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July 8, 2013

Ken Landau
California Regional Water
Quality Control Board
Central Valley Region
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

Re: Henry Tosta's Rebuttal to the Regional Board's Evidence Submittal, Exhibit List, and Supplemental Witness List

Dear Mr. Landau:

1. Introduction.

1.1 These documents are intended to rebut the Administrative Civil Liability Complaint, the CAO and evidence that have been submitted with respect to the hearing that set for July 25-26, 2013 on Mr. Tosta's dairy. This document refers to a number of attachments (See Supplemental Evidence and Witness List, attached) that correspond to each topic. Due to unavailability of Counsel, we have requested that the hearing be scheduled for July 25, 2013 rather than July 26th. We also expect to be submitting additional declarations to support our Exhibits. Attached is a Response to the ACL, a memorandum on penalties, objections to the State's Exhibits, and supplemental evidence and witness lists.

2. Summary

2.1 Background. 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 industry, is facing severe economic strains, to comply with the Dairy General Order (the "Order"). We believe under these circumstances, the CAO contained unreasonable timelines. Further, many of the deadlines were not met because the Board Staff was not satisfied with the reports submitted. While it is appropriate for Staff to require

report revisions, to penalize the Dairy for being late while the report is being revised seems to be subjective and improper.

Despite Mr. Tosta's 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 and has attempted to comply with the CAO, at the time the Board issued the ACL. Mr. Tosta replaced his existing consultants and retained John Minney, P.E., Kevin Abernathy, and our office to assist as well. 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 prior 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. Mr. Tosta has indicated that three quarters of the manure located on his property has been removed. 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. The pictures included taken demonstrate the extent of compliance.

While the Dairy admits that there are violations, given the economic circumstances, the efforts made by Mr. Tosta and the relatively low level of risk that the site presents to the environment, the Dairy believes that fines should be minimal and the existing limited funds dedicated to compliance.

2.2 Discussion of the State of the Dairy Industry.

2.2.1. Economy. We have attached the Testimony of Robert Vandenheuvel, General Manager, Milk Producers Council as Exhibit C, and the Fraser Inc. report as Exhibit D, both which indicate the dire straits that the Dairy industry is in and has been in for several years. Mr. Tosta's ability to pay and the economic benefit that he obtained are clearly affected.

2.2.2. Mr. Tosta's Situation. Attached as exhibits to the Dairy's original submittal are tax returns and other documents that describe his financial situation. This is also discussed in the memorandum regarding penalties.

2.2.3. Dairy General Order. The Dairy General Order was vacated by Sacramento Superior Court in 2012 - 2013. It is not clear at this time whether any of the required revisions will affect these alleged violations, and we have suggested to the Board

in correspondence that the enforcement action should not be brought at this time.

3. Response to the CAO

3.1 Attached to this document as Exhibit E is the letter that we recently submitted to the Board Staff to respond to any outstanding issues with the CAO as the main Gravamen of the ACL is the Board's belief that there has been a lack of cooperation. As noted above, Mr. Tosta's actions needed to be taken into account in the context of the current economics of running a dairy. Exhibit F is a response to the allegations in the ACL.

3.1.1 Photographs. Attached as well as Exhibit G is a series of photographs taken in late June that clearly display the fact that the majority of the manure that was at issue has been removed.

3.1.2 Declaration. We have also attached the Declaration of Henry Tosta with regard to the removal of manure as Exhibit H.

4. Response to the ACL

4.1 The ACL Itself. We have attached a response to the ACL setting our response to each section therein. See Exhibit I.

4.2 Penalty Amount.

4.2.1 Penalty Calculation. The Dairy believes that the penalty request therein was not properly calculated.

4.2.2 Penalty Recalculation. Recalculation was previously submitted with respect to the penalty calculations (see Exhibit J). In summary, we believe that:

4.2.2.1 Staff calculated multiple daily penalties where a one-time penalty was appropriate.

4.2.2.2 Staff increased penalties for physical inaction, when the penalties at issue were related to failure to complete documents.

4.2.2.3 Staff is penalizing reports being late with multiple-day penalties where in fact documents were submitted, but this same Staff bringing the ACL found the documents to be inadequate.

4.2.2.4 Staff has overemphasized the potential impacts on an already highly impacted groundwater.

4.2.2.5 Staff has miscalculated the economic benefit attributed to Mr. Tosta.

4.2.2.6 Staff has not properly analyzed Mr. Tosta's ability (or lack thereof) to pay these penalties.

4.2.3 Economic Benefit.

4.2.3.1 No Cost. Mr. Tosta is able to have the manure removed at no cost to him, diminishing the projected economic benefits leaving only Staff's speculation of the cost of ongoing maintenance at the Dairy that was deferred. Deferred compliance should be subject to interest, no penalties.

4.2.3.2 Delayed Costs. Any costs that are attributed to economic benefit have to be paid at this time, and any analysis should be calculated for delayed compliance rather than avoided.

4.3.4 Objections to Evidence. We have attached as Exhibit K our objections to the State's exhibits.

4.3.5 Additional Exhibits. Additional exhibits include:

Exhibit L – Imperial Sugar WDR
Exhibit M – Declaration of Henry Tosta

Very truly yours,

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Lee N. Smith

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Attachments