

**To:**

**State Water Resources Control Board**

**Office of Chief Counsel**

**Jeanette L. Bashaw, Legal Analyst**

**1001 "I" Street, 22<sup>nd</sup> Floor**

**P O Box 100**

**Sacramento, CA 95812-0100**

**Date: November 9, 2011**



**Petition Under California Water Code Section 13320 for Review of the State Water Resources Control Board of Various Actions and Failures to Act by the Central Valley Regional Water Quality Control Board Regarding Sweeney Dairy and Administrative Civil Liability Complaint No. R5-2011-0562.**

**A. Introduction.**

We are James G. Sweeney and Amelia M. Sweeney, doing business as Sweeney Dairy, and are the "Dischargers" named under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2011-00562 (Complaint). Our address is 30712 Road 170, Visalia, CA 93292. Our telephone number is (559) 280-8233 and our email address is [japlus3@aol.com](mailto:japlus3@aol.com).

Pursuant to Section 13320 of the California Water Code, we hereby appeal to the State Water Resources Control Board (State Board) regarding the following decisions, actions, and failures to act by the Central Valley Regional Water Quality Control Board (Regional Board) and petition the State Board to review the same and to grant us the relief we hereinafter request.

**B. Statement of Facts.**

1. We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 300 cows on a site where a dairy has continuously been conducted for over eighty years. We are a small business in that our gross receipts from our agricultural operation were under \$1,000,000.00 in 2009.

2. The Regional Board's Order No. R5-2007-0035 (2007 Order) compelled us, along with all other dairymen, to prepare and file all of the following reports with the Regional Board by July 1, 2009. (2007 Order, pages 27-28; Exhibit 1) The Regional Board amended the 2007 Order in 2009 with Order No. R5-2009-0029 (2009 Order) in which the filing date for these reports was extended for one year, to July 1, 2010. (Exhibit 2) The 2009 Order cited financial distress in the dairy industry as the justification for the extension.

The 2009 Annual Report, which includes an Annual Dairy Facility Assessment for 2009, and a Waste Management Plan (WMP). The WMP consists of the following reports:

- (a) Retrofitting Plan for needed improvement to storage capacity, flood protection or design of the production area.
- (b) Dairy site and Cropland maps.
- (c) Wastewater lagoon capacity evaluation.
- (d) Flood protection evaluation.
- (e) Dairy and cropland design and construction evaluation.
- (f) Cross-connection assessment report.

The 2007 Order required most of these reports, technical and otherwise, to be prepared by appropriately licensed professionals/engineers and consultants, who are very expensive. And these burdens do not include the costs of the expensive reports that we are required to submit to the San Joaquin Valley Air Pollution Control District. In total, we were facing regulatory costs of approximately \$20,000.00.

3. The dairy industry suffered through a dreadful period in 2009 due to a combination of low milk prices and high feed costs that were unprecedented in recent memory. It was a period from which many of us dairymen have not yet recovered. Indeed, the Regional Board's 2009 Order acknowledged the seriousness of the dairy industry's economic situation by postponing for a year the filing date for most of the above reports.
4. Our dairy was losing money in 2009 and in 2010. By the fall of 2009, our lender had categorized our loan as "distressed," and it advanced us a limited amount of funds that was barely enough to purchase feed and to pay such essentials as labor and utility bills. On a per cow basis, the regulatory costs imposed by the Order's requirements are disproportionately higher for small dairies as compared to large operations, and put small dairies at a competitive disadvantage and threaten their very survival.
5. Environmental groups have often been critical of large dairies, referring to them as "mega dairies" and "factory farms." It is true that larger dairies discharge larger volumes of waste and generally pose a greater potential threat to our groundwater. Yet, ironically, the Regional Board, in adopting the 2007 Order, imposed extremely costly monitoring and reporting requirements that put extra financial pressure on smaller dairies to the extent of driving some of them out of business. We know of a number of small dairies who told us that they sold out because they could not afford the costs of complying with the Regional Board's new reporting requirements.

6. In response to our request, the Regional Board's staff supplied us with data (broken down by herd size) that show the number of dairies that filed reports in the Fresno Office in 2010, versus 2007. While there was less than a 1% decline in reports filed by large dairies (over 700 cows) between 2007 and 2010, there were 36% fewer medium sized dairies (between 400 and 700 cows), and 46% fewer small dairies (less than 400 cows) that filed reports in 2010 than did in 2007. So the evidence is not just anecdotal; this is data consistent with the claim that it was the smaller dairies that were disappearing in much larger measure during this financially stressful period. There should be no dispute that the Regional Board's costly reporting requirements as set forth in the 2007 Order are contributing to large dairies growing even larger as they fill the production lost by the small dairies going out of business.
7. As a result of the financial situation in which we found ourselves in 2009 and 2010, we wrote a letter dated March 28, 2010 to the Regional Board's staff – more than three months before the July 1, 2010 filing deadline - in which we asked for a waiver from submitting these reports. (Exhibit 3) We wrote a follow-up letter dated April 7, 2010 to the Regional Board staff in which we requested a one-year suspension of filing the reports. (Exhibit 4) Anticipating that the staff would refuse to grant said relief, we stated in both of these letters that if they were unable to grant our request, to please schedule the matter for a face-to-face hearing before the Regional Board at a future meeting so that we could present our request for relief to the Board.
8. The Regional Board's staff replied to our March 28 and April 7 letters by a letter dated June 15, 2010. (Exhibit 5) They did not agree to our request to a one-year suspension, and they did not schedule a hearing before the Regional Board, as we had asked. Instead, they advised us that we could address the Board during the "Public Forum" section of their agenda. Such presentations are limited to three (3) minutes.
9. In a letter dated June 27, 2010, we again asked the staff to schedule a hearing before the Regional Board, and it was ignored. (Exhibit 6)
10. On August 20, 2010, we received a Notice of Violation dated August 16, 2010 from the Regional Board staff charging us with failing to file the July 1, 2010 reports. (Exhibit 7)
11. In a letter to the Regional Board's staff dated August 22, 2010 we again mentioned our request for a hearing before the Regional Board. (Exhibit 8) Again, the staff continued to ignore our request. We later found out why. At the July 14, 2011 hearing before the Hearing Panel, Mayumi Okamoto, one of the Regional Board's legal counsel, stated that "the decision to place a matter on the agenda remains with the discretion of your [Regional Board's] management in consultation with the Executive Officer as the gatekeeper." (Hearing Panel hearing transcript (HPT), page 50). Regional Board staff member, Clay Rodgers, also testified that "Mr. Sweeney did approach us to ask for an extension. We decided that an extension, as the gatekeepers to the Board, that the extension of the Waste Management Plan had already been granted. ... And we did not feel that the extension of the annual report would be appropriate." (HPT, page 50)

While the Regional Board may delegate some of its powers and duties, some are not delegable. According to Section 13223 (a) of the California Water Code, the modification of any waste discharge requirement is one of those powers and duties that is not delegable. It is the Regional Board's nondelegable duty and responsibility to hear and decide, or to refuse to hear and decide, our request for a modification of the waste discharge requirements contained in the 2007 Order. While Section 13223 (a) grants only the Regional Board the authority to make such determinations, but Ms. Okamoto and Mr. Rodgers chose to ignore the law. Their admissions clearly demonstrate that the Regional Board's staff acts outside their statutory authority and acts as an unlawful barrier to someone trying to appear before the board to request a change to, or relief from, waste discharge requirements.

12. Nothing happened for almost nine months. Then on May 10, 2011 an Administrative Civil Liability Complaint was served on us for failing to file the July 1, 2011 reports, and seeking civil penalties against us in the amount of \$11,400.00. (Exhibit 9) Oddly, the Complaint prejudicially failed to mention our multiple efforts to schedule a hearing before the Regional Board to seek relief.
13. Attached to the Complaint was a description of the "Hearing Procedures," which included various deadlines. (Exhibit 10) It informed us that a hearing on the Complaint would be held before a Hearing Panel on July 14, 2011. It also informed us that we had to submit to the Regional Board staff no later than June 13, 2011, 33 days after receiving the Complaint, a document identifying all evidence, witnesses, testimony and legal arguments that we intended to present at the hearing before the Hearing Panel. According to the Regional Board's procedures, we could not present anything at the hearing that we had not submitted by that date. In short, we were given only thirty-three days after being served with the Complaint to acquaint ourselves with the situation and protocols, to engage in and complete discovery, to research the law, to marshal our evidence and to formulate our testimony and legal arguments.
14. The "Hearing Procedure" attached to the Complaint went on to state that "Participants who would like additional time must submit their request to the Advisory Team so that it is received by 5:00 pm on 20 June, 2011." So on May 31, 2011, we asked the Regional Board in writing for a 60-day extension of the June 13, 2011 submission deadline and of the July 14, 2011 hearing date. (Exhibit 11)
15. It was not until June 13, 2011, the deadline for submission of our evidence/arguments, that the Regional Board's counsel informed us by email that our requests for those 60-day continuances were denied. (Exhibit 12)
16. Anticipating that our requests for 60-days extensions would be ignored or denied, we managed to quickly prepare a submission of evidence, testimony and argument, and submitted it to the Regional Board staff on the deadline of June 13, 2011. (Exhibit 13) But because of the inadequate time, we were unable to complete our discovery and to identify and fully develop the evidence, testimony and arguments that we wished to present.

17. On June 20, 2011 we made a Public Records Act request, asking for copies of all documents in the Regional Board's file concerning information on our dairy, and we asked that they be provided in time for us to review and evaluate them before the July 14, 2011 hearing. (Exhibit 14) These copies, consisting of 251 pages, were made available to us on June 30, 2011.
18. We also requested from the Regional Board on June 20, 2011 copies of "all studies, evidence and testimony that the CVRWQCB [Regional Board] had received, considered and utilized in connection with its development and/or adoption of Order R5-2007-0035 (administrative record). The Regional Board staff sent us a total of four CDs on or about July 1, 2011, which we eventually discovered contained 34,028 pages of administrative record relating to the 2007 Order.
19. Because we had received the foregoing documents only thirteen days before the July 14 hearing, we had insufficient time to adequately review and digest all 34,000 pages. So on July 1, 2011 we again asked the Regional Board staff for a continuance of the hearing before the Hearing Panel. (Exhibit 15)
20. Even though we were unable to review all 34,000 pages of administrative record and other documents that the Regional Board's staff provided to us on June 30 and July 1, we submitted to the Regional Board and its counsel on July 8, 2011 the testimony, documents and arguments we would present at the July 14, hearing before the Hearing Panel (Exhibit 16) In this July 8 document, we again requested a continuance of the upcoming hearing on grounds that we needed additional time to review the recently received administrative record documents and to fully develop our defense to the Complaint.
21. On July 12, 2011, only two days before the July 14 hearing, we received an email (Exhibit 17) from the Regional Board's legal counsel informing us that our requests for a continuance, dated July 1 and July 8, were denied. In the email, counsel expressed his opinion that "Mr. Sweeney has had sufficient time to prepare for the hearing. The request is denied because Mr. Sweeney has not established good cause that the hearing should be continued by 30 days." He declared that our Exhibits 25 through 42 would not be admitted into evidence because they were not listed in our June 13 submission and that we had not explained why these exhibits were being submitted after the June 13 deadline. His statement completely ignored that we had explained earlier that many of these exhibits had not been given to us until after the June 13 deadline, and that the June 13 deadline gave us insufficient time to complete discovery, to review the results of such discovery, to prepare our defense, and to identify them on the June 13 submission.
22. On July 14, 2011, we appeared at the hearing before the Hearing Panel, and we read our written testimony (Exhibit 16 above). Our testimony began with our request for a continuance of the hearing. The Hearing Panel ignored our request for a continuance and, upon the conclusion of the hearing, adopted a proposed order recommending a civil

penalty against us of \$11,400.00. (Exhibit 18) This proposed order was to be considered by the Regional Board at a hearing to be held at their October 13, 2011 meeting.

23. On July 27, 2011, we advised the Regional Board's legal counsel that we intended to present all evidence and legal arguments to the Regional Board at its October 13, 2011 hearing on our matter, including all evidence that we had been provided by the Regional Board after the submission deadline of June 13, 2011. (Exhibit 19)
24. On July 27, 2011, the Regional Board's legal counsel informed us that "the hearing is now closed," that "all evidence, testimony, and policy statements must have been made at the 14 July 2011 hearing," and that the Regional Board would "not be accepting additional evidence unless the Regional Board Chair determines it is necessary to reopen the hearing." (Exhibit 20) In effect, legal counsel was informing us that we could not present at the October 13, hearing before the Regional Board any evidence, testimony or argument that we had not identified by June 13, 2011, unless the Regional Board voted on October 13, 2011 to allow it.
25. On September 5, 2011, we sent a four-page letter to the Regional Board's legal counsel in which we objected to his position, and in which we informed him that we still intended to introduce this additional evidence, testimony and argument at the October 13 hearing. (Exhibit 21) We also asked that the October 13, 2011 hearing before the Regional Board be continued and rescheduled for the Regional Board's next meeting so as to allow us more time to complete our review of the 34,000 pages of administrative record and to develop any new arguments that such review might produce.  
  
Our letter presented detailed reasons why it would be prejudicial to us and would create a severe hardship if we were not allowed sufficient time to complete our review of the 2007 Order's administrative record and to present the evidence that was delivered to us after the June 13, 2011 submission deadline.
26. On September 20, 2011, the Regional Board's legal counsel informed us that the Chair of the Regional Board had denied our requests for a continuance and for permission to present the additional evidence referred to above. (Exhibit 22) We contend that the Chair's decisions were arbitrary and capricious and an abuse of discretion. We were not given any reasons for the denials, despite the fact that we explained in great detail in our September 5 letter (Exhibit 21 above) how such denials would impose a severe and prejudicial hardship to our ability to defend against the Complaint. Moreover, we do not believe that these decisions should have been made by the Chair alone; they should have been decisions made by vote of the Regional Board, after hearing argument from both sides.
27. On September 21, 2011, we responded to legal counsel's email of September 20, 2011, again repeating our request for a continuance of the October 13, 2011 hearing before the Regional Board. (Exhibit 23) We again asked that a hearing be scheduled before the Regional Board where we could ask the Board for a modification of the reporting requirements of the 2007 Order as it applied to us.

28. We were advised by two emails from the Regional Board's legal counsel dated September 29, 2011 that the Chair of the Regional Board had denied our requests for a continuance and to allow the additional evidence, testimony and argument. (Exhibit 24) He also informed us that he had no authority to schedule the hearing we requested before the Board, but that we could appear before the Board as "a member of the public" and would be allowed only three minutes to speak during their "public forum" section of their agenda. (Exhibit 25)
29. We sent a letter to the Board's legal counsel, Mr. Mayer, dated September 30, 2011 containing our response to the herd number data that the Prosecution Team had introduced as "surprise evidence" at the hearing before the Hearing Panel on July 14, 2011. (Exhibit 26)
30. We sent a second letter to Mr. Mayer dated September 30, 2011 in which we again requested a continuance of the October 13 hearing before the Regional Board. The letter included a detailed factual and legal basis upon which the hearing should be continued, and why our additional evidence should be admitted. (Exhibit 27) This letter also pointed out that Section 13228.14 of the Water Code provides that after a hearing before a hearing panel, a regional board can take "additional evidence as may be necessary." We requested that he have the Regional Board consider and vote on our forgoing requests. We condemn counsel Mayer for not transmitting this letter and our other requests to the Board. He also failed to mention them to the Board at the October 13 hearing.
31. We sent a package of written testimony, evidence and arguments, dated October 2, 2011, (Exhibit 28) to the Regional Board staff and asked that it be presented to the Regional Board members prior to the October 13, 2011 hearing so that they could familiarize themselves with its contents before the hearing. We also asked that it be made a part of the record of the proceedings. This package included our written request to the Regional Board for a continuance of the hearing and for a decision that would allow us to present all evidence that was given to us by the Regional Board staff after June 13, 2011, including all arguments that such new evidence supported.

Mr. Mayer did not transmit to the Board our letter or our package of intended evidence and arguments that we were asking to be allowed. (Exhibits 27 and 28 above) We wanted to Board to be aware of what we were requesting and the reasons why so that the Board could make a well-informed decision on these requests. At the hearing, Attorney Mayer mentioned the October 2 package to the Board, but recommended that it not be accepted into the record. Immediately, Chair Hart ruled that it would not be accepted. (OHT, pages 2-5)

32. We appeared at the hearing before the Regional Board on October 13, 2011. (October 13 hearing transcript (OHT) is Exhibit 41) The Chair told us at the outset that we would only be given five minutes and that it would be limited to evidence regarding dairy herd size data (not a particularly significant issue). (OHT, page 1) We began reading a two-page presentation, beginning with an introduction. One minute into the presentation, just as we

were about to request a continuance of the hearing, and present the reasons therefor, Board legal counsel Okamoto interrupted us and objected to what we were saying. Chair Hart responded by making the following untrue statement: "We are fully advised what your position is." She then ordered us to limit our comments to just the herd size data. (OHT, page 12-14)

During the next four minutes, I commented on the herd size data. However, during that time, the Chair, Mr. Landau and both legal counsel interrupted me, debated the herd size issue, and ended up taking up much of my five minutes. Then Chair Hart stopped and said "Thank you Mr. Sweeney and your time is up." (OHT, page 19) The Regional Board refused to continue the hearing, and went ahead and adopted the proposed order for civil liability against us in the amount of \$11,400.00. (OHT, page 32)

When it came to the vote on the proposed order to impose a civil liability on us, Board member Hoag made an interesting comment: "This is a vexing case. And part of the actions we heard in testimony occurred before my tenure on the Board. On that basis, I'm going to abstain [from voting]." (OHT, page 32)

33. We were sent an email on October 25, 2011 by Ken Landau, Assistant Executive Officer of the Regional Board (Exhibit 29), in which he listed the documents that had been "made available to the Board members for their consideration at the 13 October hearing." Our letter dated September 30 (Exhibit 27 above) and our package of evidence and arguments dated October 2 (Exhibit 28 above) were not on that list. So it is abundantly clear that our requests for a continuance of the hearing and for allowing us to present this additional evidence (and the reasons therefor) were not seen, read or considered by the Regional Board in connection with the actions it took at the October 13 hearing. In paragraph 32 above, we pointed out how Chair Hart prevented us from orally making that same presentation.
34. Water Code Section 13292 states that it is the state water board's responsibility to ensure that the regional boards provide "fair" access to participants in its proceedings and to improve its "adjudication procedures." The Regional Board's self-written Hearing Procedures is a quagmire of complex protocols and short-fused deadlines. We have little doubt that it is intentional - designed to overwhelm, intimidate, discourage and set traps against anyone who would otherwise want to challenge the Board or any of its rules and regulations. That and the Board's refusal to grant our requests for continuances and to not accept additional evidence, testimony and argument have effectively deprived us of an opportunity to adequately make our case and defend ourselves against the Complaint. In short, the Regional Board deprived us of due process and a fair hearing on October 13, 2011.

## C. Legal Arguments and Analysis.

All of the hereinafter issues we either presented to the Regional Board at its October 13, 2011 hearing, or we attempted to present them but were not allowed to by the Board on October 13.

### 1. The Administrative Civil Liability Complaint (R5-2011-0562) filed is illegal and unenforceable because it is premature.

- (a) The 2007 Order declares that it “serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes.” (2007 Order, p.1; Exhibit 30) The Order describes the procedures where a Discharger makes a request for a modification of the Order or of any of its general waste discharge requirements. (2007 Order, SPRR-2; Exhibit 31) The reporting requirements, including the filing deadlines for annual and technical reports, are part of the Order’s general waste discharge requirements for which someone like ourselves may seek modification, exemption or other similar relief.
- (b) Addressing waste discharge requirements, Section 13263 (e) provides that “(e) Upon application by any affected person, or on its own motion, the regional board may review and revise requirements ...” Therefore, we, as affected persons, have the right to apply to the Regional Board for a *modification* or *revision* of the general waste discharge requirements, including the reporting requirements contained in the 2007 Order.
- (c) Section 13269 (a) (1) and (2) of the Water Code goes on to say that a regional board may *wave* waste discharge requirements (dealt with in section 13263) as they apply to the performance of an individual, such as ourselves.
- (d) As stated earlier, the regional board may not delegate modification of waste discharge requirements. (Water Code Section 13223(a)) It is the regional board’s undelegable duty and responsibility to hear and decide our request for relief from these waste discharge requirements. The staff cannot appoint itself as the “gatekeepers” in these matters, and the board is prohibited under section 13223 (a) and other applicable law to appoint the staff as “gatekeepers.” We have a right to appear before the Regional Board to seek a modification or waiver from any of the Order’s general waste discharge requirements. Even a decision to not hear our request for relief would have to be made by the Regional Board - not by its staff.

Had the Regional Board’s staff scheduled a hearing before the Board, as we had requested over and over, it is possible that the Board would have granted us relief from these deadlines or some of these reports, in which case, we would not be in violation of the filing requirements. The filing and serving of the Complaint is premature. The Regional Board cannot contend that we have violated the 2007 Order’s reporting requirements until such time as the Regional Board has heard and denied our request and after we have exhausted our appeal and all other legal

remedies afforded us under the Water Code. (Water Code Sections 13320, 13325, and 13330)

**2. The Regional Board has denied us due process and a fair hearing.**

Section 13228.14 of the Water Code deals with hearing panels and the proceedings before them. Subsection (b) of that section provides that “[n]o party who appears before a [hearing] panel is precluded from appearing before the regional board at any subsequent hearing relating to the matter.”

Subsection(c) of the same section goes on to provide that “[t]he regional board, after making an independent review of the record and taking additional evidence as necessary, may adopt, with or without revision, or reject, the proposed decision and order of the panel.”

As explained in paragraph 31 of the Statement of Facts above, the Regional Board refused on October 13, 2011 to grant us a continuance of its hearing that day, despite us presenting, and attempting to present, reasonable and compelling reasons why we needed a continuance of the hearing; that we needed more time to complete an exhaustive review of the administrative record for the 2007 Order, and that the evidence that we were seeking to find in administrative record was relevant to the legal issues of this matter.

It should parenthetically be noted that after we had sent the Regional Board’s legal counsel two detailed letters dated July 1 and July 8, 2011 explaining the need for a continuance of the July 14 hearing before the Hearing Panel (Exhibit 15 and 16 above), legal counsel responded on July 12 (Exhibit 17 above) that we had “had sufficient time to prepare for the [July 14] hearing,” and that we had not explained why the evidence was being submitted after the June 13 deadline. Both of his assertions were blatantly false.

As recited in paragraph 31 of the Statement of Facts above, the Regional Board refused on October 13, 2011 to allow us to submit into evidence at the hearing that day the package of testimony and argument dated October 2, 2011. (Exhibit 27 above; OHT, page 5)).

As recited in paragraph 32 of the Statement of Facts above, the Regional Board refused on October 13, 2011 to allow us to present at the hearing that day the additional evidence which the Regional Board staff did not provide us until after the June 13, 2011 submission deadline. (OHT, pages 12-14)

As recited in paragraph 32 of the Statement of Facts above, the Regional Board refused on October 13, 2011 to allow us to complete reading our intended two-page presentation to the Board at the hearing that day. (OHT, pages 12-14)

Chair Hart concluded the hearing with a troubling comment: "I would say I don't see our staff as being heavy-handed here and as being reasonable." (OHT, page 31) Perhaps this rose-tinted view is not surprising since we have found that the Regional Board's staff are especially adept "gatekeepers," who are exceptionally skilled at keeping the unfavorable facts and complaints from reaching the Board.

All of the foregoing constitutes a shameful violation of Section 13228.14 (b) and (c) of the Water Code, in addition to being an abuse of discretion, an abuse of power, authority and responsibility, and a denial of due process and a fair hearing. Under Water Code section 13292, it is the responsibility of the State Board to ensure that the adjudicatory proceedings held by the regional boards are fair and provide fair access to participants.

[The following is mentioned as a supplementary example of unfair treatment by the Regional Board and its staff at the hearing before the Hearing Panel: To prevent "surprise" evidence, the Regional Board's "Hearing Procedures" attached to the Complaint provided that any rebuttal evidence or testimony intended to be presented to the Hearing Panel had to be submitted no later than June 27, 2011. While Regional Board's legal counsel, Mr. Mayer, would not allow us to present evidence or testimony that was not set forth in our June 13 submission, he allowed the Regional Board's Prosecution Team to present evidence and testimony to the Hearing Panel that was not set forth in their rebuttal submission of June 27. It was another example of the uneven-handed application of their own rules.]

3. **Order R5-2007-0035 is unlawful and unenforceable against us because it fails to comply with applicable provisions of the Water Code and Government Code.**
  - (a) No rule or regulation of a state agency is valid and enforceable unless the administrative record shows that it is supported by substantial evidence. In our review of the administrative record of the hearings held in connection with the adoption of the 2007 Order, we have encountered no substantial evidence – in fact, no evidence whatsoever – that supports the need to replace the former reporting requirements with the new reporting requirements adopted in the 2007 Order. We have encountered no evidence in the record that the pre-order data, reports and information that the Regional Board's staff obtained from or about dairies were inadequate, insufficient, unreliable or otherwise flawed. And we have encountered no evidence whatsoever in the record that claimed or demonstrated that the new reporting requirements were needed to replace the former.
  - (b) The "Monitoring and Reporting Program" of the 2007 Order recites that it is issued pursuant to Water Code Section 13267. (2007 Order, p. MRP-1) Section 13267 (b) (1) states that "the regional board may require that any person who ... discharges ... waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

But Section 13267 (b) (1) goes on to say that “The burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports. In requiring these 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.”

The Regional Board failed to comply with Section 13267 in that the 2007 Order does not contain “a written explanation with regard for the need for the reports,” and it fails to “identify the evidence that supports requiring [us] to provide the reports.” In addition, the Regional Board never provided us with “a written explanation with regard for the need for the reports,” and it did not “identify the evidence that supports requiring [us] to provide the reports.”

We had testified at the Hearing Panel hearing that a dairy has been continuously operating on our dairy site for over eighty years. We showed that we have submitted to the Regional Board staff water sample test results from each of our wells in 2003, 2007 and 2009. All well results were and are substantially below the state’s maximum contaminant levels (MCL) Not only that, our most recent water samples from our wells tested .2, 1.1 and 1.4 mg/L for nitrate nitrogen levels –unheard of low levels. Such results indicate that our operation is not and has not been a threat to the ground water underlying our dairy site.

In showing the Regional Board the foregoing well-water test results, it is our argument that these test results were compelling evidence that our operation was not adversely impacting ground water, and therefore the cost of these reports did not, in the words of Section 13267, “bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.”

Over the years, the Regional Board’s staff has visited our dairy site to inspect and obtain information about it. For example, staff member Ken Jones visited our dairy in 2003 and spent one day gathering information. He measured and calculated the storage capacity of our three waste water lagoons and concluded that our storage capacity exceeded what the Regional Board required. In fact, it was 128% of what was required. He also concluded that we had excess cropland for application of waste water. We have his letter dated April 17, 2003, confirming that our dairy was in full compliance with all Regional Board requirements. (Exhibit 32) We were also prepared to submit evidence that our dairy has essentially the same number of animals, the same lagoon capacity and even more cropland now than we had in 2003.

Yet, the Regional Board now required us to hire licensed engineers to re-calculate the storage capacity of our lagoons at a cost of \$7500.00, as well as require us to hire engineers and other licensed professionals to produce other new reports that we believe are, for the most part, duplicative, and add nothing useful or valuable, besides being terribly costly. In this regard, the Regional Board’s refusal to accept already available information in its files would ignore Section 13267’s requirement that the

reports should “bear a reasonable relationship to the need for the reports.” For the most part, the Regional Board’s new Waste Management Reports are redundant, unneeded and unjustified. We set forth all of the foregoing in our June 13, 2011 submission (Exhibit 13 above ) and in the written testimony and arguments we presented to the Hearing Panel on July 14, 2011 (Exhibit 16 above). The Regional Board staff has entirely failed to dispute them.

- (c) Water Code Section 13263 (e) provides that “any affected person may apply to the regional board to review and revise its waste discharge requirements. All requirements shall be reviewed periodically.” If new and more cost effective ways can accomplish the same purpose, we contend that the Regional Board is under a legal duty to review such issues and revise its requirements accordingly. New and old research and advanced technologies exist which may provide less expensive means for evaluating groundwater contamination risk, of determining non-contamination of groundwater, and of using less expensive practices that can still prevent such contamination.

For example, Lawrence Livermore National Laboratory published two papers in *Environmental Science Technology*, (2007) 41, 753-765. (We believe the State Board has copies) in which they stated that they discovered that soil bacteria break down and eliminate nitrates in dairy waste water in a substantial if not complete degree. They have also ascertained that there are certain compounds and gasses in manure water that can be used to determine whether water from dairy lagoons or from waste applied in irrigation water has infiltrated into first encountered groundwater. There are also simple and inexpensive ways to show the amount of highly compacted clay layers sitting beneath a dairy site and whether they constitute an impervious barrier between the dairy and the groundwater. Yet, the 2007 Order contains a “one-size-fits-all” approach, and generally requires reports that provide little to no meaningful information. Indeed, some of these reports are ludicrous and unnecessary. One laughable example is that we are required to provide monthly photos of our lagoons to show that the water level was not too high. This is as absurd as requiring us to photograph our speedometer each month to prove we didn’t drive over the speed limit.

In short, most of the Order’s reporting requirements are primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants and laboratories. The Regional Board has not continued to sufficiently examine and consider recent research results and advanced testing technologies, and it has not modified its Order accordingly. We set forth these contentions in our June 13 submission (Exhibit 13 above) and in the written testimony and arguments we presented to the Hearing Panel on July 14, 2011 (Exhibit 16 above), and the Regional Board staff has entirely failed to dispute them.

- (d) The 2007 Order’s waste discharge requirements as they relate to water quality objectives must take into account economic considerations. (Water Code Sections 13241 and 13263 (a)) The Order does not do so. It specifically fails to set or

implement water quality objectives that are within the economic means of smaller dairies – operations that have to deal with disproportionately higher per cow reporting costs. Indeed, the Order fails to address the special economic circumstances of smaller dairies in any way whatsoever. In contrast, the SJ Valley Air Pollution Control District exempts smaller dairies from many of its requirements.

The administrative record (AR) of the 2007 Order reveals that a great deal of testimony was presented concerning how expensive the new reporting requirements would be, and how especially unbearable it would be for smaller dairies. Yet, the Regional Board on October 13, 2011 refused to accept into evidence or consider what we gleaned from the 34,000 pages of administrative record for the 2007 Order, including the following:

- (1) There was testimony that the cost would be “as high as \$89,000.00 initially and \$58,000.00 annually per dairy.” (AR 002089) Mr. Souza testified that “some dairies will be out of business as a result of this waste discharge requirement ... (AR 000384).”
- (2) Ms Asgill, an agricultural economist, testified that because of these regulations, “we are probably looking at the smaller dairies going under. Probably those dairies that we [are] usually fond of protecting – dairies under 500 milking cows - will be going out.” (AR 000444)
- (3) A letter from the State Department of Food and Agriculture Board mentioned that Governor Schwarzenegger “made a commitment to reject new regulations that unfairly impact small business. ... It is expected that new and existing regulations will be reviewed for economic impact to small business. ... we encourage the RWQCB to review your proposal ... propose alternatives that are less burdensome.” (AR 007297)
- (4) The Federal government presented input: The EPA’s Small Business Advocacy Panel submitted its recommendation to streamline the reporting requirements and that operations under 1000 animal units should be exempted from certain requirements. (AR 02397)
- (5) Your own State Water Board expressed concern in its submission during the hearings that the proposed requirements “may have significant adverse economic impact on small business.” The State Board went on to recommend “different compliance or reporting requirements ... which would take into account the resources available to small business ... [and] exemption or partial exemption from regulatory requirements for small business.” (AR 019632)
- (6) Even Regional Board member Dr. Longley expressed concern: “Whereas larger dairies, a 10,000 cow dairy, would be able to absorb the costs, a 100 cow dairy is going to be faced with possible disaster.” (AR 002163)

We recently requested data from the Regional Board staff that would reveal the report filing compliance rate of dairies, broken down by herd size. In response to our request, Jorge Baca, from the Regional Board, provided us with data concerning the dairies dealt with by its Fresno office. This data shows the following with respect to the dairies that provided reports to the Fresno office:

<b>Herd Size</b>	<b>2007</b>	<b>2010</b>	<b>Attrition</b>
Less than 400 cows	56	30	-26 = 46% attrition
400 to 700 cows	92	62	-30 = 32% attrition
Over 700 cows	485	455	-30 = .6% attrition
Total	633	547	-86 = 13% overall attrition

In other words, about one-half of the smaller dairies that filed reports in 2007 filed reports in 2010.

The California Department of Food and Agriculture publishes "Dairy Statistics" for California dairies and posts this data on its website:

([http://www.cdffa.ca.gov/dairy/dairystats\\_annual.html](http://www.cdffa.ca.gov/dairy/dairystats_annual.html)).

It shows that there were 1950 dairies in California in 2007 and 1715 in 2010. This represents a loss of 235 dairies during that three year period, or a loss of 12%. The Central Region also posted a loss of 12% (1543 in 2007 vs. 1365 in 2010). These loss figures correspond quite closely to the 13% decline that appeared in Jorge Baca's numbers for dairies in the Fresno district during that same period.

We are satisfied that the above is consistent with the claim we have made from the beginning: That small dairies are under much greater economic stress than larger, more efficient dairies and, therefore, are less able to handle the high costs of complying with the 2007 Order's reporting requirements.

In response to a written question submitted by Baywatch, Sierra Club, California Sportfishing Protection Alliance and Waterkeeper Alliance, the Regional Board staff gave them assurances that "the Board has the option of limiting the application of this order based on the *size of herd*," and that "waste discharge requirements or a *waiver* of waste discharge requirements would be adopted for facilities that are not covered by the order." (AR 000583)

Yet, no economic analysis was presented into the record that countered the position that the proposed 2007 Order would be harmful, even fatal, to smaller dairies. Despite the foregoing, no exceptions or waivers for smaller dairies ended up in the 2007 Order. Even Dr. Longley went ahead and voted to adopt the Order without it containing any provision whatsoever to help the smaller dairies.

- (e) The California Administrative Procedure Act ("APA"- Chapter 3.5 of the California Government Code, Section 11340 et seq), is intended to keep the regulations of state agencies from becoming unreasonably costly and otherwise burdensome. Indeed,

Section 11340 of APA recites that the legislature found that “the complexity and lack of clarity in many regulations put small businesses, which do not have the resources to hire experts to assist them, at a distinct disadvantage.” APA created the Office of Administrative Law to administer the Act. Section 11340.1 goes on to declare that it is the legislature’s intent under APA for state agencies to “actively seek to reduce the unnecessary regulatory burden on private individuals.” It is undisputed that the regional water boards are state agencies.

While it is true that Section 11340.9 (i) of APA states that this chapter does not apply to a number of matters, including a regulation that “does not apply generally throughout the state,” it does apply however, under Section 11353, to “any policy, plan or guideline” that (1) the State Water Resources Control Board has adopted after June 1, 1992, or (2) that a court determines is subject to this part. In other words, Section 11353 is a specific exception to the more general exception under 11340.9 (i). Section 11353 goes on to say that the policies, plans and guidelines adopted by the SWRCB are not effective until their regulatory provisions are approved by the Office of Administrative Law. Indeed, the Regional Board admitted in its Forward to the Tulare Lake Basin Water Quality Plan (2<sup>nd</sup> ed., 1995) that the Tulare Lake Basin Plan needed to be adopted by the State Water Board in order to be effective, and that it had to be approved by the Office of Administrative Law (under APA). (Exhibit 33)

On June 20, 2011 we requested from the Regional Board copies of “all submissions and correspondence that the CVRWQCB sent to the Office of Administrative Law regarding the preparation and adoption of ... the 1995 Tulare Lake Basin Plan.” Having received no response, we followed up on June 26 with another request for a copy of the OAL’s approval of the 1995 Tulare Lake Basin Plan. The Regional Board’s staff has never provided us with the foregoing. Therefore, no evidence exists in the record that the Tulare Lake Basin Plan is effective or enforceable.

Paragraph 14, page 3, of the 2007 Order recites that it is implementing the Tulare Lake Basin Water Quality Control Plan, among other things. (Exhibit 34) If there is no evidence that the Tulare Lake Basin Plan is effective, how can the 2007 Order be effective if it is an implementation of an ineffective plan? It is our contention that the 2007 Order is unenforceable by virtue of noncompliance with APA.

It is also our contention that we can file an action for declaratory relief with the superior court, under Government Code sections 11350 and 11353, under which we ask the court whether this Order is a “regulation” that should be subject to the requirements of APA. Given the significant adverse impact that the Order has on small dairies, we believe a court will be inclined to find a way to declare that the 2007 Order is subject to APA requirements.

- (f) Water Code section 13201 (a) provides that each Regional Board shall consist of nine members, each appointed by the Governor. As of October 13, 2011, the Regional Board had five members, while the other four board positions were vacant. Water

Code section 13201 (b) provides that "All persons appointed to a regional board shall be subject to Senate confirmation, ..."

On June 26, 2011, we had asked the Regional Board's staff whether each of the current Regional Board members have had their appointment to the board confirmed by the State Senate, and we asked for copies of documents reflecting such confirmation. At the October 13 hearing, the Regional Board's legal counsel, Mr. Mayer, responded to our allegation that the Board lacked a quorum to take action. He disputed our allegation by asking the Board to "take official notice of certain legislative documents that confirm that, indeed, all five of our Board members are currently authorized to act," and he produced six documents dated: January 7, 2008, September 15, 2008, September 11, 2009, August 31, 2010, January 3, 2011, and August 29, 2011. (OHT, page 4, Exhibits 35 through 40, inclusive)

The January 7, 2008 document deals with Board member Odenweller's reappointment to a four-year term ending on September 30, 2011, and the September 15, 2008 document represents the Senate's confirmation of that reappointment. The other four documents reflect the Senate confirming the other four Board members; Hart, Longley, Hoag and Meraz. But none of the six documents show Odenweller's reappointment to a new term commencing on October 1, 2011, or of its confirmation of his new reappointment, if such reappointment occurred. Sadly, Mr. Mayer misrepresented the facts when he claimed these six documents confirmed that all five Board members were "currently authorized to act." In conclusion, there is no evidence in the record to establish that Odenweller was duly qualified to act as a Board member at the October 13 hearing, and there is no evidence in the record that the Regional Board had a qualified quorum that was able to take any action on that day.

- (g) We assume that Board member Sandra Meraz was reappointed by the Governor to a new term commencing October 1, 2010 (since the Regional Board's website shows her four-year term expiring on September 30, 2014), but the staff failed to provide us with any document reflecting said reappointment. More troubling, however, is the fact that the staff provided us with a document showing that her appointment was confirmed by the Senate on August 29, 2011 (Exhibit 40 above), almost a year after her presumed reappointment, and prior to the July 14 Hearing Panel hearing. So she sat on that panel before being confirmed by the Senate.

Section 13228.14 (a) of the Water Code requires a hearing panel to be composed of "three or more members of the regional board." Ms. Meraz served on the Hearing Panel on July 14, 2011 as one of three regional board members. Therefore, it appears that the Hearing Panel only had two qualified members on July 14, a violation of the

foregoing code section. [It also appears that she may have sat on the Regional Board for a period of eleven months without having been confirmed by the State Senate.]

#### **D. Appeal and Petition for Review.**

Pursuant to Section 13320 of the California Water Code, we hereby appeal to the State Board regarding the following decisions, actions, and failures to act by the Regional Board and petition the State Board to review the same and to grant us the relief we hereinafter request:

1. We appeal the failure of the Regional Board on October 13, 2011 to grant our request for a formal hearing before the Board, where we could present a full case in support of a request for either an extension of time or for an exemption from some of the waste discharge reporting requirements contained in Order No. R5-2007-0035 (2007 Order). We petition the State Board to review said failure and to order the Regional Board to grant us such a hearing. The relevant dates on which we made these requests are more particularly set forth in the Statement of Facts above.
2. We appeal the failure of the Regional Board on October 13, 2011 to grant our request for a continuance of the October 13 hearing on the proposed civil liability order. We petition the State Board to review said failure and to determine and declare that as a result of said failure, the hearing held on October 13, 2011 was unfair, deprived us of due process, and hence was invalid.
3. We appeal the failure of the Regional Board on October 13, 2011 to grant our request:
  - (a) To accept and consider at the October 13 hearing the evidence which the Regional Board's staff provided to us after the June 13 submission deadline but which it would not allow us to present during the July 14 hearing;
  - (b) to accept and consider at the October 13 hearing the evidence which the Regional Board's staff provided to us after the July 14 hearing; and
  - (c) to accept and consider at the October 13 hearing the arguments based on the evidence described above.

We petition the State Board to review said failures and to determine and declare that as a result of said failures the hearing held on October 13, 2011 was unfair, deprived us of due process, and hence was invalid.

4. We appeal the failure of the Regional Board on October 13, 2011 to allow us sufficient time to present oral testimony and arguments at the October 13 hearing. We petition the State Board to review said failure and to determine and declare that as a result of said failure, the hearing held on October 13, 2011 was unfair, deprived us of due process, and hence was invalid.

5. We appeal the Regional Board's action on October 13, 2011 of adopting the proposed order imposing civil liability against us of \$11,400.00. We petition the State Board to review that action and to determine and declare that that said action was premature, improper, invalid and that it be set aside.
6. We have contended that the 2007 Order is illegal, invalid, and unenforceable, a position that the Regional Board refused to agree with and declare on October 13, 2011. We petition the State Board to review our evidence and legal arguments and analysis in support of our contention that the 2007 Order is illegal, invalid and unenforceable, and we petition the State Board to determine and declare that the 2007 Order is illegal, invalid and unenforceable, and that the Regional Board's adoption of the order of civil liability against us on October 13, 2011 is therefore invalid and it is set aside.
7. We petition the State Board to determine and declare that the Regional Board lacked a duly qualified quorum to take any action on October 13, 2011, and therefore the Regional Board's adoption of the order of civil liability against us is invalid and that it is set aside.

#### **E. Actions Requested of State Board.**

1. We request that the State Board declares that, under Sections 13223 (a), 13263 (e), and 13269 of the Water Code, we have the right to request a formal hearing before the Regional Board during which we can seek a modification to, or exemption from, some of the waste discharge requirements (reporting requirements) contained in the 2007 Order. Since we had requested such a hearing many times prior to the issuance of the Complaint against us on May 5, 2011, and since the Regional Board (a) had not held the hearing and denied our request for relief, and (b) had not granted us such a hearing and denied our request for relief, we request that the State Board declares that the issuance of the Complaint was premature.
2. We request that the State Board declares that we were deprived of due process and a fair hearing on October 13, 2011 when we were not allowed to present at said hearing all evidence and arguments we could have developed had we been given more time to submit the statement of evidence, testimony and arguments that the Regional Board's staff had required us to submit by June 13, 2011.
3. We request that the State Board declare that we were deprived of due process and a fair hearing on October 13, 2011 when we were not allowed to present at said hearing all the additional evidence that the Regional Board staff provided to us after June 13, 2011, as well as the testimony and arguments that were based on said new evidence.
4. We request that the State Board declares that the civil liability order against us that was adopted by the Regional Board on October 13, 2011 in the amount of \$11,400.00 is invalid, and we request that the enforcement of the same against us be stayed pursuant to the powers granted to the State Board by Sections 13321 of the Water Code.

5. We request that the State Board order the scheduling of the hearing for modification described in paragraph 1 above, and which we requested many times prior to the issuance of the Complaint. If the State Board is not willing to order that the Regional Board provide us with such a hearing, then we request that the State Board order the Regional Board to re-start the hearing procedures on the Complaint, commencing with setting a new deadline for the identification of evidence, testimony and argument that is at least 90-days after the State Board renders this decision and order.
6. Based upon the various legal and factual grounds set forth in subsection 2 of section C. above, we request that the State Board declares that the 2007 Order is illegal and unenforceable against us and all other Dischargers.
7. We request that the State Board declares that the Regional Board did not have a duly qualified quorum to take any action on October 13, 2011, and for that reason we request that the State Board declares that the Regional Board's adoption of an order of civil liability against us on that date is null and void.

#### **F. Concluding Remarks.**

Thirty-one years ago, in 1980, the State legislature enacted the California Administrative Procedures Act. The legislature expressed its concern thirty years ago that the "complexity and lack of clarity in many regulations put small business, which do not have the resources to hire experts to assist them, at a distinct disadvantage." (Government Code, Section 11340)

As a small business, we found ourselves in precisely the predicament about which the legislature was concerned. Indeed, we are one of those operations about which you, the State Board, expressed concern about what effect the proposed 2007 Order would have on operations like ours.

We are clearly an endangered species. While many, including some in government, pay simple lip service to the value and attributes of the "family farm," little is done to protect them. So we call upon the State Board to step up and courageously do its part to grant relief to our small business.

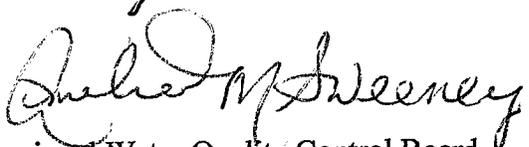
A copy of this Petition (including all Exhibits) has concurrently been sent to the Regional Board as required by law.

Respectfully submitted,

James G. Sweeney

Amelia M. Sweeney

Cc: Central Valley Regional Water Quality Control Board



# **ATTACHMENT 1**

Waste Discharge Requirements General Order No. R5-2007-0035  
Existing Milk Cow Dairies

Table 1. Schedule for Submittal of Existing Conditions Report, Waste Management Plan, Nutrient Management Plan, Salinity Report, Preliminary Infrastructure Needs Checklist, and Annual Reports

Due Date	Submittal Due	Contents of Submittal	Professional Certification Requirements
1 July 2009	Annual Report	Per Monitoring and Reporting Program No. R5-2007-0035 including Annual Dairy Facility Assessment with modifications implemented to date.	None
1 July 2009	Documentation of Interim Facility Modifications Completion for Storage Capacity and to Balance Nitrogen <b>Nutrient Management Plan</b> Retrofitting Plan with Schedule	Document all interim modifications completed and identify those that were proposed but not completed.  Retrofitting needed to improve nitrogen balance (may include piping, meters, pumps, etc.).	None
1 July 2009	Statement of Completion of the Following Items in Attachment C (Nutrient Management Plan)*:  Item I.A.2  Item III  <b>Waste Management Plan</b> (with Retrofitting Plan/Schedule) Including the Following Items in Attachment B (Waste Management Plan):  Items I.F.1.b, I.F.2.b	Land Application Area Information  Nutrient Budget  Retrofitting needed to improve storage capacity, flood protection, or design of production area- may include design/construction of new pond, berms for flood protection, grading for drainage, etc.  Facility Description	None  Certified Nutrient Management Specialist  California Registered Professional  None

Waste Discharge Requirements General Order No. R5-2007-0035  
Existing Milk Cow Dairies

Table 1. Schedule for Submittal of Existing Conditions Report, Waste Management Plan, Nutrient Management Plan, Salinity Report, Preliminary Infrastructure Needs Checklist, and Annual Reports

Due Date	Submittal Due	Contents of Submittal	Professional Certification Requirements
1 July 2009	Item II	Storage Capacity	California Registered Professional
	Item III	Flood Protection	California Registered Professional****
	Item IV	Production Area Design/Construction	None
	Item VI	Documentation there are no cross connections.	Trained Professional**
1 July 2009	Salinity Report	Identification of salt sources at dairy, evaluation of measures to minimize salt in the dairy waste, and commitment to implement measures identified to minimize salt in the dairy waste.	None
1 July 2010	Annual Report	Per Monitoring and Reporting Program No. R5-2007-0035 including Annual Dairy Facility Assessment with facility modifications implemented to date.	None
1 July 2010	Status on facility retrofitting completed or in progress	Status on facility retrofitting completion as proposed (1 July 2009) for the Nutrient Management Plan and Waste Management Plan.	None
1 July 2011	Annual Report	Per Monitoring and Reporting Program No. R5-2007-0035 including Annual Dairy Facility Assessment with facility modifications implemented to date.	None

# **ATTACHMENT 2**

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION**

**ORDER NO. R5-2009-0029  
AMENDING ORDER NO. R5-2007-0035  
WASTE DISCHARGE REQUIREMENTS GENERAL ORDER  
FOR  
EXISTING MILK COW DAIRIES**

The California Regional Water Quality Control Board, Central Valley Region (hereafter Central Valley Water Board), finds that:

1. On 3 May 2007 the Central Valley Water Board adopted Order No. R5-2007-0035 Waste Discharge Requirements General Order for Existing Milk Cow Dairies (hereafter General Order).
2. As of March 2009, 1467 dairies are regulated under the General Order.
3. The General Order requires that the dairies prepare and submit technical reports addressing waste management at the dairy facilities. Where the assessment of the waste management determines that modifications to facilities or management are required to comply with the terms of the General Order, the dairy must make the changes within specified timeframes. General Order, Required Reports and Notices H.1.b and Attachment B.
4. Because the General Order imposed new and more stringent requirements on existing milk cow dairies, compliance with provisions of the General Order was phased in over time, with deadlines specified in Table 1 of the General Order. Major elements of the Waste Management Plan (WMP) are due on 1 July 2009.
5. In a letter dated 27 February 2009, the Community Alliance for Responsible Environmental Stewardship (CARES), a coalition of California's dairy producer and processor associations, requested Board consideration of a change in the deadline for the elements of the WMP due 1 July 2009. CARES points out that the cost of the report can be as high as \$30,000 per facility and that the industry is dealing with a significant drop in income as a result of the decrease in milk prices caused by the national and international economic downturn. CARES reports that on 1 February 2009 the minimum price paid to producers for milk dropped from \$1.50 per gallon to 97 cents per gallon. CARES further reports that

Order No. R5-2009-0029  
Amending Order No. R5-2007-0035  
Waste Discharge Requirements General Order  
For Existing Milk Cow Dairies

6. Most of the elements of the WMP due 1 July 2009 must be prepared by registered engineers and would provide details on the changes needed (any) to meet wastewater storage requirements and flood protection at the facility. Where improvements are necessary, the dairies must submit a retrofitting plan and schedule along with the WMP. Under the schedule specified in Table 1 of the General Order, dairies must certify that the improvements have been completed by 1 July 2011. Table 1 additionally provides that a status on facility retrofitting completed or in progress must be submitted by 1 July 2010.
7. Revising the deadline for submission of elements of the WMP to 1 July 2010 does not change the 1 July 2011 due date when all improvements must be in place. Therefore, the modification will have no impact on water quality. The due date for the status report on facility retrofitting completion as proposed by the WMP will be moved from 1 July 2010 to 31 December 2010 to help ensure that the dairies are on track with implementing the necessary WMP modifications by 1 July 2011.
8. This Order does not change the schedule for submission of the Nutrient Management Plan (1 July 2009) or submission of a report on the status of facility retrofitting completion as proposed by the Nutrient Management Plan (1 July 2010).
9. Finding 38 of the General Order states: "The Central Valley Water Board recognizes that this Order imposes new and more stringent requirements on existing milk cow dairies than they have previously been required to comply with and that some revisions to this Order may be necessary in the future in order to address issues that are not presently foreseen. The Executive Officer will provide annual updates to the Central Valley Water Board on the overall compliance with the Order and make recommendations for revisions to the Order if necessary." This Order is the first proposed revision to the General Order.
10. This action to amend the General Order is not a "project" as defined under California Public Resources Code section 21065 and Title 14 of the California Code of Regulations, section 15378, because it has no potential

Order No. R5-2009-0029  
Amending Order No. R5-2007-0035  
Waste Discharge Requirements General Order  
For Existing Milk Cow Dairies

involves no expansion of use of existing facilities beyond what the General Order currently allows.

11. The Central Valley Water Board has notified interested agencies and persons of its intent to issue this Order and has provided them with an opportunity of a public hearing and an opportunity to submit comments.
12. The Central Valley Water Board, in a public meeting, heard and considered all comments pertaining to the proposal to regulate discharge of wastes from existing milk cow dairies under this Order.
13. Any person affected by this action of the Central Valley Water Board may petition the State Water Resources Control Board (State Water Board) to review this action, in accordance with Water Code section 13320 and Title 23, California Code of Regulations, Section 2050. The State Water Board must receive the petition within 30 days of the date on which the Central Valley Water Board adopted this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request.

IT IS HEREBY ORDERED that, pursuant to the California Water Code Sections 13260, 13263, and 13267 and in order to meet the provisions contained in Division 7 of the California Water Code and regulations and policies adopted thereunder; all dischargers that have been notified by the Central Valley Water Board that they must comply with the General Order shall comply with the following:

1. Table 1 of the General Order is revised to show that the elements of the WMP originally due on 1 July 2009 are now due on 1 July 2010. The Table is also revised to change the due date for the status report on facility retrofitting completion as proposed by the WMP from 1 July 2010 to 31 December 2010. The status report shall provide the status of facility retrofitting needed to implement the WMP. The portion of the Table that is modified is attached (Attachment A).

I, PAMELA C. CREEDON, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional

(Only those portions of the table that were changed are shown below)

Table 1. Schedule for Submittal of Existing Conditions Report, Waste Management Plan, Nutrient Management Salinity Report, Preliminary Infrastructure Needs Checklist, and Annual Reports

Due Date	Submittal Due	Contents of Submittal	Prof Cert Requ
1 July 200910	<b>Waste Management Plan</b> (with Retrofitting Plan/Schedule) Including the Following Items in Attachment B (Waste Management Plan): Items I,F.1.b, I,F.2.b	Retrofitting needed to improve storage capacity, flood protection, or design of production area- may include design/construction of new pond, berms for flood protection, grading for drainage, etc.	California Prof
		Facility Description	
		Storage Capacity	California Prof
		Flood Protection	California Prof
		Production Area Design/Construction	
		Documentation there are no cross connections.	Trained f
1 July 2010	Status on facility retrofitting completed or in progress	Status on facility retrofitting completion as proposed (1 July 2009) for the Nutrient Management Plan. and <del>Waste Management Plan.</del>	
31 December 2010	Status on facility retrofitting completed or in progress	Status on facility retrofitting completion as proposed (1 July 2010) for the Waste Management Plan.	

# **ATTACHMENT 3**

March 28, 2010

California Regional Water Quality Control Board

Central Valley Region

1685 E Street

Fresno, CA 93706

Attention: David A Sholes

Mr. Sholes,

We operate a small dairy in Visalia, California milking about 300 cows. The financial burden placed on us to comply with the requirements of the Regional Water Quality Board is tremendous. The current economic conditions of the dairy industry compound our problems. We are unable to pay the bills which we have and are asking for a reprieve from your office.

If you check the previous reports from our dairy the water quality of is excellent. We do an outstanding job with our farming practices and export much of the manure generated to other farms. The amount of waste water is minimal as we do not flush. The only water is from washing the cows and washing the barn.

I would welcome a visit from you so that you can personally see our operation. A dairy has been operated on these premises for at least 75-80 years. If there was a problem with water contamination it would show up in the testing.

I grew up in San Francisco and have a deep appreciation for nature and protecting our environment. I, like most farmers, value the resources that we are blessed with. It seems unfair that a court decision that was directed at mega dairies should have such a devastating effect on our livelihood.

If you are unable to grant a waiver for this year I would like to ask to present my case to the Regional Water Quality Board at their next meeting.

Sincerely,

Jim Sweeney

Sweeney Dairy

30712 Road 170

Visalia, CA 93292

# **ATTACHMENT 4**

April 7, 2010

California Regional Water Quality Control Board

Central Valley Region

1685 E Street

Fresno, CA 93706

Attention: Ken Jones

Mr. Jones,

We operate a small dairy in Visalia, California milking about 300 cows. The financial burden placed on us to comply with the requirements of the Regional Water Quality Board is tremendous. The current economic conditions of the dairy industry compound our problems. We are unable to pay the bills which we have and are asking for a reprieve from your office that you suspend our reporting requirements for one year.

If you check the previous reports from our dairy the water quality is excellent. We do an outstanding job with our farming practices and export much of the manure generated to other farms. The amount of waste water is minimal as we do not flush. The only water is from washing the cows and washing the barn.

I would welcome a visit from you so that you can personally see our operation. A dairy has been operated on these premises for at least 75-80 years. If there was a problem with water contamination it would show up in the testing.

I grew up in San Francisco and have a deep appreciation for nature and protecting our environment. I, like most farmers, value the resources that we are blessed with. It seems unfair that a court decision that was directed at mega dairies should have such a devastating effect on our livelihood.

If you are unable to grant our request I would like to appeal your decision and request the opportunity to present my case to your board at some future meeting.

Sincerely,

Jim Sweeney

Sweeney Dairy

30712 Road 170

Visalia, CA 93292

cc. Mike Lasalle

# **ATTACHMENT 5**



Linda S. Adams  
Secretary for  
Environmental  
Protection

# California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair

1685 E Street, Fresno, California 93706  
(559) 445-5116 • Fax (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>



Arnold  
Schwarzenegger  
Governor

15 June 2010

Mr. James Sweeney  
30712 Road 170  
Visalia, CA 93292

## **INFORMATION REVIEW, SWEENEY DAIRY, WDID #5D545155N01, 30712 ROAD 170, VISALIA, TULARE COUNTY**

On 12 April 2010, Central Valley Regional Water Quality Control Board (Central Valley Water Board) staff received a letter from you regarding the subject facility (Dairy). In your letter, you requested that we "suspend" your reporting requirements for one year. Your letter also requested the opportunity to present your case to the Central Valley Water Board.

Your Dairy is enrolled under Order No. R5-2007-0035, Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order). The General Order requires reporting as outlined in section H, Required Reports and Notices. The schedule for submitting the required reports is outlined in section J, Schedule of Tasks. Central Valley Water Board staff has no authority to suspend or otherwise modify the reporting requirements specified in the General Order.

The next meeting of the Central Valley Water Board is scheduled for 28, 29, and 30 July 2010 at our Sacramento Office, 11020 Sun Center Drive, #200, Rancho Cordova, CA 95670. Any member of the public may address the Board on any matter within the Board's jurisdiction and not scheduled for consideration at the meeting. Certain time limits and schedule restrictions for a public forum apply. An agenda of for the July meeting is not yet available. The agenda for the May Meeting with an outline of the meeting rules are attached. Additional information can be found on our website [www.waterboards.ca.gov/centralvalley](http://www.waterboards.ca.gov/centralvalley).

If you have any questions regarding this matter, please contact Ken Jones at [kjones@waterboards.ca.gov](mailto:kjones@waterboards.ca.gov) or (559) 488-4391.

DALE E. ESSARY, PE  
RCE No. 53216  
Lead Associate  
Confined Animals Unit

Enclosure

cc: Tulare County Resource Management Department, Visalia  
Tulare County Health & Human Services Agency, Visalia

California Environmental Protection Agency

# **ATTACHMENT 6**

June 27, 2010

California Regional Water Quality Control Board

1685 E Street

Fresno, CA 93706

Attention: Dale E. Essary, PE

Mr. Essary,

This letter is in response to your letter dated June 15, 2010.

As you know the dairy business continues to suffer unprecedented financial hardship. Our dairy has had our loans put into distress and we have had to spend quite a bit of money protecting ourselves from Farm Credit West. We are doing our best to improve our financial position by my wife accepting a full time position at College of the Sequoias and by getting a part time job myself.

As I read paragraph 13 of Section E of your Order R5-2007-0035, I have the right to inform you of my anticipated noncompliance, but I must give you the date when I can be in compliance. I would hope that I could submit the 2010 Annual Report in one year, namely, on or before July 1, 2011.

If you have reviewed my prior reports, you can see that our dairy operation has a history of compliance and of protecting the underground water. I am unsure as if the authors of this policy ever considered the financial strain that it would place on smaller dairy farms regardless of the economic situation. Even if the dairy is in complete compliance the costs of hiring engineers and specialists to comply with current regulations places an undue stress on the operator.

If your agency suffered a drastic cut in state funding, it would have no choice but to curtail and/or suspend many of its current functions and everyone would understand. It is no different with us.

We would welcome if a member of your staff would come to the dairy and assist us filling out the reports needed and doing the engineering work required to bring us into compliance.

If you are unwilling to accept our proposal for a modification of the filing date for the 2010 Annual Report, then we appeal your determination to the Board. In such an event, I believe that we are entitled to a full hearing before the Board as a scheduled and properly noticed Agenda item. Because I cannot be away from the dairy for very long, I request that the matter be scheduled for a board meeting when it sits in Fresno.

Sincerely,

# **ATTACHMENT 7**



# California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair

Linda S. Adams  
Secretary for  
Environmental  
Protection

1685 E Street, Fresno, California 93706  
(559) 445-5116 • Fax (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>



Arnold  
Schwarzenegger  
Governor

## NOTICE OF VIOLATION

16 August 2010

James G. & Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

### POTENTIAL ADMINISTRATIVE CIVIL LIABILITY FOR FAILURE TO SUBMIT ANNUAL REPORT, SWEENEY DAIRY, 30712 ROAD 170, W DID 5D545155N01, TULARE COUNTY

The dairy facility identified above is covered under Order No. R5-2007-0035, Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order). The General Order required that a 2009 Annual Report be submitted for regulated facilities by 1 July 2010, including an Annual Dairy Facility Assessment with facility modifications implemented to date and a status on facility retrofitting completion as proposed in the Nutrient Management Plan submittal that was due 1 July 2009. Central Valley Regional Water Quality Control Board (Central Valley Water Board) staff have not received these items.

The General Order-required reports, including those due on 1 July 2010, are requested pursuant to California Water Code (CWC) §13267. CWC §13268 provides that failure to submit the required reports can subject you to administrative civil liability (monetary penalties) at a rate of up to \$1,000 for each day each report is late or substantially incomplete, if imposed by the Regional Water Board, or at a rate up to \$5,000 for each day a report is late or substantially incomplete, if imposed by the superior court. It is important that you promptly provide the Central Valley Water Board with the reports required by the General Order that were due by 1 July 2010, to minimize your potential liability.

Please contact Ken Jones at (559) 488-4391 if you have any questions regarding this matter.

DALE E. ESSARY  
Lead Associate  
Dairy Compliance Unit

# **ATTACHMENT 8**

August 22, 2010

Central Regional Water Quality Control Board

1685 E Street

Fresno, CA 93706

Attention: Dale Essary

Mr. Essary,

This letter is in response to letters dated August 16, 2010 from your office.

I am appealing your decision to the Regional Board. It is my understanding that I have the right to appear as a separate agenda item before the Board when it sits in Fresno.

As I stated in an earlier letter dated June 27, 2010 the dairy industry continues to suffer unprecedented financial hardship. If your agency suffered a drastic cut in state funding, it would have no choice but to curtail and/or suspend many of its current functions and everyone would understand. It is no different with us.

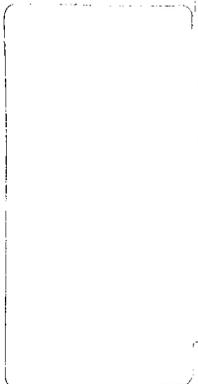
I do not believe that the intention of the original ruling of the Court was to eliminate small dairies by burdening them with excessive regulations and expense. The original lawsuit was filed against construction of large dairies. It seems to be that actions initiated by the Regional Water Quality Board favor large operations.

There has been a dairy present at this location for eighty years. If you review our reports filed previously you will see that the water quality is excellent. How long does it take for a dairy to contaminate the ground water? How many dairies our size was included in the testing prior to the writing of these regulations?

Please advise us when you have scheduled the hearing on our appeal before the Regional Board, as well as the address where the hearing will be held. Please ensure that I am given at least 20 days advance notice so that I can make the necessary arrangements at the dairy. As I have said before I need to have the hearing held when the Board meets in Fresno since I cannot be away from the dairy for an extended period of time.

Thank you for your cooperation.

Sincerely,



# **ATTACHMENT 9**



**California Regional Water Quality Control Board**  
**Central Valley Region**  
Katherine Hart, Chair



Linda S. Adams  
Acting Secretary for  
Environmental Protection

1685 E Street, Fresno, California 93706  
(559) 445-5116 • FAX (559) 445-5910  
<http://www.waterboards.ca.gov/centralvalley>

Edmund G. Brown Jr.  
Governor

5 May 2011

**CERTIFIED MAIL**  
**7007 0710 0003 6399 8794**

James G. and Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2011-0562 FOR SWEENEY DAIRY,  
WDID 5D545155N01, REGULATORY MEASURE 378971, 30712 ROAD 170, VISALIA,  
TULARE COUNTY**

Enclosed is an Administrative Civil Liability Complaint (Complaint), issued pursuant to California Water Code (CWC) section 13268, for violations of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order) to James G. and Amelia M. Sweeney (Discharger) regarding the Sweeney Dairy. The Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) issued the General Order on 3 May 2007. The Complaint charges the Discharger with administrative civil liability in the amount of **eleven thousand four hundred dollars (\$11,400)**, which represents a penalty assessment that is based on a consideration of several factors for the Discharger's failure to submit required technical reports as required by the General Order pursuant to CWC section 13267(b).

Pursuant to CWC section 13323, the Discharger may:

- Waive its right to a hearing by signing the enclosed waiver and submitting it to this office by **6 June 2011 and one of the following options** (these options are explained in full in item #3 in the attached waiver form):
  1. It may accept the proposed liability amount submit payment of the full amount of \$11,400 by **6 June 2011** or
  2. It has the ability to reduce the full amount of the proposed administrative liability provided that it also submits one or more of the required technical reports along with the adjusted payment by **20 June 2011**; or
- Ask that the hearing be postponed to facilitate settlement discussion or for other reasons (items #4 and #5 on the attached waiver form); or
- Contest the Complaint and/or enter into settlement discussions with the Central Valley Water Board without signing the enclosed waiver.

***California Environmental Protection Agency***

If the Central Valley Water Board does not receive a signed waiver by 6 June 2011 **and** either 1) payment of the full liability amount **by 6 June 2011** or 2) payment of the adjusted liability amount and the required reports by **20 June 2011**, a hearing on this matter will be scheduled for **14/15 July 2011** before a panel of the Central Valley Water Board to be held at 1685 E Street, Fresno, California. If a hearing on this matter is held, this hearing will be governed by the attached Hearing Procedures. Any objections to the Hearing Procedures must be received by Alex Mayer, whose contact information is listed in the Hearing Procedures, by **5 p.m. on 19 May 2011**. The Hearing Panel will consider whether it should recommend to the Central Valley Water Board the issuance of an administrative civil liability order assessing the proposed liability, or a higher or lower amount, or rejecting the proposed liability, or it may recommend referral of the matter to the Attorney General for enforcement.

If the Discharger chooses to sign the waiver and pay the administrative civil liability, this will be considered a tentative settlement of the violations in the Complaint. This settlement will be considered final pending a period of public notice, during which time interested parties may comment on this action by submitting information to the Central Valley Water Board staff person listed below. Should the Central Valley Water Board receive new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the Complaint, return payment, and issue a new complaint. If the Central Valley Water Board does not hold a hearing on the matter, and if the terms of the final settlement are not significantly different from those proposed in the enclosed Complaint, then there will not be additional opportunities for public comment on the proposed settlement.

If you have any questions or comments regarding the Administrative Civil Liability Complaint, please contact Dale Essary at (559) 445-5093 or [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov).



CLAY L. RODGERS  
Assistant Executive Officer

Enclosure: Administrative Civil Liability Complaint R5-2011-0562  
Administrative Civil Liability Fact Sheet  
Hearing Procedures for Administrative Civil Liability Complaint R5-2011-0562

cc w/encl: Ms. Pamela Creedon, Central Valley Water Board, Rancho Cordova  
Mr. Reed Sato, Office of Enforcement, SWRCB, Sacramento  
Mr. Alex Mayer, Office of Chief Counsel, SWRCB, Sacramento  
Tulare County Resource Management Department, Visalia  
Tulare County Health & Human Services Agency, Visalia

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2011-0562

IN THE MATTER OF

JAMES G. AND AMELIA M. SWEENEY  
SWEENEY DAIRY  
TULARE COUNTY

This Complaint is issued to James G. and Amelia M. Sweeney (hereinafter Discharger) pursuant to California Water Code (CWC) section 13268, which authorizes the imposition of Administrative Civil Liability (ACL) and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that indicate that the Discharger failed to submit technical reports pursuant to an Order issued by the Regional Water Quality Control Board, Central Valley Region under the authority of CWC section 13267.

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

1. The Discharger owns and operates the Sweeney Dairy (Dairy) located at 30712 Road 170, Visalia, California, County of Tulare.
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007. (Exhibit A.) Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order. (Exhibit B.) The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. The General Order and the MRP required that an Annual Report for the calendar year 2009 be submitted for regulated facilities by 1 July 2010 (2009 Annual Report), including the following components: a revised Annual Dairy Facility Assessment, with facility modifications implemented to date; and a status on facility retrofitting completed as proposed in the Nutrient Management Plan submittal that was due 1 July 2009.
4. The General Order required regulated facilities to submit a Waste Management Plan (WMP) by 1 July 2009. The General Order was amended by Order R5-2009-0029 to modify the compliance schedule, extending the deadline to submit the WMP to 1 July 2010 in order to give regulated parties additional time to come in to compliance. The WMP is required to have the following components: a retrofitting plan, with schedule, needed to improve storage capacity, flood protection, or design of production area; maps of the production area and land application area; a wastewater storage capacity evaluation; a flood protection evaluation; a production area design/construction evaluation; and documentation that there are no cross connections.

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

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

## ALLEGED VIOLATIONS

9. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the 2009 Annual Report with appurtenant components had not been received. (Exhibit C.) The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
10. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the Waste Management Plan with appurtenant components had not been received. (Exhibit D.) The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
11. Central Valley Water Board's compliance tracking system and case files indicate that the Board has not received the 2009 Annual Report or the Waste Management Plan.

James G. And Amelia M. Sweeney  
Sweeney Dairy  
Tulare County

12. The Discharger is alleged to have violated the following sections of the General Order and of the MRP:

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

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

B) Provision E.13 of the General Order, which states in part:

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

C) The MRP, which states in part:

"An annual monitoring report is due by 1 July of each year . . . . [T]he annual report shall cover information on crops harvested during the previous calendar year . . . ."

D) Required Reports and Notices H.1.b of the General Order, which states in part:

"The Discharger shall submit a Waste Management Plan for the production area of the dairy facility, prepared in accordance with Attachment B. The Waste Management Plan shall provide an evaluation of the existing milk cow dairy's design, construction, operation, and maintenance for flood protection and waste containment . . . ."

13. The Discharger violated both the General Order and the MRP by failing to submit the 2009 Annual Report as directed by the MRP that accompanies the General Order, which contain reporting requirements for dairies regulated by the General Order.

14. The Discharger violated the General Order by failing to submit the Waste Management Plan as directed by the General Order.

### SUMMARY OF ALLEGED VIOLATIONS

1. **Violation No. 1:** The Discharger failed to submit an annual report for 2009 by 1 July 2010 as required by the General Order and the MRP. As of the date of this Complaint this report is now 308 days late.
2. **Violation No. 2:** The Discharger failed to submit a Waste Management Plan by 1 July 2010 as required by the General Order and as amended by Order R5-2009-0029. As of the date of this Complaint this report is now 308 days late.

The Discharger has been out of compliance for a total of 616 days.

James G. And Amelia M. Sweeney

Sweeney Dairy

Tulare County

**FACTORS CONSIDERED IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY**

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

[http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_final\\_111709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final_111709.pdf).

16. The administrative civil liability was derived from the use of the penalty methodology in the Policy. In summary, this penalty assessment is based on a consideration of the failure to respond to requests made pursuant to CWC section 13267, subdivision (b), for Violations 1 through 3. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Violations under Water Code section 13267 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy. The failure to submit an annual report or a WMP does not cause daily detrimental impacts to the environment or the regulatory program. It is appropriate to assess daily penalties for the first thirty (30) days, plus one violation for each additional thirty-day period. For Violations 1 and 2, the days fined is reduced to 16 days (Attachment B).

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

17. The maximum penalty for the violations described above is \$616,000 based on a calculation of the total number of per-day violations times the statutory maximum penalty (616 total days of violation X \$1000). However, based on consideration of the above facts and after applying the penalty methodology, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **eleven thousand four hundred dollars (\$11,400)** for the two 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.

James G. And Amelia M. Sweeney  
Sweeney Dairy  
Tulare County

## PROPOSED ADMINISTRATIVE CIVIL LIABILITY

The Executive Officer proposes that the Discharger be assessed an administrative civil liability pursuant to Water Code sections 13323 and 13268 in the amount of **eleven thousand four hundred dollars (\$11,400)** for failure to submit the 2009 Annual Report and the Waste Management Plan by the 1 July 2010 deadline as required by the General Order and the MRP.

The Executive Officer proposes that the amount of the assessed administrative civil liability (\$11,400) may be reduced provided the Discharger submits one or more of the following: 1) a complete 2009 Annual Report; and/or 2) a complete Waste Management Plan. The amount of the assessed civil liability shall be reduced by \$2,000 for each report described above that is received by **20 June 2011** and which the Executive Officer finds complete. The total adjustment to the liability amount will not exceed \$4,000.

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

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

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

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

James G. And Amelia M. Sweeney  
Sweeney Dairy  
Tulare County

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

5/5/11

Date

*Clay L. Rodgers*

*for*

Pamela C. Creedon  
Executive Officer

Central Valley Water Board Prosecution Team

# **ATTACHMENT 10**

Hearing Panel of the  
Central Valley Regional Water Quality Control Board

HEARING PROCEDURE  
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT  
R5-2011-0562

ISSUED TO  
JAMES G. AND AMELIA M. SWEENEY  
SWEENEY DAIRY  
TULARE COUNT

SCHEDULED FOR 14/15 JULY 2011

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

**Background**

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (CWC) section 13323 to James G. and Amelia M. Sweeney (hereinafter Discharger), alleging violations of CWC section 13267 for failing to provide technical reports required by Order R5-2007-0035, Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order).

The Complaint proposes that an administrative civil liability in the amount of eleven thousand four hundred dollars (\$11,400) be imposed as authorized by CWC section 13268. A hearing is currently scheduled to be conducted before a Hearing Panel of the Central Valley Water Board on July 14/15. Pursuant to Water Code section 13228.14, a Hearing Panel consisting of three or more members of the Central Valley Water Board will convene a hearing to hear evidence and argument and to propose a recommendation to the Central Valley Water Board about resolution of the ACL Complaint. The recommendation of the Hearing Panel will be presented to the Board at a subsequent meeting. You will be notified of the date of the meeting. At the meeting, the Board may adopt, modify, or reject, the recommendation of the Hearing Panel.

**Purpose of the Hearing**

The purpose of the hearing is to consider relevant evidence and testimony regarding the ACL Complaint. The Hearing Panel will consider whether it should recommend to the Central Valley Water Board the issuance of an administrative civil liability order assessing the proposed liability, or a higher or lower amount, or rejecting the proposed liability. The public hearing will commence at 9:00 a.m. or as soon thereafter as practical, or as announced in the Hearing Panel meeting agenda. The meeting will be held at

1685 E Street, Fresno, California 93706.

An agenda for the meeting will be issued at least ten days before the meeting and posted on the Central Valley Water Board's web page at:

[http://www.waterboards.ca.gov/centralvalley/board\\_info/meetings](http://www.waterboards.ca.gov/centralvalley/board_info/meetings).

### **Hearing Procedures**

The hearing will be conducted in accordance with this Hearing Procedure. This Hearing Procedure has been proposed by the Prosecution Team and is subject to further revision by the Hearing Panel's Advisory Team. These Hearing Panel Procedures will become final by **6 June 2011** unless the Hearing Panel's Advisory Team makes further revisions. A copy of the general procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with Section 648, subdivision (d), any procedure not provided by this Hearing Panel Procedure is deemed waived. Except as provided in Section 648, subdivision (b) and herein, Chapter 5 of the Administrative Procedures Act (commencing with Gov't Code § 11500) does not apply to this hearing.

**ANY OBJECTIONS TO THE HEARING PROCEDURE MUST BE RECEIVED BY THE HEARING PANEL'S ADVISORY TEAM NO LATER THAN 19 MAY 2011, OR THEY WILL BE WAIVED. FAILURE TO COMPLY WITH THE DEADLINES AND REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF DOCUMENTS AND/OR TESTIMONY.**

The Discharger shall contact the Prosecution Team to try to resolve objections regarding due dates, the hearing date and hearing time limits BEFORE submitting objections to the Advisory Team.

### **Hearing Participants**

Participants in this proceeding are designated as either "parties" or "interested persons." Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from members of the Hearing Panel, staff or others, at the discretion of the Hearing Panel.

The following participants are hereby designated as parties in this proceeding:

1. Central Valley Water Board Prosecution Team
2. James G. and Amelia M. Sweeney, referred to as the Discharger

**Requesting Designated Party Status**

Persons who wish to participate in the hearing as a designated party must request party status by submitting a request in writing (with copies to the existing designated parties) so that it is received no later than 5 p.m. on **19 May 2011**, by the Advisory Team attorney (contact information listed below). The request shall include an explanation of the basis for status as a designated party (i.e., how the issues to be addressed at the hearing and the potential actions by the Central Valley Water Board affect the person, and the need to present evidence or cross-examine witnesses), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be received by the Advisory Team, the person requesting party status, and all other parties by 5 p.m. on **24 May 2011**. The parties will be notified by 5 p.m. on **26 May 2011** whether the request has been granted or denied.

**Primary Contacts****Advisory Team:**

Kenneth Landau, Assistant Executive Officer  
11020 Sun Center Drive, Suite 200, Rancho Cordova, CA 95670  
Phone: (916) 464-4726  
[klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)

Alex Mayer, Staff Counsel  
State Water Resources Control Board, Office of Chief Counsel  
Physical Address: 1001 I Street, Sacramento, CA 95814  
Mailing Address: P.O. Box 100, Sacramento, CA 95812  
Phone: (916) 341-5051; fax (916) 341-5199  
[amayer@waterboards.ca.gov](mailto:amayer@waterboards.ca.gov)

**Prosecution Team:**

Pamela Creedon, Executive Officer  
Clay Rodgers, Assistant Executive Officer  
Doug Patteson, Supervising WRC Engineer  
Dale Essary, Senior WRC Engineer  
1685 E Street, Fresno, California 93706  
Phone: (559) 445-5093; fax: (559) 445-5093  
[dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

Mayumi Okamoto, Staff Counsel  
State Water Resources Control Board, Office of Enforcement  
Physical Address: 1001 I Street, Sacramento, CA 95814  
Mailing Address: P.O. Box 100, Sacramento, CA 95812  
Phone: (916) 341-5677; fax: (916) 341-5896  
[ehoward@waterboards.ca.gov](mailto:ehoward@waterboards.ca.gov)

**Discharger:**

James G. and Amelia M. Sweeney  
Sweeney Dairy (owner/operator)  
30712 Road 170  
Visalia, CA 93292  
(559) 594-5511

**Separation of Functions**

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Hearing Panel (Prosecution Team) have been separated from those who will provide advice to the Hearing Panel (Advisory Team). Members of the Advisory Team are: Ken Landau and Alex Mayer. Members of the Prosecution Team are: Pamela Creedon, Clay Rodgers, Doug Patteson, Dale Essary, and Mayumi Okamoto. Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Pamela Creedon regularly advises the Central Valley Water Board in other, unrelated matters, but is not advising the Central Valley Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Hearing Panel in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Hearing Panel or the Advisory Team regarding this proceeding.

**Ex Parte Communications**

The designated parties and interested persons are forbidden from engaging in ex parte communications regarding this matter with members of the Advisory Team or members of the Central Valley Water Board. An ex parte contact is any written or verbal communication pertaining to the investigation, preparation or prosecution of the ACL Complaint between a member of a designated party or interested person on the one hand, and a Central Valley Water Board or an Advisory Team member on the other hand, unless the communication is copied to all other designated parties (if written) or made in a manner open to all other designated parties (if verbal). Communications regarding non-controversial procedural matters are not ex parte contacts and are not restricted. Communications among one or more designated parties and interested persons themselves are not ex parte contacts.

The following communications to the Advisory Team must be copied to all designated parties: Objections to these Hearing Procedures; requests for modifications to these Hearing Procedures; requests for designated party status, or objections thereto; and all written evidence, legal argument or policy statements from designated parties. This is not an all-inclusive list of ex parte communications.

**Hearing Time Limits**

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined **20 minutes**

to present evidence (including evidence presented by witnesses called by the designated party), cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have 3 minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. **Participants who would like additional time must submit their request to the Advisory Team so that it is received by 5:00 p.m. on 20 June 2011.** Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Hearing Panel Chair (at the hearing) upon a showing that additional time is necessary. Such showing shall explain what testimony, comments or legal argument require extra time, and why the Discharger could not adequately provide the testimony, comments or legal argument in writing before the hearing.

A timer will be used, but will not run during questions by the members of the Hearing Panel or the responses to such questions, or during discussions of procedural issues.

### **Submission of Evidence and Policy Statements**

**Case in Chief:** The Prosecution Team, the Discharger and each other designated party must submit the following information in writing in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the Hearing Panel to consider. Evidence and exhibits already in the public files of the Central Valley Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3. Hearing Panel members will generally not receive copies of materials incorporated by reference, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony. (This information is not required for rebuttal witnesses or rebuttal testimony.)
4. The qualifications of each expert witness, if any. (This information is not required for rebuttal witnesses.)

The Prosecution Team's information must include the legal and factual basis for its claims against each Discharger; a list or attached copy of all evidence on which the Prosecution Team relies, which must include, at a minimum, all documents cited in the complaint or Staff Report; and the witness information required under items 3-4 for all witnesses, including staff. The Prosecution Team shall provide an electronic copy to Ken Landau and Alex Mayer of all documents cited in the complaint or Staff Report no later than the due date under Important Deadlines, below.

The Prosecution Team shall submit one hard copy and one electronic copy to Ken Landau and one electronic copy to Alex Mayer. Each other designated party shall submit 3 hard copies and one electronic copy to Ken Landau and one electronic copy to Alex Mayer. Ken Landau and Alex Mayer must receive all submissions no later than 5:00 p.m. on the applicable due date under Important Deadlines, below.

Rebuttal: Any designated party that would like to submit evidence, legal analysis or policy statements to rebut the information previously submitted by other designated parties shall submit 3 hard copies of their rebuttal information to Ken Landau and one electronic copy of the information to Alex Mayer so that they are received by 5 p.m. on the due date under Important Deadlines, below. "Rebuttal" means evidence, analysis or comments offered to disprove or contradict other designated parties' submissions. Rebuttal shall be limited to the scope of the materials previously submitted by the other designated parties. Rebuttal information that is not responsive to information previously submitted by other designated parties may be excluded.

Closing of Hearing: Designated Parties should be sure to submit all evidence or rebuttal evidence they want the Hearing Panel to consider by the dates set forth in the Important Deadlines, below. Once the Hearing Panel adjourns the hearing, the evidentiary record on which that recommendation is based will be closed. The Central Valley Water Board will not ordinarily allow new evidence to be presented or considered at the future Board meeting.

Copies: Hearing Panel members will receive copies of all materials submitted in hard copy or electronic format. The Hearing Panel's copies will be printed in black and white from the designated parties' electronic copies. Designated parties who are concerned about print quality of all or any part of their written materials should submit a high-resolution pdf or provide an extra three paper copies for the Hearing Panel members. For items with voluminous submissions, Hearing Panel members may receive copies electronically only. Electronic copies are also posted on the Board's website.

Parties without access to computer equipment are strongly encouraged to have their materials scanned at a copy and mailing center. However, the Hearing Panel will not reject materials solely for failure to provide electronic copies.

By **1 July 2011** the Prosecution Team shall prepare a summary agenda sheet ("buff sheet") for this item to be included in the Hearing Panel's agenda package and posted on the internet. The buff sheet shall clearly state that it was prepared by the Prosecution Team. The Prosecution Team shall provide a copy of the buff sheet to all parties by mail or email.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible, but they must be received by **1 July 2011**. Interested persons do not need to submit written comments in order to speak at the hearing.

In accordance with California Code of Regulations, title 23, section 648.4, the Central Valley Water Board endeavors to avoid surprise testimony or evidence. Absent a showing

of good cause and lack of prejudice to the parties, the Hearing Panel may exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will not be considered by the Hearing Panel and will not be included in the administrative record for this proceeding. Power Point and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. Designated parties must provide the Advisory Team with a printed copy of such materials at or before the hearing, for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

### **Evidentiary Documents and File**

The Complaint and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 1685 E Street, Fresno, California 93706. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Hearing Panel Chair. Many of these documents are also posted on-line at [http://www.waterboards.ca.gov/centralvalley/board\\_decisions/tentative\\_orders/index.shtml](http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml). Although the web page is updated regularly, to assure access to the latest information, you may contact Clay Rodgers (contact information above).

### **Questions**

Questions concerning this proceeding may be addressed to the Advisory Team attorney (contact information above).

### IMPORTANT DEADLINES

(Note: the Central Valley Water Board is required to provide a hearing within 90 days of issuance of the Complaint (CWC § 13323). The Advisory Team will generally adhere to this schedule unless the discharger submits a waiver and it is accepted.)

All required submissions must be received by 5:00 p.m. on the due date.

- |              |   |
|--------------|---|
| 5 May 2011   | Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends proposed Hearing Procedure to Discharger and Advisory Team, and publishes Public Notice  |
| 19 May 2011  | Objections due on proposed Hearing Procedure  |
| 19 May 2011  | Deadline for submission of request for designated party status.   |
| 24 May 2011  | Deadline for opposition to request for designated party status.   |
| 24 May 2011  | Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above.   |
| 26 May 2011  | Advisory Team issues decision on requests for designated party status, if any.  |
| 6 June 2011  | Discharger's deadline for submitting signed form to waive right to hearing within 90 days.  |
| 13 June 2011 | Remaining Designated Parties' (including the Discharger's) deadline for submission of all information required under "Evidence and Policy Statements," above.   |
| 13 June 2011 | Prosecution Team submits an electronic copy to Kenneth Landau and Alex Mayer of all documents cited in the complaint or Staff Report, unless previously submitted.  |
| 20 June 2011 | Requests for additional hearing time (see Hearing Time Limits, above).  |
| 27 June 2011 | All Designated Parties shall submit any rebuttal evidence, written rebuttal to legal argument and/or written rebuttal to policy statements; and all evidentiary objections to other Designated Parties' submittals. |
| 1 July 2011  | Interested persons' comments are due.   |
| 1 July 2011  | Prosecution Team's deadline to submit Buff Sheet.   |

8 July 2011

If *new* rebuttal evidence or argument is submitted, deadline for designated parties to submit any requests for additional time at the hearing to respond to the rebuttal.

14/15 July 2011

Hearing

# **ATTACHMENT 11**

May 31, 2011

Clay L. Rodgers  
Assistant Executive Officer  
California Regional Water Quality Control Board  
Central Valley Region  
1685 E. Street  
Fresno, CA 93706

Re: Civil Liability Complaint R5-2011-0562  
Sweeney Dairy

Dear Mr. Rodgers:

I enclose your form entitled "Waiver of 90-day Hearing Requirement for Administrative Civil Liability Complaint." We have checked box 5, and are thereby waiving the 90-day hearing requirement because we are requesting an extension of the hearing date and of the hearing deadlines. We request that the hearing date be extended at least 60 days beyond the current date of July 14/15, and that the hearing deadlines be extended by a corresponding 60 days.

Please treat this cover letter as the attached separate sheet explaining the reasons for the request. We need additional time to properly secure and prepare our evidence, to complete our legal research, and to develop our arguments that we intend to introduce at the hearing.

Because of the demands of operating our dairy, we request that the hearing before the regional board be when the board meets in Fresno. Travel to Sacramento would create excessive problems for us. We also ask that subject of the hearing include the issue of the request that we first made to your agency on March 28, 2010 for a modification of Order R5-2007-0035. As you know, modification of waste discharge requirements cannot be delegated by the regional board, but must be decided by the regional board itself. Hence, we made a number of subsequent requests to your agency to schedule our request as an agenda item before the regional board, but you failed to do so.

These failures on your agency's part are inextricably related to the merits of your Complaint for Civil Liability, and a consideration of these issues must be considered concurrently with consideration of your Complaint. Also please be advised that we intend to challenge the legal validity of Order R5-2007-0035 as part of our defense. Because of the magnitude and complexity of all of these issues, we need the requested extensions.

Also because of the magnitude and the complexity of the issues, we request additional time during the hearing to allow for the presentation of all of our evidence and arguments. We ask for

two hours of time, although we may need less. Please promptly advise the Advisory Team of this request.

Please advise us no later than June 8, 2011 whether you will agree to our request for extensions of time.

Sincerely,

Jim Sweeney

cc. Pamela Creedon

# **ATTACHMENT 12**

From: Japlust3 <japlust3@aol.com>  
To: lasallem <lasallem@lightspeed.net>  
Subject: Fwd: ACL Complaint No. R5-2011-0562 Sweeney Dairy  
Date: Mon, Jun 13, 2011 8:55 pm

---

-----Original Message-----

From: Alex Mayer <AMayer@waterboards.ca.gov>  
To: Ken Landau <klandau@waterboards.ca.gov>; Mayumi Okamoto <MIOkamoto@waterboards.ca.gov>  
Cc: Japlust3 <Japlust3@aol.com>; Clay Rodgers <CRodgers@waterboards.ca.gov>; Dale Essary <dessary@waterboards.ca.gov>; Doug Patteson <dpatteson@waterboards.ca.gov>  
Sent: Mon, Jun 13, 2011 9:20 am  
Subject: Re: ACL Complaint No. R5-2011-0562 Sweeney Dairy

The Chair of the Fresno Hearing Panel has made a ruling on the two matters referenced below. First, the hearing for ACL Complaint No. R5-2011-0562 will remain on the calendar as scheduled for 14/15 July 2011. Next, the Discharger's request for two additional hours to present its case at the hearing is denied.

The Discharger's request to continue the hearing until the Central Valley Water Board holds its regularly scheduled meeting in Fresno is not feasible. The Central Valley Water Board does not intend to hold a regularly scheduled meeting in Fresno during calendar year 2011. Continuing the discharger's hearing until a Fresno meeting would amount to an indefinite continuance, and would not achieve the efficiencies intended by the Panel Hearing.

In regards to the request for two additional hours to present its case, the Chair has determined that the Discharger has not established good cause for additional time. The Discharger will have the amount of time specified in the Hearing Procedures. While the discharger may use the allocated time in any manner it chooses, the Advisory Team notes that the appropriateness of Order R5-2007-0035 is not the relevant issue in the enforcement proceeding. The statute of limitations for the Discharger to challenge this order was 30 days from the adoption date of Order R5-2007-0035. Water Code sections 13320, 13330. Since the date to challenge Order R5-2007-0035 has long since passed, the Discharger's potential allegations regarding the propriety of the Order are not timely.

Sincerely,

Alex P. Mayer  
Staff Counsel, Central Valley Regional Water Quality Control Board

>>> Mayumi Okamoto 6/7/2011 2:55 PM >>>

\*To comply with ex parte rule, Mr. Sweeney is cc'ed on this email.

Mr. Landau and Mr. Mayer,

Please see the attached waiver of the 90-day hearing requirement and request to delay the hearing submitted by Mr. Sweeney regarding the above references matter. The waiver includes a cover letter with a justification for the request to delay the hearing by 60 days to allow the Discharger more time to prepare for the hearing scheduled for 14/15 July in Fresno. Additionally, the cover letter includes a request for an additional 2 hours to present his case before the panel of the Central Valley Regional Board. Given that both of these requests relate to modification of matters in the Hearing Procedures, the Prosecution Team is forwarding this request to you for your consideration and ruling.

The Prosecution Team respectfully asks that the hearing for this matter remain on the calendar as scheduled for 14/15 July 2011. Even in light of the additional issues and potential complexities identified by Mr. Sweeney as justification for a request to delay, the Prosecution Team feels that the hearing procedures provide the Discharger with sufficient time to compile and submit evidence for the panel's consideration. That being said, as a potential compromise and pending Advisory Team approval, the Prosecution Team would be willing to stipulate to a modified deadline of 20 June 2011 to

# **ATTACHMENT 13**

**To: Central Valley Regional Water Quality Control Board**

**Advisory Team**

[klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)

[amayer@waterboards.ca.gov](mailto:amayer@waterboards.ca.gov)

**Date: June 13, 2011**

Dear Advisory Team:

**Overview.**

Whenever I hereafter use the terms "we" or "us" I am referring to my wife and myself, owners of Sweeney Dairy.

The deadline for us to submit six technical reports was July 1, 2010. 2009 and 2010 were dreadful years for us financially; the entire dairy industry was reeling from catastrophically low milk prices and high feed costs. We are a small dairy, much less able to deal with the situation than a larger dairy. More than three months before the July 1 filing deadline we asked the Central Valley RWQCB staff for relief from that deadline, and when they refused to grant our request, we asked that our request be calendared for a formal, agenda-item hearing so that we could submit our request for a modification of the Order directly to the regional board. Your agency continued to deny our request for a hearing before the board.

On August 16, 2010, the Central Valley RWQCB sent us a Notice of Violation, specifying our failure to file the technical reports by the July 1 deadline. The RWQCB did not serve its Administrative Civil Liability Complaint on us until May 5, 2011, nine months later. Despite your Agency taking all of that time to develop its case against us, it has given us only 35 days after we received the Complaint to submit all documents, evidence and legal arguments that we wish to use or rely upon in our defense. According to your self-serving rules, we would be precluded from using anything that we did not identify and/or deliver to you by June 13, 2011. Because of the extensive time needed for us to do research and to line up documents and possible professional consultants, we asked for a 60-day extension of the hearing date and of the deadline for submission of documents and legal arguments.

We have received no communication from you that you have granted our request for an extension. The refusal to grant an extension deprives us of due process and is a terrible abuse of discretion. A common criminal is afforded much greater procedural protections than has been extended to us, and we somehow feel a judge will agree.

13

**Documents/Evidence.**

You require us to identify and provide all documents and other evidence that we intend to use or rely upon at the hearing.

(a) At the present time we intend to use or rely upon the following, which we submit by reference because they are believed to already be in the files or in the possession of the Central Valley RWQCB:

1. Jim Sweeney letter to Central Valley RWQCB dated March 28, 2010.
2. Jim Sweeney letter to Central Valley RWQCB dated April 7, 2010.
3. Central Valley RWQCB letter to the Sweeneys dated June 15, 2010.
4. Jim Sweeney letter to Central Valley RWQCB dated June 27, 2010.
5. Central Valley RWQCB Notice of Violation sent to the Sweeneys on August 16, 2010.
6. Jim Sweeney letter to Central Valley RWQCB dated August 22, 2010.
7. Jim Sweeney letter to Central Valley RWQCB dated September 5, 2010.
8. Central Valley RWQCB letter to Sweeneys from Clay Rodgers dated May 5, 2011 re Administrative Civil Liability Complaint R5-2011-0562.
9. Administrative Civil Liability Complaint R5-20011-0562 against James G. and Amelia M. Sweeney, dated May 5, 2011 (together with all attachments, including the Hearing Procedures).
10. Jim Sweeney letter to Central Valley RWQCB dated May 15, 2011.
11. Jim Sweeney letter to Central Valley RWQCB dated May 31, 2011.
12. Email from Mayumi Okamoto to Alex Mayer et al, dated June 7, 2011.
13. Order No. R5-2007-0035, "Waste Discharge Requirements General Order for Existing Milk Cow Dairies."

14. All evidence, including the Administrative Record of all Public Hearings and Public Input, upon which Order R5-2007-0035 was based and adopted.
15. Water Quality Control Plan for the Tulare Lake Basin (2<sup>nd</sup> ed., 1995).
16. State Water Resources Control Board ("SWRCB") Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California."
17. Final Report of Brown, Vence & Associates, "Review of Animal Waste Management Regulations – Task 4 Report (November, 2004)." While we believe that your Agency is in possession of a copy, please advise if you do not.
18. Study Findings, Recommendations, and Technical Report (Parts I & II) of the University of California Extension, entitled "Manure Waste Ponding and Field Application Rates (March, 1973). We believe that your Agency has a copy.
19. NRCS Guidelines for Water Treatment Lagoons, Natural Resources Conservation Service Conservation Practice Standards, Code 359 (July, 2000).
20. "Impact of Dairy Operations on Groundwater Quality," a research project conducted and a report prepared by the Lawrence Livermore National Laboratory in cooperation with the State Water Resources Control Board. The report was submitted to the SWRCB in August, 2009, and we believe your agency has a copy.
21. "Fate and Transport of Waste Water Indicators: Results from Ambient Groundwater and from Groundwater Directly Influenced by Wastewater," a report prepared by the Lawrence Livermore National Laboratory in connection with the State Water Resources Control Board. We believe this report is in the possession of the Central Valley Board, and if it is not, it is available at the SWRCB website:  
<http://www.swrcb.ca.gov/gama/gamadocs.shtml>.
22. Every other document and report which we have submitted to the Central Valley RWQCB since 1995.
23. Every other letter, note and report that the Central Valley RWQCB has prepared or sent to us since 1995, including the results of any on-site inspections of the Sweeney Dairy that Central Valley RWQCB staff have made since 1995.

(b) At the present time we intend to use the following additional documents at the hearing, which are attached to this letter:

1. Letter from Farm Credit West to us dated September 30, 2009.
2. Dairy Inventory Worksheet, dated 12/30/09, prepared by us for Farm Credit West.
3. Well water test dated 6/28/10, domestic well.
4. Well water test dated 6/29/10, Rd 170 well.
5. Well water test dated 6/29/10, Rd 180 well.
6. Letter from 4 Creeks Civil Engineering firm dated June 1, 2011, with attachments.
7. Proposed Regulatory Service Agreement between Jim Sweeney and Innovative Ag Services, LLC.

**Witnesses.**

1. Jim Sweeney.
2. James Sullins, Tulare County Director of University of California Cooperative Extension.

We reserve our right to use other evidence and witnesses not listed above if any come to light during the course of continuing to develop our case. We will notify you when such evidence or witnesses become known.

**Legal Arguments.**

1. As can be seen from the volume of documents referred to above, especially those of a highly technical nature, substantial time is needed by us to identify and secure all relevant evidence and to secure all needed witnesses by June 13, 2011, which, under your Hearing Procedures, is the deadline for identifying and presenting the evidence and arguments that we can use at the hearing. Anything not identified and submitted by that date cannot be used. This is less than 35 days after being served the Complaint and a copy of the Hearing Procedures.

In refusing to grant the requested continuance of the hearing date and the information submission deadline, our ability to satisfactorily prepare our evidence and position and to defend ourselves against the Complaint has been substantially impaired. Hence, we have been deprived of due process and have suffered an abuse of discretion.

2. We have a right to appear before the regional board to seek a modification of or a waiver from any of Order R5-2007-0035's general waste discharge requirements. The Order declares that it "serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes." Under the Order's terms, a Dairyman (Discharger) has the right to seek a modification of any of those general waste discharge requirements. The reporting requirements, including the filing deadlines for annual and technical reports, are part of the Order's general waste discharge requirements for which a dairyman may seek modification, exemption or other similar relief.

While the regional board may delegate some of its powers and duties, some are not delegable. The modification of any waste discharge requirement is one of those powers and duties that are not delegable. (Water Code Section 13223) The regional board must review the staff's determination with respect to a request for relief.

3. Under the Order, we would have been required to file the following technical reports with the Central Valley RWQCB by July 1, 2010: (1) retrofitting plan needed to improve storage capacity, flood protection or design of the production area, (2) dairy site and cropland maps, (3) wastewater lagoon capacity evaluation, (4) flood protection evaluation, (5) dairy design and construction evaluation, (6) cross-connection inspection report. We were also required to submit an Annual Report, an Annual Dairy Facility Assessment report, and a Nutrient Management Plan. Most of these reports, technical and otherwise, must be prepared by appropriately licensed professionals/engineers and consultants, who are very costly. It was going to cost almost \$20,000.00.

We operate a 300 cow dairy, very small compared to the average size in the industry. 2009 and 2010 were unprecedented years in that they represented a combination of extraordinarily low milk prices and high feed costs. We were losing money and our lender would not advance funds to have these reports prepared and submitted. It was a financial impossibility.

Hence, on March 28, 2010, more than three months before the July 1, 2010 filing deadline, we wrote a letter to the Central Valley RWQCB asking for an extension of the deadline for submission of these reports. Anticipating that the staff would refuse to grant said relief, we asked the RWQCB staff in our letter of April 7, 2010 to schedule the matter for a hearing before the regional board. In their letter of June 15, 2010, the Central Valley staff stated that they had no authority to modify the reporting requirements, which

is true. But they refused to schedule a formal, agenda-item hearing before the regional board. Instead, they advised us that we were free to address the Board during the Public Forum section of their Agenda, even though such presentations are limited to 3 minutes.

In letters dated July 27, 2010, and August 22, 2010 we continued to press the staff to schedule a hearing before the regional board.

The RWQCB staff continues to refuse to schedule a hearing before the regional board. Had the staff scheduled a hearing, it is possible that the regional board could have granted us relief from these deadlines, in which case, we would not be in violation of the filing requirements. Therefore, the Central Valley cannot contend that we have violated the filing requirements until such time as the regional board has heard and denied our request and after we have exhausted all of our appeal and other legal remedies afforded us under the Water Code. (Water Code Sections 13320, 13325, and 13330)

4. We would not be in violation of failing to file the reports alleged in the Complaint if such reporting requirements were determined to violate applicable provisions of the Water Code. We contend that the Order fails to comply with state law in the following respects:
  - (a) The Order's waste discharge requirements must take into account economic considerations. (Water Code Sections 13241 and 13263 (a)) The Order does not sufficiently do so, particularly because it fails to provide means for smaller dairies to deal with disproportionately higher per cow reporting costs. Indeed, the Order fails to address the special financial circumstances of smaller dairies in any way whatsoever.
  - (b) The regional board is under a duty to review waste discharge requirements periodically. (Water Code Section 13263 (e)) If new and more cost effective ways can accomplish the same purpose, it must revise its requirements accordingly. New and old research and advanced technologies exist which may provide less expensive means for evaluating groundwater contamination risk, of determining non-contamination of groundwater, and of using less expensive practices that can still prevent such contamination. We contend that the Central Valley RWQCB will be unable to show that it has continued to sufficiently examine and consider such research results and advanced technologies, or that it has modified the Order accordingly.
  - (c) The law requires the regional board to provide a discharger with a written explanation for the need for these technical reports and the evidence that supports the requirement for the person to provide these reports (Water Code Section 13267) The RWQCB has failed to adequately comply with this legal requirement.

- (d) The RWQCB staff possesses inspection and other reports about our dairy from earlier years. These reports already provide information about our facility and operation. Hence, much of the information required in the technical reports would be duplicative and would add nothing useful or valuable.
- (e) The Order would be more sensitive to economic considerations if it was more "performance based," and less "rule based." A dairy has continuously operated on our site for more than eighty years. Yet, all our well water tests consistently show incredibly low nitrate nitrogen levels (less than 2 mg/L). This is considerably below state limits. Do such results indicate that our operation is a threat to the underground water? Are these results not excellent grounds to justify relief from these costly reports?
5. For the Order to be enforceable, the Central Valley RWQCB must show that its Order was approved by the State Water Resources Control Board. (Water Code Section 13245)
6. We would not be in violation of the Order's filing requirements if it is determined that the consideration, adoption and processing of the Order failed to comply with all applicable provisions of the California Administrative Procedure Act ("CAPA"). (Govt. Code Sections 11340 et seq) We contend that CAPA applies to the Order and that its consideration, adoption and processing failed to comply with the Act's requirements. Considering that the legislative intent of CAPA is to protect small business from excessively expensive and burdensome regulations, it is difficult to foresee a court not concluding that the Order is subject to CAPA requirements.

### Concluding comments

Despite participating in your Hearing Procedure, we are not waiving our right to have a face-to-face hearing before the regional board under circumstances where we are given sufficient time to present all evidence relevant to the foregoing important issues.

In closing, let me make some final grim observations. It is extremely troublesome that the Agency's staff prepared the Complaint but purposely chose to not mention the letters we wrote prior to the filing deadline and thereafter. The Complaint also failed to mention that we had often requested a hearing before the regional board. Thus, the Complaint is inherently deceptive and prejudicial. This will only serve to bolster our contention that your Agency abuses its legal and discretionary powers.

We are responding to your self-serving set of protocols and short-fused deadlines, but we have concluded that they are unjustifiably difficult to meet and suspect that they are purposely designed to overwhelm, intimidate and discourage anyone from questioning or challenging your

Agency. We intend to eventually ask a court to rule whether they effectively constitute a denial of due process and whether they represent a significant obstacle to being afforded a fair hearing.

Let me also add that your creation of an Advisory Team, a Prosecution Team, and a Hearing Panel appears to be a convoluted sham. Each member of each Team/ Panel/Board is either an agent or employee of the same agency; all serving the same master. Hence, I do not expect this process to be fair, balanced and impartial. Despite your protestations to the contrary, your Agency is performing all of the functions of rule-maker, prosecutor, judge, jury and executioner. Thank goodness that our probable recourse is to have the issues ultimately ruled upon by an impartial superior court judge.

Submitted by,

Jim Sweeney

c.c. Prosecution Team

[dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

[MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov)



Farm Credit West

Headquarters  
1111 W. Lacey Blvd., Redford, CA 95230  
P.O. Box 11001, Redford, CA 95232  
359.584.2681 FAX: 359.584.9675  
Web: www.farmcreditwest.com

September 30, 2009

David Souza

James G. Sweeney  
Amelia M. Sweeney

Re: Farm Credit West Customer No. [REDACTED]  
Loan Nos. [REDACTED]

Dear Customer:

Although we recognize that the above loans are not now delinquent, Federal Regulations require that we notify you that, based upon the financial information we currently have available to us and representations you have made, we have determined that the above-referenced loans are distressed loans that may be suitable for restructuring pursuant to the Farm Credit Act of 1971, as amended (the "Act"). An alternative to restructuring may be foreclosure. Enclosed is an Application for Restructure and a copy of the Distressed Loan Restructuring Policy of Farm Credit West, PCA and Farm Credit West, FICA, collectively ("FCW"). Please note that only one application will be considered on these loans. That application must be signed by all borrowers and agreed to by all guarantors.

Before you submit a completed Application for Restructure to the association, we would strongly recommend that you contact the association to set up a personal meeting to review the status of your loans, your current financial condition and the suitability of your loans for restructuring. In order to have a productive discussion about possible restructure options, we would encourage you to provide to us the financial information requested in the Restructure Application three (3) days prior to the meeting so that we may have a chance to review it. If you would like to have such a meeting, please contact David Hill at (559) 584-2681 to arrange for a convenient time and date. Please inform us at that time if you intend to be represented by counsel at that meeting. However, please be advised that before your loans can be considered for restructuring, the association must receive a completed Application for Restructure, which includes a restructure plan, within 48 days of this letter i.e., by November 17, 2009.

We must remind you that the above-referenced loans, while not in default, are considered distressed.

- 1) Loan No. [REDACTED] has a monthly payment due October 1, 2009 in the estimated amount of \$3,487.16. The principal and interest balance as of today's date is \$217,213.46.
- 2) Loan No. [REDACTED] has a monthly payment due October 1, 2009 in the estimated amount of \$5,226.11. The principal and interest balance as of today's date is \$229,755.24.
- 3) Loan No. [REDACTED] has a monthly payment due October 1, 2009 in the estimated amount of \$4,449.95. The principal and interest balance as of today's date is \$636,177.46.

Farm Credit West, FICA  
Farm Credit West, PCA  
Subsidiaries of Farm Credit West, ACA

The Farm Credit System

This is to inform you that unless the default is cured, the association will be entitled to begin foreclosure proceedings after the forty-eighth (48th) day following the date of this letter, i.e., after November 17, 2009, if you have not submitted a completed Application for Restructure, including a restructure plan by that date or if your Application for Restructure is denied and the process for considering your loans for restructuring has been completed.

WHETHER OR NOT YOU REQUEST A MEETING, IF YOU WANT THE ASSOCIATION TO CONSIDER YOUR LOANS FOR RESTRUCTURING, YOU MUST COMPLETE AND EXECUTE THE APPLICATION FOR RESTRUCTURE. THE ASSOCIATION MUST RECEIVE YOUR APPLICATION, TOGETHER WITH ALL OTHER DOCUMENTS AND INFORMATION REQUESTED ON THE APPLICATION FORM, NO LATER THAN 5:00 P.M. ON NOVEMBER 17, 2009, WHICH IS 48 DAYS FROM THE DATE OF THIS LETTER. YOUR FAILURE TO PROVIDE TO THE ASSOCIATION A COMPLETED APPLICATION BY THIS DATE MAY RESULT IN YOUR LOSING THE RIGHT TO HAVE YOUR LOANS CONSIDERED FOR RESTRUCTURING. ORAL APPLICATIONS, INCOMPLETE WRITTEN APPLICATIONS AND APPLICATIONS RECEIVED AFTER 5:00 P.M. ON NOVEMBER 17, 2009 WILL NOT COMPLY WITH THIS REQUIREMENT.

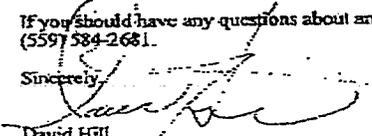
Any application received by the association after 5:00 P.M. on November 17, 2009 if considered by the association in its sole discretion, will not be subject to the provisions of the Farm Credit Act of 1971, as amended, or the Distressed Loan Restructuring Policy. For example, you will not be entitled to a personal meeting with the association to discuss the application, the association will not be obligated to evaluate the application under the restructuring guidelines set forth in the Act and the Distressed Loan Restructuring Policy, and you will not have the right to seek review by a credit review committee of the association's decision on the application.

If your loans are restructured and you do not perform under the restructure agreement, Farm Credit West may initiate foreclosure proceedings without further notice. Performance means that a borrower has made six consecutive monthly payments under the restructure agreement.

Finally, please note that a copy of this letter, together with copies of the application and the policy, are being provided to all other obligors and guarantors on the loans.

If you should have any questions about any of the foregoing, please contact David Hill at (559) 584-2681.

Sincerely,

  
David Hill  
Vice President

Enclosures

**FEED LOCATED ON THE DAIRY**

	Cost		Total
	Tons	Per Ton	Cost
Hay			
Milk Cow Hay	15 \$	175 \$	\$2,625
Dry Cow Hay	90 \$	110 \$	\$9,900
Oat Hay	80 \$	95 \$	\$7,600
Straw	\$		
Sodan	\$		
<b>TOTAL</b>		\$	\$20,125

**CE**

Corn Silage	1700 \$	45 \$	\$76,500
Wheat Silage	\$	\$	
Haylage	\$	\$	
Winter Silage	\$	\$	
<b>Total</b>	1,700	\$	\$76,500

**GRAIN/COMMODITIES**

Corn	\$	\$	
Barley	\$	\$	
Almond Hulls	\$	\$	
Beet Pulp	\$	\$	
Hominy	\$	\$	
Minerals	\$	\$	
Molasses	\$	\$	
Cottonseed	20 \$	300 \$	\$6,000
Inside Mix	\$	\$	
Outside Mix	15 \$	220 \$	\$3,300
<b>Total</b>	35	\$	\$9,300

**PREPAID FEED**

Dealer	Amount \$
<b>Total</b>	\$

**CASH IN GROWING CROPS** \$ 3,250

NAME Jim Sweeney

**HERD INVENTORY**

**MATURE COWS**

	Current
	No. of Head
Milk Cows	290
Dry Cows	34
Springers	7
<b>TOTAL</b>	331

**HEIFERS**

	Current
	No. of Head
Bred Heifers	76
Heifers 12-15 Months Old	85
Heifers 6-12 Months Old	58
Heifers 3-6 Months Old	23
Heifers 0-3 Months Old	27
<b>TOTAL</b>	267

**BULLS**

Mature Bulls	2
Yearling Bulls	18
Young Bulls	8
<b>TOTAL</b>	28

**ACCOUNTS PAYABLE**

Cow Brokers	
Food Brokers	7800
Grain Companies	71722
Other	27000
<b>Total</b>	\$ 176,722

**ACCOUNTS RECEIVABLE**

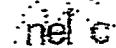
Current Monthly	
Cremery Milk Check	64,000

**CASH ON HAND** \$ 8,280

DATE September 30, 2008



**ENVIRONMENTAL**



Analytical Chemists  
July 14, 2010

Lab ID : VI 1041217-001  
Customer ID : 4-18503

Valley Tech Agricultural Lab Services  
Attn: Monique Baldiviez  
2120 S. "K" St.  
Tulare, CA 93274

Sampled On : June 28, 2010-07:00  
Sampled By : Not Available  
Received On : July 3, 2010-14:40  
Matrix : Ground Water

Description : Domestic 6-29X751-1  
Project : Sweeney Dairy

**Sample Result - Inorganic**

Constituent	Result	PQL	Units	Note	Sample Preparation		Sample Analysis	
					Method	Date/ID	Method	Date/ID
Dairy Analysis <sup>(1)</sup>								
Nitrate Nitrogen	1.4	0.1	mg/L		450003F	07/07/10-29479	250003F	07/07/10-29479
Conductivity	216	1	umhos/cm		25940	07/07/10-29479	25108	07/07/10-29479

ND-Non-Detect, PQL-Practical Quantitation Limit, Compliers; (F) Plastic Preservatives; (E)2504 pH < 2.5mmHg.

Corporate Offices & Laboratory  
3rd Cornerley Street  
Santa Paula, CA 93000  
TEL: 805/983-3000  
FAX: 805/982-1777  
CALSWAP Certification No. 079004

Office & Laboratory  
2000 Stearnswood Road  
Stockton, CA 95215  
TEL: 209/942-0122  
FAX: 209/942-0123  
CA ELAP Certification No. 1293

Office & Laboratory  
583 E. Linden Avenue  
Oroville, CA 95966  
TEL: 530/931-2818  
FAX: 530/931-2887  
CA ELAP Certification No. 2670

Field Office  
Visalia, CA 93291  
TEL: 559/734-9473  
Mobile: 559/732-2779  
FAX: 559/734-9435



**ENVIRONMENTAL**



July 14, 2010 Analytical Chemists

Lab ID : V11041217-002  
Customer ID : 4-18503

Valley Tech Agricultural Lab Services  
Attn: Monique Bakdivicz  
2120 S. "K" St.  
Tulare, CA 93274

Sampled On : June 29, 2010-06:30  
Sampled By : Not Available  
Received On : July 3, 2010-14:40  
Matrix : Ground Water

Description : Rd.170 6-29X751-2  
Project : Sweeney Dairy

**Sample Result - Inorganic**

Constituent	Result	PQL	Units	Note	Sample Preparation		Sample Analysis	
					Method	Date/ID	Method	Date/ID
Drinky Analysis <sup>(1)</sup>								
Nitrate Nitrogen	1.1	0.1	mg/L		4520N015	07/16/10-28009	4520N015	07/16/10-28009
Conductivity	272	1	microhm/cm		25106	07/06/10-24045	25106	07/06/10-24045

ND=Non-Detect, PQL=Passive Quality Limit, Combustion (P) Plastic Preservatives: 17504 pH<2.5 Sterilize

Page 4 of 6

Corporate Office & Laboratory  
851 Corporation Street  
Santa Ana, CA 92703  
TEL: 949/222-2400  
FAX: 949/222-4142  
CALFELAP Certification No. 021106A

Office & Laboratory  
2500 Stegmann Road  
Shawnee, GA 30226  
TEL: 770/962-0182  
FAX: 770/962-0453  
CALFELAP Certification No. 1563

Office & Laboratory  
525 E. Linda Avenue  
Chico, CA 95926  
TEL: 530/433-5819  
FAX: 530/433-3859  
CALFELAP Certification No. 2670

Field Office  
Ukiah, California  
TEL: 709/734-8173  
Mobile: 660/727-3280  
FAX: 709/734-8136



ENVIRONMENTAL



July 14, 2010 Analytical Chemists

Lab ID : VI 1041217-003  
Customer ID : 4-18503

Valley Tech Agricultural Lab Services  
Attn: Monique Baldiviez  
2120 S. "K" St.  
Tulare, CA 93274

Sampled On : June 29, 2010-06:30  
Sampled By : Not Available  
Received On : July 3, 2010-14:40  
Matrix : Ground Water

Description : R.I. 180 6-29X751-3  
Project : Sweeney Dairy

Sample Result - Inorganic

Constituent	Result	PQL	Units	Note	Sample Preparation		Sample Analysis	
					Method	Date/ID	Method	Date/ID
Dairy Analysis <sup>1</sup>					4306041F	07/15/10/2010/9	4306041F	07/15/10/2010/9
Nitrate Nitrogen	0.2	0.1	mg/L		2368	07/06/10/2010/6	2368	07/06/10/2010/6
Conductivity	147	1	umhos/cm					

ND=Not Detected, PQL=Practical Quantitation Limit, Contaminant (F) Plastic Preservatives: H2SO4 pH < 2 25umhos/cm

Corporate Offices & Laboratory  
521 Corporation Blvd  
Santa Paula, CA 93003  
TEL: 805/379-7800  
FAX: 805/379-5472  
CA RELAP Certification No. 0770024

Office 3 Laboratory  
2540 Stagecoach Road  
Sacto, CA 95825  
TEL: 916/442-0189  
FAX: 916/442-0423  
CA ELAP Certification No. 1263

Office 4 Laboratory  
303 E. Lugo Avenue  
Chico, CA 95926  
TEL: 530/893-6888  
FAX: 530/893-3807  
CA ELAP Certification No. 2570

Field Office  
Visalia, California  
TEL: 559/734-0473  
Mobile: 559/734-0299  
FAX: 559/734-3435



June 1, 2011

Jim Sweeney  
Sweeney Dairy  
30712 Road 170  
Visalia, CA 93292

RE: General Order Waste Management Plan  
Sweeney Dairy

Dear Mr. Sweeney,

As you are aware, the California Regional Water Quality Control Board (CRWQCB) required a Waste Management Plan (General Order No. R5-2007-0035, Attachment B) to be submitted for each existing dairy by July 1, 2010. Per your email, the facility in question located at 30712 Road 170, Visalia, CA has not yet prepared a WMP.

4Creeks has completed a preliminary assessment of your facility based on the location, facility size, and flood zone designation. This has allowed us to provide you an accurate scope of work and engineering fees for this project. Please refer to Attachment A for a summary our scope of work.

In addition to a WMP, a Nutrient Management Plan and an Annual Report will need to be prepared and submitted by an agronomist. 4Creeks does not provide these services but can help coordinate with an agronomist to complete these reports. 4Creeks will complete the Waste Management Plan and coordinate to ensure consistency with the Nutrient Management Plan and Annual Report. The Annual Report and Nutrient Management Plan fees are not included within our scope of work.

4Creeks would be privileged to assist you in the preparation and submittal of the Waste Management in a timely manner.

Respectfully,

A handwritten signature in black ink, appearing to read "D. De Groot", written over a horizontal line.

David De Groot, RCE 70992  
4Creeks, Inc.

1150 N. Chinoweth St., Suite B, Visalia, CA 93291  
(559) 802-3052

**ATTACHMENT "A"**  
**SWEENEY DAIRY**  
**WASTE MANAGEMENT PLAN**

4Creeks, Inc. will provide the following services to complete the Waste Management Plan per the General Order No. R5-2007-0035 Attachment B requirements.

To complete the items outlined below, 4Creeks, Inc. will provide a topographic survey of the production area to substantiate the results and conclusions of the Waste Management Plan.

**I. Facility Maps**

- a. Provide an updated Production Area Map with wastewater conveyance system
- b. Provide an updated Land Application Map with wastewater conveyance system
- c. Review existing maps and exhibits previously prepared by owners and update as required

**II. Wastewater Pond Storage Volume Analysis**

- a. Calculate the storage volume of the existing wastewater pond
- b. Calculate the total amount of process wastewater generated during the retention period
- c. Calculate the total amount of storm drain run-off during the storage period
- d. Provide an analysis of the pond required capacity versus existing capacity
- e. Determine any modifications needed to meet storage volume requirements and prepare a summary of the options for the dairy owner.
- f. Prepare a Technical Report summarizing results, conclusions and any modifications required.

**III. Flood Protection Analysis**

- a. Determine FEMA flood designation for production area
- b. Prepare exhibits outlining the boundary of the flood zone and identifying the Base Flood Elevation per the Zone AE Designation
- c. Prepare a Flood Analysis Summary with the results, conclusions, and modifications for adequate flood protection summarized

**IV. Production Area Design Assessment**

- a. Review the production area and verify that
  - i. Corrals drain to wastewater pond
  - ii. Milk Parlor, Barn areas drain to wastewater pond
  - iii. Manure and Feed Storage areas drain to wastewater pond
- b. Determine any modifications needed to divert run-off to wastewater pond

- c. Prepare a Technical Report summarizing results and conclusions

V. **Operation and Maintenance Plan**

- a. Prepare Draft Operation and Maintenance Plan and review the plan with owner for consistency and update as needed
- b. Prepare a Technical Report summarizing plan

VI. **Backflow Prevention**

- a. Verify that there are no cross connections on any irrigation or domestic wells
- b. Provide a summary report identifying the wells with adequate backflow prevention.

4Creeks, Inc. will provided the services described above on a fixed fee basis. Please note that this fee only includes the portions above in the waste management plan portion of the General Order.

**Total Fixed Fee: \$7,500**

*This fee amount will expire after 30 days of delivering the proposal. After the 30 day period, 4Creeks, Inc. will re-evaluate the fee, which may increase based on capacity of work at 4Creeks, Inc.*

**25% Retainer Amount Due: \$1,875**

4Creeks, Inc. will require a 25% retainer to be paid prior to commencing work. Upon a complete draft submittal to the owner for review prior to submittal, the project will be billed to 75%. Upon completing the final document and providing it to the owner, the project will be billed to 100%.

*The final WMP will not be submitted until payment has been received in full for the project. If this is not possible, please discuss with 4Creeks and a separate payment agreement may be discussed.*



## Innovative Ag Services, LLC

1201 Lacey Blvd., Suite 5 Hanford, CA 93230  
Office (559) 587-2800 Fax (559) 587-2801

### Regulatory Service Agreement

#### INTRODUCTION

The following agreement has been prepared by Innovative Ag Services, LLC (IAS) to provide agronomic and environmental consulting services for Jim Sweeny (Client) to address regulatory compliance for the SWEENEY DAIRY (Facility), located at 30712 ROAD 172, Visalia CA 93277 (Facility Address).

#### SCOPE OF WORK

The scope of work identified in this proposal includes the services needed to address the agronomic expertise necessary for your facility.

#### \*REGIONAL WATER QUALITY CONTROL BOARD (RWQCB) STANDARD SERVICES\*

##### I. NUTRIENT MANAGEMENT PLAN – \$5,000.00

- a. IAS will provide a Nutrient Management Plan (NMP) to meet the requirements of the General Order for Existing Milk Cow Dairy R5-2007-0035. The NMP will be prepared by a Certified Nutrient Management Specialist and provide recommendations designed to maximize returns while complying with the RWQCB using the most recent and available laboratory data from the Monitoring and Reporting Program (MRP) on your dairy facility.
- b. A Certified Crop Advisor (CCA) will perform a site visit to inspect the farming operation and verify the agronomic capacity of the farming operation.
- c. The Client agrees to provide IAS with all laboratory data and record keeping records that are available.
- d. Since the NMP is a plan for the upcoming year, IAS can modify the report to meet current operation or prepare one of the upcoming season.

##### II. ANNUAL REPORT – \$3,000.00

- a. IAS will prepare and submit the required "Annual Report" of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies R5-2007-0035
- b. The client agrees to provide a complete copy of all their MRP results for the previous year by February 1<sup>st</sup>.

##### III. RECORD KEEPING SYSTEM SET-UP – \$550.00

- a. IAS will provide a record keeping system to comply with the Waste Discharge Requirements General Order R5-2007-0035 that is customized specifically for your facility.

##### IV. MONTHLY RECORD KEEPING – \$350.00 per month

- a. IAS will provide monthly record keeping services to assist the dairy facility meet its MRP requirements of the Waste Discharge Requirements General Order R5-2007-0035, including monthly pictures.
- b. This monthly fee will be charged to the client and continue on an annual automatic renewal agreement.
- c. A set-up fee of \$350.00 will be charged to set up the record keeping system where applicable.

# **ATTACHMENT 14**

From: Japlus3 <japlus3@aol.com>  
To: dessary <dessary@waterboards.ca.gov>  
Cc: klandau <klandau@waterboards.ca.gov>; amayer <amayer@waterboards.ca.gov>; MOkamoto <MOkamoto@waterboards.ca.gov>; crodgers <crodgers@waterboards.ca.gov>  
Subject: In the matter of the Administrative Civil Liability Complaint R5-2011-0562 Sweeney Dairy  
Date: Mon, Jun 20, 2011 9:07 pm

**To: Receptionist, Fresno Office (445-5910 fax)**

**And to Dale Essary** [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

**Central Valley Regional Water Quality Control Board**

**Date: June 20, 2011**

**Re: In the matter of the Administrative Civil Liability Complaint R5-2011-0562  
Sweeney Dairy**

Dear Mr. Essary and Receptionist:

To allow us to adequately prepare for the hearings before the Hearing Panel and the regional board in the above matter, we are requesting copies of the following that we believe are in your possession:

1. All letters, reports and other documents submitted by us or by our agents/consultants to CVRWQCB from January 1, 1998 to the present.
2. All letters and notices sent by CVRWQCB staff to us from and after January 1, 1998.
3. All memorandum and reports that CVRWQCB has prepared concerning our dairy from January 1, 1998 to the present, including the results of any on-site inspections performed by CVRWQCB staff from January 1, 1998 to the present.
4. All studies, evidence and testimony that CVRWQCB received, considered, or utilized in connection with its development and/or adoption of Order R5-2007-0035.
5. All submissions and correspondence that CVRWQCB sent to the Office of Administrative Law regarding the preparation and adoption of Order R5-2007-0035 and of the 1995 Tulare Lake Basin Water Quality Control Plan.

In order for us to adequately prepare for said hearings, the foregoing copies must be made available to us no later than June 30, 2011 at 5 p.m. Please inform us by email when and where they are available and the cost you are charging to make the copies.

Sincerely,

Jim Sweeney

Cc: [klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)  
[amayer@waterboards.ca.gov](mailto:amayer@waterboards.ca.gov)  
[MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov)  
[crodgers@waterboards.ca.gov](mailto:crodgers@waterboards.ca.gov)

14

# **ATTACHMENT 15**

**To:** Alex Mayer [AMayer@waterboards.ca.gov](mailto:AMayer@waterboards.ca.gov)

**Cc:** [klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)

[MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov)

[dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

**Date:** July 1, 2011

**Re:** Complaint R5-2011-0562 – Sweeney

Dear Mr. Mayer:

We have succeeded in obtaining copies of documents (a) 14, (a) 17 through (21), and no longer need to identify them by reference. Treat them as identified. Since we believe they are all in your agency's possession, we believe it is unnecessary for us to send them to you as copies. If your agency cannot locate any of them let me know.

After being served with the Complaint on May 8, it has taken a great deal of time for us to evaluate the situation, to acquaint ourselves with the applicable law, to determine what documents we needed to review, to request and obtain them, to develop our legal arguments and to prepare for the hearings. We asked for a continuance of the hearings on June 1, 2011, and you waited to inform us of your denial of the request until June 13, the day when we had already submitted to you an identification of all documents, evidence, witnesses and legal arguments that we intended to use; otherwise we would be deprived of the right to use them.

We requested items (a) 22 and 23 from your agency under a Public Records Act request on June 20, 2011. We just received them from your Fresno office. These documents may be extremely critical to our case. They consist of over 250 pages, and will take us a great deal of time to review and evaluate them.

We once again request a continuance of the hearing before the Hearing Panel for at least 30 days. If you deny our request for a continuance, you are expecting us to be fully prepared for the hearing on July 14, a mere five weeks after becoming aware of your Complaint, and only two weeks after we have received the above-mentioned documents. It is not only insane, it is outrageous, unreasonable and unfair. It will result in us challenging further proceedings on grounds that we have effectively been denied due process and a fair hearing.

Sincerely,

Jim Sweeney

# **ATTACHMENT 16**

**To: Central Valley Regional Water Quality Control Board Hearing Panel**

**Cc: AMayer@waterboards.ca.gov**

**klandau@waterboards.ca.gov**

**MOkamoto@waterboards.ca.gov**

**dessary@waterboards.ca.gov**

**Date: July 8, 2011**

**Re: Complaint R5-2011-0562 – Sweeney Dairy**

**Written Testimony**

My name is James Sweeney, and my wife and I are the named Dischargers under the Central Valley Regional Water Quality Control Board's Administrative Civil Liability Complaint R5-2011-00562.

I begin by asking once again for a continuance of this proceeding on grounds that to refuse our request gives us insufficient time to develop our defense against the Complaint and therefore deprives us of a fair hearing.

**Facts.**

We operate a small dairy at 30712 Road 170, Visalia, CA. We milk around 300 cows on a site where a dairy has continuously been conducted for over eighty years. We are a small business in that our gross receipts from our agricultural operation were under \$1,000,000.00 in 2009.

Your agency's Order No. R5-2007-0035, as amended by Order No. R5-2009-0029 ("Order"), compelled us, along with all other dairymen, to prepare and file with your agency by July 1, 2010 the 2009 Annual Report, including an Annual Dairy Facility Assessment for 2009, and a Waste Management Plan, which consists of the following reports: (1) Retrofitting Plan for needed improvement to storage capacity, flood protection or design of the production area, (2) Dairy site and Cropland maps, (3) Wastewater lagoon capacity evaluation, (4) Flood protection evaluation, (5) Dairy and cropland design and construction evaluation, (6) Cross-connection assessment report. The Order required most of these reports, technical and otherwise, to be prepared by appropriately licensed professionals/engineers and consultants, who are very expensive. And these burdens do not include the costs of the expensive reports that we are required to submit to the San Joaquin Valley Air Pollution Control District. In total, we were facing regulatory costs of approximately \$20,000.00.

The dairy industry suffered through a dreadful period in 2009 due to a combination of low milk prices and high feed costs that were unprecedented in recent memory. It was a period from which many of us dairymen have not yet recovered. Indeed, your agency's 2009 Order acknowledged

the seriousness of the dairy industry's economic situation by postponing for a year the filing date for most of the above reports.

Our dairy was losing money in 2009 and in 2010. By the fall of 2009, our lender had categorized our loan as "distressed," and it advanced us a limited amount of funds that was barely enough to purchase feed and to pay such essentials as labor and utility bills. Had we used these funds to hire the engineers and consultants needed to prepare these reports, then we would have been put in a position where we would have been guilty of fraud - buying feed from farmers while knowing that we would have not have the funds to pay for it. On a per cow basis, the regulatory costs imposed by the Order's requirements are disproportionately higher for small dairies as compared to large operations, and put small dairies at a competitive disadvantage and threaten their very survival.

Environmental groups and your agency have both at times been critical of large dairies, calling them "mega dairies" and "factory farms." It is true that larger dairies discharge larger volumes of waste and generally pose a greater potential threat to our groundwater. Yet, ironically, your agency has adopted burdensome monitoring and reporting requirements that put extra pressure on smaller dairies to the extent of driving some of them out of business. I know of a number of small dairies who told me they sold out because they knew they could not afford the costs of complying with your agency's reporting requirements. As a result, perhaps unwittingly, your agency's requirements are causing large dairies to grow even larger as they fill the production lost by the small dairies going out of business.

On March 28, 2010, more than three months before the July 1, 2010 filing deadline, we wrote a letter to your agency asking for an extension of the deadline for submission of these reports. Anticipating that the staff would refuse to grant said relief, we asked the staff in our letter of April 7, 2010 to schedule the matter for a face-to-face hearing before the regional board so that we could present our request for a modification of the Order.

In their letter of June 15, 2010, the Central Valley staff stated that they had no authority to modify the reporting requirements, and they refused to schedule a formal, agenda-item hearing before the regional board. Instead, they advised us that we were free to address the Board during the Public Forum section of their Agenda, even though such presentations are limited to 3 minutes.

In letters dated July 27, 2010, and August 22, 2010 we continued to press the staff to schedule a hearing before the regional board. Yet, your agency continued to deny our request for a hearing before the board.

We heard nothing from your staff until May 10, 2011 when we received the Complaint by certified mail.

### **Legal Arguments.**

1. Your agency is denying us due process for the following reasons:
  - (a) On August 16, 2010, your agency sent us Notices of Violation, specifying our failure to file the above-named reports by the July 1 deadline. We did not receive your Administrative Civil Liability Complaint until May 10, 2011, almost nine months

later. Attached to the Complaint was a description of the hearing protocols, including various deadlines. One of these deadlines was that we had to notify your agency of any documents, evidence, witnesses and legal arguments we intended to use or make at the hearing by June 13, 2011, only 33 days after receiving the Complaint. According to your self-serving rules, we could not use anything we did not identify, produce or submit as legal argument by that date. We are full time dairymen. Because we are small I do some of the milking and much of the feeding and cow care, and we have very little time each day to work on this matter. We asked your agency in writing for an extension of the hearing dates, waiving the 90-day requirement. But your agency refused to grant our request.

(b) On June 20, 2011 we made a Public Records Act request, asking for copies of all documents in your agency's file concerning information on our dairy, and we asked that they be provided by June 30, 2011 so that we would have time to review and evaluate them before the hearing. We were advised by agency counsel that because the documents were "voluminous" this request was "not practicable." We were told that we would have to make arrangements to go to your agency's Fresno office to personally go through the files. If the task was "impracticable" for your agency, it was certainly "impracticable" for us, as we have very few available hours beyond our full time duties at the dairy. Finally, the copies we requested were made available to us on June 30, 2011. They consist of 250 pages of documents, and while we have tried to completely review and evaluate them all, we have not been able to adequately do so before the hearing. This is additional evidence why a continuance of the hearing was needed and why a refusal to grant a continuance constituted an abuse of discretion and a denial of due process. Water Code Section 13292 states that it is the state water board's responsibility to ensure that the regional boards provide "fair" access to participants in its proceedings and to improve its "adjudication procedures." In short, your agency's self-written Hearing Procedures is a quagmire of detailed and confusing protocols and short-fused deadlines. That and your refusal to grant a continuance effectively deprives us of an opportunity to satisfactorily prepare our evidence, to adequately make our case, and to defend ourselves against the Complaint. We have little doubt that it is all of intentional design to overwhelm, intimidate, discourage and set traps against anyone who would otherwise want to challenge the agency or any of its rules and regulations. We intend to bring this sad situation to the attention of the state board in the near future, and if necessary to a superior court.

2. The Administrative Civil Liability Complaint filed against us is premature, for the following reasons.

(a) Section 13269 of the Water Code recites that a regional board may waive monitoring requirements if it determines that a discharge does "not pose a significant threat to water quality." The 2009 Order declares that it "serves as general waste discharge requirements of waste from existing milk cow dairies ... of all sizes." (2007 Order, p.1) Under the Order's terms, a Discharger has the right to seek a modification of any of those general waste discharge requirements. (2007 Order, SPRR-2) The reporting

requirements, including the filing deadlines for annual and technical reports, are part of the Order's general waste discharge requirements for which a dairyman may seek modification, exemption or other similar relief.

- (b) While the regional board may delegate some of its powers and duties, some are not delegable. The modification of any waste discharge requirement is one of those powers and duties that are not delegable. (Water Code Section 13223) It was the regional board's nondelegable duty and responsibility to hear and decide our request for relief.
- (c) Thus, we believe we have a right to appear before the regional board to seek a modification or waiver from any of the Order's general waste discharge requirements. Had your agency's staff scheduled a hearing before the regional board, it is possible that the regional board would have granted us relief from these deadlines, in which case, we would not be in violation of the filing requirements. The filing and serving of your Complaint for Administrative Civil Liability is premature. Your agency cannot contend that we have violated the filing requirements until such time as the regional board has heard and denied our request and after we have exhausted our appeal and all other legal remedies afforded us under the Water Code. (Water Code Sections 13320, 13325, and 13330)

3. The Order is unlawful and unenforceable in that it fails to comply with applicable provisions of the Water Code in the following ways:

- (a) The "Monitoring and Reporting Program" of the 2007 Order recites that it is issued pursuant to Water Code Section 13267. (2007 Order, p. MRP-1) Section 13267 (b) (1) states that "the regional board may require that any person who ... discharges ... waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

But Section 13267 (b) (1) goes on to say that "The burden, including costs, of the reports shall bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports. In requiring these 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."

Your agency has failed to comply with Section 13267 in that it never provided us "with a written explanation with regard for the need for the reports," and it has failed to "identify the evidence that supports requiring [us] to provide the reports."

Had we been allowed to appear before the regional board, we were prepared to show that our site has continuously had a dairy operating on it for over eighty years. We were prepared to show that we have submitted to your agency water sample test results from each of our wells in 2003, 2007 and 2009. All well results were and are substantially below the state's maximum contaminant levels (MCL) Not only that, our most recent water samples from our wells tested .2, 1.1 and 1.4 mg/L for nitrate

nitrogen levels –unheard of low levels. Such results indicate that our operation is not and has not been a threat to the ground water underlying our dairy site.

We were intending to show the regional board the foregoing well-water test results and intended to argue that they were compelling evidence that our operation was not adversely impacting ground water, and therefore the cost of these reports did not, in the words of Section 13267, “bear a reasonable relationship to the need for the reports and the benefits to be obtained from the reports.”

Over the years, your agency’s staff has visited our dairy site to inspect and obtain information about it. For example, your Ken Jones visited our dairy in 2003 and spent a day gathering information. He measured and calculated the storage capacity of our ~~two~~ waste water lagoons and concluded that our storage capacity was 128% of what your agency required, and concluded that we had excess cropland for application of waste water (we have his letter confirming that our dairy was in full compliance with all RWQCB requirements). Yet, your agency is now requiring me to hire licensed engineers to re-calculate the storage capacity of our lagoons at a cost of \$7500.00, as well as other new reports that must be prepared by engineers and other licensed professionals that we believe are, for the most part, duplicative, and add nothing useful or valuable, besides being terribly costly. In this regard, your agency’s refusal to accept already available information in its files ignores Section 13267’s requirement that your agency’s reports should “bear a reasonable relationship to the need for the reports.” For the most part, your required Waste Management Reports are redundant, unneeded and unjustified.

- (b) Water Code Section 13263 (e) provides that “any affected person may apply to the regional board to review and revise its waste discharge requirements. All requirements shall be reviewed periodically.” If new and more cost effective ways can accomplish the same purpose, we contend that the regional board is under a legal duty to review such issues and revise its requirements accordingly. New and old research and advanced technologies exist which may provide less expensive means for evaluating groundwater contamination risk, of determining non-contamination of groundwater, and of using less expensive practices that can still prevent such contamination.

For example, Lawrence Livermore National Laboratory published two papers in 2007 in *Environmental Science Technology*, in which they stated that they discovered that soil bacteria break down and eliminate nitrates in dairy waste water in a substantial if not complete degree. They have also ascertained that there are certain compounds and gasses in manure water that can be used to determine whether water from dairy lagoons or from waste applied in irrigation water has infiltrated into first encountered groundwater. There are also simple and inexpensive ways to show the amount of highly compacted clay layers sitting beneath a dairy site and whether they constitute an impervious barrier between the dairy and the groundwater.

Yet, your Order contains a “one-size-fits-all” approach, and requires reports that in some cases may not be needed. Some of these reports are ludicrous and unnecessary.

One laughable example is that we are required to provide monthly photos of our lagoons to show that the water level was not too high. This is as absurd as requiring us to photograph our speedometer each month to prove we didn't drive over the speed limit.

In short, most of the Order's reporting requirements are primitive, antiquated, obsolete, and provide nothing of real value, except for lining the pockets of engineers, consultants and laboratories. We contend that your agency will be unable to show that it has continued to sufficiently examine and consider such research results and advanced technologies, or that it has modified its Order accordingly. The foregoing represents another reason why the Complaint against us is premature. Had our request been scheduled for a hearing before the regional board and had we been allowed the opportunity to present in detail all of the matters and issues described above, we believe that there were abundant grounds under which the regional board could have granted us considerable relief from many of its reporting requirements. In such event, there would not have been a basis for filing the Complaint against us.

- (c) The Order's waste discharge requirements as they relate to water quality objectives must take into account economic considerations. (Water Code Sections 13241 and 13263 (a)) The Order does not do so, particularly failing to set or implement water quality objectives that are within the economic means of smaller dairies that have to deal with disproportionately higher per cow reporting costs. Indeed, the Order fails to address the special economic circumstances of smaller dairies in any way whatsoever. In contrast, the SJ Valley Air Pollution Control District exempts smaller dairies from many of its requirements.
- (d) The California Administrative Procedure Act ("CAPA"- Chapter 3.5 of the California Government Code, Section 11340 et seq), is intended to keep the regulations of state agencies from becoming unreasonably costly and otherwise burdensome. Indeed, Section 11340 of CAPA recites that the legislature found that "the complexity and lack of clarity in many regulations put small businesses, which do not have the resources to hire experts to assist them, at a distinct disadvantage." CAPA created the Office of Administrative Law to administer the Act. Section 11340.1 goes on to declare that it is the legislature's intent under CAPA for state agencies to "actively seek to reduce the unnecessary regulatory burden on private individuals." It is undisputed that the regional water boards are state agencies.

While it is true that Section 11340.9 (i) of CAPA states that this chapter does not apply to a number of matters, including a regulation that "does not apply generally throughout the state," it does apply however, under Section 11353, to "any policy, plan or guideline" that (1) the State Water Resources Control Board has adopted after June 1, 1992, or (2) that a court determines is subject to this part. In other words, Section 11353 is a specific exception to the more general exception under 11340.9 (i). Section 11353 goes on to say that the policies, plans and guidelines adopted by the SWRCB are not effective until their regulatory provisions are approved by the Office of Administrative Law. Even your agency admitted in its Forward to the Tulare Lake

Basin Water Quality Plan (2<sup>nd</sup> ed., 1995) that the Tulare Lake Basin Plan needed to be adopted by the SWRCB in order to be effective, and that it had to be approved by the Office of Administrative Law (under CAPA). Even though the Tulare Lake Basin Plan is regional in nature, once adopted by the SWRCB, your agency recognized that it became subject to the requirements of CAPA. This is not illogical since the entire State has an interest in and is affected by how the waters of the Central Valley Basin, including the Tulare Lake Basin, are regulated. Excess surface waters from these basins flow to the San Francisco Bay, for example. Therefore, the burden is on your agency to show that the Tulare Lake Basin Plan was approved by the Office of Administrative Law.

Paragraph 14, page 3, of the 2007 Order recites that it is implementing the Tulare Lake Basin Plan, SWRCB Resolution 68-16, among other things. It makes no logical sense for your agency to claim that the 2007 Order is not an extension of the Tulare Lake Basin Plan, a State adopted Plan, and therefore is not subject to the requirements of CAPA. Unless your agency can show that the provisions of the Order were processed in accordance with CAPA provisions, it is our contention that the Order is invalid and not effective.

It is also our contention that we can file an action for declaratory relief with the superior court, under Sections 11350 and 11353, under which we ask the court whether this Order is a "regulation" that should be subject to the requirements of CAPA. Given the significant adverse impact that the Order has on small dairies, we believe a court will be inclined to find a way to declare that the Order is subject to CAPA requirements.

### **Concluding comments**

In closing, let me make some final grim observations. It is extremely troublesome that the Agency's staff prepared the Complaint but purposely chose to not mention the letters we wrote prior to the filing deadline and thereafter. The Complaint also failed to mention that we had often requested a hearing before the regional board. Thus, the Complaint is inherently deceptive and prejudicial. This only serves to bolster our contention that your Agency abuses its legal and discretionary powers.

Most dairymen, me included, appreciate the resources under our stewardship. We care about the environment and deeply respect nature. We drink the water; our families will live on this land for generations. Classifying us as ungrateful, apathetic enemies to water quality is a flagrant falsehood and unjust. Besides a deep investment our land and community, we have a demonstrable commitment to water quality and the health of this precious resource. You must agree that we are not here because of any allegation of pollution; in fact the evidence is that we have not polluted at all. It is all about us not filing unaffordable reports, and even here, we tried to approach it the right way. Before the deadline we sought a hearing to ask for relief.

I, like hundreds of other dairymen, have worked a lifetime to build my dream. We work with our animals and land to produce high-quality milk. However, the unreasonable expense of reporting

requirements is forcing us from business. Your agency has imposed "country club" regulations-- only large dairies with the resources to comply will be allowed to stay in business. I agree that polluters should be punished. However, your distinction between 'compliers' and 'non-compliers' has absolutely nothing to do with water quality. Small family dairies like ours, which has a verified record of outstanding water quality, are being eliminated because of lack of funds. Where was your economic analysis for smaller dairies? Were small dairies examined? Has anyone considered sustainable agriculture?

I continue to be denied due process. It is impossible to receive a fair hearing: your agency makes all the rules, selects the judges, decides which evidence can be allowed, and even requires that we submit our testimony to you before the hearing. And your agency knows that someone as small as me doesn't have the resources to challenge your authority.

There seems to be a striking similarity between how your agency treats us and how the U.S. government treated the American Indian. The government convinced the public that this "dangerous threat" should be forcefully confined to reservations. Native people were blamed, denied fair hearings, and their voices were silenced. Thousands of Native Americans were killed, their land taken, and their cultures destroyed. Tribes who resisted met extreme hostility and were forced into submission.

Today, injustice takes a new form. It is one-sided power. Your agency holds all the cards. You have made it economically unfeasible for our small dairy to comply with your reporting requirements, and have created a daunting, very unfair hearing process.

Once small family dairies are gone, they are gone forever. I can't help but feel much the same as early American Indians as you push us into submission and try to break our spirit.

Sincerely,

Jim Sweeney

# **ATTACHMENT 17**

**From:** Alex Mayer <AMayer@waterboards.ca.gov>  
**To:** japlus3 <japlus3@aol.com>; Dale Essary <dessary@waterboards.ca.gov>; Mayumi Okamoto <MOkamoto@waterboards.ca.gov>  
**Cc:** Ken Landau <klandau@waterboards.ca.gov>  
**Subject:** ACL Complaint No. R5-2011-0562 - Sweeney Dairy  
**Date:** Tue, Jul 12, 2011 2:32 pm

The Chair of the Fresno Hearing Panel has made rulings on three procedural matters in regards to the hearing for ACL Complaint No. R5-2011-0562. As described below, the rulings are as follows. First, Mr. Sweeney's requests for continuance dated July 1 and July 8 are denied. The hearing for ACL Complaint No. R5-2011-0562 will remain on the calendar as scheduled for 14 July 2011. Next, Mr. Sweeney's 13 June 2011 request to incorporate evidence into the record by reference is denied as to items (a)(14) and (a)(17) through (a)(23). Finally, the evidence submitted by Mr. Sweeney on 11 July 2011 will not be admitted into the record.

#### Requests for Continuance

Mr. Sweeney's requests for continuance dated 1 July 2011 and 8 July 2011 are denied. Mr. Sweeney sought a 30-day continuance on the stated basis that he did not have enough time to prepare for the hearing. Mr. Sweeney has had sufficient time to prepare for the hearing. The request is denied because Mr. Sweeney has not established good cause that the hearing should be continued by 30 days.

#### Incorporation by Reference

Mr. Sweeney's 13 June 2011 request to incorporate evidence into the record by reference is denied as to items (a)(14) and (a)(17) through (a)(23). By letter dated 13 June 2011, Mr. Sweeney requested that a number of documents be entered into the administrative record by reference. On 30 June 2011, the Chair informed Mr. Sweeney how the request did not comply with the requirements set forth in 23 Cal. Code Regs. § 648.3 with respect to those items. That regulation requires the requesting party to specifically identify "each exhibit" to be introduced into the record. It also requires requestors to "designate the particular portions on which the party relies."

The Chair requested Mr. Sweeney to provide the missing information by 7 July 2011 before ruling on the request. Mr. Sweeney did not provide the requested information by that date. For those items, the request to incorporate evidence into the record by reference does not comply with 23 Cal. Code Regs. § 648.3. Accordingly, the request to incorporate those items by reference is denied.

#### July 11, 2011 Evidentiary Submission

The evidence submitted by Mr. Sweeney on 11 July 2011 will not be admitted into the record. On that date, Mr. Sweeney submitted a package of exhibits numbered 25 through 42. In the submittal, Mr. Sweeney did not explain why the exhibits were being submitted after the 13 June 2011 deadline found in the hearing procedures for this proceeding. The Prosecution Team objected to this submission on the basis that the deadline to submit evidence for this case had passed and that the submission contained new evidence that had not been previously submitted or contained evidence that was already part of the administrative record. Because this evidence was not provided by the deadline specified in this procedure, because some of the evidence is already in the administrative record, and because Mr. Sweeney has not demonstrated that compliance with the 13 June 2011 deadline would have created a severe hardship, the 11 July 2011 evidentiary submission is denied.

Sincerely,

Alex P. Mayer  
Staff Counsel, Central Valley Regional Water Quality Control Board

# **ATTACHMENT 18**

HEARING PANEL REPORT  
Sweeney Dairy  
ACL Complaint No. R5-2011-0562

James G. and Amelia M. Sweeney  
Sweeney Dairy  
ACL Complaint No. R5-2011-0562

**HEARING PANEL REPORT AND PROPOSED ORDER**

This matter was heard on 14 July 2010 in Fresno, California before a Hearing Panel consisting of Central Valley Regional Water Quality Control Board (Central Valley Water Board) Members Karl Longley, Sandra Meraz, and Dan Odenweller. Alex Mayer and Ken Landau were Panel Advisors. Mr. James Sweeney appeared on behalf of himself and Amelia M. Sweeney (Discharger). Clay Rodgers, Doug Patteson, Dale Essary and Mayumi Okamoto appeared for the Prosecution Team.

The Hearing Panel makes the following determinations:

**FINDINGS OF FACT**

1. The Discharger owns and operates the Sweeney Dairy (Dairy) located at 30712 Road 170, Visalia, California, County of Tulare.
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007. Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order. The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. The General Order and the MRP required that an Annual Report for the calendar year 2009 be submitted for regulated facilities by 1 July 2010 (2009 Annual Report), including the following components: a revised Annual Dairy Facility Assessment, with facility modifications implemented to date; and a status on facility retrofitting completed as proposed in the Nutrient Management Plan submittal that was due 1 July 2009.
4. The General Order required regulated facilities to submit a Waste Management Plan (WMP) by 1 July 2009. The General Order was amended by Order R5-2009-0029 to modify the compliance schedule, extending the deadline to submit the WMP to 1 July 2010 in order to give regulated parties additional time to come in to compliance. The WMP is required to have the following components: a retrofitting plan, with schedule, needed to improve storage capacity; flood protection, or design of production area; maps of the production area and land application area; a wastewater storage capacity evaluation; a flood protection evaluation; a production area design/construction evaluation; and documentation that there are no cross connections.

HEARING PANEL REPORT  
Sweeney Dairy  
ACL Complaint No. R5-2011-0562

5. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the 2009 Annual Report with appurtenant components had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
6. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the Waste Management Plan with appurtenant components had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
7. Central Valley Water Board's compliance tracking system and case files indicate that the Board has not received the 2009 Annual Report or the Waste Management Plan.
8. CWC section 13268(a)(1) states that "Any person failing or refusing to furnish technical or monitoring reports as required by subdivision (b) of Section 13267...is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."
9. CWC section 13268(b)(1) states that "Civil Liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violations occurs."
10. On 5 May 2011, the Executive Officer issued Administrative Civil Liability Complaint (Complaint) No. R5-2011-0562 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$11,400 pursuant to CWC section 13268 for the failure to submit the 2009 Annual Report and Waste Management Plan as required by the General Order.
11. The Discharger violated the requirements of the General Order and MRP by failing to submit the 2009 Annual Report by the required deadline of 1 July 2010. As of the date of the Complaint, the 2009 Annual Report was 308 days late.
12. The Discharger violated the requirements of the General Order and MRP by failing to submit a Waste Management Plan by the required deadline of 1 July 2010. As of the date of the Complaint, the 2009 Annual Report was 308 days late.
13. On 17 November 2009 the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy establishes a methodology for assessing discretionary administrative civil liability. Use of the methodology

HEARING PANEL REPORT  
Sweeney Dairy  
ACL Complaint No. R5-2011-0562

addresses the factors used to assess a penalty under CWC section 13327 including the Discharger's culpability, history of violations, ability to pay and continue in business, economic benefit, and other factors as justice may require. The required factors under CWC section 13327 have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A and shown in the Penalty Calculation for Civil Liability spreadsheet in Attachment B. Attachments A and B are attached hereto and incorporated herein by reference.

14. In general, violations of CWC section 13267 are assessed on a per day basis. Under the Enforcement Policy, an alternate approach to the penalty calculation for multiple day violations may be used if the regional board makes express findings that the violations do not cause daily detrimental impacts to the environment, result in no daily economic benefit that can be measured on a daily basis or occurred without the knowledge or control of the violator. Here, the failure to submit the required reports does not cause a daily detrimental impact to the environment and does not result in an economic benefit that can be measured on a daily basis, so the alternative approach is appropriate. Under this alternate approach, daily penalties are assessed for the first day of violation, plus one day for each 5-day period of violation until the 30<sup>th</sup> day, plus a one-day assessment for each additional thirty-day period of violation. In accordance with the alternative approach, a total of 16 days of violation have been assessed for the failure to submit the 2009 Annual Report, and a total of 16 days of violation have been assessed for the failure to submit a WMP.
15. On considering the written record and evidence presented at the hearing, the Hearing Panel determined that \$11,400 should be imposed on the Discharger pursuant to CWC section 13268 for violations of CWC section 13267.

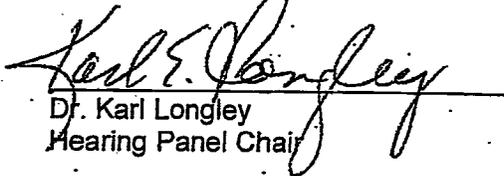
#### CONCLUSIONS OF LAW

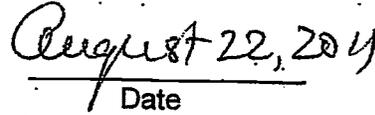
1. The failure to submit the 2009 Annual Report constitutes a violation of CWC section 13267.
2. The failure to submit the Waste Management Plan constitutes a violation of CWC section 13267.
3. Pursuant to CWC section 13268, the Central Valley Water Board may impose administrative civil liability up to \$1,000 for each day of violation.
4. The total maximum amount of administrative civil liability assessable for the violations alleged in Complaint No. R5-2011-0562 pursuant to CWC section 13268 is \$616,000.

HEARING PANEL REPORT  
Sweeney Dairy  
ACL Complaint No. R5-2011-0562

RECOMMENDED ADMINISTRATIVE CIVIL LIABILITY AMOUNT

The Hearing Panel recommends that the Central Valley Water Board impose administrative civil liability in the amount of \$11,400 on the Discharger for violations found herein to have been committed by the Discharger. A proposed ACL Order is attached.

  
Dr. Karl Longley  
Hearing Panel Chair

  
Date

Attachment A Enforcement Policy methodology  
Attachment B Penalty Calculation for Civil Liability spreadsheet  
Proposed Administrative Civil Liability Order R5-2011-XXXX

# **ATTACHMENT 19**

**To: Central Valley Regional Water Quality Control Board**

**Cc: [dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)**

**[AMayer@waterboards.ca.gov](mailto:AMayer@waterboards.ca.gov)**

**[klandau@waterboards.ca.gov](mailto:klandau@waterboards.ca.gov)**

**[MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov)**

**Date: July 27 2011**

**Re: Complaint R5-2011-0562 – Sweeney Dairy**

**Confirmation of Hearing Date and Time**

Dear Regional Board/Mr. Essary

My wife and I intend to appear before your board to present evidence, testimony and argument in opposition to the above referenced Administrative Civil Liability Complaint that was served on my wife and I on May 10, 2011.

Your website once indicated that the regional board would hold a hearing regarding the above Complaint during your August meeting in Rancho Cordova, CA. However, recently checking your agency's website, I discovered under "Tentative Orders" a reference to our matter. It said that "A hearing was conducted on this tentative Order at the 20 July 2011 Board panel hearing. The panel recommended that this matter be adopted by the full board at the 12/13/14 October 2011 board meeting."

First of all, the hearing on our matter before the Hearing Panel was held on July 14, not July 20. But more importantly, you need to provide us with prompt written clarification: Is the regional board going to hold the hearing on the above Complaint at its August or at its October meeting?

Sincerely,

Jim Sweeney

# **ATTACHMENT 20**

From: Alex Mayer <AMayer@waterboards.ca.gov>

To: Japlus3 <japlus3@aol.com>; Dale Essary <dessary@waterboards.ca.gov>; Ken Landau <klandau@waterboards.ca.gov>; Mayumi Okamoto <MOkamoto@waterboards.ca.gov>

Subject: Re: Sweeney complaint R5-2011-0562 confirmation of hearing time

Date: Wed, Jul 27, 2011 3:54 pm

---

Mr. Sweeney,

Today, the Advisory Team for ACL Complaint No. R5-2011-0562 received a letter from you electronically. In the letter, you asked whether the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) will be considering a proposed Administrative Civil Liability Order for the Sweeney Dairy at the Board meeting scheduled for 4/5 August 2011.

To answer your question, the Board will not be considering a proposed Administrative Civil Liability Order for the Sweeney Dairy at the Board meeting scheduled for 4/5 August 2011. The proposed Administrative Civil Liability Order will instead be considered at the Board meeting scheduled for 12/13/14 October 2011.

In your letter, you also stated your intent to provide evidence, testimony and argument on ACL Complaint No. R5-2011-0562 at the scheduled meeting. As written in the public agenda distributed prior to the hearing on ACL Complaint No. R5-2011-0562, and as restated by the Hearing Panel Chair at the 14 July 2011 hearing, all evidence, testimony, and policy statements must have been made at the 14 July 2011 hearing. Since the hearing is now closed, the Central Valley Water Board will not be accepting additional evidence unless the Regional Board Chair determines it necessary to reopen the hearing.

Finally your letter identifies an erroneous statement found on the Central Valley Water Board's website. That statement mistakenly indicated that the hearing on ACL complaint No. R5-2011-0562 was held on 20 July 2011. That statement will be corrected. Thank you for bringing this matter to the Board's attention.

Sincerely,

Alex Mayer  
Staff Counsel, Central Valley Regional Water Quality Control Board

>>> Japlus3 <japlus3@aol.com> 7/27/2011 11:20 AM >>>

# **ATTACHMENT 21**

**To: Alex Mayer** [AMayer@waterboards.ca.gov](mailto:AMayer@waterboards.ca.gov)

**Cc: klandau@waterboards.ca.gov**

[MOkamoto@waterboards.ca.gov](mailto:MOkamoto@waterboards.ca.gov)

[dessary@waterboards.ca.gov](mailto:dessary@waterboards.ca.gov)

**Date: September 5, 2011**

**Re: Complaint R5-2011-0562 – Sweeney**

Dear Mr. Mayer:

This letter is intended to respond to your email of July 27, 2011. We had asked you in that email to confirm when the CVRWQCB would consider the Hearing Panel's proposed order on our Complaint. Your responding email confirmed that the matter will be taken up at the regional board's October meeting.

We also advised you on July 27 that we intended to present additional evidence, testimony and argument at the regional board's October hearing. Your email response informed us that "the hearing is now closed" and that the regional board will not be accepting additional evidence, testimony or argument other than what we presented before the Hearing Panel on July 14.

We object to your position for the following reasons:

1. On June 20, 2011, we requested from your agency copies of "all studies, evidence and testimony that CVRWQCB received, considered and utilized in connection with its development and/or adoption of Order R5-2007-0035." Your agency sent us a CD on or about July 1, 2011, which contained what it referred to as "Vol. 2 and Vol. 6" of the administrative record relating to the above Order. This CD contained 851 pages of documents and transcript. Concluding that we had insufficient time to adequately review and digest this large volume of testimony and documents before the July 14, 2011 hearing, we asked on July 1, 2011 for a continuance of the hearing. You advised us on July 12, only two days before the hearing, that you denied our request for a continuance.

Suspicious that the one CD, containing only "Vol. 2 and Vol. 6," might not be all of the administrative record, we wrote to your Dale Essary on August 21, 2011, and inquired whether there was more to the administrative record. We were informed that there were three more CDs, which we picked up on August 31. Our suspicions were correct; your agency had earlier failed to provide us with Volumes 1, 3, 4, 5 and 7 through 69.

Altogether, we have discovered that the administrative record that we requested on June 20, 2011, consists of a total of 34,028 pages, of which 33,177 pages were not given to us until after the July 14 hearing. We have started the prodigious task of slogging through all of these materials in order to determine whether substantial evidence was introduced to support the need for changing the reporting requirements that were adopted in the 2007 Order. It will require a great deal more time to complete the process.

2. On June 20, 2011, we requested copies of all documents that your agency had in its files regarding our dairy. Your agency provided us with these copies, consisting of 253 pages, on June 30, only two weeks before the July 14 hearing. With insufficient time to review them, and to develop additional legal arguments based on the results of this review. This was another reason why we asked on July 1 that the hearing before the Hearing Panel be continued, which you denied.

Since the July 14 hearing, we have been able to digest these documents relating to our dairy and have found that a number of them are relevant to our matter and provide us with new legal arguments that we wish to make. We need the opportunity to present them to the regional board and to make our additional arguments.

3. On June 20, 2011, we also requested from your agency copies of "all submissions and correspondence that the CVRWQCB sent to the Office of Administrative Law regarding the preparation and adoption of ... the 1995 Tulare Lake Basin Water Quality Control Plan." On June 26, 2011 we asked your agency to provide us with a copy of the Office of Administrative Law's approval of the 1995 Tulare Lake Basin Water Quality Control Plan. Your agency has not provided us with any of the foregoing, depriving us of potentially important evidence for the July 14, 2011 hearing.
4. Your staff made statements at the July 14 hearing that we believe is relevant evidence supporting some of the legal arguments we intend to make. In reviewing the transcript of the July 14 hearing, we have identified these statements and need to be able to testify about them and argue their legal significance before the regional board.
5. Your Hearing Procedure for the hearing before the Hearing Panel specified that any rebuttal evidence and testimony had to be submitted no later than June 27, and that anything not submitted by that deadline was subject to being excluded from what could be presented to the Hearing Panel. We received the Prosecution Team's rebuttal by email attachment on June 27. In reviewing the transcript of the hearing before the Hearing Panel held on July 14, we have identified where the Prosecution Team presented evidence and testimony that was neither set forth in the Complaint nor contained in their rebuttal submission. As your Hearing Procedure states, the purpose of its procedures is "to avoid surprise testimony or evidence." Understandably, we were not prepared to deal with this "surprise" evidence and testimony at the July 14 hearing. In failing to enforce your own rules, you put us in a position where we were unprepared to respond to this "surprise" evidence.
6. We have read 23 CCR, section 648.4 and it states that your agency can require parties to submit evidence and proposed testimony prior to a hearing before a regional board provided that it is submitted by a date specified in the hearing notice. The only hearing notice we have received so far in which deadlines for evidence submissions were set forth was the Hearing Procedures for the Hearing Panel (which was attached to the Complaint).

We are unaware of you sending us a hearing notice for the October regional board hearing in which you specify a reasonable deadline for evidence submission.

7. In order to provide us with a fair hearing before the regional board, we must be allowed to appear before it and must be allowed to introduce the additional evidence and arguments we have referred to above. We believe we should be afforded the opportunity to appear personally so that we will have the ability to ask questions of board members and so that board members can ask us any questions that may occur to them.
8. We should be allowed at the hearing before the regional board to ask for either a modification of Order R5-2007-0035 as it relates to us, or for a waiver of some of its reporting requirements. As you well know, we began asking as early as April 7, 2010 for an opportunity to appear before the regional board to seek relief from some of the July 1, 2010 reporting requirements set forth in your Order R5-2007-0035. We continued to ask your staff to schedule a hearing before the regional board for that purpose in follow up letters dated June 27, 2010, August 22, 2010, September 5, 2010 and, most recently, May 31, 2011. The Water Code is clear that the regional board has no right to delegate modification of waste discharge requirements to anyone but itself. Hence, we believe that any decision to not hear someone's request for a modification can only be made by the regional board and is not delegable to its staff.
9. We recently reviewed the proposed order that you will be asking the regional board to adopt against us during its October hearing on this matter. In reviewing your finding of facts, we discovered that you failed to disclose any of the forgoing facts to the regional board, which we believe is deceitful and prejudicial, and will, among other things, contribute toward the holding of an unfair hearing.
10. We have contended from the beginning that, until the regional board has heard and denied our request for relief from the reporting requirements of July 1, 2010, and that until we have exhausted all remedies provided us by law, the prosecution of an Administrative Civil Liability Complaint against us is legally premature and impermissible.

In light of the forgoing:

- a. Your proposed order on our matter is invalid because (1) you had not provided us with all requested documents before the hearing, and (2), in violation of your own rules, you allowed the Prosecution Team to introduce surprise evidence that we were unprepared to respond to. In short, the hearing before the Hearing Panel was unfair and deprived us of due process.
- b. We request that you continue our matter from the regional board's October hearing to its next scheduled meeting so that we can have sufficient time to complete our review of the 35,000 page administrative record. Finally, we want your assurances that we will be

allowed to personally testify before the regional board and to present all of the evidence that we have developed at this later hearing.

We will look forward to your timely response.

Sincerely,

Jim Sweeney

# **ATTACHMENT 22**