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9 PAUL RYKEN and
10 ESTATE OF NICK VAN VLIET



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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Estate of Nick Van Vliet and Paul Ryken's Petition for Review of Action and Failure to Act by the California Regional Water Quality Control Board, Lahontan Region, in Issuing Cleanup and Abatement Order No. R6V-2008-034.

CASE NO.

PETITION FOR REVIEW, REQUEST FOR STAY AND REQUEST FOR HEARING (Cal. Water Code §§ 13320, 13221)

Pursuant to Section 13320 of California Water Code and Section 2050 of Title 23 of the California Code of Regulations ("CCR"), the Estate of Nick Van Vliet and Paul Ryken (collectively "Desert View Dairy") hereby petition the State Water Resources Control Board ("State Board") to review and vacate the final decisions of the California Regional Water Quality Control Board for the Lahontan Region ("Regional Board") in the cleanup and abatement order entitled "Cleanup and Abatement Order No. R6V-2008-0034 Requiring Paul Ryken, the Estate of Nick Van Vliet Children LLC, Flaming Dairy, Incorporated, K&H Van Vliet Children LLC, and The Pacific Gas And Electric Company to Cleanup or Abate the Effects of Contaminants to Groundwaters of the Mojave River Hydrologic Unit, Desert View Dairy, Hinkley, WDID No. 6B36040900" (the "Order"). A true and correct copy of the Order is attached hereto as *Exhibit A* and incorporated herein by reference.

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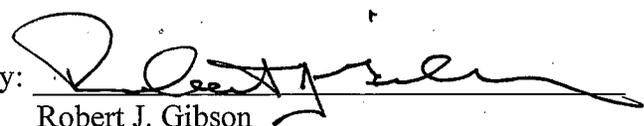
PETITION FOR REVIEW, REQUEST FOR STAY AND REQUEST FOR HEARING

1 Desert View Dairy requests that the State Board review the Regional Board's
2 Order on the ground that the Order is overly broad, arbitrary and capricious and the
3 findings in support of the Order are not supported by evidence in the record.

4 Furthermore, Desert View Dairy concurrently, but separately, seeks a partial stay
5 of the Order pursuant to Water Code section 13321 and section 2053 of Title 23 of the
6 California Code of Regulations. The Order requires Desert View Dairy to perform actions
7 which are the subject of the Petition and Desert View Dairy will suffer substantial harm if
8 the partial stay is not granted. Desert View Dairy has complied with Order No. 1 that
9 requires Desert View Dairy to supply interim uninterrupted replacement water service to
10 residences or businesses in the Affected Area that are served by private or community
11 domestic wells in which nitrate has been detected at concentrations exceeding the
12 minimum drinking water requirements.¹ See *Exhibit A*, at 8, order No. 1. The remaining
13 actions that the Regional Board has required Desert View Dairy to take are in regard to
14 testing and submitting reports to the Regional Board. Thus, no substantial harm will be
15 incurred by any other interested person, or the public, if the stay is granted. And because
16 of the imminent deadlines contained in the Order, Desert View Dairy requests that the
17 State Board conduct a hearing on this matter as soon as possible. The facts supporting
18 Desert View Dairy's request for a stay are set out in more detail in the accompanying
19 declarations of Paul Ryken and Steve Mockenhaupt.

20 Dated: December 9, 2008

SNELL & WILMER L.L.P.

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23 By: 

Robert J. Gibson
Alina Amarkarian
Attorneys for PAUL RYKEN and ESTATE
OF NICK VAN VLIET

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28 ¹ The users of the wells which have been identified were already using bottled water
because, unrelated to any activity of Desert View Dairy, the TDS levels in the wells
exceeded standards for household use.

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I.

INTRODUCTION

A. Desert View Dairy’s Facility

Desert View Dairy’s facility is located at 37501 Mountain View Road in Hinkley, California (the “Property”). The Property is located in the Southwest corner of Mountain View Avenue and Santa Fe Avenue in the County of San Bernardino and is approximately 180 acres. The Property is comprised of the dairy operations, two homes along the southeast corner of the Property, Mr. Ryken’s home, dirt roads, crop fields and a stormwater storage pond. See *Exhibit B*, at 2-3 and Attachment B, a true and correct copy of the report prepared by Conestoga-Rovers & Associates summarizing the historical data and the source of the nitrate groundwater impacts attached hereto and incorporated herein by reference.

B. Ownership History of Desert View Dairy

From 1981 to 1992, the Property was owned by FD Farms. Under FD Farms’ ownership, Flaming Dairy Inc. conducted dairy operations on the Property from 1981 to 1986. In 1992, K&H Van Vliet Children LLC and various Van Vliet trusts became owners of the Property until 2002, while Desert View Dairy conducted dairy operations on the Property.

In 2002, Pacific Gas & Electric (“PG&E”) purchased the Property as part of its Interim Plume Containment and Hexavalent Chromium Treatment Project (“Project”) in an effort to contain and clean up the hexavalent chromium pollution in the ground water. PG&E leased the Property back to Desert View Dairy so that it can continue its dairy operations, while PG&E conducts its hexavalent chromium project on the property.

C. Past and Present Dairy Operations On and Near the Property.

For decades, at least since 1952, the entire area surrounding Desert View Dairy’s Property has been used primarily for agricultural purposes. In addition to the large

1 number of acres fertilized and irrigated for crop production, several livestock/dairy
2 operations are noted throughout this time period. *See Exhibit B*, at 3.

3 For instance, there have been two hog operations that existed near the Property,
4 one immediately west of the Property and one to the north along Thompson Road. *See*
5 *Exhibit B*, Attachment B. These facilities had liquid manure storage ponds and likely
6 land application and stockpiling of solid manure throughout their operational history.
7 Moreover, a dairy farm operated by Nelson Dairy was located south of the Property and it
8 was in operation for several decades. *Id.* *See also Exhibit C*, at 4-5, a true and correct
9 copy of the Groundwater Investigation Data Report (October 2008) prepared by
10 Conestoga-Rovers & Associates (“October 2008 Groundwater Report”) is attached hereto.

11 Currently, Desert View Dairy’s dairy operation consists of approximately 1,250
12 dairy cows, 200 dry cows and 40 springers. All manure and wastewater generated by the
13 facility is carefully managed by Desert View Dairy in accordance with waste discharge
14 requirements. The water from the Desert View Dairy is run through a solids separator and
15 then the solid manure is transported to an offsite facility for processing and the liquids
16 (washwater and wastewater) are contained in concrete tanks with subsurface liners and
17 leak detectors. *See Exhibit B*, at 1. These liquids are then land applied to approximately
18 27 acres of cropland through center pivot irrigation to the fields in the north east corner of
19 the Property. Desert View Dairy estimates that approximately 45,000 gallons of water are
20 currently being applied on a daily basis to this field. The tests of this water range from
21 ND to 4 milligrams per liter (mg/L) nitrate as N (i.e., ND to 17.7 mg/L nitrate as NO₃)
22 (when the oxygen is measured with the nitrogen).² *See Exhibit B*, at 1.

23 It should be noted that prior to the construction of the North Pond in 1981, when
24 Flamelng Dairy Inc. operated the site, wastewater was directed to the field immediately
25 west of the Property (“West Field”). *See Exhibit C*, at 4. Flamelng Dairy, Inc. was
26 responsible for applying the wastewater to the west field from 1981 to 1986.

27
28 ² Nitrate-N concentration needs to be mathematically converted to nitrate-NO₃ by
multiplying by 4.428. This accounts for the difference in molecular weight of the two.

1 **D. PG&E's Application Of Groundwater As Part Of The Remediation Project.**

2 Since 2004, PG&E has discharged pumped groundwater containing hexavalent
3 chromium and elevated nitrate levels onto fields on Desert View Dairy's Property.
4 PG&E is pumping water out at rates of 350 gallons per minute (gal/min) in the winter and
5 600 gal/min in the summer and discharging it to an 80-acre parcel of land. *See Exhibit B,*
6 *at 2.* In other words, PG&E is pumping an average of 400,000 gallons of water containing
7 elevated nitrate levels *per day.*³ Notably, the historical concentration of nitrate in the
8 discharged water range from 9.15 to 12.9 mg/L nitrate as N (i.e., 40.5 to 57.1 mg/L nitrate
9 as NO₃), which for the most part exceeds the MCL for nitrate in drinking water. *See*
10 *Exhibit B,* at 2.

11 Furthermore, PG&E is currently the only entity pumping water onto the fields to
12 the south of the Property ("South Field") and to the west of the Property ("West Field").
13 *See Exhibit B,* at 2. This clearly explains the elevated readings of the monitoring well
14 near the West Field (Monitoring Well DW02). *See Exhibit C,* Figure 4.3 (showing that
15 the concentration of nitrate as NO₃ at DW02 is at 420 mg/L). PG&E's activity also
16 impacted Monitoring Well DW03. *Id.* This critical data was apparently not considered by
17 the Regional Board in issuing its Order to Desert View Dairy.

18 **E. Past and Present Groundwater Conditions Near Or Around The Property.**

19 The federal standard or the maximum contaminant level ("MCL") for nitrate in
20 drinking water is 10 mg/L nitrate-N, or 45 mg/L nitrate-NO₃.⁴ Given this standard,
21 historical data shows that the groundwater upgradient and cross-gradient of the Property
22 has exceeded the drinking water standard. *See Exhibit B,* at 3 and Figures 1 and 2.

23 For instance, wells upgradient and to the east show concentrations in the 65 to 70
24 mg/L nitrate as NO₃ range. Wells upgradient and to the south of the Desert View Dairy
25 show concentrations ranging from 55 to 90 mg/L nitrate as NO₃. The area southwest of

26 ³ On the other hand, Desert View Dairy only discharges 45,000 gallons of water per day
27 which has nitrate levels from non-detectable ("ND") to only 4 mg/L. *See infra* Section C.

28 ⁴ *See Exhibit D,* at 13, a true and correct copy of the Lahontan Regional Water Quality
Control Board, Executive Officer's Report, dated November 2001, attached hereto and
incorporated herein by reference.

1 mg/L nitrate as NO₃ range. Wells upgradient and to the south of the Desert View Dairy
2 show concentrations ranging from 55 to 90 mg/L nitrate as NO₃. The area southwest of
3 the Property, which is where Nelson Dairy ran its dairy operations for approximately 25
4 years, has nitrate as NO₃ detected at concentrations ranging from 53 to 70 mg/L. Farther
5 west of the Property where the former Lyerely Dairy was located, monitoring wells have
6 detected concentrations at 72 mg/L nitrate as NO₃. See *Exhibit B*, at 3 and Figures 1 and
7 2. On the other hand, sampling data provided by Desert View Dairy shows that its
8 washwater has a nitrate concentration in the range of ND to 4 mg/L nitrate as N (i.e., ND
9 to 17.7 mg/L nitrate as NO₃). See *Exhibit B*, at 2.

10 Thus, there are pre-existing nitrate levels which exceeded the drinking water
11 standard that cannot be associated with just Desert View Dairy.

12 **F. Groundwater Flows North Near and On the Property**

13 The Property is within the northern half of the Mojave River groundwater basin.
14 The Mojave River groundwater basin is considered topographically enclosed and contains
15 unconsolidated alluvial and floodplain sediments of sands, gravels, silts, and clays.⁵
16 Groundwater is typically encountered in 75 to 102 feet below ground surface (bgs) and the
17 groundwater flow in this region is in a northeasterly direction based on the 2007 Annual
18 Monitoring Report. See *Exhibit C*. Furthermore, reports of monitoring wells on or near
19 the Property have also confirmed that the groundwater generally flows north. *Id.*
20 Notably, the Regional Board reached the same conclusion in July of 2004, in Board Order
21 No. R6V-2004-0034 (“July 2004 Order”). A true and correct copy of the July 2004 Order
22 is attached hereto as *Exhibit E*.

23 The direction of groundwater is important to determine the origin of the nitrate
24 concentration in the groundwater surrounding the Property. Here, because the
25 groundwater near and on the Property flows to the north or to the northeast,⁶ Desert View
26

27 ⁵ U.S. Geological Survey, 2001, Stimulation of Groundwater Flow in the Mojave River
Basin, California.

28 ⁶ Notably, the groundwater to the east of Desert View Dairy does not have elevated nitrate
levels.

1 to investigate these areas.

2 **G. Regional Board Finds Elevated Nitrate Levels Near Desert View Dairy.**

3 In August of 2001, the Regional Board performed water sampling in the Hinkley
4 area to measure hexavalent chromium among other general inorganics, including nitrate as
5 nitrogen. The test results detected high nitrate as nitrogen levels at 62 mg/L in the
6 Hinkley area. See *Exhibit D*, at 13.

7 In September of 2001, the Regional Board sampled 24 drinking water wells of
8 Hinkley residents in the vicinity of PG&E's chromium plume pursuant to the
9 recommendation of the California Department of Health Services Environmental Health
10 Investigation Board ("CDHS EHB"). See *Exhibit F*, at 6, a true and correct copy of the
11 Lahontan Regional Water Quality Control Board, Executive Officer's Report, dated
12 September 2001, attached hereto and incorporated herein by reference. In seven of the
13 wells, nitrate as N was detected at 55 mg/L. *Id.* The Regional Board suspected that
14 Desert View Dairy's dairy and agricultural operations were a possible source of the nitrate
15 problem; thus, the Executive Officer of the Regional Board issued a letter to Mr. Paul
16 Ryken under California Water Code section 13267, requesting a technical report regarding
17 waste disposal practices. *Id.* Mr. Ryken complied with the Regional Board's request.

18 On November 30, 2001, the Regional Board requested that Desert View Dairy
19 create "a work plan that contains a proposed ground water monitoring plan that would
20 adequately characterize impacts to ground water from [Desert View Dairy's] washwater,
21 dairy manure storage areas, and agricultural operations." Desert View Dairy provided this
22 groundwater monitoring plan to the Regional Board and also complied with the Regional
23 Board's request that it provide Quarterly Ground Water Monitoring Reports. See
24 *Exhibit G*, a true and correct copy of the Waste Management Plan, dated February 2002
25 and prepared by Nolte Associates is attached hereto and incorporated herein by reference.

1 **1. In 2004, the Regional Board acknowledges the elevated nitrate levels on**
2 **the Property, but takes no action.**

3 In July of 2004, in relation to PG&E's Interim Plume Containment and Hexavalent
4 Chromium Treatment Project, the Regional Board issued an order providing PG&E with
5 new waste discharge requirements for their Project ("July 2004 Order"). See *Exhibit E*.
6 In the July 2004 Order the Regional Board made a number of findings that are relevant to
7 the Order.

8 Although the Regional Board acknowledged that the nitrate levels on some parts of
9 the Property reached 275 mg/L, which is six times higher than the drinking water standard
10 of 45 mg/L, *Exhibit E*, at 3, it reached the conclusion that the groundwater under the
11 Property did not meet the beneficial use of municipal and domestic supply because of
12 elevated TDS levels, not because of the nitrate levels.⁷ *Exhibit E*, at 4. In other words, as
13 early as 2004, the Regional Board was not only aware of the elevated nitrate levels in the
14 groundwater, but it also did not consider the groundwater to be suitable for human use and
15 consumption due to the elevated TDS levels. Thus, as early as 2004, residences and
16 businesses around the Property used replacement supply due to the elevated TDS levels.
17 Notably, the Regional Board permitted PG&E to continue its activities on the Property. In
18 the meantime, the residents and businesses surrounding the Property arranged to have
19 replacement water service supplied to them due to the elevated TDS levels.

20 **2. In January of 2008, the Regional Board, once again, acknowledges the**
21 **elevated nitrate levels on the Property, but solely focuses on Desert**
22 **View Dairy.**

23 On January 31, 2008, the Regional Board staff collected a water sample from the
24 domestic well of a resident near the Property. *Exhibit A*, at 2. The well is situated
25 approximately 200 feet north of the Property. The test results indicated that the nitrate
26 levels in that well were 81 mg/L. *Id.*

27 ⁷ Although the Regional Board also determined that the percolation of discharged
28 groundwater by PG&E should not reach the groundwater for at least eight years.
Exhibit E, at 4. Desert View Dairy has been unable to locate any data to support this
statement. To the contrary, the evidence suggests that the re-injected water could reach
the Upper Aquifer in approximately one year (80 ft/yr). See *Exhibit B*, at 2.

1 On May 9, 2008, the Regional Board ordered Paul Ryken and PG&E to submit a
2 groundwater investigation plan and technical reports to investigate pollution in
3 groundwater beneath and adjacent to the Property pursuant to Water Code section 13267.
4 Paul Ryken complied with this request. Paul Ryken submitted a work plan proposing a
5 groundwater investigation at and in the vicinity of the Property and a letter report
6 describing waste management practices during the past 15 years. *See Exhibit H*, a true
7 and correct copy of the letter dated July 30, 2008 from Conestoga-Rovers & Associates to
8 the Regional Board regarding Desert View Dairy's waste storage and application practices
9 is attached hereto and incorporated herein by reference. Mr. Ryken, also, conducted the
10 groundwater investigation, with off-site domestic well sampling in early October of 2008.
11 The technical report describing the investigation results were detailed in the October 2008
12 Groundwater Report. *See Exhibit C*. The October 2008 Groundwater Report was simply
13 a data report that summarized nitrate levels in the groundwater on or near the Property and
14 some of the potential causes of the elevated nitrate levels at that particular time. The
15 October 2008 Report did not provide any evidence, test results or analysis regarding the
16 source of the nitrates or the persons or entities responsible for the elevated nitrate levels.

17 In response to Desert View Dairy's submission of the October 2008 Report, the
18 Regional Board ignored the effect of PG&E's massive pumping operations which has
19 caused the elevated nitrate levels in the groundwater and also ignored the pre-existing
20 elevated TDS levels and issued the Order holding Desert View Dairy primarily liable for
21 the elevated concentrations of nitrate without a hearing or any other opportunity to present
22 evidence.

23 **H. Regional Board Issues The Order That Holds Desert View Dairy Primarily**
24 **Liable For The Contaminants.**

25 On November 10, 2008, the Regional Board issued the Order directing Desert
26 View Dairy and Flamelng Dairy, Inc. to: (1) provide uninterrupted replacement water
27 supply to well owners with elevated nitrate concentrations in private drinking water
28 supply wells in the vicinity of and in the down gradient flow of Desert View Dairy's

1 property; (2) perform quarterly testing of all private wells affected or potentially affected
2 by nitrate pollution; and (3) submit reports to the Regional Board on a regular basis. *See*
3 *Exhibit A*.

4 The Regional Board held that wastes from the Property have adversely impacted or
5 threaten to impact supply wells with nitrates that exceeded the drinking water standard.
6 The Regional Board found Desert View Dairy and Flamelng Dairy, Inc. primarily liable
7 for compliance with the Order because, according to the Regional Board, they “initiated
8 and contributed to the discharge of waste.” *See Exhibit A*, Finding No. 21. The Regional
9 Board also found that PG&E was not primarily liable because it did not initiate or
10 contribute to the discharge; instead, it is named as secondarily responsible party due to its
11 former or current ownership of the Property. *See Exhibit A*, Finding No. 22. Notably, the
12 Order is not supported with any evidence that suggests that Desert View Dairy initiated or
13 contributed to the discharge and PG&E massive discharges did not. If Desert View
14 Dairy’s limited discharges contributed to the nitrates in the groundwater, then PG&E’s
15 massive discharges also would have primarily contributed to them. Or, if PG&E does not
16 contribute to the issue, then Desert View Dairy’s lesser discharge clearly would not either.

17 Furthermore, the Regional Board ordered Desert View Dairy, along with Flamelng
18 Dairy, Inc., to comply with a number of actions in accordance with a time schedule
19 included in the Order. At this time, Desert View Dairy has complied with the Regional
20 Board’s request that replacement water be provided to affected residences in accordance
21 with the Order pending review of this Petition. *See Exhibit A*, order No. 1. Desert View
22 Dairy has also complied with the Regional Board’s request that parcel owners and
23 occupants in the affected area be notified of the elevated nitrate levels and that a technical
24 report be submitted to the Regional Board listing all residences and businesses that have
25 been provided replacement water service. *See Exhibit A*, order Nos. 2 and 3.

26 However, the Regional Board has set forth additional actions that need to be taken
27 on a time schedule that provides for an unreasonably short period of time for Desert View
28 Dairy to execute the required actions. But more importantly, the Regional Board expects

1 Desert View Dairy, and only Desert View Dairy, to take any and all necessary actions
2 pursuant to the Order. The Regional Board had indicated that it will not proceed to
3 enforce the Order against Flaming Dairy, Inc. because Desert View Dairy has been
4 complying with the Order.

5
6 **II.**

7 **NAME AND ADDRESS OF PETITIONERS**

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9 Desert View Dairy
10 37501 Mountain View Road
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22 **III.**

23 **SPECIFIC ACTION FOR WHICH THIS PETITION FOR REVIEW IS SOUGHT**

24 The Regional Board action that is the subject of this Petition is the issuance of the
25 Order and all action that Desert View Dairy needs to take in response to the Order,
26 including, but not limited to: (1) providing uninterrupted replacement water supply to well
27 owners with elevated nitrate concentrations in private drinking water supply wells in the
28 vicinity of and in the down gradient flow of Desert View Dairy's property; (2) performing
quarterly testing of all private wells affected or potentially affected by nitrate pollution;
and (3) submitting reports to the Regional Board on a regular basis. *See Exhibit A.*

Desert View Dairy also requests that the State Board review the following findings
by the Regional Board:

1 (a) The Regional Board's unsupported findings Nos. 6 and 7 that Desert
2 View Dairy's past discharges of manure solid waste and wastewater discharges
3 contributed to increased nitrate levels in groundwater beneath and in the downgradient
4 groundwater flow direction of the Property.

5 (b) The Regional Board's unsupported finding No. 17 that wastes from
6 the Property either have adversely impacted or threaten to impact supply wells with
7 nitrates and other wastes exceeding the drinking water MCLs.

8 (c) The Regional Board's unsupported finding No. 20 that the affected
9 ground water is no longer useable for drinking or domestic supply.

10 (d) The Regional Board's unsupported finding No. 21 that Mr. Paul
11 Ryken, the estate of Mr. Nick Van Vliet, and Flameling Dairy, Inc. are primarily liable for
12 complying with this Order because they initiated and contributed to the discharge of
13 waste.

14 (e) The Regional Board's unsupported finding No. 22 that PG&E is only
15 secondarily liable for complying with this Order because it did not initiate or contribute to
16 the discharge of waste.

17
18 IV.

19 **THE DATE THE REGIONAL BOARD ACTED**

20 The Regional Board issued the Order on November 10, 2008, but was received by
21 Desert View Dairy on November 12, 2008.

22
23 V.

24 **STATEMENT OF THE REASONS THE ACTION IS**
25 **INAPPROPRIATE AND IMPROPER**

26 The Order is improper, inappropriate, arbitrary and capricious for the following
27 reasons:
28

1 (1) The Regional Board’s findings in the Order are not supported by
2 evidence in the record, and in fact, is contrary to such evidence;

3 (2) Desert View Dairy is not responsible for the nitrates in the groundwater
4 and the Order fails to hold other potential dischargers primarily liable;

5 (3) The Order is arbitrary and capricious as to how the Regional Board
6 determined who is primarily and secondarily liable for the groundwater contamination;

7 (4) The Order was issued without a hearing or opportunity to respond.
8 Desert View Dairy was afforded no opportunity to formally introduce evidence on the
9 record to refute the Executive Officer’s assertion that Desert View Dairy is solely
10 responsible for the contamination of the groundwater;

11 (5) The Order requires Desert View Dairy to submit technical reports and
12 perform investigations under arbitrary and capricious time frames;

13 (6) The Order is arbitrary and capricious as to the scope of Desert View
14 Dairy’s investigation of the groundwater contamination;

15 (7) The Order is vague and uncertain as to the extent bottled water service
16 will need to be provided; the scope of the water service and the indefinite time period
17 Desert View Dairy is obligated to do sampling and submit technical reports to the
18 Regional Board; and

19 (8) The Order arbitrarily imposes administrative civil fines of \$5,000/day
20 that is in violation of Desert View Dairy’s due process rights.

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VI.

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PETITIONERS ARE AGGRIEVED

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Desert View Dairy is and will be adversely affected by the actions taken by the
Regional Board. Desert View Dairy is aggrieved in that it is required by an overbroad and
unsubstantiated Order to expend substantial funds to abate the effects of the waste and to
conduct activities to investigate subsurface contamination caused by others for which
Desert View Dairy has no legal responsibility.

1 Furthermore, Desert View Dairy has been aggrieved by the process used by the
2 Executive Officer. The Order fails to set forth the evidence relied upon by the Regional
3 Board in support of this action and there has been no formal hearing or development of
4 evidentiary records. This has left Desert View Dairy with no meaningful ability to
5 evaluate an evidentiary record on which to seek review of the Order.

6 Thus, the Regional Board's Order is not supported by substantial evidence and is
7 improper, premature, inappropriate, arbitrary and capricious. For all of these reasons,
8 Desert View Dairy's legal and constitutional rights have been violated.

9
10 **VII.**

11 **PETITIONERS' REQUEST FOR ACTION BY THE STATE BOARD**

12 Desert View Dairy seeks an order by the State Board:

13 (1) To vacate the Order and remand the Order to the Regional Board with
14 instructions to clarify the Order by identifying all responsible parties and the scope and
15 extent of liability for each responsible party;

16 (2) That Desert View Dairy be provided a hearing to allow it to address the
17 issues presented in the Petition which Desert View Dairy was precluded from addressing
18 in a hearing before the Regional Board. Desert View Dairy was denied due process of
19 law and a sufficient opportunity to be heard by the Regional Board's failure to hold a
20 hearing to allow Desert View Dairy an opportunity to present evidence prior to issuing the
21 Order; and

22 (3) That an Order be issued by the State Board providing for such other and
23 further relief as is just and proper.

24
25 **VIII.**

26 **STATEMENT OF POINTS AND AUTHORITIES**

27 The Order is defective and invalid for both substantive and procedural reasons as
28 discussed in detail below.

1 **A. The Regional Board's Findings in the Order Are Not Supported by Evidence**
2 **In the Record.**

3 In the Order, the Regional Board makes numerous findings that are not supported
4 by the evidence before the Regional Board. Based on these erroneous findings, the
5 Regional Board issued the Order against Desert View Dairy, holding it primarily liable for
6 the groundwater contamination and requiring Desert View Dairy to take a number of
7 actions to abate the effects of the alleged contamination. The Regional Board's erroneous
8 findings are as follows:

9 **1. Finding No. 6: Desert View Dairy's wastewater discharges contributed**
10 **to increased nitrate levels in groundwater beneath and in the**
11 **downgradient groundwater flow direction of the Property.**

12 The Regional Board has made a finding that Desert View Dairy's wastewater
13 discharges have contributed to increased nitrate levels in groundwater beneath and in the
14 downgradient groundwater flow direction of the Property. *See Exhibit A*, at 1-2, Finding
15 No. 6. However, the Regional Board fails to cite to any evidence to support this
16 conclusion; instead, the evidence indicates otherwise.

17 As discussed above, the groundwater in the area surrounding the Property flows in
18 a northerly, or in some areas in a northeasterly, direction. *See Exhibit C*. The Regional
19 Board is in agreement with this assessment. *See Exhibit E*, at 2 ("Ground water flows in
20 the upper aquifer is primarily to the north"). Because groundwater that may have possibly
21 been affected by any manure or wastewater discharge originating from Desert View
22 Dairy's dairy operations would flow to the north, dairy operations on the Property could
23 have no effect on the groundwater to the south or west of the Property due to the flow of
24 groundwater. *See Exhibit B*, at 3. Thus, the Regional Board has reached an erroneous
25 conclusion that has no merit because it is contrary to hydrogeologic conditions in this
26 area.
27
28

1 **2. Finding No. 7: Manure waste from the Property has adversely impacted**
2 **or threatened to impact supply wells with nitrates exceeding the**
3 **minimum drinking water standard.**

4 The Regional Board has also made the determination that the manure waste from
5 the Property has caused the supply wells to have elevated nitrate levels. *See Exhibit A,*
6 at 2. No such evidence was ever submitted to the Regional Board nor has the Regional
7 Board indicated that such evidence exists; instead, the Regional Board has based this
8 finding on pure speculation.

9 First of all, the Regional Board has offered no evidentiary support for its finding
10 that manure waste from the Property is the cause of the elevated nitrate levels in the
11 supply wells. The Order fails to mention how the Regional Board reached this conclusion
12 and what source it is relying on. Secondly, no evidence was before the Regional Board
13 that would suggest it is the cause of the elevated nitrate levels. The October 2008
14 Groundwater Report that was submitted to the Regional Board identified several potential
15 source areas that may be contributing to the nitrate groundwater impacts that are being
16 detected. *See Exhibit C, § 2.4.* The report stated that agricultural activities that occur
17 around the Desert View Dairy Property “*may* ... be contributing sources of nitrates to the
18 groundwater;” however, no definite conclusion was ever reached. *Id.* (emphasis added).
19 More importantly, the Regional Board has never required or requested any analysis,
20 testing or study to determine the source of the elevated nitrate levels surrounding the
21 Property. Although preliminary investigation has revealed that elevated concentrations of
22 nitrate exist in the surrounding area of the Property, all potential sources for the elevated
23 nitrate levels have not been identified. For example, the October 2008 Groundwater
24 Report identifies on-site and off-site septic systems as a potential source. At this point, no
25 evidence exists to exclude this potential source; however, given the dischargers listed in
26 the Order, it appears that the Regional Board has discounted this and other potential
27 sources. Nevertheless, further investigation is necessary to identify all of the potential
28 sources of nitrate contamination in the surrounding area of the Property. Until such

1 investigation is completed, there is no substantial evidence supporting the finding that
2 Desert View Dairy's discharge was and is the cause of the elevated nitrate concentration.

3 **3. Finding No. 20: The affected groundwater is no longer useable for**
4 **drinking or domestic supply.**

5 In the Order the Regional Board states that the affected ground water near the
6 Desert View Dairy Property is no longer useable for drinking or domestic supply. *See*
7 *Exhibit A*, at 5. However, the Regional Board made this determination in 2004 and it was
8 not because of elevated nitrate levels, but due to the naturally occurring TDS levels.

9 In the July 2004 Order, The Regional Board held that because of elevated TDS and
10 chromium levels the ground water below and near the Property did "not presently support
11 the beneficial use of a municipal and domestic supply." *See Exhibit E*, at 3. In other
12 words, as early as 2004, the Regional Board considered the groundwater in this area to be
13 unsafe for human use and consumption. Thus, the residences and businesses in this area
14 would have been required to receive replacement water supply because of elevated TDS
15 and total chromium levels. However, the Regional Board has now taken the position that
16 the affected groundwater is "no longer" useable for drinking or domestic supply because
17 of the elevated nitrate levels. The Order ignores the Regional Board's prior findings in its
18 July 2004 Order and the fact that all occupants in this area have already been using bottled
19 water for their use and consumption. Thus, the Regional Board's Order requiring Desert
20 View Dairy to provide uninterrupted replacement water supply to several well owners in
21 the vicinity of the Property because the groundwater "is no longer useable for drinking or
22 domestic supply" is arbitrary and capricious.

23 **4. Finding No. 21: Desert View Dairy is primarily liable for complying**
24 **with the Order because they initiated and contributed to the discharge**
25 **of waste.**

26 The Regional Board has reached the conclusion that Desert View Dairy is
27 primarily liable for complying with the Order because they initiated and contributed to the
28 discharge of waste. *See Exhibit A*, at 5. Once again, the Regional Board fails to provide
any evidentiary support for this conclusion.

1 The Regional Board's finding is based upon a number of erroneous assumptions
2 and unsupported evidence. For instance, the Regional Board has taken the position that
3 the party that initiates or contributes to the discharge of waste should be held primarily
4 liable, yet this conclusion fails to take into consideration the quantity and quality of
5 discharge by each potentially responsible party and the period of time that a party has
6 been discharging waste on or near the Property. The scope and extent of waste discharge
7 was not considered by the Regional Board in determining who is primarily liable.

8 Furthermore, at this point there is no evidence to suggest that the discharge of
9 waste by Desert View Dairy is the primary cause of the elevated nitrate levels. At all
10 times, Desert View Dairy has engaged in sound waste management practices has abided
11 by all water discharge requirements and orders to ensure that the water quality is up to par
12 with the minimum standards. Notably, Desert View Dairy has tested its waste water and
13 the nitrate levels are at or below 4 mg/L, which is far below the drinking water standard of
14 45 mg/L. *See Exhibit C*, at 2. The Regional Board fails to take into account that PG&E is
15 pumping massive quantities of wastewater onto the fertilized agricultural fields. More
16 specifically, PG&E is pumping an average of 400,000 gallons of wastewater with elevated
17 nitrate levels per day onto the fields in comparison to Desert View Dairy's 45,000 gallons
18 of water per day. *See also Exhibit B*, at 2. Desert View Dairy's wastewater has a nitrate
19 concentration in the range of ND to 17.7 mg/L nitrate as NO₃ in comparison to PG&E's
20 discharged water that has a nitrate concentration of 40.5 to 57.1 mg/L nitrate as NO₃. *See*
21 *Exhibit B*, at 2. PG&E's discharge obviously has a greater adverse effect on nitrate levels
22 than Desert View Dairy's discharge. *Id.* For instance, assuming that Desert View Dairy's
23 wastewater is at its highest concentration and 45,000 gallons per day are being used to
24 irrigate the 27-acre field, Desert View Dairy is applying approximately 0.25 pounds of
25 NO₃/acre/day. *Id.* On the other hand, assuming that PG&E's wastewater is at its highest
26 concentration and 400,000 gallons per day are being used to irrigate the 80-acre field,
27 PG&E is applying approximately 2.4 pounds of NO₃/acre/day. *Id.* As such, PG&E's
28

1 remedy discharge is approximately ten times the mass of NO₃ per acre compared to
2 Desert View Dairy.

3 Thus, once again, the Regional Board's conclusions were arbitrary and capricious
4 and further investigation is necessary to determine the causes of the elevated nitrate levels.
5 Until such investigation is completed, there is no substantial evidence supporting the
6 finding that Desert View Dairy's discharge was and is the primary cause of the elevated
7 nitrate concentration and therefore, it should be held primarily liable.

8 **5. Finding No. 22: PG&E is secondarily liable for complying with this**
9 **Order because it did not initiate or contribute to the discharge of waste.**

10 In the Order the Regional Board has determined that PG&E is secondarily liable
11 because it may not have initiated or contributed to the discharge of waste. *See Exhibit A*,
12 at 2. However, once again, there is no evidentiary support for the Regional Board's
13 conclusion; instead, the evidence contradicts this conclusion.

14 The Order fails to take into account the fact that the nitrate levels have dramatically
15 increased since PG&E started pumping water with elevated nitrate levels at rates of up to
16 600 gal/min and applying it to the fields, which in turn has caused the elevation of nitrates
17 in the groundwater. Notably, the Regional Board also fails to take into account that
18 PG&E is pumping massive quantities of wastewater onto the fertilized agricultural fields
19 since 2004 even though the Regional Board has knowledge of PG&E's actions. The
20 Regional Board ignored PG&E's activities and has arbitrarily decided that Desert View
21 Dairy is primarily responsible for the elevated nitrate levels simply because it runs a dairy
22 operation on the Property. This ignores the highest nitrate levels at Monitoring Well
23 DW02 which is where PG&E's operations are conducted, not where the dairy herd is
24 located. *See Exhibit C*, Figure 4.3 (showing that the concentration of nitrate as NO₃ at
25 DW02 is at 420 mg/L). This evidence demonstrates that PG&E should be held primarily
26 liable. Thus, Desert View Dairy seeks an opportunity to present this evidence to the
27 Regional Board so that all responsible parties can be held liable for the elevated nitrate
28 levels in the groundwater.

1 **B. The Evidence Strongly Supports a Finding That Desert View Dairy Is Not**
2 **Solely Responsible for the Groundwater Contamination; However the Order**
3 **Fails To Hold Other Known Responsible Parties Primarily Liable.**

4 Desert View Dairy has been singled out by the Regional Board as the sole party
5 responsible for the elevated nitrate levels in the groundwater surrounding the Property,
6 despite findings and substantial evidence to the contrary. In fact, the Regional Board's
7 entire theory of liability is that Desert View Dairy "as dairy operators initiated and
8 contributed to the discharge of waste." See *Exhibit A*, at 8, Finding No. 21. Even though
9 the Regional Board has also named Flameling Dairy, Inc. as a primarily liable party under
10 the Order, Flameling Dairy, Inc. has not taken any action to comply with the Order.
11 Notably, the Regional Board has had no response from Flameling Dairy, Inc. and yet the
12 Regional Board has refused to take any enforcement action against them because Desert
13 View Dairy has indicated that it will be complying with the Order.

14 Furthermore, the Regional Board has not imposed mandatory obligations on other
15 known and potential dischargers to participate in the investigation. The Regional Board
16 has an obligation to identify all known or suspected dischargers and require them each to
17 participate in appropriate phases of investigation and remediation. The State Board has
18 previously ruled that when the balance of evidence plainly indicates that the source of
19 contamination is offsite and that a party is not a "discharger," the Regional Board's
20 authority to request further investigation ceases. See *in re: Chevron Products Co.*, Order
21 WQO 2004-005 (May 20, 1994).

22 In the *Chevron Products Co.* case, a regional board sought to require Chevron to
23 conduct further investigation despite the fact that the evidence collected supported a
24 finding that the source of contamination was offsite and upgradient to the site. The State
25 Board ruled for Chevron, finding that where the balance of the evidence indicates that the
26 site is downgradient from the center of contamination, the regional board in that case
27 could not require Chevron to conduct further investigation or remediation of the
28 discharges. For the same reasons, this Regional Board may not order Desert View Dairy

1 to investigate groundwater contamination when Desert View Dairy could not be the cause
2 of any groundwater contamination downgradient to the Property.

3 Thus, the Order erroneously and unlawfully imposes obligations on Desert View
4 Dairy to conduct excessive groundwater investigation despite a tide of evidence indicating
5 that there are other known and potential dischargers that should also be obligated to
6 conduct such investigations. Thus, the costs of the investigation required by the Order are
7 unfairly placed on one party; instead of all responsible parties.

8 **C. The Regional Board's Determination As To Who Is Primarily And**
9 **Secondarily Liable For The Groundwater Contamination Is Arbitrary And**
10 **Capricious.**

11 In the Order, the Regional Board distinguishes between the parties that are
12 primarily and secondarily liable. *See Exhibit A*, at 5, Finding Nos. 21-22. The Regional
13 Board's determination is based upon who initiated and contributed to the discharge of
14 waste and who should be considered a responsible party solely due to their land
15 ownership. *Id.* However, given the facts and circumstances surrounding this case, the
16 Regional Board's determination fails to consider important factors that would play a vital
17 role in determining who is primarily liable.

18 For instance, as it was discussed above, the Regional Board fails to consider the
19 quantity and quality of discharges, by each potentially responsible party. The scope and
20 extent of water discharge and the levels of nitrate in that water is directly correlated with
21 the impact of nitrate levels in the groundwater. However, the Regional Board has failed
22 to consider such evidence. Instead, it has relied on erroneous assumptions and
23 unsupported evidence. For this reason, the Regional Board's determination as to who is
24 primarily and secondarily liable for the groundwater contamination is arbitrary and
25 capricious.

26 **D. The Order Was Issued Without a Hearing or Opportunity to Respond.**

27 Prior to the Regional Board issuing the Order, Desert View Dairy was afforded no
28 opportunity to formally or informally introduce evidence on the record to refute the

1 Executive Officer's assertion that Desert View Dairy is primarily responsible for the
2 contamination of the groundwater. The Regional Board's Order was simply based on the
3 October 2008 Groundwater Report that was simply a report that showed elevated nitrate
4 levels in the groundwater on or near the Property at a single point in time. The Regional
5 Board did not request that Desert View Dairy conduct any tests or analysis to determine
6 the source of the elevated nitrate levels; thus, it is both premature and a violation of Desert
7 View Dairy's constitutional right to due process for the Regional Board to hold Desert
8 View Dairy responsible without giving it an opportunity to provide further evidence to
9 refute the Regional Board's unsupported findings.

10 **E. The Regional Board Ordered Desert View Dairy To Submit Technical Reports**
11 **and Perform Investigations Under Arbitrary and Capricious Time Frames.**

12 The Order was issued by the Executive Officer without hearing or opportunity to
13 respond. Further, the Regional Board failed to present Desert View Dairy with credible
14 evidence supporting the Executive Officer's position. The Regional Board has also
15 arbitrarily determined the Affected Area in which Desert View Dairy is now responsible
16 for providing replacement water service. The Regional Board is also requiring that Desert
17 View Dairy take action for an indefinite period of time without any substantial
18 justification. For instance, the Regional Board requires that Desert View Dairy complete
19 sampling of all private and community domestic wells including those that could not be
20 impacted by Desert View Dairy's activities and submit the results of the sampling to the
21 Regional Board by December 31, 2008 and *quarterly thereafter*. See *Exhibit A*, at 9,
22 order No. 4. The Regional Board's Order unfairly places upon Desert View Dairy the
23 responsibility of sampling and submitting technical reports without any supporting
24 evidence that Desert View Dairy is responsible for the elevated nitrate levels in the
25 groundwater. This is particularly true for the areas to the east and west of the Property
26 which cannot be affected by Desert View Dairy's operations due to the direction of flow
27 of the groundwater.

1 Thus, Desert View Dairy has been denied its fundamental right of due process and
2 equal protection and, as a consequence, has had imposed on it regulatory burdens that are
3 unsupported by the requisite level and nexus of proof. As a result, and without relief from
4 the State Board, Desert View Dairy stands to bear what are tantamount to punitive costs
5 and expenses.

6 **F. The Order Is Arbitrary And Capricious As To The Scope Of Desert View**
7 **Dairy's Investigation Of The Groundwater Contamination.**

8 The Order requires Desert View Dairy to conduct an investigation of the
9 groundwater contamination to the east and west of the Property. See *Exhibit A*, at 8.
10 However, there is no evidence to support the Regional Board's Order. The evidence
11 shows that the nitrate levels to the east of the Property are non-detectable or within the
12 federal standard set for drinking water. See *Exhibit C*, Figure 4.3. Due to the direction of
13 the groundwater flow/gradient, the operations of Desert View Dairy do not affect the
14 groundwater nitrate levels to the west of the Property. Thus, there is no evidence to
15 support the Regional Board's Order that requires Desert View Dairy to conduct an
16 investigation of an area that either has no elevated nitrate levels or where it is not
17 responsible for the elevated nitrate levels.

18 **G. The Order is Vague and Uncertain In a Number of Aspects.**

19 The Order is improperly vague in several respects. First, it is unclear the extent to
20 which the Order requires that Desert View Dairy provide replacement water service to
21 residences or businesses. For instance, the Order fails to mention that Desert View
22 Dairy's obligation to provide replacement water is limited to a definite time period despite
23 the fact that the groundwater had not previously been suitable for human consumption due
24 to naturally occurring elevated TDS levels. Second, Desert View Dairy's obligation to do
25 sampling and submit technical reports is for an indefinite time period. It requires that
26 Desert View Dairy commence quarterly groundwater monitoring without identifying a
27 definite ending date. Thus, Desert View Dairy would be obligated to comply with this
28 request even if in the future nitrate levels, as they are currently are to the east of the

1 Property, are within the minimum drinking requirements or if other potential and known
2 dischargers are acknowledged by the Regional Board in the future.

3 Thus, Desert View Dairy is left to wonder what action it needs to take to be in
4 compliance with the Order so that civil penalties are not imposed.

5 **H. The Order Improperly Imposes Administrative Civil Penalties of \$5,000/day**
6 **in Violation of Desert View Dairy's Due Process.**

7 The Regional Board has explicitly warned that failure to comply with the
8 requirements contained in the Order may result in the Regional Board imposing
9 administrative civil liability penalties of up to \$5,000/per day in which the violation
10 occurs. *See Exhibit A*, at 11. By issuing such a vague and uncertain Order and then
11 threatening massive civil fines for failure to comply, the Regional Board has acted
12 inappropriately and in violation of due process, aggrieving Desert View Dairy. *See Smith,*
13 *Sheriff v. Goguen*, 415 U.S. 566, 575-76 (1974) ("Where inherently vague language
14 permits such selective law enforcement, there is a denial of due process."); *Gatto v.*
15 *County of Sonoma*, 405 U.S. 156, 162 (1972).

16
17 **IX.**

18 **REQUEST FOR STAY**

19 Under Section 13321 of the California Water Code, the State Board has the
20 authority to stay in whole or in part the effect of a decision and order of the Regional
21 Board. Cal. Water Code § 13321. Furthermore, under Section 2053 of the California
22 Code of Regulations, a stay of the effect on an order shall be granted if a petitioner shows:
23 (1) substantial harm to petitioner or to the public interest if a stay is not granted; (2) a lack
24 of substantial harm to other interested parties and to the public if a stay is granted; and (3)
25 substantial questions of fact or law regarding the disputed action exist. 23 Cal. Code
26 Regs. tit. 23, § 2053.

27 Here, Desert View Dairy seeks a *partial* stay of the Order. Desert View Dairy has
28 complied with order No. 1 that requires Desert View Dairy to supply interim

1 uninterrupted replacement water service to residences or businesses in the Affected Area
2 that are served by private or community domestic wells in which nitrate has been detected
3 at concentrations exceeding the minimum drinking water requirements.⁸ See *Exhibit A*, at
4 8; Ryken Decl. ¶ 8. Thus, Desert View Dairy is not currently seeking a stay as to order
5 No. 1. Furthermore, Desert View Dairy has also complied with the Regional Board's
6 request that parcel owners and occupants in the affected area be notified of the elevated
7 nitrate levels and that a technical report be submitted to the Regional Board listing all
8 residences and businesses that have been provided replacement water service. See
9 *Exhibit A*, at 8, Finding No. 2 and 3. Thus, Desert View Dairy's stay does not include
10 these orders. The scope of the stay is the remaining actions that must be taken in the
11 coming months under the Order which involves further sampling, the submission of
12 sampling reports to the Regional Board and the creation of an Alternative Water Supply
13 Implementation Workplan. See *Exhibit A*, at 8, Finding Nos. 4-6. It is these remaining
14 actions that Desert View Dairy is requesting that the State Board stay pending resolution
15 of the Petition. Given the scope of the stay and the facts and circumstances surrounding
16 the Petition, the requirements for issuance of a stay are clearly met in this case.

17 **A. Desert View Dairy Will Suffer Substantial Harm If A Stay Is Not Granted.**

18 Desert View Dairy is required to immediately comply with the directives set forth
19 in the Order. Specifically, as early as December 31, 2008 Desert View Dairy is required
20 to begin the process of its quarterly sampling of all private and community domestic wells
21 within the Affected Area. See *Exhibit A*, at 9, Finding No. 4. Soon thereafter, Desert
22 View Dairy is required to submit to the Regional Board quarterly sampling reports and a
23 detailed Alternative Water Supply Implementation Workplan. See *Exhibit A*, at 9-10,
24 Finding Nos. 5 and 6. Thus, the Order requires Desert View Dairy to take a number of
25 immediate actions that will be both expensive and unnecessary if the State Board finds

26 ⁸ Even though Desert View Dairy has agreed to supply interim uninterrupted replacement
27 water service it is not admitting liability for the elevated nitrate levels in the Affected
28 Area; instead, its decision to provide water service is for the sole purpose of being in
compliance with an order of the Regional Board until the State Board has had an
opportunity to review the Order.

1 that Desert View Dairy is not responsible for the elevated nitrate levels. Ryken Dec. ¶ 9.
2 Furthermore, there are other known or potential dischargers that should be held primarily
3 liable for the elevated nitrate levels, Desert View Dairy should not be the sole party
4 shouldering the costs of the sampling and reporting.

5 Given all the facts set forth above, there is clear evidence that Desert View Dairy is
6 not the primary cause of the groundwater contamination and that Desert View Dairy's
7 wastewater is not causing the elevated nitrate levels. *See also Exhibit B*, at 2-3, *Exhibit*
8 *C*, at § 2.4. Thus, Desert View Dairy would suffer substantial harm if it is required to
9 expend substantial amount of funds to comply with the Order that is premature, improper
10 and inappropriate. Ryken Decl. ¶ 10. A partial stay of the Order is necessary to minimize
11 the harm that will result to Desert View Dairy. If a stay of the Regional Board's actions is
12 not granted, Desert View Dairy will be forced to proceed with its investigation in a
13 manner that will result in unnecessary investigation and sampling costs that would only be
14 paid for by Desert View Dairy.

15 **B. The Public Will Not Be Substantially Harmed If A Stay Is Granted.**

16 There is no evidence that suggests that a delay in the imposition of the Regional
17 Board's deadlines to allow for the State Board's review will result in substantial harm to
18 the public or the environment. Desert View Dairy will continue to provide replacement
19 water pending review of the Order, thereby eliminating any alleged imminent or
20 substantial danger to the public or environment. Ryken ¶ 11. Thus, there is no harm to
21 the public if the State Board stays the part of the Order that requires Desert View Dairy to
22 conduct sampling and submit technical reports as early as December 31, 2008.
23 Furthermore, the State Board's review of the Order may affect the scope, extent and
24 frequency of the sampling required under the Order. As such, Desert View Dairy should
25 not be required to prematurely expend time and money to conduct sampling that is
26 inappropriate and improper. The requested stay would simply maintain the status quo
27 pending a hearing and decision on the merits, and would have no impact on the public or
28 on water quality.

1 Thus, the harm that will result to Desert View Dairy if it is forced to comply with
2 the Order, unless modified, will far outweigh any alleged harm to interested persons and
3 the public from the issuance of a stay.

4 **C. The Petition Raises Substantial Questions of Law and Fact.**

5 As discussed in more detail above, substantial questions of both law and fact exist
6 which must be resolved before a determination can be made on whether the findings made
7 by the Regional Board and the actions taken by the Regional Board are substantially
8 supported by law and the evidence in the record.

9 For instance, under the Order, Desert View Dairy is held primarily liable for the
10 groundwater contamination and is required to take a number of actions to abate the effects
11 of the alleged contamination. *See Exhibit A*, at 1-2. However, the Regional Board's
12 findings that support the Order are unsupported and without any merit. For instance, the
13 Regional Board found that Desert View Dairy's wastewater discharges contributed to
14 increased nitrate levels in groundwater beneath and in the downgradient groundwater flow
15 direction of the Property. However, the groundwater in the area surrounding the Property
16 flows in a northerly direction and therefore, cannot affect groundwater to the south or
17 west of the Property. *Exhibit C*, at § 2.3. Moreover, the Regional Board found that
18 manure waste from the Property adversely impacted supply wells with nitrates exceeding
19 the minimum drinking water standard; however, the evidence suggests that there are
20 several potential source areas which were ignored by the Regional Board. *Exhibit B*, at 2-
21 3, *Exhibit C*, at § 2.4. Thus, without a proper and thorough investigation to determine the
22 source of the elevated nitrate levels surrounding the Property, the Regional Board cannot
23 discount other potential sources and blame Desert View Dairy for the elevated nitrate
24 levels. Also, the evidence shows that the wells to the east of the Property do not contain
25 groundwater with elevated nitrate levels, yet Desert View Dairy was ordered to conduct
26 an investigation to the east of the Property. *See Exhibit C*, Figure 4.3. Furthermore, the
27 Regional Board has taken the position that the party that initiates or contributes to the
28 discharge of waste should be held primarily liable, yet this conclusion fails to take into

1 consideration the quantity and quality of discharge by each potentially responsible party.
2 The Regional Board has failed to take into account that PG&E is not only pumping more
3 than ten times the amount of waste water onto the fertilized agricultural fields, but that
4 Desert View Dairy's wastewater is at or below 4 mg/L, which is far below the drinking
5 water standard of 45 mg/L. *see Exhibit B*, at 2.

6 Because the Order is based upon numerous findings that are not supported by
7 evidence before the Regional Board, a stay is necessary to ensure that the proper parties
8 are held liable for any alleged groundwater contamination. It is necessary that these
9 substantial factual questions that form the basis of the Order be resolved before Desert
10 View Dairy is required to further comply with the Order.

11 In sum, there would be no substantial harm to the public from a partial stay that
12 will merely maintain the status quo pending the State Board's review of this matter.

13
14 **X.**

15 **REQUEST A HEARING AND TO SUPPLEMENT THE RECORD**

16 Pursuant to Section 2050.6 of the California Code of Regulations, Desert View
17 Dairy respectfully requests that the State Board conduct a hearing to consider evidence
18 not before the Regional Board and to supplement the record for this proceeding. Cal.
19 Code Regs., tit. 23 § 2050.6.

20 Because the Order was issued without a hearing and Desert View Dairy was not
21 given an opportunity to formally or informally introduce evidence on the record to refute
22 the Regional Board's findings and determinations, Desert View Dairy presents the
23 following additional evidence in support of its Petition and Request for Stay:

24 (1) Report and figures prepared by Conestoga-Rovers & Associates summarizing
25 the historical data and the source of the nitrate groundwater impacts near and around the
26 Property (Exhibit B);

27 (2) Lahontan Regional Water Quality Control Board, Executive Officer's Report,
28 dated September 2001 and November 2001 discussing the discovery of elevated nitrate

1 levels near or around the Property and the action the Regional Board has taken in response
2 to this discovery (Exhibit F and D, respectively);

3 (3) Regional Board Order No. R6V-2004-0034, the new waste discharge
4 requirements for PG&E for its Interim Plume Containment and Hexavalent Chromium
5 Treatment Project, which discusses the elevated nitrate levels on or near the Property and
6 PG&E's role in the discharge of wastewater with elevated nitrate levels (Exhibit E); and

7 (4) Declaration of Stephen Mockenhaupt, Senior Project Manager at Conestoga-
8 Rovers & Associates, who was responsible for reviewing and analyzing the groundwater
9 testing of nitrate levels and determining the potential sources of the elevated nitrate levels
10 on or around the Property.

11 Desert View Dairy also requests that the State Board conduct a hearing so that it
12 can present arguments and evidence set forth in this Petition that it was not able to present
13 to the Regional Board. This will give Desert View Dairy an opportunity to present live
14 testimony and answer any questions the State Board may have.

15
16 **XI.**

17 **STATEMENT OF TRANSMITTAL OF PETITION TO THE REGIONAL BOARD**

18 A true and correct copy of this Petition was transmitted to:

19 Harold J. Singer, Executive Officer
20 California Regional Water Quality Control Board, Lahontan Region
21 2501 Lake Tahoe Blvd.
22 South Lake Tahoe, California 96150

23 A true and correct copy of this Petition was also sent to Flaming Dairy, Inc.,
24 Pacific Gas & Electric Company, and K&H Van Vliet Children LLC, which are named in
25 the Order but are not Petitioners, at the following address:

26 Flaming Dairy, Inc.
27 c/o Bert & Kathleen A. Flaming
28 2088 Candlewood Avenue
Twin Falls, ID 83301-8338

Robert Doss
Mail Code B16A
Pacific Gas & Electric Company
77 Beale Street
San Francisco, CA 94105-1814

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K&H Van Vliet Children LLC
c/o Nellie Ruisch
23925 Waalew Road
Apple Valley, CA 92307-6932

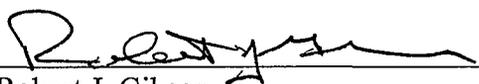
XII.

SUBSTANTIVE ISSUES RAISED BEFORE THE REGIONAL BOARD

Desert View Dairy was never given an opportunity to review and/or challenge the determinations made by the Executive Officer in support of the Order. Desert View Dairy maintains that they are without a remedy unless the State Board grants this petition for review in concert with the requested partial stay of the Order.

Dated: December 9, 2008

SNELL & WILMER L.L.P.

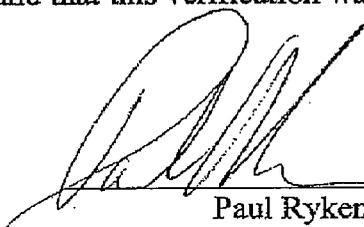
By: 
Robert J. Gibson
Alina Amarkarian
Attorneys for PAUL RYKEN and ESTATE
OF NICK VAN VLIET

Snell & Wilmer
LLP
LAW OFFICES
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
(714) 427-7000

VERIFICATION

1
2 I, Paul Ryken, am the operator of Desert View Dairy's dairy operations and am
3 responsible for complying with the Regional Board's Order directed at Desert View
4 Dairy. I have read the foregoing Petition for Review, Request for Stay and Request for
5 Hearing and believe that the statements made therein are true and correct. If called as a
6 witness to testify with respect to the matters stated therein, I could and would competently
7 do so under oath.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct and that this verification was executed in Hinkley, California
10 on December 9, 2008.

11
12 
13 Paul Ryken

LLP
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1 Robert J. Gibson (#144974)
2 Alina Amarkarian (#245470)
3 SNELL & WILMER L.L.P.
4 600 Anton Boulevard, Suite 1400
5 Costa Mesa, CA 92626-7689
6 Telephone: (714) 427-7000

7 Attorneys for Petitioner
8 PAUL RYKEN and
9 ESTATE OF NICK VAN VILET

10
11 BEFORE THE
12 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

13 In the Matter of the Estate of Nick Van
14 Vilet and Paul Ryken's Petition for Review
15 of Action and Failure to Act by the
16 California Regional Water Quality Control
17 Board, Lahontan Region, in Issuing
18 Cleanup and Abatement Order No. R6V-
19 2008-034.

CASE NO.

DECLARATION OF PAUL RYKEN IN
SUPPORT OF PETITION FOR REVIEW,
REQUEST FOR STAY AND REQUEST FOR
HEARING (Cal. Water Code §§ 13320, 13221)

Snell & Wilmer
LLP
LAW OFFICES
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
(714) 427-7000

20 I, PAUL RYKEN, declare as follows:

21 1. I submit this declaration in Support of the Estate of Nick Van Vilet and Paul
22 Ryken's (collectively "Desert View Dairy") Petition for Review, Request for Stay and
23 Request for Hearing ("Petition") of the California Regional Water Quality Control Board
24 for the Lahontan Region's ("Regional Board") cleanup and abatement order entitled
25 "Cleanup and Abatement Order No. R6V-2008-0034 Requiring Paul Ryken, the Estate of
26 Nick Van Vilet Children LLC, Flamelng Dairy, Incorporated, K&H Van Vilet Children
27 LLC, and The Pacific Gas And Electric Company to Cleanup or Abate the Effects of
28 Contaminants to Groundwaters of the Mojave River Hydrologic Unit, Desert View Dairy,
Hinkley, WDID No. 6B36040900" (the "Order"). I declare the following of my own
personal knowledge, except as to those matters declared on information and belief, which

1 matters I believe to be true. If called as a witness, I could and would competently testify
2 to the following matters.

3 2. I am one of the operators of Desert View Dairy's dairy operations.

4 3. I have received Executive Officer's Reports from the Regional Board.
5 Attached to the Petition and incorporated herein by reference as *Exhibit D* and *Exhibit F*,
6 respectively, is a true and correct copy of the Regional Board's, Executive Officer's
7 Report, dated November 2001 and September 2001, respectively.

8 4. On November 30, 2001, I received a request from the Regional Board that
9 Desert View Dairy needs to create "a work plan that contains a proposed ground water
10 monitoring plan that would adequately characterize impacts to ground water from [Desert
11 View Dairy's] washwater, dairy manure storage areas, and agricultural operations."
12 Attached to the Petition and incorporated herein by reference as *Exhibit G* is a true and
13 correct copy of the Waste Management Plan, dated February 2002, and prepared by Nolte
14 Associates. I provided this groundwater monitoring plan to the Regional Board on Desert
15 View Dairy's behalf.

16 5. In July of 2004, in relation to PG&E's Interim Plume Containment and
17 Hexavalent Chromium Treatment Project, the Regional Board issued an order providing
18 PG&E with new waste discharge requirements for their Project ("July 2004 Order").
19 Attached to the Petition and incorporated herein by reference as *Exhibit E* is a true and
20 correct copy of the July 24 Order.

21 6. On November 12, 2008, I received a copy of the Order from the Regional
22 Board dated November 10, 2008. A true and correct copy of the Order is attached to the
23 Petition as *Exhibit A* and hereto incorporated herein by reference.

24 7. The Order directs Desert View Dairy to (1) provide uninterrupted
25 replacement water supply to well owners with elevated nitrate concentrations in private
26 drinking water supply wells in the vicinity of and in the down gradient flow of Desert
27 View Dairy's property; (2) perform quarterly testing of all private wells affected or
28

1 potentially affected by nitrate pollution; and (3) submit reports to the Regional Board on a
2 regular basis.

3 8. Desert View Dairy is required to immediately comply with the directives set
4 forth in the Order. The Order sets out a firm timetable, with several deadlines which will
5 arise during the pendency of the Petition. Desert View Dairy has complied with order No.
6 1 in the Order that requires Desert View Dairy to supply interim uninterrupted
7 replacement water service to residences or businesses in the Affected Area that are served
8 by private or community domestic wells in which nitrate has been detected at
9 concentrations exceeding the minimum drinking water requirements.

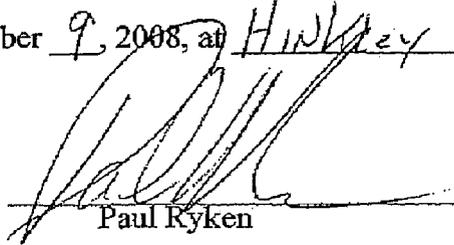
10 9. Also, as early as December 31, 2008, Desert View Dairy is required to begin
11 the process of its quarterly sampling of all private and community domestic wells within
12 the Affected Area. Soon thereafter, Desert View Dairy is required to submit to the
13 Regional Board quarterly sampling reports and a detailed Alternative Water Supply
14 Implementation Workplan. It is very likely that Desert View Dairy will need to take such
15 action prior to the Petition being decided. Thus, the Order requires Desert View Dairy to
16 take a number of immediate actions that will be both expensive and unnecessary if the
17 State Board finds that Desert View Dairy is not responsible for the elevated nitrate levels.

18 10. Desert View Dairy would suffer substantial harm if it is required to
19 expend substantial amount of funds to comply with the Order that if the State Board finds
20 that the Regional Board acted prematurely, improperly and inappropriately. The amount
21 of time, resources and money that would have to be expended to begin the quarterly
22 sampling and providing reports to the Regional Board cannot be recovered should the
23 Petition be successful.

24 11. Even if Desert View Dairy is not successful in its Petition, a short delay in
25 the implementation of the work plan laid out in the Order will not be significant or cause
26 substantial harm to the public or environment because Desert View Dairy has complied
27 with order No. 1.
28

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct.
3

4 Executed on December 9, 2008, at Hinkley, California.

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8 Paul Ryken
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Attorneys for Petitioner
PAUL RYKEN and
ESTATE OF NICK VAN VILET



BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Estate of Nick Van Vilet and Paul Ryken's Petition for Review of Action and Failure to Act by the California Regional Water Quality Control Board, Lahontan Region, in Issuing Cleanup and Abatement Order No. R6V-2008-034.

CASE NO.

DECLARATION OF STEPHEN
MOCKENHAUPT IN SUPPORT OF
PETITION FOR REVIEW, REQUEST FOR
STAY AND REQUEST FOR HEARING (Cal.
Water Code §§ 13320, 13221)

I, STEPHEN MOCKENHAUPT, declare as follows:

1. I submit this declaration in Support of the Estate of Nick Van Vilet and Paul Ryken's (collectively "Desert View Dairy") Petition for Review, Request for Stay and Request for Hearing ("Petition") of the California Regional Water Quality Control Board for the Lahontan Region's ("Regional Board") cleanup and abatement order entitled "Cleanup and Abatement Order No. R6V-2008-0034 Requiring Paul Ryken, the Estate of Nick Van Vliet Children LLC, Flameling Dairy, Incorporated, K&H Van Vliet Children LLC, and The Pacific Gas And Electric Company to Cleanup or Abate the Effects of Contaminants to Groundwaters of the Mojave River Hydrologic Unit, Desert View Dairy, Hinkley, WDID No. 6B36040900" (the "Order"). I declare the following of my own personal knowledge, except as to those matters declared on information and belief, which

1 matters I believe to be true. If called as a witness, I could and would competently testify
2 to the following matters.

3 2. I have a Bachelor of Science in Biology and Earth Sciences from the
4 University of Wisconsin-River Falls and I am currently the Senior Project Manager at
5 Conestoga-Rovers & Associates (CRA).

6 3. Attached hereto as *Exhibit I* is a true and correct copy of my *curriculum*
7 *vitae* which accurately states my educational and professional background. As it is
8 discussed in greater detail in my *curriculum vitae*, I have 24 years of training and
9 experience with environmental issues, including groundwater investigations.

10 4. CRA has been retained by Snell & Wilmer, L.L.P, counsel of record for
11 Desert View Dairy, as a consultant in regard to the groundwater issues in the above-
12 referenced matter.

13 5. Attached to the Petition and incorporated herein by reference as *Exhibit B* is
14 a true and correct copy of a report prepared by Conestoga-Rovers & Associates, under my
15 supervision, which summarizes the historical data and the source of the nitrate
16 groundwater impacts. The report discusses the existing conditions of the groundwater,
17 the treated discharge from PG&E remediation system, groundwater conditions prior to
18 1991 on or around the subject property at issue in the Petition and historical aerial photo
19 review of the subject property at issue in the Petition.

20 6. Attached to the Petition and incorporated herein by reference as *Exhibit C* is
21 a true and correct copy of a Groundwater Investigation Data Report that was prepared by
22 Conestoga-Rovers & Associates, under my supervision, for the Regional Board in
23 October of 2008. This report was prepared in response to the Regional Board's order that
24 Paul Ryken submit a groundwater investigation plan and technical reports to investigate
25 pollution in groundwater beneath and adjacent to the subject property at issue in the
26 Petition.

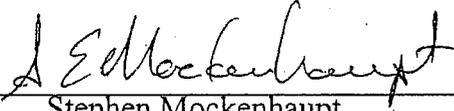
27 7. Attached to the Petition and incorporated herein by reference as *Exhibit H*
28 is a true and correct copy of a letter dated July 30, 2008 from Conestoga-Rovers &

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Associates to the Regional Board describing Desert View Dairy's waste storage and application practices during the past 15 years.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 9, 2008, at St. Paul, Minnesota.



Stephen Mockenhaupt

Snell & Wilmer
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