CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

In the matter of Administrative Civil Liability Complaint No. R5-2015-0506 (Sweeney Dairy)	Prosecution Team Rebuttal Argument and Rebuttal Evidence

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PROSECUTION TEAM REBUTTAL ARGUMENT AND REBUTTAL EVIDENCE; ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2015-0506

TO ALL PARTIES HEREIN;

PLEASE TAKE NOTICE that the Prosecution Team for the California Regional Water Quality Control Board, Central Valley Region ("Prosecution Team") hereby submits a response to the 30 April 2015 *Submission of Evidence and Policy Statement Regarding Hearing on Administrative Civil Liability Complaint R5-2015-0506* submitted by Mr. Raymond L. Carlson on behalf of Mr. James Sweeney and Ms. Amelia Sweeney (collectively referred to as "Discharger").

The Prosecution Team continues to recommend a discretionary penalty in the amount of $34,650 for the Discharger's failure to file a 2013 Annual Report. The Discharger's argument that Order No. R5-2013-0122, the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies ("Reissued General Order"), is unenforceable because the Sacramento Superior Court ordered the Central Valley Regional Water Quality Control Board ("Central Valley Water Board") to set it aside, is without merit. Furthermore, the Discharger's arguments challenging the Reissued General Order at this juncture in the enforcement proceeding are improper, untimely, and should not be considered at the 4/5 June 2015 hearing. Lastly, the Discharger's argument that the Prosecution and the Advisory Teams have a conflict of interest is meritless and should be rejected.

I. Background on Order No. R5-2013-0122 (Reissued General Order)

The Central Valley Water Board adopted Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 ("2007 General Order") on 3 May 2007. Part of the 2007 General Order includes a Monitoring and Reporting Program No. R5-2007-0035 ("2007 MRP"), issued pursuant to the Central Valley Water Board's authority under California Water Code § 13267. The MRP requires the submission of, among other items, annual monitoring reports every first of July. The Annual Report is comprised of reporting components, which include, but are not limited to: analytical data for samples of manure process wastewater, irrigation water, soil, and plant tissue; information detailing the crops planted and harvested during the calendar year; groundwater monitoring results for those dischargers that monitor supply wells and subsurface drainage systems; and, stormwater monitoring results during the wet season. This information must be collected throughout the calendar year and cannot be recreated after-the-fact.

After the issuance of the 2007 General Order, a coalition of community residents and non-profit organizations ("Petitioners") petitioned the 2007 General Order to the State Water Resources Control Board ("State Water Board"). Upon the State Water Board's dismissal of the petition, the Petitioners filed a petition for writ of mandate in the Sacramento County Superior Court ("Superior Court"), arguing that the Central Valley Water Board failed to comply with the requirements of State Water Board Resolution 68-16, the Statement of Policy with Respect to Maintaining High Quality of Waters in California (*State Anti-Degradation Policy*) when it issued the 2007 General Order. The Superior Court denied the petition, and the Petitioners subsequently filed an appeal in the Third District Court of Appeal (the "Appellate Court"). The Appellate Court reversed the Superior Court's decision, and found that the 2007 General Order did not comply with the requirements of the *State Anti-Degradation Policy.* (*Asociación de Gente*

Unida por el Agua v. Central Valley Regional Water Quality Control Bd. (hereafter *AGUA*) (2012) 210 Cal.App.4th 1255). Responding to the reversal, the Superior Court issued a writ of mandate on 17 April 2013 that ordered the Central Valley Water Board to set aside the 2007 General Order and reissue the permit only after application of, and compliance with, the *State Anti-Degradation Policy*. Issuance of the writ of mandate did not vacate or immediately void the 2007 General Order.

On 3 October 2013, the Central Valley Water Board adopted the Reissued General Order and accompanying Monitoring and Reporting Program ("MRP"). The Reissued General Order set aside and replaced the 2007 General Order and 2007 MRP in compliance with the Superior Court's writ of mandate. On 11 October 2013, the Central Valley Water Board filed a Return to the Writ of Mandate indicating that it had rescinded the 2007 General Order and adopted the Reissued General Order.

Petitioners filed a petition to the State Water Resources Control Board (State Board) on 5 November 2013 challenging the Reissued General Order on the basis that it fails to comply with the *State Anti-Degradation Policy*. On 6 November 2014, the Superior Court ordered that proceedings to determine the adequacy of the Central Valley Water Board's Return to Writ of Mandate be stayed until the State Board has issued a decision or an order of dismissal on the Petitioner's challenge to the Reissued General Order.

II. The *AGUA* Decision and the Superior Court's Stay of Proceedings Does Not Affect the Ability of the Central Valley Water Board to Enforce Annual Report Violations under the Reissued General Order

The Discharger argues that the Reissued General Order was invalidated by the Superior Court's writ of mandate and stay of proceedings following the *AGUA* decision and is, therefore, unenforceable. The Discharger argues that the Superior Court's April 2013 writ of mandate and

November 2014 stay of proceedings bar the Central Valley Water Board from seeking administrative civil liability for the Discharger's failure to file the 2013 Annual Report. In asserting this argument, the Discharger mistakenly treats the writ of mandate and stay of proceedings as if they had the force of abolishing the Reissued General Order.

The Superior Court, in issuing the writ of mandate, ordered the Central Valley Water Board to set aside the 2007 General Order and reissue the permit in accordance with the Appellate Court's determinations regarding the *State Anti-Degradation Policy.* The Central Valley Water Board set aside the 2007 General Order, pursuant to the Superior Court's writ of mandate, when it adopted the Reissued General Order in October 2013. The *AGUA* decision and the subsequent writ of mandate do not bar the Central Valley Water Board's enforcement of the violation underlying this proceeding.

In *AGUA*, the Appellate Court held that "the record indicates the monitoring requirements of the Order are inadequate to detect groundwater degradation . . ." and that "the Order does not provide a sufficient enforcement mechanism to ensure that any groundwater contamination is stopped." (*AGUA,* 210 Cal.App.4th at 1260-78). From this, the Discharger attempts to extrapolate that an Annual Report submission is no longer required because "many of the elements to be reported in the Annual Report were based upon a monitoring plan in the 2007 Order that the Appellate Court determined was flawed and unlawful." (30 April 2015 *Submission of Evidence and Policy Statement*, p. 12). The Appellate Court held that the monitoring plan[1] was insufficient to prevent groundwater degradation. (*AGUA,* 210 Cal.App.4th at 1278). The Discharger fails to recognize that the effect of the *AGUA* decision was to enhance, not diminish or eviscerate, the requirements imposed under the 2007 General Order.

[1] The Appellate Court, in *AGUA*, discusses only the MRP that was originally issued with the Dairy General Order in 2007. (*See AGUA*, 210 Cal.App.4th at fn. 14). A revised MRP was issued by the Central Valley Water Board on 23 February 2011 and is the MRP under which the Discharger was required to submit the subject 2012 Annual Report.

The Discharger erroneously draws the conclusion that the Superior Court's November 2014 Order to Stay Proceedings resulted in a nullification of the Reissued General Order. (30 April 2015 *Submission of Evidence and Policy Statement*, p. 21; p. 22, fn. 13). The Order to Stay Proceedings temporarily suspends the Superior Court's determinations regarding the Central Valley Water Board's Return to the Writ of Mandate. It does not repeal the Central Valley Water Board's adoption of the Reissued General Order, nor does it constrict the ability to the Central Valley Water Board to pursue enforcement under that Order.

III. The Central Valley Water Board Already Made a Factual Determination About Many Issues Raised by the Discharger in its Evidence Submission.

The Central Valley Water Board has already determined that the Discharger is subject to the Annual Report requirements and has previously voted to adopt administrative civil liability against it for a failure to file the 2009 Annual Report and a Waste Management Plan (ACLO R5-2011-0068), failure to file the 2010 Annual Report (ACLO R5-2012-0070), failure to file the 2011 Annual Report and a groundwater monitoring well installation and sampling plan (ACLO R5-2013-0091), and failure to file the 2012 Annual Report (ACLO R5-2014-0119). In its 30 April 2015 evidence submission for the present matter, the Discharger raises many of the exact same issues previously raised in its briefs and evidence submissions for ACLC R5-2011-0562, ACLC R5-2012-0542, ACLC R5-2013-0539, and ACLC R5-2014-0543. In 2011, these issues were considered and addressed in adjudicative proceedings by the Central Valley Water Board. The Board found Mr. Sweeney's arguments to be unpersuasive, and imposed administrative civil liability based on Sweeney Dairy's failure to comply with the reporting requirements of the Dairy General Order. Likewise, in 2012, in 2013, and again in 2014, the same issues were considered and addressed in adjudicative proceedings before the Board, which concluded in the same result.

Many of the Discharger's arguments in its 30 April 2015 evidence submission are duplicative to arguments raised during the adjudicative proceedings for ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, and ACLO R5-2014-0119. As such, they should be barred for reconsideration by collateral estoppel (*People v. Sims* (1982) 32 Cal.3d 468, 489). Collateral estoppel bars the relitigation of issues of fact or law that have already been necessarily determined as part of an earlier case. It promotes judicial economy, preservation of the integrity of the judicial system by avoiding inconsistent judgments, and protection of litigants from harassment by repeated litigation (*Lucido v. Superior Court*, supra, 51 Cal.3d at pp. 342-343).

Collateral estoppel extends to agency determinations of legal issues (*Guild Wineries and Distilleries v. Whitehall Co., LTD* (9th Cir. 1988) 853 F.2d 755, 758-759, citing *United States v. Utah Construction Company* (1966) 384 U.S. 394). Collateral estoppel applies in claims brought in future administrative proceedings if the agency met the prerequisite requirements when arriving at its decision in the first instance: (1) the issue decided in a prior proceeding is identical to the issue sought to be relitigated, (2) the issue was actually litigated in the prior proceeding, (3) the issue was necessarily decided in the prior proceeding, (4) the prior proceeding resulted in a final judgment on the merits, and (5) the party against whom collateral estoppel is asserted is the same as, or in privity with, a party to the prior proceeding (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341). In addition, in evaluating whether to apply collateral estoppel, an agency must consider the public policies underlying the doctrine. (*Id*. at 342-343).

The Discharger should be barred from relitigating the issues that have been previously resolved by this Board. All of the prerequisites to the application of collateral have been satisfied. First, the Discharger's current evidentiary submission essentially repeats verbatim the same contentions and arguments that were made in evidence submissions for the previous enforcement actions. Second and third, the Discharger seeks to relitigate issues that were

properly raised during the administrative proceedings for ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, and ACLO R5-2014-0119 ("previous proceedings"), and that were decided by the Central Valley Water Board. Fourth, the previous proceedings resulted in final judgments on the merits, which were memorialized in administrative civil liability orders. Fifth, the Discharger is the same party involved in both the present matter and in the previous proceedings. Finally, public policy supports the application of the collateral estoppel doctrine here to preclude the Discharger from raising the same issues in successive petitions. The application will promote judicial economy and protect the Central Valley Water Board from being harassed by repeated adjudication.

IV. ACLC R5-2015-0506 is not in Excess of the Board's Jurisdiction, and does not Result in a Deprivation of the Discharger's Due Process or Civil Rights and is not an Abuse of Power

The Discharger argues that it is a violation of due process and civil rights, and an abuse of power and process, for the Central Valley Water Board to take enforcement action against it before the State Water Board has issued rulings on the Discharger's appeals of ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, and ACLO R5-2014-0119 (*30 April 2015 Submission of Evidence and Policy Statement*, pp. 21-22).

This argument is identical to an argument raised by the Discharger during the four previous adjudicative proceedings. In all instances the Central Valley Water Board rejected the Discharger's arguments and determined that the Discharger was legally obligated to submit Annual Reports under the Dairy General Order. (*See* ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, and ACLO R5-2014-0119). There is no need to revisit this issue in the current proceeding.

The Discharger indicates that any application of the State Water Board's *Water Quality Enforcement Policy* ("*Enforcement Policy*") which increases the administrative civil liability penalty is a violation of due process because "[i]t is improper to assign fault to us because of the State Board's inaction in deciding the merits of our appeals." (30 April 2015 *Submission of Evidence and Policy Statement*, p. 22). The Discharger also states that it is improper to enhance "the monetary penalty on the basis of prior violations, not one of which has reached a final adjudication" (30 April 2015 *Submission of Evidence and Policy Statement*, p. 21). The Discharger implies in these arguments that the Prosecution Team's proposed penalty is based solely on the Discharger's history of violations, and implies that the previous proceedings did not result in final orders adopted by the Central Valley Water Board.

The proposed penalty amount of $34,650 is based on the *Enforcement Policy* methodology, which provides, in part, that the administrative civil liability amount should be increased where the Discharger has engaged in intentional or negligent behavior, where the Discharger has not voluntarily cooperated in returning to compliance, and where there is a history of repeat violations. (*Enforcement Policy*, p. 17). In addition to the other considerations delineated in the *Enforcement Policy,* the Prosecution Team's assessment properly accounts for the Discharger's history of repeated prior violations, which were formally adjudicated and resulted in final orders adopted by the Central Valley Water Board. (*See* ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, and ACLO R5-2014-0119).

The Discharger argues that the Prosecution Team, in reaching the adjusted total liability amount, is penalizing the Discharger for exercising its right to petition the previous orders. The fact that the Discharger's appeals are pending before the State Water Board is not relevant to the Prosecution Team's application of the *Enforcement Policy* methodology. In fact, the

application of the *Enforcement Policy* methodology in this case is very similar to that in other recent cases brought before the Central Valley Water Board.[2]

V. The Discharger's Attempts to Challenge the Propriety of the 2007 General Order and the Reissued General Order are Improper During this Enforcement Proceeding

In its 30 April 2015 submission, the Discharger argues that the 2007 General Order and the Reissued General Order are invalid for a number of reasons detailed in Section E.2[3] of its evidence submission. Even if some of the evidence submitted by the Discharger supporting the attack is new to this proceeding, the underlying basis for the challenge remains the same. The Discharger's arguments are duplicative of those raised in the prior proceedings and should be barred by collateral estoppel.

The Discharger is attempting to challenge the validity of the Reissued General Order in an enforcement proceeding. This is a collateral attack on the Order itself (*Transcript from 14 July 2011 Panel Hearing*, p. 24). The Central Valley Water Board contemplated this argument both in July 2011, and August 2012, in July 2013, and again in October 2014, and rejected it each time.

The appropriate window of time to challenge the reporting requirements in the MRP has passed. If the Discharger felt aggrieved by either the reporting requirements or the deadlines in which to submit the reporting requirements as established in the MRP, these issues should have been raised within the appropriate time period subsequent to the Reissued General Order's adoption. Pursuant to Water Code § 13320, the Discharger had 30 days following 3 October 2013 to

[2] See California Regional Water Quality Control Board, Central Valley Region Administrative Civil Liability Order R5-2015-0037 (In the Matter of Carlos and Bernadette Estacio, San Isidro Jersey Dairy), Attachment A, "Specific Factors Considered for Administrative Civil Liability."

[3] See Section B.8 of the Discharger's 30 April 2015 *Submission of Evidence and Policy Statement* (arguing that the 2007 General Order requirements violate the First Amendment rights of associational freedom and represents compelled speech).

petition the Central Valley Water Board's action in adopting the Reissued General Order. This subsequent attempt to challenge the legality of the reporting requirements in the Reissued General Order in the present enforcement proceeding is merely a collateral attack on the Order and should not be permitted.

VI. The Discharger's Conclusions about the Impact of the Dairy General Order on Small Dairy Attrition Rates, and about the Impact of Small Dairies on Water Quality are not Based in Fact

The Discharger's arguments regarding small dairies are not on point to the issues in the current proceeding and, furthermore, should be barred by collateral estoppel because they were raised by the Discharger during the previous proceedings. The Discharger argues that both the San Francisco and North Coast Regional Water Quality Control Boards have made a factual finding that small dairies do not pose a threat to water quality. In its evidentiary submission, the Discharger references two Waste Discharge Requirement waiver programs enacted by other Regional Water Quality Control Boards. (*See* 30 April 2015 *Submission of Evidence and Policy Statement*, p.17, referring to R1-2012-0003 and R2-2003-0094).

When the 2007 General Order was adopted, the Central Valley Water Board considered exempting small dairies from monitoring requirements, but eventually rejected this approach. In 2007, evidence showed that small dairies pose a threat to water quality. In comparison to the Central Valley Region, the North Coast and San Francisco Bay Regions have very different climatic, geologic, and land use conditions that justify different permitting conditions for small dairies. Those regions have fewer dairies and the spacing between individual dairies is greater. The overwhelming majority of dairy cattle in California are in the Central Valley Region, and are concentrated in areas surrounded by intensive agricultural use that presents a significant threat to groundwater quality, of which dairies are a contributor. Unlike the North Coast and San

Francisco Bay Regions, the Central Valley receives comparatively little precipitation and groundwater recharge of an aquifer that it is extensively used for drinking water, industrial supply, agricultural supply, and other uses.

The Central Valley Water Board decided that it was necessary to regulate small dairies in order to identify water quality problems. Collection of information through the Reissued General Order allows the Board to determine what improvements are necessary to improve water quality. It also allows necessary improvements to be planned so they can be implemented in an effective and efficient manner that protects water quality throughout the region.

The Discharger also makes several statements arguing that the cost of complying with the 2007 General Order led to the decline in small dairies in the Central Valley. These arguments are oversimplified and rely upon a very loose interpretation of fact. Central Valley Water Board staff estimates that the cost associated with complying with the Reissued General Order Annual Reporting Requirements is approximately $964. (Attachment A of ACLC R5-2015-0506). The Discharger references attrition data from 2007 and 2010 for small dairies in an attempt to show that the cost associated with complying with the 2007 General Order resulted in many small dairies closing down. (30 April 2015 *Submission of Evidence and Policy Statements*, p. 17). This conclusion ignores many key facts. Like other small businesses in the economic downturn, small dairies declined for a variety of economic reasons. Much of the attrition suffered by small dairies resulted from economic conditions unrelated to adoption of the 2007 General Order, and not from the cost associated with compliance.

VII. The Central Valley Water Board Staff Provided the Discharger with all Necessary Information Pertaining to the Representative Groundwater Monitoring Program

The Discharger asserts that the Central Valley Water Board has failed to demonstrate the value of or need for joining a representative groundwater monitoring program. This issue is not

relevant to the subject complaint, which only alleges a violation for failure to submit the 2013 annual report. Furthermore, the issue has been previously considered by the Central Valley Water Board and should be barred by collateral estoppel.

To satisfy the monitoring requirements of the Reissued General Order, permittees may perform individual monitoring, or may join a representative groundwater monitoring program. Contrary to the Discharger's assertion, the Central Valley Water Board does not have an obligation to convince dairies to join a representative groundwater monitoring program, but only to provide the information to be able to do so.

On 5 May 2012 the Executive Officer of the Central Valley Water Board issued an Order, pursuant to Water Code § 13267 Order ("13267 Order") that directed the Discharger to implement groundwater monitoring at the Dairy. Specifically, the 13267 Order directed the Discharger to submit either: 1) written notification, by 25 May 2012, that the Discharger has joined a coalition group that will develop a representative groundwater monitoring program as an alternative to implementing an individual groundwater monitoring program at the Dairy; or, 2) an acceptable groundwater monitoring well installation and sampling plan (MWISP) to the Central Valley Water Board by 29 June 2012. On 19 July 2012, Central Valley Water Board staff issued a Notice of Violation notifying the Discharger that the MWISP had not been received for the Dairy. The Notice of Violation also requested that the delinquent MWISP be submitted as soon as possible to avoid incurring any additional liability. To date, the Discharger has not joined a coalition or submitted the required MWISP. In ACLO R5-2013-0091, the Central Valley Water Board imposed administrative civil liability penalties for this violation.

In its 30 April 2015 *Submission of Evidence and Policy Statement* the Discharger states that on 27 May 2012 the Central Valley Water Board provided the relevant contact information for the representative groundwater monitoring program. The Discharger states that it contacted the

program and was told that the Sweeney Dairy would be accepted. In addition, the Central Valley Water Board staff provided further information about the representative groundwater monitoring program in an email on 20 June 2013, in which the Central Valley Water Board staff advised the Discharger regarding where to obtain the locations of the proposed wells for the monitoring program.

Contrary to the assertions of the Discharger, which are in any case irrelevant to the current proceedings, the Central Valley Water Board has responded to inquiries regarding the representative groundwater monitoring program.

VIII. No conflict of interest exists between the Prosecution Team and Advisory Team

The Discharger incorrectly asserts that the attorneys for Prosecution and Advisory Teams have a conflict of interest, as both are employed by the State Water Resources Control Board. The Hearing Procedures clearly state:

> "[t]o 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 Board (the "Prosecution") have been separated from those who will provide legal and technical advice to the Board (the "Advisory Team")." *Hearing Procedures*, p. 3.

Moreover the Hearing Procedures provide further assurance of fairness and impartiality by forbidding designated parties and interested persons from engaging in ex parte communications regarding this matter. (*Id.*).[4] Finally, this issue was raised by the Discharger in the previous proceedings and should be barred by collateral estoppel.

[4] In any event, assuming, arguendo, that the Prosecution and Advisory Teams' attorneys have collaborated on unrelated matters, the Supreme Court has held that there is no conflict of interest in those circumstances. (*See Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal.4th 731 (2009), [no conflict of interest where attorney prosecuting matter before State Water Resources Control Board simultaneously serves as advisor to Board in unrelated matter].)

IX. Conclusion

The Discharger has submitted legal arguments in this proceeding that are nearly identical to the arguments presented to the Board during the proceedings for ACLC R5-2011-0562, ACLC R5-2012-0542, ACLC R5-2013-0539, and ACLC R5-2014-0543. The Discharger has not succeeded in challenging the Reissued General Order's requirement to submit Annual Reports, and arguments against the propriety of that requirement should be rejected on jurisdictional grounds in this proceeding. Any evidence submitted by the Discharger in support of these arguments should be excluded from the record on the basis of relevance and on the basis of collateral estoppel. The only issue relevant to this administrative civil liability proceeding is whether the Discharger submitted the 2013 Annual Report by 1 July 2014 as required by the MRP, as amended. The Prosecution Team contends that it is clear that the report was not submitted by the required deadline and recommends to the Central Valley Water Board the imposition of an administrative civil liability penalty of $34,650 as proposed.

Dated: 6 May 2015

Respectfully submitted,

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL VALLEY REGION PROSECUTION TEAM

By:

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Naomi Kaplowitz