

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER R5-2012-0708

FOR

HENRY J. TOSTA (DBA HENRY TOSTA DAIRY)
AND HENRY J. TOSTA TRUST

SAN JOAQUIN COUNTY

This Order is issued to Henry J. Tosta, Henry J. Tosta Trust (Henry J. Tosta, trustee) owner and operator of the Henry Tosta Dairy (hereafter collectively referred to as "Discharger"), pursuant to California Water Code ("Water Code") section 13304, which authorizes the California Regional Water Quality Control Board, Central Valley Region (hereafter "Central Valley Water Board" or "Board") to issue a Cleanup and Abatement Order ("CAO"), and Water Code section 13267, which authorizes the Central Valley Water Board to require the preparation and submittal of technical and monitoring reports. This order covers only those water quality violations associated with the Henry Tosta Dairy's operations that occurred on land owned by the Henry J. Tosta Trust.

The Executive Officer of the Central Valley Water Board finds, with respect to the Discharger's acts or failure to act, the following:

FINDINGS

PROPERTY OWNERSHIP AND OPERATIONS

1. Henry Tosta Dairy (hereafter "Henry Tosta Dairy" or "Dairy") (WDID 5B39NC00154) is located at [REDACTED], Tracy, San Joaquin County. The property is owned by the Henry J. Tosta Family Trust. Henry J. Tosta operates Henry Tosta Dairy.

LEGAL AND REGULATORY AUTHORITY

2. This Order conforms to, and implements policies and requirements of, the Porter-Cologne Water Quality Control Act (Division 7, commencing with Water Code section 13000) including: (1) Water Code sections 13267 and 13304; (2) applicable state and federal regulations; (3) the 2007 Central Valley Regional Water Quality Control Board Waste Discharge Requirements for Existing Milk Cow Dairies General Order R5-2007-0035 (Dairy General Order); (4) all applicable provisions of Statewide Water Quality Control Plans adopted by the State Water Resources Control Board (State Board) and the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins*, Fourth Edition, revised October 2011, (hereafter "Basin Plan") adopted by the Regional Board;

(5) State Board policies and regulations, including State Board Resolution No. 68-16 (Statement of Policy with Respect to Maintaining High Quality of Waters in California), and Resolution No. 92-49 (Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code section 13304) ("Resolution 92-49"); California Code of Regulations (CCR) Title 23, Chapter 16, Article 11; CCR Title 23, Section 3890 et. seq., and (6) relevant standards, criteria, and advisories adopted by other state and federal agencies.

3. **Waste Discharge Requirements:** 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.

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. 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 Discharger is required to file a Report of Waste Discharge with the Central Valley Water Board at least 140 days before making any material change in the character, location, or volume of the discharge including, but not limited to the addition of new waste water that results in a change in the character of the waste; significantly changing the disposal or waste application method or location; significantly changing the method of treatment; increasing the discharge flow beyond that specified in the Dairy General Order, and/or expanding the existing herd size beyond 15 percent. Henry J. Tosta owns and operates the Henry Tosta Dairy which is a dairy operation covered by the Dairy General Order.

4. **Basin Plan:** The Dairy is located in the San Joaquin River Watershed, San Joaquin Delta subarea, in the Sacramento and San Joaquin River Basin. The Basin Plan covers the San Joaquin River Watershed. Chapter IV of the Basin Plan also contains a policy for the *Investigation and Cleanup of Contaminated Sites*. The strategy generally outlines a process that includes site investigation, source removal or containment, information requirements for the consideration of establishing cleanup levels, and a basis for establishing soil and groundwater cleanup levels. Pursuant to Water Code section 13263(a), the Dairy General Order implements the Basin Plan. Henry Tosta Dairy is covered by the Dairy General Order and is also subject to the prohibitions and requirements of the Basin Plan.

5. **State Board Policies:** The State Water Resources Control Board ("State Water Board") has adopted Resolution 92-49, *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304* ("Resolution 92-49"). Resolution 92-49 sets forth the policies and procedures to be used during an investigation and cleanup of a polluted site, and requires that cleanup levels be consistent with State Water Board Resolution 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. ("Resolution 68-16"). Resolution 92-49 requires the waste to be cleaned up in a manner that promotes attainment of either background water quality, or the best water quality which is reasonable if background levels of water quality cannot be restored. Any alternative cleanup level to background must: (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Water Board.

BACKGROUND

6. The Henry Tosta Dairy at [REDACTED] was purchased by Henry J. Tosta in 1994. A dairy facility has been in operation on the property intermittently since 1962. The property was inactive at the time of its purchase in 1994; in 1995, Henry Tosta filed a Form 200 with the Central Valley Water Board to reopen the Dairy. The Dairy is permitted under the Dairy General Order to house up to 1,196 mature dairy cows, and currently houses 1,180 mature cows. The Dairy's production area occupies approximately 20 acres, with milk cows housed in one freestall barn with scraped lanes and an adjoining corral. Support stock is kept in corrals. Manure from the freestall barn is scraped into a large open area at the east end of the barn. There are a total of seven wastewater storage lagoons/settling basins at the Dairy, but there are no mechanisms apparent and no evidence of any attempt to move scraped manure into the lagoons/settling basins or to export the scraped manure from the dairy. Depth to groundwater in the production area is five feet or less, based on data from monitoring wells collected in 1996. There are 428 acres of cropland associated with the Dairy, but according to the most recent annual report, for the 2010 calendar year, no solid manure or manure wastewater was applied to the cropland.
7. The Dairy production area is surrounded by cropland on the west, north, and east sides. Some of the cropland is owned and farmed by Henry Tosta, and some of the cropland is farmed by Henry Tosta but owned by Echeverria Brothers Dairy General Partnership. Tosta Dairy has identified much of this cropland as a Land Application Area in its Nutrient Management Plan. Land Application Areas are considered to be part of the Dairy facility for purposes of the Dairy General Order.
8. On the south side, the Dairy production area is bordered by the Main Drain canal of Naglee-Burk Irrigation District, which flows northwest through cropland owned by Echeverria Brothers Dairy General Partnership and farmed by Henry Tosta. At Bethany

Road, the Main Drain canal enters an underground pipe which trends due north and discharges into the Old River. 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 into the Main Drain canal from cropland controlled by Henry Tosta.

9. On 24 April 2012, Central Valley Water Board staff ("Staff") scheduled an appointment with Henry Tosta to conduct a routine compliance inspection of the Henry Tosta Dairy. On 1 May 2012, Central Valley Water Board staff conducted the inspection of the facility. During the 1 May 2012 inspection (hereinafter "the Inspection"), staff identified **onsite violations** and **record-keeping violations** at the Henry Tosta Dairy. **(See Attachment 1).**

VIOLATIONS

10. **Onsite violations of Dairy General Order:** Staff identified the following onsite violations, including
 - a. Slurry manure issues in the Production Area of Henry Tosta Dairy – At the time of the Inspection large quantities of slurry manure were stored in a central portion of the production area of the Dairy, approximately 3 to 4 acres in size, in a location without any defined boundaries or drainage controls, and with no evidence that the slurry was managed in any way. Manure slurry in this area was approximately three feet deep. The location where the slurry is placed in the production area is not identified as a manure storage area in the Waste Management Plan.

The collection and storage of waste that results in the (1) discharge of waste constituents in a manner which could cause degradation of surface water or groundwater, (2) contamination or pollution of surface water or groundwater or (3) a condition of nuisance is a violation of Prohibition A4 of the Dairy General Order.
 - b. Lagoon issues in the Production Area of Henry Tosta Dairy – At the time of the Inspection, the complex of wastewater storage lagoons and settling basins at the Dairy showed excessive vegetation and manure on and adjacent to the embankments, exhibited no definition between any of the impoundments. Solid manure was being used to reinforce embankments, and no staff gages existed in the lagoons or settling basins. It was difficult for Staff to determine lagoon dimensions or embankment integrity due to the dilapidated condition of these facilities. The methods by which liquids were moved into the lagoons/settling basins system or transferred between the lagoons and settling basins was unclear. The two settling basins had no freeboard; a minimum of one foot of freeboard is required. Lack of the required freeboard is a violation of General Specifications B1

and B10 of the Dairy General Order, and the lack of maintenance (no definition of pond boundaries, excess weeds and piled manure) violates General Specifications B1 and B11. The use of manure to construct containment structures or to repair, replace, improve, or raise existing containment structures is a violation of Prohibition 13 of the Dairy General Order. Lack of a pond level marker is a violation of General Specification B13 of the Dairy General Order.

- c. Well Maintenance Issues at Henry Tosta Dairy – A monitoring well network of three wells was installed at the Henry Tosta Dairy in 1996 as a requirement by the Central Valley Water Board and the San Joaquin County Department of Environmental Health, as part of the reactivation of the existing dairy at that location. At the time of the Inspection, two of the monitoring wells could not be located; a third well was surrounded by manure slurry. It appears that one or more of the required monitoring wells may be buried in manure slurry.

Well #1 at the Dairy requires installation of a well pad and does not comply with setback requirements in the General Order. Improperly maintained wells can cause degradation of groundwater quality in violation of Prohibition A4 of the Dairy General Order. Setbacks and separations are required pursuant to Standard Provision B18 in the Standard Provisions and Reporting Requirements of the Dairy General Order. Improperly maintained wells and lack of setbacks can allow wells to serve as conduits to groundwater for surface water and/or wastes.

- d. Storage and Disposal of Waste– The onsite waste management operations exhibited at the Dairy violates Prohibition A4 of the Dairy General Order, prohibiting the collection, treatment, storage, discharge or disposal of wastes at an existing milk cow dairy that results in (1) the discharge of waste constituents in a manner which could cause degradation of surface water or groundwater, (2) contamination or pollution of surface water or groundwater or (3) a condition of nuisance.

11. **Record-keeping violations:** The **record-keeping violations** were inaccuracies in the Waste Management Plan (WMP) and the Nutrient Management Plan for the Henry Tosta Dairy. The Waste Management Plan does not accurately reflect the conditions in the production area, including the use of the area where slurry is deposited. The WMP indicates silage leachate is routed to Settling Basin #1, which is incorrect; the conveyance channel routes silage leachate through a corral to an area west of the wastewater lagoons that was not designed to store waste. The Nutrient Management Plan indicates that solid manure is applied to cropland; however, neither solid manure nor wastewater is applied to any cropland. Inaccuracies in the Waste Management Plan are a violation of Attachment B to the Dairy General Order which requires that the Waste Management

Plan ensure that the production area of the dairy facility is designed constructed, operated and maintained so that dairy waste are managed to prevent adverse impacts to groundwater and surface water quality (page B-1).

LEGAL AUTHORITY

12. CWC section 13304(a) states, in relevant part:

Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or by the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts... Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the regional board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order...

13. CWC section 13304(c)(1) states, in relevant part:

The person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions.

14. CWC section 13267(b)(1) states, in relevant part:

In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

15. Pursuant to Water Code section 13267, subdivision (b), this Order requires the Discharger to submit technical and monitoring reports, including but not limited to work plans, to Central Valley Water Board Staff. The Central Valley Water Board requires technical and monitoring reports to determine the extent of the impacts of

the discharge of waste and to assess additional cleanup and/or remediation measures at Henry Tosta Dairy.

16. The May 2012 Inspection found that ongoing dairy operations on Henry Tosta Dairy are discharging waste into waters of the state in violation of the Dairy General Order, as demonstrated in Finding 10. Operations at the Henry Tosta Dairy have also caused or permitted and threaten to cause or permit waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and create or threatens to create, a condition of pollution or nuisance, as demonstrated in Finding 10.
17. The Water Board has considered the financial and technological resources available to the Discharger, and has determined that the cleanup directives required by this Order are feasible to implement and will be effective and necessary to protect the water quality of waters of the state. Therefore, the Executive Officer is authorized to issue this Cleanup and Abatement Order in accordance with Water Code sections 13304 and 13267 to the Discharger to cleanup and abate the effects of the discharge of waste from Henry Tosta Dairy.

DIRECTIVES

IT IS HEREBY ORDERED that, pursuant to CWC sections 13304 and 13267 that the Discharger shall take the following actions to comply with this Order:

1. **By 25 June 2012**, develop a plan for the Production Area of Henry Tosta Dairy which:
 - a. addresses removal of all slurry manure in the 3 to 4 acre central portion of the Production Area **by 27 August 2012**,
 - b. addresses removal of all manure within the two settling basins by **27 September 2012**, and
 - c. addresses removal of excess vegetation, excess manure, and manure used for construction on the six lagoons, and installation of staff gages, by **27 September 2012**.

The plan must be submitted to the Central Valley Water Board for approval. Removal of manure must commence **by 2 July 2012**.

2. **By 29 June 2012**, permanently cap the pipe that extends from Settling Basing #1 to the Main Drain canal of the Naglee Burk Irrigation District

3. **By 29 June 2012**, install a concrete pad around Well #1 and install controls to ensure that 100 feet of separation is maintained between the well and manured areas as required by Standard Provision B18 in the Standard Provisions and Reporting Requirements of the Dairy General Order.
4. **By 23 July 2012**, locate and sample the three monitoring wells in the Production Area of the Henry Tosta Dairy and submit the results to the Central Valley Water Board. Depth to water in the wells shall be measured, and the groundwater tested for total dissolved solids, pH, nitrate-nitrogen, ammonia-nitrogen, total and fecal coliform, and standard minerals (calcium, magnesium, sodium, bicarbonate, carbonate, sulfate, and chloride).
5. **By 27 August 2012, using a hydropunch or other similar method**, collect one-time groundwater samples in the 3 to 4 acre area where slurry manure was placed and submit the results to the Central Valley Water Board. Depth to water in the area shall be measured, and the groundwater tested for total dissolved solids, pH, nitrate-nitrogen, ammonia-nitrogen, total and fecal coliform, and standard minerals (calcium, magnesium, sodium, bicarbonate, carbonate, sulfate, and chloride).
6. **By 27 August 2012**, submit a revised Waste Management Plan for the Henry Tosta Dairy to the Central Valley Water Board that accurately describes how the settling basins and the lagoons in the Production Area will be operated in conformance with the Dairy General Order, including a description of modifications needed to manage slurry manure within the existing constructed settling basin/lagoon system.
7. If groundwater samples in the vicinity of the Dairy area indicate that waste disposal has caused pollution of groundwater, by **27 September 2012**, submit a plan for the remediation of the groundwater. The plan shall also include an engineering evaluation of the impacts of the existing lagoons and settling basins on groundwater quality and a proposal for remedial measures, as required by General Specification B5 of the Dairy General Order.
8. Upon approval of the proposed remedial actions by the Central Valley Water Board, the discharger will have 360 days to implement any necessary changes to the existing lagoons and settling basins to ensure they are protective of water quality.

GENERAL REQUIREMENTS

The Discharger shall:

9. As required by the California Business and Professions Code sections 6735, 7835, and 7835.1, have reports prepared by, or under the supervision of, a registered professional engineer or geologist and signed by the registered

professional. All technical reports submitted by the Discharger shall include a cover letter signed by an authorized representative of the Discharger, certifying under penalty of law that the signer has examined and is familiar with the report and that to their knowledge, the report is true, complete, and accurate. The Discharger shall also state if it/they agree with any recommendations/proposals and whether it/they approved implementation of said proposals.

10. The Discharger will obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning the work. The Discharger will continue any remediation or monitoring activities until such time as the Executive Officer determines that sufficient assessment and/or remediation has been accomplished to fully comply with this Order and this Order has been either amended or rescinded in writing.
11. If, for any reason, the Discharger is unable to perform any activity or submit any document in compliance with the schedule set forth herein, or in compliance with any work schedule submitted pursuant to this Order and approved by the Executive Officer, the Discharger may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. Any extension request shall be submitted as soon as the situation is recognized and no later than the compliance date. An extension may be granted by revision of this Order or by a letter from the Executive Officer. Extension requests not approved in writing by the Executive Officer with reference to this Order are denied.
12. Reimburse the Central Valley Water Board for reasonable costs associated with oversight of the investigation and remediation of the Site, as provided in Water Code section 13304(c) (1). Failure to reimburse the Central Valley Water Board's reasonable oversight costs shall be considered a violation of this Order.
13. This Order does not limit the authority of the Water Board to institute additional enforcement actions or to require additional investigation and cleanup of the site consistent with the Water Code. This Order may be revised by the Executive Officer as additional information becomes available. **Failure to comply with the terms or conditions of this Cleanup and Abatement Order will result in additional enforcement action**, which may include the imposition of administrative civil liability pursuant to CWC including sections 13350, 13385 and 13268 or referral to the Attorney General of the State of California for civil enforcement.

REPORTING REQUIREMENTS

1. **Signatory Requirements.** All reports required under this Cleanup and Abatement Order shall be signed and certified by the Discharger or by a duly authorized representative of the Discharger and submitted to the Water Board staff. A person is a

duly authorized representative of the Discharger only if: (1) the authorization is made in writing by the Discharger and (2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility of activity. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

2. **Certification.** Include the following signed certification with all reports submitted pursuant to this Order:

I certify under penalty of perjury under the laws of the State of California that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

3. **Report Submittals.** All monitoring and technical reports required under this Order shall be submitted to:

California Regional Water Quality Control Board
Central Valley Region - Sacramento Office
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
Attn: Charlene Herbst, Chief, Confined Animal Unit
Email: cherbst@waterboards.ca.gov
Phone: (916) 464-4724

Notifications:

4. **Cost Recovery.** Pursuant to Water Code section 13304, the Water Board is entitled to, and may seek, reimbursement for all reasonable costs actually incurred by the Water Board to investigate unauthorized discharges of wastes and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action required by this Order.
5. **Applicability of Other Orders.** This Order does not affect the Discharger's obligation to comply with any previously issued Orders, including the 2007 Dairy General Order (R5-2007-0035). The requirements and legal enforceability of these Orders are not superseded or affected upon issuance of this Order.

6. **California Environmental Quality Act (CEQA) Compliance.** The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), pursuant to California Code of Regulations (CCR), title 14, section 15321(a)(2). The issuance of this Order may also be considered an action by a regulatory agency for the protection of the environment, exempt pursuant to CCR, title 14, section 15308. This action is also exempt from the provisions of CEQA in accordance with section 15061(b) (3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

7. **Requesting Administrative Review by the State Water Board.** Any person aggrieved by an action of the Water Board that is subject to review as set forth in Water Code section 13320, subdivision (a), may petition the State Water Resources Control Board (State Water Board) to review the action. Any petition must be made in accordance with Water Code section 13320 and California Code of Regulations, title 23, section 2050 and following. The State Water Board must receive the petition within 30 days of the date the action was taken, except that if the thirtieth day following the date the action was taken falls on a Saturday, Sunday, state holiday, then the State Water Board must receive the petition by 5:00 p.m. on the next business day. Copies of the law and regulation applicable to filing petitions may be found on the internet at: <http://www.waterboards.ca.gov/publicnotices/petitions/waterquality> or will be provided upon request.

8. **Enforcement Notification.** If, in the opinion of the Executive Officer, the Discharger fails to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. Failure to comply with the terms or conditions of this Cleanup and Abatement Order may result in additional enforcement action, which may include the imposition of administrative civil liability pursuant to Water Code section 13350 and/or section 13268, in an amount not to exceed **\$5,000 for each day in which the violation occurs** under Water Code section 13304 or 13350, or referral to the Attorney General of the State of California for injunctive relief or civil or criminal liability.

This Order is effective upon the date of signature.

Original signed by Rick Moss for

PAMELA C. CREEDON, Executive Officer

11 June 2012

(Date)