

June 21, 2013

Ken Landau
Central Valley Regional Water
Quality Control Board

Re: Henry J. Tosta Dairy / Extension of Hearing Date

Dear Mr. Landau:

We represent Henry Tosta solely with respect to this request for a continuance from the current hearing set for July 24th or 25th, 2013, compliance and settlement issues. We do not represent Mr. Tosta with respect to the hearing to be held in late July 2013.

We believe that there are several undeniable reasons why the hearing should be continued, with no countervailing reasons to have the hearing as scheduled. In summary, Mr. Tosta has been making progress with respect to the Dairy site and if the Regional Board's goal is to obtain compliance at the site, then a continuation of this hearing is vital. However, if their goal is to force Mr. Tosta to hearing without counsel, and threaten any opportunity for compliance, then the July date should stand. We believe based on his existing action and a new team of consultants we can have Mr. Tosta on the way to compliance by the date of the continued hearing.

We have reconstituted Mr. Tosta's team to include Kevin Abernathy and John Minney, two private consultants who have worked on numerous dairy projects in the past. We believe that they can get Mr. Tosta's dairy in compliance. We also believe that taking him to a hearing with or without counsel, and assessing penalties, will serve to lessen the changes of compliance occurring. Further, it appears that Mr. Tosta has, in fact, made efforts to comply, such that an additional extension to obtain compliance is merited.

This case involves Henry Tosta, a longtime dairyman in the Tracy area. In June 2012 the Board issued a CAO against Mr. Tosta to get his dairy in compliance with the Dairy General Order, with also a separate order respect to this dairy and a Heifer Ranch that he also managed. The CAO required Mr. Tosta who, along with the rest of the dairy, is facing severe economic strains, to comply with unreasonable timelines. He was also using several consultants that were essentially ineffective.

Despite efforts to meet the requirements of the CAO with limited funds, the board issued an ACL against Mr. Tosta in November of 2012 with a fine of over a million dollars. Mr. Tosta retained

an attorney (who has recently withdrawn) and has attempted to comply with the CAO, at the time the Board issued the ACL. Mr. Tosta fired his existing consultants and retained John Minney, P.E., Kevin Abernathy, and our office to assist as well, because of the withdrawal of his existing counsel after submitting evidence of the July hearing.

Staff's verbiage implies that Mr. Tosta has done nothing to attempt compliance since the CAO was issued. This is clearly not true and not what is reflected in the file. Although we will not comment on the efficacy of the work that was submitted, Mr. Tosta's consultants submitted numerous reports since the CAO was issued in order to obtain compliance. While the board may not agree with studies and letters that were submitted, they cannot assert that efforts were not made. Clearly, even per the board's own inspection records, the site is improving. One of the major issues appears to be the storage of manure on the site.

A review of the file since the CAO reveals that Mr. Tosta is working to comply. According to the manure manifest records, approximately 5000-6000 tons of manure was removed before October 12, 2012, and since then another 900 tons have been removed.

Additionally, Mr. Minney is preparing Mr. Tosta's response to the 13267 letter that was issued. Next Tuesday, Mr. Minney will be surveying the property in order to determine the direction of groundwater movement.

In summary, the following are the major reasons for continuing the July hearing:

1. The new "team" consisting of Kevin Abernathy, John M. Minney, and this office is working on a plan to get Mr. Tosta into compliance with the CAO as soon as possible.
2. Mr. Tosta is without counsel for the hearing, and has limited funds that can be better spent complying with the orders than in defending himself before the Board.
3. This case is capable of being settled and should not go to the Board for hearing.
4. The team is requesting that they be given a chance to get Mr. Tosta moving in the correct direction before a hearing is scheduled.
5. Despite staff rhetoric, Mr. Tosta has attempted compliance throughout the period of the CAO; his consultants at the initial stage were non-effective and have since been replaced.
6. Finally, we note that the Dairy General Order is in flux and in the process of being revised, and this may not be the opportune time to try to enforce the Order.

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7. Mr. Tosta is in the process of taking money out of his real property, but will not have additional funds until the fall.

At this time we have been retained by Mr. Tosta to help him try to get the hearing date extended, get his compliance on track and help him try to settle the ACL; but we cannot represent him at the hearing for various reasons. We also believe that it would be in the best interests of both Mr. Tosta and the RWQCB to give us the chance to get his progress to a satisfactory level during the requested period of extension. If satisfactory progress is not made during this period the Board can proceed at that time.

The Prosecutions' arguments for not allowing the extensions are baseless. Lack of counsel for a hearing where the potential for penalties exceed a million dollars, and perhaps the end of Mr. Tosta's life as a dairyman is not a trivial matter, and could in fact be a violation of his right to due process. The suggestion that compliance at the site would be furthered by having the hearing in July is nonsensical, in our view it is more likely to lead to quite the opposite result. We have scheduled a meeting to meet with them next week to try to resolve these issues and provide a schedule of compliance.

As noted, we believe it is in the best interest of both the State of California and Mr. Tosta to allow him the next few months to get back on track. We would be happy to meet with you to respond to any questions..

Please let me know.

Very truly yours,

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Lee N. Smith

LNS/cas

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