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15 Attorneys for Petitioners
16 Henry J. Tosta (dba Henry Tosta Dairy),
17 Henry J. Tosta Jr. Family Limited Partnership,
18 and Henry J. Tosta Trust

19 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

20 In the Matter of Henry J. Tosta (dba Henry) **Case No.**
21 Tosta Dairy), Henry J. Tosta Jr. Family)
22 Limited Partnership, and Henry J. Tosta)
23 Trust’s Petition for Review of Action by the) **PETITION FOR REVIEW; REQUEST**
24 California Regional Water Quality Control) **FOR HEARING**
25 Board, Central Valley Region, in Issuing)
26 Administrative Civil Liability Order No. R5-) **California Water Code § 13320**
27 2013-0095) **(Adopted July 25, 2013)**
28)

29 **I. INTRODUCTION**

30 Pursuant to California Water Code § 13320 and Section 2050 of Title 23 of the California
31 Code of Regulations, Henry J. Tosta (dba Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited
32 Partnership, and Henry J. Tosta Trust (collectively “Petitioners”) hereby respectfully petition the
33 California State Water Resources Control Board (the “State Board”) to review and either set
34 aside Administrative Civil Liability Order No. R5-2013-0095 (the “ACL Order”) adopted by the

1 Regional Water Quality Control Board, Central Valley Region (the "Regional Board") on
2 July 25, 2013, or reduce the penalty; further, Petitioners request an opportunity to be heard on
3 this matter. A true and correct copy of the ACL Order is attached hereto as **Exhibit A**.

4 **II. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

5 Petitioners submit this Petition in compliance with Water Code § 13320. Petitioners each
6 fully participated in the review process for the ACL Order. Throughout the process, Petitioners
7 challenged the Regional Board's authority to adopt the ACL Order by submitting written
8 evidence and oral testimony prior to and at the hearing held on July 25, 2013.

9 **III. NAME, ADDRESS, TELEPHONE NUMBER,
10 AND EMAIL ADDRESS OF PETITIONERS**

11 Henry J. Tosta (dba Henry Tosta Dairy),
12 Henry J. Tosta Jr. Family Limited Partnership,
13 and Henry J. Tosta Trust
14 20662 San Jose Road
15 Tracy, California 95304
16 Telephone: (209) 814-0139
17 Facsimile: (209) 836-1286

18 Petitioners request that all materials in connection with the Petition and administrative
19 record be provided to Petitioners' counsel as follows:

20 Lee N. Smith
21 WEINTRAUB TOBIN CHEDIAK COLEMAN GRODIN
22 4800 Capitol Mall, 11th Floor
23 Sacramento, CA 95814
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**IV. THE SPECIFIC ACTION OR INACTION OF
THE REGIONAL BOARD WHICH PETITIONERS
REQUEST THE STATE BOARD TO REVIEW**

Petitioners seek review of the Regional Board's Administrative Civil Liability Order No. R5-2013-0095; in particular, the penalty amount is excessive and not supported by any evidence.

**V. THE DATE ON WHICH THE REGIONAL BOARD
ACTED OR REFUSED TO ACT**

The Regional Board adopted the ACL Order on July 25, 2013.

**VI. A STATEMENT OF THE REASONS THE ACTION OR
FAILURE TO ACT IS INAPPROPRIATE OR IMPROPER**

As explained in more detail in the Statement of Points and Authorities herein, the action of the Regional Board was inappropriate for the following reasons:

1. Petitioners were denied due process of law under the federal and state constitutions and statutory rights for evidentiary reasons, as well as conflicts of interest that were apparent at the hearing. Additionally, prejudicial documents were entered into the record that should have been excluded.
2. Because the prosecution team presented no admissible evidence that Petitioners actually contributed to the contamination of groundwater, the Prosecution's allegation and the Board's findings and penalty calculations are improper. In the alternative, the evidence submitted was not substantial evidence upon which to base their allegations or findings, and the Board's findings and penalty calculations were improper.
3. The administrative civil penalties are not based on substantial evidence, but were based on speculative and improper testimony, and are thus arbitrary and capricious.
4. Any penalty should have been predicated on Petitioners' Ability to Pay and on Petitioners' Ability to Remain in Business and was not; therefore, the Board failed to follow the law and violated its own enforcement policies, regulations, and statutory authority, and was therefore arbitrary and capricious.
5. The applied fine was, and is, excessive because the hearing board made no attempt to correlate the penalties to the policy, regulation or statutes.

1 6. The penalty scheme is unconstitutional because the adjudicative body as well as the
2 prosecution and advisory team benefit from the issuance of penalties.

3 **VII. THE MANNER IN WHICH PETITIONERS ARE AGGRIEVED**

4 Petitioners' due process rights were violated and Petitioners are aggrieved by the ACL
5 Order as it improperly imposed penalties in the amount of Six Hundred Eighty-Five Thousand
6 Dollars (\$685,000).

7 **VIII. THE SPECIFIC ACTION REQUESTED BY PETITIONERS**

8 Petitioners request that the State Board order the Regional Board to set aside its decision
9 to issue the ACL Order and to suspend all activities in furtherance of the ACL Order, including
10 any and all regulatory actions that will implement the ACL Order or, in the alternative, after
11 hearing before the Board, reduce the penalties to levels that take into account regulatory
12 guidance. Petitioners request a hearing before the Board to be allowed to fairly argue their case.

13 **IX. A STATEMENT OF POINTS AND AUTHORITIES IN
14 SUPPORT OF LEGAL ISSUES RAISED IN THIS PETITION**

15 As required by Title 23, section 2050(a)(7) of the California Code of Regulations,
16 Petitioners include herein a Statement of Points and Authorities in support of this Petition.
17 Petitioners request the opportunity to file supplemental points and authorities in support of this
18 Petition once the administrative record becomes available. Petitioners also reserve the right to
19 submit additional argument and evidence in reply to the Regional Board's or other interested
20 parties' responses to this Petition filed in accordance with Title 23, Section 2050.5(a) of the
21 California Code of Regulations.

22 **X. A STATEMENT THAT THIS PETITION WAS
23 SENT TO THE REGIONAL WATER BOARD**

24 In accordance with Title 23, Section 2050(a)(8) of the California Code of Regulations,
25 Petitioners emailed and mailed a true and correct copy of this Petition by First Class Mail on
26 August 26, 2013, to the Regional Board. The address to which Petitioners mailed the copy is:

27
28 ///

1 Kenneth D. Landau, Assistant Executive Officer
2 Central Valley Regional Water Quality Control Board
3 11020 Sun Center Drive, Suite 200
4 Rancho Cordova, California 95670
5 Email: Ken.Landau@waterboards.ca.gov

6
7 **XI. A STATEMENT AS TO WHETHER THE PETITIONERS
8 RAISED THE SUBSTANTIVE ISSUES OR OBJECTIONS
9 IN THE PETITION TO THE REGIONAL BOARD**

10 Petitioners have fully exhausted all administrative remedies by submitting written and
11 oral comments on the ACL Order. All issues raised in this Petition were raised before the
12 Regional Board by Petitioners, such that the Regional Board was fully apprised of the legal
13 deficiencies of the ACL Order. Any issues not raised to the Board were due to unavailability of
14 evidence or fact that the issues arose after the hearing was closed or they are constitutional issues
15 that are not subject to the exhaustion doctrine.

16 **XII. REQUEST FOR HEARING TO PRESENT ADDITIONAL EVIDENCE**

17 Petitioners hereby request that the State Board conduct a hearing on this matter for the
18 purpose of oral argument and to receive additional evidence.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. PROCEDURAL BACKGROUND**

21 The Regional Board adopted Administrative Civil Liability Order No. R5-2013-0095 on
22 July 25, 2013. This Petition challenges the ACL Order for the reasons set forth herein.

23 **II. FACTUAL BACKGROUND**

24 Mr. Henry Tosta has operated a dairy on a site in Tracy since 1994. In 2006, the Regional
25 Board issued a General Dairy Order. The requirements of the Order for submittal of waste plans
26 went into effect in or about July of 2011. Mr. Tosta was required to submit certain materials,
27 which he did, albeit several weeks late. Almost a year later Mr. Tosta was told the materials
28 were insufficient. A Cleanup and Abatement Order (“CAO”) was issued on June 11, 2012 and,
despite his best efforts, the Administrative Civil Liability Complaint was issued a short time later
(November 19, 2012) for failure to comply. At the hearing, without clear evidence that he had
contributed to any contamination and despite evidence that he had no ability to pay and had not

1 profited from the violations, he was fined \$685,000 without sufficient basis. We are appealing
2 that Order.

3 III. ARGUMENT

4 The Regional Board failed to proceed in the manner required by law and abused its
5 discretion by adopting the ACL Order with all of the following legal deficiencies.

6 A. Petitioners Were Denied Due Process of Law and Statutory Rights.

7 It is undisputed that Petitioner, a dairy farmer, has a property interest at stake in this
8 matter and, as such, is entitled to due process of law in any proceeding affecting its property
9 interest.¹ Yet from the issuance of the CAO and the Administrative Civil Liability Complaint
10 through the July 25, 2013 Regional Board hearing, this proceeding has been replete with
11 violations of due process and statutory and regulatory procedure to the great prejudice of
12 Petitioners.² Of these numerous violations, three are highlighted below.

13 1. Petitioners' Repeated Requests for a Continuance Were Summarily Denied.

14 The hearing on this matter was scheduled for July 25, 2013. The agenda on the day of
15 the hearing was full, starting at 9:00 a.m. By 4:00 p.m., after more than seven hours of hearings
16 and testimony on other items, Board members were noticeably and understandably tired.
17 Counsel for Petitioner had previously submitted written requests to the Advisory Team
18 requesting that the matter be continued, both to allow counsel more time to prepare,³ and to
19 allow Petitioner's expert, Mr. Robert Fuhrman, to appear personally and testify concerning
20 Petitioner's financial condition. In particular, the first glimpse of the Prosecution's penalty
21 calculations was in the Prosecution's rebuttal papers two weeks before the hearing. Petitioners

22 _____
23 ¹ One court recently observed: "In fact, the broad applicability of administrative hearings to the
24 various rights and responsibilities of citizens and businesses, and the undeniable public interest
25 in fair hearings in the administrative adjudication arena, militate in favor of assuring that such
26 hearings are fair. (*Night Life Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81.)

27 ² For example, virtually every one of Petitioners' objections were overruled by the Chair, often
28 before the objection was fully stated, and in certain cases, the ruling came before the Regional
Board members even had possession of the information necessary to fairly resolve the objection.
Full citations to the hearing transcript will be supplied prior to the State Board's hearing on this
matter.

³ Co-counsel had only been retained two weeks before the hearing, and existing counsel was not
formally retained for the hearing until about the same time.

1 requested a continuance which is supported by the Board's enforcement policy. Petitioner had
2 insufficient time to prepare for the hearing and for its expert to address the issue. Inasmuch as
3 the ACLC has been issued more than eight months prior to the hearing date, it is difficult to
4 imagine any prejudice to Regional Board staff or anyone else from continuing the matter for one
5 month. Moreover, given the complexity of the case, and in particular, the issue of economic
6 benefit of noncompliance and the discharger's ability to pay a substantial civil penalty, it was
7 evident that the hearing would require several hours of testimony, cross-examination and legal
8 argument even without Mr. Fuhrman's testimony. Accordingly, due to the lateness of the hour
9 and the unavailability of a key witness, considerations of fundamental fairness and due process
10 required the Regional Board to continue the hearing. Yet, the Regional Board stubbornly
11 trudged ahead, to the considerable detriment of the Petitioner.

12 2. Regional Board Staff Introduced Numerous New and Conflicting Documents in an
13 Attempt to Mislead the Board at the Start of the Hearing Without Giving Defense
14 Any Time for Review with the Chair Denying Additional Time.

15 As stated previously, the hearing on this matter did not begin until after 4:00 p.m. By
16 that time, Petitioner's counsel had been waiting in the back of the room for at least seven hours.
17 Throughout the day, Regional Board counsel would come into the hearing room to check on the
18 status of prior hearing items, in an attempt to gauge the starting time for the hearing. Despite this
19 fact, at the beginning of the hearing, Petitioner's counsel was provided, for the very first time,
20 when the hearing started, significant new information in the form of an entirely new Exhibit 26,
21 the so-called Economic Benefit of Non-Compliance calculation. The original Exhibit 26 (to the
22 ACL) has been provided at the time of issuance of the Administrative Civil Liability Complaint
23 in November, 2012, more than eight months earlier. The original Exhibit 26 had been evaluated
24 by Petitioner's expert, Dr. Robert Fuhrman, in his detailed written analysis of Petitioner's
25 "ability to pay" any substantial civil penalty, which, of course, would be (and proved to be) a
26 critical factor in the Regional Board's decision. Because of the improper method used in
27 calculating the exhibit, the advisory team presented new variations to which Petitioner objected.
28 Upon receipt of the newly revised Exhibit 26, Petitioner's counsel lodged a detailed objection to
the submission of this new information at the beginning of the hearing, and once again requested

1 a continuance of the hearing to allow for appropriate time to evaluate the critical new
2 information. This, of course, is entirely consistent with the Enforcement Policy, which provides:

3 **In some cases, this (new financial information provided in rebuttal or otherwise)
4 may necessitate a continuance of the proceeding to provide the discharger with a
5 reasonable opportunity to rebut the staff's evidence.**

6 A continuance would also have been appropriate considering the prohibition on “surprise
7 evidence” as defined in California Code of Regulations, title 23, section 648.4, but was
8 summarily ignored by the Chair. Further, this “new” exhibit recalculated the economic benefits
9 back to 1996 even after the Prosecution Team had been admonished by the Advisory Team to
10 use 2010, the date alleged in the Civil Liability Complaint. To compound the confusion, upon
11 careful (albeit brief) examination of the Prosecution Team’s new Exhibit 26, it was discovered
12 that there were critical mathematical and other errors in the economic benefit calculations from
13 2010.⁴ Thereupon, the Prosecution Team submitted yet another new Exhibit 26, with entirely
14 different calculations. Once again, Petitioner’s request for additional time and a continuance was
15 denied. After a third-round of revisions, resulting in yet another new Exhibit 26, and yet another
16 denial of a continuance request, Board members were understandably frustrated, with the Chair
17 chastising staff for submitting such “poorly prepared” documents. Nevertheless, the Chair
18 refused Petitioner’s request for additional time and/or a brief recess to respond to the flurry of
19 new information. Given the complexity of the legal issues before it and the amount of penalty in
20 controversy, the lack of time afforded to Petitioner’s counsel both to review the documents and
21 then to agree their case included the need to address the evidence in their argument and their
22 cross-examination violated Petitioner’s right of due process.

23 3. Board Violated Hearing Procedures Because “Advisory” Team Members Acted as
24 Advocates for Prosecution Team.

25 Prior to the hearing on this matter, all parties were furnished with the “Hearing Procedure
26 for ACL Complaint R5-2012-0564,” a document which describes in considerable detail the rules
27 and procedures under which the hearing was to be held. Notably, the Hearing Procedure

28 ⁴ The fact that they had alternate versions leads to the conclusion that they were aware that the
first version misstated the evidence.

1 included important assurances that even though members of the Prosecution Team and the
2 Advisory Team are employed by the same agency, interact routinely, and in the case of the
3 Advisory Team staff (Assistant Executive Officer) is the immediate subordinate of the Chief of
4 the Prosecution team, this would (theoretically) not interfere with the separation of their
5 functions in this case. Specifically, the Hearing Procedure provided as follows:

6 **Separation of Prosecutorial and Advisory Functions**

7 To help ensure the fairness and impartiality of this proceeding, the functions of
8 those who will act in a prosecutorial role by presenting evidence for consideration
9 by the Board (the “Prosecution Team”) have been separated from those who will
10 provide legal and technical advice to the Board (the “Advisory Team”). Members
11 of the Advisory Team are: Ken Landau, Assistant Executive Officer, and Alex
12 Mayer, Staff Counsel. Members of the Prosecution Team are: Pamela Creedon,
13 Executive Officer, Robert Busby, Supervising Engineering Geologist, Charlene
14 Herbst, Senior Engineering Geologist, Sean Walsh, Environmental Scientist,
15 Gilberto Corral, Water Resources Control Engineer, Ellen Howard, Staff Counsel,
16 and Vanessa Young, Staff Counsel.⁵

17 Any members of the Advisory Team who normally supervise any members of the
18 Prosecution Team are not acting as their supervisors in this proceeding, and vice
19 versa. Pamela Creedon regularly advises the Central Valley Water Board in
20 other, unrelated matters, but is not advising the Central Valley Water Board in
21 this proceeding. Other members of the Prosecution Team act or have acted as
22 advisors to the Central Valley Water Board in other, unrelated matters, but they
23 are not advising the Central Valley Water Board in this proceeding. Members of
24 the Prosecution Team have not had any ex parte communications with the
25 members of the Central Valley Water Board or the Advisory Team regarding this
26 proceeding.

27 The attempt to separate the prosecutorial and advisory functions is founded on
28 considerations of fundamental fairness and due process. Recent case law, indeed an emerging
judicial trend, acknowledges the difficulties associated with attorneys in the same office
providing both prosecutorial and advisory functions before the same body. (*Sabey v. City of
Pomona* (2013) 215 Cal.App.4th 452.) The situation is fraught with potential and actual
conflicts of interest--a young attorney representing the Advisory Team who must render advice

29 _____
30 ⁵ It should also be noted for completeness, that all of the engineers/staff on the Compliance
Team – charged with helping Mr. Tosta get into compliance: are on the Prosecution team,
loading the dice from the outset. How can Mr. Tosta be expected to come into compliance when
those persons intent on prosecuting him are supposed to be helping him comply.

1 which is contrary to the Prosecution Team’s case, an Assistant Executive Officer who must
2 disagree publicly with his immediate supervisor, or an Executive Officer who normally advises
3 the Board on matters within its jurisdiction, but in this case, is acting as a prosecutor before the
4 same Board. Clearly, in these instances, a mere prohibition on “ex parte” communications is
5 hardly sufficient to resolve the inherent and fundamental conflicts of interest.

6 Indeed, a review of the transcript of this hearing reveals that the attempt to separate the
7 prosecutorial and advisory functions was an abject failure. Examples are abundant, but two
8 should suffice to prove the point. First, Advisory Team legal counsel struggled mightily to find
9 some middle ground on the critical issue of the starting date for purposes of calculating the
10 “Economic Benefit of Non-Compliance,” with the result that the Board was hopelessly confused
11 on the issue. This was after he had already made this point clear in the previous Board
12 pronouncements regarding evidence. Here, the attorney knew full well that the Prosecution
13 Team’s position that the starting date was 1996 or even 2007 was entirely indefensible, but the
14 best he could muster under the watchful glare of his supervisors on the Prosecution Team was a
15 lukewarm endorsement of the correct date, October of 2010.⁶ As a result, the Board was left
16 with the impression that it had discretion to choose the starting date of the discharger’s alleged
17 noncompliance. There clearly was no such discretion, but Mayer’s reluctance to advise
18 definitively led to a corresponding level of confusion on this critical issue, leading Board
19 members to simply give up and ignore the ability to pay issue entirely in their final decision.

20 This was a crucial issue for Petitioner, because as both experts agreed Mr. Tosta had no
21 ability to pay absent selling all of his properties including his entire herd and dairy. The second,
22 and most egregious, example comes in the form of the Assistant Executive Officer’s final
23 comments to the Board. After all testimony had been submitted, and while the Board was
24 deliberating, and Petitioner’s representatives were not allowed to comment upon, it was clear

25 _____
26 ⁶ Again, for the sake of completeness, the Assistant Executive Officer improperly stated the issue
27 near the beginning of the hearing as merely requiring that the Board find evidence going back to
28 1996 to allow the Board to calculate economic benefit that far back, when the real issue was
whether the allegation in the ACL alleged violations prior to 2010; not to mention that the Dairy
General Order was issued in 2006, 10 years after they were seeking to find an economic benefit
from a dairy that cannot pay its bills.

1 that Board members were thoroughly confused as to the proposed calculations of penalties under
2 the Enforcement Policy, the relationship between the economic benefit of noncompliance and the
3 Petitioner's ability to pay a substantial civil penalty, and the degree of harm to groundwater
4 resulting from the alleged violations. Some Board members commented that the Prosecution
5 Team had failed to provide them with enough information as to the severity of the alleged
6 violations. At least three Board members offered their opinion that the civil penalty should be
7 somewhere between \$125,000 and \$250,000. At that point, the Assistant Executive Officer,
8 without any prompting from Board members abandoned his role as an advisor as to "legal and
9 technical" matters, and became the Witness for the Prosecution Team, a witness who could
10 neither be contradicted nor cross-examined, to the clear detriment of Petitioner. In a last-minute
11 attempt to supply what was clearly missing in the Prosecution Team's case, Mr. Landau offered
12 improper and unsubstantiated expert-type opinion testimony as to the nature of Petitioner's
13 operation, his reputation, and his alleged "recalcitrance," and urged the Board to impose a
14 substantial civil penalty, arguing that "penalties are supposed to hurt." The impact of
15 Mr. Landau's unsolicited unchallenged testimony was immediate; Board members began
16 discussing penalties in excess of \$500,000. The Assistant Executive Officer's improper
17 testimony was directly responsible for Board's ultimate decision to impose the civil penalty of
18 \$685,000. His testimony in favor of the Prosecution Team (headed by his immediate supervisor,
19 Ms. Creedon) was unquestionably prejudicial to Petitioner. He also made incorrect, hearsay
20 statements with respect to the waste water on the site, and speculation as to why manure was not
21 removed from the site.

22 These examples unquestionably show that individuals in an in-house environment are
23 subject to the same personal and pecuniary interests that attend those in private practice. Anyone
24 in-house junior to the Agency Attorney has promotions, compensation and employment on the
25 line at all times, and so has every incentive to do what they believe the "boss" wants. And the
26 boss has every incentive to make sure his or her subordinates get the results that make the boss
27 look good so the boss's job is safe. There is simply no practical difference between that and the
28 circumstances in a private law firm, as was the case in *Sabey v. City of Pomona* (2013)

1 215 Cal.App.4th 452. Clearly, considerations of fundamental fairness and due process require
2 the State Board to overturn the Regional Board's decision and order a new hearing in which the
3 advisory and prosecution functions are truly separated.

4 4. The Regional Board's Statutory Penalty Scheme Is Unconstitutional Because it
5 Creates Bias.

6 Petitioners request that the Board take notice of the order in *Blue Diamond Growers v.*
7 *Sacramento Environmental Management*, Sacramento County Superior Court Case No. 34-2011-
8 80000940-CU-WM-GDS. (Attached hereto as **Exhibit B** to this brief.) In this case, Judge
9 Michael P. Kenny found that the process Sacramento County used for ordering penalties violated
10 due process because it did not guarantee an impartial ultimate decision-maker. The bias was
11 created because the County retains a significant portion of enforcement penalties it received, and
12 uses those funds to support its activities. The Court then held that this system violated the
13 petitioner's due process right to an impartial adjudicator. (See Exh. B, p. 2.) The appropriate
14 remedy, as indicated in that case, is to provide Petitioners with a fair hearing. (See *Clark v. City*
15 *of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1174.)

16 As requested here, the Superior Court in *Blue Diamond* followed the federal case of
17 *Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley* (9th Cir. 1997) 114 F.3d
18 840. The *Alpha Epsilon* case held that because the percentage of the money that was collected in
19 penalties was such a small portion of the budget there was no prejudice. However where the
20 penalties constitute a higher percentage there was potential for bias. Here, in 2011, \$10 million
21 was used by the State Board from the fund
22 (http://www.waterboards.ca.gov/water_issues/programs/grants_loans/caa/) in which ACL fines
23 are held.

24 **B. No Admissible Evidence that Petitioners Have Contributed to Contamination of**
25 **Groundwater**

26 As noted, Petitioners assert that the State Board should apply the Independent Judgment Test
27 wherein the reviewing agency or Court can reweigh the evidence de novo. This is particularly
28 necessary here because of the rights that are at stake and because of the new evidence Petitioners

1 seek to admit. However, even if the standard of review is substantial evidence, the State's
2 evidence does not rise to that level. Substantial evidence is relevant evidence that a reasonable
3 mind might accept as adequate to support a conclusion. (*See California Youth Authority v. State*
4 *Personnel Board* (2002) 104 Cal.App.4th 575, or evidence of ponderable legal significance ...
5 "reasonable in nature, credible, and of solid value." *Young v. Gannon* (2002) 97 Cal.App.4th
6 209, 225.) However, case law is clear that opinion testimony of an expert witness does not
7 constitute substantial evidence when it is based upon conclusions or assumptions not supported
8 by evidence in the record. (*See, also, Maples v. Kern County Assessment Appeals Bd.* (2002)
9 103 Cal.App.4th 172, 198, in which an expert's opinion that is premised on facts contradicted by
10 evidence in the record does not constitute substantial evidence.) Thus, the conclusions reached
11 by the Prosecution's witnesses, including Gerald Hohner and the Assistant Executive Officer,
12 should be disregarded. The Regional Board's findings were based on the testimony of these two
13 witnesses and was thus improper.

14 5. Request to Consider New Evidence

15 Title 23, section 2050.5(a) of the California Code of Regulations allows for the
16 submission of new evidence that was not available at the original hearing. The argument in this
17 section of the brief contains evidence that was not previously submitted; however, Petitioners'
18 argument can still be made absent this evidence. However, new evidence further substantiates
19 the water tested from Mr. Tosta's dairy pond is of so much higher quality than the groundwater,
20 that Mr. Tosta's dairy pond cannot have caused the groundwater contamination. The level of
21 contamination in the groundwater is, however, consistent with the low quality of groundwater
22 that is found in the surrounding areas. (See Exh. L, Spreckels WDRs to Rebuttal submitted by
23 Petitioners; *see, also*, Declaration of John Minney and associated testimony attached as
24 **Exhibit C** to this Petition.)

25 The evidence should be allowed because, on at least three occasions, Petitioners
26 requested that the Board provide Petitioners with an extension. One of the reasons for this was
27 that new counsel and new consultants had recently been retained, and that new samples had been
28

1 taken and had not yet been returned by the lab, although they had been promised to be delivered
2 before the hearing. They were, in fact, received just before the due date of this brief.

3 Thus, the evidence was not available at the time of the hearing, and Petitioners timely
4 requested a continuance, stating that these results were forthcoming. Further, staff was also
5 aware that the sample was outstanding. Of most significance is that the results of the testing
6 clearly support Petitioners' arguments made at the hearing that the Board had no evidence upon
7 which to base their decision with respect to liability and no evidence with respect to the Board
8 and staff's analysis and, consequently, their findings were made with insufficient evidence.

9 The additional evidence that has been submitted provides substantial evidence that
10 Mr. Tosta did not create the existing groundwater contamination. Because the State did not have
11 sufficient evidence, the decisions were improper. Petitioners' substantial evidence that
12 Mr. Tosta did not cause the contamination leaves the State Board with no choice but to find that
13 Mr. Tosta is not responsible for the low-quality groundwater in the area of his dairy.

14 6. Mr. Tosta Attempted to Comply with the Order.

15 One of the prosecution's main arguments was that Mr. Tosta failed to comply with the
16 original CAO. The Board staff further continues to assert that, because Mr. Tosta violated
17 provisions of the general order, he was responsible for contaminating groundwater. In the
18 beginning of the hearing, it was stated by staff that it was a presumption, but, by closing
19 statements, the Prosecution and the advisory staff of the Board stated it as a fact. The Board in
20 fact issued its exaggerated fine based on the comments on how badly Mr. Tosta contaminated the
21 groundwater – a fact never proven.

22 Mr. Minney, even without the need for the new evidence, testified for Petitioners that the
23 groundwater in the area is already degraded and that there was no proof that Mr. Tosta caused
24 levels of contamination despite staff's assertions to the contrary. This information is supported
25 by evidence that was submitted in the record, which indicates that the groundwater several miles
26 away is similar in quality to the groundwater located at the Tosta dairy. In the instance of the
27 Spreckels plant, the Regional Board established that Waste Discharge Requirements would be
28 based on discharging water of low-quality the same level as Mr. Tosta's groundwater would be

1 inconsistent with the Spreckels' Waste Discharge Requirements. (See Exh. L to Petitioners'
2 Rebuttal.)

3 The Civil Liability Complaint also contains allegations that only go back as far as 2010
4 and, therefore, documents that predate that time have no relevance as to whether or not there is
5 contamination at the Tosta dairy. There are documents in the file that deal with incidents that
6 occurred in 2002 and relate to a different location (the Reeves Road heifer facility). Although
7 Petitioners objected to the admissibility of those documents, they were admitted over objection
8 and are not relevant here and should not be considered. None of them even have the quality of
9 water under the Tosta dairy, and neither are these documents relevant to the Tosta dairy
10 operations. These documents should never have been entered into the record and are more
11 prejudicial than probative and should have been excluded.

12 Mr. Tosta did attempt to comply with the CAO and, thus, there are numerous indications
13 in the record that were ignored by the Board in the effort by Board staff to argue that Mr. Tosta
14 was not engaging in attempts to comply. The only evidence presented by staff shows the depth
15 to groundwater and indicates high conductivity. Neither do the Regional Board inspections
16 identify any groundwater contamination.

17 In the section 13267 letter dated April 15, 2003, the Board states that the detection of
18 ammonia in groundwater in the immediate vicinity of the dairy's wastewater ponds indicates that
19 the wastewater ponds were leaking and adversely affecting groundwater. There is no
20 substantiation for this finding. The finding of liability in this case and the assessment of
21 penalties based on this finding of liability are improper because there is no substantial evidence
22 in the record that there was contamination caused by Mr. Tosta. Even if there were
23 contamination caused by Mr. Tosta, it is certainly not to the extent that was argued by the
24 Regional Board proponents at the hearing. At worst, Mr. Tosta is contributing contamination at
25 a lower level than that that already exists in the groundwater, which, although a violation of the
26 general order, is not worthy of a \$685,000 fine as assessed by the Board.

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1 7. Evidence of the 2002 Enforcement Action and the Reeves Road Facility Should
2 Have Been Excluded.

3 As noted above, Board staff introduced into the record evidence of a 2002 spill and
4 settlement with San Joaquin County and an unrelated investigation at another property. This,
5 coupled with the clearly orchestrated testimony of the Fish & Game Warden that
6 mischaracterized the violation, was prejudicial and deprived Mr. Tosta of his due process rights.

7 **A. The Administrative Civil Penalties Are Arbitrary and Capricious.**

8 As set forth herein, Board members were thoroughly confused by the relationship
9 between the ability to pay, the economic benefit of noncompliance, and the application of the
10 factors set forth in the Enforcement Policy, and their confusion was only exacerbated by the
11 inconsistent and halting advice of their Counsel. As a result of their confusion, Board Members
12 failed to properly apply the factors set forth in the Enforcement Policy and consequently imposed
13 an arbitrary penalty of 60% of the initial ACL Complaint amount.

14 **B. Under the circumstances, any penalty should have been predicated on Petitioners’**
15 **Ability to Pay and on Petitioners’ Ability to Remain in Business.**

16 Water Code section 13327 states that in assessing a penalty, the Regional Board “shall”
17 take into account enumerated factors, including the ability to pay. Thus, it was incumbent upon
18 the Regional Board affirmatively to explore and apply these factors to the evidence before it.

19 The Prosecution Team submitted a report by Mr. Gerald L. Horner which contained no
20 meaningful analysis of Petitioners’ ability to pay or to continue in business. Horner’s only
21 evidence in support of his conclusion that Petitioners were sufficiently able to pay a large civil
22 penalty came in the form of a one-time capital gain in 2009 from the sale of Petitioners’
23 replacement heifer stock. During cross examination, Mr. Horner admitted that he was not aware
24 that the sale of Petitioners’ entire replacement heifer stock was forced by Bank of the West and
25 was not a voluntary sale for business purposes. As such, the key piece of evidence relied upon by
26 Mr. Horner supports Petitioners’ position, not Mr. Horner’s position. Furthermore, the record
27 reveals that the Prosecution Team never inquired as to Petitioners’ \$1.5 million in delinquent
28 operating expenses or their property liens and encumbrances (which are a matter of public
record).

1 Under section 13327, the “Ability to Pay” and “Ability to Continue in Business” are
2 separate factors and need to be addressed separately. In this case, Petitioners’ perennial losses,
3 together with the excessive amount of a fine grossly disproportionate to the “Economic Benefit”
4 or avoided cost, demonstrated that the Board failed to apply a standard (or fair) economic or
5 accounting analysis. Moreover, the “Ability to Continue in Business” factor by itself is
6 sufficient to negate other factors. It is obviously part of the public policy behind section 13327
7 that, absent some egregious quasi-criminal conduct or exceptional circumstances not present
8 here, the purpose of the statutory construct is not to run legitimate small enterprises out of
9 business.

10 In summary, Petitioners submit that the penalty should have been predicated on
11 competent evidence of Petitioners’ ability to pay and to continue in business. It was not.

12 Virtually every factor enumerated in Section 13327 either warranted only a modest fine
13 based on these facts, or it was inapplicable, leading to the conclusion that any fine should have
14 been modest. The factors are: (1) “nature, circumstance, extent, and gravity of the violation or
15 violations” (a generalized factor that was applicable); (2) “whether the discharge is susceptible to
16 cleanup or abatement” (3) “the degree of toxicity of the discharge” (4) “with respect to the
17 violator, the ability to pay” (a specific factor that militated in favor of reducing the fine); (5) “the
18 effect on ability to continue in business” (a second economic factor that militated in favor of
19 reducing the fine); (6) “any voluntary cleanup efforts undertaken”; (7) “any prior history of
20 violations” (again a specific but mitigating factor); (8) “the degree of culpability” (a relevant,
21 potentially non-mitigating factor); and (9) “economic benefit or savings, if any, resulting from
22 the violation.” Here, the application of each of these factors strongly militated in favor of a
23 significantly reduced penalty.

24 Of the nine factors, other than the generalized introductory factor, there were only 4
25 factors arguably militating in favor of a greater fine (factors 2, 3, 6, and 8), while there were 4
26 factors that militated in favor of a reduced fine (factors 4, 5, 7, and 9). Accordingly, the
27 proposed penalty should, in equity, have been significantly reduced.

28

1 Thus, the assessed penalty (\$685,000) is excessive, particularly in light of the
2 circumstances under which it was imposed and in view of the testimony at the July 25, 2013
3 hearing regarding the financial condition of Petitioner and its ability to pay. The penalty
4 therefore is unconstitutional as an excessive fine. The imposition of an excessive fine is viewed
5 as a constitutional violation. (See U.S. Const., 8th Amend.; Cal. Const., Art. I, § 17; see, also,
6 *Hale v. Morgan* (1978) 22 Cal.3d 388 (\$17,300 fine, accrued at \$100 per day, imposed on
7 landlord for shutting off tenant utilities, found to be constitutionally excessive and violative of
8 due process).

9 Accordingly, Petitioners respectfully request that if the Board ultimately elects to affirm a
10 penalty assessment against Petitioners, any such assessment should be limited to the minimal
11 injury incurred, as described herein, and not calculated based upon a daily accrual or any other
12 unreasonable arbitrary and capricious template.

13 **PRAYER**

14 Petitioners request that the State Board order the Regional Board to set aside its decision
15 to issue the ACL Order and to suspend all activities in furtherance of the ACL Order, including
16 any and all regulatory actions that will implement the ACL Order. Petitioners request a hearing
17 before the State Board to be allowed to fairly argue their case; or in the alternative that the State
18 Board reduce the fine to as level commensurate with Mr. Tosta's economic benefit.

19
20 Dated: 8/26/13

THOMAS H. TERPSTRA
A Professional Corporation

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22 By 
23 THOMAS H. TERPSTRA
Attorneys for Petitioners

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PROOF OF SERVICE

I, Kay Konopaske, certify and declare:

I am over the age of 18 years and not a party to this action. My business address is: 578 N. Wilma Avenue, Suite A, Ripon, California 95366. On the date set forth below, I served the following document(s):

PETITION FOR REVIEW; REQUEST FOR HEARING

BY U.S. MAIL. By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY FACSIMILE. By use of facsimile machine, telephone number (209) 599-5008, to the person(s) at the facsimile number(s) listed below. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2.301 and 2.306]

BY OVERNIGHT DELIVERY. By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.] The envelope(s) were addressed to the person(s) as set forth below.

BY ELECTRONIC MAIL (EMAIL). By sending the document(s) to the person(s) at the email address(es) listed below.

BY PERSONAL SERVICE. I personally served the following person(s) at the address(es) listed below:

Kenneth D. Landau, Assistant Executive Officer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, California 95670
Email: Ken.Landau@waterboards.ca.gov

State Water Resources Control Board
Office of Chief Counsel
Jeannette L. Bashaw, Legal Analyst
P.O. Box 100
Sacramento, California 95812
Email: jbashaw@waterboards.ca.gov

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

Dated: August 26, 2013


KAY KONOPASKE

Exhibit A



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Central Valley Regional Water Quality Control Board

31 July 2013

Henry J. Tosta, dba Henry Tosta Dairy
Henry J. Tosta Jr. Family Limited Partnership
Henry J. Tosta Trust
20662 San Jose Road
Tracy, CA 95304

FINAL ADMINISTRATIVE CIVIL LIABILITY ORDER

The Administrative Civil Liability Order has been finalized and your copy is enclosed. The payment of **\$685,000** required under the Administrative Civil Liability Order is to be paid no later than 30 days from the date of issuance of this Order, or by **26 August 2013**. Send the check to:

California Regional Water Quality Control Board, Central Valley Region
Attn: Della Kramer
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Make the check payable to the *State Water Resources Control Board Waste Discharge Permit Fund*, and indicate the Order number, R5-2013-0095, on the check. Please send a copy of the first check to:

State Water Resources Control Board, Office of Enforcement, Attn: Vanessa Young
1001 "I" Street, 16th Floor
Sacramento, CA 95314

If you have questions on the Order, please contact Vanessa Young at (916) 327-8622 or at vyoung@waterboards.ca.gov. You can also contact me at (916) 464-4724 or at cherbst@waterboards.ca.gov.

A handwritten signature in cursive script that reads "Charlene Herbst".

Charlene Herbst
Senior Engineering Geologist
Confined Animal Facilities Regulatory Unit

Enclosure: Final Administrative Civil Liability Order

Henry J. Tosta
Henry Tosta Dairy

- 2 -

31 July 2013

cc w/encl: Mr. Thomas H. Terpstra, Esq.
Mr. Lee N. Smith, Esq.
Mr. Dennis DeAnda, Assistant Chief, Cal DFW-OSPR-Law Enforcement
Ms. Vanessa Young, Esq., Office of Enforcement, SWRCB, Sacramento

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2013-0095

IN THE MATTER OF

HENRY J. TOSTA (DBA HENRY TOSTA DAIRY), HENRY J. TOSTA JR. FAMILY LIMITED
PARTNERSHIP, AND HENRY J. TOSTA TRUST
SAN JOAQUIN COUNTY

This Administrative Civil Liability Order (hereafter Order) is issued to Henry J. Tosta (dba Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited Partnership, and Henry J. Tosta Trust (hereafter collectively referred to as Discharger) based on findings that the Discharger violated Cleanup and Abatement Order (CAO) No. R5-2012-0708 and provisions of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (Dairy General Order). Provisions of California Water Code Sections 13268 and 13350 authorize the imposition of Administrative Civil Liability.

The Regional Water Quality Control Board, Central Valley Region (hereinafter Central Valley Water Board) finds, with respect to the Discharger's acts, or failure to act, the following:

BACKGROUND

1. Henry J. Tosta operates Henry Tosta Dairy (Tosta Dairy) located at 20662 San Jose Road, Tracy, San Joaquin County. The Henry J. Tosta Jr. Family Limited Partnership owns the real property located at 20662 San Jose Road, Tracy, San Joaquin County.
2. The Tosta Dairy is enrolled under the Dairy General Order, which was adopted by the Central Valley Water Board on 3 May 2007. The facility is currently an operating dairy and, as of 31 December 2011, houses 1,196 mature cows. As an enrolled facility, the Tosta Dairy is subject to the requirements of the Dairy General Order for regulatory purposes.

CHRONOLOGY OF EVENTS

3. On 1 May 2012 the Central Valley Water Board performed a routine compliance inspection of the Tosta Dairy. During the 1 May 2012 inspection, Board staff identified violations of the Dairy General Order and inadequacies and deficiencies in the Waste Management Plan, including the discharge of slurry manure into areas not designed to contain waste, resulting in the discharge of manure constituents to groundwater; excessive accumulation of manure within the production area; and failure to produce an adequate Waste Management Plan.
4. On 11 June 2012 the Executive Officer for the Central Valley Water Board issued Cleanup and Abatement Order (CAO) R5-2012-0708 to the Discharger to address the immediate water quality threats from the Tosta Dairy identified during the 1 May 2012 Inspection.

5. Staff conducted four inspections of the Tosta Dairy between the date of issuance of the CAO and 10 August 2012 and identified an ongoing failure to comply with deadlines and directives in the CAO and ongoing threats to water quality.
6. On 10 August 2012, the Assistant Executive Officer issued a letter notifying the Discharger of his failure to comply with deadlines and directives in the CAO.
7. Staff conducted four inspections of the Tosta Dairy between 10 August 2012 and 19 November 2012, and identified an ongoing failure to comply with deadlines and directives in the CAO and ongoing threats to water quality.
8. On 19 November 2012, the Executive Officer issued Administrative Civil Liability Complaint (Complaint) No. R5-2012-0561 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$1,140,713.
9. Staff conducted an additional five inspections since the issuance of the Complaint to monitor the Discharger's progress with the directives of the CAO and compliance with the Dairy General Order.

REGULATORY CONSIDERATIONS

10. On 3 May 2007, the Central Valley Water Board adopted the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035 (hereinafter Dairy General Order) (Exhibit 1) and a Monitoring and Reporting Program (hereinafter MRP) that accompanies the Dairy General Order (Exhibit 2). The Dairy General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007. The Dairy General Order is a set of general waste discharge requirements that apply to owners and operators of existing milk cow dairies that (1) submitted a Report of Waste Discharge in response to the Central Valley Water Board's 5 August 8, 2005 request and (2) have not expanded operations since 17 October 2005.
11. Water Code Section 13268 states, in part: (a)(1) [a]ny person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
12. Water Code section 13350 states, in part: (a) [a] person who (1) violates a cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of a waste discharge requirement, waiver condition, certification, or other order or prohibition issued, reissued, or amended by a regional board or the state board, discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other actions or provisions of this division, shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

VIOLATIONS

13. Violation #1: The Prosecution Team alleges the Discharger violated Prohibition A.4 of the Dairy General Order by discharging manure waste to groundwater from at least 1 May 2012, the date of the initial inspection, until 16 November 2012, for a total of 200 days. The Prosecution Team selected 1 May 2012 as the start date of this violation given that the manure waste at the Tosta Dairy remained unchanged from the 1 May 2012 Inspection until the time when Board staff sampled groundwater on 12 July 2012.
14. Violation #2: The Prosecution Team alleges the Discharger violated Section H of the Dairy General Order by failing to submit an adequate waste management plan from at least 20 September 2010, until 16 November 2012, for a total of 789 days.
15. Violation #3: The Prosecution Team alleges that the Discharger violated directives 1, 1A, 1B, 6 and 7 of CAO R5-2012-0708.
 - A) Violation #3a: CAO Directive 1: Submittal of Production Area Cleanup Plan: As of 16 November 2012, Directive 1 (Develop a plan for the Cleanup of the Production Area of the Dairy) is 145 days late.
 - B) Violation #3b: CAO Directive 1A: Removal of Slurry Manure in the Central Portion of the Production Area: As of 16 November 2012, Directive 1A (Removal of slurry manure in the 3 to 4 acre central portion of the production area) is 82 days late.
 - C) Violation #3c: CAO Directive 1B: Removal of Manure from Two Settling Basins: As of 16 November 2012, Directive 1B (Removal of manure from the two settling basins) is 51 days late.
 - D) Violation #3d: CAO Directive 6: Submission of Revised WMP: As of 16 November 2012, Directive 6 (Submit a revised waste management plan that describes how the settling basins and lagoons will operate in conformance with the Dairy General Order including a description of modifications needed to manage slurry manure within the existing constructed settling basin/lagoon system) is 82 days late.
 - E) Violation #3e: CAO Directive 7: Submission of Groundwater Remediation Plan: As of 16 November 2012, Directive 7 (Submit a Groundwater Remediation Plan if groundwater samples indicate the waste disposal caused pollution to groundwater) is 51 days late.
16. Water Code section 13268(b)(1) provides that civil liability may be administratively imposed by a regional board in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
17. Water Code section 13350 states at section (e)(1): The civil liability on a daily basis shall not exceed five thousand dollars (\$5,000) for each day the violation occurs.

18. An administrative civil liability may be imposed pursuant to the procedures described in Water Code section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.
19. Pursuant to Water Code section 13327, in determining the amount of any civil liability imposed, the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on the violator's ability to continue business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
20. On 17 November 2008 the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy establishes a methodology for assessing discretionary administrative civil liability. Use of the methodology addresses the factors used to assess a penalty under Water sections 13327 and 13385 subdivision (e) including the Discharger's culpability, history of violations, ability to pay and continue in business, economic benefit, and other factors as justice may require. The required factors under Water Code sections 13327 and 13385 subdivision (e) have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A to this Order and shown in the Penalty Calculation for Civil Liability spreadsheets in Attachment B of this Order. Attachments A and B are attached hereto and incorporated herein by reference.
21. Maximum Civil Liability: The maximum administrative civil liability that may be assessed pursuant to Water Code sections 13350 and 13268 is \$2,732,000.
22. Minimum Civil Liability: The minimum administrative civil liability according to the Enforcement Policy is equal to the economic benefit plus 10%. Based upon evidence received, the economic benefit is substantially less than the \$826,991 listed in Attachment A.
23. After considering Attachment A, the Board adjusted the proposed penalty downward in consideration of "other factors that justice may require." The Discharger has taken preliminary steps to remove excess manure from portions of the site, and has obtained funding to conduct additional activities to bring the site into compliance. In light of those factors, the penalty is reduced to \$685,000. This amount exceeds the economic benefit described in Finding 22.
24. Issuance of this Administrative Civil Liability Order to enforce Water Code Division 7 is exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) in accordance with title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).
25. This Order is effective and final upon issuance by the Central Valley Water Board. Payment must be received by the Central Valley Water Board no later than thirty (30) days from the date on which this Order is issued.

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2013-0095
HENRY TOSTA DAIRY, SAN JOAQUIN COUNTY

26. In the event that the Discharger fails to comply with the requirements of this Order, the Executive Officer or her delegatee is authorized to refer this matter to the Attorney General's Office for Enforcement.
27. Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date that this Order becomes final, except that if the thirtieth day following the date that this Order becomes final falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

IT IS HEREBY ORDERED THAT:

1. Pursuant to Water Code section 13323, Henry J. Tosta (dba Henry Tosta Dairy), Henry J. Tosta Jr. Family Limited Partnership, and Henry J. Tosta Trust shall be assessed an Administrative Civil Liability in the amount of six hundred eighty-five thousand dollars (\$685,000).
2. Payment shall be made no later than thirty days from the date of issuance of this Order. Payment shall be made in the form of a check made payable to the State Water Resources Control Board Waste Discharge Permit Fund, and shall have the number of this Order written upon it.

I, Kenneth D. Landau, Assistant Executive Officer, do hereby certify that the foregoing is a full, true, correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 25 July 2013.



KENNETH D. LANDAU, Assistant Executive Officer

Attachment A: Narrative Summary of Administrative Civil Liability Penalty Methodology
Attachment B: Administrative Civil Liability Penalty Methodology Matrix

Attachment A – ACL Complaint No. R5-2012-0561
Specific Factors Considered for Administrative Civil Liability
HENRY J. TOSTA (DBA HENRY TOSTA DAIRY), HENRY J. TOSTA JR. FAMILY LIMITED
PARTNERSHIP, AND HENRY J. TOSTA TRUST
SAN JOAQUIN COUNTY

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code sections 13350, subdivision (a) and 13327. Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:
http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

I. Violation 1: Discharge to Groundwater from the Production Area

The following steps are used in determining administrative civil liability for the production area discharges.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm that may result from exposure to the pollutants in the illegal discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses.

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses ranges from negligible (0) to major (5). The designated beneficial uses of groundwater are municipal and domestic water supply¹, agricultural supply, industrial service supply, and industrial process supply.

Dairy waste, including manure and urine, can seriously impact groundwater unless the discharges are carefully managed. Such discharges can introduce nitrogen, salts, and bacteria to the groundwater, either by the movement of waste constituents through soil or by the movement of waste constituents through man-made conduits such as improperly constructed wells. Nitrogen contamination, in the form of both nitrate and ammonia, pose a serious threat to beneficial uses, including the drinking water supply. Groundwater beneath the dairy is very shallow, at a depth of less than 10 feet. The bottom of lagoons and settling basins at the dairy are likely at or near the groundwater surface, providing a direct conduit between wastes and groundwater. The placement of manure and wastewater in the production area has been identified as moderate threat to beneficial uses resulting in exceedances of primary and secondary MCLs thereby justifying score of **3** is assigned for this factor.

¹ Although groundwater in monitoring wells at the dairy contains total dissolved solids (TDS) in excess of 3,000 mg/l, evidence suggests that the TDS concentration is the result of on-site dairy operations and does not necessarily represent the natural quality of shallow groundwater in the area.

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge.

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. "Potential receptors" are those identified considering human, environmental, and ecosystem exposure pathways. Dairy waste contains nitrogen, salts, and bacteria. Nitrogen, total dissolved solids (TDS). Nitrate-nitrogen has a primary Maximum Contaminant Level (MCL) of 10mg/L. TDS has a secondary MCL ranging between 500mg/L and 1500mg/L. Because dairy waste poses a threat to beneficial uses, a score of **3** was assigned for this factor.

Factor 3: Susceptibility to Cleanup or Abatement.

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, more than 50% of the discharge was susceptible to abatement, because the Discharger, once the source of the discharge (manure and manure wastewater) was removed, could have pumped underlying groundwater and applied it to cropland at agronomic rates for use as a fertilizer. Therefore, a factor of **0** is assigned.

Final Score – "Potential for Harm"

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a **final score of 5** was calculated. The total score is then used in Step 2, below.

Step 2 – Assessment for Discharge Violations

This step addresses administrative civil liabilities for the discharge based on a per-day basis.

Per Day Assessments for Discharge Violations

The "per day" factor (determined from Table 2 of the Enforcement Policy) is 0.15. The deviation from requirements is major because the Dairy General Order requirements (Prohibition A.4) prohibiting the discharge of waste that results in 1) discharge of waste constituents in a manner which could cause degradation of groundwater, or 2) contamination or pollution of groundwater, have been rendered ineffective.

The length of the alleged violation is from the date of the first inspection, 1 May 2012 through 16 November 2012, for a total of 200 days.

The Per Day Assessment is calculated as: (0.15 factor from Table 2) x (200 days) x (\$5,000 per day). The **Initial Liability** value is **\$150,000**.

Step 3 – Per Day Assessment for Non-Discharge Violation

The Enforcement Policy states that the Central Valley Water Board shall calculate an initial liability for each non-discharge violation. In this case, this factor does not apply because all of the violation is related to the discharge of wastewater, and the liability was determined in Step 2.

Step 4 – Adjustment Factors

The Enforcement Policy allows for multi-day violations to be consolidated provided specific criteria are satisfied. The Enforcement Policy also describes three factors related to the violator's conduct that should be considered for modification of the initial liability amount: the violator's culpability, efforts to cleanup or cooperate with regulatory authority, and the violator's compliance history. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The violation at issue does not qualify for the alternative approach to the penalty calculation under the Enforcement Policy because none of the three required criteria can be met. The continuance of this violation causes daily detrimental impacts to the water quality of the groundwater where the accumulation of manure waste causes degradation and pollution to groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not removing manure and wastewater as it accumulates; and the Discharger knew and could have taken action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger did not follow the Operation and Maintenance Plan that was part of its Waste Management Plan (WMP) for the Dairy, requiring regular cleanout of lagoons and settling basins in the production area. Manure and wastewater was placed in areas of the production area not identified for manure storage on maps associated with the WMP. Despite repeated attempts during the 12 July 2012, 17 July 2012 and 26 July 2012 inspections reminding the Discharger of cleanup obligations under the Dairy General Order and the CAO, the Discharger failed to comply with cleanup of the 3 to 4 acre central portion of the Production Area potentially exacerbating the water quality issues at the Tosta Dairy. No effort was made to ensure that dairy waste did not come into contact with shallow groundwater. Dairy manure was allowed to accumulate and even bury one of the monitoring wells. A reasonably prudent person under similar circumstances would have managed manure and wastewater to minimize or prevent prohibited discharges to groundwater, in compliance with the Dairy General Order. Accordingly, the culpability factor has been set at the maximum.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger failed to operate and maintain the Dairy in a manner to prevent adverse impacts to water quality, an essential component of the requirements of the Dairy General Order. Moreover, the Discharger has not complied with the cleanup measures required in the CAO, which would

have reduced further harm and minimize the source of the pollution. Therefore, the cleanup and cooperation multiplier factor has been set at the maximum, **1.5**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger has a history of violations of water quality laws.

On 1 March 2002, staff from the Central Valley Water Board and the Department of Fish and Game (DFG) investigated a discharge of wastewater from cropland operated by the Henry Tosta Dairy into a Naglee-Burk drain; this cropland is now part of the current Henry Tosta Dairy production area. Mr. Tosta explained to the investigators that he had been pumping wastewater out onto approximately 15 acres for approximately one year instead of using his waste pond. The reason given for not using the waste pond was the lack of a pump and distribution system. No crop was growing in the field receiving the wastewater. In addition, manure scraped from the freestall barn had been deposited into the Main Drain canal of the Naglee-Burk Irrigation District south of the production area (Exhibit 23). On 28 March 2002, staff from the Central Valley Water Board and DFG conducted a follow-up inspection of the Henry Tosta Dairy to determine what steps had been taken to abate the discharge of 1 March 2002. The inspection revealed ongoing discharges of wastewater from the same field into the Naglee-Burk drain and no significant improvements (Exhibit 24). On 3 February 2003, a settlement agreement was reached between Henry Tosta and the Deputy District Attorney for San Joaquin County in the sum of \$141,730 for discharges of manure wastewater to the Naglee-Burk Canal (Exhibit 25). The Prosecution Team has factored this violation as a history of violation for the purposes of this Complaint, since the reason for the surface water discharge in 2003 was that the Discharger lacked infrastructure to deliver wastewater to cropland for agronomic use. This lack of infrastructure is closely related to the lack of proper manure handling which led to the discharge to groundwater in this violation. Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$150,000) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$371,250**.

II. Violation #2: Failure to Submit Adequate Waste Management Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be major. The General Order uses the preparation and implementation of a complete and accurate Waste Management Plan (WMP) as the tool to determine if a dairy has sufficient capacity for the waste generated by the herd, if the dairy production area is protected from flooding, if modifications are needed to the production area to ensure that the dairy waste management operations are protective of water quality, and includes an Operation and Maintenance Plan that will provide a schedule and list of activities needed to maintain waste management features at the dairy. An evaluation of the WMP submitted to Staff for the dairy on 21 September 2010 reveals that the WMP: 1) does not accurately describe the dimensions of the lagoons and settling basins, thus leading to an incorrect evaluation of the storage capacity as more than adequate; 2) lists a critical storage period that is much less than the actual amount of time that waste is stored in the production area, thus leading to an incorrect evaluation of the storage capacity as more than adequate; and 3) includes a Production Area Design & Construction Report and a Waste Management Plan Modification Progress Status Report, both signed by the Discharger, stating that the entire production area drains into ponds and that no modifications of the production area are needed to comply with the General Order. As a requirement of the Dairy General Order, the failure to submit an adequate WMP creates a major potential for harm to the regulatory program of the Dairy General Order requiring the submission of the WMP to prevent adverse impacts to groundwater and surface water quality.

b. The Deviation from Applicable Requirements is major. Although the Discharger submitted a Waste Management Plan within the required time period, the Discharger's submission was deficient for the reasons explained above. The Discharger failed to submit an adequate Waste Management Plan and in effect, disregarded the requirement in the General Order that the plan accurately reflect existing conditions and identify needed remedial measures.

The length of the violation is alleged from the date of the submission of the WMP, 20 September 2010 through 16 November 2012, for a total of 789 days late. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (789 days) x (\$1000 per day). The Initial Liability value is \$670,650.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit an adequate plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.85) X (32 days of violation) X (\$1,000) = **\$27,200**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The documents signed by the

Discharger as part of the WMP all include a certification that states: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment." The Discharger was therefore aware that it was important that the information in the WMP be accurate in reflecting the operations and maintenance of the Tosta Dairy, yet when compared to the Discharger's actual operations and maintenance, demonstrates inherent deficiencies and inaccuracies in the information provided by the Discharger.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **1.5**. The General Order, as a phased-in set of requirements, provides multiple points at which dischargers are required to evaluate various documents regarding their operations, correct any problems, and modify plans as needed to reflect changed conditions. The Discharger never submitted any modifications to the WMP submitted in 2010, even though a reasonable person could have recognized that there were serious problems with manure management in the production area that merited a review of the WMP provisions.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount for Lagoon Discharges: This value is calculated as the Revised Initial Liability (\$27,200) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$67,320**.

III. Violation #3: Failure to Comply with the Cleanup and Abatement Order Directives

A. Violation #3a: CAO Directive 1: Submittal of Production Area Cleanup Plan

The following steps are used in determining administrative civil liability for the failure to develop and submit a Production Area Cleanup Plan in compliance with Directive 1 of CAO R5-2012-0708 (CAO), addressing 1) removal of all slurry manure in the 3 to 4 acre central portion of the Production Area by 27 August 2012; 2) removal of all manure within the two settling basins by 27 September 2012; and 3) removal of excess vegetation, excess manure, and manure used

for construction on the six lagoons, and installation of staff gages, by 27 September 2012.

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.40. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. The Discharger submitted an incomplete plan on 5 July 2012 and referenced cleanup activities in a second document received 3 August 2012. The Discharger was notified by letter dated 10 August 2012 that the plan and cleanup activities were inadequate. Absent a complete cleanup plan that contains a time schedule and specific information on who will handle manure removal, how manure will be removed, and where removed manure will go, the cleanup of a significant quantity of waste as in this case is unlikely to proceed in a timely manner and, has not been completed as of the date of this Complaint. A plan is typically a pre-requisite for implementation. The failure to submit the Production Area Cleanup Plan potentially increases the potential for harm of manure waste discharge to groundwater in the production area. Not having a plan, in of itself, however, does not necessarily mean cleanup is not addressed. At the same time, the placement of waste in violation of the General Order undermines the regulatory program of the Dairy General Order; absent a complete cleanup plan, the Tosta Dairy remains in violation of the Dairy General Order's requirements. In all, the Prosecution Team assessed moderate potential for harm.

b. The Deviation from Applicable Requirements is moderate. The Discharger's initial submission was ten days late but Board staff deemed the plan inadequate; therefore the effectiveness of the requirement was only partially achieved.

The length of the violation is alleged from June 25, 2012 (the date that the cleanup plan was due) through 16 November 2012, for a total of 145 days late. Therefore the Per Day Assessment is calculated as (0.4 factor from Table 3) x (145 days) x (\$1,000 per day). The Initial Liability value is \$58,000.

Step 4 – Adjustment Factors

Multiple Day Violations

For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. The failure to prepare and submit a plan does not cause daily detrimental impacts to the environment. Therefore, an adjustment can be made. The Water Board Prosecution Team recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

$$\text{Revised Initial Liability} = (.4) \times (10 \text{ days of violation}) \times (\$1,000) = \mathbf{\$4,000}$$

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.2**. Where the Discharger submitted a report, albeit incomplete, such circumstances do not warrant a 1.4 or above where there is no evidence of willful or intentional negligence. The Discharger's culpability is higher than a neutral 1.0 where a reasonable and prudent person under similar circumstances would have submitted a complete report addressing the cleanup requirements under the CAO.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was cooperative in submitting a plan, although it was not timely or complete. However, even after notifying the Discharger of the incomplete submittal, the Discharger has failed to provide a plan to supplement the initial submittal. Exhibit 14 identifies a letter, dated 10 August 2012 from the Assistant Executive Officer to the Discharger discussing the status of the Discharger's compliance with the CAO, including how the submission of the Discharger's cleanup plan was unrealistic because land applying the excess manure is insufficient if agronomic application rates are to be maintained. Therefore, the Discharger is assessed a multiplier value of **1.1**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$4,000) X Adjustment Factors (**1.2**) (**1.1**) (**1.1**) and is equal to **\$5,808**.

b. Violation #3b: CAO Directive 1A: Removal of Slurry Manure in the Central Portion of the Production Area

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be major. As long as the manure remains in this area it poses a threat to underlying shallow groundwater and to the existing beneficial uses, as detailed in the potential for harm section of Violation #1.

b. The Deviation from Applicable Requirements is major. The General Order requires that waste be placed in areas identified in a WMP for waste storage and where the storage of the waste will not result in degradation, contamination, or pollution of groundwater. Placing slurry manure on unprepared native soil with no controls to contain the waste is a major deviation from the requirements of the General Order and the requirement in the CAO.

The length of the violation is alleged from 27 August 2012 (the date removal of manure from this area was to be complete) through 16 November 2012, a total of 82 days. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (82 days) x (\$5,000 per day). The Initial Liability value is \$348,500.

Step 4 – Adjustment Factors

Multiple Day Violations

The violation at issue does not qualify for the alternative approach to penalty calculation under the Enforcement Policy. The continuance of this violation: causes daily detrimental impacts to the water quality of the groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not expending the money to remove the slurry manure and transport it offsite; and the Discharger knew and had control to take action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Dairy's enrollment under the General Order and was provided with a copy of the General Order. On 21 September 2010, the Discharger submitted a signed WMP to the Board describing, among other things, his manure management practices. The WMP did not identify the central area as a manure storage area. Additionally, Board staff followed up and inspected Tosta Dairy on 3 July 2012, 12 July 2012, 17 July 2012, and 26 July 2012, and continued to find the Discharger placing and storing the solid manure and liquid wastewater in the 3-4 acre area. Placement of newly-generated manure in the 3-4 acre area ceased briefly but resumed by Board staff's inspection on 30 October 2012. The Discharger was aware of the requirements of the Dairy General Order, but chose to manage his waste in violation of the Dairy General Order. In the status letter of 10 August 2012 in Exhibit 14, Staff specifically rejected a request for an extension of time to clean manure in the production area because of concerns that the cleanup would not be completed before winter rains; Staff also cited the lack of any progress in cleaning up the central area and, in fact, the continued use of the central area for dumping of newly-generated manure as additional reasons to deny the extension request. Therefore, the Prosecution Team assessed a multiplier of 1.5.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a deadline of 27 August 2012 to remove the slurry manure in the central area. On 5 September 2012, Staff inspected Tosta Dairy and determined that a minimal amount of manure rearrangement was being done, but that no manure had been removed from the area. Subsequent inspections, referenced above, indicate that only minimal progress was conducted in the cleanup of this area. Therefore, the Discharger is assessed a multiplier value of **1.5**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$348,500) X Adjustment Factors **(1.5) (1.5) (1.1)** and is equal to **\$826,538**. In considering the maximum statutory liability of \$5,000 per day of violation, the Total Base Liability exceeds the statutory maximum of \$410,000 (82 days x \$5,000). Therefore, the Total Base Liability must be adjusted to **\$410,000**.

c. Violation #3c: CAO Directive 1B: Removal of Manure from Two Settling Basins

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.85. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be major. Settling basins are required to have freeboard to prevent the overtopping of the basin embankments by waste and the subsequent uncontrolled release of waste from the basin. The two settling basins, at the time of the initial inspection on 1 May 2012, neither settling basin had any freeboard. Although the Discharger removed some material from the settling basins, subsequent deposition of waste into the settling basins resulted in overtopping of some embankments and threatened discharge of waste into the Naglee-Burk Canal.

b. The Deviation from Applicable Requirements is major. Settling basins are to be maintained and regularly cleaned so that they can function to separate solid and liquid fractions of waste. Freeboard is to be maintained to ensure that embankments are not

overtopped by waste and subsequent loss of containment and embankment integrity. Failure to remove the manure from the settling basins is violation of the CAO directive. Therefore, because the requirement was rendered ineffective, the violation was a major deviation from applicable requirements.

The length of the violation is alleged from 27 September 2012 (the date that removal of all manure within the two settling basins was to be complete) through 16 November 2012, a total of 51 days. Therefore the Per Day Assessment is calculated as (0.85 factor from Table 3) x (51 days) x (\$5,000 per day). The Initial Liability value is \$216,750.

Step 4 – Adjustment Factors

Multiple Day Violations

The violation at issue does not qualify for the alternative approach to penalty calculation under the Enforcement Policy. The continuance of this violation: causes daily detrimental impacts to the water quality of the groundwater; results in an economic benefit that can be measured on a daily basis where the Discharger benefits every day from not expending the money and resources to appropriately manage the settling basins, effectively reaping an advantage in the cost of operating the dairy Facility; and the Discharger knew and had control to take action to mitigate or eliminate the violation.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The Discharger was notified in 30 June 2007 of the Tosta Dairy's enrollment under the Dairy General Order and was provided with a copy of the General Order. On 21 September 2010, the Discharger submitted a signed WMP to the Board describing, among other things, his manure management practices. The Discharger was therefore aware of the need to regularly maintain his settling basins. In the Status letter of 10 August 2012, Staff specifically rejected a request for an extension of time to clean manure in the production area because of concerns that the cleanup would not be completed before winter rains. At an inspection on 5 September 2012, Settling Basin #1 had no freeboard. At an inspection on 10 October 2012, Settling Basin #1 was overtopping and flooding a road inside the production area. At an inspection on 22 October 2012, staff noted that a small manure berm had been constructed along Settling Basin #1 to prevent manure and wastewater from discharging across an access road and into the Naglee-Burk Canal. These conditions indicate a complete lack of intent to comply with the General Order.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the settling basins have not been cleaned of manure, the Discharger was given a higher factor than a neutral score of 1.0. Unlike the removal of manure from the production area, Board staff noted that manure removal activities in the settling basins commenced around 12 July 2012. On 17 July 2012, Board staff noted the manure solids had been removed and stacked on the embankments of Settling Basins #1 and #2, but that significant amounts of wastewater were

still present in the basin. On 5 September 2012 Central Valley Water Board staff noted Settling Basin #1, which had two to three feet of freeboard at the time of the last inspection on 26 July 2012, had no freeboard. Also, manure generated by the current herd was being pushed into Settling Basin #1 instead of being placed in the 3-4 acre manure disposal area. Settling Basin #2 still contained significant amounts of manure. At the 10 October Inspection Board staff observed settling basin #1 overtopping the southern and northern embankment and adjacent dirt access roads. At the 22 October Inspection, Board staff observed a small manure berm had been constructed along the south side of Settling Basin #1 to prevent the discharge of wastewater from that basin into the Naglee Burk canal. On 30 October 2012, Board staff observed Settling Basin #1 was lowered in the level of liquids but Settling Basin #2 was now overtopping.

Board staff observed manure removal activities in Settling Basin #1 and #2 but, given the ineffectiveness of the Discharger's activities and conduct, assessed a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Initial Liability (\$216,750) X Adjustment Factors **(1.5) (1.2) (1.1)** and is equal to **\$429,165**. In considering the maximum statutory liability of \$5,000 per day of violation, the Total Base Liability exceeds the statutory maximum of \$255,000 (51 days x \$5,000). Therefore, the Total Base Liability must be adjusted to **\$255,000**.

d. Violation #3d: CAO Directive 6: Submission of Revised WMP

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

a. The Potential for Harm for the violation is determined to be moderate. A plan is typically a pre-requisite before implementation. The existing WMP failed to identify areas of the production area requiring improvement to ensure that storage of waste is protective of water quality. The failure to submit revisions to the WMP potentially increases the potential for harm of manure waste discharge to groundwater in the production area. The placement of waste in violation of the General Order undermines the regulatory program of the Dairy General Order; absent a revised WMP, the Tosta Dairy remains in violation of the Dairy General Order's requirements.

b. The Deviation from Applicable Requirements is major. The Discharger failed to submit revisions to the WMP and in effect, disregarded the requirement. Staff routinely requests the submittal of revised WMPs when inspections indicate that revision of the WMP is necessary to represent on site conditions or correct deficiencies.

The length of the violation is alleged from 27 August 2012 (the date the revised WMP was due) through 16 November 2012, for a total of 82 days late. Therefore the Per Day Assessment is calculated as (0.55 factor from Table 3) x (82 days) x (\$1,000 per day). The Initial Liability value is \$45,100.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made.

This results in a Revised Initial Liability Amount as follows:

Revised Initial Liability = (.55) X (8 days of violation) X (\$1,000) = **\$4,400**

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO issued to the Discharger clearly stated the requirement to submit the revised WMP. The Status letter sent to the Discharger on 10 August 2012 reminded the Discharger of the upcoming deadline to submit the revised WMP. The revised WMP has not been submitted as of the date of this Complaint.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the revised WMP has not been submitted and no explanation for the lack of the revised WMP has been provided, the Discharger was assessed a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$4,400) X Adjustment Factors (1.5) (1.2) (1.1) and is equal to **\$8,712**.

e. Violation #3e: CAO Directive 7: Submission of Groundwater Remediation Plan

Because this is a non-discharge violation, Step Nos. 1 and 2 of the Enforcement Policy's administrative civil liability methodology are not addressed.

Step 3 – Per Day Assessment for Non-Discharge Violation

The per-day factor for the violation is 0.55. This factor is determined by a matrix analysis based upon the Potential for Harm and the Deviation from Applicable Requirements.

- a. The Potential for Harm for the violation is determined to be moderate. Without a plan, groundwater impacts will remain unremediated. A plan is typically a pre-requisite before implementation. As long as the submission of the Groundwater Remediation Plan remains outstanding, the Discharger is taking no steps to remediate currently impacted groundwater; absent the Groundwater Remediation Plan, the Tosta Dairy remains in violation of the Dairy General Order's requirements.
- b. The Deviation from Applicable Requirements is major. The Discharger failed to submit the groundwater remediation plan and in effect, disregarded the requirement of the CAO.

The length of the violation is alleged from 27 September 2012 (the date the plan was due) through 16 November 2012, for a total of 51 days late. Therefore the Per Day Assessment is calculated as (0.55 factor) x (51 days) x (\$1,000 per day). The Initial Liability value is \$28,050.

Step 4 – Adjustment Factors

Multiple Day Violations

The failure to submit a plan is a one-time violation that does not result in an economic benefit that can be measured on a daily basis. Therefore, an adjustment can be made. The Water Board Prosecution Team recommends applying the alternative approach to civil liability calculation provided by the Enforcement Policy. Using this approach, the calculation of days of violation will include the first day of violation, plus one additional day of violation for each five-day period up to the 30th day of violation, and thereafter, plus one additional day of violation for each 30-day period.

This results in a Revised Initial Liability Amount as follows:

$$\text{Revised Initial Liability} = (.55) \times (7 \text{ days of violation}) \times (\$1,000) = \mathbf{\$3,850}$$

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.5**. The CAO clearly stated the

requirement to submit the groundwater remediation plan if groundwater sampling indicated groundwater pollution. The Status letter issued by Staff on 10 August 2012 states that Staff's evaluation of groundwater data received from the Discharger's consultant on 20 July 2012 indicates negative impacts to groundwater from dairy operations and states that a plan for the remediation of the groundwater, including an engineering evaluation of the impacts of the existing lagoons and settling basins on groundwater quality and a proposal for remedial measures is required by 27 September 2012. None of the elements of the plan have been received.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. Because the remediation plan has not been submitted and no explanation for the lack of the remediation plan has been provided, the Discharger was given a higher factor than a neutral score of 1.0. Instead, the Discharger is given a multiplier value of **1.2**.

History of Violation

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. For the reasons stated above, Staff assessed a multiplier value of **1.1**.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability for the violation is determined by multiplying the Revised Initial Liability by the multipliers associated with each of the Adjustment Factors discussed above.

Total Base Liability Amount: This value is calculated as the Revised Initial Liability (\$3,850) X Adjustment Factors **(1.5) (1.2) (1.1)** and is equal to **\$7,623**.

The follow penalty methodology steps apply to all prior violations.

Step 6 - Ability to Pay and Ability to Continue in Business

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. Below is a brief analysis of the Discharger's financial situation, which was further informed by the Horner report and testimony, and the Fuhrman Declaration. Based upon this testimony, the Board believes that the Discharger may lack the ability to pay this liability.

Besides the Heifer Ranch operated on property leased from the Echeverria Brothers Dairy General Partnership, the Discharger owns and operates a 1,196 cow dairy in the immediate area. The Tosta Dairy is an ongoing business that generates profits that may be used to pay off the assessed penalty. The Discharger owns additional parcels of land in the vicinity of the Heifer Ranch, together with a restaurant/bar in a neighboring community. Public records show that the Discharger is the legal property owner of the following parcels:

APN 229-060-15 (agricultural); APN 239-270-06 (residential); APN 209-290-06 (agricultural); APN 209-290-07 (agricultural); APN 209-300-18 (agricultural); APN 239-160-02; APN 239-160-16 (dairy); APN 239-160-15 (agricultural); APN 212-090-01 (agricultural); APN 239-270-02 (agricultural); APN 209-300-18 (agricultural); APN 249-020-06; APN 229-060-16 (agricultural); APN 229-060-17 (agricultural).

In all, based on the information publicly available, the Prosecution Team finds that Henry Tosta has the ability to pay the proposed administrative civil liability amount.

Step 7 – Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require,” but only if express findings are made to justify this.

Costs of Investigation and Enforcement Adjustment

The costs of investigation and enforcement are “other factors as justice may require”, and should be added to the liability amount. Staff of the Central Valley Water Board has spent over 100 hours associated with the investigation of the discharges alone, independent of time required for preparation of the enforcement action. The State Water Board Office of Enforcement has directed that all regions are to use a value of \$150 per hour for staff costs. For this case, staff time for investigation of the discharges is \$15,000. The Enforcement Policy states that staff costs should be added to the liability amount.

Step 8 – Economic Benefit

The Enforcement Policy directs the Water Board to determine any Economic Benefit Amount of the violation based upon the best available information. The Enforcement Policy suggests that the Water Board compare the Economic Benefit Amount to the Adjusted Total Base Liability and ensure that the Adjusted Total Base Liability is at a minimum, 10 percent greater than the Economic Benefit Amount. Doing so should create a deterrent effect and will prevent administrative civil liabilities from simply becoming the cost of doing business.

The Prosecution Team has estimated the economic benefit of non-compliance at \$751,810. This estimation is based on actions the Discharger should have taken to comply with the Dairy General Order (Exhibit 26):

- Install Lagoon Management System
- Submission of Clean-up Plan
- Submission of Revised WMP
- Submission of Accurate WMP in 2010
- Submission of Remediation Groundwater Plan
- Avoided Manure Management cost
- Avoided General Maintenance

The economic benefit of non-compliance plus 10% is **\$826,991**. The Adjusted Total Base Liability Amount is greater than 110 percent, and therefore, no adjustment is necessary based on the economic benefit analysis.

Final adjusted liability

The final adjusted liability is **\$1,125,713** plus **\$15,000** in staff costs, or **\$1,140,713**.

Step 9 – Maximum and Minimum Liability Amounts

The maximum and minimum amounts for discharge violation must be determined for comparison to the amounts being proposed. These values are calculated in the ACL Complaint, and the values are repeated here.

Maximum Liability Amount:

Violation #	Requirement	Days of Violation	Maximum Potential Liability
1	Dairy General Order Prohibition A.4: Discharge or disposal of waste resulting in the pollution of groundwater	200	\$1,000,000
2	13267 Failure to Submit Adequate Waste Management Plan	779	\$789,000
3a	CAO Directive 1: Develop a plan for cleanup of the Production Area	145	\$145,000
3b	CAO Directive 1A: Remove manure in 3 to 4 acre central portion of production area	82	\$410,000
3c	CAO Directive 1B: Remove all manure within two settling basins	51	\$255,000
3d	CAO Directive 6: Submission of Revised WMP	82	\$82,000
3e	CAO Directive 7: Submission of Remediation Groundwater Plan	51	\$51,000
		TOTAL	\$2,732,000

Minimum Liability Amount: the minimum liability according to the Enforcement Policy is equal to the economic benefit plus 10%, which estimated to be \$826,991.

Step 10 – Final liability Amount

The final liability amount consists of the added amounts for each violation, with any allowed adjustments, provided amounts are within the statutory minimum and maximum amounts. Without further investigation of the discharge, calculation of economic benefits, and additional staff time, the proposed Administrative Civil Liability is **\$1,140,713**.

ADMINISTRATIVE CIVIL LIABILITY ORDER RS-2013-0095
 HENRY TOSTA DAIRY
 SAN JOAQUIN COUNTY

	D	P	G	R
1	Select Item		Select Item	
6	Select Item		Select Item	
14	Select Item		Select Item	
17	Select Item		Select Item	
21				
22				
23				
24				
25				
26	Essential for Harm: Moderate; Population Total		Essential for Harm: Moderate; Population Total	
27	Requirement: Major		Requirement: Major	
28				
29				
30				
31	\$		\$	
32				
33				
34				
35	\$		\$	
36	0.55		0.55	
37	B		7	
38	\$		\$	
39	1,000		1,000	
40	\$	4,400.00	\$	3,850.00
41	1.5	6,600.00	1.5	5,775.00
42	1.2	7,920.00	1.2	6,930.00
43	1.1	8,712.00	1.1	7,623.00
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Violation #3d:
 Directive 7:

Violation #3d:
 Submission of Revised

ADMINISTRATIVE CIVIL LIABILITY ORDER RS-2013-0095
 HENRY TOSTA DAIRY
 SAN JOAQUIN COUNTY

	O	P	D	R
1	Select Item		Select Item	
8	Select Item		Select Item	
14	Select Item		Select Item	
17	Select Item		Select Item	
21		Violation #3d: Directive 6 Submission of Revised		Violation #3e: Directive 7
22				
23				
25				
26	Potential for Harm: Moderate; Deviation from Requirement: Major		Potential for Harm: Moderate; Deviation from Requirement: Major	
27				
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36	0.55		0.55	
37	8		7	
38	\$ 1,000		\$ 1,000	
39	\$ 4,400.00		\$ 3,950.00	
40	\$ 4,400.00		\$ 3,950.00	
41	1.5	\$ 6,600.00	1.5	\$ 5,775.00
42	1.2	\$ 7,820.00	1.2	\$ 6,930.00
43	1.1	\$ 8,712.00	1.1	\$ 7,623.00
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Exhibit B

weintraub tobin chediak coleman grodin
LAW CORPORATION

1 John R. Briggs, State Bar No. 100371
2 ibriggs@weintraub.com
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8 law corporation
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10 Sacramento, CA 95814
11 Telephone: 916/558.6000
12 Facsimile: 916/446.1611

FILED
JAN 25 2013
100 2110:00
LEGAL PROCESS #6

13 Attorneys for Petitioner
14 Blue Diamond Growers

15 SUPERIOR COURT OF CALIFORNIA
16 IN AND FOR THE COUNTY OF SACRAMENTO

17 BLUE DIAMOND GROWERS, a
18 California nonprofit cooperative association,
19
20 Petitioner,
21
22 vs.
23 THE SACRAMENTO COUNTY
24 ENVIRONMENTAL MANAGEMENT
25 DEPARTMENT, REAL PARTY IN INTEREST;
26 AND DOES 1 THROUGH 150, INCLUSIVE,
27
28 Respondents.

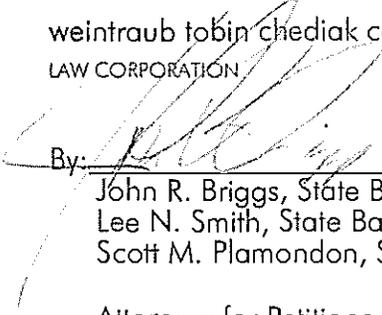
Case No.: 34-2011-80000940-CU-WM-GDS

NOTICE OF ENTRY OF ORDER
AFTER HEARING ON PETITIONER
BLUE DIAMOND GROWER'S
PETITION FOR WRIT OF MANDATE

29 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:
30
31 PLEASE TAKE NOTICE that, on January 14, 2013, the Court signed and entered the
32 attached Order.

33 Dated: January 25, 2013

Respectfully submitted,
weintraub tobin chediak coleman grodin
LAW CORPORATION

By: 
John R. Briggs, State Bar No. 100371
Lee N. Smith, State Bar No. 138071
Scott M. Plamondon, State Bar No. 212294

Attorneys for Petitioner, Blue Diamond Growers

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7 Facsimile: 916/446.1611
8 Attorneys for Petitioner
9 Blue Diamond Growers

FILED
3
by *[Signature]*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO

10
11 BLUE DIAMOND GROWERS, a) Case No. 34 2011-80000940-CU-WM-GDS
12 California nonprofit cooperative)
13 association,)
14) [PROPOSED]
15) ORDER AFTER HEARING ON PETITIONER
16) BLUE DIAMOND GROWER'S
17) PETITION FOR WRIT OF MANDATE
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THE SACRAMENTO COUNTY)
ENVIRONMENTAL MANAGEMENT)
DEPARTMENT, REAL PARTY IN)
INTEREST; AND DOES 1 THROUGH)
150, INCLUSIVE,)
Respondents.)

20 On April 27, 2012 and September 7, 2012, the Court heard argument on Petitioner
21 Blue Diamond Growers' ("BDG") motion for issuance of writ of mandate [Code of Civil
22 Procedure § 1094.5] or traditional mandate [Code of Civil Procedure § 1085]. BDG
23 appeared by its counsel, Weintraub Tobin Chediak Coleman Grodin Law Corporation by
24 John R. Briggs. Respondent Sacramento County Environmental Management Department
25 ("EMD") appeared by its counsel, Sacramento County Counsel by John E. Reed.

26 The Court having considered the moving papers, opposition papers and evidence
27 submitted in support of and against the motion hereby enters judgment as follows:

28 1. For the reasons set forth in the Ruling on Submitted Matter: Petition for

1 Writ of Mandate dated November 29, 2012, a copy which is attached hereto as Exhibit A
2 and incorporated by this reference, the Petition for Writ of Mandate is granted pursuant
3 to Code of Civil Procedure § 1085 on the ground that EMD violated BDG's due process
4 rights when it acted as the ultimate adjudicator in an enforcement action in which it had
5 an improper pecuniary interest.

6 2. A writ of mandate shall issue requiring EMD to set aside its decision
7 imposing monetary penalties against BDG and directing EMD to provide Petitioner with a
8 new hearing on the underlying Administrative Enforcement Order in this case that
9 complies with due process requirements by assuring that the ultimate decision maker
10 does not have a potential pecuniary interest in the result.

11 3. EMD shall file a return to the peremptory writ of mandate within 60 days of
12 its issuance.

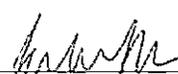
13 4. The Court does not make any findings or rulings concerning BDG's claims
14 that EMD's decision is invalid under Code of Civil Procedure § 1094.5.

15 5. BDG as the prevailing party is awarded costs pursuant to Code of Civil
16 Procedure § 1032(b).

17
18 Dated: 1/14/13

19
20 
21 _____
22 MICHAEL P. KENNY
23 JUDGE OF THE SUPERIOR COURT

24
25 **Approved as to form:**

26 
27 _____
28 **John E. Reed, Deputy County Counsel**
Counsel for Respondent The Sacramento
Environmental Management Department

FILED/ENDORSED
NOV 29 2012
By J. M. J. [Signature]

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

BLUE DIAMOND GROWERS,

Petitioner,

v.
**SACRAMENTO COUNTY
ENVIRONMENTAL MANAGEMENT
DEPARTMENT,**

Respondent.

Case No. 34-2011-80000940-CU-WM-GDS
**RULING ON SUBMITTED MATTER:
PETITION FOR WRIT OF MANDATE**

The Court heard oral argument in this matter on September 7, 2012. At that time, the Court received documentary evidence submitted by the parties, and granted counsel's request for leave to submit additional evidence and briefing. The Court subsequently received the additional evidence and briefing and issued a minute order on September 27, 2012 taking the matter under submission. The following shall constitute the Court's final ruling on the petition for writ of mandate.

The additional evidence submitted by respondent addresses the manner in which the County Environmental Management Department accounts for enforcement revenue in its budgeting process. Having considered that evidence, as well as the briefing submitted by the parties, the Court finds that such evidence does not affect its conclusion, set forth in detail in its prior tentative rulings in this case, that the process that led to the order of penalties against petitioner violated due process requirements because it did

1 not guarantee petitioner an impartial ultimate decision-maker. The fact that respondent accounts for
2 enforcement revenue retrospectively, rather than prospectively, does not alter the fact that respondent
3 retains a significant portion of enforcement penalties it receives, and uses those funds to support its
4 activities. As the Court concluded in its September 7, 2012 tentative ruling, given the percentages
5 involved here, the fact that respondent acted as the ultimate decision-maker in petitioner's case violated
6 petitioner's due process right to an impartial adjudicator.

7 The Court therefore affirms its tentative ruling issued prior to the hearing of September 7, 2012
8 granting the petition for writ of mandate pursuant to Code of Civil Procedure section 1085. The prior
9 tentative ruling (which incorporated an earlier tentative ruling issued for a hearing on April 27, 2012) is set
10 forth in full below.

11 In that ruling, the Court ordered that a writ of mandate should issue requiring respondent to set
12 aside its decision imposing monetary penalties against petitioner. The Court further finds that the writ
13 should direct respondent to provide petitioner with a new hearing on the Administrative Enforcement
14 Order in this case that complies with due process requirements by assuring that the ultimate decision-
15 maker does not have a potential pecuniary interest in the result. The appropriate remedy for violation of
16 the right to a fair hearing is to order the respondent to provide the petitioner with a fair hearing. (See,
17 *Clark v. City of Hermosa Beach* (1996) 48 Cal. App. 4th 1152, 1174.)

18 **Court's Tentative Ruling Issued for September 7, 2012 Hearing**

19 This matter originally was set for hearing on April 27, 2012. Prior to the hearing, the Court issued
20 a tentative ruling granting the petition pursuant to Code of Civil Procedure section 1085 on the ground that
21 EMD violated Blue Diamond's due process rights when it acted as the ultimate adjudicator in an
22 enforcement action in which it had an improper pecuniary interest.

23 After hearing oral argument by counsel, the Court took the matter under submission and
24 subsequently issued an order directing the parties to provide additional evidence and further briefing
25 regarding the application of the standard set forth in the federal court case of *Alpha Epsilon Phi Tau*
26 *Chapter Housing Association v. City of Berkeley* (9th Cir., 1997) 114 F. 3rd 840. The Court also set the
27

1 matter for further hearing.

2 The Court has received and reviewed the opinion in the *Alpha Epsilon Phi* case along with the
3 additional briefing submitted by both parties and the evidentiary declaration of Elise Rothschild, Division
4 Chief of the Environmental Compliance Division of EMD, submitted by respondent. Having exercised its
5 independent judgment on this matter under the applicable standard of review as set forth in the original
6 tentative ruling, the Court finds that the facts of this case establish a due process violation under the
7 standard set forth in the *Alpha Epsilon Phi* case.

8 In that case, the Ninth Circuit Court of Appeals applied the standard that an administrative
9 agency's institutional financial interest in matters potentially under adjudication violates due process when
10 it is sufficiently strong that it reasonably warrants fear of partisan influence on the judgment.

11 The court's analysis focused closely on the facts of the case. The court observed that the activities
12 of the Berkeley Rent Stabilization Board, which acted as both adjudicator of coverage and executor of its
13 own finances, represented a "less than an optimal design for due process purposes." Nevertheless, after an
14 analysis of the facts, the court found that the Board's activities did not offend the applicable due process
15 standard, because "[t]he Board's motive to adjudicate landlords covered by the ordinance is not 'strong'.
16 No person could 'reasonably...fear...partisan influence in [the] judgment.' And this situation would not
17 pose a temptation to the 'average man as judge' or induce him 'not to hold the balance nice, clear, and
18 true.'"¹

19 In reaching this conclusion, the Court noted several factors established by the evidence in the case,
20 including the number of coverage decisions the Board made each year and the practice of the Board
21 regularly to waive large amounts of penalties.² The factor that the Court treated as most significant in its
22 discussion of the due process issue, however, was the fact that penalties resulting from Board
23 adjudications over whether properties were covered by the rent stabilization ordinance amounted to just
24 two to five percent of the Board's entire budget. The Court found that this level of institutional financial
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26
27 ¹ See, 114 F. 3rd at 847-848.

28 ² See, 114 F. 3rd at 846

1 interest in penalty adjudications did not create a "strong" motive to adjudicate against landlords such that
2 it reasonably warranted fear of partisan influence on the judgment.

3 The facts of this case, as established by the evidence previously presented in the administrative
4 record and in the Declaration of Elise Rothschild, are different. Here, the facts demonstrate that
5 respondent EMD has a significantly greater institutional financial interest in penalty adjudications than the
6 "rather small" amount of the budget at stake in the *Alpha Epsilon Phi* case.³ This is particularly evident
7 when analysis centers on the two enforcement programs that were involved in this case. The three-year
8 budget figures for the Hazardous Materials and Hazardous Waste Programs (under which the penalties
9 against Blue Diamond were assessed), show that penalties ranged from a 9% share of the budget for the
10 Hazardous Materials Program in 2010 and 2011 up to a 30% share of the budget for the Hazardous Waste
11 Program in 2009. The three-year average for 2009-2011 was 23% for the Hazardous Waste Program and
12 16% for the Hazardous Materials Program.⁴

13
14 These percentages are, by any measure, significant. They represent far more than the *de minimis*
15 exception the Ninth Circuit recognized could be available in an institutional setting.⁵ In comparison to the
16 significant proportion of the program budgets covered by penalty assessments in the past three years, the
17 Court finds the number of penalty assessments and the practice of the Board frequently to negotiate
18 settlements of penalty assessments to be of lesser weight.

19 As the Court noted in the *Alpha Epsilon Phi* case, "... the issue, in the end, comes down to a
20 judgment whether the official motive here is 'strong' ...so that it 'reasonably warrant[s] fear of partisan
21 influence on the judgment.'⁶ This Court's judgment is that the percentage of respondent's budget for the
22 programs at issue here that is covered by penalty assessments does create a strong motive that reasonably
23 warrants fear of partisan influence on the judgment. The situation presented in this case is one that would

24 ³ The "rather small" language appears in 114 F. 3rd at 847.

25 ⁴ The budget and penalty amounts are found in the Declaration of Elise Rothschild, filed on July 30, 2012, par. 13-14.
26 The Court has calculated the percentages. The Court is not persuaded by respondent's argument that the largest
penalty assessment, involving the Georgia Pacific Company, should not be considered simply because it is so much
larger than the others. It is precisely the largest penalty assessments that raise the greatest level of concern.

27 ⁵ See, 114 F. 3rd at 845

28 ⁶ See, 114 F. 3rd at 847

1 ... pose a temptation to the average man as judge or induce him not to hold the balance nice, clear, and
2 true."⁷

3 The newly-presented facts, authority and argument do not alter the Court's previous analysis of
4 the due process issue presented by the petition. The Court therefore affirms its previous tentative ruling
5 granting the petition for writ of mandate under Code of Civil Procedure section 1085. That tentative
6 ruling is set forth in full immediately below.

7 Court's Tentative Ruling Issued for April 27, 2012 Hearing

8 Introduction and Summary of Ruling

9 This is a petition for writ of mandate under Code of Civil Procedure sections 1085 and 1094.5 in
10 which petitioner Blue Diamond Growers ("Blue Diamond") challenges a decision of respondent
11 Sacramento County Environmental Management Department ("EMD"), entered after an evidentiary
12 hearing, upholding the assessment of a monetary penalty against Blue Diamond. The penalty arose from
13 charges that Blue Diamond discharged high pH water, a by-product of its blanching equipment cleaning
14 process, into the sanitary sewer on two occasions in March, 2010.

15 Blue Diamond's petition under Code of Civil Procedure section 1085 asserts that the decision is
16 invalid as a violation of its due process rights. In particular, Blue Diamond contends that it was deprived
17 of the right to an impartial tribunal because EMD, which was the final decision-maker in its case, is
18 funded by the penalties it assesses in enforcement actions, and thus has a disqualifying pecuniary interest
19 in the result of such actions.

20 Blue Diamond's petition under Code of Civil Procedure section 1094.5 asserts that the decision is
21 invalid on several grounds: EMD improperly applied unpublished policies to its case; the findings
22 regarding the circumstances of the discharges are not supported by substantial evidence; and EMD
23 improperly applied statutory criteria for the determination of the amount of the penalty.

24 The Court finds that Blue Diamond's due process contention has merit and grants the petition on
25 that basis. Because this conclusion results in the invalidation of EMD's decision, it is not necessary for
26

27
28 ⁷ See, 114 F. 3rd at 847-848

1 the Court to address Blue Diamond's claims under Code of Civil Procedure section 1094.5.

2 Factual Findings on Petitioner's Due Process Claim

3 The facts related to Blue Diamond's due process contention are not in dispute, and are found to be
4 as follows.

5 Under state law, EMD acts as a unified program agency ("UPA") for the purposes of
6 administrative enforcement of state laws and regulations involving the disposal of hazardous waste, and
7 acted as such in this case. EMD is authorized to issue an Administrative Enforcement Order ("AEO") if it
8 determines that a "person" such as Blue Diamond has committed a violation of law. The AEO may
9 require that the violation be corrected and may impose a monetary penalty. (See, Health and Safety Code
10 Section 25404.1.1(a).)

11 Health and Safety Code section 25404.1.1(i) provides: "All administrative penalties collected from
12 actions brought by a UPA pursuant to this section shall be paid to the UPA that imposed the penalty, and
13 shall be deposited into a special account that shall be expended to fund the activities of the UPA in
14 enforcing this chapter."

15 In this case, EMD issued an AEO against Blue Diamond on April 29, 2010, based on releases of
16 hazardous materials that occurred on two days in March, 2010.⁴ The AEO imposed a penalty of
17 \$56,150.00
18

19 State law requires EMD, in establishing a penalty amount, to "...take into consideration the
20 nature, circumstances, extent, and gravity of the violation, the violator's past and present efforts to
21 prevent, abate, or clean up conditions posing a threat to the public health and safety or the environment,
22 the violator's ability to pay the penalty, and the deterrent effect that the imposition of the penalty would
23 have on both the violator and the regulated community." (See, Health and Safety Code Section
24 25404.1.1(b).)

25 EMD has promulgated an Inspection and Enforcement Plan ("IEP") which includes a description
26 of the process it uses to determine the amount of monetary penalties. The IEP explicitly states that EMD
27

28 ⁴ See, Administrative Record ("A.R."), pp. 8-15

1 issues enforcement orders and assesses penalties under Health and Safety Code section 25404.1.1. For
2 calculation of the amount of any penalties, the IEP sets out a matrix of "initial penalties" which EMD may
3 select from, after consideration of the degree of actual or potential harm from the release and the extent of
4 the charged party's deviation from legal requirements. EMD then may adjust the initial penalty up or
5 down (with potential upward adjustments of as much as 100%) based on factors such as the charged
6 party's intent and degree of cooperation and effort.⁹

7 The AEO in this case included a "Penalty Calculation Matrix" showing an upward adjustment of
8 25% on each element of the penalty assessed against Blue Diamond.¹⁰

9 The AEO informed Blue Diamond that it had the right to request a hearing on the order by filing a
10 Notice of Defense.¹¹ The Notice of Defense form stated, as permitted by law, that the charged party could
11 select a hearing officer designated by the County, or an Administrative Law Judge of the State Office of
12 Administrative Hearings.¹²

13 Blue Diamond filed a timely Notice of Defense selecting a hearing before an Administrative Law
14 Judge.¹³ Blue Diamond also filed an Attachment to Notice of Defense that contained the following
15 allegation: "EMD's imposition of monetary penalties against [Blue Diamond] constitutes an illegal
16 contingency fee pursuant to *In re Clancy*, 39 Cal. 3d 740 (1985), presents a conflict of interest and violates
17 [Blue Diamond's] substantive and procedural due process right under the state and federal constitutions."¹⁴

18 An evidentiary hearing was held before a state Administrative Law Judge on four days in August
19 and September, 2010, and February, 2011. On July 20, 2011, the Administrative Law Judge issued a
20 Proposed Decision for consideration by EMD. The Proposed Decision granted Blue Diamond's appeal in
21 part, reducing the penalty to \$45,795.00, but otherwise sustained the AEO.¹⁵

22
23 _____
24 ⁹ See, A.R., pp. 273-282.

25 ¹⁰ See, A.R., p. 18.

26 ¹¹ See, A.R., pp. 14-15.

27 ¹² See, A.R., p. 16; Health and Safety Code section 25404.1.1(e).

28 ¹³ See, A.R., p. 19.

¹⁴ See, A.R., p. 21, paragraph 10.

¹⁵ See, A.R., pp. 2145-2181.

1 The Proposed Decision dealt with Blue Diamond's due process contention as follows: "This is an
2 issue that cannot be addressed in an administrative tribunal. (Cal Const , art III, § 3.5 [administrative
3 agencies lack power to declare a statute unconstitutional or unenforceable on the basis of
4 unconstitutionality])."¹⁶

5 Pursuant to the IEP, EMD had the authority to adopt the Proposed Decision, adopt portions of the
6 proposed Decision while revising other portions, or reject the Proposed Decision.¹⁷ On July 29, 2011,
7 EMD adopted the Proposed Decision as its decision in the case.¹⁸

8 EMD's IEP includes a component described as the "Enforcement Revenue Offset Program",
9 which details its use of amounts received from enforcement penalties. The IEP states that EMD does not
10 budget for any realized enforcement revenue, because EMD's position is that "...enforcement revenue
11 should not be formalized as a traditional revenue stream needed for the support of necessary and
12 appropriate program activities. Thus, core program activities such as staff costs relating to inspections,
13 documentation, staff training, business education and outreach and Department and County level overhead
14 are built into the [EMD] fee structure."¹⁹

15 The IEP states that, after recovering the cost of implementing enforcement actions, EMD uses
16 remaining revenue and accumulated savings to establish "program specific rate stabilization reserves".
17 When ("on occasion") accumulated fines and penalties exceed the amount needed for a prudent reserve,
18 EMD returns the "excess revenue" to compliant facilities in the form of a fee offset during the annual
19 billing process.²⁰ EMD finds that this program has significant benefits:

20 "The Enforcement Revenue Offset Program enhances [EMD's] enforcement program credibility
21 by insulating the Department from accusations of basing enforcement activity on perceived funding needs,
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23
24

25 ¹⁶ See, A R., p. 2080, Legal Conclusion No. 2.

26 ¹⁷ See, A R., p. 272.

27 ¹⁸ See, A R., p. 2146.

28 ¹⁹ See, A R., p. 283

²⁰ *Id.*

1 thereby providing tangible proof of the enforcement program's objectivity."²¹

2 Witnesses who testified on behalf of EMD at the administrative hearing provided evidence as to
3 how the funds generated from enforcement penalties are used in practice.

4 The Director of EMD, Val Siebai, testified that EMD is a special fund agency that does not
5 receive any money from the County general fund. Instead, all funds come from fees paid by the regulated
6 community. All penalties are paid to EMD and are held in a special account by Sacramento County. He
7 testified that fines and penalties are not calculated in the budget, but conceded that fines and penalties do
8 come into the control of EMD, and are used to fund enforcement activities.²²

9 Elise Rothschild, who issued the AEO in this case on behalf of EMD, provided specific testimony
10 regarding EMD's budget, based on documents admitted into evidence at the hearing. Her testimony was
11 that EMD brought in \$1.378 million in enforcement revenue in 2010-2011, and that \$662,079.00 of that
12 amount was returned to compliant businesses as a credit to reduce their regulatory fees, while the rest,
13 \$716,717.00, was retained by EMD to support its activities.²³

14
15 Standard of Review for Petitioner's Due Process Claim

16 Blue Diamond's due process claim focuses on Health and Safety Code section 25404.1.1(1),
17 which, as quoted above, provides that all monetary penalties collected from actions brought by EMD shall
18 be paid to EMD and deposited in a special account that shall be expended to fund EMD's enforcement
19 activities. Blue Diamond contends that, given this statutory provision, EMD violated due process
20 principles by acting as the adjudicator in its case, because EMD had an improper pecuniary interest in the
21 outcome of the case. Blue Diamond does not challenge the constitutionality of the statute itself, but rather
22 the constitutionality of the hearing procedure followed in this case.

23 Because petitioner's due process claim in this case is presented based on undisputed facts, it raises
24 a pure issue of law, on which the Court exercises its independent judgment. (See, *Donahson v*

25
26 ²¹ *Id.*

27 ²² See, A.R., pp. 1317-1325

28 ²³ See, A.R., pp. 1536-1552. The budget documents to which Ms. Rothschild referred in her testimony are at A.R.,
pp. 570-571.

1 *Department of Real Estate* (2005) 134 Cal. App. 4th 948, 954; *Moosa v State Personnel Board* (2002) 102
2 Cal. App. 4th 1379, 1385.)

3 Analysis of Petitioner's Due Process Claim

4 EMD raises the threshold issue of whether petitioner's due process claim is barred for failure to
5 raise it at the administrative hearing. Specifically, EMD contends that petitioner only raised the issue of
6 whether its imposition of monetary penalties constituted an "illegal contingency fee" as held in *In re*
7 *Clancy*, 39 Cal. 3d 740 (1985), but not the issue presented here, which is whether EMD, as adjudicator,
8 had an impermissible pecuniary interest in the outcome of the case. EMD contends that Blue Diamond
9 thereby waived the issue it presents here

10 This contention is not persuasive. As quoted above, petitioner's Attachment to Notice of Defense
11 also asserted that EMD's imposition of monetary penalties presented a conflict of interest that violated
12 Blue Diamond's due process rights.²⁴ This was sufficient to preserve the issue of an improper pecuniary
13 interest presented here. Moreover, Blue Diamond was not required to exhaust administrative remedies by
14 raising its due process contention at the hearing before the ALJ. As the ALJ noted in the Proposed
15 Decision, the due process issue, which the ALJ perceived as involving the constitutionality of a statute,
16 could not be addressed in the administrative proceedings. The Court accordingly finds that Blue Diamond
17 did not waive the due process claim it presents in this case.

18
19 The California Supreme Court set forth the fundamental due process principles applicable to this
20 case in *Haas v. County of San Bernardino* (2002) 27 Cal. 4th 1017, 1025-1027. Those principles may be
21 summarized as follows. When due process requires a hearing, the adjudicator must be impartial. Of all
22 the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal
23 condemnation and the least forgiving scrutiny. Thus, while adjudicators challenged for reasons other than
24 financial interest have in effect been afforded a presumption of impartiality, adjudicators challenged for
25 financial interest have not. The standard is whether the adjudicator's financial interest would offer a
26 possible temptation to the average person as judge not to hold the balance "nice, clear and true." This rule

27
28 ²⁴ See, A.R., p. 21, paragraph 10

1 applies "with full force" to administrative proceedings.

2 Applying these principles in the *Haas* case, the Supreme Court held that a temporary
3 administrative hearing officer has a pecuniary interest requiring disqualification when the government
4 unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future
5 adjudicative work depends entirely on the government's good will. Thus, a decision of the hearing officer
6 revoking a county-issued license was properly invalidated by the trial court.

7 In its opinion in the *Haas* case, the Supreme Court cited and relied on two United States Supreme
8 Court cases, *Tunney v. Ohio* (1927) 273 U.S. 510, and *Ward v. Village of Monroeville* (1972) 409 U.S. 57.
9 A subsequent opinion of the Court of Appeal succinctly summarized those cases:

10 "In *Tunney v. Ohio*, the court held that due process in the form of an impartial judge was denied
11 when the judge received as part of his salary the costs that he imposed on a convicted defendant. [Citation
12 omitted.] The result was the same in *Ward v. Village of Monroeville*, even though the fines imposed by
13 the 'mayor's court' did not benefit the mayor personally, but rather the municipality. The court held that
14 the mayor's responsibilities for village finances 'may make him partisan to maintain the high level of
15 contribution from the mayor's court.'" (See, *McBride v. California Board of Accountancy* (2005) 130 Cal
16 App 4th 518, 524.)

17 In this case, the plain language of the applicable statute demonstrates that EMD's activities are
18 funded by enforcement penalties. This method of funding raises due process concerns if EMD acts as the
19 adjudicator in enforcement cases. In this case, even though the evidentiary hearing on petitioner's
20 administrative appeal was conducted by an Administrative Law Judge provided by the state Office of
21 Administrative Hearings, the ALJ rendered a proposed decision which EMD had the legal authority to
22 accept, revise, or reject. The undisputed facts thus demonstrate that EMD was the ultimate adjudicator as
23 well as the enforcing agency in petitioner's case, and that it had a pecuniary interest in the outcome. On
24 its face, this procedure violates fundamental due process standards: the adjudicator's financial interest
25 would offer a possible temptation to the average person as judge not to hold the balance "nice, clear and
26 true." The fact that EMD's decision is subject to review in this Court is irrelevant, because Blue Diamond
27
28

1 is entitled to a neutral and detached adjudicator in the first instance (See, *Haas v. County of San*
2 *Bernardino, supra*, 27 Cal. 4th at 1034.)

3 Because EMD had the ultimate legal authority to accept, revise or reject the ALJ's proposed
4 decision, this case differs from *McBride v. California Board of Accountancy, supra*, 130 Cal. App. 4th 518.
5 In that case, the Court of Appeal held that due process principles were not violated where an
6 Administrative Law Judge made a proposed finding regarding the amount of reasonable costs of
7 prosecution and investigation a disciplined licensee was to pay to the Board, but the applicable statutes
8 gave the Board the power only to reduce or eliminate the award. From a practical perspective, the Court
9 found, these statutes vested the decision on the question of costs in the ALJ, and not the Board, and the
10 ALJ had no pecuniary interest in the award of costs. Here, EMD's authority is not limited to reducing or
11 eliminating the monetary penalties. Because it has the authority to revise the proposed decision, EMD
12 also has the authority to increase the amount of monetary penalties ordered by the ALJ, to reject any
13 reduction ordered by the ALJ and, presumably, also to reinstate monetary penalties even if the ALJ finds
14 them to be unwarranted. Thus, the final decision as to the amount of penalties is vested in EMD, not the
15 ALJ.
16

17 Relying on the provisions of the Enforcement Revenue Offset Program contained in the IEP, EMD
18 argues that, as a matter of fact, it is not funded by enforcement penalties, but by facility fees, thus negating
19 any pecuniary interest in the enforcement cases it ultimately adjudicates. This argument is not persuasive
20 As Blue Diamond points out, no matter what EMD does in practice, the applicable statute requires it to use
21 enforcement penalties to fund its activities, which results in a violation of due process if EMD acts as the
22 ultimate adjudicator. Moreover, even if EMD does not establish its budget on the basis of enforcement
23 penalties, the undisputed facts demonstrate that EMD retains a significant portion of enforcement penalties
24 it receives, and uses those amounts to support its activities. This is sufficient to violate the due process
25 right to an impartial adjudicator.

26 The Court therefore concludes that Blue Diamond has demonstrated that the hearing procedure
27 followed in this case, in which EMD acted as the ultimate adjudicator, violated due process principles
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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

John R. Briggs, Esq.
Weintraub Tobin Chediak Coleman Grodin
400 Capitol Mall, 11th Floor
Sacramento, CA 95814

John E. Reed
Deputy County Counsel
700 H Street, Suite 2650
Sacramento, CA 95814

Superior Court of California,
County of Sacramento

Dated: November 30, 2012

By: J. Zuraggen 
Deputy Clerk

1 Re Blue Diamond Growers v. The Sacramento Environmental Management Department, etc.
2 Sacramento County Superior Court, Case No. 34-2011-80000940

3 PROOF OF SERVICE

4 I am a citizen of the United States, employed in the City and County of Sacramento,
5 California. My business address is 400 Capitol Mall, Eleventh Floor, Sacramento, California
6 95814. I am over the age of 18 years and not a party to the within action. On today's date, I
7 caused to be served the following:

8 NOTICE OF ENTRY OF ORDER AFTER HEARING ON
9 PETITIONER BLUE DIAMOND GROWER'S
10 PETITION FOR WRIT OF MANDATE

11 I am readily familiar with the firm's practice of collection and processing correspondence for
12 mailing in the ordinary course of business. Under this practice, correspondence is collected,
13 sealed, postage thereon fully prepaid, and deposited the same day with the U. S. Postal
14 Service.

15 I caused the above documents to be served on the parties in this action by placing them in a
16 sealed envelope in the designated area for outgoing mail, addressed as shown below.

17 I caused the above documents to be personally delivered to the addressee(s) set forth below.

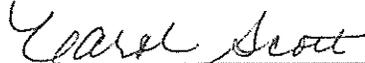
18 I caused the above documents to be served on the parties in this action by causing them to
19 be delivered via Federal Express, for next-day delivery to the addressee(s) set forth below.

20 I caused the above documents to be served on the parties in this action by transmitting them
21 via facsimile to the addressee(s) indicated below.

22 I declare that I am employed in the office of a member of the bar of this Court at whose
23 direction the service was made. (Federal)

24 John Reed, Esq.
25 Deputy County Counsel
26 County of Sacramento
27 700 H Street, Suite 2650
28 Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct and that this
declaration was executed on January 25, 2013, in Sacramento, California.



Carol Scott

Exhibit C

John Minney
17137 Road 37
Madera CA 93636
559-275-5937 559-645-0870
jminney@gmail.com

August 23, 2013

JOB F12033A

Mr. Lee Smith, Attorney
Weintraub Tobin
400 Capitol Mall, 11th Floor
Sacramento CA 95814

**SUBJECT: Third Quarter 2013 Groundwater Monitoring
Tosta Dairy
Tracy, California**

Dear Sir:

This report is related to groundwater monitoring at the Tosta Dairy for the third quarter, 2013. The facility has three previously approved monitoring wells (MW-1, MW-2, and MW-3) which have recently been surveyed for elevation and sampled for groundwater on July 3, 2013. In addition, a fourth monitoring well (MW-4) was included in the surveying and sampling at the site; although this well is pre-existing, I saw no record of the Board's approval of this well.

This report also further addresses items that I testified to at the previous Regional Board hearing on August 25, 2013 including the very poor quality of the shallow groundwater in that vicinity and the .

The first groundwater is shallow, on the order of 5 feet deep. The map showing the gradient as determined on July 3, 2013 is attached. It essentially shows groundwater going south, which I would consider unusual (but not unheard of) for this vicinity. Since 1996, I have done most of the groundwater monitoring at the nearby sugar beet factory and the predominant flow direction has been north or northwest in the shallow groundwater (also 5 feet deep), although it was south also for a brief while. You can see the sugar beet plant and its associated irrigated lands when you are standing on the Tosta Dairy site.

The Regional Board has recently opined that Tosta Dairy has adversely impacted the beneficial uses of the shallow groundwater through the way it has operated the ponds/manure drying areas. The RWQCB has complained specifically about the TDS and Nitrate-N in the groundwater. The RWQCB has also stated that the shallow groundwater at the site is currently deemed a resource for MUN supply based upon regulation, though no factual information supporting that conclusion was provided. My response (again based upon doing most of the groundwater monitoring issues at the nearby sugar beet factory since 1996) was that the shallow groundwater is naturally that very poor quality.

This report will therefore specifically address whether the technical data supports the position that was raised at the past Board hearing that the beneficial uses of shallow groundwater have been impacted by the Tosta Dairy handling of ponds/manure drying and whether the technical data supports the position that the shallow groundwater is just naturally that very poor quality.

Since the pond water quality and the manure extract water quality are relevant to this discussion, both the pond water and the manure have been recently sampled for similar constituents to the groundwater.

I have put all the available groundwater, pond and manure data to date into the spreadsheet that is attached.

The following table compares three items for the relevant test parameters. The Irrigation Area is the compilation of background shallow groundwater values agreed to by the RWQCB about ten years ago at the nearby sugar beet factory. The Tosta GW is the average of all the groundwater tests that I currently have at Tosta for MW-1, MW-2, MW-3 and MW-4. It can be seen that TDS and N are present at Tosta at values remarkably similar to background at the sugar beet factory. I consider that as substantiating my previous position.

I also sampled the Tosta Dairy pond water and manure for similar constituents as the RWQCB has alleged that pond seepage has caused that the very poor quality groundwater to be on the Tosta property. The dairy has several acres which are used for combined pond areas and manure drying areas. The pond bottoms are close to the groundwater table, so significant infiltration to groundwater could be expected. The manure drying is done to evaporate the water out of the manure, so the amount of water which could come out of the manure is simply the precipitation reduced by effective evaporation. Since the manure drying and the ponds have occupied essentially the same parcel of ground over the years, there has been a blending of the two from the perspective of what can reach groundwater. Most of the water is from the pond and some from the manure.

The TDS in the pond-manure is much lower than the TDS in the Tosta groundwater (GW), so it is impossible for the pond-manure to have caused the very poor quality groundwater. I consider that as substantiating my previous position. The N in the Tosta pond-manure is apparently the immobile form, which would be expected for a manure pond or a manure pile.

Parameter	Irrigation Area	Tosta GW	Tosta Pond-Manure
TDS (mg/l)	11,391	10,961	4,532
TFDS (mg/l)	10,780		
TOC (mg/l)	4.4		
Bicarbonate (mg/l)	800	593	1,926
Hardness (mg/l)	1,342		
Nitrogen (mg/l)	40.6	17.9	412
Calcium (mg/l)	425	839	144
Chloride (mg/l)	766	3,911	896
Sodium (mg/l)	2,679	2,563	421
Sulfate (mg/l)	6,205	2,492	12
Potassium (mg/l)	4.4	17	650
Boron (mg/l)	21	6	
Magnesium (mg/l)	219	624	86

Note that there are other elevated constituents in the Tosta groundwater. Chloride is most notable. Again, the pond water-manure extract has minimal chloride compared to the Tosta groundwater, so it could not have caused it. Sodium is also there as well in a similar amount. Since the shallow groundwater is virtually at or below sea-level in elevation, it suggests a historical salt-water intrusion remnant as opposed to a Tosta release.

Regarding the groundwater flow, the RWQCB alleges that there is a “mound” of groundwater coming out of the ponds which is both highly contaminated and disruptive of the regular direction that groundwater would move.

I have some old measurements of depth to water from 2012 by others.

Well	Date	Measuring Point Elevation	Water Depth, ft	Total Well Depth, ft	Groundwater Elevation
MW-1	7/16/2012	4.36	5.33	21.0	-0.97
MW-2	7/16/2012	8.07	6.93	23.3	1.14
MW-3	7/16/2012	5.13	7.60	16.0	-2.47
MW-4		5.76		10.4	

MW-2 is the well nearest the wastewater pond. It shows the highest elevation of water on the site, which is consistent with the State’s assertion that there is a “mound”. MW-3 is the lowest, suggesting water not in the mound is moving north.

Here are my new measurements (I added MW-4 which is the unapproved-as-yet existing well).

Well	Date	Measuring Point Elevation	Water Depth, ft	Total Well Depth, ft	Groundwater Elevation
MW-1	7/3/2013	4.36	6.73	21.0	-2.37
MW-2	7/3/2013	8.07	7.48	23.3	0.59
MW-3	7/3/2013	5.13	3.92	16.0	1.21
MW-4	7/3/2013	5.76	5.28	10.4	0.48

MW-2 not the highest anymore, so the “mound” is now missing. Also MW-3 now the highest, suggesting flow has reversed to the south.

So the available data currently indicates that Tosta is not creating a “mound” but used to. That means that there was some discharge of pond water into groundwater. Note that I have so calculated it in my above analyses.

The next question is whether that “mound” discharge caused contamination of groundwater. MW-2 is the one closest to the pond; MW-1 is farther away. MW-1 is the higher well with most constituents (i.e. sodium, calcium, magnesium, chloride, conductivity and TDS). MW-2 is the higher well with fewer

constituents (i.e. nitrate, sulfate). Preponderance of evidence says the “mound” has not impacted groundwater and implies that a “mound” would actually improve the groundwater in this area.

The Regional Board has requested that the top of MW-3 be repaired to prevent surface water intrusion. This is what it looks like now. A drawing regarding a repair is attached. A steel sleeve would be grouted into the near surface.



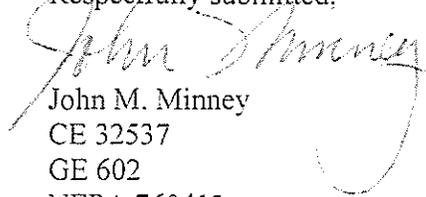
In summary, the principal issue to be addressed was whether the shallow, very poor quality groundwater documented at the site is the result of the Tosta Dairy pond-manure drying operations or the result of naturally occurring, similarly very poor quality groundwater found nearby also. I conclude that the Tosta Dairy pond water-manure extract are not bad enough to have caused the very poor quality groundwater and that this site's very poor quality groundwater is remarkably similar to another nearby site that I have worked on extensively.

Regarding the beneficial uses of natural groundwater which has a TDS greater than 10,000 mg/l, it is my conclusion that there are basically no beneficial uses. The MUN designation is generally considered treatable to 3,000 mg/l but there is no shallow groundwater in this area that is less than 3000 mg/l.

Regarding future groundwater monitoring, I would expect that quarterly monitoring of at least the three approved wells will be required for at least one year, with the same constituents included herein. I would recommend similar testing of the pond and manure at the same time and, provided that the results remain similar, that a request for no further groundwater monitoring be made based upon the shallow groundwater being naturally such poor quality that it has no beneficial uses.

Please call if you have questions or comments in this regard.

Respectfully submitted,



John M. Minney
CE 32537
GE 602
NEPA 760413



JMM/bf

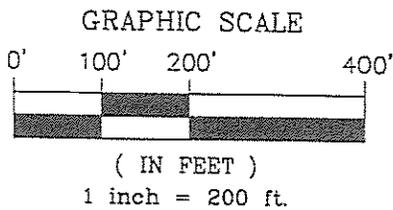
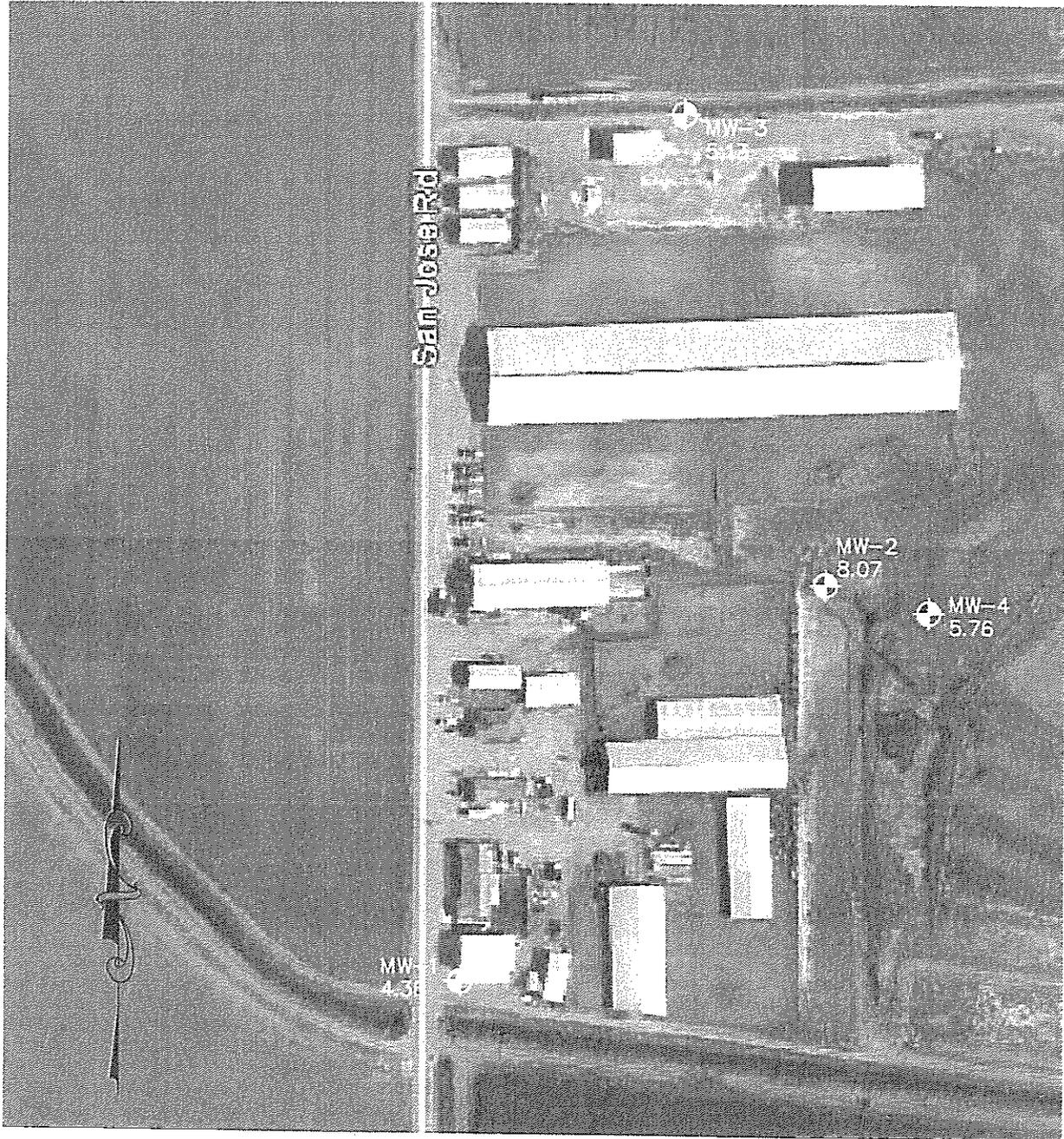
- Attachments:
- Figure 1, Site Map
 - Figure 2, Groundwater Gradient 7/3/2013
 - Figure 3, MW-3 Well Repair
 - Lab Test Results
 - Spreadsheet



NOTE: ELEVATIONS SHOWN ARE
TO THE NORTH EDGE OF THE
WELL CASING AND ARE ON THE
NAVD88 DATUM

LEGEND

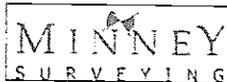
MONITORING WELL



MONITORING WELL LOCATION EXHIBIT
TOSTA DAIRY
20662 SAN JOSE ROAD
TRACY, CA

DRAWN BY:
AMS

DATE:
6-26-13



3757 CHessa LANE
CLOVIS, CA 93619
(559) 322-8235
www.minneysurveying.com

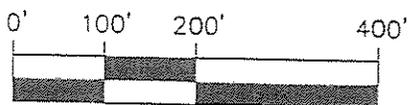
LEGEND

JOB F12033A
FIGURE 2

 MONITORING WELL



GRAPHIC SCALE



(IN FEET)
1 inch = 200 ft.

GROUNDWATER CONTOURS 7/3/2013
TOSTA DAIRY
20662 SAN JOSE ROAD
TRACY, CA

DRAWN BY:
AMS

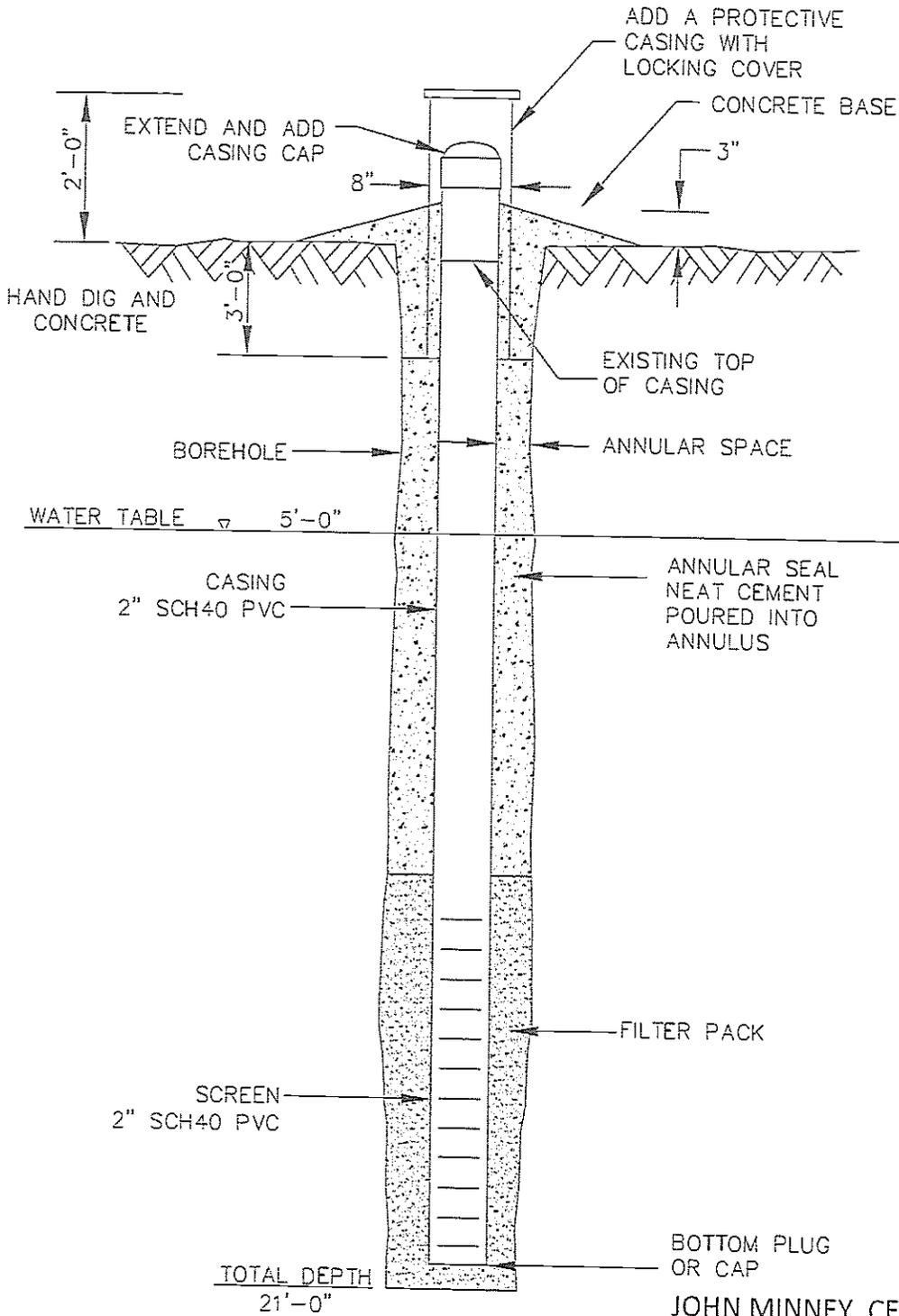
DATE:
8-23-13


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SURVEYING

3757 CHESSA LANE
CLOVIS, CA 93619
(559) 322-8235

www.minneysurveying.com

CROSS SECTION OF A PROPOSED MONITORING WELL JOB F12033A
 TOSTA DAIRY MW-3
 TRACY, CA
 FIGURE 3



JOHN MINNEY, CE 32537, GE 602
 17137 ROAD 37
 MADERA, CA 93636
 (559) 275-5937
 jminney@gmail.com

*NOT TO SCALE

Herbst, Charlene@Waterboards

From: Mr. Jeff Fleming <jefflem@dairydesigners.com>
Sent: Friday, July 20, 2012 3:42 PM
To: Herbst, Charlene@Waterboards; Davis, Daniel@Waterboards; Corral, Gilberto@Waterboards; Walsh, Sean@Waterboards
Cc: David Avila; Skelton Chris
Subject: Fwd: Directive 4, Cleanup and Abatement Order R5-2012-0708
Attachments: 4206irrgwtr12-199-114.pdf; 4206irrgwtr12-199-113.pdf; 12199114 NH4N NO3N TDS.pdf; 12199114 Total Coliform Ecoli.pdf; 12199113 Total Coliform Ecoli.pdf; 12199113 NH4N NO3N TDS.pdf; Henry Tosta Dairy- MWs.jpg

These are the lab results for monitoring well samples taken Monday, 16 July 2012. Note these are at the Henry Tosta Dairy. Monitor well 1 is southernmost, MW2 is in the middle, near the settling pond, and MW3 is northernmost. A locator map is included. Depth and depth to water readings will be included in a following email.

Jeff Fleming

Western Dairy Design Associates, Inc.

OFF: 209-848-8674

CEL: 209-840-0363

FAX: 209-848-8654

jefflem@dairydesigners.com

A & L WESTERN AGRICULTURAL LABORATORIES

1311 WOODLAND AVE #1 • MODESTO, CALIFORNIA 95351 • (209) 529-4080 • FAX (209) 529-4736



REPORT NUMBER: 12-109-114

CLIENT: 4206-D

SUBMITTED BY: JEFF FLEMING

SEND TO: WESTERN DAIRY DESIGN ASSOC, INC
316 WEST F STREET, SUITE 100
OAKDALE, CA 95361

GROWER: 053-13

DATE OF REPORT: 07/19/12

IRRIGATION WATER ANALYSIS REPORT

PAGE: 1

Sample ID	Lab Number	Sodium Na meq/L	Calcium Ca meq/L	Magnesium Mg meq/L	Carbonate CO ₃ meq/L	Bicarbonate HCO ₃ meq/L	Chloride Cl meq/L	Conductivity E.C. dS/m	pH	Copper Cu ppm	Iron Fe ppm	Manganese Mn ppm	Zinc Zn ppm
MW-1	61701	46.14	32.09	30.67	0.00	7.90	86.46	12.66	7.3				
MW-3	61702	35.48	29.34	13.82	0.00	11.34	36.49	7.82	7.3				

Sample ID	Phosphorus P ppm	Potassium K ppm	Nitrate NO ₃ ppm	Sulfate SO ₄ ppm	Boron B ppm	Dissolved Solids ppm	Adjusted S.A.R.	Langelier Saturation Index	NOTES:
MW-1	0.12	20.8	7	1013	1.67	6668	10.52		This report applies only to the sample(s) tested. Samples are retained a maximum of thirty days after testing. <i>MJ Bullress</i> Mike Bullress, CPAg A & L WESTERN LABORATORIES, INC.
MW-3	0.02	5.3	6	1617	5.68	5192	11.36		

A & L WESTERN AGRICULTURAL LABORATORIES, INC.
 1311 Woodland Avenue, Suite 1 • Modesto, California 95351 • (209) 529-4080

Report No: 12-199-114

Account No: 4206-D

Send to: WESTERN DAIRY DESIGN
 316 W. F STREET SUITE 100
 OAKDALE, CA 95361

Project ID: 053-13

Submitted by: Jeff Fleming

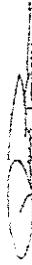
Date Received: 07/17/2012
 Date Reported: 07/19/2012

WATER ANALYSIS REPORT

Analyte:	Ammonia Nitrogen	Nitrate Nitrogen	T.D.S.
Detection Limit:	0.05 mg/L	0.5 mg/L	10 mg/L
Method Detection:	SM 4500-NH ₃ H	SM 4500-NH ₃ B	SM 2540 C
Lab Number:	Sample Id:	Ammonia Nitrogen	Nitrate Nitrogen
61701	MW-1	mg/L 1.3	mg/L 1.6
61702	MW-3	0.4	1.4
			T.D.S. Mg/L 10329
			5460

BOX INDICATED THE LEVEL FOUND IS BELOW THE ESTABLISHED DETECTION LIMIT FOR THAT ANALYTE.

A & L Western Agricultural Laboratories



Robert Butterfield
 Laboratory Director

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1311 Woodland Avenue, Suite 1 • Modesto, California 95351 • (209) 529-4080

Report No: 12-199-113

Account No: 4206-D

Send To: WESTERN DAIRY DESIGN
316 W. F STREET, SUITE 100
OAKDALE, CA 95361

Project: 053-13

Submitted by: Jeff Fleming

Date Received: 07/17/2012
Date Reported: 07/19/2012

PATRIENCE ANALYSIS REPORT

Lab Number:	Sample ID:	Total Coliform MPN/100 ml	E.coli MPN/100 mL
61700	MW-2 7/16 6:04	>200.5	<1.0

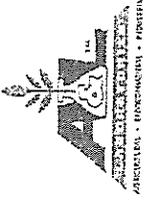
A & L Western Agricultural Laboratories



Robert Butterfield
Laboratory Director

A & L WESTERN AGRICULTURAL LABORATORIES

1311 WOODLAND AVE #11 • MODESTO, CALIFORNIA 95351 • (209) 529-4080 • FAX (209) 529-4736



REPORT NUMBER: 12-199-113

CLIENT: 4206-D

SUBMITTED BY: JEFF FLEMING

SEND TO: WESTERN DAIRY DESIGN ASSOC, INC
316 WEST F STREET, SUITE 100
OAKDALE, CA 95361

GROWER: 053-13

DATE OF REPORT: 07/19/12

IRRIGATION WATER ANALYSIS REPORT

PAGE: 1

Sample ID	Lab Number	Sodium Na meq/L	Calcium Ca meq/L	Magnesium Mg meq/L	Carbonate CO ₃ meq/L	Bicarbonate HCO ₃ meq/L	Chloride Cl meq/L	Conductivity E.C. dS/m	pH	Copper Cu ppm	Iron Fe ppm	Manganese Mn ppm	Zinc Zn ppm
MW-2	61700	72.53	26.40	44.65	0.00	20.00	91.48	16.62	7.4				

Sample ID	Phosphorus P ppm	Potassium K ppm	Nitrate NO ₃ ppm	Sulfate SO ₄ ppm	Boron B ppm	Dissolved Solids ppm	Adjusted S.A.R.	Langglier Saturation Index	NOTES:
MW-2	0.63	28.4	679	2223	9.66	10145	14.75		<p>This report applies only to the sample(s) tested. Samples are retained a maximum of thirty days after testing.</p> <p><i>MJ</i> advise Mike Bultress, CPAg A & L WESTERN LABORATORIES, INC.</p>

A & L WESTERN AGRICULTURAL LABORATORIES, INC.
1311 Woodland Avenue, Suite 1 • Modesto, California 95351 • (209) 529-4080



Report No: 12-199-114

Account No: 4206-D

Send To: WESTERN DAIRY DESIGN
316 W. F STREET, SUITE 100
ONKDALE, CA 95361

Submitted by: Jeff Fleming

Date Received: 07/17/2012
Date Reported: 07/19/2012

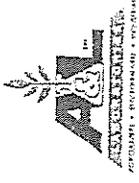
EFFICIENT ANALYSIS REPORT

Lab Number:	Sample ID:	Total Coliform MPN/100 ml	E.coli MPN/100 mL
61701	MW-1 7/16 3:29	>200.5	<1.0
61702	MW-3 7/16 4:00	165.2	<1.0

A & L Western Agricultural Laboratories

Robert Butterfield
Laboratory Director

A & L WESTERN AGRICULTURAL LABORATORIES, INC.
1311 Woodland Avenue, Suite 1 • Modesto, California 95351 • (209) 529-4080



Report No: 12-199-113

Account No: 4206-D

Send to: WESTERN DAIRY DESIGN
316 W. F STREET SUITE 100
OAKDALE, CA 95361

Project ID: 053-13

Submitted by: Jeff Fleming

Date Received: 07/17/2012
Date Reported: 07/19/2012

WATER ANALYSIS REPORT

Analyte: Ammonia Nitrogen Nitrate Nitrogen T.D.S.
Detection Limit: 0.05 mg/L 2.5 mg/L 10 mg/L
Method Detection: SM 4500-NH₃ H SM 4500-NH₃ B SM 2540 C

Lab Number: 61700 Sample Id: MW-2 Ammonia Nitrogen Nitrate Nitrogen T.D.S.
mg/L 0.6 mg/L 153 mg/L 14296

BDL-INDICATED THE LEVEL FOUND IS BELOW THE ESTABLISHED DETECTION LIMIT FOR THAT ANALYTE.

A & L Western Agricultural Laboratories

Robert Butterfield
Laboratory Director

Herbst, Charlene@Waterboards

From: Mr. Jeff Fleming <jefflem@dairydesigners.com>
Sent: Friday, July 20, 2012 4:25 PM
To: Herbst, Charlene@Waterboards; Davis, Daniel@Waterboards; Corral, Gilberto@Waterboards; Walsh, Sean@Waterboards
Cc: David Avila; Skelton Chris
Subject: Sounding Data - Directive 4 Cleanup and Abatement Order R5-2012-0708
Attachments: B 2012-7-16 Well Purge Data MW1, MW2, MW3.pdf

Here is well sounding data taken 16 July, 2012 for the 3 monitoring wells at Henry Tosta Dairy. Includes depth to water, total depth, water column height, all to the nearest hundredth of a foot, and field readings of temperature, conductivity, ORP, and pH.

Jeff Fleming

Western Dairy Design Associates, Inc.

OFF: 209-848-8674

CEL: 209-840-0363

FAX: 209-848-8654

jefflem@dairydesigners.com

Date: 7/16/2012 Well Designated MW3

15:40 DTW = 7.6 FD = 19.79 Water Column Height = TD-DTW = 12.19
 One well volume = 2.072 Three well volumes = 6.217 Pumping rate = approx 1 gal/min
 Started well pumping
 Stopped well pumping

Gallons pumped = approx 12 Gallons

Temperature (°C)	Conductivity (µS/cm)	ORP	pH	Notes
22	1908	-75	7.1	
20.4	1923	-54	7.0	
20.2	1931	-52	7.0	

Well Elevation: Feet #VALUE!

Water Table Elevation: Feet #VALUE!

Conductivity: µS/cm

Temperature: degrees Celsius

ORP: millivolts per centimeter

Date: 7/16/2012 Well Purge Data Well Designated MW2

DTW = 6.93 TD = 23.29 Water Column Height = TD-DTW = 16.36
 One well volume = 2.781 Three well volumes = 8.344 Pumping rate = approx 1.0 gal/min
 Started well pumping
 Stopped well pumping

Gallons pumped = approx 0 Gallons

Temperature (°C)	Conductivity (µS/cm)	ORP	pH	Notes
22.5	536	169	7	
22.9	534	108	6.9	
23.3	524	110	6.9	

Well Elevation: Meters ?? Feet #VALUE!

Water Table Elevation: Feet #VALUE!

°C... degrees Celsius

µS/cm... microSiemens per centimeter

ORP... Oxidation Reduction Potential

Date: 7/16/2012 Well Designated MW1

Well Purge Data

DTW = 5.33 TD = 20.01 Water Column Height = TD-DTW = 14.68
 One well volume = 2.496 Three well volumes = 7.487 Pumping rate = approx. 1.0 gal/min
 Started well pumping
 Stopped well pumping

Gallons pumped = approx. 19 Gallons

Well Elevation	Temperature (°C)	Conductivity (µS/cm)	ORP	pH	Notes
15:19	25.3	1460	234	6.9	
15:24	24.4	1616	211	7	
15:29	23	1929	234	7.2	

Well Elevation Meters Feet Water Table Elevation Feet

?? #VALUE! #VALUE!

°C... degrees Celsius
 µS/cm microSiemens per centimeter
 ORP... Oxidation Reduction Potential



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1311 Woodland Avenue, Suite 1 • Modesto, California 95351 • (209) 529-4080

Report No: 12-284-057

Account No: 4206-D

Send To: WESTERN DAIRY DESIGN
316 W. F STREET, SUITE 100
OAKDALE, CA 95361

Project: 053-13

Submitted by: Jeff Fleming

Date Received: 10/10/2012
Date Reported: 10/17/2012

PATHOGEN ANALYSIS REPORT

Lab Number:	Sample ID:	Total Coliform MPN/100 ml	E.coli MPN/100 mL
63642	MW-1 10/09/12 11:51	>200.5	<1.0
63643	MW-2 10/09/12 1:08	83.1	<1.0
63644	MW-3 10/09/12 2:06	2.0	<1.0

A & L Western Agricultural Laboratories

Robert Butterfield
Laboratory Director

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Report No: 12-284-057

Account No: 4206-D

Send to: WESTERN DAIRY DESIGN
 316 W. F STREET SUITE 100
 OAKDALE, CA 95361

Project ID: 053-13

Submitted by: Jeff Fleming

Date Received: 10/10/2012
 Date Reported: 10/17/2012

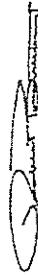
WATER ANALYSIS REPORT

Analyte: Ammonia Nitrogen Nitrate Nitrogen T.D.S.
 Detection Limit: 0.05 mg/L 0.5 mg/L 10 mg/L
 Method Detection: SM 4500-NH₃ H SM 4500-NH₃ B SM 2540 C

Lab Number:	Sample Id:	Ammonia Nitrogen mg/L	Nitrate Nitrogen mg/L	T.D.S. Mg/L
63642	MW-1 10/09/12 11:51	0.6	BDL	21621
63643	MW-2 10/09/12 1:08	BDL	26	15302
63644	MW-3 10/09/12 2:06	BDL	BDL	7536

BDL-INDICATED THE LEVEL FOUND IS BELOW THE ESTABLISHED DETECTION LIMIT FOR THAT ANALYTE.

A & L Western Agricultural Laboratories



Robert Butterfield
 Laboratory Director

A & L WESTERN AGRICULTURAL LABORATORIES

1311 WOODLAND AVE #1 • MODESTO, CALIFORNIA 95351 • (209) 529-1080 • FAX (209) 529-4736



REPORT NUMBER: 12-284-057

CLIENT: 4206-JD

SUBMITTED BY: JEFF FLEMING

SEND TO: WESTERN DAIRY DESIGN ASSOC, INC
316 WEST F STREET, SUITE 100
OAKDALE, CA 95361

GROWER: 053-13

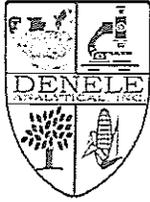
DATE OF REPORT: 10/17/12

IRRIGATION WATER ANALYSIS REPORT

PAGE: 1

Sample ID	Lab Number	Sodium Na meq/L	Calcium Ca meq/L	Magnesium Mg meq/L	Carbonate CO ₃ meq/L	Bicarbonate HCO ₃ meq/L	Chloride Cl meq/L	Conductivity E.C. dS/m	pH	Copper Cu ppm	Iron Fe ppm	Manganese Mn ppm	Zinc Zn ppm
MW-1	63642	124.70	97.11	133.60	0.00	5.00	240.90	28.30	7.5				
MW-2	63643	65.53	28.34	46.88	0.00	23.70	75.97	17.20	7.5				
MW-3	63644	37.27	36.28	14.97	0.00	11.75	33.78	8.95	7.6				

Sample ID	Phosphorus P ppm	Potassium K ppm	Nitrate NO ₃ ppm	Sulfate SO ₄ ppm	Boron B ppm	Dissolved Solids ppm	Adjusted S.A.R.	Langeller Saturation Index	NOTES:
MW-1	0.08	19.5	< 2	2517	2.19	17825	14.13		This report applies only to the sample(s) tested. Samples are retained a maximum of thirty days after testing. <i>MJ</i> Mike Buttress, CPAG A & L WESTERN LABORATORIES, INC.
MW-2	0.33	21.6	117	2024	9.39	8957	13.06		
MW-3	<0.01	6.6	< 2	1625	6.26	5319	11.37		



Denele Analytical, Inc.

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Compliance Analysis Report

Customer
John Minney
17137 Rd. 37
Madera, CA 93636

Grower
John Minney
17137 Rd. 37
Madera, CA 93636

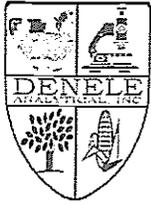
PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:07 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

Monitoring Well_Basic (MW_B)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-1	13070069A	Nitrate (NO3)		< 50.0	mg/L
		Ammonia Nitrogen (NH3-N)	SM 4500-NH3 C	0.600	mg/L
		Total Nitrogen (TN)		< 0.50	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Nitrate (NO3)	119.6	120.1		0.39
Ammonia Nitrogen (NH3-N)	99.6	95.6	97.2	1.66

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PURCHASE ORDER: N/A

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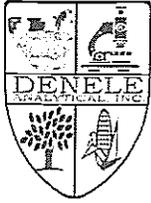
APPROVED DATE: 08/08/2013 5:36 pm

E. coli+Total+Fecal Coliform - Water (E_T_F_W)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-1	13070069A	Total Coliform (SM9223)	SM 9223	> 24196	MPN/100ml
		Fecal Coliform (SM 9222D)	SM 9222D	< 10	MPN/100ml
		E. Coli (SM9223B)	SM9223B	< 10	MPN/100ml

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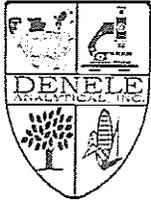
PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:07 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

Monitoring Well - Minerals (MW7)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-1	13070069A	Bicarbonate Alkalinity (ALK-B)	SM 2320B	300	mg/L
		Carbonate Alkalinity (ALK-C)	SM 2320B	< 2.0	mg/L
		Calcium (Ca)	EPA 200.7	1,200	mg/L
		Magnesium (Mg)	EPA 200.7	921	mg/L
		Sodium (Na)	EPA 200.7	7,890	mg/L
		Sulfate (SO ₄)	EPA 300.0	2,350	mg/L
		Chloride (Cl)	EPA 300.0	8,340	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Calcium (Ca)	105	101	96.4	4.7
Magnesium (Mg)	104	98.9	95.6	2.4
Sodium (Na)	102	95.8	94.8	1.0
Sulfate (SO ₄)	109.2	124.4	119.7	2.93
Chloride (Cl)	101.8	121.3	123.5	1.66

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Grower

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PURCHASE ORDER: N/A

RECEIVED DATE: 07/11/2013 4:07 pm

SUBMITTED BY: John Minney

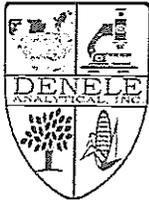
APPROVED DATE: 08/08/2013 5:36 pm

Total Dissolved Solids (TDS)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-1	13070069A	Total Dissolved Solids (TDS)	SM 2540C	15.200	mg/L

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PURCHASE ORDER: N/A

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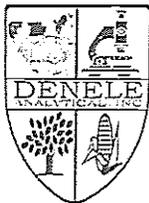
APPROVED DATE: 08/08/2013 5:36 pm

pH (pH)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-1	13070069A	pH (PH)	SM4500-H+B	7.58	Units

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PURCHASE ORDER: N/A

RECEIVED DATE: 07/11/2013 4:07 pm

SUBMITTED BY: John Minney

APPROVED DATE: 08/08/2013 5:36 pm

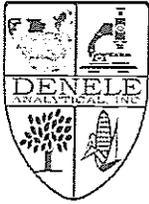
Monitoring Well_Basic (MW_B)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-2	13070069B	Nitrate (NO3)		< 50.0	mg/L
		Ammonia Nitrogen (NH3-N)	SM 4500-NH3 C	< 0.50	mg/L
		Total Nitrogen (TN)		< 0.50	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Nitrate (NO3)	119.6	120.1		0.39
Ammonia Nitrogen (NH3-N)	99.6	95.6	97.2	1.56

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Compliance Analysis Report

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Grower

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Madera, CA 93636

PURCHASE ORDER: N/A

RECEIVED DATE: 07/11/2013 4:07 pm

SUBMITTED BY: John Minney

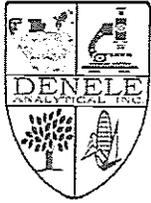
APPROVED DATE: 08/08/2013 5:36 pm

Total Dissolved Solids (TDS)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-2	13070069B	Total Dissolved Solids (TDS)	SM 2540C	14,600	mg/L

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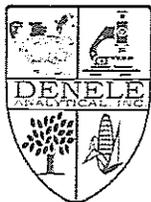
PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:07 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/06/2013 5:36 pm

Monitoring Well - Minerals (MW7)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-2	13070069B	Bicarbonate Alkalinity (ALK-B)	SM 2320B	1,000	mg/L
		Carbonate Alkalinity (ALK-C)	SM 2320B	< 2.0	mg/L
		Calcium (Ca)	EPA 200.7	517	mg/L
		Magnesium (Mg)	EPA 200.7	1,050	mg/L
		Sodium (Na)	EPA 200.7	6,560	mg/L
		Sulfate (SO ₄)	EPA 300.0	5,960	mg/L
		Chloride (Cl)	EPA 300.0	4,530	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Calcium (Ca)	105	101	96.4	4.7
Magnesium (Mg)	104	98.9	98.6	2.4
Sodium (Na)	102	95.8	94.8	1.0
Sulfate (SO ₄)	108.2	124.4	119.7	2.93
Chloride (Cl)	101.8	121.3	123.5	1.68

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Denele Analytical, Inc.

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Compliance Analysis Report

Customer

John Minney
17137 Rd. 37
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Grower

John Minney
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PURCHASE ORDER: N/A

RECEIVED DATE: 07/11/2013 4:07 pm

SUBMITTED BY: John Minney

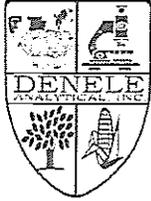
APPROVED DATE: 08/06/2013 5:36 pm

E. coli+Total+Fecal Coliform - Water (E_T_F_W)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-2	13070069B	Total Coliform (SM9223)	SM 9223	3.0	MPN/100ml
		Fecal Coliform (SM 9222D)	SM 9222D	< 10	MPN/100ml
		E. Coli (SM9223B)	SM9223B	< 1.0	MPN/100ml

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Compliance Analysis Report

Customer
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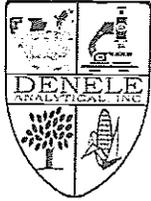
Grower
John Minney
17137 Rd. 37
Madera , CA 93636

PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:07 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

pH (pH)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
1MW-2	13070069B	pH (PH)	SM4500-H+B	7.56	Units

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17137 Rd. 37
Madera, CA 93636

Grower

John Minney
17137 Rd. 37
Madera, CA 93636

PURCHASE ORDER: N/A

RECEIVED DATE: 07/11/2013 4:07 pm

SUBMITTED BY: John Minney

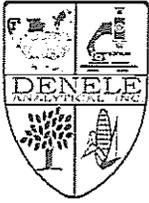
APPROVED DATE: 08/08/2013 5:36 pm

Total Dissolved Solids (TDS)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-3	13070069C	Total Dissolved Solids (TDS)	SM 2540C	7,160	mg/L

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Denele Analytical, Inc.

1232 South Ave. Turlock, CA 95380
Phone (209) 634-9055 - Fax (209) 634-9057

www.denelelab.com

Compliance Analysis Report

Customer

John Minney
17137 Rd. 37
Madera, CA 93636

Grower

John Minney
17137 Rd. 37
Madera, CA 93636

PURCHASE ORDER: N/A

RECEIVED DATE: 07/11/2013 4:07 pm

SUBMITTED BY: John Minney

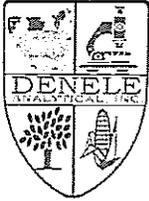
APPROVED DATE: 08/08/2013 5:36 pm

pH (pH)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-3	13070069C	pH (PH)	SM4500-H+B	7.51	Units

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Madera , CA 93636

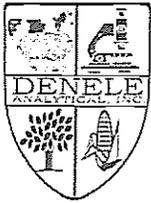
Grower
John Minney
17137 Rd. 37
Madera . CA 93636

PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:07 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

E. coli+Total+Fecal Coliform - Water (E_T_F_W)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-3	13070069C	Total Coliform (SM9223)	SM 9223	2,143	MPN/100ml
		Fecal Coliform (SM 9222D)	SM 9222D	< 10	MPN/100ml
		E. Coli (SM9223B)	SM9223B	< 10	MPN/100ml

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PURCHASE ORDER: N/A

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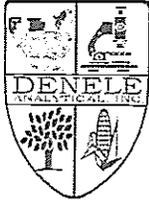
Monitoring Well - Minerals (MW7)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-3	13070069C	Bicarbonate Alkalinity (ALK-B)	SM 2320B	560	mg/L
		Carbonate Alkalinity (ALK-C)	SM 2320B	< 2.0	mg/L
		Calcium (Ca)	EPA 200.7	708	mg/L
		Magnesium (Mg)	EPA 200.7	256	mg/L
		Sodium (Na)	EPA 200.7	1,090	mg/L
		Sulfate (SO ₄)	EPA 300.0	3,250	mg/L
		Chloride (Cl)	EPA 300.0	1,800	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Calcium (Ca)	105	101	96.4	4.7
Magnesium (Mg)	104	98.9	96.6	2.4
Sodium (Na)	102	95.8	94.3	1.0
Sulfate (SO ₄)	109.2	124.4	119.7	3.93
Chloride (Cl)	101.8	121.3	123.5	1.66

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www.denelelab.com

Compliance Analysis Report

Customer
John Minney
17137 Rc. 37
Madera, CA 93636

Grower
John Minney
17137 Rd. 37
Madera, CA 93636

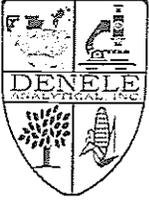
PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:07 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

Monitoring Well_Basic (MW_B)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-3	13070069C	Nitrate (NO ₃)		< 25.0	mg/L
		Ammonia Nitrogen (NH ₃ -N)	SM 4500-NH ₃ C	< 0.50	mg/L
		Total Nitrogen (TN)		< 0.50	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Nitrate (NO ₃)	119.6	120.1		0.39
Ammonia Nitrogen (NH ₃ -N)	99.6	95.6	97.2	1.65

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Compliance Analysis Report

Customer
John Minney
17137 Rd. 37
Madera , CA 93636

Grower
John Minney
17137 Rd. 37
Madera . CA 93636

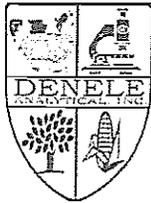
PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:21 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

Monitoring Well_Basic (MW_B)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-4	13070070A	Nitrate (NO3)		< 25.0	mg/L
		Ammonia Nitrogen (NH3-N)	SM 4500-NH3 C	< 0.50	mg/L
		Total Nitrogen (TN)		< 0.50	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Nitrate (NO3)	119.6	120.1		0.39
Ammonia Nitrogen (NH3-N)	99.6	95.6	97.2	1.66

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Compliance Analysis Report

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Grower

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PURCHASE ORDER: N/A

RECEIVED DATE: 07/11/2013 4:21 pm

SUBMITTED BY: John Minney

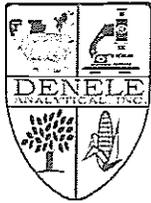
APPROVED DATE: 08/08/2013 5:36 pm

E. coli+Total+Fecal Coliform - Water (E_T_F_W)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-4	13070070A	Total Coliform (SM9223)	SM 9223	185	MPN/100ml
		Fecal Coliform (SM 9222D)	SM 9222D	< 10	MPN/100ml
		E. Coli (SM9223B)	SM9223B	< 10	MPN/100ml

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SUBMITTED BY: John Minney

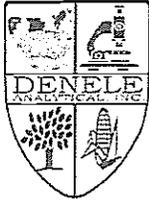
APPROVED DATE: 08/08/2013 5:36 pm

Total Dissolved Solids (TDS)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-4	13070070A	Total Dissolved Solids (TDS)	SM 2540C	9.760	mg/L

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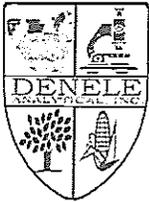
PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:21 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

Monitoring Well - Minerals (MW7)
SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-4	13070070A	Bicarbonate Alkalinity (ALK-B)	SM 2320B	520	mg/L
		Carbonate Alkalinity (ALK-C)	SM 2320B	< 2.0	mg/L
		Calcium (Ca)	EPA 200.7	960	mg/L
		Magnesium (Mg)	EPA 200.7	557	mg/L
		Sodium (Na)	EPA 200.7	1,320	mg/L
		Sulfate (SO ₄)	EPA 300.0	2,310	mg/L
		Chloride (Cl)	EPA 300.0	4,410	mg/L

Laboratory Quality Control	LCS %	MS %	MSD %	RPD %
Calcium (Ca)	105	101	96.4	4.7
Magnesium (Mg)	104	98.9	96.6	2.4
Sodium (Na)	102	95.8	94.6	1.0
Sulfate (SO ₄)	109.2	124.4	119.7	2.93
Chloride (Cl)	101.8	121.3	123.5	1.66

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Madera , CA 93636

Grower

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PURCHASE ORDER: N/A

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SUBMITTED BY: John Minney

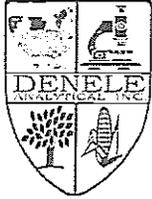
APPROVED DATE: 08/08/2013 5:36 pm

pH (pH)

SOURCE: Well Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
MW-4	13070070A	pH (PH)	SM4500-H+B	7.73	Units

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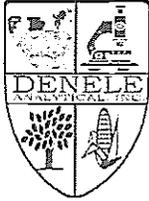
Grower
John Minney
17137 Rd. 37
Madera, CA 93636

PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:22 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

Total Fixed Solids (TFS)
SOURCE: Process Waste Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
Pond	13070071A	Fixed Dissolved Solids (FDS)	SM 2540C	2,740	mg/L

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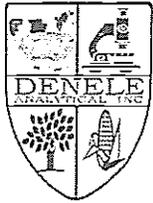
Grower
John Minney
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Madera , CA 93636

PURCHASE ORDER: N/A
RECEIVED DATE: 07/11/2013 4:22 pm
SUBMITTED BY: John Minney
APPROVED DATE: 08/08/2013 5:36 pm

pH (pH)
SOURCE: Process Waste Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units
Pond	13070071A	pH (PH)	SM4500-H+B	7.82	Units

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Compliance Analysis Report

Customer
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 17137 Rd. 37
 Madera, CA 93636

Grower
 John Minney
 17137 Rd. 37
 Madera, CA 93636

PURCHASE ORDER: N/A
 RECEIVED DATE: 07/11/2013 4:22 pm
 SUBMITTED BY: John Minney
 APPROVED DATE: 08/08/2013 5:36 pm

Processed Water - H3 & H5 (H8)
 SOURCE: Process Waste Water

Sample ID	Lab ID	Analyte	Method Ref	Result	Units	Lbs/10K Gallons
Pond	13070071A	Electrical Conductivity (EC)	EPA 120.1	5.86	mmhos/cm	N/A
		Soluble Salts (SALT-SOL)		3750	ppm	N/A
		Calcium (Ca)	EPA 200.7	160	mg/L	13.3
		Magnesium (Mg)	EPA 200.7	87.0	mg/L	7.26
		Sodium (Na)	EPA 200.7	389	mg/L	32.5
		Potassium (K)	EPA 200.7	650	mg/L	54.2
		Chloride (Cl)	EPA 300.0	773	mg/L	64.5
		Total Kjeldahl Nitrogen (TKN)	SM 4500-NH3 C	258	mg/L	21.5
		Ammonium Nitrogen (NH4-N)	SM 4500-NH3 C	154	mg/L	12.8
		Phosphorus (P)	SM 4500-P E	31.98	mg/L	2.67
		Total Dissolved Solids (TDS)	SM 2540C	3,480	mg/L	290
		Sulfate (SO4)	EPA 300.0	13.7	mg/L	1.14
		Bicarbonate Alkalinity (ALK-B)	SM 2320B	1,940	mg/L	162
		Carbonate Alkalinity (ALK-C)	SM 2320B	< 2.0	mg/L	0

Laboratory Quality Control	LCS %	MS %	MSD %	Dup mg/L	Sample mg/L	RPD %
Calcium (Ca)	101	106	103			2.9
Magnesium (Mg)	101	101	99.7			1.3
Sodium (Na)	102	94.6	94.2			0.42
Potassium (K)	101	93.3	92.9			0.43
Chloride (Cl)	101.8	121.3	123.5			1.66
Total Kjeldahl Nitrogen (TKN)	101	85.8	85.8			0.0
Ammonium Nitrogen (NH4-N)	104	92.4	95.2			2.9
Phosphorus (P)	90.7	94.6	101.5			4.23
Total Dissolved Solids (TDS)				6.190	5.920	4.5
Sulfate (SO4)	109.2	124.4	119.7			2.63

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DENELE ANALYTICAL, INC.
 1232 SOUTH AVENUE
 TURLOCK, CA 95380

PH# 209-634-9055 FAX# 209-634-9057

Client: JOLIA WILSON

Mailing address: 11151 FORD ST

(not facility address) INDIANA CA 95328

Phone#: 209 275 9997

DAIRY COMPLIANCE

Authorized Copy Released To:

WILSON WILSON COMPANY, COM

Sampled By: JOLIA WILSON

Project ID: 11151 FORD ST

ANALYSIS TO BE COMPLETED:

IRRIGATION/GROUND WATER

- H1 EC*, NO3-N, NH4-N*
- H6 EC, TN, TDS
- H7 Combination of H1 & H6
- H14 EC, NO3-N, NH4-N, Ca, Mg, Na, Bicarb
Carb, SO4, Cl, TDS

PROCESS WASTE WATER

- H3 EC*, NH4-N, TKN, TP, K, TDS
- H4 EC*, NO3-N, NH4-N, TKN, TP, K, TDS
- H5 Ca, Mg, Na, Bicarb, Carb, SO4, Cl
- H8 Combination of H3 & H5
- H9 Combination of H4 & H5

TILE DRAIN

- H2 EC*, NO3-N, TP, NH4-N*, TDS

* Required Field Measurement

____ (Check here if performed)

DISCHARGE WATER

- E1 EC*, Temp*, pH*, NO3-N, NH4-N, TKN, TP, K, TDS, Dissolved Oxygen*, BOD 5, TSS, Total & Fecal Coliforms
- E2 EC*, Temp*, pH*, NO3-N, NH4-N*, Turbidity, TP, Dissolved Oxygen*, Total & Fecal Coliforms
- E3 EC*, Temp*, pH*, NO3-N, NH4-N*, TP, Total & Fecal Coliforms
- E4 EC*, Temp*, pH*, NO3-N, NH4-N*, Turbidity, TP, Total & Fecal Coliform

MANURE

- M1 % Moisture
- M3 TN TP, K, % Moisture
- M4 Ca, Mg, Na, Bicarb, Carb, SO4, Cl, Ash
- M7 Combination of M3 & M4

PLANT TISSUE

- F18 % Moisture, Ash, TN, P, K, DM and as received
- F18+ % Moisture, Ash, TN, P, K, DM and as received
- F19+ (Package also includes NIR DCAD)
- F19+ % Moisture, TN (Package includes complete plant tissue analysis)

SOIL

- K3 Soluble Phosphorus
- K4 II NO3, Organic Matter
- K5 Pre-Plant (2II NO3), Fall (1-2II NO3), Fall (2-3II NO3)
- K6 0-1ft EC, NO3, Soluble P, K, Organic Matter
- K7 Combination of K3 & K4
- K8 Combination of K3 & K5

Sample ID	Description	Temp	Well Purge	Analysis		
				EC	NO3	NO3-N
1	MANURE	11/12	YES			
2	MANURE	11/12	YES			
3	MANURE	10/18	YES			
4						
5						
6						
7						
8						
9						
10						

CHAIN OF CUSTODY RECORDING

Signature	Company	Received Date & Time	Relinquished Date & Time	LABORATORY USE ONLY
<u>JOLIA WILSON</u>	<u>DENELE ANALYTICAL, INC.</u>	<u>11/12/12 10:00</u>	<u>11/12/12 10:00</u>	Logged in By: <u>JOLIA WILSON</u> LABORATORY NUMBER: <u>11151 FORD ST</u>



DENELE ANALYTICAL, INC.
 1232 SOUTH AVENUE
 TURLOCK, CA 95380

DAIRY COMPLIANCE

PH# 209-634-9055 FAX# 209-634-9057

Client: John Minney
 Mailing address: 1137 Road 37
 (not facility address) MADERA CA 93636
 Phone#: 559 225 9937

Authorized Copy Released To:

MINNEY'S GMAIL.COM

Sampled By: John Minney
 Project ID: F120551

ANALYSIS TO BE COMPLETED:

IRRIGATION/GROUND WATER

- H1 EC, NO3-N, NH4-N*
- H6 FC, TN, TDS
- H7 Combination of H1 & H6
- H14 EC, NO3-N, NH4-N, Ca, Mg, Na, Bicarb
 Carb, SO4, Cl, TDS

PROCESS WASTE WATER

- H3 EC, NH4-N, TKN, TP, K, TDS
- H4 EC, NO3-N, NH4-N, TKN, TP, K, TDS
- H5 Ca, Mg, Na, Bicarb, Carb, SO4, Cl
- H8 Combination of H3 & H5
- H9 Combination of H4 & H5

TILE DRAIN

- H2 EC, NO3-N, TP, NH4-N*, TDS

* Required Field Measurement

(Check here if performed)

DISCHARGE WATER

- E1 EC, Temp, pH, NO3-N, NH3-N, NH4-N, TKN, TP, K, TDS, Dissolved Oxygen*,
 BOD 5, TSS, Total & Fecal Coliforms
- E2 EC, Temp, pH, NO3-N, NH3-N*, NH4-N*, Turbidity, TP, Dissolved Oxygen*,
 Total & Fecal Coliforms
- E3 EC, Temp, pH, NO3-N, NH3-N*, NH4-N*, TP, Total & Fecal Coliforms
- E4 EC, Temp, pH, NO3-N, NH3-N*, NH4-N*, Turbidity, TP, Total & Fecal Coliform

MANURE

- M1 % Moisture
- M3 IN TP, K, % Moisture
- M4 Ca, Mg, Na, Bicarb, Carb, SO4, Cl, Ash
- M7 Combination of M3 & M4

PLANT TISSUE

- F18 % Moisture, Ash, TN, P, K, DM and as received
- F18+ % Moisture, Ash, TN, P, K, DM and as received
 (Package also includes NIR DCAD)
- F19+ % Moisture, TN (Package includes complete plant tissue analysis)

SOIL

- K3 Soluble Phosphorus
- K4 1ft NO3, Organic Matter
- K5 Pre-Plant (2ft NO3), Fall (1-2ft NO3), Fall (2-3ft NO3)
- K6 0-1ft EC, NO3, Soluble P, K, Organic Matter
- K7 Combination of K3 & K4
- K8 Combination of K3 & K5

Sample ID	Description	Temp	Well Purge	Analysis		
				H3	M3	F18
1	ANALYSIS	25.10	Yes			EMULSION (OTHER) TOTAL PHOSPHORUS
2						RAW
3						RAW-B-TDS
4						
5						
6						
7						
8						
9						
10						

CHAIN OF CUSTODY RECORDING

Signature	Company	Received Date & Time	Relinquished Date & Time	LABORATORY USE ONLY
<u>John Minney</u>	<u>John Minney</u>	<u>7.3.13 3:00</u>	<u>7.3.13 3:00</u>	Logged In By: _____ LABORATORY NUMBER
<u>John Minney</u>	DENELE ANALYTICAL, INC.	<u>7.3.13 3:00</u>		<u>12070010</u>



A3H1301

08/22/2013

John Minney
John Minney Engineering
17137 Road 37
Madera Ranchos, CA 93638

Invoice
A320480

Dear John Minney,

Thank you for selecting BSK Associates for your analytical testing needs. We have prepared this report in response to your request for analytical services. Enclosed are the results of analyses for samples received by the laboratory on 08/14/2013 15:40.

If additional clarification of any information is required, please contact your Client Services Representative, John Montierth at (800) 877-8310 or (559) 497-2888.

BSK ASSOCIATES

John Montierth
Project Manager



08/22/2013

Case Narrative

Work Order Information

Client Name:	John Minney Engineering	Submitted by:	John Minney
Client Code:	JohnM5937	Shipped by:	Walk-In
Work Order:	A3H1301	COC Number:	
Project:	General	TAT:	7
Client Project:	F12033A	PO #:	

Sample Receipt Conditions

Cooler:	Default Cooler	Temp. °C:	23.3
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Containers Intact
COC/Labels Agree
Sample(s) arrived at lab on same day sampled.
Packing Material - Other
Initial receipt at BSK-FAL

Report Manager

John Minney

Report Format

Final.rpt



Certificate of Analysis

John Minney
 John Minney Engineering
 17137 Road 37
 Madera Ranchos, CA 93638

Report Issue Date: 08/22/2013 16:57
 Received Date: 08/14/2013
 Received Time: 15:40

Lab Sample ID: A3H1301-03
 Sample Date: 08/14/2013 13:00
 Sample Type: Composite

Client Project: F12033A
 Sampled by: John Minney
 Matrix: Solid

Sample Description: Composite Old & New Manure

General Chemistry

Analyte	Method	Result	RL	Units	RL Mult	Batch	Prepared	Analyzed	Qual
*Alkalinity as CaCO3	SM 2320 B	1900	30	mg/kg	2.0	A309546	08/22/13	08/22/13	X01
Bicarbonate as CaCO3	SM 2320 B	1800	30	mg/kg	2.0	A309546	08/22/13	08/22/13	X01
Carbonate as CaCO3	SM 2320 B	160	30	mg/kg	2.0	A309546	08/22/13	08/22/13	X01
Hydroxide as CaCO3	SM 2320 B	ND	30	mg/kg	2.0	A309546	08/22/13	08/22/13	X01
*Chloride, DI Extract	EPA 300.0	2000	50	mg/kg	10	A309520	08/22/13	08/22/13	X01
*Nitrate as N, DI Extract	EPA 300.0	ND	12	mg/kg	10	A309520	08/22/13	08/22/13	DL01, X01
*pH, Solid at 25°C	EPA 9040B	8.08		pH Units	1	A309566	08/22/13	08/22/13	X01
*pH Temperature in °C		25.1							X01
*Sulfate as SO4, DI Extract	EPA 300.0	130	100	mg/kg	10	A309520	08/22/13	08/22/13	X01
*Total Dissolved Solids, DI WET	SM 2540C	14000	5.0	mg/L	1	A309551	08/21/13	08/22/13	

Metals

Analyte	Method	Result	RL	Units	RL Mult	Batch	Prepared	Analyzed	Qual
*Calcium, DI WET	EPA 6010B	40	0.40	mg/L	1	A309528	08/22/13	08/22/13	B1.3
*Magnesium, DI WET	EPA 6010B	73	0.40	mg/L	1	A309528	08/22/13	08/22/13	
*Sodium, DI WET	EPA 6010B	710	4.0	mg/L	1	A309528	08/22/13	08/22/13	



General Chemistry Quality Control Report

Analyte	Result	RL	Units	Spike Level	Source Result	%REC	Limits	RPD	RPD Limit	Date Analyzed	Qual
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Batch: A309620 Analyst: AJT Prepared: 08/21/2013

Blank (A309620-BLK1) EPA 300.0 - Quality Control

Chloride, DI Extract	ND	1.0	mg/kg							08/21/13	
Nitrate as N, DI Extract	ND	0.23	mg/kg							08/21/13	
Sulfate as SO4, DI Extract	ND	2.0	mg/kg							08/21/13	

Blank Spike (A309620-BS1) EPA 300.0 - Quality Control

Chloride, DI Extract	50	1.0	mg/kg	50		100	90-110			08/21/13	
Nitrate as N, DI Extract	11	0.23	mg/kg	11		100	90-110			08/21/13	
Sulfate as SO4, DI Extract	50	2.0	mg/kg	50		101	90-110			08/21/13	

Blank Spike Dup (A309620-BSD1) EPA 300.0 - Quality Control

Chloride, DI Extract	50	1.0	mg/kg	50		100	90-110	1	20	08/21/13	
Nitrate as N, DI Extract	11	0.23	mg/kg	11		99	90-110	0	20	08/21/13	
Sulfate as SO4, DI Extract	51	2.0	mg/kg	50		101	90-110	0	20	08/21/13	

Matrix Spike (A309620-MS1) EPA 300.0 - Quality Control

						Source: A3H1301-03					
Chloride, DI Extract	3600	50	mg/kg	2500	2000	62	80-120			08/22/13	MS02 Low
Nitrate as N, DI Extract	580	12	mg/kg	560	ND	102	80-120			08/22/13	
Sulfate as SO4, DI Extract	2700	100	mg/kg	2500	130	102	80-120			08/22/13	

Matrix Spike Dup (A309620-MSD1) EPA 300.0 - Quality Control

						Source: A3H1301-03					
Chloride, DI Extract	3600	50	mg/kg	2500	2000	63	80-120	0	20	08/22/13	MS02 Low
Nitrate as N, DI Extract	580	12	mg/kg	560	ND	102	80-120	1	20	08/22/13	
Sulfate as SO4, DI Extract	2700	100	mg/kg	2500	130	102	80-120	0	20	08/22/13	

Batch: A309646 Analyst: CEG Prepared: 08/22/2013

Blank (A309646-BLK1) SM 2320 B - Quality Control

Alkalinity as CaCO3	ND	3.0	mg/kg							08/22/13	
Bicarbonate as CaCO3	ND	3.0	mg/kg							08/22/13	
Carbonate as CaCO3	ND	3.0	mg/kg							08/22/13	
Hydroxide as CaCO3	ND	3.0	mg/kg							08/22/13	

Blank Spike (A309646-BS1) SM 2320 B - Quality Control

Alkalinity as CaCO3	100	3.0	mg/kg	100		104	80-120			08/22/13	
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Blank Spike Dup (A309646-BSD1) SM 2320 B - Quality Control

Alkalinity as CaCO3	110	3.0	mg/kg	100		106	80-120	1	20	08/22/13	
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Duplicate (A309646-DUP1) SM 2320 B - Quality Control

						Source: A3H1301-03					
Alkalinity as CaCO3	1800	30	mg/kg	1900				6	10	08/22/13	
Bicarbonate as CaCO3	1700	30	mg/kg	1800				6	10	08/22/13	
Carbonate as CaCO3	140	30	mg/kg	160				11	10	08/22/13	DP01
Hydroxide as CaCO3	ND	30	mg/kg	ND					10	08/22/13	

Batch: A309661 Analyst: DEH Prepared: 08/21/2013

Blank (A309661-BLK1) SM 2540C - Quality Control

Total Dissolved Solids, DI WET	ND	5.0	mg/L							08/22/13	
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General Chemistry Quality Control Report

Analyte	Result	RL	Units	Spike Level	Source Result	%REC	Limits	RPD	Limit	Date Analyzed	Qual
Batch: A309661			Analyst: DEH		Prepared: 08/21/2013						
Blank Spike (A309661-BS1) SM 2540C - Quality Control											
Total Dissolved Solids, DI WET	980	5.0	mg/L	1000		98	70-130			08/22/13	
Duplicate (A309661-DUP1) SM 2540C - Quality Control											
Total Dissolved Solids, DI WET	14000	5.0	mg/L		14000			1	20	08/22/13	
Batch: A309668			Analyst: RCN		Prepared: 08/22/2013						
Duplicate (A309668-DUP1) EPA 9040B - Quality Control											
pH, Solid at 25°C	8.02		pH Units		8.08			1	20	08/22/13	



Metals Quality Control Report

Analyte	Result	RL	Units	Spike Level	Source Result	%REC	Limits	RPD	Limit	Date Analyzed	Qual
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Batch: A309628

Analyst: NRE

Prepared: 08/22/2013

Blank (A309628-BLK1) EPA 6010B - Quality Control

Calcium, DI WET	1.7	0.40	mg/L							08/22/13	B1.0
Magnesium, DI WET	ND	0.40	mg/L							08/22/13	
Sodium, DI WET	ND	4.0	mg/L							08/22/13	

Blank Spike (A309628-BS1) EPA 6010B - Quality Control

Calcium, DI WET	83	0.40	mg/L	80		103	75-125			08/22/13	
Magnesium, DI WET	79	0.40	mg/L	80		99	75-125			08/22/13	
Sodium, DI WET	82	4.0	mg/L	80		102	75-125			08/22/13	

Blank Spike Dup (A309628-BSD1) EPA 6010B - Quality Control

Calcium, DI WET	84	0.40	mg/L	80		105	75-125	2	20	08/22/13	
Magnesium, DI WET	79	0.40	mg/L	80		99	75-125	1	20	08/22/13	
Sodium, DI WET	81	4.0	mg/L	80		102	75-125	0	20	08/22/13	

Duplicate (A309628-DUP1) EPA 6010B - Quality Control

Source: A3H1301-03

Calcium, DI WET	44	0.40	mg/L	40				11	20	08/22/13	
Magnesium, DI WET	83	0.40	mg/L	73				13	20	08/22/13	
Sodium, DI WET	780	4.0	mg/L	710				9	20	08/22/13	

Matrix Spike (A309628-MS1) EPA 6010B - Quality Control

Source: A3H1301-03

Calcium, DI WET	120	0.40	mg/L	80	40	102	75-125			08/22/13	
Magnesium, DI WET	150	0.40	mg/L	80	73	101	75-125			08/22/13	
Sodium, DI WET	800	4.0	mg/L	80	710	109	75-125			08/22/13	

Matrix Spike Dup (A309628-MSD1) EPA 6010B - Quality Control

Source: A3H1301-03

Calcium, DI WET	120	0.40	mg/L	80	40	100	75-125	1	20	08/22/13	
Magnesium, DI WET	150	0.40	mg/L	80	73	99	75-125	1	20	08/22/13	
Sodium, DI WET	810	4.0	mg/L	80	710	115	75-125	1	20	08/22/13	

A3H1301 FINAL 08222013 1657



Certificate of Analysis

08/22/2013

Notes:

- The Chain of Custody document and Sample Integrity Sheet are part of the analytical report.
- Any remaining sample(s) for testing will be disposed of one month from the final report date unless other arrangements are made in advance.
- Sample(s) received, prepared, and analyzed within the method specified criteria unless otherwise noted within this report.
- The results relate only to the samples analyzed in accordance with test(s) requested by the client on the Chain of Custody document. Any analytical quality control exceptions to method criteria that are to be considered when evaluating these results have been flagged and are defined in the data qualifiers section.
- All results are expressed on wet weight basis unless otherwise specified.
- All positive results for EPA Methods 504.1 and 524.2 require the analysis of a Field Reagent Blank (FRB) to confirm that the results are not a contamination error from field sampling steps. If Field Reagent Blanks were not submitted with the samples, this method requirement has not been performed.
- Results contained in this analytical report must be reproduced in its entirety.
- Samples collected by BSK Analytical Laboratories were collected in accordance with the BSK Sampling and Collection Standard Operating Procedures.
- BSK Analytical Laboratories certifies that the test results contained in this report meet all requirements of the NELAP Standards for applicable certified drinking water chemistry analyses unless qualified or noted in the Case Narrative.
- Analytical data contained in this report may be used for regulatory purposes to meet the requirements of the Federal or State drinking water wastewater, and hazardous waste programs.
- J-value is equivalent to DNQ (Detected, not quantified) which is a trace value. A trace value is an analyte detected between the MDL and the laboratory reporting limit. This result is of an unknown data quality and is only qualitative (estimated). Baseline noise, calibration curve extrapolation below the lowest calibrator, method blank detections, and integration artifacts can all produce apparent DNQ values, which contribute to the un-reliability of these values.
- (1) - Residual chlorine and pH analysis have a 15 minute holding time for both drinking and waste water samples as defined by the EPA and 40 CFR 136. Waste water and ground water (monitoring well) samples must be field filtered to meet the 15 minute holding time for dissolved metals.
- * - This is not a NELAP accredited analyte.
- Summations of analytes (i.e. Total Trihalomethanes) may appear to add individual amounts incorrectly, due to rounding of analyte values occurring before or after the total value is calculated, as well as rounding of the total value.
- RL Multiplier is the factor used to adjust the reporting limit (RL) due to variations in sample preparation procedures and dilutions required for matrix interferences.

Certifications: Please refer to our website for a copy of our Accredited Fields of Testing for each certification.

State of California - ELAP	1180	State of Nevada	CA000792009A
State of California - ELAP (Rancho Cordova)	2435	State of Hawaii	04227CA
State of California - NELAP	04227CA	State of Oregon	4017
State of Washington	0997	State of Oregon - NWTPH	4021

Definitions and Flags for Data Qualifiers

mg/L:	Milligrams/Liter (ppm)	MDL:	Method Detection Limit	MDA95:	Min. Detected Activity
mg/Kg:	Milligrams/Kilogram (ppm)	RL:	Reporting Limit. DL x Dilution	MPN:	Most Probable Number
µg/L:	Micrograms/Liter (ppb)	ND:	None Detected at RL	CFU:	Colony Forming Unit
µg/Kg:	Micrograms/Kilogram (ppb)	pCi/L:	Picocuries per Liter	Absent:	Less than 1 CFU/100mLs
%:	Percent Recovered (surrogates)	RL Mult:	RL Multiplier	Present:	1 or more CFU/100mLs
NR:	Non-Reportable				

- X01 Sample analyzed using DISTLC extract per client request
- MS02 Matrix spike recovery was low; the associated blank spike recovery was acceptable.

Certificate of Analysis

08/22/2013

- DP01 Sample Duplicate RPD exceeded the method acceptance limit.
- DL01 Sample required dilution due to matrix or high concentration of non-target analyte.
- B1.3 Analyte detected in associated method blank. Reanalysis was not attempted because the reported result was >10x that found in the blank. Sample result may be, in part, attributable to ambient laboratory background.
- B1.0 Analyte present in method blank above reporting limit.

A3H1301



John Minney Engineering

JohnM5937



08152013

Turnaround: Standard
Due Date: 8/23/2013

BSK

Associates
Analytical Laboratories

1414 Starklaus St., Fresno, CA 93706
(559) 497-2888 Fax (559) 497-2893
www.bsksocieties.com

A3H1301
JohnM5937
08/14/2011
5



Company Client Name: **JOHN MINNEY** Required Fields: **Temp: 23.3**
 Report Attention: **JOHN MINNEY** Additional Fields: **PO# F12033A**
 Invoice To: **JOHN MINNEY** Phone: **F12033A** Fax:

Address: **17137 ROAD 37** City: **MADERA** State: **CA** Zip: **93636**
 Project: **F12033A** Project #: **F12033A**
 Reporting Options: Trace (41 bag) Sevens EMB Type

Shipping Name/Price/Quantity: **John Minney**
 Sample Description: **Water**
 Matrix: **Water**
 Date: **8/13** Time: **1:00 PM**
 Matrix: **Water**
 Date: **8/13** Time: **1:00 PM**

Standard: Standard - 10 Business Days
 Rush: Rush (also booked) 8/13
 Regulatory Carbon Copies: CDPH Private Co
 Mailed Co: Lab Co
 Mailed Co: Client

Comments / Station Code / WTRAX: **COMPOSITE INTD**
 System Number: **ONE TEST BY P.I. WENT TO METHOD**
 Regulatory Compliance: EBT to California DPH

Amount: **15.40** P/L# **1** Check **1** Cash **1**
 Amount: **15.40** P/L# **1** Check **1** Cash **1**

Chilling Process: **Begin**
 Quantity: **1** P/L# **1** Check **1** Cash **1**

Received by: **John Minney** Date: **8/13**
 Received by: **John Minney** Date: **8/13**

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 Received by: **John Minney** Date: **8/13**



Sample Integrity

BSK Bottles: Yes No Page 1 of 1

COC Info	Was temperature within range? Chemistry $\leq 6^{\circ}\text{C}$ Micro $< 10^{\circ}\text{C}$			Were correct containers and preservatives received for the tests requested?		
		Yes	No	NA	Yes	No
COC Info	If samples were taken today, is there evidence that chilling has begun?			Were there bubbles in the VOA vials? (Volatiles Only)		
	Yes	No	NA	Yes	No	NA
	Did all bottles arrive unbroken and intact?			Was a sufficient amount of sample received?		
	Yes	No	NA	Yes	No	NA
COC Info	Did all bottle labels agree with COC?			Do samples have a hold time < 72 hours?		
	Yes	No	NA	Yes	No	NA
COC Info	Was sodium thiosulfate added to CN sample(s) until chlorine was no longer present?			Was PM notified of discrepancies?		
	Yes	No	NA	Yes	No	NA
Bottles Received <small>* means preservation/chemistry checks are either N/A or are performed in the lab</small>	250ml(A) 500ml(B) 1Liter(C) 40ml VOA(V)	Checks	Passed?	1-2	3	
	Bacti $\text{Na}_2\text{S}_2\text{O}_5$	—	—			
	None (P) ^{White Cap}	—	—			
	Cr6 Buffer (P) ^{Blue Cap}	pH 9-9.5	Y	N		
	HNO_3 (P) ^{Red Cap}	—	—			
	H_2SO_4 (P) ^{Yellow Cap}	pH ≤ 2	Y	N		
	NaOH (P) ^{Green Cap}	Cl, pH ≥ 12	Y	N		
	NaOH + ZnAc (P)	pH ≥ 9	Y	N		
	Dissolved Oxygen 300ml (g)	—	—			
	None (AG) 605/608/1608/2, 625, 632/6321, 8151, 8270	—	—			
	H_2SO_4 (AG) ^{Yellow Label} C&G Diesel	—	—			
	$\text{Na}_2\text{S}_2\text{O}_5$ 1 Liter (Brown P) 549	—	—			
	$\text{Na}_2\text{S}_2\text{O}_5$ (AG) ^{Blue Label} 547, 515, 525, 543	—	—			
	$\text{Na}_2\text{S}_2\text{O}_5$ (AG) ^{Blue Label} THMs 524.2 or 524.3	—	—			
	$\text{Na}_2\text{S}_2\text{O}_5$ (CG) ^{Blue Label} 504, 505	—	—			
	$\text{Na}_2\text{S}_2\text{O}_5$ + MCAA (CG) ^{Orange Label} 531	pH = 3	Y	N		
	NH_4Cl (AG) ^{Purple Label} 552	—	—			
	EDA (AG) ^{Brown Label} DBPs	—	—			
	Ascorbic + Maleic (AG) ^{LT Green Label} 524.3	—	—			
	HCL (CG) 524.2, BTEX, Gss, MTBE, 8260/824	—	—			
	Buffer pH 4 (CG)	—	—			
	None (CG)	—	—			
	H_3PO_4 (CG) ^{Salmon Label}	—	—			
	Other:					
	Asbestos 1 Liter Plastic w/ Foil	—	—			
	Low Level Hg / Metals Double Baggie	—	—			
	Bottled Water	—	—			
	Clear Glass Jar: 250 /- 500 / 1 Liter	—	—		1 B	1 L
Soil Tube Brass / Steel / Plastic	—	—			4	
Tedlar Bag / Plastic Bag	—	—				
Split	Container	Preservative	Date/Time/Initials	Container	Preservative	Date/Time/Initials
	S P			S P		
Comments	* Called & let Diane know run is ready 8/15/13 SV					

Labeled by: 26 @ 1139
8/15/13

Labels checked by: ORC @ 1600

RUSH Paged by: 8/15/13
Page 11 of 11

