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Edmund G. Brown Jr.
Governor

27 June 2011

VIA EMAIL

Mr. Alex Mayer
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PROSECUTION TEAM REBUTTAL ARGUMENT AND REBUTTAL EVIDENCE; ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2011-0542

Dear Mr. Mayer and Mr. Landau:

The Prosecution Team submits this response in rebuttal to documentation provided by Mr. Albers in his 20 June 2011 submission and previous correspondence. The Prosecution Team continues to recommend a discretionary penalty in the amount of \$19,800 for the violations alleged in Complaint No. R5-2011-0542. A table of rebuttal evidence is listed incorporated as an attachment.

Naming David Albers in the Administrative Civil Liability Complaint

In his 20 June 2011 email, Mr. Albers indicates that Vintage Dairy is a General Partnership. California law does not require a general partnership to register with the California Secretary of State, or the county where the partnership is formed. Consequently, the regional board does not have access to information regarding the Vintage Dairy General Partnership outside of its files. Regional Board files indicate that Mr. Albers was the party responsible for keeping Vintage Dairy in compliance with the General Order, and Complaint No. R5-2011-0542 lists David Albers and Vintage Dairy as responsible parties for all administrative civil liabilities incurred for non-compliance.

Naming Mr. Albers in his individual capacity on the Complaint was proper. A partnership is a legal entity distinct from its partners (California Corporations Code §16201), but general partnerships do not protect the individual members from the debts incurred by the partnership. Co-partners are liable for the entire amount of partnership debt (*Brazil v. Azevedo*, 32 Cal.App. 364 (1916)). Contribution for debts incurred by the partnership may be sought from each

individual partner, who may then apportion the liability to his co-partners based on the partnership agreement. Therefore the complaint as to Mr. Albers and Vintage dairy is proper as issued. Regional Board staff will note the change of address provided by Mr. Albers for Vintage Dairy General Partnership in its files.

Submission of the 2008 Annual Report

a. Response to Early Conditional Settlement Offer

In 20 June 2011 his email, Mr. Albers refers to recent submissions to the Central Valley Water Board Fresno Office arguing that his 2008 report had been submitted in 2010. Regional Board Staff did correspond with Mr. Albers about the 2008 Annual report in April, 2010 but do not have record of receiving the report in 2010. Furthermore, all responses received by the Regional Board from Mr. Albers did not meet the terms of Conditional Early Settlement Offer R5-2009-0585-M (Conditional Early Settlement Offer).

The Conditional Early Settlement Offer provided Mr. Albers with an opportunity to settle the violations of the General Order associated with a failure to submit the 2008 Annual report if they waived the right to a hearing before the Central Valley Water Board and submitted the past-due annual report and paid a penalty of \$2,000 by 31 March 2010. On 30 March 2010 the Central Valley Board received a signed acceptance of the offer and waiver of a right to hearing. On 13 April, the Discharger submitted the \$2000 penalty, but did not submit the required 2008 Annual Report with appurtenant components (Exhibit "B"). The Central Valley Water Board Fresno Office Mail Log records all correspondence received by the Regional Board. This record is kept as part of ordinary business practices by the regional board. Mail log records from 1 March 2010 to 15 June 2010 (Exhibit "C") show that documents were received on 1 April 2010 and 15 April 2010, but do not show any additional communications from Mr. Albers to the Regional Water Board Fresno Office. Therefore, the Regional Board does not believe that they received an Annual Report from Mr. Albers in 2010.

b. May 2011 Submissions of 2008 Annual Report

In response to receiving the ACLC, Mr. Albers faxed a copy of his 2008 Annual Report on 15 May 2011 to the Fresno Office. The report itself was unsigned, and did not contain a time stamp separate from the footers printed by the Regional Board fax machine. The report was attached to a cover letter dated April 30, 2010. Regional Board staff requested that Mr. Albers sign his report and re-submit it. On 26 May 2011 an identical, signed report was received by fax to the Fresno office.

Regional Board staff has determined that the report submitted by Mr. Albers on 15 May 2011 (Exhibit "E") and 26 May 2011 (Exhibit "F") could not have been produced on the 30 April 2010, the date of the attached cover letter. This report was generated using software developed by Merced County under contract to the State of California and managed by Central Valley Water Board staff, entitled California Central Valley Dairy Waste and Nutrient Management Software (Dairy Compliance Software). This program generates Dairy General Order Annual Reports as PDF documents to be printed out by the user and mailed to the appropriate Central Valley Water Board office. The software and associated files to generate the Annual Report are

maintained on a computer server operated by Merced County. This software is maintained and updated by Merced County. Changes to the software are indicated by release notes published by the county (Exhibit "G"). Several changes to the software were made between 30 April 2010 and 15 May 2011. These changes have resulted in distinct differences among reports generated in April 2010 (Exhibit H) to reports generated in May 2011 (Exhibit I).

Rebuttal Witness

Stephen Klein of the Regional Board Fresno Office is the Project Manager in charge of the Merced County contract to establish and maintain the Dairy Compliance Software. After reviewing the report submitted by Mr. Albers (Exhibits E and F) with both the Release Notes (Exhibit G) and reports generated in 2010 (Exhibit H) and Reports generated in 2011 (Exhibit I). Upon his review, Mr. Klein has determined that the report submitted by Mr. Albers was created using the Dairy Compliance Software at some time in 2011, and could not have been created on April 30, 2010.

4 February 2010 Sale of Vintage Dairy Milking Cows

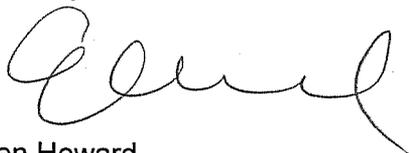
In his 20 June 2010 submission, Mr. Albers attached escrow sale instructions outlining the sale of approximately 2,900 cattle from the Vintage Dairy to Texas Holsteins, LLC. The sale of cattle alone does not stay the requirements of General Order R5-2007-0035. Provision 11(Section E-11) requires that "The discharger must maintain coverage under this Order...until all manure, process wastewater, and animal waste impacted soil, including soil within the pond(s), is disposed of or utilized in a manner which does not pose a threat to surface water or groundwater quality or create a condition of nuisance." Furthermore, the Order requires that "At least 90 Days before desiring to terminate coverage under this Order, the Discharger shall submit to the Executive Officer a Closure Plan...No more than 30 days after completion of site closure, the Discharger shall submit a closure report which documents that all closure activities were completed as proposed and approved in the Closure Plan."

Mr. Albers failed to submit an Annual Report for 2009 on 1 July 2010. The 4 February 2010 sale of cattle did not affect the requirement to submit an annual report for dairy activities in 2009. Vintage maintained its coverage under the General Order after 4 February 2010 because Mr. Albers did not submit a Closure Plan as required by the General Order. Vintage was required to comply with the requirements of the General Order, including the requirement to submit a Waste Management Plan by 1 July 2010. Furthermore, Mr. Albers leased the Vintage Dairy property in December 2010 to Flavio Martins, who continued to operate Vintage Dairy as a milking cow facility. Vintage Dairy has still not submitted a Waste Management Plan to the Central Valley Water board, and is operating in violation of the General Order.

Conclusion

The prosecution team asks that the hearing panel recommend that the administrative civil liability of \$19,800 be adopted by the Central Valley Water Board.

Sincerely,



Ellen Howard
Counsel for the Prosecution Team

Enclosure: Rebuttal Evidence
List of Rebuttal Evidence

Cc: [via email w/ enclosure]
David Albers, dalbers@americandairyparks.com



List of Rebuttal Evidence

Exhibit A	Conditional Early Settlement Offer
Exhibit B	Copy of Check 13182 with notes
Exhibit C	Central Valley Water Board Fresno Office Mail Log 3/1/2010 to 6/15/2010
Exhibit D	Abbreviated Version of Central Valley Water Board Fresno Office Mail Log 3/1/2010 to 6/15/2010
Exhibit E	Vintage 19 May 2011 Fax
Exhibit F	Vintage 26 May 2011 Fax
Exhibit G	Dairy Compliance Software Release notes
Exhibit H	2009 Example Annual Report, created in 2010
Exhibit I	2010 Example Annual Report, created in 2011



