

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2011-0548

IN THE MATTER OF

MANUEL FIALHO
FRANK PIMENTEL
FIALHO & SONS DAIRY
SAN JOAQUIN COUNTY

This Complaint is issued to Frank Pimentel and Manuel Fialho (hereinafter Discharger) pursuant to California Water Code (CWC) section 13268, which authorizes the imposition of Administrative Civil Liability (ACL) and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that indicate that the Discharger failed to submit technical reports pursuant to an Order issued by the Regional Water Quality Control Board, Central Valley Region under the authority of CWC section 13267.

The Executive Officer of 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:

1. The Discharger owns and operates the Fialho & Sons Dairy located at 13310 E. Kettleman Lane, Lodi, San Joaquin County.
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007 (Exhibit A). Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order (Exhibit B). The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. The General Order and the MRP required that an Annual Report for the 2009 calendar year be submitted for regulated facilities by 1 July 2010, including the following components: a revised Annual Dairy Facility Assessment, with facility modifications implemented to date; and a status on facility retrofitting completed as proposed in the Nutrient Management Plan submittal that was due 1 July 2009.
4. The General Order required regulated facilities to submit a Waste Management Plan (WMP) by 1 July 2009. The General Order was amended by Order R5-2009-0029 to modify the compliance schedule, extending the deadline to submit a WMP to 1 July 2010 in order to give regulated parties additional time to come in to compliance. The WMP is required to have the following components: a retrofitting plan, with schedule, needed to improve storage capacity, flood protection, or design of production area; maps of the production area and land application area; a wastewater storage capacity evaluation; a

flood protection evaluation; a production area design/construction evaluation; and documentation that there are no cross connections.

STATEMENT OF WATER CODE SECTIONS UPON WHICH LIABILITY IS BEING ASSESSED

5. An administrative civil liability may be imposed pursuant to the procedures described in CWC 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.
6. Pursuant to CWC section 13267, subdivision (b), a regional board may require that any person who has discharged, discharges, or is suspected of having discharge or discharging, or who proposes to discharge waste within its region..., shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.
7. Pursuant to CWC section 13268, subdivision (a), any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of section 13267, or failing or refusing to furnish a statement of compliance as required by subdivision (b) of section 13399.2, or falsifying any information provided therein, is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b).
8. Pursuant to CWC section 13268, subdivision (b) (1), civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with section 13323) of Chapter 5 for a violation or subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

ALLEGED VIOLATIONS

9. On 2 September 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the 2009 Annual Report with appurtenant components had not been received (Exhibit C). The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
10. On 2 September 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the Waste Management Plan with appurtenant components had not been received (Exhibit D). The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
11. Central Valley Water Board's compliance tracking system and case files indicate that the Board has not received the 2009 Annual Report or the Waste Management Plan to date.

12. The Discharger is alleged to have violated the following sections of the General Order and of the MRP:
- A) Provision E.3 of the General Order, which states:

"The Discharger shall comply with the attached Monitoring and Reporting Program No. R5-2007-0035 which is part of this Order, and future revisions thereto or with an individual monitoring and reporting program, as specified by the Central Valley Water Board or the Executive Officer."
 - B) Provision E.13 of the General Order, which states in part:

"The Discharger must comply with all conditions of this Order, including timely submittal of technical and monitoring reports as directed by the Executive Officer."
 - C) The MRP, which states in part:

"An annual monitoring report is due by 1 July of each year [T]he annual report shall cover information on crops harvested during the previous calendar year"
 - D) Required Reports and Notices H.1.b of the General Order, which states in part:

"The Discharger shall submit a Waste Management Plan for the production area of the dairy facility, prepared in accordance with Exhibit A. The Waste Management Plan shall provide an evaluation of the existing milk cow dairy's design, construction, operation, and maintenance for flood protection and waste containment"
13. The Discharger violated both the General Order and the MRP by failing to submit the 2009 Annual Report as directed by the MRP that accompanies the General Order, which contains reporting requirements for dairies regulated by the General Order.
14. The Discharger violated the General Order by failing to submit the Waste Management Plan as directed by the General Order.

SUMMARY OF ALLEGED VIOLATIONS

1. **Violation No. 1:** The discharger failed to submit an annual report for 2009 on 1 July 2010 as required by the General Order and the MRP. As of the date of this Complaint this report is now 308 days late.
2. **Violation No. 2:** The discharger failed to submit a Waste Management Plan on 1 July 2010 as required by the General Order. As of the date of this Complaint this plan is now 308 days late.

The Discharger has been out of compliance for a total of 616 days.

FACTORS CONSIDERED IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY

15. On 17 November 2009, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability. This policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final_111709.pdf.

16. The administrative civil liability was derived from the use of the penalty methodology in the Policy. In summary, this penalty assessment is based on a consideration of the failure to respond to requests made pursuant to CWC section 13267, subdivision (b), for Violations 1 through 2. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Violations under Water Code 13267 are assessed on a per day basis. However, the violations at issue are primarily reporting violations and therefore qualify for the alternative approach to penalty calculation under the Enforcement Policy. The failure to submit an annual report and a WMP does not cause daily detrimental impacts to the environment or the regulatory program. It is appropriate to assess daily penalties for the first thirty (30) days, plus one violation for each additional thirty-day period. For Violation 1, the days fined is reduced to 16 days and for Violation 2 the days fined is reduced to 16 days (Attachment A).

The required factors have been considered using the methodology in the Enforcement Policy, as explained in detail in Attachment A (Penalty Calculation for Civil Liability) and Attachment B.

17. The maximum penalty for the violations described above is \$616,000 based on a calculation of the total number of per-day violations times the statutory maximum penalty (616 total days of violation X \$1000). However, based on consideration of the above facts and after applying the penalty methodology, the Assistant Executive Officer of the Regional Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **eleven thousand four hundred dollars (\$11,400)** for the two violations cited above. The specific factors considered in this penalty are detailed in Attachment A. The Discharger's culpability, history of violations, and ability to pay and continue in business were considered, but did not change the amount of liability. Other factors as justice may require were considered, but circumstances warranting an adjustment under this step were not identified by staff or provided by the discharger.

PROPOSED ADMINISTRATIVE CIVIL LIABILITY

The Executive Officer proposes that the Discharger be assessed an administrative civil liability pursuant to Water Code Sections 13323 and 13268 in the amount of **eleven thousand four hundred dollars (\$11,400)** for failure to submit the 2009 report by the July 1, 2010 deadline as required by the General Order and the MRP, and failure to submit a WMP by the 1 July 2010 deadline as required by the General Order.

The Executive Officer proposes that the amount of the assessed administrative liability (\$11,400) may be reduced provided the Discharger submits one or more of the following: 1) a complete 2009 Annual Report; and/or 2) a complete Waste Management Plan. The amount of the assessed civil liability shall be reduced by \$2,000 for each report described above that is received by **20 June 2011** and which the Executive Officer finds complete. The total adjustment to the liability amount will not exceed \$4,000.

If a panel of the Central Valley Water Board holds a hearing, it may choose to recommend to the Central Valley Water Board the imposition of administrative civil liability in the amount proposed, in a higher or lower amount, or it may decline to seek civil liability, or it may recommend referral of the matter to the Attorney General for enforcement. . If this matter proceeds to hearing, the Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this administrative civil liability complaint through hearing.

There are no statutes of limitations that apply to administrative proceedings. The statutes of limitations that refer to "actions" and "special proceedings" and are contained in the California Code of Civil Procedure apply to judicial proceedings, not an administrative proceeding. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.)

Notwithstanding the issuance of this Complaint, the Regional Board retains the authority to assess additional penalties for violations of the requirements of the Discharger's waste discharge requirements for which penalties have not yet been assessed or for violations that may subsequently occur.

Issuance of this Complaint is an enforcement action and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) pursuant to title 14, California Code of Regulations sections 15308 and 15321 subsection (a) (2).

Payment of the assessed liability amount does not absolve the Discharger from complying with the General Order or the MRP, the terms of which remain in effect.

Additional civil liability may be assessed in the future if the Discharger fails to comply with the General Order, the MRP, and/or future orders issued by the Regional Board.

5 May 2011

Date

Tredwell, Moss
for Pamela Creedon
Assistant Executive Officer
Central Valley Water Board Prosecution Team

**WAIVER OF 90-DAY HEARING REQUIREMENT FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent Frank Pimentel and Manuel Fialo (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2011-0543 (hereinafter the "Complaint");
2. I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served" with the Complaint;
3. **(Check one of the boxes below if the Discharger will waive its right to a hearing and either [Box 1] accept the proposed liability amount of eleven thousand four hundred dollars (\$11,400) in full or [Box 2] accept an adjusted amount of proposed liability subject to timely submission of the required reports)** I hereby waive any right the Discharger may have to a hearing before the Central Valley Regional Water Quality Control Board (Central Valley Water Board) within ninety (90) days of service of the Complaint

[Box 1] I certify that the Discharger will be liable for **eleven thousand four hundred dollars (\$11,400) in full** and will submit this signed waiver and full payment by check, which will contain a reference to "ACL Complaint R5-2011-0548" and will be made payable to the "State Water Resources Control Board Cleanup and Abatement Account" by **6 June 2011**

[Box 2] I certify that the Discharger will be liable for the adjusted amount of proposed liability if the Discharger submits one or more of the following documents by **20 June 2011**:

- a complete 2009 Annual Report; and/or
- a complete Waste Management Plan.

The amount of the assessed civil liability shall be reduced by two thousand dollars (\$2,000) for each report described above that is received by **20 June 2011** and which the Executive Officer finds complete.

In addition to the reports, the Discharger shall also remit payment of the adjusted liability amount, by check, which will contain a reference to "ACL Complaint R5-2011-0548" and will be made payable to the "State Water Resources Control Board Cleanup and Abatement Account". Payment must be received by the Central Valley Water Board along with the reports described above by **20 June 2011** or this matter will be placed on the Central Valley Water Board's agenda for consideration at the **19/20 July 2011** Hearing Panel.

I understand that payment of the **liability amount** either in full or in the adjusted amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability

-or-

4. **(Check here if the Discharger will waive the 90-day hearing requirement, but wishes to engage in settlement negotiations. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted.)** I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board staff in discussions to resolve the outstanding violation(s). By checking this box, the Discharger is *not* waiving its right to a hearing on this matter. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and Central Valley Water Board staff can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. A hearing on the matter may be held before the Central Valley Water Board if these discussions do not resolve the liability proposed in the Complaint. The Discharger agrees that this hearing may be held after the 90-day period referenced in California Water Code section 13323 has elapsed.
5. **(Check here if the Discharger will waive the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or**

the waiver may not be accepted. Attach a separate sheet with the amount of additional time requested and the rationale. I hereby waive any right the Discharger may have to a hearing before the Regional Water Board within 90 days after service of the complaint but reserve the ability to request a hearing in the future. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

6. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify the proposed Administrative Civil Liability Order, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability.

(Print Name and Title)

(Signature)

(Date)

EXHIBIT A

Waste Discharge Requirements General Order for Existing Milk Cow Dairies
Order R5-2007-0035

and

EXHIBIT B

Monitoring and Reporting Program R5-2007-0035

can be viewed at:

[http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/general_orders/
r5-2007-0035.pdf](http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf)

EXHIBIT C

Notice of Violation Issued 2 September 2010
For Failure to Submit 2009 Annual Report



California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair



Arnold
Schwarzenegger
Governor

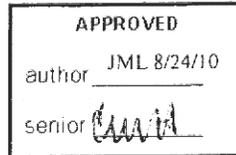
Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>

NOTICE OF VIOLATION

2 September 2010

Fialho & Sons Dairy
Manuel Fialho
P.O. Box 523
Hilmar, CA 95324



Certified Mail No.
7007 0710 0004 3777 8031

POTENTIAL ADMINISTRATIVE CIVIL LIABILITY FOR FAILURE TO SUBMIT ANNUAL REPORT, FIALHO & SONS DAIRY, 13310 E KETTLEMAN LN, LODI, WDID 5B39NC00113, SAN JOAQUIN COUNTY

The dairy facility identified above is covered under Order No. R5-2007-0035, Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order). The General Order required that a 2009 Annual Report be submitted for regulated facilities by 1 July 2010, including an Annual Dairy Facility Assessment with facility modifications implemented to date and a status on facility retrofitting completion as proposed in the Nutrient Management Plan submittal that was due 1 July 2009. Central Valley Regional Water Quality Control Board (Central Valley Water Board) staff have not received these items.

The General Order-required reports, including those due on 1 July 2010, are requested pursuant to California Water Code (CWC) §13267. CWC §13268 provides that failure to submit the required reports can subject you to administrative civil liability (monetary penalties) at a rate of up to \$1,000 for each day each report is late or substantially incomplete, if imposed by the Central Valley Water Board, or at a rate up to \$5,000 for each day a report is late or substantially incomplete, if imposed by the superior court. It is important that you promptly provide the Central Valley Water Board with the reports required by the General Order that were due by 1 July 2010, to minimize your potential liability.

Please contact Charlene Herbst at (916) 464-4724 if you have any questions regarding this matter.

Charlene Herbst
Senior Engineering Geologist
Confined Animal Facility Regulatory Unit

13310 E Kettleman Lane
Lodi

2 SEPTEMBER 2010
NOTICE OF VIOLATIONS

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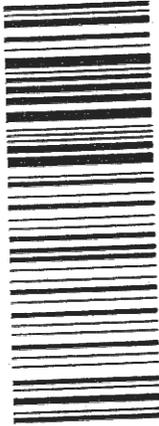
Central Valley Regional

Water Quality Control Board

Confined Animal Facilities Unit

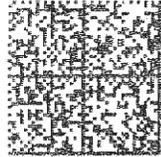
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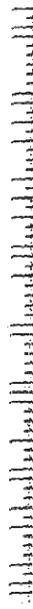
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California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair



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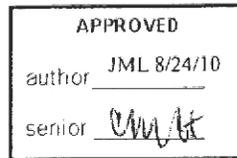
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2 September 2010

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665 Valentine Ct
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POTENTIAL ADMINISTRATIVE CIVIL LIABILITY FOR FAILURE TO SUBMIT ANNUAL REPORT, FIALHO & SONS DAIRY, 13310 E KETTLEMAN LN, LODI, WDID 5B39NC00113, SAN JOAQUIN COUNTY

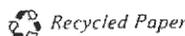
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Charlene Herbst
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California Environmental Protection Agency



13310 E Kettlerman Lane
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<p>1. Article Addressed to:</p> <p style="text-align: center;">Fialho & Sons Dairy Manuel Fialho P.O. Box 523 Hilmar, CA 95324</p>	<p>3. Service Type</p> <p><input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>
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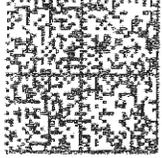
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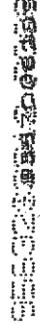


EXHIBIT D

Notice of Violation Issued 2 September 2010
For Failure to Submit Waste Management Plan



California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair



Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>

Arnold
Schwarzenegger
Governor

NOTICE OF VIOLATION

2 September 2010

Certified Mail No.

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Fialho & Sons Dairy
Manuel Fialho
P.O. Box 523
Hilmar, CA 95324

APPROVED
author JML 8/24/10
senior <i>CMH</i>

POTENTIAL ADMINISTRATIVE CIVIL LIABILITY FOR FAILURE TO SUBMIT WASTE MANAGEMENT PLAN, FIALHO & SONS DAIRY, 13310 E KETTLEMAN LN, LODI, WDID 5B24NC00066, SAN JOAQUIN COUNTY

The dairy facility identified above is covered under Order No. R5-2007-0035, Waste Discharge Requirements General Order for Existing Milk Cow Dairies (General Order). The General Order required that a Waste Management Plan (WMP) be submitted for regulated facilities by 1 July 2010, including the following: 1) Retrofitting plan, with schedule, needed to improve storage capacity, flood protection, or design of the production area; 2) Production area and land application area maps (facility information); 3) Wastewater storage capacity evaluation; 4) Flood protection evaluation; 5) Production area design/construction evaluation; and 6) Documentation that there are no cross connections. Central Valley Regional Water Quality Control Board (Central Valley Water Board) staff have not received these items.

The General Order-required reports, including those due on 1 July 2010, are requested pursuant to California Water Code (CWC) §13267. CWC §13268 provides that failure to submit the required reports can subject you to administrative civil liability (monetary penalties) at a rate of up to \$1,000 for each day each report is late or substantially incomplete, if imposed by the Central Valley Water Board, or at a rate up to \$5,000 for each day a report is late or substantially incomplete, if imposed by the superior court. It is important that you promptly provide the Central Valley Water Board with the reports required by the General Order that were due by 1 July 2010, to minimize your potential liability.

Please contact Charlene Herbst at (916) 464-4724 if you have any questions regarding this matter.

Charlene Herbst
Senior Engineering Geologist
Confined Animal Facility Regulatory Unit

13310 E. Kettleman Lane
Lodi

2 SEPTEMBER 2010
NOTICE OF VIOLATIONS

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only, No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$		Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total		

Sent to: **Fialho & Sons Dairy**
Manuel Fialho
P.O. Box 523
Hilmar, CA 95324

PS Form 3811, February 2004

7007 0710 0004 3777 8031

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Fialho & Sons Dairy
Manuel Fialho
P.O. Box 523
Hilmar, CA 95324

2. 7007 0710 0004 3777 8031
(Print or stamp on back of mailpiece)

COMPLETE THIS SECTION ON DELIVERY

A. Signature
 Manuel Fialho
 Agent
 Addressee

B. Received by (Printed Name)
Manuel Fialho

C. Date of Delivery
9-8-10

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes



California Regional Water Quality Control Board Central Valley Region

Katherine Hart, Chair



Linda S. Adams
Secretary for
Environmental
Protection

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>

Arnold
Schwarzenegger
Governor

NOTICE OF VIOLATION

2 September 2010

Certified Mail No.

7007 0710 0004 3777 8048

APPROVED
author JML 8/24/10
senior <i>CHH</i>

Fialho & Sons Dairy
Frank Pimentel
665 Valentine Ct
Galt, CA 95632

POTENTIAL ADMINISTRATIVE CIVIL LIABILITY FOR FAILURE TO SUBMIT WASTE MANAGEMENT PLAN, FIALHO & SONS DAIRY, 13310 E KETTLEMAN LN, LODI, WDID 5B24NC00066, SAN JOAQUIN COUNTY

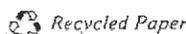
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Please contact Charlene Herbst at (916) 464-4724 if you have any questions regarding this matter.

Charlene Herbst
Senior Engineering Geologist
Confined Animal Facility Regulatory Unit

California Environmental Protection Agency



Administrative Civil Liability

Fact Sheet

The California Regional Water Quality Control Boards (Regional Water Boards) have the authority to impose administrative civil liabilities for a variety of violations under California Water Code section 13323. This document generally describes the process that the Regional Water Boards follow in imposing administrative civil liabilities.

The first step is the issuance of an administrative civil liability complaint (complaint) by the authorized Regional Water Board's Executive Officer or Assistant Executive Officer. The complaint describes the violations that alleged to have been committed, the Water Code provisions authorizing the imposition of liability, and the evidence that supports the allegations. **Any person who receives a complaint must respond timely as directed, or risk the Regional Water Board imposing the administrative civil liability by default.** The complaint is accompanied by a letter of transmittal, a Waiver Form and a Hearing Procedure. Each document contains important information and deadlines. You should read each document carefully. A person issued a complaint is allowed to represent him or herself. However, legal advice may be desirable to assist in responding to the complaint.

Parties

The parties to a complaint proceeding are the Regional Water Board Prosecution Team and the person/s named in the complaint, referred to as the "Discharger." The Prosecution Team is comprised of Regional Water Board staff and management. Other interested persons may become involved and may become "designated parties." Only designated parties are allowed to submit evidence and participate fully in the proceeding. Other interested persons may play a more limited role in the proceeding and are allowed to submit non-evidentiary policy statements. If the matter proceeds to hearing, the hearing will be held before the full membership of the Regional Water Board (composed of up to nine board members appointed by the Governor) or before a panel of three board members. The board members who will hear the evidence and rule on the matter act as judges. They are assisted by an Advisory Team, which provides advice on technical and legal issues. Both the Prosecution Team and the Advisory Team have their own attorney. Neither the Prosecution Team nor the Discharger or his/her representatives are permitted to communicate with the board members or the Advisory Team about the complaint without the presence or knowledge of the other. This is explained in more detail in the Hearing Procedure.

Complaint Resolution options

Once issued, a complaint can lead to (1) withdrawal of the complaint; (2) withdrawal and reissuance; (3) payment and waiver; (4) settlement; (5) hearing. Each of these options is described below.

Withdrawal: may result if the Discharger provides information to the Prosecution Team that clearly demonstrates that a fundamental error exists in the information set forth in the complaint.

Withdrawal and reissuance: may result if the Prosecution Team becomes aware of information contained in the complaint that can be corrected.

Payment and waiver: may result when the Discharger elects to pay the amount of the complaint rather than to contest it. The Discharger makes a payment for the full amount and the matter is ended, subject to public comment.

Settlement: results when the parties negotiate a resolution of the complaint. A settlement can include such things as a payment schedule, or a partial payment and suspension of the remainder pending implementation by the Discharger of identified activities, such as making improvements beyond those already required that will reduce the likelihood of a further violation or the implementation or funding of a Supplemental Environmental Project (SEP) or a Compliance Project. Qualifying criteria for Compliance Projects and SEPs are contained in the State Water Resources Control Board's (State Water Board) Enforcement Policy, which is available at the State Water Board's website at: http://www.waterboards.ca.gov/plans_policies/. Settlements are generally subject to public notice and comment, and are conditioned upon approval by the Regional Water Board or its authorized staff management. Settlements are typically memorialized by the adoption of an uncontested Administrative Civil Liability Order.

Hearing: if the matter proceeds to hearing, the parties will be allowed time to present evidence and testimony in support of their respective positions. The hearing must be held within 90 days of the issuance of the complaint, unless the Discharger waives that requirement by signing and submitting the Waiver Form included in this package. The hearing will be conducted under rules set forth in the Hearing Procedure. The Prosecution Team has the burden of proving the allegations and must present competent evidence to the Regional Water Board regarding the allegations. Following the Prosecution Team's presentation, the Discharger and other parties are given an opportunity to present evidence, testimony and argument challenging the allegations. The parties may cross-examine each others' witnesses. Interested persons may provide non-evidentiary policy statements, but may generally not submit evidence or testimony. At the end of the presentations by the parties, the board members will deliberate to decide the outcome. The Regional Water Board may issue an order

requiring payment of the full amount recommended in the complaint, it may issue an order requiring payment of a reduced amount, it may order the payment of a higher amount, decide not to impose an assessment or it may refer the matter to the Attorney General's Office.

Factors that must be considered by the Regional Water Board

Except for Mandatory Minimum Penalties under Water Code section 13385 (h) and (i), the Regional Water Board is required to consider several factors specified in the Water Code, including nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in 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 as justice may require (Cal. Water Code §§ 13327, 13385(e) & 13399). During the period provided to submit evidence (set forth in the Hearing Procedure) and at the hearing, the Discharger may submit information that it believes supports its position regarding the complaint. If the Discharger intends to present arguments about its ability to pay it must provide reliable documentation to establish that ability or inability. The kinds of information that may be used for this purpose include:

For an individual:

1. Last three years of signed federal income tax returns (IRS Form 1040) including schedules;
2. Members of household, including relationship, age, employment and income;
3. Current living expenses;
4. Bank account statements;
5. Investment statements;
6. Retirement account statements;
7. Life insurance policies;
8. Vehicle ownership documentation;
9. Real property ownership documentation;
10. Credit card and line of credit statements;
11. Mortgage loan statements;
12. Other debt documentation.

For a business:

1. Copies of last three years of company IRS tax returns, signed and dated,
2. Copies of last three years of company financial audits

3. Copies of last three years of IRS tax returns of business principals, signed and dated.
4. Any documentation that explains special circumstances regarding past, current, or future financial conditions.

For larger firms:

1. Federal income tax returns for the last three years, specifically:
 - IRS Form 1120 for C Corporations
 - IRS Form 1120 S for S Corporations
 - IRS Form 1065 for partnerships
2. A completed and signed IRS Form 8821. This allows IRS to provide the Regional Water Board with a summary of the firm's tax returns that will be compared to the submitted income tax returns. This prevents the submission of fraudulent tax returns;
3. The following information can be substituted if income tax returns cannot be made available:
 - Audited Financial Statements for last three years;
 - A list of major accounts receivable with names and amounts;
 - A list of major accounts payable with names and amounts;
 - A list of equipment acquisition cost and year purchased;
 - Ownership in other companies and percent of ownership for the last three years;
 - Income from other companies and amounts for the last three years.

For a municipality, county, or district:

1. Type of entity:
 - City/Town/Village;
 - County;
 - Municipality with enterprise fund;
 - Independent or publicly owned utility;
2. The following 1990 and 2000 US Census data:
 - Population;
 - Number of persons age 18 and above;
 - Number of persons age 65 and above;
 - Number of Individual below 125% of poverty level;
 - Median home value;
 - Median household income.
3. Current or most recent estimates of:
 - Population;
 - Median home value;
 - Median household income;
 - Market value of taxable property;

- Property tax collection rate.
- 4. Unreserved general fund ending balance;
- 5. Total principal and interest payments for all governmental funds;
- 6. Total revenues for all governmental funds;
- 7. Direct net debt;
- 8. Overall net debt;
- 9. General obligation debt rating;
- 10. General obligation debt level.
- 11. Next year's budgeted/anticipated general fund expenditures plus net transfers out.

This list is provided for information only. The Discharger remains responsible for providing all relevant and reliable information regarding its financial situation, which may include items in the above lists, but could include other documents not listed. Please note that all evidence regarding this case, including financial information, will be made public.

Petitions

If the Regional Water Board issues an order requiring payment, the Discharger may challenge that order by filing a petition for review with the State Water Board pursuant to Water Code section 13320. More information on the petition process is available at:

http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml

An order of the State Water Board resolving the petition for review of the Regional Water Board's Administrative Civil Liability Order can be challenged by filing a petition for writ of mandate in the superior court pursuant to Water Code section 13330.

Once an Administrative Civil Liability Order becomes final, the Regional Water Board or State Water Board may seek a judgment of the superior court under Water Code section 13328, if necessary, in order to collect payment of the administrative civil liability amount.

Hearing Panel of the
Central Valley Regional Water Quality Control Board

HEARING PROCEDURE
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
R5-2011-0548

ISSUED TO
MANUEL FIALHO
FRANK PIMENTEL
FIALHO & SONS DAIRY
SAN JOAQUIN COUNTY
SCHEDULED FOR 19/20 JULY 2011

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Background

The Executive Officer has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (CWC) section 13323 to Manuel Fialho and Frank Pimentel, alleging violations of CWC section 13267 (b) by failure to submit required technical reports.

The Complaint proposes that an administrative civil liability in the amount of \$11,400 be imposed. A hearing is currently scheduled to be conducted before a Hearing Panel of the Central Valley Water Board on **July 19/20**. Pursuant to Water Code section 13228.14, a Hearing Panel consisting of three or more members of the Central Valley Water Board will convene a hearing to hear evidence and argument and to propose a recommendation to the Central Valley Water Board about resolution of the ACL Complaint. The recommendation of the Hearing Panel will be presented to the board at a subsequent meeting. You will be notified of the date of the meeting. At the meeting, the board may adopt, modify, or reject, the recommendation of the Hearing Panel.

Purpose of the Hearing

The purpose of the hearing is to consider relevant evidence and testimony regarding the ACL Complaint. The Hearing Panel will consider whether it should recommend to the Central Valley Water Board the issuance of an administrative civil liability order assessing the proposed liability, or a higher or lower amount, or rejecting the proposed liability. The public hearing will commence at 9:00 a.m. or as soon thereafter as practical, or as announced in the Hearing Panel meeting agenda. The meeting will be held at

11020 Sun Center Drive, Suite 200, Rancho Cordova, California.

An agenda for the meeting will be issued at least ten days before the meeting and posted on the Central Valley Water Board's web page at:
http://www.waterboards.ca.gov/centralvalley/board_info/meetings.

Hearing Procedures

The hearing will be conducted in accordance with this Hearing Procedure. This Hearing Procedure has been proposed by the Prosecution Team and is subject to further revision by the Hearing Panel's Advisory Team. These Hearing Panel Procedures will become final by 6 June 2011 unless the Hearing Panel's Advisory Team makes further revisions. A copy of the general procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with Section 648, subdivision (d), any procedure not provided by this Hearing Panel Procedure is deemed waived. Except as provided in Section 648, subdivision (b) and herein, Chapter 5 of the Administrative Procedures Act (commencing with Gov't Code § 11500) does not apply to this hearing.

ANY OBJECTIONS TO THE HEARING PROCEDURE MUST BE RECEIVED BY THE HEARING PANEL'S ADVISORY TEAM NO LATER THAN 19 MAY 2011, OR THEY WILL BE WAIVED. FAILURE TO COMPLY WITH THE DEADLINES AND REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF DOCUMENTS AND/OR TESTIMONY.

The Discharger shall contact the Prosecution Team to try to resolve objections regarding due dates, the hearing date and hearing time limits BEFORE submitting objections to the Advisory Team.

Hearing Participants

Participants in this proceeding are designated as either "parties" or "interested persons." Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from members of the Hearing Panel, staff or others, at the discretion of the Hearing Panel.

The following participants are hereby designated as parties in this proceeding:

1. Central Valley Water Board Prosecution Team
2. Manuel Fialho
3. Frank Pimentel

Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party must request party status by submitting a request in writing (with copies to the existing designated parties) so that it is received no later than 5 p.m. on 19 May 2011, by the Advisory Team attorney (contact information listed below). The request shall include an explanation of the basis for status as a designated party (i.e., how the issues to be addressed at the hearing and the potential actions by the Central Valley Water Board affect the person, and the need to present evidence or cross-examine witnesses), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be received by the Advisory Team, the person requesting party status, and all other parties by 5 p.m. on 24 May 2011. The parties will be notified by 5 p.m. on 26 May 2011 whether the request has been granted or denied.

Primary Contacts**Advisory Team:**

Kenneth Landau, Assistant Executive Officer
11020 Sun Center Drive, Suite 200, Rancho Cordova, CA 95670
Phone: (916) 464-4726
klandau@waterboards.ca.gov

Alex Mayer, Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
Physical Address: 1001 I Street, Sacramento, CA 95814
Mailing Address: P.O. Box 100, Sacramento, CA 95812
Phone: (916) 341-5051; fax (916) 341-5199
amayer@waterboards.ca.gov

Prosecution Team:

Pamela Creedon, Executive Officer
Rick Moss, Assistant Executive Officer
Robert Busby, Supervising Engineering Geologist
Charlene Herbst, Senior Engineering Geologist
Daniel Davis, Engineering Geologist
11020 Sun Center Drive, Suite 200, Rancho Cordova, CA 95670
Phone: (916) 464-4724; fax: (916) 464-4800
cherbst@waterboards.ca.gov

Ellen Howard Staff Counsel
State Water Resources Control Board, Office of Enforcement
Physical Address: 1001 I Street, Sacramento, CA 95814
Mailing Address: P.O. Box 100, Sacramento, CA 95812
Phone: (916) 341-5677; fax: (916) 341-5896
ehoward@waterboards.ca.gov

Discharger:

Manuel Fialho
PO Box 523
Hilmar, CA 95324

Frank Pimentel
665 Valentine Court
Galt, CA 95632-3312

Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Hearing Panel (Prosecution Team) have been separated from those who will provide advice to the Hearing Panel (Advisory Team). Members of the Advisory Team are: Ken Landau and Alex Mayer. Members of the Prosecution Team are: Pamela Creedon, Clay Rodgers, Doug Patteson, Charlene Herbst, Daniel Davis, and Ellen Howard. Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Pamela Creedon regularly advises the Central Valley Water Board in other, unrelated matters, but is not advising the Central Valley Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Hearing Panel in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Hearing Panel or the Advisory Team regarding this proceeding.

Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in ex parte communications regarding this matter with members of the Advisory Team or members of the Central Valley Water Board. An ex parte contact is any written or verbal communication pertaining to the investigation, preparation or prosecution of the ACL Complaint between a member of a designated party or interested person on the one hand, and a Central Valley Water Board or an Advisory Team member on the other hand, unless the communication is copied to all other designated parties (if written) or made in a manner open to all other designated parties (if verbal). Communications regarding non-controversial procedural matters are not ex parte contacts and are not restricted. Communications among one or more designated parties and interested persons themselves are not ex parte contacts.

The following communications to the Advisory Team must be copied to all designated parties: Objections to these Hearing Procedures; requests for modifications to these Hearing Procedures; requests for designated party status, or objections thereto; and all written evidence, legal argument or policy statements from designated parties. This is not an all-inclusive list of ex parte communications.

Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined **20** minutes to present evidence (including evidence presented by witnesses called by the designated party), cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have **3** minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. **Participants who would like additional time must submit their request to the Advisory Team so that it is received by 5:00 p.m. on 20 June 2011.** Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Hearing Panel Chair (at the hearing) upon a showing that additional time is necessary. Such showing shall explain what testimony, comments or legal argument require extra time, and why the Discharger could not adequately provide the testimony, comments or legal argument in writing before the hearing.

A timer will be used, but will not run during questions by the members of the Hearing Panel or the responses to such questions, or during discussions of procedural issues.

Submission of Evidence and Policy Statements

Case in Chief: The Prosecution Team, the Discharger and each other designated party must submit the following information in writing in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the Hearing Panel to consider. Evidence and exhibits already in the public files of the Central Valley Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3. Hearing Panel members will generally not receive copies of materials incorporated by reference, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony. (This information is not required for rebuttal witnesses or rebuttal testimony.)
4. The qualifications of each expert witness, if any. (This information is not required for rebuttal witnesses.)

The Prosecution Team's information must include the legal and factual basis for its claims against each Discharger; a list or attached copy of all evidence on which the Prosecution Team relies, which must include, at a minimum, all documents cited in the complaint or Staff Report; and the witness information required under items 3-4 for all witnesses, including staff. The Prosecution Team shall provide an electronic copy to Ken Landau and Alex Mayer of all documents cited in the complaint or Staff Report no later than the due date under Important Deadlines, below.

The Prosecution Team shall submit one hard copy and one electronic copy to Ken Landau and one electronic copy to Alex Mayer. Each other designated party shall submit 3 hard copies and one electronic copy to Ken Landau and one electronic copy to Alex Mayer. Ken Landau and Alex Mayer must receive all submissions no later than 5:00 p.m. on the applicable due date under Important Deadlines, below.

Rebuttal: Any designated party that would like to submit evidence, legal analysis or policy statements to rebut the information previously submitted by other designated parties shall submit 3 hard copies of their rebuttal information to Ken Landau and one electronic copy of the information to Alex Mayer so that they are received by 5 p.m. on the due date under Important Deadlines, below. "Rebuttal" means evidence, analysis or comments offered to disprove or contradict other designated parties' submissions. Rebuttal shall be limited to the scope of the materials previously submitted by the other designated parties. Rebuttal information that is not responsive to information previously submitted by other designated parties may be excluded.

Closing of Hearing: Designated Parties should be sure to submit all evidence or rebuttal evidence they want the Hearing Panel to consider by the dates set forth in the Important Deadlines, below. Once the Hearing Panel adjourns the hearing, the evidentiary record on which that recommendation is based will be closed. The Central Valley Water Board will not ordinarily allow new evidence to be presented or considered at the future Board meeting.

Copies: Hearing Panel members will receive copies of all materials submitted in hard copy or electronic format. The Hearing Panel's copies will be printed in black and white from the designated parties' electronic copies. Designated parties who are concerned about print quality of all or any part of their written materials should submit a high-resolution pdf or provide an extra three paper copies for the Hearing Panel members. For items with voluminous submissions, Hearing Panel members may receive copies electronically only. Electronic copies are also posted on the Board's website.

Parties without access to computer equipment are strongly encouraged to have their materials scanned at a copy and mailing center. However, the Hearing Panel will not reject materials solely for failure to provide electronic copies.

By 8 July 2011 the Prosecution Team shall prepare a summary agenda sheet ("buff sheet") for this item to be included in the Hearing Panel's agenda package and posted on the internet. The buff sheet shall clearly state that it was prepared by the Prosecution Team. The Prosecution Team shall provide a copy of the buff sheet to all parties by mail or email.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible, but they must be received by 8 July 2011. Interested persons do not need to submit written comments in order to speak at the hearing.

In accordance with California Code of Regulations, title 23, section 648.4, the Central Valley Water Board endeavors to avoid surprise testimony or evidence. Absent a showing

of good cause and lack of prejudice to the parties, the Hearing Panel may exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will not be considered by the Hearing Panel and will not be included in the administrative record for this proceeding. Power Point and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. Designated parties must provide the Advisory Team with a printed copy of such materials at or before the hearing, for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Evidentiary Documents and File

The Complaint and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 11020 Sun Center Drive, Suite 200, Rancho Cordova, California. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Hearing Panel Chair. Many of these documents are also posted on-line at http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/index.shtml Although the web page is updated regularly, to assure access to the latest information, you may contact Charlene Herbst (contact information above).

Questions

Questions concerning this proceeding may be addressed to the Advisory Team attorney (contact information above).

IMPORTANT DEADLINES

(Note: the Central Valley Water Board is required to provide a hearing within 90 days of issuance of the Complaint (CWC § 13323). The Advisory Team will generally adhere to this schedule unless the discharger submits a waiver and it is accepted.)

All required submissions must be received by 5:00 p.m. on the due date.

- | | |
|--------------|---|
| 5 May 2011 | Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends proposed Hearing Procedure to Discharger and Advisory Team, and publishes Public Notice |
| 19 May 2011 | Objections due on proposed Hearing Procedure |
| 19 May 2011 | Deadline for submission of request for designated party status. |
| 24 May 2011 | Deadline for opposition to request for designated party status. |
| 24 May 2011 | Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above. |
| 26 May 2011 | Advisory Team issues decision on requests for designated party status, if any. |
| 6 June 2011 | Discharger's deadline for submitting signed form to waive right to hearing within 90 days. |
| 13 June 2011 | Remaining Designated Parties' (including the Discharger's) deadline for submission of all information required under "Evidence and Policy Statements," above. |
| 13 June 2011 | Prosecution Team submits an electronic copy to Ken Landau and Alex Mayer of all documents cited in the complaint or Staff Report, unless previously submitted. |
| 20 June 2011 | Requests for additional hearing time (see Hearing Time Limits, above). |
| 27 June 2011 | All Designated Parties shall submit any rebuttal evidence, written rebuttal to legal argument and/or written rebuttal to policy statements; and all evidentiary objections to other Designated Parties' submittals. |
| 8 July 2011 | Interested persons' comments are due. |
| 8 July 2011 | Prosecution Team's deadline to submit Buff Sheet. |

- 14 July 2011 If *new* rebuttal evidence or argument is submitted, deadline for designated parties to submit any requests for additional time at the hearing to respond to the rebuttal.
- 19/20 July 2011 Hearing

Attachment A
Penalty Calculation for Civil Liability

Attachment A
ACL Complaint No. R5 –2011- 0548
Specific Factors Considered – Civil Liability
Fialho & Sons Dairy (Complaint)

Each factor of the Enforcement Policy and its corresponding score for each violation are presented below:

1. **Violation No. 1 (Failure to submit 2009 Annual Report):** In accordance with Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035, an Annual Report must be submitted for regulated facilities by 1 July 2010. To date, Manuel Fialho and Frank Pimentel (Discharger) have not submitted this report for the Fialho & Sons Dairy.

Calculation of Penalty for Failure to Submit 2009 Annual Report

Step1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.30.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to submit the 2009 Annual Report did not increase the amount of pollution discharged or threatened to discharge into Waters of the State. The deviation from requirements was determined to be major, as the requirement to submit technical reports has been rendered ineffective. The failure to submit the required technical reports undermines the Regional Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the 2007 General Order.

Initial Liability

A failure to submit annual reports is punishable under CWC 13268(a)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The discharger failed to submit an annual report for 2009 on July 1, 2010 as required by the General Order and the MRP, which is now 308 days late.

However, the alternative approach for calculating liability for multiday violations in the Enforcement Policy is applicable. The failure to submit required technical reports does not cause a daily detrimental impact to the environment or the regulatory program and it does not result in an economic benefit that can be measured on a daily basis. It is the extended time period of non-compliance that causes the detrimental impact to both the environment and the regulatory program. Furthermore, the Discharger only receives an economic benefit by not submitting the required technical reports, and not a per-day benefit during the entire period of violation.

Applying the per-day factor to the adjusted number of days of violation rounded to the nearest full day equals 16 days of violation. A calculation of initial liability totals \$4,800 (0.3 per day factor X 16 adjusted days of violation X \$1000 per day penalty).

Step 4. Adjustment Factors

a) *Culpability: 1*

Discussion: The Discharger was given the neutral score of 1, which neither increases nor decreases the fine.

The Discharger is fully responsible for failure to submit annual reports alleged in this Complaint. The requirement to submit an Annual Report and associated documents were detailed in the 2007 General Order. Dischargers were issued a Notice of Violation on 2 September 2010, which requested that the report be submitted as soon as possible to minimize liability. Since that time, the Dischargers have failed to submit the 2009 annual report or any of the associated documents, and are therefore highly culpable for their failure to comply with the program.

b) *Cleanup and Cooperation: 1*

Discussion: The Discharger was given the neutral score of 1, which neither increases nor decreases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the General Order, including notice through the General Order and an NOV, the Discharger continues to fail to comply. The violation of CWC section 13268(a), alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

c) *History of Violations: 1*

Discussion: The Discharger was given the score of 1 which neither increases nor decreases the fine. The Regional Board has no documentation of violations for the Discharger with respect to the failure to submit technical and/or monitoring reports as required by an order issued pursuant to CWC section 13267(b).

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2.

a) *Total Base Liability Amount: \$4,800* (Initial Liability (\$4,800) x Adjustments (1)(1)(1)).

Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

2. **Violation No. 2 (Failure to submit a Waste Management Plan):** In accordance with Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035, and amended Order R5-2009-0029, a Waste Management Plan for regulated facilities must be submitted by 1 July 2010. To date, Discharger has not submitted this Plan.

Calculation of Penalty for Failure to Submit a Waste Management Plan

Step 1. Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2. Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3. Per Day Assessment for Non-Discharge Violations

The per day factor is 0.30.

This factor is determined by a matrix analysis using the potential for harm and the deviation from requirements. The potential for harm was determined to be minor due to the following: The failure to develop and submit a Waste Management Plan does not itself threaten water quality. The deviation from requirements was determined to be major, as the requirement to develop a Waste Management Plan for the operational portions of the dairy facility has been rendered ineffective. The failure to submit the required management plans undermines the Regional Board's efforts to prevent water quality degradation and implement the regulatory protection measures detailed in the 2007 General Order.

Initial Liability

A failure to submit a Waste Management Plan is punishable under CWC 13268(b)(1) by civil liability in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs. The discharger failed to submit a Waste Management Plan by the July 1, 2010 deadline as required by the General Order and the MRP. It is now 308 days late.

The alternative approach for calculating liability for multiday violations in the Enforcement Policy is applicable. The failure to submit a Waste Management Plan addressing the disposal of waste in the production area does not cause a daily detrimental impact to the environment or the regulatory program and it does not result in an economic benefit that can be measured on a daily basis. It is the extended time period of non-compliance that causes the detrimental impact to both the environment and the regulatory program. The Discharger receives a single economic benefit in cost saved in not developing the report, and not a per-day benefit during the entire period of violation.

Applying the per day factor to the adjusted number of days of violation rounded to the nearest full day equals 16 days of violation. This yields an initial liability of \$ 4,800 (0.3 per day factor X 16 adjusted days of violation X \$1000 per day penalty).

Step 4. Adjustment Factors

a) *Culpability: 1*

Discussion: The Discharger was given the neutral score of 1, which neither increases nor decreases the fine.

Manuel Fialho (the Discharger), is fully responsible for failure to submit a Waste Management Plan alleged in this Complaint. The requirement to develop and submit a Waste Management Plan was detailed in the 2007 General Order. Further, the amended Order gave dischargers an extra calendar year to develop and submit the Plan. Dischargers were issued a Notice of Violation on 2 September 2010, which requested that the Plan be submitted as soon as possible to minimize liability. Since that time, the Dischargers have failed to show any progress toward developing a Plan, and are therefore highly culpable for their failure to comply with the program.

b) *Cleanup and Cooperation: 1*

Discussion: The Discharger was given the neutral score of 1, which neither increases nor decreases the fine. Despite the fact that the Discharger received multiple notices regarding the requirements set forth in the General Order, the Discharger continues to fail to comply. The violation of CWC section 13268, alleged herein, is a non-discharge violation, and thus cleanup is not applicable.

c) *History of Violations: 1*

Discussion: The Discharger was given the score of 1 which neither increases nor decreases the fine. The Regional Board has no documentation of violations for the Discharger with respect to the failure to submit technical and/or monitoring reports as required by an order issued pursuant to CWC section 13267(b).

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

a. *Total Base Liability Amount: \$4,800* (Initial Liability (\$4,800) x Adjustments (1)(1)(1)).

Steps 6 through 10 Are Applied to the Combined Total Base Liability Amount for All Violations and Will be Discussed After the Total Base Liability Amounts Have Been Determined for the Remaining Violations.

COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS

The Combined Total Base Liability Amount for the two Violations is \$9,600 (\$4,800 + \$4,800).

The following factors apply to the combined Total Base Liability Amounts for all of the violations discussed above.

Step 6. Ability to Pay and Continue in Business

a) *Adjusted Combined Total Base Liability Amount: \$9,600*

Discussion: The Discharger has the ability to pay the total base liability amount based on 1) the Discharger owns the dairy, a significant asset, 2) the Discharger operates a dairy, an ongoing business that generates profits.

Based on the reasons discussed above, an ability to pay factor of 1 has been applied to the Combined Total Base Liability Amount.

Step 7. Other Factors as Justice May Require

a) *Adjusted Combined Total Base Liability Amount: \$9,600 + \$1,800 (Staff Costs) = \$11,400.*

b) *Discussion:* The State and Regional Water Board has incurred \$1,800 in staff costs associated with the investigation and enforcement of the violations alleged herein. This represents approximately 12 hours of staff time devoted to investigating and drafting the complaint at \$150 an hour. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount. A further adjustment of the combined total based liability amount may be made if the discharger submits a complete 2009 Annual report and a complete Waste Management Plan by 20 June 2011. The amount of the combined total based liability amount may be reduced by \$2000 for each completed report that is submitted to the Central Valley Water Board by 20 June 2011. This reduction in the combined total base liability amount by \$2000 for each completed report accounts for enforcement efficiencies gained by the discharger submitting the completed report or reports.

Step 8. Economic Benefit

a) *Estimated Economic Benefit: \$7,500*

Discussion: The Discharger has received an economic benefit from the costs saved in not drafting and preparing the 2009 Annual Report and the Waste Management Plan. This is based on the current consulting costs of producing one annual reports (\$2,500 each), employing a certified engineer to conduct a site inspection and produce a Waste Management Plan (\$5,000), and employing a licensed professional to prepare a MWISP (\$2,500). The adjusted total base liability amount of \$11,400 is more than at least 10% higher than the economic benefit amount (\$7,500) as required by the enforcement policy.

Step 9. Maximum and Minimum Liability Amounts

a) *Minimum Liability Amount: \$ 8,250*

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Regional Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the violations cited in this Complaint is \$ 7,500.

b) *Maximum Liability Amount: \$616,000*

Discussion: The maximum administrative liability amount is the maximum amount allowed by Water Code Section 13367(b)(1): one thousand dollars (\$1,000) for each day in which the violation occurs. Without the benefit of the alternative approach for calculating liability for multiday violations under the Enforcement Policy, the Discharger could face penalties for the total number of days in violation (616 total days X \$1,000 per day).

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the failure to submit the 2009 Annual Report and the Waste Management Plan is **\$11,400**. Attachment B is a spreadsheet that demonstrates the use of the penalty calculation methodology.

Attachment B
Penalty Calculation Methodology Spreadsheet

- Instructions**
1. Select Potential Harm for Discharge Violations
 2. Select Characteristics of the Discharge
 3. Select Susceptibility to Cleanup or Abatement
 4. Select Deviation from Standard
 5. Click "Determine Harm & per Gallon/Day..."
 6. Enter Values into the Yellow highlighted fields

Discharger Name/ID:

		Violation 1		Violation 2	
Discharge Violations	Step 1	Potential Harm Factor (Generated from Button)			
	Step 2	Per Gallon Factor (Generated from Button)			
		Gallons			
		Statutory / Adjusted Max per Gallon (\$)			
		Total			
		Per Day Factor (Generated from Button)	0	0	
		Days			
		Statutory Max per Day			
		Total			
Non-Discharge Violations	Step 3	Per Day Factor	0.3	0.3	
		Days	16	16	
		Statutory Max per Day			
		Total	\$ 1,000	\$ 1,000	
		Initial Amount of the ACL	\$ 4,800.00	\$ 4,800.00	
Add'l Factors	Step 4	Culpability	1	1	
		Cleanup and Cooperation	1	1	
		History of Violations	1	1	
	Step 5	Total Base Liability Amount	\$ 9,600.00	\$ 9,600.00	
	Step 6	Ability to Pay & to Continue in Business	\$ 9,600.00	\$ 9,600.00	
	Step 7	Other Factors as Justice May Require	\$ 1,800	\$ 1,800.00	
		Staff Costs*	\$ 7,500	\$ 11,400.00	
	Step 8	Economic Benefit	\$ 8,250	\$ 11,400.00	
	Step 9	Minimum Liability Amount	\$ 616,000	\$ 11,400.00	
	Step 10	Final Liability Amount	\$ 11,400.00	\$ 11,400.00	

Select Item
 Select Item
 Select Item
 Select Item

Potential Harm for Discharge Violations
 Characteristics of the Discharge
 Susceptibility of Cleanup or Abatement
 Deviation from Requirement

Select Item
 Select Item
 Select Item
 Select Item

ATTACHMENT B

Penalty Day Range Generator

Start Date of Violation=
 End Date of Violation=

Maximum Days Fined (Steps 2 & 3) = Days
 Minimum Days Fined (Steps 2 & 3) = Days