



## Central Valley Regional Water Quality Control Board

**TO:** Kenneth Landau  
Assistant Executive Officer

Alex Mayer, Staff Counsel  
Office of Chief Counsel  
State Water Resources Control Board

**FROM:** Joe Karkoski, Chief [*Original signed by*]  
Irrigated Lands Regulatory Program

**DATE:** 12 July 2012

**SUBJECT:** Del Mar Farms et al. Administrative Civil Liability Complaint R5-2012-0515  
Prosecution Team Response to Comments and Dischargers' Request to Rescind Complaint

Pursuant to the hearing procedures for the subject Administrative Civil Liability (ACL) Complaint R5-2012-0515 (hereafter Complaint), the designated parties had a deadline of 3 July 2012 to comment on the Complaint. Comments were received on this date from Theresa Dunham, Esq., on behalf of Del Mar Farms and Jon Maring, both named in the Complaint (collectively Del Mar Farms or DMF); and from Bernard O'Neill, also named in the Complaint.

Ms. Dunham's comments consist of an introduction, a discussion presented as three main points, and a conclusion. Mr. O'Neill's comments consist of a brief letter and his agricultural lands lease agreement with Jon Maring. The Prosecution Team's response to Ms. Dunham's comments is provided below, with the response to Mr. O'Neill's comments provided thereafter.

### *Objections*

The Prosecution Team objects to all analysis and conclusions contained in the "Technical Memorandum on Regional Water Board's Administrative Civil Liability Complaint Issued to Del Mar Farms" [dated July 3, 2012 from Michael (Mike) J. Day, P.E. to Theresa A. Dunham, Somach Simmons & Dunn], which rely on information allegedly provided in a June 29 e-mail from an individual described as Chris White, the manager of the Central California Irrigation District. The e-mail and accompanying data were not submitted as evidence by Del Mar Farms. The Prosecution Team, therefore, does not have an opportunity to verify the analysis that Mr. Day conducted, nor determine whether Mr. Day included all information in his analysis that may have been germane to the violations and potentially prejudicial to Del Mar Farms. Note on page 4 of his Memorandum, Mr. Day indicates "I combined CCID data to make maps for each day..." On page 5, he performed dilution calculations for the Amaral Line that the Prosecution Team is unable to independently verify. In these and other instances, Mr. Day conducted analysis and drew conclusions based on evidence that has not been submitted to the Prosecution Team. We respectfully request that the Advisory Team strike any such analysis or conclusions from the hearing

record, as well as any comments provided by Ms. Dunham that rely wholly or in part on that analysis and those conclusions.

*Response to Dunham Comments – Introduction*

[Theresa Dunham Response (TD) 1] Re: commenter claim that enforcement approach in this case is not typical of recent enforcement actions.

**Prosecution Team Response 1:** The commenter cites only two examples of irrigated lands enforcement actions by the board (see Exhibits D & E of Ms. Dunham's comments) and attempts to draw broad conclusions regarding the inconsistency of the current course of action with previous enforcement cases and the Enforcement Policy. The cases are not comparable, but in any event, the Enforcement Policy does not require formal notification of violations to the discharger prior to issuance of an Administrative Civil Liability complaint. The Enforcement Policy contemplates that the board may take any enforcement action appropriate to the particular circumstances of each case. In addition to the facts outlined in the Complaint, the following factors support issuing an ACL Complaint prior to other formal enforcement action: 1) Although Del Mar Farms had only recently begun managing those properties, they had been farming for thirty years on the west-side of San Joaquin Valley; have been enrolled in two coalitions since 2006; and the thousands of acres of land they currently have enrolled in the two coalitions are on the west-side of the San Joaquin Valley (see evidence submitted by the Prosecution Team on 3 July 2012). As their expert witness indicated (page 3, Day memo), furrow irrigated fields commonly cause erosion in that area. Based on their vast operations and long tenure of farming in the area, Del Mar Farms knew or should have known that furrow irrigation could result in excess sediment discharge, and they had several months to plan and implement mitigation measures prior to the 2011 irrigation season; 2) Del Mar Farms provided no evidence that they had taken any mitigation action to control the sediment discharges in 2011 after attending a presentation by Water Board staff and discussing with staff the concerns regarding their discharges; 3) the Westside San Joaquin River Watershed Coalition conducted numerous outreach meetings identifying problems related to sediments; multiple practices available to address excessive sediment; and funding opportunities to support implementation of practices (see 30 November 2010 Semi-Annual Monitoring Report – Attachment A; and 30 November 2011 Semi-Annual Monitoring Report – Attachment B); and 4) It is not the burden of the water board to formally notify dischargers of violations before the dischargers take corrective action, or before the board pursues enforcement. Del Mar Farms and the other parties named in the Complaint are responsible for implementing effective management practices to prevent violations of applicable water quality standards. Their obligation to comply with the Conditional Waiver and implement effective practices started when the parcels in question were enrolled in 2010. A grower's obligation to protect water quality does not start with the board staff investigation or with notification of violations.

[TD 2] Re: commenter claim that it is not reasonable to expect Del Mar Farms to convert irrigated lands to drip irrigation in the middle of crop season.

**Prosecution Team Response 2:** The commenter assumes that drip irrigation is the only remedy to address Del Mar Farms' discharges of excessive amounts of sediment. There are other management practices that could have been employed during the crop season (e.g., irrigation water management, check dams in furrows to reduce irrigation water velocity, sediment basins with irrigation water recycling to top of fields). Del Mar Farms is a member of the Westside San Joaquin River Watershed Coalition, which has produced a Best Management Practice Handbook that addresses practices to control sediment and manage discharges more effectively (see Attachment C). In addition, the Natural Resource Conservation Service has technical standards for agricultural practices that can reduce soil erosion and other resources are readily available that describe practices, short of installing drip irrigation, that can be used to reduce or eliminate sediment discharges from furrow irrigated fields (see Attachment D). Del Mar Farms knew or should have known of these standards and practices.

[TD 3] Re: the drip system has been installed by Del Mar Farms prior to the 2012 crop season.

**Prosecution Team Response 3:** The Prosecution Team appreciates the Dischargers' efforts to eliminate future waste discharges. However, the penalty associated with the Complaint is intended to redress past violations. In addition, the penalty should provide a deterrent to the myriad other agricultural dischargers in the area that may be discharging excess sediment. The drip irrigation system on the Del Mar Farms-operated parcels will not mitigate sediment discharges caused by rain events. The penalty is also intended to ensure that Del Mar Farms and other agricultural dischargers in the area implement and maintain management practices to avoid excessive sediment discharges during both the irrigation season and during wet weather events before violating water quality requirements and triggering enforcement action.

[TD 4] Re: the complexities of the Amaral Line.

**Prosecution Team Response 4:** Board staff inspected the Amaral Line drainage on the cited violation days and identified discharging fields and water diversions within the limitations of observing the Amaral Line from publicly accessible areas. Despite these limitations, the evidence gathered by staff is sufficient to demonstrate that the Dischargers caused or contributed to violations of applicable water quality standards in the San Joaquin River (SJR) and its tributary, the Amaral Line. Furthermore, Del Mar Farms cannot rely on intermittent and unpredictable transfers of its wastewater onto down-gradient agricultural fields to prevent its wastewater from impacting the San Joaquin River; or intermittent and unpredictable dilution of its wastewater by transfers of irrigation supply water into the Amaral Line. DMF is responsible for reducing or eliminating waste discharges from the irrigated lands it owns or operates; and for not causing or contributing to violations of applicable water quality standards. Additionally, Del Mar Farms acknowledges that the Amaral Line is used for irrigation water supply, and, therefore, has a beneficial use of agricultural irrigation water supply. The excessive sediment discharged by Del Mar Farms clearly impacted that beneficial use,

creating a nuisance, as evidenced by the complaint received by Water Board staff from a downstream grower on 6 July 2011 (Attachment E).

*Response to Dunham Comments, Discussion Section A - Del Mar Farms' Discharge Alone Could Not Have Contributed to Exceedances of Sediment Water Quality Objectives*

[TD 5] Re: commenter claim that flow differentials between the SJR and the DMF outfalls indicate turbidity would be less than one percent after complete mixing.

**Prosecution Team Response 5:** The evidence presented by the Prosecution Team shows that the DMF waste discharges caused or contributed to a turbidity violation at a point about 100 feet downstream of the Amaral Line outfall, thus showing that the elevated turbidity occurred over a significant stretch of the San Joaquin River. The Coalition Group Conditional Waiver does not establish a mixing zone in the San Joaquin River for discharges from the Amaral Line. In addition, the commenter provided no evidence or technical analysis to describe when complete mixing would occur. The Prosecution Team's evidence also shows that the DMF waste discharges caused significant turbidity violations in the Amaral Line, a water of the state and tributary to the San Joaquin River. In addition, the complaints received by the Water Board regarding sediment in the river and sediment in the Amaral Line clearly indicate a nuisance condition was created due to the excessive amounts of sediment.

[TD 6] Re: commenter claim that the Complaint cites no evidence that sediment from Del Mar Farms-operated parcels has caused nuisance or adversely affected beneficial uses.

**Prosecution Team Response 6:** The Del Mar Farms waste discharges caused nuisance by degrading the quality of agricultural supply water for downstream users in the Amaral Line, and by causing sediment plumes in the San Joaquin River, thus degrading fish spawning habitat through deposition of fine sediment, and recreational opportunities. Any use of the Amaral Line for irrigation supply by downstream users would have been impaired due to accelerated clogging of filters necessary for pressurized irrigation systems or deposition of excess sediments in furrows, which would decrease irrigation distribution uniformity and efficiency. Attachment E (Record of Communication; 6 July 2012) to this memo provides a particular example of how Del Mar Farms waste discharges have affected downstream agricultural water supply users.

[TD 7] Re: evidence of nuisance and turbidity violations for the 19 July 2011 event.

**Prosecution Team Response 7:** The Del Mar Farms waste discharge on this date was similar in nature (amount of flow and turbidity levels) to the 19 May event. In fact, Del Mar Farms expert suggests that the visual evidence indicates that the discharge rate on 19 July 2011 was greater than the discharge rate observed on 19 May 2011. Given that the discharge from the O'Neill property on 19 July was at least equal to, and likely greater than, the discharge on 19 May, the downstream impacts would likely be equivalent or greater. The evidence clearly indicates that the 19 July 2011 event

caused or contributed to a nuisance and turbidity violations, and harmed beneficial uses in the San Joaquin River.

[TD 8] Re: commenter claim that the Prosecution Team has made an inappropriate assumption that return flows from the Del Mar Farms-operated parcels were entirely responsible for waste discharges.

**Prosecution Team Response 8:** Complaint findings 20, 23 and 25 clearly state that staff's observations indicate that Del Mar Farms and the other named parties caused or contributed to the violations. Board staff made every reasonable effort to identify other potential dischargers to the Amaral Line by inspecting the length of the line and observing fields to see if others were actively irrigating or discharging sediments. None were identified. Assuming for the sake of argument that other sources could be identified, such contributions do not mitigate or excuse Del Mar Farms' contribution to the downstream impact. In any event, Del Mar Farms' speculation regarding the potential that other farms contributed excessive sediment to the Amaral Line and San Joaquin River on the dates in question is not supported by any evidence in the record.

[TD 9] *Response to Dunham Comments, Discussion Section B – The Enforcement Policy Is Not Being Applied in a Fair and Consistent Manner as Required by the State Water Quality Enforcement Policy*

**Prosecution Team Response 9:** See response to comment TD1. In citing the amount of the Bettencourt ACL fine being only \$10,000, it is important to note that this was the maximum fine allowable under Water Code section 13350(e) for two violation days at \$5,000 per day. If waste discharge flow data had been available there as in the DMF case, board staff would have pursued a higher penalty based on the per gallon penalty calculation.

With respect to the Stanislaus Almond Ranch Administrative Civil Liability Order case, the commenter misrepresents the length of time between the initial enforcement action (a Clean-up and Abatement Order issued in March 2008) and the issuance of the ACL Complaint, which was issued in December 2009 for \$405,000. The ACL Order was issued a year later after a settlement agreement was reached. The storm season had largely ended by March 2008, so the board did not have an opportunity to check the effectiveness of the sediment and erosion controls the discharger had installed. The inspections conducted in 2009 revealed that the controls had not been effective. During 2009, staff resources were severely constrained due to three day a month mandatory furloughs. A timelier issuance of a complaint would have likely occurred with the greater availability of staff resources. It is also important to note that the Clean-up and Abatement Order was issued in that case because the land was not being irrigated at the time and, therefore, may not have been subject to the Coalition Group Conditional Waiver in 2008. DMF, on the other hand, was actively irrigating and knew, or should have known, of the Conditional Waiver requirements that they had been subject to since 2006.

With respect to the commenter's claim that the Amaral Line has no beneficial uses, the commenter's own technical expert acknowledges that the Amaral Line supplies irrigation

supply water to a number of growers. The Amaral Line clearly has agricultural supply use, is a water of the state, and a tributary to the San Joaquin River.

*Response to Dunham Comments, Discussion Section C – Challenge to the Basis for Penalty Calculations*

[TD 10] Re: commenter objections to finding of moderate harm or potential harm to beneficial uses (Factor 1).

**Prosecution Team Response 10:** The sediment discharges to the Amaral Line have harmed or potentially harmed downstream agricultural supply beneficial uses. Any use of the Amaral Line for irrigation supply by downstream users would have been impaired due to accelerated clogging of filters necessary for pressurized irrigation systems or deposition of excess sediments in furrows, which would decrease irrigation distribution uniformity and efficiency. Additionally, the Del Mar Farms waste discharges caused sediment plumes in the San Joaquin River, thus degrading fish spawning habitat and recreational opportunities. In addition, there are numerous water quality problems identified in the Orestimba Creek Watershed for which the Westside San Joaquin River Watershed Coalition has developed management plans. A number of those pollutants are associated with sediments, such as pesticides and sediment toxicity.

[TD 11] Re: commenter objections to finding of moderate risk or threat to potential receptors (Factor 2).

**Prosecution Team Response 11:** The sediment discharges to the Amaral Line pose a moderate risk to downstream agricultural supply users for the reasons described above. Potential damage to gills and toxicity caused by agricultural pesticides are threats to fish and other gilled or pesticide-sensitive species. Pesticide residues are commonly found in sediment discharges from agricultural sources.

[TD 12] Re: commenter objections to finding of major deviation from requirement (Step 2).

**Prosecution Team Response 12:** Staff recognizes that Del Mar Farms leased the ACL-related parcels in October 2010. However, the board's records indicate that Del Mar Farms has been a Westside San Joaquin River Watershed Coalition member since 2006. Further evidence (e.g., the Del Mar Farms website pages – 3 July 2012 Prosecution Team Evidence) shows that Del Mar Farms is a sophisticated agricultural operation with packing and shipping operations, as well as related companies to form what they describe as a vertically integrated business that includes "...packing, cooling, storage, marketing, chemicals, fertilizers, trucking, seed, harvesting, and equipment rental." Such sophisticated agricultural operators should be capable of understanding the requirements of the Conditional Waiver and implementing appropriate management practices to reduce or eliminate waste discharges. The requirements of the Conditional Waiver have been rendered completely ineffective by Del Mar Farm's failure to implement appropriate management practices from the outset of crop production.

[TD 13] Re: commenter objections to end-of-field flow rates being used to assess per gallon discharge violations (Step 3)

**Prosecution Team Response 13:** Agricultural supply in the Amaral Line is a beneficial use harmed by the end-of-field waste discharges. Additionally, Del Mar Farms recognizes that its control of its waste discharges ends at the end of its fields, and that the Amaral Line drains to the San Joaquin River. DMF cannot rely on intermittent and unpredictable transfers of its wastewater onto down-gradient agricultural fields to prevent its wastewater from reaching the San Joaquin River; or intermittent and unpredictable dilution of its wastewater by transfers of irrigation supply water. Del Mar Farms is responsible for reducing or eliminating waste discharges from the irrigated lands it owns or operates; and for not causing or contributing to violations of applicable water quality standards.

[TD 14] Re: commenter concerns with the adjustment factors used under Step 4.

**Prosecution Team Response 14:** The DMF waste discharge on 19 July was similar in nature (amount of flow and turbidity levels) to the 19 May event, and therefore caused or contributed to nuisance and turbidity violations, and harmed beneficial uses in the San Joaquin River. Additionally, the Amaral Line has a beneficial use of agricultural water supply. The DMF waste discharges affected the free use of a considerable number of downstream growers' properties by adding sediment load to agricultural water supply and potentially damaging and reducing the efficiency of downstream growers' irrigation systems.

[TD 15] Re: commenter claim that board staff failed to consider factors, other than the cost of investigation, as justice may require (Step 7).

**Prosecution Team Response 15:** The amount of the Bettencourt ACL fine (\$10,000) was the maximum allowable under Water Code section 13350(e) for two violation days at \$5,000 per day. If waste discharge flow data had been available there as in the DMF case, board staff would have pursued a higher penalty. The statutory per day limit on the fine is not applicable in the DMF case, so the Prosecution Team is pursuing a more appropriate fine based on the available evidence.

[TD 16] Re: commenter concern that economic benefit was calculated using the estimated cost to install a drip system (Step 8).

**Prosecution Team Response 16:** The Prosecution Team based its estimate on drip system installation because the drip system option was chosen by DMF. DMF's intention to install a drip system was known to board staff prior to the Complaint being prepared, so there was no dictating the manner of compliance on staff's part. The estimate of economic benefit was used to determine the minimum penalty amount per the Enforcement Policy. Staff neither applied the minimum penalty in this case, nor added the estimated economic benefit on top of the total base liability (Step 5). Consequently, the estimate of economic benefit had no effect on the proposed penalty.

[TD 17] *Response to Dunham Comments – Conclusions*

**Prosecution Team Response 17:** The conclusions are addressed in the responses above.

*Response to Michael Day Memorandum, Exhibit B to Dunham Comments*

[Michael Day Response (MD) 1] Re: under 'Irrigation Systems', Day's claim that the Complaint appears to suggest that DMF should have installed the drip systems before the 6 July and 19 July 2011 discharge events.

**Prosecution Team Response MD-1:** Board staff concurs that the installation of an in-ground drip system following the 19 May event would cause significant crop destruction and was therefore not feasible. However, Mr. Day did not provide any evidence or analysis stating why the time frame between when the lease became effective on 1 October 2010 and when the crop had to be planted was not sufficient to install appropriate sediment and erosion control measures or a drip system. If the installation of an in-ground drip system prior to the 2011 crop season was not feasible, there are other management practices that could have been used both prior to the 19 May event, as well as throughout the 2011 irrigation season.

Given the existing field conditions such as soil type and field slope, there are a number of management practices to address the erosion factors of volume and velocity of water flowing down the furrows. Polyacrylamide (PAM), when used properly, and especially when used in conjunction with water management, can be effective. The use of PAM often requires monitoring of tail water to make adjustments in rates and application for the various soil and field conditions. End of the field management practices, either solely or in conjunction with in-field management is another opportunity to manage tail water. Vegetative ditches, recirculation systems, or sediment basins are some examples of mitigation measures that could have been considered. There is no evidence that Del Mar Farms implemented these practices or, if they did so, implemented them in an effective manner.

Information on these management practices and others is available from a number of sources, such as the Natural Resource Conservation Service (NRCS), the Coalition for Urban/Rural Environmental Stewardship (CURES) BMP Handbook, and the local water quality coalition (see Attachments A-D).

[MD 2] Re: also under 'Irrigation Systems', Day states that tail water runoff containing substantial amounts of sediment is not unusual in the area; and that he observed that all of the furrow irrigated fields in the area had signs of substantial erosion and high sediment concentrations in tail water drains.

**Prosecution Team Response MD-2:** Given Mr. Day's statements and Del Mar Farms long history of farming in the area, Mr. Day does not provide any evidence or analysis to justify the lack of action on the part of Del Mar Farms to mitigate the erosion and sediment discharges that were certain to occur. These practices and conditions also contribute to numerous water quality exceedences in a number of the creeks and drains that have been detected by the coalition monitoring program. These exceedences have led to water quality management plans, an increased board staff presence in the area,

and are being considered in the commodity/geographic based Waste Discharge Requirements currently being drafted for the area as part of the Long-term Irrigated Lands Regulatory Program.

Over the past few years the Westside San Joaquin River Water Quality Coalition has held a number of grower meetings and discussed the continued water quality exceedences in field tail water on the San Joaquin Valley's west side that have led to an increased board staff presence in the area, and the potential enforcement actions for growers found to be discharging waste. Board staff have attended and made presentations at some of those meetings, including the meeting on 1 June 2011.

Board staff is familiar with the practice of allowing tail water to runoff until there is sufficient infiltration in all of the furrows, as well as the continued head of water after the irrigation is shut off. This was considered when determining the duration of the waste discharges. Sediment-laden tail water was flowing off of the field and into the Amaral Line when staff arrived at the site, and was continuing when staff left the site on all three dates. Flow volume was calculated only for the duration while staff was on site and observing the discharge. The actual discharge events extended for an undetermined time both before and after the inspections.

[MD 3] Re: under 'Drainage Flow Rates', precision to the hundredth of a gallon per minute, and the reduction factor for some width and depth measurements

**Prosecution Team Response MD-3:** Staff identified the flow volumes as estimates. Therefore, the flow volume was reduced to consider friction (factor obtained from the "Water management Manual, USDVBOR, 1997, University of Arizona, Cooperative Extension). In addition, the field ditch dimensions were reduced by 30 percent to conservatively account for possible error measuring ditch dimensions. This reduction factor was an attempt to ensure that any error would be in the discharger's favor.

[MD 4] Re: also under 'Drainage Flow Rates', Day's statement that it appears the drainage flow rate is greater on 19 July than on 19 May.

**Prosecution Team Response MD-4:** See Prosecution Team's Response 7.

[MD 5] Re: also under 'Drainage Flow Rates', Day's claim that Central California Irrigation District records show that for each DMF violation day, other fields were being irrigated from the Amaral Line and likely draining into the line.

**Prosecution Team Response MD-5:** See Prosecution Team's objections to the use of these data. Note that on the 6 July event, staff observed and sampled a discharge from a corn field on the northwest side of River Road and JT Crow Road. The corn field's tail water discharges were measured at 85 and 141 NTU. This compared to the supply water at 111 NTU, and the DMF field drainage into the Amaral Line of 668 NTU and 584 NTU at 13:00 hours and 14:25 hours, respectively. The comparison of these two fields suggest that tail water can be effectively managed in the area to reduce sediment discharges.

*Response to Bernard O'Neill Comments*

Mr. O'Neill provided the Prosecution Team with a copy of his lease agreement with DMF (as did Ms. Dunham as Exhibit A to her comments). He also stated in a cover letter that he is a passive landlord who has no control over farming operations, including the choice of crops.

**Prosecution Team Response O'Neill-1:** The lease agreement is a private contract between Mr. O'Neill and Del Mar Farms. Should the board adopt an ACL Order, it will be the responsibility of the two parties to the contract to determine relative liability for paying any fine.

After careful consideration of the attached comments, the Prosecution Team finds that the additional information and issues these parties have raised does not merit rescission of the Complaint or reduction of the proposed ACL penalty amount.

If you have questions regarding this memo, please contact me at (916) 464-4668 or via e-mail at [jkarkoski@waterboards.ca.gov](mailto:jkarkoski@waterboards.ca.gov).

Attachment A – Westside San Joaquin River Watershed Coalition November 30, 2010  
Semi-Annual Monitoring Report

Attachment B – Westside San Joaquin River Watershed Coalition November 30, 2011  
Semi-Annual Monitoring Report

Attachment C – Westside San Joaquin Valley BMP Handbook

Attachment D – NRCS guidance on erosion and sediment control for irrigated lands;

Reducing Silt in Your Irrigation Drain Water – A Handbook on Best Management Practices for the Imperial County Silt TMDLs

Attachment E – Record of Communication, Amaral Line Complainant

cc: Tess Dunham, Somach Simmons & Dunn  
Jon Maring, Del Mar Farms  
Bernard O'Neill, Bernard N. & Barbara C. O'Neill Trust