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July 19, 2013

Ken Landau, Assistant Executive Officer
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Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Re: Request for Information

Dear Advisory Team:

This letter and accompanying attachments are in response to your information request of July 15, 2013. We preface our response with the fact that Dairy objects to Exhibit 26 in toto because there is no substantive evidence in the record to support the figures that were included in their table. Their calculations are built on speculation as to the amount of manure that was generated, and any costs associated with the removal. Neither is the backup material provided; as noted in our expert's declaration, his opinion was hindered by the fact that the BEN analysis itself was not provided. Further, the analyses were all done with respect to the Limited Partnership; Dischargers will request that if the ACO is issued it be issued only as against the Limited Partnership that owns and operates the Dairy. Finally, we would refer you to the Declaration of Robert Fuhrman with respect to the Ability to Pay and Economic Benefit which is attached. The following is Dischargers' response to the Advisory Team's information request:

1) *Does Exhibit 26 estimate the economic benefit of avoided manure management costs assuming that the Discharger avoided manure management costs from January 1, 1996 until December 31, 2012? If so, how does this estimate of economic benefit meet or conflict with the Enforcement Policy's definition of economic benefit, which is "any savings or monetary gained derived from the act or omission that constitutes the violation." (Enforcement Policy, at p. 20). The Advisory Team notes that the earliest*

violation alleged in the administrative civil liability complaint began on September 20, 2010.

As a preliminary matter, we reassert our position based on Mr. Tosta's Declarations that there are no costs associated with manure removal. Second, we agree that the question of timing that should be addressed; our expert, Robert Fuhrman, has voiced the same concern in his Declaration, which we previously submitted and have attached here for reference. It is the Dairy's view that the calculations of the volume of manure on the site reach too far back for several reasons. First, the violations alleged in the ACL start in late 2010; second, there is a statute of limitations which we believe to be reflected in CCP § 338(i) (three years) that also limits the Board's authority to reach back. Finally, and this is made clear by both common sense and Mr. Tosta's Declarations, that manure has not simply been collecting on the site since 1996; although the volume may be disputed,[1] manure has been removed from the site in some quantity since 1996. If the Board determines that there is cost associated (which Discharger denies) with removal, the purported savings have been spent for manure that was removed already. Mr. Tosta also asserts that since the Dairy General Order was passed in 2007, and the waste management procedures were not implemented until 2011, the Dairy cannot be held accountable for an order and/or regulations that were not in place at the time.

2) *Does the estimation of economic benefit of avoided manure management assume that the manure is removed as it is generated as opposed to stored and then removed from storage? If so, please explain how the estimated volumes of trucked waste would change if the loss of water from the wastes while in storage is taken into account.*

This question, in our view, is irrelevant for several reasons. First, as indicated in Mr. Tosta's Declarations that are attached, he does not pay for the removal of the waste, and second, and most significantly, the wet manure is not, and cannot be, removed per industry standards because of its weight and because of the risk of spillage on the highway. Only the dried manure can be hauled off.

3) *Does the calculated economic benefit for avoided manure management assume that all liquid wastes generated at the site must be trucked away? If so, please explain how the calculation is or is not consistent with Finding 12 of the ACL Complaint, which*

[1] The Staff bases some of their calculations on material submitted by Mr. Tosta's former consultants which Mr. Tosta believes is incorrect.

states that, from 2007 to 2011, "3,332 tons of manure was reportedly applied to the Tosta Dairy cropland and a total of 10,445 tons of manure was exported offsite."

The liquid wastes are not trucked away from the site but are left in the lagoons and ponds, some of the manure is applied to the land. It is the Dairy's position that there are no manure management costs and therefore none avoided and none delayed. If, however, the Board finds that there are costs, they are certainly delayed costs; under EPA guidance, from which BEN originates, waste that is improperly stored that is eventually removed is a delayed cost. See Fuhrman Declaration, and EPA Framework for Statute Specific Approaches to Penalty Assessment (1984) p. 9. Even if the Board accepts the purely speculative number included in ex. 26, delayed costs of $36,800 for five years, the calculation is still not accurate because they have not taken into account Mr. Tosta's Declarations that indicate that large percentages of the manure were already removed at various times. Even if the manure is only partially removed, the full year figure is not accurate. According to Mr. Tosta, in 2010, the majority of the manure was removed; in 2011, half was removed; in 2012 80% was removed; and in 2013, it will all be removed. This leaves no delayed costs in 2010; 50% in 2011; 20% in 2012; and none in 2013. Finally, because it is an operating dairy, and wet manure cannot be transported, there will always be some volume of manure present.

4) *Should all of the manure management costs be considered avoided costs as opposed to delayed costs (see Enforcement Policy, at p. 20), or should the management cost of the manure that remains onsite be considered a delayed cost if the Discharger remains responsible for managing that manure according to the terms of the Dairy General Order and the Cleanup and Abatement Order? If the costs should be considered delayed costs, please provide an economic benefit estimate for those delayed costs, as well as the estimated on-site waste amounts assumed by the economic benefit estimate, along with an estimate of the avoided costs, if any.*

It is the Dairy's position that there are no maintenance costs and therefore none avoided or delayed. If, however, the Board finds that there are costs, they are certainly delayed costs. As noted in Mr. Fuhrman's Declaration under EPA guidance the failure to remove waste that was removed and in many years the manure was eventually at least partially removed. If the Board does decide to calculate this amount, the Board must than estimate the delayed costs on a year-by-year basis consistent with Mr. Tosta's Declarations. Discharger agrees that, as it moves into compliance with the Dairy General Order and the CAO, it would expend additional costs.

In conclusion, Dairy asserts that there is no support for the Economic Benefit calculations made by the Board Staff. Mr. Tosta further asserts that no costs were incurred ever in removing the manure. If the Board determines there are expenses, they are delayed expenses. These delayed expenses should only go back to 2010 at most, and should take into account Mr. Tosta's Declarations with respect to the amount of manure that was in fact removed. Finally, no assertions have been made as to any entity other than the Limited Partnership, and Dairy would ask they not be included in any order.

Very truly yours,

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Lee N. Smith /cas

Lee N. Smith

LNS/cas
Enclosure: Declaration of Robert Fuhrman

cc: Advisory Team (via e-mail with enclosure)