EXHIBIT J

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Memorandum

To: KEN LANDAU, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

From: LEE N. SMITH

Date: JULY 8, 2013

Re: ADDITIONAL COMMENTS ON PENALTIES

This Memorandum contains additional comments to the Staff's attempt to try to justify the large fine initially imposed on Mr. Tosta. This fine is not proper here where Mr. Tosta is in dire economic straits due to the current milk pricing, and he has tried to comply, but due to his consultants, and due to the compliance staff, now prosecutorial staff, refusing to accept the submitted reports as complete, staff attempts to argue that the Dairy's reports were late such that they should be penalized. The language of the statute does not support that position.

Introduction

Pursuant to the State Water Board's Water Quality Enforcement Policy, any assessment of administrative civil liability, whether negotiated pursuant to a settlement agreement or imposed after an administrative adjudication, should:

- Be assessed in a fair and consistent manner
- Fully eliminate any economic advantage obtained from noncompliance;
- Bear a reasonable relationship to the gravity of the violation and the harm to beneficial uses or regulatory program resulting from the violation;
- Deter the specific person identified in the ACL from committing further violations;
- Deter similarly situated person(s) in the regulated community the same or similar violations." See State Water Resources Control Board "Water Quality Enforcement Policy," Effective May 20, 2010.

Discharger asserts (and will prove) that approving these factors will derive a very low potential for a fine. This, taken into account with the minimal actual harm caused, the low toxicity of

the material, the state of the dairy industry, and the lack of an economic benefit, we would expect penalties to be considered less than what has been imposed.

Board Procedure per their enforcement policy sets out a general approach for determining penalties. The first step is the Potential Harm for Discharge Violations; here because of the existing ground water quality levels there is very little chance the beneficial uses would be impacted, further the chemicals of concern- nitrates and TDS which are found throughout the Valley.

It is also made clear by Mr. Tosta's current activities that the existence of the manure on the property can be abated. Per gallon per day assessments have a little meaning here as the gravamen of the claims was the failure to remove manure and the failure to submit adequate reports most if not all of these violations should be characterized as one time violations.

Adjustment factors that would increase the fine, concerning conduct, multiple violations, and multiple day violations are minimal. The Ability to Pay and Ability to Continue in Business is also supposed to be reviewed. Both of these components which are important issues have scarcely been addressed by staff. Other factors such as what justice requests are supposed to be considered. This aspect is important here as there are factors such as the difficulty that the dairy industry has been having and the fact that are little to no economic benefits provable.

> The ability of the discharge to pay an ACL is determined by its revenues and assets... If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay.

Objections To Penalty Calculations

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

Discharger believes from the outset that the proof of a discharge that impacts groundwater is lacking at this point.

Step 1. Potential for Harm for Discharge Violations

Discharger acknowledges the three-step system

Factor 1. Harm or Potential Harm to Beneficial Uses

This factor looks at the potential for this site to affect beneficial uses. First, in this instance, the question of whether there is a discharge and, second, because of the high levels of nitrates and TDS already existing in the background water, there is no threat to any beneficial uses, this factor should be zero, rather than three.

Factor 2. Physical, Chemical, Biological or Thermal Characteristics

This factor is intended to look at the toxicity – risk of the chemical "discharged" into the environment, with a particular review of the potential receptors. The Regional Water Quality Control Board Staff (the "RWQCB Staff") gives the site a "3," based on its impact on beneficial uses. This number is improper for at least three reasons. First, there are no impacts on beneficial uses, this factor/beneficial uses was examined in the prior section.

Factor 3. Successful Cleanup or Abatement

Discharger agrees with the rating of zero for this section, as in fact three quarters of the manure (the greatest gravamen here) has already been removed.

Final Score. Potential for Harm

Staff has calculated a final score of "5." Discharger in turn believes the factor supported by the State Board's Policy should be lower.

Step 2. Assessment for Discharge Violations

This section is intended to look at the violations on a day-to-day basis.

Factor 1. Per Day Assessments for Discharge Violations

The RWQCB Staff has chosen a ".15" factor based on the determination as a major deviation from the General Order for alleging discharge of waste constituents that could cause degradation, contamination or discharge. RWQCB Staff has calculated a violation from the first inspection.

Discharger denies that there was a discharge that harmed groundwater, and that most of the materials were removed – thus, the per day is less than the two hundred – and certainly less than ".15" – this amount should at most be $60,000 rather than $150,000 due to the factor, and the number of days reduced.

Step 3. Per Day Assessment; Non-Discharge Assessment

Discharger agrees with RWQCB Staff that this is not applicable.

Step 4. Adjustment Factors

A. Multi-Day Violations. Discharger disagrees that this is a factor, since discharge has not been proven, not on a daily basis.

B. Liability. Discharger disagrees with RWQCB Staff's analysis and believes that due to the combination of consultants that were not properly drafting documents, the fact that over the last few years, Mr. Tosta has been losing thousands of dollars per month per cow. In short, Mr. Tosta is paying to milk his cows rather than vice versa. Discharger suggests that this should be "1" or less. Further, Mr. Tosta has spent thousands of dollars since the CAO was issued, including substantially complying with the CAO on time. RWQCB Staff has instead set the "culpability factor has been set at the maximum." Appendix A at p. 3.

C. Clean up and Cooperation. As noted above, Discharger believes that it has, to the extent possible, been trying to comply with the order, and that the multiplier here should not be set at a maximum for all the reasons set forth above. The multiplier here should be ".75" or less.

D. History of Violator. Discharger objects to the discussion of prior violations going back as far as 2001. Mr. Tosta was already penalized for those actions, the most significant of which was caused by an accidental spill into an irrigation canal – an action totally unrelated to compliance here. That violation was resolved with payment by Mr. Tosta of considerable funds. This violation, which is unrelated, should not be used to aggravate the penalties in this matter. RWQCB Staff's attempts weakly to link the two by arguing that the "lack of infrastructure" covered both issues. Discharger disagrees with Prosecutor's multiplier of "1.1." to "1.0."

Step 5. Total

RWQCB Staff's calculation was $371,250.

Dairy at a maximum would calculate the amount of $45,000.

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

Step 1. Potential for Claim

Not relevant / Agree.

Step 2. Harm to Beneficial Uses

Not relevant / Agree.

Step 3. Per Day Assessment for Non-Discharge Violation

RWQCB Staff has chosen a per-day factor violation of ".85" based on a matrix analysis based upon the Potential for Harm and Deviation from the Applicable Requirements. Despite the fact that RWQCB Staff found that there was no harm with respect to discharge violations, they found a major potential for harm based on the failure to submit adequate Waste Management Plans. They do not, however, take into account the fact that plans were submitted that were inadequate. Instead, they identify the deficiencies in the plans and weigh the harm on that basis.

A. Discharger believes that a maximum penalty might be appropriate when no plan was submitted as opposed to inadequate reports.

B. Deviation from Applicable Requirements. RWQCB Staff applies the enhancement here as well despite Mr. Tosta's attempts to comply.

Step 4. Adjustment Factors

A. Multiple Day Violations. Discharger disagrees that submittal of a report is subject to multi-day violations. Staff's position is not consistent with their statutes concerning how the lack of a plan has done sufficient damage to derive full deviation ranking. The RWQCB Staff initially used 78 days as the multiplier, based on an inadequate versus the lack of filing a plan and is thus unfair. As noted, Discharger disagrees with both the multiplier and the 32 days – has no basis in the record.

Step 4: Culpability.

The RWQCB Staff imposes a multiplier because of the certification signed by

Mr. Tosta of his consultants' inaccurate data.

Step 5: Cleanup and Cooperation.

The RWQCB Staff has chosen the highest multiplier here, even though Mr. Tosta, in an economic downturn, is striving to comply with the Order within several months. Discharger is penalized for not revising the inadequate WMP submitted by its consultant.

Step 6: History of Violations.

The RWQCB Staff chooses to issue a higher multiplier because of the past violations. It is unfair to increase these penalties related to non-submittal – to prior unrelated violations. The RWQCB Staff then totals the violations as equal to $67,320. Discharger calculates this as a one-time violation with an adjustment to $8,400.00.

III. Violation 3a: Failure to Comply with the CAO/Failure to Develop a Plan for Cleanup of the Production Area

Agree that this is a non-discharge violation.

Step 3: Per Day Assessment for Non-Discharge Violations

A. Potential for Harm as listed as moderate due to the potential for harm for not submitting a cleanup plan. This does not take into account the amount of work that has already been done at the site. It also unfairly links the failure to have adequate plan with the failure to remove the materials, adding adjustments that are more appropriately associated with a different violation.

B. Deviation was found to be moderate. RWQCB Staff acknowledged that the report was only 10 days late, but still insists on moderate multiplier because the Plan was inadequate. The length of time that RWQCB Staff has suggested is 145 days – June to November. There basis for the November date. Given Discharger's efforts to comply, the multiplier should be lower, and it is unfair to impose multiday penalties where the reports were found to be inadequate by the Board staff.

Step 4. Adjustment Factors

A. Multiple Day Violations. Here, as suggested, the RWQCB Staff has reduced the amount of days to 10; it should be a one day violation.

B. Culpability. RWQCB Staff imposes an adjustment. However, Discharger has been working to comply with the best of his economic ability.

C. Cleanup and Cooperation. Again Discharger believes that given the submittals of the consultant, and the state of the economy, and the fact that the site is ¾ removed, the multiplier should be less.

D. History of Violations. As noted above, the history of violations has no relevance to these violations.

Step 5: Determination of Total Base Liability Amount.

The RWQCB Staff has calculated that the amount of this Penalty would be Dairy would argue that the violation was a one-time $1,000 violation and should total no more than $1,875.00

b. Violation 3b. Failure to Comply with CAO – Manure Removal from Central Production.

Steps 1 and 2 are not necessary according to RWQCB Staff because there is no discharge. However, staff's statement that this is not a discharge is inconsistent with their analysis.

Step 3: Per Day Assessment for Non-Discharge Violations.

Because this is a non-discharge violation, the concept of a multi-day assessment does not make sense. Especially since they adjust the penalty because they assert this will lead to groundwater degradation, further this is an ongoing procedure, not all the manure would be removed at one time; in addition to the fact that because it is an operating dairy there is a continuing supply of fresh manure.

A. Potential for Harm. RWQCB Staff has attributed the results of not complying with plans with submittal of the Plan, which Discharger believes is an incorrect characterization. They chose a moderate multiplier.

B. Deviation. They assert that the Plan was 145 days late and applied that as a multiplier and come to the conclusion that the initial liability value is $348,000. See above.

Step 4: Adjustment Factors

A. Multiple Day Violations. RWQCB Staff used 10 days, here again; Discharger would assert that a one-time/one-day violation is appropriate. They state that the "the continuance of this violation: causes daily detrimental impacts to the water quality' and use those circumstances to increase the penalty yet calculations are for non-discharge violations.

B. Culpability. Here, the Discharger did submit reports although the Board was not satisfied with the content; Mr. Tosta was relying on his consultants and his penalties should not be increased because of their poor performance.

C. Clean up and Cooperation. The RWQCB Staff has provided a multiplier of 1.1, not taking into account the current level of cooperation.

D. History of Violation. The RWQCB Staff again has referred to the prior violations, which are not applicable here.

Step 6. Determination of Total Base Liability Amount

The staff has calculated that the violation merits a fine of $410,000. We originally calculated that the fine should be no more than $167,625; but based on the above believe that it should be much less; particularly if it is treated a one-time violation.

C. Violation 3(c). CAO Directive 1B – Removal of Soil from Two Settling Basins.

Step 3. Per Day Assessment for Don-Discharge Violation.

The RWQCB Staff skipped Steps1and Step 2 because they argue that there was no discharge violation. Again this is inconsistent with their which is

A. Potential for Harm. Not clear from the ACL how this violation of the Dairy General Order.

B. Deviation. The RWQCB Staff takes the position is a major deviation because it allegedly interfered with the operation of the settling ponds.

Step 4. Adjustment Factors.

A. Multiple Day Violations. The RWQCB Staff admits that it is a non-discharge violation, yet for some reason still allocates 8 days to the violation which makes no sense.

B. Culpability. Culpability multiplier is set at 1.5 because of the potential harm, which is associated with a non-discharge violation. At this time, additional testing is being done to provide a revised WMP. Additionally, during early 2013, Mr. Tosta had a CNMP done which could have been submitted that substantially addresses the same issues. Further staff goes back to June of 2007 to state that the Dairy should have been compliance since that time. Extension of time to remove the manure was denied by staff due to the rainy season.

C. Cleanup and Cooperation. Staff imposed higher adjustments because they Mr. Tosta did not meet some of the deadlines for removal of the manure.

D. History of Violations. The history of the prior site is not relevant here.

Step 5. Determination of Total Base Liability Amount.
The State's base liability under this section is $429,165 adjusted to $255,000. Based on Dairy's review the penalty should before more than $66,938.

D. Violation 3(d). CAO Directive, Submission of Revised WMP.

Step 3. Per Day Assessment for Don-Discharge Violation.

The RWQCB Staff skipped Steps 1 and Step 2 because they argue that there was not discharge violation.

C. Potential for Harm. Potential for Harm is considered by the RWQCB Staff to be moderate because the plan is "pre-requisite before implementation." Discharger believes that the failure to submit the plan is a one-time violation.

D. Deviation. The RWQCB Staff takes the position is a major deviation because Mr. Tosta failed to provide revisions to the WMP.

Step 4. Adjustment Factors.

E. Multiple Day Violations. The RWQCB Staff admits that it is a one-time violation, yet for some reason still allocates 82 days to the violation, which makes no sense. We calculate a toll claim at penalty of $1,000.

F. Culpability. Culpability multiplier is set at 1.5 because there was no revised WMP. At this time, additional testing is being done to provide a revised WMP. Additionally, during early 2013, Mr. Tosta had a CNMP done which could have been submitted that substantially addresses the same issues.

G. Cleanup and Cooperation. As indicated Mr. Tosta has removed ¾ of the manure that was located on the property

H. History of Violations. The history of violations is not relevant.

Step 5. Determination of Total Base Liability Amount.

Staff has determined that the violation is equal to $8,712.00 Dairy believes that the proper level is no more than $2,100.00.

E. Violation 3(e). Submission of Groundwater Remediation Plan.

Step 3. Per Day Assessment for Non-Discharge Violations.

As with the other similar violations, the RWQCB Staff has not taken into account Steps 1 and 2 because it is a non-discharge violation.

A. Potential for Harm. Potential for Harm is determined to be moderate because they consider it to be prerequisite to implementation, and that as long as the plan is outstanding, no steps are being taken. The RWQCB Staff then attempts to further enforce non-action and therefore is enforcing the same action twice.

B. Deviation. As above, RWQCB Staff considers this to be major deviation; they look at the duration to be the time from the due date

until it was submitted.

Step 4. Adjustment Factors.

A. Multiple Day Violations. Discharger agrees that this should be a one-time discharge. However, they continue to apply 7 days.

B. Culpability. The discharger has been assigned a multiplier of 1.5 because the Board believes that because the Board believes these actions to be from the General Order.

C. Clean up and Cooperation. Mr. Tosta is in the process of removing the materials.

D. History of Violations. History of violations is not relevant here.

Step 5. Determination of Total Base Liability Amount.

Dairy believes that the amount should be in the range of $1,838.00.

Step 6. Ability to Pay to Continue in Business.

The RWQCB Staff's ability to pay analysis is wholly inadequate and not based on substantive evidence. The only evidence that the RWQCB Staff has is based on public records indicating that Mr. Tosta owns additional real property. It is also our understanding that all of Mr. Tosta and the Partnership's properties are cross-collaterized; if the Board Staff points out which property they believe is not encumbered we would request an opportunity to address that issue. Further, just because an asset owned by these parties does not mean that it can be converted to cash. It is our understanding that Mr. Tosta is at this time selling a property with the object of the sale is to pay already outstanding debts.

Under the ability to pay we would also direct you to the Mr. Tosta's recent tax returns which have been submitted and indicate losses of 4-5 million dollars per year. We also refer you to the Frazer Report which is attached to our letter of rebuttal that shows that Dairyman on a whole in the San Joaquin Valley, a net income loss of $287.00 per cow in 2012. With these numbers and the lack of encumbered assets, we believe that Mr. Tosta has no ability to pay anything more than the interest on the delayed compliance.

Step 7. Other Factors as Justice May Require.

The Board shall take into account the state of the industry and the amount of money that Mr. Tosta has already spent.

Step 8. Economic Benefit. The economic benefit was calculated by estimating the actions that it would take to comply with the Dairy order including:

Install Lagoon Management Systems
Submission of Cleanup Plan
Submission of Revised WMP
Submission of Accurate WMP in 2010
Submission of remediation Groundwater Plan
Avoidance Manure Management Cost
Avoidance Maintenance

They determined that this derived an economic benefit of $826,991.00.

A major component of the states' basis for calculating economic benefits was $826,991.00 and consists of a loan amount than calculated, $659,268.00 for manure removal; this number is incorrect because as set forth in Mr. tossed his declaration the manure has been three quarters removed at no cost to the dairy. Historically this has been the case. Additionally dairy has complied with the additional requirements and therefore no economic benefit from noncompliance is the obtained, at worst the Dairy of would be responsible for the interest on that amount as delayed compliance. However, the only considerable amount in the non-compliance ledger is maintenance for which there is no evidence.

Conclusion

Based on the above and Dairy's prior submittals, penalties, if any, should be minimal due to the lack having an economic benefit and based on the Dairy's inability to pay.