

ITEM: 10

SUBJECT: Frank Pimentel, Fialho & Sons Dairy, San Joaquin County

BOARD ACTION: Consideration of an Administrative Civil Liability Order

BACKGROUND: Frank Pimentel (Discharger) owns the property that has been operated as the Fialho & Sons Dairy (Dairy) in San Joaquin County. The Dairy is regulated by Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (General Order), which was adopted in May 2007. The General Order contains reporting requirements for dairies regulated by the General Order, including timely submission of technical reports. The reports are required to document that the dairies are operating in compliance with the General Order and are not unreasonably affecting groundwater and/or surface water quality. The Discharger failed to submit the following technical reports by the respective due dates: 1) an Annual Report for the calendar year 2009, due by 1 July 2010; and 2) a Waste Management Plan, due by 1 July 2010. Central Valley Water Board staff issued notices of violation to the Discharger for failure to submit the reports. To date, the Discharger has not submitted any of the reports.

ISSUES: On 5 May 2011, the Executive Officer issued Administrative Civil Liability (ACL) Complaint R5-2011-0548 pursuant to California Water Code (CWC) section 13268, proposing that the Discharger be assessed monetary penalties in the amount of \$11,400 for failure to submit the technical reports. The ACL Complaint provided the opportunity for the Discharger to reduce the full amount of the assessed monetary penalty by \$2,000 for each of the missing reports that is submitted by 20 June 2011, in an effort to stimulate compliance.

The ACL Complaint was originally issued to both Frank Pimentel, the property owner, and to Manuel Fialho, the operator of the property at the time the reports were due. The copy of the ACL Complaint mailed to Manuel Fialho was returned unclaimed.

Subsequently, the Prosecution Team learned that Manuel Fialho filed for bankruptcy on 30 September 2010. The filing of bankruptcy and automatic stay of creditor claims by the federal bankruptcy court pre-dates the assessment of penalties for the violations alleged in the ACL Complaint. Because monetary penalties cannot be sought from Manuel Fialho without violating the automatic stay of the court, Manuel Fialho has been removed as a party cited in the ACL Complaint.

The ACL Complaint mailed to Frank Pimentel was also returned unclaimed. Staff determined that the mailing address used was the most recent available for Frank Pimentel and arranged for service of the ACL Complaint by a process server. The process server made three attempts to deliver the ACL Complaint, on three separate days during the course of a week, at times varying from 8:39 am to 7:04 pm. None of the attempts were successful. An attempt to contact Frank Pimentel by phone on 3 June 2011 was unsuccessful as the phone had been disconnected. The ACL Complaint was finally served to Frank Pimentel's daughter on 7 June 2011 on the fifth attempt by the process server.

The ACL Complaint was accompanied by Hearing Procedures which describe the process that must be followed if the matter proceeds to a hearing. The Discharger did not submit a signed form to waive its right to a hearing within 90 days after being served with the ACL Complaint by the 6 June deadline provided in the Hearing Procedures. The Discharger did not submit any evidence that it wishes the Board to consider or any policy statements by the 13 June 2011 deadline provided in the Hearing Procedures.

RECOMMENDATION: Prosecution Team recommends that the Central Valley Water Board adopt the Administrative Civil Liability Order as proposed.

Mgmt. Review _____
Legal Review _____EH_____
20 July 2011
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