive the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted. Attach a separate sheet with the amount of additional time requested and the rationale.)** I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

ACL Complaint R5-2012-0564

HENRY J. TOSTA, dba HENRY TOSTA DAIRY, REEVES ROAD HEIFER RANCH and  
ECHEVERRIA BROTHERS DAIRY GENERAL PARTNERSHIP  
SAN JOAQUIN COUNTY

6. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify the proposed Administrative Civil Liability Order, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability.

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(Print Name and Title)

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(Signature)

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(Date)

## **ATTACHMENT A**

Penalty Methodology: Specific Factors Considered

**ATTACHMENT B**  
Penalty Calculation for Civil Liability

**Attachment A – ACL Complaint No. R5-2012-0564**  
**Specific Factors Considered for Administrative Civil Liability**  
**HENRY J. TOSTA (DBA REEVE ROAD HEIFER RANCH)**  
**AND**  
**ECHEVERRIA BROTHERS DAIRY GENERAL PARTNERSHIP**  
**SAN JOAQUIN COUNTY**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code sections 13350, subdivision (a) and 13327. 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:  
[http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_final111709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf).

**A. Factors Considered Relating to Dead Cow Discharge to Groundwater**

The following steps are used in determining administrative civil liability for the production area discharges.

**Step 1 – Potential for Harm for Discharge Violations**

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

**Factor 1: Harm or Potential Harm to Beneficial Uses.**

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5). The designated beneficial uses of groundwater are municipal and domestic water supply, agricultural supply, industrial service supply, and industrial process supply. The decomposition of a dead mature cow releases approximately 63 gallons of fluid; a 1,200 pound cow carcass contains from 24 to 36 pounds of organic nitrogen. Nitrogen in the form of nitrate-nitrogen has a maximum contaminant level in drinking water of 10 mg/l. Groundwater samples collected from the excavation when some of the dead cows were removed contained nitrate-nitrogen at 21.9 and 30 mg/l, and ammonia-nitrogen at 5.2 mg/l. . The illegal burial of dead cows in and/or above shallow groundwater has been identified as moderate threat to beneficial uses, with a score of **3** is assigned for this factor

**Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.** The A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. “Potential receptors” are those identified considering human, environmental, and ecosystem exposure pathways. The Discharger illegally buried dead cows in and/or within several feet of groundwater, which leads to the direct discharge of decomposing flesh in to waters of the state. The decomposition of a dead cow releases many chemicals, including nitrogen, chloride, pathogens such as eColi. If the animal was treated before death with antibiotics or other pharmaceuticals, these chemicals may be released into

groundwater as well. The chemicals discharged into groundwater as a result of the illegal burial of dead cows has the potential to pose a significant threat to environmental and human health. Because release of nitrogen, chloride, and pathogens from decomposing cow carcasses poses “a significant risk or threat to potential receptors”, a score of **4** was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, more than 50% of the discharge was susceptible to abatement. Once the source of the discharge (the dead cow carcasses) was removed from groundwater, the ongoing discharge of decomposing carcass materials would have stopped. In addition, the Discharger could have abated the impacts of the discharge of its waste if it pumped the underlying groundwater and applied it to cropland. Therefore, a factor of **0** is assigned.

Final Score – “Potential for Harm”

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a **final score of 7** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses administrative civil liabilities for the discharge based on a per-day basis.

Per Day Assessments for Discharge Violations

The “per day” factor (determined from Table 2 of the Enforcement Policy) is 0.31 based on the total score from Step 1 and the deviation from requirements. The deviation from requirements was determined to be major. The burial of dead cows at a dairy facility that impacts groundwater is a violation of several General Prohibitions in the Dairy General Order. The Pollution of groundwater is a violation of Prohibition A.4 which prohibits the discharge of waste that results in 1) discharge of waste constituents in a manner which could cause degradation of groundwater, or 2) contamination or pollution of groundwater. In addition, the burial of dead cows is a violation of Prohibition A.6. which prohibits the burial of animal carcasses at a dairy facility

The days of violation for the buried dead cows that are the subject of this enforcement action have been calculated from 1 May 2012, the date of the inspection when dead cows were first observed buried in groundwater, to 25 June 2012, the date the cows were excavated, according to the removal report filed by the Discharger, or a total of 56 days. Therefore, the Per Day Assessment is calculated as: (0.31 factor from Table 2) x (56 days) x (\$5,000 per day). The **Initial Liability** value is **\$ 86,800**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Central Valley Water Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of

the violations are related to the discharge of pollutants via dead animals, and the liability was determined in Step 2.

#### **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 violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

#### **Multiple Day Violations**

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The violations at issue do not qualify for the alternative approach to penalty calculation under the Enforcement Policy. The continuance of this violation: causes daily detrimental impacts to the quality of the groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not paying rendering costs for dead animal disposal; and the Discharger knew and could have taken action to mitigate or eliminate the violation.

#### **Culpability**

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Dairy's enrollment under the General Order and was provided with a copy of the General Order. Prohibition A6 of the General Order prohibits the disposal of dead animals on property except in certain very limited emergency circumstances. The Discharger did not comply with this prohibition of the General Order and disposed of his cattle in an improper fashion.

#### **Cleanup and Cooperation**

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger did cooperate with Cleanup and Abatement Order R5-2012-0709 (CAO) directives, because he removed between eight and twelve cows and properly disposed of them by the required deadline. However, Regional Board staff believes the discharger failed to remove all of the dead cows buried at the facility. The average attrition rate at a dairy farm is anywhere from 2 to 7% of the herd, which means that anywhere from 20 to 70 cattle per year are culled from the Henry Tosta Dairy. Photographic evidence and statements from an informer indicate that the discharger did not dispose of any of his cattle through a rendering plant, and that they were buried at the Reeve Road Heifer Ranch. Additionally, the Discharger failed to produce any rendering receipts to show he had properly disposed of cull cattle through a renderer. Therefore, the cleanup and cooperation multiplier factor has been set at **1.0**, which neither increases nor decreases the fine. .

### History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger Henry Tosta has a history of violations of water quality laws. On 3 February 2003, a settlement agreement was reached between Henry Tosta and the Deputy District Attorney for San Joaquin County in the sum of \$141,730 for discharges of manure wastewater to the Naglee-Burk Canal (Exhibit 8). The Prosecution Team has factored this violation as a history of violation for the purposes of this Complaint, since the amount of the settlement agreement is based in part on the fact that Henry Tosta failed to correct an ongoing discharge for 30 days. Staff assessed a multiplier value of **1.1**.

### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Initial Liability (\$86,800) X Adjustment Factors **(1.5) (1.0) (1.1)** and is equal to **\$143,220**.

### **B. Factors Considered Relating to Violation of CAO Directive 2: Timely Submittal of Comprehensive Dead Animal Removal Report**

The following steps are used in determining administrative civil liability for the failure to timely submit proof of legal disposal of illegally buried carcasses. The discharger was required to submit proof of legal disposal of the animal carcasses at a landfill permitted to accept animal carcasses by 2 July 2012. On 3 July 2012, the Discharger's consultant submitted a cell-phone photograph of a receipt from Foothills Sanitary Landfill. A report with narrative and photographs documenting removal of animal remains was received on 20 July 2012.

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

### **Step 3 – Per Day Assessment for Non-Discharge Violation**

The per-day factor for the violation is 0.35. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The purpose of the proof of legal disposal via a comprehensive report is to document that the illegally buried animals have indeed been removed and do not pose an ongoing threat to water quality. Delay in the submittal of the report results in ongoing questions about the method and thoroughness of the removal activities.

b. The Deviation from Applicable Requirements is moderate. The Discharger's submission was 18 days late; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from 3 July 2012 (the day after the report was due) to 20 July 2012 (the date the comprehensive dead animal removal report was received by the Board) for a total of 18 days date. Therefore the Per Day Assessment is calculated as (0.35 factor from Table 3) x (18 days) x (\$1000 per day). **The Initial Liability value is \$6,300.**

#### **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 violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

#### **Multiple Day Violations**

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The violations at issue do not qualify for the alternative approach to penalty calculation under the Enforcement Policy because the duration of the violation is less than 30 days.

#### **Culpability**

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was aware of the need for the timely submittal of the comprehensive report, and a reasonable person could assume that a photograph of a receipt did not constitute proof of legal disposal, since the receipt did not indicate any information about the nature of the material received other than the tonnage of material.

#### **Cleanup and Cooperation**

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was cooperative in submitting a plan, although it was not timely. Therefore, the Discharger is given a neutral multiplier value of **1.0**.

#### **History of Violation**

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

#### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Initial Liability (\$6,300) X Adjustment Factors (1.5) (1.0) (1.1) and is equal to **\$10,395**.

### **C. Factors Considered Relating to Violation of CAO Directive 4: Failure to Submit a Groundwater Remediation Plan**

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

#### **Step 3 – Per Day Assessment for Non-Discharge Violation**

The per-day factor for the violation is **0.55**. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The CAO directed the discharger to collect groundwater samples and determine if the illegal burial of dead animals has caused pollution of groundwater. Groundwater samples indicated pollution due to nitrate-nitrogen and therefore a groundwater remediation plan was required under the CAO. Until a plan is developed, it cannot be approved or implemented, and groundwater impacts will remain unremediated.

b. The Deviation from Applicable Requirements is major. The Discharger failed to submit the groundwater remediation plan and in effect, disregarded the requirement of the CAO.

The length of the violation is alleged from 27 August 2012 (the date the groundwater remediation plan was due) through 16 November 2012 (the issue date of this ACLC), a total of 82 days. Therefore the Per Day Assessment is calculated as (0.55 factor from Table 3) x (82 days) x (\$1000 per day). **The Initial Liability value is \$45,100.**

#### **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 violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

#### **Multiple Day Violations**

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation.

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Water Board Prosecution Team recommends applying the alternative approach to civil liability

calculation provided by the Enforcement Policy. 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.

This results in a Revised Initial Liability Amount as follows:

**Revised Initial Liability = (.55) X (8 days of violation) X (\$1,000) = \$4,400**

#### Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO clearly stated the requirement to submit the groundwater remediation plan if groundwater sampling indicated groundwater pollution. The Status letter issued by Staff on 14 September 2012 states that Staff's evaluation of groundwater data received from the Discharger's consultant on 20 July 2012 indicates negative impacts to groundwater from dairy operations and states that a plan for the remediation of the groundwater was required by 27 August 2012. The plan has not been received.

#### Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the remediation plan has not been submitted and no explanation for the lack of the remediation plan has been provided, the Discharger was given a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.1**.

#### History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

#### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Revised Initial Liability (\$4,400) X Adjustment Factors **(1.5) (1.1) (1.1)** and is equal to **\$7,986**.

#### **D. Factors Considered Relating to Violation of CAO Directive 4: Failure to Properly Dispose of Comingled Manure and Animal Remains**

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

### **Step 3 – Per Day Assessment for Non-Discharge Violation**

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. During past dairy operations at what is now the Heifer Ranch, dead cows were placed in an area south of the lagoon at the Heifer Ranch and covered with manure. When the lagoon was cleaned out as required by the CAO, the removed manure was added to the piled manure/animal remains. Land application of manure containing residues from mammalian tissue is not allowed because pathogens that are resistant to decomposition can be present. Instead, this material must be discharged to a landfill that is permitted to accept this material.

b. The Deviation from Applicable Requirements is major. The Discharger has failed to remove the commingled manure and animal remains. By adding manure from the lagoon to the piled manure containing animal remains, the total volume of material requiring landfill disposal has actually increased from the amount at the time of issuance of the CAO. The Discharger has been repeatedly informed of the need to ship this material to an appropriate landfill; this requirement was reiterated in the Status letter of 14 September 2012.

The length of the violation is alleged from 30 June 2012 (the day after the manure and animal remains were to be removed per the CAO) through 16 November 2012, for a total of 140 days late. Therefore the Per Day Assessment is calculated as (0.55 factor from Table 3) x (140 days) x (\$5000 per day). The Initial Liability value is \$385,000.

### **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 violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

#### **Multiple Day Violations**

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The failure to remove the manure and animal remains does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Water Board Prosecution Team recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. 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.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.55) X (10 days of violation) X (\$5,000) = **\$27,500**

#### Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO issued to the Discharger clearly stated the requirement to remove the manure and animal remains by 29 June 2012. The Status letter sent to the Discharger on 14 September 2012 reminded the Discharger that the removal had not been done as of that date. The manure and animal remains has not been removed as of 16 November 2012.

#### Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the manure and animal remains have not been removed, because the Discharger and the Discharger's consultant have repeatedly questioned the need to remove the material to a landfill without taking any steps towards removal, and because actions taken at the Heifer Ranch have only increased the amount of material requiring landfill disposal, the Discharger was given the maximum multiplier value of **1.5**.

#### History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

#### **Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

**Total Base Liability Amount:** This value is calculated as the Revised Initial Liability (**\$27,500**) X Adjustment Factors (**1.5**) (**1.5**) (**1.1**) and is equal to **\$68,062**

#### **Step 6 - Ability to Pay and Ability to Continue in Business**

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. Below is a brief analysis of the Discharger's financial situation, which may be revised based on the submission of additional information by the Discharger. Henry J. Tosta, operator of the Reeve Road Heifer Ranch, and the Echeverria Brothers Partnership, owner of the Reeve Road Heifer Ranch are jointly and severally liable for compliance with the Dairy General Order and the fine assessed under this Complaint.

Besides the Heifer Ranch operated on property leased from the Echeverria Brothers Dairy General Partnership, Henry Tosta owns and operates a 1,196 cow dairy in the immediate area. The dairy is an ongoing business that generates profits that may be used to pay off the

assessed penalty. Henry Tosta owns an additional five parcels of land in the vicinity of the Heifer Ranch, together with a restaurant/bar in a neighboring community. Public records show that Henry Tosta is the legal property owner of the following parcels.

APN 229-060-15 (agricultural); APN 239-270-06 (residential); APN 209-290-06 (agricultural); APN 209-290-07 (agricultural); APN 209-300-18 (agricultural); APN 239-160-02; APN 239-160-16 (dairy); APN 239-160-15 (agricultural); APN 212-090-01 (agricultural); APN 239-270-02 agricultural); APN 209-300-18 (agricultural); APN 249-020-06; APN 229-060-16 (agricultural); APN 229-060-17 (agricultural)

In all, based on the information publicly available, the Prosecution Team finds that Henry Tosta has the ability to pay the proposed administrative civil liability amount.

The Echeverria Brothers Dairy General Partnership has significant landholdings throughout the Central Valley. Publically available records indicated that they are the titled landowner of numerous parcels of land Bakersfield. In addition, members of the Echeverria Brothers Dairy General Partnership operate at least 3 separate dairies outside of Bakersfield that milk a combined total of more than 7,000 milking cows. The ongoing profits from these dairies and the equity in existing landholdings represent significant assets. In the event that Henry Tosta does not pay the penalty in full, publically available financial records indicate that the Echeverria Brothers General Partnership has the ability to pay the outstanding penalty.

#### **Step 7 – Other Factors as Justice May Require**

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this.

#### **Costs of Investigation and Enforcement Adjustment**

The costs of investigation and enforcement are “other factors as justice may require”, and should be added to the liability amount. Staff of the Central Valley Water Board has spent over 100 hours associated with the investigation of the discharges alone, independent of time required for preparation of the enforcement action. The State Water Board Office of Enforcement has directed that all regions are to use a value of \$150 per hour for staff costs. For this case, staff time for investigation of the discharges is \$9,900. The Enforcement Policy states that staff costs should be added to the liability amount.

#### **Step 8 – Economic Benefit**

The Enforcement Policy directs the Water Board to determine any Economic Benefit Amount of the violation based upon the best available information. The Enforcement Policy suggests that the Water Board compare the Economic Benefit Amount to the Adjusted Total Base Liability and ensure that the Adjusted Total Base Liability is at a minimum, 10 percent greater than the Economic Benefit Amount. Doing so should create a deterrent effect and will prevent administrative civil liabilities from simply becoming the cost of doing business.

The Prosecution Team has estimated the economic benefit of non-compliance at \$49,956. (Exhibit 28). This estimation is based on one-time costs and annually recurring costs associated with complying with water quality laws, including the Dairy General Order and the

Cleanup and Abatement Order. The economic benefits of non-compliance are calculated using U.S. EPA's BEN Model version 4.7.0, which accounts for accrued interest and taxation rates associated with delayed and avoided costs of compliance.

In this case, the Discharger incurred an economic benefit from non-compliance because it failed pay the trucking and rendering fees associated with proper disposal of dead cows as required by the General Order. Instead, cull cows were disposed of on APN 209-300-016 at a significant cost to the environment. The discharger saved approximately \$6,900 dollars per year since the time of adoption of the General Order by improperly disposing of cull cattle. This yields a benefit of non-compliance of \$27,271 for this violation.

The Discharger did not dispose of comingled manure, soil, and mammalian tissue as required by the CAO. This is a one-time non-depreciable expenditure. Prosecution Team staff estimates that there were 693 tons of comingled manure and animal remains on the Reeve Road facility. Tipping fees associated with the disposal of this material at Foothill Landfill is \$22,176. Trucking costs for disposing of this amount of material are \$13,895. Since the discharger is taxed by the Federal and State governments for the money it failed to spend on compliance, the actual benefit of non-compliance is \$22,255, which is less than the actual cost to properly dispose of the materials. This accounts for the compliance monies already paid to federal and state governments at a taxation rate of 35% and 5%, respectively.

The economic benefit of non-compliance plus 10% is **\$54,951**. The Adjusted Total Base Liability Amount is greater than 110 percent, and therefore, no adjustment is necessary based on the economic benefit analysis.

#### **Final adjusted liability**

The final adjusted liability is **\$229,663** plus **\$9,900** in staff costs, or **\$239,563**.

#### **Step 9 – Maximum and Minimum Liability Amounts**

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Complaint, and the values are repeated here.

Maximum Liability Amount: \$1,080,000

Minimum Liability Amount: the minimum liability is the lowest amount allowed by statute and by policy. The Enforcement Policy requires that, at a minimum, the assessed penalty must be equal to the economic benefit plus 10% which estimated to be \$54,951.

#### **Step 10 – Final liability Amount**

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Without further investigation of the discharge, calculation of economic benefits, and additional staff time, the proposed Administrative Civil Liability is **\$239,563**.

**Instructions**  
 1. Select Potential Harm for Discharge Violations  
 2. Select Characteristics of the Discharge  
 3. Select Susceptibility to Cleanup or Abatement  
 4. Select Deviation from Standard  
 5. Click "Determine Harm & per Gallon/Day..."  
 6. Enter Values into the Yellow highlighted fields

Select Item 3 = Moderate  
 Select Item 4 = Discharged material poses significant risk  
 Select Item > 50% of Discharge Susceptible to Cleanup or Abatement  
 Select Item Major

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Moderate

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Major

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

Select Item  
 Select Item  
 Select Item  
 Select Item

Discharger Name/ID: Reeve Road Heifer Ranch, Tracy, San Joaquin County

		Dairy General Order Violation: Dead Cow Discharge to Groundwater		CAO Directive 2: Comprehensive Dead Animal Removal Report		CAO Directive 4: Submission of Groundwater Remediation Plan		CAO Directive 4: Proper Disposal of Comingled Manure and Dead Animal Remains			
Discharge Violations	Step 1	Potential Harm Factor (Generated from Button)	7								
	Step 2	Per Gallon Factor (Generated from Button)	0.31								
		Gallons									
		Statutory / Adjusted Max per Gallon (\$)									
	<b>Total</b>			\$ -				\$ -		\$ -	
Non-Discharge Violations	Step 3	Per Day Factor (Generated from Button)	0.31							0	
		Days	56								
		Statutory Max per Day	5000.00								
		<b>Total</b>		\$ 86,800		\$ -		\$ -		\$ -	
	<b>Initial Amount of the ACL</b>			\$ 86,800.00		\$ 6,300.00		\$ 4,400.00		\$ 27,500.00	
Add'l Factors	Step 4	Culpability	1.5	\$ 130,200.00	1.5	\$ 9,450.00	1.5	\$ 6,600.00	1.5	\$ 41,250.00	
		Cleanup and Cooperation	1	\$ 130,200.00	1	\$ 9,450.00	1.1	\$ 7,260.00	1.5	\$ 61,875.00	
		History of Violations	1.1	\$ 143,220.00	1.1	\$ 10,395.00	1.1	\$ 7,986.00	1.1	\$ 68,062.50	
<b>Step 5 Total Base Liability Amount</b>			\$ 229,663.50								
Step 6 Ability to Pay & to Continue in Business			\$ -								
Step 7 Other Factors as Justice May Require			\$ -								
Step 8 Economic Benefit			\$ 49,956.00								
Step 9 Minimum Liability Amount			\$ 54,951.60								
Step 10 Final Liability Amount			\$ 239,563.50								

| Penalty Day Range Generator   |
|---|---|---|---|
| Start Date of Violation= 5/1/12<br>End Date of Violation= 6/25/12                       | Start Date of Violation= 7/3/12<br>End Date of Violation= 7/20/12                       | Start Date of Violation= 8/27/12<br>End Date of Violation= 11/16/12                     | Start Date of Violation= 6/30/12<br>End Date of Violation= 11/16/12                       |
| Maximum Days Fined (Steps 2 & 3) = 56 Days<br>Minimum Days Fined (Steps 2 & 3) = 7 Days | Maximum Days Fined (Steps 2 & 3) = 18 Days<br>Minimum Days Fined (Steps 2 & 3) = 4 Days | Maximum Days Fined (Steps 2 & 3) = 82 Days<br>Minimum Days Fined (Steps 2 & 3) = 8 Days | Maximum Days Fined (Steps 2 & 3) = 140 Days<br>Minimum Days Fined (Steps 2 & 3) = 10 Days |

Potential Harm for Discharge Violations  
 Characteristics of the Discharge  
 Susceptibility of Cleanup or Abatement  
 Deviation from Requirement

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

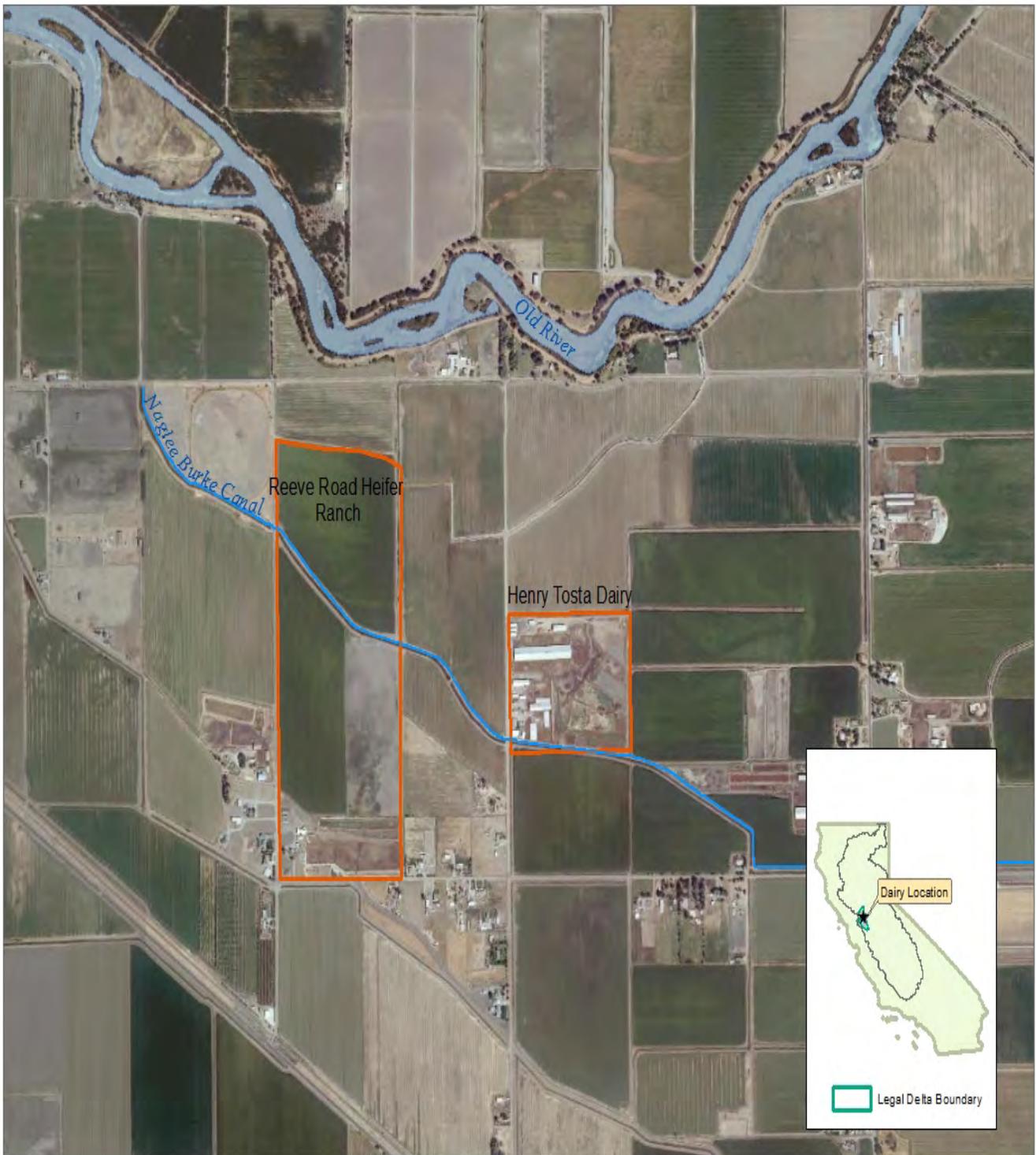
Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

Select Item Potential Harm for Discharge Violations  
 Select Item Characteristics of the Discharge  
 Select Item Susceptibility of Cleanup or Abatement  
 Select Item Deviation from Requirement

Violation 5	Violation 6		Violation 7		Violation 8		Violation 9		Violation 10	
\$ -		\$ -		\$ -		\$ -		\$ -		\$ -
	0		0		0		0		0	
\$ -		\$ -		\$ -		\$ -		\$ -		\$ -
\$ -		\$ -		\$ -		\$ -		\$ -		\$ -
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Aerial photo showing the Reeve Road Heifer Ranch and the Henry Tosta Dairy located just north of Tracy, CA.



During the 1 May 2012 inspection, cow carcasses were found both above ground surface and in an open grave. Note the dead cows are submersed in groundwater.



Photo of the cow burial area located on the Reeve Road Heifer Ranch's cropland just south of the Naglee-Burk Irrigation District's Canal. Dead cows from the Henry Tosta Dairy were being buried in shallow graves.



Photo of cow carcasses placed in a shallow grave on Heifer Ranch cropland managed by Mr. Henry Tosta.



Different photo of cow carcasses placed in a shallow grave on Heifer Ranch cropland managed by Mr. Henry Tosta.



Photo of cow bones scattered on Reeve Road Heifer Ranch cropland.



Photo of an area south of the wastewater storage lagoon in the Heifer Ranch production area where cows were buried in manure in the past. Bones are mixed throughout the manure.