

# Exhibit C

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HILMAR CHEESE COMPANY, INC. AND  
10 HILMAR WHEY PROTEIN, INC.

11 BEFORE THE  
12 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
13

14 In the Matter of Hilmar Cheese Company,  
Inc.'s and Hilmar Whey Protein Inc.'s  
15 Petition for Review of Certain Actions and  
Inactions of the Central Valley Regional  
16 Water Quality Control Board in Denying  
Hilmar's Requests to Modify Hilmar's  
17 Waste Discharge Requirements.

**PETITION FOR REVIEW; PRELIMINARY  
POINTS AND AUTHORITIES IN SUPPORT  
OF PETITION FOR REVIEW; and REQUEST  
FOR EVIDENTIARY HEARING.**

**[WATER CODE § 13320]**

18  
19  
20 In accordance with section 13320 of the Water Code, Petitioners Hilmar Cheese  
21 Company, Inc. and Hilmar Whey Protein, Inc. (collectively "Hilmar") hereby petition the State  
22 Water Resources Control Board ("State Board") to review the action and failure to act by the  
23 California Regional Water Quality Control Board for the Central Valley Region ("Regional  
24 Board") in denying, via letter dated August 4, 2005 ("Denial Letter"), Hilmar's request for action  
25 to modify waste discharge requirements ("WDRs") Order No. 97-206, pursuant to Water Code  
26 section 13263(e). A copy of the Denial Letter is attached hereto as **Exhibit A**.

27 A summary of the basis for Hilmar's Petition and a preliminary statement of points and  
28 authorities are set forth in this Petition for Review in accordance with Title 23, California Code of

1 Regulations ("C.C.R.") section 2050(a). Hilmar reserves the right to file supplemental points and  
2 authorities in support of Hilmar's Petition for Review once the administrative record becomes  
3 available. Hilmar also reserves the right to submit additional arguments and evidence responsive  
4 to the Regional Board's or other interested parties' responses to Hilmar's Petition for Review, to  
5 be filed in accordance with 23 C.C.R. § 2050.5.

6  
7 **1. NAME, ADDRESS, TELEPHONE NUMBER, AND EMAIL ADDRESS OF THE**  
8 **PETITIONERS:**

9 Hilmar Cheese Company, Inc.  
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17 However, all materials in connection with this Petition for Review should also be  
18 provided to Hilmar's counsel at the following addresses:

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1           **2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE**  
2           **BOARD IS REQUESTED TO REVIEW:**

3           Hilmar seeks review of the Regional Board's denial of its request to modify its existing  
4 waste discharge requirements, Order No. 97-206 ("Permit"). A copy of the Permit is attached  
5 hereto as **Exhibit B**.

6           **3. THE DATE ON WHICH THE REGIONAL BOARD ACTED:**

7           On August 4, 2005, the Regional Board denied Hilmar's requests to reopen and modify  
8 Hilmar's Permit, which were submitted by Hilmar to the Regional Board via letters dated June  
9 17, 2005 and July 13, 2005, and are attached as **Exhibit C** and **Exhibit D**, respectively.

10           **4. A FULL AND COMPLETE STATEMENT OF REASONS THE ACTION OR**  
11           **FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:**

12           This case involves Hilmar's request for the Regional Board to reopen and modify  
13 Hilmar's existing Permit, and the Regional Board counsel's summary denial of such request.

14           The Regional Board adopted the Permit at issue on September 19, 1997 to regulate the  
15 operation of Hilmar's wastewater discharge to land. At the time that the Permit was adopted, the  
16 monthly average EC levels in Hilmar's discharge were determined to be 1900  $\mu\text{mhos/cm}$  at 25°C  
17 using data from October 1994 to April 1997. *See* Permit at Finding 2. Notwithstanding this fact,  
18 the Regional Board adopted a discharge specification for EC in the permit of 900  $\mu\text{mhos/cm}$  and  
19 only provided approximately eighteen (18) months to come into compliance. *See* Permit,  
20 Discharge Specification B.2.

21           In order to meet this new discharge specification in the Permit, Hilmar proposed to treat  
22 its wastewater with a patented V-SEP<sup>®</sup> vibrating membrane system using nanofiltration  
23 membranes, sending the treated wastewater to the reclamation area in order to meet the Permit's  
24 requirements. *See* Permit at Finding 12. Based on pilot studies, Hilmar anticipated that the  
25 average Phase I wastewater quality under this system would be 1390  $\mu\text{mhos/cm}$  by March of  
26 1998, and that Phase II wastewater quality would be 880  $\mu\text{mhos/cm}$  by March of 1999. *Id.*  
27 However, due to technological difficulties and failure of the system to perform as anticipated,  
28 Hilmar was unable to meet the Permit's requirement for EC levels consistently.

1 In April of 2000, Hilmar submitted a new Report of Waste Discharge (“ROWD”)  
2 requesting an increase in flow from 0.75 million gallons per day (“mgd”) to 1.25 mgd. In  
3 addition, Hilmar proposed to meet the Permit’s other requirements, including the discharge  
4 specification for EC, by treating 65 percent of the wastewater and combining or blending that  
5 treated wastewater with separated low suspended solids wastewater flows to meet the discharge  
6 requirements.

7 In order to address concerns raised by and to meet additional requirements imposed by the  
8 Regional Board staff,<sup>1</sup> Hilmar altered its proposed treatment process by proposing to pass all flow  
9 through a single stage reverse osmosis system. However, this proposal also was not fully  
10 effective due to technical difficulties. Therefore, Hilmar again proposed to change its process to a  
11 two-stage system of ultrafiltration and reverse osmosis (“UF/RO”), which went on line in  
12 December of 2000. This was a significant change in course away from land treatment and  
13 Hilmar’s proposal to blend waste flows with various levels of treatment.<sup>2</sup> In addition, significant  
14 problems continued to occur, including the inability to process all wastewater flows, premature  
15 failure of membranes, and higher than expected operation and maintenance costs.

16 Accordingly, Hilmar was compelled in 2002, yet again, to change course away from its  
17 original plan for land treatment and to take a different approach in its efforts to comply with its  
18 Permit, including addition of physico-chemical dissolved air flotation thickeners, anaerobic  
19 treatment, and aerobic polishing along with sand filters and reverse osmosis membranes.<sup>3</sup> In its  
20 continued attempts to meet the Permit’s current discharge specification for EC of 900  $\mu$ mhos/cm,  
21 Hilmar continues to implement innovative treatment technologies and processes at considerable  
22 expense.

23  
24 <sup>1</sup> See Hilmar’s February 2001 ROWD at pg. 3-4 revised in response to Letters from the Regional Board to Hilmar on  
25 June 2, 2000 and August 2, 2000. Because these new interpretations of the requirements imposed upon Hilmar were  
not part of a formal permit modification or reissuance proceeding, Hilmar had no direct appeal rights to challenge  
these new interpretations and mandates, and felt that it also had no choice but to comply.

26 <sup>2</sup> To the extent that this prohibition could be construed to prohibit the blending of different wastewater flows, Hilmar  
27 challenges the validity of this prohibition under State law, which forbids the Regional Board from specifying the  
manner of compliance. See Water Code §13360(a).

28 <sup>3</sup> Sand filters were only used briefly on aerobic polisher decants before reverse osmosis. Because these filters did not  
work well in that circumstance, the sand filters were pulled from service soon thereafter.

1           Upon review of the Permit during a recently proposed enforcement action, Hilmar has  
2 discovered that many of the Permit's requirements and the Basin Plan provisions upon which  
3 these requirements were based are inconsistent with recent court and State Board rulings and with  
4 the requirements of state law and regulations. With invalid provisions in its Permit, Hilmar  
5 remains subject to unnecessary administrative enforcement and the continued potential for the  
6 imposition of penalties. For these reasons, and because the 900  $\mu\text{mhos/cm}$  EC limit is neither  
7 economically viable nor environmentally sustainable, Hilmar requested via letters dated June 17,  
8 2005 and July 13, 2005 that the Regional Board modify Hilmar's Permit, pursuant to the authority  
9 granted to the Regional Board under Water Code §13263(e). See Exhibits C and D.

10           The Regional Board's counsel replied to Hilmar's letters via the Denial Letter dated  
11 August 4, 2005, summarily denying Hilmar's requests without addressing the merits of the  
12 requests. Specifically, regarding Hilmar's request for retroactive modification of the Permit, the  
13 Denial Letter only provides the following:

14           The Basin Plan is the valid and controlling water quality control plan  
15 establishing beneficial uses, water quality objectives and implementation  
16 plans for achieving the water quality objectives for surface waters and  
17 ground waters within the Sacramento and San Joaquin River Basins.  
18 WDRs Order No. 97-206 was adopted on September 19, 1997, in  
19 accordance with the Basin Plan and with Hilmar's consent. I note that  
20 Hilmar had ample opportunity prior to adoption of WDRs Order No. 97-  
21 206 to demonstrate that a higher Electrical Conductivity (EC) limit would  
be protective of groundwater. Hilmar did not do so. Instead, as you  
acknowledge in your letters, Hilmar proposed to meet the Order's EC limit  
by March 1999. Hilmar chose not to contest the Order at the time it was  
adopted and chose not to challenge adoption of the Order, or any  
requirement therein, within thirty days as required by California Water  
Code section 13320(a). The time to challenge the permit's terms ran  
nearly eight years ago.

22 Denial Letter at page 1. This denial ignores the fact that Hilmar thought it could comply and,  
23 thus, did not appeal. Upon determining that compliance was not feasible, Hilmar properly  
24 requested modifications to its Permit, which were never acted on by the Regional Board.

25           Regarding Hilmar's request for prospective modification of the Permit, counsel for the  
26 Regional Board stated the following:

27           . . . I am aware that Central Valley Water Board staff is currently drafting  
28 revised WDRs for the Hilmar facility based upon Hilmar's most recent  
report of waste discharge (RWD), submitted in late 2004. When revised  
requirements are adopted, they will replace WDRs Order No. 97-206 and

1 will apply prospectively to regulate discharges, including flow limits, at  
2 Hilmar's facility. Staff plans to discuss draft requirements with Hilmar in  
3 the near future. To the extent your June 17 and July 13 letters seek to  
4 modify the substance of that RWD, you should inform Staff immediately  
as to the manner in which Hilmar's RWD has changed either by  
submitting a revised RWD or by submitting a new RWD that replaces the  
existing RWD.

5 Denial Letter at page 2. Thus, the Regional Board neither addressed the merits of Hilmar's  
6 request, both for retroactive modification and for prospective modification of the Permit, nor the  
7 new information presented.

8 **5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED:**

9 The Regional Board has been promising to amend Hilmar's WDRs since at least January  
10 of 2002, and such amendments have not yet been made. See **Exhibit E**, Letter from Gary Carlton  
11 to Hilmar Cheese at pg. 2 (Jan. 2, 2002)(stating that tentative new WDRs, including a schedule  
12 for compliance, were expected within two months). Hilmar has no ability to force the Regional  
13 Board to take action on its permit besides requesting modifications. Because no action has been  
14 taken for several years, despite promises to make changes to the Permit, Hilmar finally formally  
15 requested that its Permit be modified in June of 2005, and that these requested modifications  
16 revert back to at least January of 2002, when the Regional Board agreed in writing that Hilmar's  
17 permit should and would be amended. *Id.*

18 The Denial Letter denies Hilmar's June 2005 requests that the Regional Board modify,  
19 both retroactively and prospectively, Hilmar's existing Permit. Hilmar is seriously aggrieved by  
20 the denial for at least two reasons. First, Hilmar has recently become aware of new information  
21 not available at the time of the Permit's issuance, including revised cost estimates for compliance,  
22 and a determination that certain of the Permit provisions (or the Basin Plan provisions upon  
23 which the Permit requirements are based) are infeasible and flatly inconsistent with recent court  
24 and State Board rulings made subsequent to the adoption of the Permit and/or with the  
25 requirements of state law and regulations. Hence, Hilmar is aggrieved because the denial requires  
26 it to comply with waste discharge requirements that are both unlawful and invalid. Second,  
27 Hilmar is currently subject to a pending enforcement action (ACLC No. R05-2005-0501) alleging  
28

1 a proposed **\$4 million** in administrative civil penalties<sup>4</sup> for alleged violations of its Permit,  
2 including specifically the EC discharge specification with which Hilmar has made extraordinary  
3 efforts to comply over the past eight years at a cost of approximately \$85 million. Hilmar is  
4 further aggrieved by the denial because it exposes Hilmar to the enforcement action and the  
5 possibility of significant monetary penalties for alleged violation of waste discharge requirements  
6 that are unlawful and invalid.

7 **6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH**  
8 **PETITIONERS REQUEST:**

9 Because of the Regional Board's consistent failure to act to modify Hilmar's Permit,  
10 Hilmar respectfully requests an Order by the State Board reopening and modifying the Permit's  
11 discharge prohibitions and specifications for EC and flow (and related bypass requirements) for  
12 the Hilmar plant.

13 Specifically, Hilmar requests that the State Board:

14 1) Determine that the challenged provisions of the Permit were invalid/unlawful  
15 when issued, or should be retroactively modified based upon new information;<sup>5</sup>

16 Since judicial case law and orders issued by the State Board specifically state that the  
17 Regional Boards are required to make findings based on the facts and site-specific conditions in  
18 each case, and support those findings with substantial evidence, the State Board must address this  
19 issue and retroactively revise Hilmar's Permit (or direct the Regional Board to revise Hilmar's  
20 Permit) to either omit the EC limit until further studies are performed to determine the necessary  
21 and applicable water quality objective for EC,<sup>6</sup> or increase the EC limit to coincide with the full  
22 range of values set forth in the secondary MCL for EC and apply the limit as a *groundwater* limit  
23

24 <sup>4</sup> Hilmar believes that the proposed \$4 million penalty is the highest penalty ever proposed in an ACL proceeding by  
any Regional Water Quality Control Board in California.

25 <sup>5</sup> Hilmar also requests that the State Board remove the Permit's bypass prohibition as being contrary to Water Code  
26 §13360(a). The bypass prohibition should be deleted from the Permit as inconsistent with Water Code §13360(a),  
27 particularly where this provision has been or might be interpreted to forbid Hilmar to blend wastewater flows even  
where the other permit requirements are met, and the required groundwater quality is maintained at levels reasonably  
protective of existing and probable future beneficial uses.

28 <sup>6</sup> See accord State Board Order WQ 2004-0010 at pgs. 4-9 (removing limits for EC, boron, and fluoride until site-  
specific studies are completed).

1 based on a long-term average using the originally imposed point of compliance in the down  
2 gradient wells. Hilmar requests that these modifications be made retroactive to at least January  
3 27, 2002.

4 2) Adjust Hilmar's Flow Requirements;

5 In addition to asking for modifications of the EC requirements, Hilmar has also made  
6 several requests that the Regional Board formally modify the flow requirements for the Hilmar  
7 plant. The Reports of Waste Discharge submitted by Hilmar to the Regional Board in April of  
8 2000 and February of 2001 requested 1.25 mgd and 1.5 mgd, respectively. The Report of Waste  
9 Discharge submitted by Hilmar to the Regional Board in August 2004 requested 2 mgd. These  
10 requests made under Water Code §13260 never resulted in formal permit modifications, but were  
11 considered by Hilmar to be acquiesced to and deemed approved by the Regional Board under  
12 Water Code section 13264(a)(2). Notwithstanding these former implicit approvals, Hilmar would  
13 like the Permit to be modified to expressly authorize these flows. Hilmar requests that the  
14 modification to 1.5 mgd averaged over a calendar month be made retroactive to at least January  
15 27, 2002, and that the modification to 2 mgd averaged over a calendar month be made retroactive  
16 to August 2004.

17 3) Rule that the Permit's point of compliance must be interpreted as adopted since  
18 illegally modified; and

19 4) Rule that the denial of Hilmar's Request for Modification was unlawfully  
20 delegated.

21 In the alternative, Hilmar requests that the State Board, on its own motion, retroactively  
22 stay the challenged provisions, and provide direction to the Regional Board to amend Hilmar's  
23 Permit consistent with the arguments stated and the requests made in this Petition prior to taking  
24 any enforcement action against Hilmar for alleged violations of the current version of the Permit.

25 **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**  
26 **ISSUES RAISED IN THE PETITION:**

27 **A. The Permit's EC Limit Was and Remains Invalid.**

28 The Regional Board included a discharge specification for Electrical Conductivity ("EC")

1 derived from the drinking water Maximum Contaminant Levels (“MCLs”) specified in Title 22 of  
2 the California Code of Regulations in Hilmar’s Permit. *See* 22 C.C.R. §64400.70; Permit at  
3 Finding 19, Discharge Specification B.2. The use of a secondary MCL to set discharge  
4 requirements was not valid for the following reasons: 1) the adoption and implementation of the  
5 Chemical Constituents narrative water quality objective violated state law; 2) MCLs are not  
6 directly applicable to discharges that may reach a ground water basin; rather, MCLs were  
7 promulgated to apply to drinking water purveyors at the “end of tap;” 3) the Regional Board  
8 incorrectly implemented Title 22 by utilizing the lowest number for EC; 4) the Regional Board  
9 failed to comply with Water Code section 13263(a) when imposing an EC limit based on MCLs  
10 and section 13241; 5) the Regional Board failed to set an averaging period for the EC limit  
11 consistent with the Basin Plan or MCLs; and 6) the Regional Board failed to follow the “best  
12 efforts” approach when including the EC limit in Hilmar’s Permit.

13 **1. The Regional Board’s Adoption and Implementation of the Chemical**  
14 **Constituents Narrative Water Quality Objective Violated State Law.**

15 a) Prospective Incorporation by Reference of Drinking Water Standards.

16 Assuming that the Permit was based on the requirements of the Basin Plan, then the  
17 Regional Board’s adoption of the narrative water quality objective for “Chemical Constituents,”  
18 specifying that ground waters designated for use as domestic or municipal supply (“MUN”) shall  
19 not contain concentrations of chemical constituents in excess of the MCLs in effect at the time the  
20 chemical constituents objective was adopted *and including any prospective, future changes to the*  
21 *MCLs contained in Title 22*, violated the Water Code. *See* Basin Plan at III-10.00; Water Code §  
22 13241 and 13000.

23 The original Chemical Constituents objective for groundwater did not contain a  
24 *prospective* incorporation by reference, it merely read as follows:

25 “Groundwaters designated for use as domestic or municipal supply  
26 (MUN) shall not contain concentrations of chemical constituents in excess  
27 of the limits specified in California Administrative Code, Title 17, Chapter  
28 5, Subchapter 1, Group 1, Article 4, Section 7019, Tables 2,3, and 4, listed  
here in Tables A, B, and C.

1 Groundwaters designated for use as agricultural supply (AGR) shall not  
2 contain concentrations of chemical constituents that adversely affect such  
beneficial use.”

3 Water Quality Control Plan Report Abstract at 77, Table 15, RWQCB\_01418. Prior to this time,  
4 water quality objectives for groundwater had not been set. Therefore, all groundwater objectives  
5 were new additions in the 1975 Basin Plan. 1975 Basin Plan at Appendix B, page B-1,  
6 RWQCB\_01813.

7 In 1989, the Basin Plan’s Chemical Constituents objective for groundwater appears to  
8 have been changed once again. This version read as follows:

9 “Ground waters shall not contain chemical constituents in concentrations  
that adversely affect beneficial uses.

10 Ground waters designated for use as domestic or municipal supply (MUN)  
11 shall not contain concentrations of chemical constituents in excess of the  
maximum contaminant levels specified in California Code of Regulations,  
12 Title 22, Division 4, Chapter 15.

13 Ground waters designated for use as agricultural supply (AGR) shall not  
contain concentrations of chemical constituents that adversely affect such  
beneficial use.”

14 Second Edition of Basin Plan (draft 1988) at III-12, RWQCB\_04507; see also Second Edition  
15 Basin Plan (Third Printing 1992) at III-10, RWQCB\_03713. This edition was the first time that  
16 the Basin Plan specifically referenced maximum contaminant levels (MCLs); however, this  
17 incorporation by reference was still not prospective.

18 In 1994, the Regional Board’s modified Chemical Constituents objective, which was later  
19 approved by the State Water Board on February 16, 1995, was amended as follows:

20 “Ground waters shall not contain chemical constituents in concentrations  
21 that adversely affect beneficial uses.

22 At a minimum, ground waters designated for use as domestic or municipal  
supply (MUN) shall not contain concentrations of chemical constituents in  
23 excess of the maximum contaminant levels (MCLs) specified in California  
Code of Regulations, Title 22, Division 4, Chapter 15 or Title 40, Code of  
24 Federal Regulations, Parts 141 and 143, whichever is more restrictive.

25 See Oct. 4 Draft of 1994 Basin Plan at III-11, RWQCB\_06034, RWQCB\_15033.

26 However, on May 10, 1995, the Office of Administrative Law (“OAL”) issued its Notice  
27 of Approval and Disapproval, and Reasons for Approval and Disapproval of Parts of a  
28 Rulemaking Action on the 1994 Basin Plan Amendments (OAL File No. 95-0328-01). This

1 approval/disapproval decision on the 1994 Basin Plan determined that “[a] prospective  
2 incorporation-by-reference (one that automatically incorporates future changes to an incorporated  
3 document) is of dubious validity.” *Id.* at 10. However, the OAL conditionally approved of the  
4 Chemical Constituents language so long as the Regional Board made allegedly “nonsubstantive  
5 clarifications” that included the prospective incorporation by reference language. *Id.* at 3-4. The  
6 new language was as follows:

7 “At a minimum, ground waters designated for use as domestic or  
8 municipal supply (MUN) shall not contain concentrations of chemical  
9 constituents in excess of the maximum contaminant levels (MCLs)  
10 specified in following provisions of Title 22 of the California Code of  
11 Regulations, which are incorporated by reference into this plan: Tables  
12 64431-A (Inorganic Chemicals) and 64431-B (Fluoride) of Section 64431,  
13 Table 6444-A (Organic Chemicals) of section 64444, and Tables 64449-A  
14 (Secondary Maximum Contaminant Levels-Consumer Acceptance Limits)  
15 and 64449-B (Secondary Maximum Contaminant Levels-Ranges) of  
16 Section 64449. This incorporation by reference is prospective, including  
17 future changes to the incorporated provisions as the changes take effect.  
18 At a minimum, ground waters designated for use as domestic or municipal  
19 supply (MUN) shall not contain lead in excess of 0.015 mg/l. To protect  
20 all beneficial uses, the Regional Water Board may apply limits more  
21 stringent than MCLs.”

22 The Regional Board included the OAL language in the next reprint of the Basin Plan  
23 without subsequent public comment or hearing on or State Board approval of these changes, in  
24 violation of state law. *See* Basin Plan language, RWQCB\_14306-7; Water Code §13244, §13245.

25 By modifying the Basin Plan’s Chemical Constituents groundwater objective upon the  
26 OAL’s request to contain language prospectively incorporating by reference MCLs from the  
27 Department of Health Services’ (“DHS”) drinking water standards to apply as ground water  
28 quality objectives for ground water basins designated MUN, the Regional Board abdicated its  
responsibility to consider the factors contained in Water Code sections 13241 and to develop an  
implementation plan for these incorporated objectives as required under Water Code section  
13242. This analysis was required when the prospective incorporation language was placed in the  
Basin Plan, and then each time a new or more stringent MCL is newly incorporated into Title 22.

The use of the prospective, incorporation-by-reference method of adopting water quality  
objectives for those water bodies or ground water basins designated MUN violates the  
requirement that affected state and local agencies be consulted with and their concerns be

1 considered, the applicable public notice and participation requirements of the Water Code, and  
2 the requirement that changes to a Basin Plan must be approved by the State Board before those  
3 changes become effective. *See* Water Code §§13240, 13244, and 13245.

4 Contrary to findings made by the OAL and Regional Board,<sup>7</sup> deferral of these obligations  
5 to the DHS's MCL adoption hearings is inappropriate and unlawful because DHS does not adopt  
6 MCLs with the intent and understanding that the MCLs will be used for any other purpose than  
7 drinking water standards applied to public water agencies' supply of tap water to the public. DHS  
8 does not notify dischargers of potential changes to MCLs to provide them with an opportunity to  
9 review and comment on proposed changes, and DHS does not comply with the explicit Water  
10 Code or CEQA requirements for adoption of Basin Plans and water quality objectives.<sup>8</sup>  
11 Therefore, the Regional Board cannot delegate its Basin Planning powers to DHS,<sup>9</sup> and cannot  
12 rely on DHS hearings as an adequate substitute for its own mandatory water quality objective-  
13 setting procedures.

14 b) The 1994 Addition That More Stringent Limits May Be Applied.

15 In the 1994 Basin Plan Amendments' Staff Report, the Regional Board stated "the  
16 Regional Water Board reviews the water quality objectives, and the limits described, on a case-  
17 by-case basis and applies limits to assure protection of all beneficial uses. This may result in the  
18 need to apply limits more stringent than MCLs." 1994 Basin Plan Amendments Staff Report at  
19 29, RWQCB\_06119. The Staff-recommended alternative, which was ultimately adopted by the  
20 Regional Board, was to "update the water quality objectives to ensure that the water quality  
21

22 <sup>7</sup> *See* OAL File No. 95-0328-01 at 12, RWQCB\_15036 (OAL approved the prospective incorporation-by-reference  
23 of specified standards for drinking water adopted by the Department of Health Services (DHS) for waters designated  
24 by the Regional Board as MUN in part because "the public has a continuing opportunity to participate in proposed  
25 changes to the drinking water standards."); *see also* RWQCB\_21798 (The Regional Board stated that DHS "adopts  
26 new MCLs in a public process that is essentially the same as the process the Regional Board would go through to  
27 adopt objectives. There would be no purpose for the Regional Board to consider the same information that has  
28 already been considered in an open, public process by DHS. The MCLs become water quality objectives that must  
be met to protect the drinking water beneficial use.")

<sup>8</sup> Since DHS is not adopting the MCLs as water quality objectives, their CEQA analysis does not extend to potential  
impacts of applying these numbers as water quality objectives to all waters of the State.

<sup>9</sup> The Regional Board's delegation powers only allow delegation of certain activities and only to the Board's  
Executive Officer. *See* Water Code §13223(a). Delegation of basin planning activities to DHS is not authorized.

1 objectives are also at least as stringent as the federal Primary MCLs.” RWQCB\_06120. This  
2 alternative also provided language to clarify that the Regional Board “may apply limits more  
3 stringent than state and federal Primary MCLs and Secondary MCLs (SMCLs) to ensure the  
4 reasonable protection of beneficial uses and the prevention of nuisance.” *Id.*

5 The Regional Board failed to comply with state law requirements when adopting the  
6 following new language into the Chemical Constituents objective: “To protect all beneficial uses,  
7 the Regional Water Board may apply limits more stringent than MCLs.” Since the “limits more  
8 stringent than MCLs” were not defined specifically in the language of the Basin Plan, it would  
9 have been impossible to conduct a 13241 analysis on these undefined limits. Furthermore, the  
10 Regional Board erroneously concluded that “this alternative would provide consistency with  
11 existing federal standards, and clarification with respect to existing water quality objectives;  
12 therefore, attainability is not in question and no environmental or economic consequences are  
13 anticipated.” RWQCB\_06122. This assumption of attainability and no environmental or  
14 economic consequences was unsupported by the record. MCLs are standards set to apply to  
15 finished tap water, not to untreated ground water, so attainability *was* in question. In addition,  
16 Hilmar is a clear example of the costs and environmental consequences of imposing MCLs or  
17 more stringent limits. Hilmar has thus far spent close to eighty-five million dollars  
18 (\$85,000,000.00) in its attempts at attaining the EC limit in Hilmar’s Permit. The Regional  
19 Board’s failure to consider the consequences of its actions was unconscionable and unlawful.

20 c) The 1994 Addition of a Toxicity Objective For Groundwater.

21 The Regional Board added a Toxicity objective for groundwater to the Basin Plan in 1994  
22 due to their analysis that “the existing ground water objectives lack clarity and  
23 comprehensiveness with respect to toxicity.” 1994 Basin Plan Amendments Staff Report at 39,  
24 RWQCB\_06129. Despite its contradictory determination that the “beneficial uses of ground  
25 waters threatened and impacted by toxic substances are already protected in the existing Basin  
26 Plan pursuant to the water quality objective for Chemical Constituents,” the Regional Board Staff  
27 recommended that the “Basin Plan language should be more specific to ensure adequate  
28 protection against toxic effects.” RWQCB\_06129. The proposed, and ultimately adopted,

1 Toxicity objective for groundwater was designed to clarify “the existing approach to applying the  
2 existing narrative ground water objective for Chemical Constituents in cases where either no  
3 MCL is available or the MCL is not sufficiently limiting to protect beneficial uses.”  
4 RWQCB\_06131. In other words, the objective would allow the Regional Board to pick virtually  
5 any number at all to implement this narrative objective. All this would be done outside of the  
6 public objective-setting process, thereby removing a true Water Code section 13241 analysis from  
7 that process. Instead, the Regional Board cursorily concluded, without supporting evidence, that  
8 for its new Toxicity objective, “attainability is not in question and this alternative has no new  
9 environmental or economic consequences.” *Id.*

10 The Regional Board recognized that because it had not determined the actual numbers to  
11 be imposed, “it is not feasible to perform a meaningful economic analysis of its impacts at this  
12 time. To implement this Basin Plan language, the Regional Water Board will weigh economic  
13 considerations along with other factors in adopting enforcement orders and waste discharge  
14 requirements for individual discharges.” 1994 Basin Plan Amendments Staff Report at 42,  
15 RWQCB\_06132 (emphasis added). Unfortunately, when adopting Hilmar’s Permit, these  
16 considerations were **not** undertaken. Thus, the Regional Board has never considered each of the  
17 13241 factors for the Toxicity objective. This failure violates state law. *See e.g.*, Water Code  
18 §§13241, 13263, 13000.

19 Compliance with the objective was muddled further by the late addition of language in the  
20 Basin Plan stating that “For permitting purposes, it is important to clearly define how compliance  
21 with the narrative toxicity objectives will be measured. Staff is currently working with the State  
22 Water Board to develop guidance on this issue.” *See* Late Revisions to October 1994 Basin Plan  
23 (Nov. 23, 1994), RWQCB\_12588. Thus, because this determination of compliance with the  
24 Toxicity objective was indefinitely deferred and has never been clarified, this objective is too  
25 vague to be used for permitting and enforcement purposes.

26 d) The Regional Board Failed to Perform Meaningful Periodic Reviews of  
27 Basin Plan Objectives.

28 Water Code section 13240 requires that the Water Board periodically review its water

1 quality control plans, and the beneficial uses, water quality objectives, and implementation plans  
2 contained therein. Water Code §§13240, 13050(j). In its initial Basin Plan, the Regional Board  
3 made a commitment that “water quality objectives will be reviewed periodically by the Regional  
4 Board as new information becomes available and will be the subject of public hearings at least  
5 once during each three year period.” Water Quality Control Plan Report Abstract, at 61,  
6 RWQCB\_01402; 1975 Basin Plan at I-4-1, RWQCB\_01519 (emphasis added). The only real  
7 review of the Basin Plan’s objectives at issue in relation to the 1997 Hilmar Permit occurred in  
8 1994, and have not occurred since, despite requests from interested persons to do so. *See e.g.*,  
9 Letter from County of Sacramento Public Works Agency to Gary Carlton, Executive Officer,  
10 Regional Board (April 30, 1998) at 1, RWQCB\_21036 (specifically requesting review of the  
11 Chemical Constituents for groundwater and the narrative Toxicity objective). A single  
12 meaningful review in a thirty year time frame violates section 13240’s requirement for periodic  
13 review, nor with the Regional Board’s past commitment for public review every three years.

14 e) The Regional Board violated the California Environmental Quality Act.

15 The California Environmental Quality Act (“CEQA,” Cal. Pub. Res. Code §§ 21000 *et*  
16 *seq.*) requires that public agencies evaluate the impacts of projects for the purposes of: (1)  
17 avoiding, reducing, and preventing environmental damage; and (2) providing information to  
18 decision-makers and the public concerning the environmental effects of proposed actions, to  
19 promote informed self-government. (*See e.g., Friends of Mammoth v. Board of Supervisors*, 8  
20 Cal.3d 247, 259 (1972.)) To achieve these purposes, CEQA must be “interpreted in such manner  
21 as to afford the fullest possible protection to the environment . . .” (*Laurel Heights Improvement*  
22 *Assn. v. Regents of Univ. of California*, 47 Cal.3d 376, 390-92 (1988).)

23 Section 21080.5 of the Public Resources Code provides that a regulatory program of a  
24 state agency shall be certified by the Secretary for Resources as being exempt from the  
25 requirements for preparing an Environmental Impact Report (“EIR”), negative declaration, and  
26 initial studies if the program meets certain criteria. Water quality control planning by regional  
27 boards is one of the exempt programs. 14 C.C.R. § 15251(g). However, even though an EIR  
28 need not be prepared, the Regional Board, when adopting a Basin Plan, must prepare a functional

1 equivalent to substitute for the EIR process. This substitute document must contain a description  
2 of the proposed activity, and either alternatives and mitigation to avoid or reduce any significant  
3 or potentially significant effects on the environment, or a statement that the agency's review,  
4 supported by a checklist, found no significant or potentially significant effects on the  
5 environment. 14 C.C.R. § 15252.

6 When the Regional Board adopted the groundwater objectives discussed herein, its  
7 environmental documentation was incomplete. The Regional Board failed to identify significant  
8 or potentially significant effects on the environment, including increased air quality impacts from  
9 trucking brine wastes from the treatment processes required to meet the objectives, increased  
10 energy usage from those same treatment processes, water quality impacts to other watersheds  
11 from brine waste discharge, or any other potential effects, or failed to properly analyze  
12 alternatives or provide adequate mitigation measures for any potential effects. *See* 1994  
13 Environmental Checklist, RWQCB\_06165 to RWQCB\_06178. In fact, these impacts could not  
14 be properly analyzed because the narrative groundwater objectives are too vague to be able to  
15 identify the actual number that will be imposed to protect the beneficial uses. Without being able  
16 to identify the number to be met, the impacts of meeting that number cannot be properly  
17 analyzed. Thus, the performance of a CEQA analysis at the subsequent permitting stage was  
18 critical.

19 In this case, however, the Regional Board failed to undertake a CEQA analysis at the  
20 permit adoption stage and the Regional Board cannot properly claim an exemption under Water  
21 Code section 13389. Section 13389 does not work to shield or exempt the Regional Board from  
22 considering environmental costs and impacts under CEQA since Hilmar's Permit is not a federal  
23 permit issued under the Clean Water Act. *See Committee for a Progressive Gilroy v. SWRCB*  
24 (1987) 192 Cal. App.3d 847, 862. This failure to comply with CEQA provides another reason  
25 why the permit should be reissued in compliance with state law.

26 f) The Regional Board Arbitrarily Assigned Beneficial Use Designations.

27 The Regional Board admitted that collecting information as to the existing and potential  
28 beneficial uses of all groundwater "would require an expenditure of staff resources far beyond

1 current and projected funding levels. . . . Water bearing zones must be delineated both  
2 horizontally and vertically because vertical stratification of water bearing zones could result in  
3 differences in existing and potential beneficial uses of shallow versus deep ground water.  
4 Detailed site-specific geologic information would be required to delineate these differences. An  
5 extensive effort to fill data gaps, and to address inaccuracies and insufficiencies would be  
6 necessary.” See 1994 Basin Plan Amendments Staff Report at 25, RWQCB\_06115. This  
7 alternative, although not selected by the Regional Board, would have been able to “eliminate the  
8 inadequacies of the current ground water beneficial use designations.” *Id.* Thus, the Regional  
9 Board admitted that there was an inaccuracy in its manner of designating beneficial uses of  
10 groundwater. See also *id.* at 26, RWQCB\_06116 (“staff has identified inadequacies and a lack of  
11 clarity in the existing Basin Plan which have resulted in the need to modify beneficial use  
12 designations. . . .”)

13 Instead of site-specifically determining the past, present, and probable uses of each ground  
14 water basin as is required by law, the Regional Board took the far easier and less accurate path of  
15 imposing blanket use designations on all ground waters, whether these designations reflected  
16 actual attainable uses or not. See 1994 Basin Plan Staff Report at 27, RWQCB\_06117  
17 (designating “agricultural supply, industrial service supply, and industrial process supply as  
18 beneficial uses designations in the Basin Plan for all ground waters of the Region.”). This failure  
19 to regulate site specifically led to overly stringent requirements and unreasonable and imprecise  
20 regulation in the Hilmar Permit.

21 g) The Regional Board Failed to Adopt a Mixing Zone for the Limits Imposed.

22 The supporting documentation for the 1994 Basin Plan Amendments state that:

23 The objectives contained in this plan, and any State or Federally  
24 promulgated objectives applicable to the basins covered by the plan, are  
25 intended to govern the levels of constituents and characteristics in the  
26 main water mass unless otherwise designated. They may not apply at or in  
the immediate vicinity of effluent discharges, but at the edge of the mixing  
zone if areas of dilution or criteria for diffusion or dispersion are defined  
in the waste discharge specifications.

27 RWQCB\_12497. The Regional Board failed to include a mixing zone within which the water  
28 quality objective does not apply. See Late Revisions to the October 1994 Draft Basin Plan,

1 RWQCB\_12587. Recent State Board precedent held that the Regional Board was required to  
2 consider dilution, attenuation, aquifer capacities, recharge volumes, and soil adsorption prior to  
3 setting discharge specifications based on MCLs to protect groundwater. *See* State Board Order  
4 WQO 2003-0009 at 5 (July 16, 2003). These considerations were not taken into account prior to  
5 imposing the 900  $\mu$ mhos/cm limit for EC. *See infra* footnote 16 (requirement to conform  
6 regulation based on new precedent). Therefore, the Permit must be reopened to consider  
7 inclusion of mixing zones, or factors related to dilution, attenuation, and soil adsorption.

8  
9 **2. MCLs Are Not Intended to Apply Directly to Discharges.**

10 MCLs do not apply to wastewater discharges, but rather apply only to the direct supply of  
11 water to the public for drinking water purposes.<sup>10</sup> The MCLs set forth in Title 22 of the  
12 California Code of Regulations were intended only to apply to drinking water treatment facilities  
13 at the tap or point-of-use, not as discharge specifications for wastewater discharges to land. *See*  
14 22 C.C.R. §64431 and §64444.<sup>11</sup> Since the effluent produced by Hilmar is not used for direct  
15 potable purposes, the Title 22-based EC limit imposed in the Permit was and remains  
16 unnecessarily restrictive and inappropriate.

17 Moreover, the Regional Board was required to consider dilution, attenuation, aquifer  
18 capacities, recharge volumes, and soil adsorption prior to setting effluent limits to protect  
19 groundwater. *See* State Board Order WQO 2003-009 at 5 (July 16, 2003). These considerations  
20 were not taken into account prior to imposing the 900  $\mu$ mhos/cm limit for EC. Thus, Hilmar  
21 requests that these considerations be undertaken now with the new information Hilmar has  
22 provided to the Regional Board. *See e.g., "Revised Antidegradation Analysis for HCC Irrigation*  
23 *Water"* submitted to the Regional Board by Brown and Caldwell on March 15, 2002.

24 <sup>10</sup> *See accord* 22 C.C.R. §64449(a) (stating that secondary MCLs shall not be exceeded in the water supplied to the  
25 public). Under Title 22, monitoring for EC is only required by public water purveyors annually or triennially unless  
26 waived, not on a daily basis as is required in Hilmar's Permit. *See* 22 C.C.R. §64449(c) and (h); Permit Monitoring  
and Reporting Program at 1.

27 <sup>11</sup> Even if the MCLs were properly applied as water quality objectives to groundwater, discharge requirements in  
28 permits may differ from the water quality objectives established in a Basin Plan and may even exceed those  
objectives. *See* SWRCB Order No. WQ 2005-0005, *infra*, footnote 6, at 12-13. Furthermore, these objectives may  
be superseded by natural background concentrations where those natural concentrations exceed the water quality  
objective. *See* Basin Plan at IV-17.00.

1                   **3. The Regional Board Implemented Title 22 Incorrectly.**

2                   a) Title 22 Was Not Intended to Be Applied As Enforceable Discharge Limits

3                   The Permit's use of Title 22 criteria is inconsistent with how the Department of Health  
4                   Services ("DHS") uses and enforces MCLs. Secondary MCLs, like the one for EC, are set for  
5                   constituents that *may* adversely affect the taste, odor, or appearance of drinking water, and are  
6                   directly related to consumer "acceptance" or "dissatisfaction" with the drinking water provided  
7                   through a community water system. *See* 22 C.C.R. §64449(a).

8                   If a secondary MCL for a constituent contained in Table 64449-A is exceeded in drinking  
9                   water, only an investigation by DHS and a study by the water supplier is required to determine  
10                  actual consumer acceptance or dissatisfaction with the drinking water that does not meet the  
11                  particular MCL. *See* 22 C.C.R. §64449(d). If there is no community water system, as in this  
12                  case, there are no consumers to be surveyed and, thus, no acceptance or dissatisfaction to  
13                  measure. Instead, Hilmar is exposed to serious liability for non-compliance, unlike situations  
14                  where MCLs are exceeded under drinking water regulations. *See, e.g.,* Water Code §13350.

15                  In addition, DHS is permitted to waive the requirement to meet secondary MCLs based  
16                  upon consumer acceptance or economic considerations. *See* 22 C.C.R. §64449 (e)(1) and (2).  
17                  However, exceedances of secondary MCLs included in Hilmar's Permit, and interpreted by the  
18                  Regional Board to be a rigid end-of-pipe discharge specification, may subject Hilmar to liability  
19                  under the Water Code. *See, e.g.,* Water Code §§13350. Such a result was never intended by Title  
20                  22. Thus, the inclusion of secondary MCLs as enforceable discharge specifications, as was done  
21                  in Hilmar's Permit, was unwarranted and inappropriate.

22                  b) The Regional Board Incorrectly Utilized Only One Number for EC From  
23                  Title 22.

24                  Title 22 sets forth Secondary MCLs as ranges. *See* 22 C.C.R. §64449 at Table 64449-B.  
25                  For EC, the MCLs range from 900 to 1600  $\mu$ mhos/cm with an allowable a short term high of  
26                  2,200  $\mu$ mhos/cm. *Id.* The Discharge Specification for EC in Hilmar's Permit failed to include a  
27                  range of values equivalent to the Secondary MCL from which it was derived, or to provide  
28                  findings and evidence as to why the lowest value was selected and applied.

1           Instead, ignoring the range of possible MCL values, the Regional Board imposed Hilmar's  
2 discharge specifications at the lowest end of the range with no consideration of any other  
3 number,<sup>12</sup> and without consideration of the fact that drinking water can be legally served up to  
4 2,200 µmhos/cm of EC without adverse legal or public health consequence. The Regional  
5 Board's failure to consider the other alternative values in the range constituted an abuse of  
6 discretion. Water Code §13000 and §13263(a). For these reasons, the Permit should be  
7 modified, at the very least, to coincide with the full range of values in Title 22 to be applied as a  
8 groundwater limitation.

9  
10                   c)       The Regional Board Failed to Have an Implementation Plan to Meet the  
11                               Imposed De Facto EC Objectives.

12           Water Code section 13242 requires an implementation plan for all water quality  
13 objectives. Water Code §13242; *see accord* Regional Board Staff Report for the 1994 Basin Plan  
14 Amendments at 3, RWQCB\_06093. No such plan exists for meeting a 900 µmhos/cm EC  
15 objective, or for the narrative Chemical Constituents or Toxicity ground water objectives from  
16 which the *de facto* 900 µmhos/cm EC objective was derived. From the beginning, regional  
17 boards were given guidance that they should be "sensitive to the feasibility of implementing a  
18 management plan to meet the objective." *See* Management Memorandum No. 18  
19 (RWQCB\_00309, \_00311)(1972). Situations were to be recognized in which maintenance of  
20 present conditions was not feasible, and that some degradation must be accepted with any  
21 implementation plan. *Id.* at RWQCB\_00311. The recognition also existed that "there will be  
22 certain situations where it is clearly impractical to devise management plans to maintain quality  
23 in all basins if waters are to be used. Some basins must be designated "salt sinks" to provide for  
24 disposal of saline wastes from surrounding basins." *Id.*

25 \_\_\_\_\_  
26 <sup>12</sup> In fact, in 1995 when requested by Hilmar to amend the Permit limit for EC, the Regional Board wrongly  
27 determined that "a 1300 µmhos/cm EC limit does not comply with the Basin Plan." *See* Regional Board  
28 Memorandum Regarding Hilmar Cheese Company – Review of Technical Reports, from Jose Angel to Larry Beatty  
at 2 (May 15, 1995). This 1300 µmhos/cm level clearly falls within the 900 to 1600 µmhos/cm range set forth in 22  
C.C.R. §64449.

1           These types of considerations were never made because no salt management plan or  
2 implementation plan for salt objectives (including EC) were or have been established by the  
3 Regional Board for the groundwater in the Hilmar area. This failure invalidates the groundwater  
4 objectives and any subsequent permits issued based on these invalid objectives.

5           **4.       The Regional Board Failed to Comply with Water Code Section 13263(a)**  
6           **When Imposing Permit Limits Based on Title 22 Drinking Water Standards.**

7           Water Code section 13241 requires the Regional Board to consider the social,  
8 environmental and economic impacts of water quality objectives prior to their adoption. *See*  
9 Water Code §13241(a)-(f).<sup>13</sup> Furthermore, Water Code section 13263(a) requires that the  
10 Regional Board *reconsider* these same factors when issuing WDRs.<sup>14</sup> The Regional Board, when  
11 prescribing waste discharge requirements, must take into consideration the beneficial uses to be  
12 protected, the water quality objectives reasonably required for that purpose, other waste  
13 discharges, the need to prevent nuisance, and the provisions of Section 13241. *See* Water Code  
14 §13263(a) (emphasis added).

15           As discussed above, the Regional Board included discharge specifications in the Hilmar  
16 Permit based on Title 22 drinking water standards. When doing so, the Regional Board failed to  
17 consider the actual uses to be protected, the water quality objectives reasonably required to  
18 protect the actual uses being made of the local groundwater, and each of the factors required to be  
19 considered under Water Code section 13241. *Id.* Hilmar is aware of no evidence to indicate that  
20 the Regional Board complied with Water Code section 13241 when it initially adopted the  
21 groundwater quality objectives in the Basin Plan, or Water Code section 13263 when it adopted

22           <sup>13</sup> The early Basin Planning efforts also recognized that “technical or economic compromises were a necessary part of  
23 the development of objectives. These aspects of the adoption procedure should not be underestimated and, in fact,  
24 should only be abandoned in favor of conclusive technical information. . . . Certain critical objectives have  
25 considerable effect on the development or operation of the state’s water resources system or on the economy of  
particular segments of the state. Such objectives should not be established without careful consideration of these  
effects.” 1975 Basin Plan at I-4-1, RWQCB\_01519.

26           <sup>14</sup> Contrary to this requirement, the Regional Board is on record stating that “we do not have to re-justify the  
27 objectives that the Regional Water Board has previously adopted.” *See* Response to Comments (Nov. 1993 draft  
28 Basin Plan) at 1, RWQCB\_12598. While the review at the objective-setting phase reviews the 13241 factors at a  
macro, or basin-wide, level, the subsequent review under 13263 is supposed to be a double-check at the micro, or  
permit, level to make sure that the factors still justify the requirements being imposed and ensure that such  
requirements are not unreasonable and are necessary to protect the actual beneficial uses being made of local ground  
water. Water Code §13263, §13000.

1 Hilmar's Permit.

2 The State Board and many regional boards in this State have long been of the opinion that  
3 the section 13241 factors need not be reconsidered upon issuance of WDRs to implement  
4 objectives contained within a Basin Plan.<sup>15</sup> See State's Request for Rehearing in *Burbank v. State*  
5 *Water Resources Control Board et al.*, Supreme Court Case No. S119248 (filed April 19, 2005).  
6 However, the initial basin planning document for this Regional Board stated that:

7 "The Regional Board, in setting waste discharge requirements, will consider, among other  
8 things, the potential impact on beneficial use within the area of influent of the discharge,  
the existing quality of receiving waters, and the appropriate water quality objectives."

9 See Water Quality Control Plan Report Abstract, at 63, RWQCB\_01402 (emphasis  
10 added). This analysis tracks many of the same requirements contained in Water Code sections  
11 13241 and 13263.

12 A recently finalized California Supreme Court decision confirms that such an analysis and  
13 reconsideration must be performed prior to adoption of any non-federal WDRs. See *Burbank v.*  
14 *State Water Resources Control Board et al*, 35 Cal.4th 613 (April 4, 2005 (made final upon denial  
15 of rehearing on June 29, 2005)). The Supreme Court stated the following:

16 "Section 13263 directs regional boards, when issuing waste discharge requirements, to  
17 take into account various factors including those set out in section 13241. Listed among  
the 13241 factors is "[e]conomic considerations." ([Water Code] § 13241, subd. (d).)  
18 The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969,  
when these statutes were enacted, that a regional board consider the cost of compliance  
19 when setting effluent limits in a wastewater discharge permit."

20 *Id.* at 625.

21 "State law, as we have said, allows a regional board to consider a permit holder's  
22 compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for  
pollutants in a wastewater discharge permit. ([Water Code] §§ 13241 & 13263)."

23 *Id.* at 627, footnote 7 (emphasis in original).

24 Since an analysis of each of the 13241 factors was not performed when the Hilmar permit  
25 was adopted, that permit failed to comply with law and must be modified to comply with this

26 \_\_\_\_\_  
27 <sup>15</sup> Section 13263 is not the only provision of the Water Code requiring a reconsideration of the 13241 factors.  
Section 13281 also requires that the regional board consider the 13241 factors when issuing a decision not to permit  
individual disposal systems. See Water Code §13281(a).

1 recent Supreme Court ruling.<sup>16</sup>

2 An analysis of the objectives and all of the 13241 factors at the permitting stage comports  
3 with the Regional Board's intentions when adopting the narrative objectives for groundwater at  
4 issue here. See RWQCB's Response to Comments (November 1993 draft Basin Plan) at 5,  
5 RWQCB\_12602 ("When considering a permit, the Regional Water Board will consider all  
6 available information, including economics and environmental impacts."), and at 2,  
7 RWQCB\_12599 ("Economic impacts and achievability can be assessed on a case-by-case basis  
8 when we adopt a permit.") (emphasis added); see also 1994 Basin Plan Amendments Staff Report  
9 at 42 (1994), RWQCB\_06132 (stating economic considerations and other factors will be taken  
10 into account in adopting WDRs for individual dischargers). Where compliance with the proposed  
11 limitations cannot be achieved by reasonable efforts and is, therefore, infeasible,<sup>17</sup> a review of the  
12 appropriateness of the underlying water quality objectives may be required. SWRCB Order No.  
13 WQ 82-5 at 3 (May 20, 1982) citing SWRCB Order No. 81-5 at pg. 6. Since the Regional Board  
14 failed to comply with Water Code requirements when adopting Hilmar's Permit, and since recent  
15 California Supreme Court jurisprudence mandates such compliance, Hilmar's Permit must be  
16 reopened and modified to reconsider the requirements imposed therein.

17 Furthermore, even if any of the 13241 factors had been considered at the time of the  
18 Permit's adoption, those factors have changed over the last 8 years, thereby justifying  
19 modification of the Permit. For example, the economic considerations have changed drastically.

20  
21 <sup>16</sup> See accord 40 C.F.R. §122.62(a)(3). Although the federal NPDES rules are not applicable in this case, they are  
22 persuasive to demonstrate that permits are routinely modified upon Court rulings. In this case, a judicial decision  
23 after the permit was issued would be grounds for modification of the permit. See *Pacific Motor Transport Co. v. State*  
*Board of Equalization*, 28 Cal. App. 3d 230, 242 (1972) (When a regulation or other statutory interpretation by an  
administrative agency appears to be erroneous because of subsequent administrative or judicial decisions, it is the  
agency's duty to conform to the correct interpretation).

24 <sup>17</sup> Under state law, "infeasible" is defined in EPA-approved regulation as "not capable of being accomplished in a  
25 successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and  
26 technological factors." SWRCB Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed  
Bays, and Estuaries of California at Appendix 1-3. Even under federal law, infeasibility can provide a reason to not  
27 require a numeric effluent. See *Communities for a Better Environment (CBE) v. State Water Resources Control*  
*Board* (2003) 109 Cal.App.4th 1089, 1104 fn. 9, rehrg. den., 2003 Cal.App. LEXIS 1082 (1st. Dist. June 27, 2003),  
28 cert. den., 2003 Cal. LEXIS 7251 (Sept. 24, 2003) ("The regulation [40 C.F.R. §122.44(k)] provides that so-called  
'best management practices' may control or abate pollution discharges when 'numeric effluent limitations are  
infeasible. . ."). In this case, infeasibility was never considered by the Regional Board. Even though Hilmar has  
been trying to achieve the EC limit in its permit for years, this limit has proven to be infeasible to attain and maintain.

1 Hilmar and the Regional Board anticipated that the salinity (EC) limits were “based on best  
2 available technology and revised cropping and irrigation practices.” See Permit at 6, Finding 24.  
3 However, the anticipated “best available technology” did not work as anticipated and coupled  
4 with the additional requirements imposed by the Regional Board outside of the permitting process  
5 (see *supra* footnote 1), Hilmar’s costs were exponentially higher than expected and even after  
6 incurring additional costs, Hilmar was unable to consistently meet the Permit’s EC requirement.

7 For these reasons, the 13263 and 13241 analyses must be redone to determine whether the  
8 new technologies and processes needed to meet the Permit’s EC requirement are “reasonable” in  
9 accordance with the requirements of state law. Water Code §13000 and §13263(a). In addition,  
10 since the Regional Board has never formally considered the current cost of compliance with the  
11 EC limit in Hilmar’s permit, the Regional Board must now consider the costs and environmental  
12 consequences of Hilmar’s new technologies and processes. The facilities utilized under the  
13 Permit require a great deal of energy and create multiple truckloads of brine waste being hauled  
14 to the Bay Area for disposal, which may cause unanticipated energy use and air quality impacts.<sup>18</sup>  
15 The Regional Board never considered these impacts under Water Code section 13263(a), section  
16 13241, or under the California Environmental Quality Act.<sup>19</sup>

17 **5. The Discharge Specification Fails to Specify a Valid Duration or Averaging**  
18 **Period Upon Which to Judge Compliance and Violated Water Board**  
19 **Guidance.**

20 From the initial guidance given to the original Basin Plan contractors in 1972, it was clear  
21 that water quality objectives were to be set with specific averaging periods included. The original  
22 recommendation was to provide “actual mean or average numerical objectives.” See  
23 Management Memorandum No. 18 (RWQCB\_00309, \_00311)(1972). It was further  
24 recommended that objectives “should be expressed in a statistical manner to take into account  
25 natural fluctuations in measured values.” *Id.* at RWQCB\_00311.

26 <sup>18</sup> “[O]peration of a large-scale reverse osmosis treatment plant would result in the production of highly saline brine.  
27 . . . Any decision that would require use of reverse osmosis . . . should involve thorough consideration of the expected  
28 environmental benefits.” *In the Matter of the Petition of City of Manteca*, SWRCB Order No. WQ 2005-0005 at 12  
(March 16, 2005)(although this Order may not be precedential, it is certainly persuasive on the points raised).

<sup>19</sup> Water Code section 13389 does not work to shield or exempt the Regional Board from considering environmental  
costs and impacts under CEQA (Pub. Res. Code § 21000 et seq.) since this Permit is not a federal permit issued under  
the Clean Water Act. See *Committee for a Progressive Gilroy v. SWRCB* (1987) 192 Cal. App.3d 847, 862.

1 The recommended guidelines for EC issued to the Basin Planning contractors in 1972  
2 actually specified that EC objectives for freshwater be set as a value not to be exceeded in more  
3 than 20% of any 20 consecutive samples nor in any three consecutive samples. *See* Management  
4 Memorandum No. 20, Attachment 2 (RWQCB\_00342)(1972). Furthermore, this document stated  
5 that “reliable upper limits are not available,” and did not recommend that EC be set as a “never  
6 exceeded” value. *Id.* at RWQCB\_00342, \_00338.

7 No need exists for a short term average for EC since there is no aquatic life use of  
8 groundwater and no indication in the record that higher levels of EC causes proven adverse  
9 effects on local beneficial uses (*e.g.*, local crops using the current management methods) or  
10 toxicity.<sup>20</sup> *See* Response to Comments (Nov. 1993 draft Basin Plan) at 1, RWQCB\_12598  
11 (noting that the use of instantaneous maximum concentrations was to protect “primarily aquatic  
12 life beneficial uses, ” which could cause adverse impacts “even if they were exceeded for only a  
13 short time.”)

14 In this case, the EC limit was set to protect the drinking water beneficial use, but drinking  
15 water standards are set with an allowable a short term high of 2,200  $\mu$ mhos/cm. *See* 22 C.C.R.  
16 §64449 at Table 64449-B. That was not the value selected by the Regional Board as a short term  
17 limit. Instead, the Regional Board arbitrarily selected the lowest point in the possible range  
18 without clearly specifying the applicable averaging period and without supporting evidence that  
19 this value was reasonable, achievable, and necessary to protect beneficial uses.

20 An averaging period is required so that water quality objectives are consistently and fairly  
21 applied. A recent ruling from the Fourth Circuit Court of Appeal held that U.S. EPA could not  
22 define a particular regulatory term differently under different programs under the same act. *See*  
23 *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005) *upholding* 278 F. Supp. 2d 619  
24 (M.D.N.C. 2003). The Fourth Circuit cited a United States Supreme Court decision that  
25 prohibited defining the same statutory term differently in different programs. *Rowan Cos. v.*

26  
27 <sup>20</sup> Secondary MCLs, like the one for EC, are set for constituents that may adversely affect the taste, odor, or  
28 appearance of drinking water, and are directly related to consumer “acceptance” or “dissatisfaction” with the drinking  
water provided through a community water system. *See* 22 C.C.R. §64449(a). This level has no relation to or  
reasonable potential to cause toxicity.

1 *United States*, 452 U.S. 247 (1981). Similarly, the Regional Board may not declare in the Hilmar  
2 case that the EC limit is a not-to-exceed instantaneous or daily maximum value when other  
3 permits issued by this same Regional Board have included EC limits that were expressly set forth  
4 as six-month averages based on the same or similar narrative water quality objectives. *See e.g.*,  
5 *City of Woodland* permit, R5-2003-0031 at page 21 (although EC limit was removed, it was  
6 originally set forth as a 6-month average).

7 In most cases, MCLs are intended to be applied as 12-month averages. *See* 22 C.C.R.  
8 §64432. Thus, the imposition of an MCL-based permit limit without specifying the applicable  
9 averaging period was improper. Furthermore, the inclusion of requirements based on secondary  
10 MCLs (*e.g.*, EC) is especially problematic since EC is an *aesthetic* concern, not a primary  
11 drinking water standard. Thus, the secondary MCL upon which the EC requirement was imposed  
12 for aesthetic reasons does not require short-term (*e.g.*, weekly, daily, or instantaneous) average  
13 restrictions. Further, since MCLs are conservatively adopted to protect for 70 years of consistent  
14 exposure, annual averages are adequately protective. *See* 22 C.C.R. §64432. The Regional  
15 Board should have considered and clearly specified appropriate long term averages. *See accord*  
16 *State Board Order WQO 2003-009* at 7 (July 16, 2003).

17 A long term average would also be consistent with water quality objectives contained in  
18 the Basin Plan. The EC objective for the Sacramento River requires that EC meet certain levels  
19 as a 50th or 90th percentile value based upon the previous 10 years of record. *See* Basin Plan,  
20 page III-7.00, Table III-3. For these reasons, the EC limit must be modified to specifically set the  
21 requirement as a percentile of a multi-year average to be consistent with the Basin Plan, or a 12-  
22 month average to be consistent with the intent of Title 22.

#### 23 **6. The Regional Board Failed to Follow the “Best Efforts” Approach.**

24 “The ‘best efforts’ approach involves (a) making a showing that the constituent is in need  
25 of control and (b) establishing limitations which the discharger can be expected to achieve using  
26 reasonable control efforts. Factors which should be included in the ‘best efforts’ analysis include  
27 (a) the water supply available to the discharger; (b) the past effluent quality of the discharger; (c)  
28

1 the effluent quality achieved by other similarly situated dischargers;<sup>21</sup> (d) the good faith efforts of  
2 the discharger to limit the discharge of the constituent; and (e) the measures necessary to achieve  
3 compliance.” SWRCB Order No. WQ 82-5 at 3 (May 20, 1982) *citing* SWRCB Order No. 81-5  
4 at 4-5. Had this analysis been performed, it would have been clear that the EC limit being  
5 imposed upon Hilmar was unreasonable and likely unachievable. Upon reopening the permit, the  
6 “best efforts” analysis must be undertaken.

7 **B. The State Board has Overruled the Regional Board’s Past Regulation of EC.**

8 In the matter of the State Board’s *Own Motion Review of the City of Woodland*, the State  
9 Board determined that when the Regional Board applies narrative objectives, the Regional Board  
10 must evaluate whether the specific numerical values used “are relevant and appropriate to the  
11 situation at hand.” *See* State Board Order No. WQO 2004-0010 (April 22, 2004). Applying an  
12 EC value based upon a narrative objective without further study as to its general applicability,  
13 was found by the State Board to be inappropriate. *Id.* at 7. The State Board found that “the true  
14 suitability of a given water depends on the specific conditions of use and on the management  
15 capability of the user.” *Id.* In the *Woodland* case, as is the case here, the specific uses of the  
16 waters in question were not investigated to determine an appropriately protective EC value given  
17 the actual and probable future uses of the waters in question.

18 The State Board made it clear that guidance numbers for EC (such as the MCLs or  
19 agricultural goal criteria) “cannot be interpreted as an absolute value.” *Id.* Rather, the Regional  
20 Board must determine whether site-specific conditions applicable to Hilmar’s discharge allow  
21 some relaxation in the value imposed. *Ibid.*; *see also* Water Code §13263(a). That was not done  
22 in this case when the Hilmar Permit was adopted, or when the Regional Board denied Hilmar’s  
23 previous request to raise the EC limit to 1300 µmhos/cm in 1995.<sup>22</sup>

24 \_\_\_\_\_  
25 <sup>21</sup> It should be noted that historically food processing wastewater was included in a Regional Board *waiver* so long as  
an operating and maintenance plan was approved. *See* Central Valley Regional Board Resolution No. 82-036,  
RWQCB\_21956-9.

26 <sup>22</sup> *See* Regional Board Memorandum Regarding Hilmar Cheese Company – Review of Technical Reports, from Jose  
27 Angel to Larry Beatty (May 15, 1995). In this Regional Board memo, as with the Woodland permit requirement for  
EC overturned by the State Board, the Regional Board improperly relied upon agricultural salinity goal values for EC  
28 without determining the local applicability of those values. *Id.* at 2.

1           When a regulation or other statutory interpretation by an administrative agency appears to  
2 be erroneous because of subsequent administrative or judicial decisions, it is the agency's duty to  
3 conform to the correct interpretation. *See Pacific Motor Transport Co. v. State Board of*  
4 *Equalization*, 28 Cal. App. 3d 230, 242 (1972). Otherwise, the agency would be allowed to  
5 function in a manner "wholly unintended by the law." *Id.* Furthermore, the State Board has  
6 specifically found that "the treatment of [State Board] decisions and orders as precedent helps  
7 provide greater consistency and predictability in agency decision making." *See In the Matter of*  
8 *Fishery Protection and Water Right Issues of Lagunitas Creek*, State Board Order No. WR 96-1  
9 at p. 22, n.11 (1996).

10  
11           **C.    The Regional Board Staff Unlawfully Amended Hilmar's Permit Without**  
12           **Providing Public Notice and Comment and a Public Hearing.**

13           After the Permit's adoption in 1997, the Regional Board improperly and unlawfully  
14 amended the Permit to require conditions different than the requirements set forth in the formally  
15 adopted Permit. For example, the Regional Board changed Hilmar's Monitoring and Reporting  
16 Program ("MRP") to alter the point of compliance determination. *See Exhibit F*, MRP No.97-206  
17 (as revised January 31, 2001); *see also supra* footnote 1. This change was made without a formal  
18 hearing on the changes and without compliance with state law requirements related to monitoring.  
19 *See e.g.*, Water Code §13263(a) ("regional board, after any necessary hearing, shall prescribe  
20 requirements"); §13267(b)(1) and §13225(c) (requiring burden and benefit analysis for any  
21 monitoring requirements). Such a modification was also an illegal delegation of Regional Board  
22 authority to staff. *See Water Code §13323(a)(2)*; *San Francisco Baykeeper v. Regional Water*  
23 *Quality Control Board, San Francisco Bay Region*, San Francisco Superior Court, Consolidated  
24 Case No.500527, Order Granting Petition for Writ of Mandate and Statement of Decision (Nov.  
25 14, 2003)("State law prohibits the Board from delegating its authority to issue or modify waste  
26 discharge requirements.") For this reason, Hilmar requests that the State Board rule that the  
27 Permit's point of compliance must be interpreted as adopted, including using the original point of  
28 compliance for both discharge specifications and groundwater limitations.

1           **D.     The Executive Officer Lacks Authority to Deny A Request For Modification**  
2           **Without First Bringing Such Request Before the Regional Board.**

3           Hilmar's requests for modification were made to the Regional Board. However, the  
4           Denial Letter denying Hilmar's modification requests was drafted by legal counsel for the  
5           Regional Board, at the direct request and expressly on the behalf of Mr. Thomas Pinkos, the  
6           Executive Officer of the Regional Board. Mr. Pinkos failed to even bring Hilmar's modification  
7           request before the Regional Board for consideration. According to Water Code section 13223, a  
8           regional board "may delegate any of its powers and duties vested in it by this division to its  
9           executive officer excepting only the following:

- 10                   (1) the promulgation of any regulation;
- 11                   (2) the issuance, modification, or revocation of any water quality control  
12                   plan, water quality objectives, or waste discharge requirement;
- 13                   (3) the issuance, modification, or revocation of any cease and desist order;
- 14                   (4) the holding of any hearing on water quality control plans; and
- 15                   (5) the application to the Attorney General for judicial enforcement but  
16                   excluding cases of specific delegation in a cease and desist order and  
17                   excluding the cases described in subdivision (c) of Section 13002 and  
18                   Sections 13304 and 13340.

17           *See* Water Code § 13223(a) (emphasis added). Delegation of activities related to modifications of  
18           waste discharge requirements to the Executive Officer clearly is not authorized. *See accord San*  
19           *Francisco BayKeeper, et al v. SFRWQCB*, Order Granting Petition for Writ of Mandate and  
20           Statement of Decision, San Francisco Superior Court, Consolidated Case No. 500527 (Nov.  
21           2003) (holding that the ability to make changes to a permit that will modify or enhance the  
22           substantive requirements of the permit cannot be delegated to the Executive Officer). So, not  
23           only does the Executive Officer lack the authority to modify waste discharge requirements, the  
24           Executive Officer lacks the authority to request that the Regional Board's legal counsel reply to a  
25           modification request without the Regional Board as a whole being notified of the request and  
26           holding the requisite public comment period and hearing in order to render an informed and  
27           formal decision on the request.

28           Furthermore, Water Code section 13263(e) allows the Regional Board to modify waste

1 discharge requirements “upon application by any affected person, or on its own motion,” and  
2 requires the Regional Board to periodically review all requirements. Section 13263, however,  
3 does not require the affected person to go through a full-blown new permitting process (*i.e.*,  
4 submission of a report of waste discharge) in order for modification of current waste discharge  
5 requirements to occur. For these reasons, denial of Hilmar’s modification request by legal  
6 counsel for the Regional Board was unlawful and should be invalidated.

7 **E. The Waters Boards Have The Authority to Retroactively Modify Permits.**

8 Hilmar chose not to challenge the Permit when originally adopted by the Regional Board  
9 in 1997 because Hilmar thought that it could meet the EC discharge specification based on the  
10 results of the pilot studies performed. Further, Hilmar thought that if it were not able to comply  
11 with the requirements despite reasonable (and, in this case, extraordinary) efforts, the Regional  
12 Board would work with Hilmar to arrive at a reasonable and achievable discharge specification  
13 rather than penalizing Hilmar.<sup>23</sup> Fundamental fairness requires that a permit that was unlawful  
14 when issued, or which has subsequently been proven to be contrary to law or unachievable based  
15 on new information, be modified retroactively to conform to the law so as to avoid enforcement  
16 of otherwise unlawful and unachievable permit conditions.

17 The State Board has previously ordered modifications to existing permits that are to be  
18 given retroactive effect, similar to the retroactive modification that Hilmar seeks herein. For  
19 example, in State Board Order WQO 2004-0010, the State Board ordered that the EC, fluoride,  
20 and boron limits be deleted from the permit at issue as of the effective date of that permit. The  
21 State Board concluded inclusion of such limits was premature until the discharger completed an  
22 appropriate site-specific salinity study and salinity source control program. The State Board did  
23 not remand the permit to the Regional Board to remove the EC limit; the State Board ordered the  
24 limits deleted itself. *See* State Water Resources Control Board Order WQO 2004-0010, *In the*  
25 *Matter of the Own Motion Review of City of Woodland Waste Discharge Requirements Order No.*  
26 *R5-2003-0031 and Cease and Desist Order No R5-2003-0032* (June 17, 2004).

27  
28 <sup>23</sup> *See accord* Exhibit E, Letter from former Executive Officer Gary Carlton promising revised waste discharge requirements and schedule for compliance in early 2002.

1 Other regional boards have retroactively amended permit provisions. In *Revision of Waste*  
2 *Discharge Requirements for County Sanitation Districts of Los Angeles County – Saugus and*  
3 *Valencia Water Reclamation Plants* (Order Nos. R4-2005-0031 and R4-2005-0032 amending  
4 previous Order Nos. R4-2003-0143 and R4-2003-0145) (May 5, 2005), the Los Angeles Regional  
5 Board amended the effluent limitations for chloride in the existing NPDES permits retroactively.

6 Each of these examples indicates that the Regional Board and State Board have the  
7 inherent authority to retroactively modify Hilmar's Permit, including the EC discharge  
8 specification, bypass provision, and flow limits, back to at least January 27, 2002, if not the  
9 effective date of the Permit. As fundamental fairness requires that a permit that was unlawful  
10 when adopted be modified to conform to the law, the State Board should retroactively modify the  
11 provisions of Hilmar's Permit as requested herein.

12 **F. If Not Retroactively Modified, the State Board Should, On its Own Motion,**  
13 **Retroactively Stay the Applicability of the Challenged Provisions.**

14 The State Board has issued precedential order retroactively staying challenged permit  
15 provisions. In State Board Order WQO 2002-0015, *In the Matter of the Review on Own Motion*  
16 *of Waste Discharge Requirements Order No. 5-01-044 For Vacaville's Easterly Wastewater*  
17 *Treatment Plant* (Oct. 3, 2002), the State Board stayed five provisions of Vacaville's permit  
18 (effluent limitation for copper, interim effluent limitation for chloroform, receiving water  
19 limitations for temperature and ammonia, and a groundwater limitation), some of which Vacaville  
20 had admitted to violating, from the effective date of the permit (March 2001) until the Regional  
21 Board acted on the remand. Thus, the State Board Order (dated October 2002) stayed permit  
22 requirements that Vacaville had admitted violating back to the effective date of the Permit, thus  
23 precluding Vacaville from being held liable for violations of the stayed provisions.

24 The State Board took similar action with the City of Turlock's waste discharge  
25 requirements, and stayed various provisions of Turlock's permit from the effective date of the  
26 permit (May 2001) until the Regional Board acted on the remand. Thus, the State Board Order  
27 dated October 2002 stayed permit requirements that had been in effect since May 2001 back to  
28 the effective date of the Permit, thus precluding the City of Turlock from being held liable for

1 violations of the stayed provisions. *See* State Board Order WQO 2002-0016, *In the Matter of the*  
2 *Review on Own Motion The City of Turlock, Municipal Services Department, For Review of*  
3 *Waste Discharge Requirements Order No. 5-01-122 and Cease and Desist Order No. 5-01-123*  
4 (Oct. 3, 2002).

5 **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL**  
6 **BOARD AND TO THE DISCHARGER, IF NOT THE PETITIONER:**

7 A true and correct copy of this Petition was mailed via First Class Mail on September 2,  
8 2005 to the Regional Board at the following address:

9 Mr. Thomas R. Pinkos, Executive Officer  
10 California Regional Water Quality Control Board  
11 Central Valley Region  
12 11020 Sun Center Drive, #200  
13 Rancho Cordova, California 95670-6114

14 The Petitioners in this case is the discharger and the recipient of the Denial Letter from the  
15 Regional Board denying Petitioners' request. Therefore, a copy of this Petition was not  
16 separately sent to the discharger.

17 **9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED**  
18 **IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD:**

19 Via a letter dated June 17, 2005, and a supplemental letter dated July 13, 2005, Hilmar  
20 raised the substantive issues and objections contained herein. The Regional Board's Denial  
21 Letter, however, was issued by counsel for the Regional Board without any public notice and/or  
22 period for public comment. For this reason, all attempts to raise its issues and/or any other  
23 objections were futile. Hilmar had no opportunity to formally raise the substantive issues,  
24 objections, or any other points contained in this Petition to the Regional Board members  
25 themselves prior to Regional Board counsel's issuance of the Denial Letter rejecting Hilmar's  
26 requests without a hearing on the merits of these requests.  
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**10. PETITIONERS' REQUEST FOR EVIDENTIARY HEARING:**

For the reasons set forth above, Hilmar requests that the State Board conduct a full evidentiary hearing to consider this Petition along with supporting evidence in accordance with Title 23, California Code of Regulations, section 2052.

Respectfully Submitted,

DATED: September 2, 2005

STEEFEL, LEVITT & WEISS  
A Professional Corporation

By: *Craig Bloomgarden*  
CRAIG BLOOMGARDEN

DOWNEY BRAND LLP

By: *Melissa Thorme*  
MELISSA THORME

Attorneys for Petitioners  
HILMAR CHEESE COMPANY, INC. AND  
HILMAR WHEY PROTEIN, INC.

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DOWNEY BRAND LLP

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**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 555 Capitol Mall, Tenth Floor, Sacramento, California 95814-4686. On **September 2, 2005**, I served the within document(s):

**PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW; and REQUEST FOR EVIDENTIARY HEARING.**

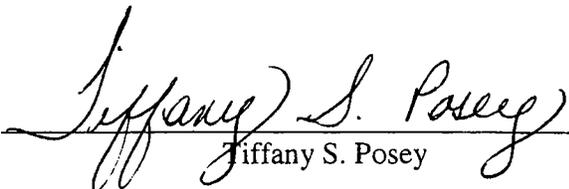
- BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- BY PERSONAL DELIVERY:** by causing personal delivery by \_\_\_\_\_ of the document(s) listed above to the person(s) at the address(es) set forth below.

Mr. Thomas Pinkos  
Executive Officer  
California Regional Water Quality  
Control Board  
Central Valley Region  
11020 Sun Center Drive, #200  
Rancho Cordova, CA 95670-6114

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 2, 2005**, at Sacramento, California.

  
\_\_\_\_\_  
Tiffany S. Posey

Exh. A



# State Water Resources Control Board



Alan C. Lloyd, Ph.D.  
Agency Secretary

Office of Chief Counsel  
1001 I Street, 22<sup>nd</sup> Floor, Sacramento, California 95814  
P.O. Box 100, Sacramento, California 95812-0100  
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>

Arnold Schwarzenegger  
Governor

August, 4, 2005

Craig Bloomgarden, Esq.  
Steefel, Levitt & Weiss, P.C.  
550 South Hope Street, Suite 2350  
Los Angeles, CA 90071-2650

Dear Mr. Bloomgarden:

## HILMAR CHEESE COMPANY, REQUEST FOR ACTION TO MODIFY WASTE DISCHARGE REQUIREMENTS, ORDER NO. 97-206

Your letter dated June 17, 2005, requests that the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) modify Hilmar Cheese Company's (Hilmar) Waste Discharge Requirements (WDRs) Order No. 97-206 (WDRs or Order) retroactively to at least January 2002 as well as prospectively. Your letter dated July 13, 2005, supplements your June 17 request. Mr. Thomas Pinkos, the Board's Executive Officer, asked me to respond to your letter on his behalf. I am treating these requests as a single request for purposes of my response.

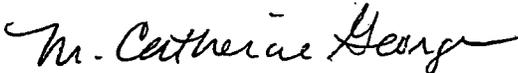
The primary basis of your request appears to be the contention that there are flaws in the existing WDRs Order No. 97-206 and the underlying Water Quality Control Plan for the San Joaquin and Sacramento Rivers (Basin Plan) that justify modification of WDRs Order No. 97-206. You state: "Hilmar has discovered that many of the Permit's requirements and the Basin Plan provisions upon which these requirements were based are inconsistent with recent court and State Board rulings and with the requirements of state law and regulations." June 17, 2005, letter at p. 1.

Your request for retroactive modification is denied for the reasons set forth below. The Basin Plan is the valid and controlling water quality control plan establishing beneficial uses, water quality objectives and implementation plans for achieving the water quality objectives for surface waters and ground waters within the Sacramento and San Joaquin River Basins. WDRs Order No. 97-206 was adopted on September 19, 1997, in accordance with the Basin Plan and also with Hilmar's consent. I note that Hilmar had ample opportunity prior to adoption of WDRs Order No. 97-206 to demonstrate that a higher Electrical Conductivity (EC) limit would be protective of groundwater. Hilmar did not do so. Instead, as you acknowledge in your letters, Hilmar proposed to meet the Order's EC limit by March 1999. Hilmar chose not to contest the Order at the time it was adopted and chose not to challenge adoption of the Order, or any requirement therein, within thirty days as required by California Water Code section 13320(a). The time to challenge the permit's terms ran nearly eight years ago.

*California Environmental Protection Agency*

With regard to Hilmar's request for prospective modification, I am aware that Central Valley Water Board staff is currently drafting revised WDRs for the Hilmar facility based upon Hilmar's most recent report of waste discharge (RWD), submitted in late 2004. When revised requirements are adopted, they will replace WDRs Order No. 97-206 and will apply prospectively to regulate discharges, including flow limits, at Hilmar's facility. Staff plans to discuss draft requirements with Hilmar in the near future. To the extent your June 17 and July 13 letters seek to modify the substance of that RWD, you should inform Staff immediately as to the manner in which Hilmar's RWD has changed either by submitting a revised RWD or by submitting a new RWD that replaces the existing RWD.

Sincerely,



M. Catherine George  
Senior Staff Counsel

cc: Mr. Thomas R. Pinkos [via email only]  
Executive Officer  
Central Valley Regional Water  
Quality Control Board  
11020 Sun Center Drive, Suite 200  
Rancho Cordova, CA 95670-6114

Mr. Loren J. Harlow [via email only]  
Assistant Executive Officer  
Central Valley Regional Water Quality  
Control Board, Fresno Office  
1685 E Street  
Fresno, CA 93706-2020

Tracy Winsor, Esq. [via email only]  
[Tracy.Winsor@doj.ca.gov](mailto:Tracy.Winsor@doj.ca.gov)  
Office of the Attorney General  
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Russell Hildreth Esq. [via email only]  
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Sacramento, CA 95814

Exh. B

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

ORDER NO. 97-206

WASTE DISCHARGE REQUIREMENTS  
FOR  
HILMAR CHEESE COMPANY, INC.  
HILMAR WHEY, INC.  
HILMAR CHEESE COMPANY PROPERTIES PARTNERSHIP  
ALVIN A. AND DEVONA WICKSTROM  
KATHY AND DELTON NYMAN dba DELTON NYMAN'S FARM  
AND  
JOSE G. AND MARIE C. SILVEIRA  
MERCED COUNTY

The California Regional Water Quality Control Board, Central Valley Region, (hereafter Board) finds that:

1. Hilmar Cheese Company Properties Partnership (HCCPP) submitted a Report of Waste Discharge, dated 11 June 1997, and a site evaluation report, dated June 1997, in support of a change in the character of its waste discharge, an increase in discharge flow, and an expansion of the reclamation area used by its cheese processing facility. The proposed discharge is to land owned by HCCPP (APN 45-140-66), Delton Nyman Farms (APN 45-140-41), and Jose G. and Marie C. Silveira (APN 45-140-35), but operated by Hilmar Cheese Company, Inc. (HCC), and Hilmar Whey, Inc. (HWI); and to land owned by Alvin and Devona A. Wickstrom (APN 45-140-30), but operated by Delton Nyman Farms. HCCPP, HCC, HWI, Kathy and Delton Nyman (dba Delton Nyman's Farm); Jose G. and Marie C. Silveira; and Alvin and Devona Wickstrom are hereafter jointly referred to as Discharger.
2. HCCPP owns a cheese manufacturing facility just northeast of the community of Hilmar. The facility is operated by HCC and HWI and is divided into four processing plants (the protein plant, lactose plant, plant 1, and plant 2). Wastewater is generated from cleanup operations and spills during cheese processing operations. The lactose plant adds lactose by-product (a.k.a. "cow water") and wastewater from equipment cooling operations to the waste stream.
3. HCCPP, HCC, and HWI currently discharge about 0.700 million gallons per day (mgd) of untreated cheese processing wastes to a 102-acre reclamation site adjacent to the facility. HCCPP owns about 6 acres of the 102-acre site. The rest is part of Delton Nyman's Farm (about 20 acres) or owned by Alvin A. and Devona Wickstrom (76 acres). Current on-site discharges include wastes from cleaning operations and whey processing byproducts. Based on monthly average effluent data collected by HCC from October 1994 to April 1997, the wastes discharged have relatively high average organic and inorganic constituent concentrations (3100 mg/l BOD, 2900 mg/l total dissolved solids "TDS", 1900  $\mu$ mhos/cm specific electrical conductance at 250C "EC", and 170 mg/l chlorides). HCCPP, HCC, and

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

-2-

HWI discharge about 1,000 gallons per day of domestic sewage to an on-site septic tank/leachfield system approved and regulated by Merced County and truck about 1,000 gpd of caustic wastewater to the City of Merced Wastewater Treatment Facility (WWTF). They also recover about 4,000 gpd of an acidic byproduct which they use to amend alkaline soils within the County. The discharge from the City's WWTF is governed by Waste Discharge Requirements Order No. 94-167 and Cease and Desist Order No. 97-018. The use of acid byproduct is not regulated by the Board.

4. Waste Discharge Requirements Order No. 94-276, adopted by the Board on 28 September 1994, prescribes requirements for HCCPP, HCC, HWI, and Kathy and Delton Nyman (dba Delton Nyman's Farm) for a discharge of wastewater from the cheese processing operations to the 102-acre site described in Finding No. 3, above.
5. Order No. 94-276 is neither adequate to describe proposed operations nor consistent with current plans and policies of the Board.
6. HCCPP proposes to increase the permitted monthly average waste discharge flow from 0.600 mgd to a monthly average of 0.750 mgd, pretreat the wastewater to reduce the inorganic and organic constituent concentrations in the wastewater, and add 35.8 acres of farm land owned by Jose G. and Marie C. Silveira and operated by HCC and HWI to the existing reclamation acreage. The proposed land addition will bring the total area available for reclamation to 137.8 acres (hereafter "reclamation area"). The monthly average wastewater flows discharged to the 102-acre site ranged from 0.685 to 0.724 mgd, from January to April 1997.
7. The facility and reclamation areas are in Section 10, T6S, R10E, MDB&M, with surface water drainage to a Turlock Irrigation District (TID) canal (Lateral 6), which is part of a system of irrigation and drainage channels with general drainage to the San Joaquin River, as shown in Attachment A, which is attached hereto and part of this Order by reference. The site lies within the Turlock hydrologic area (No. 535.50), as depicted on interagency hydrologic maps prepared by the Department of Water Resources in August 1986.
8. The area surrounding the facility is used extensively for agriculture. At least six dairies are within a mile of the reclamation areas.
9. Currently, the 102-acres are divided in half for operational purposes. From spring to fall, the half that was fallow over the winter is planted with corn. The area that is cropped is typically irrigated with water from the Turlock Irrigation District (TID), while the area that is fallow is irrigated with the wastewater. Both areas, however, are irrigated via risers and furrows. The fallow area is divided into narrow parallel checks, each of which receives wastewater for two consecutive days.

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

10. Soils in the reclamation area are classified by the U.S. Department of Agriculture Soil Conservation Service (SCS) as Delhi sands and Hilmar loamy sands with rapid permeabilities and good infiltration capacity.
11. From 1995 to August 1996, the average BOD<sub>5</sub> loading rate to the reclamation area was about 140 lbs/acre/day. While the BOD<sub>5</sub> loading rate is less than 600 lbs/acre/day maximum loading rate recommended by the United States Environmental Protection Agency (EPA) for infiltration-percolation, EPA's maximum recommended rate is based on maintaining aerobic soil conditions and is usually applicable to sites that are irrigated for only a few weeks each year. The current BOD<sub>5</sub> loading rate has exceeded the ability of the soil to filter BOD<sub>5</sub>, and resulted in degradation of groundwater with organics. Organic material measured as BOD<sub>5</sub> has been detected in groundwater in the reclamation area at a concentration of approximately 45 mg/l, as shown by groundwater data submitted by the Discharger.
12. HCCPP proposes to continue using the current cropping and disposal practices, pretreat the wastewater using patented V-SEP® vibrating membranes, and discharge the treated wastewater (a.k.a. "permeate") to the 137.8-acre reclamation area. The brine (a.k.a. "retenate") from the membranes will be collected and used as cattle feed. HCCPP proposes to construct the treatment system in two phases. Phase I will consist of the installation of two 350,000-gallon flow equalization tanks and seven V-SEP® membrane filtration units. Phase II will double the capacity of the equalization tanks and filtration systems. The filtration units will ordinarily be operated in series. Phase I and Phase II will be fully operational in March 1998 and March 1999, respectively. The costs for implementing the project are estimated to be about \$6,000,000. Table 1, below, shows the projected wastewater characteristics from each phase:

<u>Constituent</u>	<u>Units</u>	<u>Phase I Wastewater Quality</u>	<u>Phase I Wastewater Quality</u>	<u>Phase II Wastewater Quality</u>
BOD	mg/l	3100	1630	160
TDS	mg/l	2900	1700	500
IDS <sup>1</sup>	mg/l	1200	738	276
EC	µmhos/cm	1900	1390	880

WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

<u>Constituent</u>	<u>Units</u>	<u>Phase I Wastewater Quality</u>	<u>Phase I Wastewater Quality</u>	<u>Phase II Wastewater Quality</u>
Nitrate (as NO <sub>3</sub> )	mg/l	174	167	160
TKN <sup>2</sup> (as Nitrogen)	mg/l	70	40	10

<sup>1</sup> Inorganic Dissolved Solids

<sup>2</sup> Total Kjeldahl Nitrogen

13. The *Water Quality Control Plan for the Sacramento River Basin and San Joaquin River Basin, Third Edition*, (hereafter Basin Plan) designates beneficial uses, contains water quality objectives (WQOs) and contains implementation plans and policies, for all waters of the Basins. These requirements implement the Basin Plan.
14. The beneficial uses of the San Joaquin River are municipal and domestic supply, agricultural supply, industrial process supply, water contact recreation, non-contact water recreation, warm and cold freshwater habitat, wildlife habitat, migration of aquatic organisms; and spawning, reproduction, and/or early development.
15. The designated beneficial uses of the groundwater in the San Joaquin River Basin include municipal and domestic supply, industrial service supply, industrial process supply, and agricultural supply.
16. The Basin Plan states that ground waters designated for use as municipal or domestic supply shall not contain concentrations of chemical constituents in excess of the MCLs specified in Title 22.
17. The Basin Plan also requires that waters designated for use as agricultural supply shall not contain chemical constituents in amounts that adversely affect that use. The United States Department of Food and Agriculture has published guidelines for irrigation waters which indicate that irrigation waters with ECs and chloride concentrations of up to 1000 µmhos/cm and 170 mg/l, respectively, are of good to excellent quality and suitable for irrigation of most plants under most conditions.
18. The "Sources of Drinking Water" policy, which is part of the Basin Plan, provides that all groundwater is considered to be suitable, or potentially suitable, for municipal or domestic supply, with certain exceptions. One of those exceptions is for water where the TDS exceeds 3000 mg/l (EC of 5000 µmhos/cm) and it is not reasonably expected to supply a public water system.

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

-5-

19. Ten shallow on-site groundwater monitoring wells (MW-1, MW-2, MW-3B, and MW-4 to MW-10) are installed in the vicinity of the existing reclamation area. Groundwater data from these wells show that shallow groundwater is 5 to 10 feet below ground surface (bgs). The data also show nitrate, EC, and chloride concentrations of 1 to 420 mg/l, 150 to 4130  $\mu$ mhos/cm, and 9 to 860 mg/l, respectively. Title 22, California Code of Regulations (CCR), Division 4, Chapter 15 (hereafter Title 22) sets the Maximum Contaminant Level (MCL) for nitrate at 45 mg/l and the "recommended" MCLs for EC and chlorides at 900  $\mu$ mhos/cm and 250 mg/l, respectively. It also sets "upper" MCLs for EC and chlorides at 1600  $\mu$ mhos/cm and 500 mg/l, respectively.
20. HCCPP previously monitored five deeper irrigation groundwater wells within one mile of the existing reclamation area. Three of the deeper wells (B, C, and E) are owned by TID; the other two wells (A and D) are privately owned. Data from these deeper wells indicate that the deeper groundwater is about 80 feet bgs and of good quality (EC of 300 to 800  $\mu$ mhos/cm), except for nitrates, which are also found at concentrations exceeding the state MCL.
21. HCCPP submitted a report dated 22 December 1995 and entitled "*Characterization of Subsurface and Groundwater Conditions.*" It also submitted a report dated 30 June 1997 and entitled "*Supplemental Surface and Groundwater Analysis, Monitoring Well Network Proposal*" (hereafter "supplemental groundwater report"). Both reports address the impact that on-site disposal practices have had on areal groundwater, but the supplemental groundwater report establishes that there is a direct correlation between the discharge of wastewater from the facility and the increases in EC concentrations in areal groundwater. Additionally, staff's review of the 22 December 1995 report indicates that HCCPP's disposal operations have created identifiable salt plumes in shallow groundwater even though the area-wide agricultural activities have also contributed to areal groundwater degradation, as evidenced by the data submitted by HCCPP and collected by the Board. Despite this, and based on Finding Nos. 19 and 20, above, shallow and deeper groundwater in the vicinity of the reclamation area is suitable and potentially suitable for municipal and domestic supply. The supplemental groundwater report proposes the installation of ten additional groundwater monitoring wells to help characterize background groundwater quality, possible upgradient and downgradient contributors to groundwater degradation, and the extent of degradation caused by historical discharges.
22. Based on the supplemental report's findings and staff review of groundwater data submitted by the Discharger, it is reasonable to conclude that current land application practices, and specifically the discharge of untreated or partially treated wastes from the facility to fallow fields, do not prevent groundwater degradation with organic and inorganic constituents (e.g., BOD and TDS), even though the practices have been effective for nitrogen control.

WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

-6-

23. The projected quality of the treated wastewater indicates that it should be suitable for beneficial use on cropped acreage. The continued exclusive use of fresh water (e.g., water from TID) for irrigation of the cropped areas when suitable reclaimed water is available could constitute an unreasonable waste of water resources, and would be inconsistent with the state and federal policies that promote water reclamation.
24. Salinity effluent limits based on best available technology and revised cropping and irrigation practices are necessary to assure compliance with the Basin Plan and prevent further degradation of water resources. The proposed wells are necessary to determine the vertical and lateral extent of groundwater degradation and monitoring compliance.
25. *Consolidated Regulations for Treatment, Storage, Processing, or Disposal of Solid Waste*, as set forth in Title 27, CCR, Division 2, Subdivision 1, Section 20005, et seq., (hereafter Title 27) states that a discharge of wastewater to land can be exempted from Title 27 [27 CCR 20090 (b)] requirements provided the following are met:
  - a. The Board issues waste discharge requirements,
  - b. The discharge complies with the Basin Plan, and
  - c. The wastewater does not need to be managed according Title 22, CCR, Division 4.5, Chapter 11, as a hazardous waste
26. This proposed discharge of wastewater to land is exempt from Title 27 requirements because the Board is issuing waste discharge requirements; the discharge is complying with Basin Plan by implementation of best available technology in combination with best management practices, and the discharge does not need to be managed as a hazardous waste pursuant to 22 CCR.
27. The permitted discharge is consistent with the antidegradation provisions of State Water Resources Control Board Resolution 68-16. This Order provides for an increase in the volume of wastewater discharged, but within two years will result in a net decrease in the mass of pollutants discharged. Provided the Order is complied with, the project's increased discharge will not cause significant impacts on groundwater and surface waters and depletion of limited groundwater resources. The increase in the discharge accommodates economic expansion in the area and benefits the people of the State in the regard.
28. On 26 September 1997, the Board adopted a Mitigated Negative Declaration for this project in accordance with the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000, et seq.) and the State CEQA Guidelines.

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

-7-

29. The Mitigated Negative Declaration identifies several impacts on groundwater and air quality that could be potentially significant unless mitigation measures are incorporated. These Potentially Significant Unless Mitigation Incorporated Impacts include potential changes in the quantity of groundwater through direct additions resulting from application of wastewater to fallow areas, potential changes in the direction of groundwater flow, also resulting from groundwater additions, and potential impacts to existing groundwater quality due to discharges of untreated or partially treated wastewater to fallow areas. They also include the potential production of objectionable odors caused by the over application of untreated or partially treated waste to the reclamation areas.
30. The following mitigation measures are identified in the Mitigated Negative Declaration and are required as conditions of approval of the discharge through Discharge Prohibition Nos. A.3-A.5, Discharge Specification Nos. B.2-B.6, Solids Disposal Specification No. C.1, the Groundwater Limitation, and Provision Nos. E.7-E.9. Those mitigation measures that apply to the current discharge as well as the expansion require significant time and expenditures to complete, and consequently include implementation time schedules. Monitoring of mitigation measures as required by CEQA is implemented through Provision No. E.13, which incorporates an extensive Monitoring and Reporting Program by reference. Compliance with this Order and specifically the following mitigation measures will reduce Potentially Significant Unless Mitigation Incorporated Impacts to Less Than Significant Impacts:

**Mitigation Measures**

The Discharger shall be required to:

- Install the proposed treatment system according to a time schedule specified herein,
- Enlarge the reclamation area,
- Prevent the bypass or overflow of untreated or partially treated waste,
- Prevent the discharge of wastes classified as 'hazardous' or 'designated',
- Prevent, effective 15 March 1999, discharge of wastes exclusively to fallow areas,
- Maintain, effective 15 March 1999, the EC of the discharge at or below 900  $\mu\text{mhos/cm}$ ,
- Contain objectionable odors originating at the facility within the limits of the wastewater treatment and reclamation areas,
- Limit waste application rates to the reclamation areas so that they do not exceed the environmental conditions of the site,
- Limit the application of wastewater to the reclamation areas to reasonable rates considering crops, soil, climate, and irrigation management systems,
- Limit the nutrient loading of the reclamation area, including the nutritive value of organic and chemical fertilizers and of reclaimed water, to the crops' demand,
- Dispose of non-recycled screenings, sludges, and other solids removed from liquid wastes shall be disposed of in a manner that is consistent with Title 27 and approved by the Executive Officer,

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

-8-

- Manage the discharge to preclude underlying groundwater from containing waste constituents in concentrations statistically greater than background water quality,
- Implement a Board approved revised reclamation management plan that includes: (a) a water balance based on the reclamation area's infiltration and percolation capacity, crop evapotranspiration needs, and total annual precipitation with a return frequency of 25 years (distributed monthly according rainfall patterns for the area); and (b) a crop nutrient balance based on the waste's major ions and the crops' projected ability to uptake ions, and
- Install, according to a specific time schedule, new groundwater monitoring wells.

To ensure implementation and compliance with the above mitigation measures, the Discharger will be required to monitor the quantity and quality of its effluent, the quality and flow direction of underlying groundwater, and its reclamation areas for organic loading and the presence of objectionable odors.

31. The Board has notified the Discharger and interested agencies and persons of its intent to prescribe waste discharge requirements for this discharge and has provided them with an opportunity for a public hearing and an opportunity to submit their written views and recommendations.
32. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.

**IT IS HEREBY ORDERED** that Order No. 94-276 is rescinded and that Hilmar Cheese Properties Partnership, Hilmar Cheese Company, Inc., Hilmar Whey, Inc., Alvin and Devona Wickstrom; Jose G. and Marie C. Silveira; and Kathy and Delton Nyman; their agents, successors, and assigns, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following:

**A. Discharge Prohibitions:**

1. Discharge of wastes to surface waters or surface water drainage courses is prohibited.
2. Discharge of domestic wastes with plant process water is prohibited.
3. Bypass or overflow of untreated or partially treated waste is prohibited.
4. Discharge of waste classified as 'hazardous,' as defined in Section 2521(a) of Title 23, CCR, Section 2510, et seq., (hereinafter Chapter 15), or 'designated,' as defined in Section 13173 of the California Water Code, is prohibited.

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

-9-

5. **Effective 15 March 1999, discharge of wastes exclusively to fallow areas is prohibited.**

**B. Discharge Specifications:**

1. The monthly average daily discharge shall not exceed 0.750 million gallons.
2. **Effective 15 March 1999, the EC of the discharge shall not exceed 900  $\mu$ mhos/cm.**
3. Objectionable odors originating at this facility shall not be perceivable beyond the limits of the wastewater treatment and reclamation area.
4. Waste application rates at the reclamation site shall not exceed the environmental conditions at the site.
5. Application of wastewater to the reclamation area shall be at reasonable rates considering crops, soil, climate, and irrigation management system. The nutrient loading of the reclamation area, including the nutritive value of organic and chemical fertilizers and of reclaimed water, shall not exceed the crop demand.
6. The discharge shall remain within the reclamation area at all times.
7. Areas irrigated with reclaimed water shall be managed to prevent breeding of mosquitos. More specifically,
  - a. Tail water must be returned and all applied irrigation water must infiltrate completely within a 48-hour period.
  - b. Ditches not serving as wildlife habitat should be maintained free of emergent, marginal, and floating vegetation.
  - c. Low-pressure and unpressurized pipelines and ditches accessible to mosquitos shall not be used to store reclaimed water.

**C. Solids Disposal Specifications:**

1. Collected screenings, sludges, and other solids removed from liquid wastes shall be disposed of in a manner that is consistent with Title 27 and approved by the Executive Officer.

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

-10-

2. Solids applied to land shall be disced and incorporated into the soil within 24 hours of application.
3. Any proposed change in sludge use or disposal practice shall be reported to the Executive Officer at least 90 days in advance of the change.

**D. Groundwater Limitations:**

The discharge, in combination with other sources, shall not cause underlying groundwater to contain waste constituents in concentrations statistically greater than background water quality.

**E. Provisions:**

1. The Discharger shall comply with Monitoring and Reporting Program No. 97-206, which is part of this Order, and any revisions thereto as ordered by the Executive Officer.
2. The Discharger shall comply with the "Standard Provisions and Reporting Requirements for Waste Discharge Requirements," dated 1 March 1991, which are attached hereto and by reference a part of this Order. This attachment and its individual paragraphs are commonly referenced as "Standard Provision(s)."
3. In the event of any change in control or ownership of land or waste discharge facilities described herein, the Discharger shall notify the succeeding owner or operator of the existence of this Order by letter, a copy of which shall be immediately forwarded to this office.
4. To assume operation under this Order, the succeeding owner or operator must apply in writing to the Executive Officer requesting transfer of the Order. The request must contain the requesting entity's full legal name, the State of incorporation if a corporation, the name and address and telephone number of the persons responsible for contact with the Board, and a statement. The statement shall comply with the signatory paragraph of Standard Provision B.3 and state that the new owner or operator assumes full responsibility for compliance with this Order. Failure to submit the request shall be considered a discharge without requirements, a violation of the California Water Code. Transfer shall be approved or disapproved by the Executive Officer.

**WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY**

-11-

5. The Discharger must comply with all conditions of this Order, including timely submittal of technical and monitoring reports as directed by the Executive Officer. Violations may result in enforcement action, including Regional Board or court orders requiring corrective action or imposing civil monetary liability, or in revision or rescission of this Order.
6. For purposes of day-to-day communication regarding compliance with terms of this Order, the Board will communicate directly with HCCPP. Correspondence and notifications from the Board to HCCPP and vice versa shall be as if to or from all parties identified in Finding No. 1 as Discharger, except in regards to changes in control or ownership as described in Provision E.3, above.
7. Compliance with the Discharge Specification No. B.2 shall be achieved according to the following time schedule:

<u>Task</u>	<u>Compliance Date</u>	<u>Report Due</u>
a. Begin Construction of Phase I	15 Oct 97	30 Oct 97
b. Complete Construction of Phase I	15 Feb 98	30 Feb 98
c. Begin Construction of Phase II	15 Feb 98	30 Feb 98
d. Complete Construction of Phase II	15 Mar 99	30 Mar 99
e. Submit engineering report certifying that pretreatment system is completed as designed for a monthly average flow of 0.750 gpd		30 Mar 99

8. To demonstrate compliance with Discharge Specification No. B.5, the Discharger shall submit by 15 January 1998 an engineering report in the form of a revised reclamation management plan that includes: (a) a water balance based on the reclamation area's infiltration and percolation capacity, crop evapotranspiration needs, and total annual precipitation with a return frequency of 25 years (distributed monthly according rainfall patterns for the area); and (b) a crop nutrient balance based on the waste's major ions and the crops' projected ability to uptake ions. The water balance shall also show the amounts of wastewater and fresh water applied to cropped areas, and the plan shall also include a time schedule for implementation by 15 February 1998.

WASTE DISCHARGE REQUIREMENTS  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

-12-

9. By 15 January 1998, the Discharger shall complete installation of the new groundwater monitoring wells specified in its "*Supplemental Surface and Groundwater Analysis, Monitoring Well Network Proposal.*" The new wells, coupled with the existing wells, shall be used to develop a groundwater monitoring program for this site (see Groundwater Monitoring In Monitoring and Reporting Program attached to this Order).
10. All engineering and design reports shall be prepared by a California registered civil engineer experienced in the design of wastewater treatment and disposal facilities and are subject to the prior approval of the Executive Officer.
11. A copy of this Order shall be kept at the discharge facility for reference by operating personnel with responsibility for wastewater discharge operations. These operating personnel shall be familiar with its contents.
12. The Board will review this Order periodically and will revise requirements when necessary.

I, GARY M. CARLTON, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Valley Region, on 19 September 1997.

  
GARY M. CARLTON, Executive Officer

JLA/WDH:9/19/97

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

REVISED MONITORING AND REPORTING PROGRAM NO. 97-206

FOR  
HILMAR CHEESE COMPANY, INC.  
HILMAR WHEY, INC.  
HILMAR CHEESE COMPANY PROPERTIES PARTNERSHIP  
ALVIN A. AND DEVONA WICKSTROM  
KATHY AND DELTON NYMAN dba DELTON NYMAN'S FARM  
AND  
JOSE G. AND MARIE C. SILVEIRA  
MERCED COUNTY

Specific sample station locations shall be established with concurrence of the Board's staff, and a description of the stations shall be submitted to the Board and attached to this Program.

**EFFLUENT MONITORING**

Effluent samples shall be collected from the last connection just prior to discharge to the collection sump and reclamation area. Effluent samples should be representative of the volume and nature of the discharge. By 15 March 1998, the Discharger shall establish a revised sampling station to collect representative effluent samples from the completed V-SEP® pretreatment system. This revised sampling location shall be down stream of the last membrane unit and just prior to discharge to the collection sump and reclamation area. Time of collection of a grab sample shall be recorded. Effluent monitoring shall be effective throughout the processing season include at least the following:

<u>Constituents</u>	<u>Units</u>	<u>Type of Sample</u>	<u>Sampling Frequency</u>
Flow	mgd	Metered	Continuous
20 °C BOD <sub>5</sub>	mg/l	Grab	Weekly
Nitrate	mg/l	Grab	Weekly
Kjeldahl Nitrogen	mg/l	Grab	Weekly
Specific Electrical Conductance @ 25 °C	µmhos/cm	Field	Daily
COD	mg/l	Grab	Weekly
<u>General Minerals</u> <sup>1</sup>	mg/l	Grab	Weekly

<sup>1</sup> General Minerals Analyte List

Symbol	Parameter	Symbol	Parameter	Symbol	Parameter
Alk	Alkalinity (as CaCO <sub>3</sub> )	—	Hardness (as CaCO <sub>3</sub> )	K	Potassium
HCO <sub>3</sub>	Bicarbonate*	OH	Hydroxide (as CaCO <sub>3</sub> )	Na	Sodium
CO <sub>3</sub>	Carbonate (as CaCO <sub>3</sub> )	Mg	Magnesium	TDS	Total Dissolved Solids
Cl	Chloride	Mn	Manganese	IDS	Inorganic Dissolved Solids
EC	Conductivity [µmhos/cm]	pH	pH (std units)		

\* Must state whether bicarbonate is reported as either calcium carbonate (CaCO<sub>3</sub>), or bicarbonate (HCO<sub>3</sub>).

**Sample Collection and Preservation:** Using proper sampling methods and appropriate sample containers is critical in obtaining valid results for general minerals analyses. Please follow laboratory directions and secure sample containers as appropriate for requesting analyses for general minerals (including total dissolved metals), TKN, and nitrate. **Any sample placed in an acid-preserved bottle must first be filtered or you risk the chance of increasing the concentration of metals to non-representative values and making cation/anion balance impossible.** If field filtering is not feasible, collect samples in unpreserved containers and submit to the laboratory within 24-hours with a request (on the chain-of-custody form) to immediately filter then preserve the sample.

**Sample Analysis:** Inform the laboratory that you are interested in "total dissolved metals" and write this on your chain-of-custody form in the same box as "General Minerals." This step should help insure that the laboratory filters samples before they are preserved.

### GROUNDWATER MONITORING

By 15 January 1998, the Discharger shall develop a groundwater monitoring program for this site. The program shall be designed to (1) determine the vertical and lateral extent of existing groundwater degradation associated with previous on-site discharges; (2) provide the best assurance of the earliest possible detection of further impacts to groundwater due to current discharges from this facility; and (3) provide the best assurance of the earliest possible detection of whether current application of wastewater and/or freshwater to the reclamation area are causing the existing ground water pollution to spread.

#### Point of Compliance

The "Point of Compliance" for groundwater shall be the vertical surface located at the hydraulic downgradient limit of the reclamation area and shall extend through the uppermost aquifer underlying the reclamation area. The program shall include a sufficient number of groundwater monitoring wells installed at appropriate locations and depths to represent the quality of groundwater passing the point of compliance and allow for the detection of impacts to groundwater due to the current discharges from this facility.

The program shall include a sufficient number of background groundwater monitoring wells installed at appropriate locations and depths to represent the quality of groundwater unaffected by the discharges from the facility. All well locations and construction features are subject to the review and concurrence of the Executive Officer.

#### Concentration Limits

By 15 January 1999, the Discharger shall report the results of monitoring of the background groundwater monitoring well(s), accounting for measurement errors in sampling and analysis, and shall propose concentration limits, for the sampling constituents listed below. For constituents which do not

REVISED MONITORING AND REPORTING PROGRAM  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

3

have specific receiving water limits set in the requirements, concentration limits shall be equal to background concentrations. The Discharger shall also propose a statistical procedure to determine whether there is a statistically significant increase in monitoring parameters over concentration limits.

If subsequent sampling of "background" monitoring locations indicates significant water quality changes due to either seasonal fluctuations or other reasons unrelated to waste management activities at the site, the Discharger may request modification of concentration limits.

### Sampling

The monitoring program shall include a detailed description of the sampling and analytical procedures used during monitoring to assure that monitoring results provide a reliable indication of water quality at all background and monitoring points.

The Discharger shall sample all groundwater monitoring wells monthly for depth to groundwater, elevation relative to mean sea level, nitrogen forms (total Kjeldahl nitrogen, nitrate, nitrite, and ammonia) and General Minerals. The groundwater surface elevation (in feet and hundredths, USGS datum) in all wells shall be measured at the time of sampling (prior to purging) and used to determine the velocity and direction(s) of ground water flow. Contour maps shall be prepared from the complete groundwater elevation data set and submitted with monthly self-monitoring reports. All groundwater monitoring data and analyses required herein shall be submitted in hardcopy tabular form with monthly self-monitoring reports as well as on electronic media in a form and format acceptable to the Executive Officer. Resulting chain of custody forms and lab sheets shall also be submitted. All approved monitoring wells shall be sampled and analyzed for monitoring parameters and constituents of concern as indicated and listed herein. Groundwater monitoring for all indicator parameters and constituents of concern shall be collected from wells in the approved monitoring network and analyzed as follows:

<u>Constituent</u>	<u>Unit</u>	<u>Type of Measurement</u>	<u>Frequency</u> <sup>1</sup>
Nitrate (as N)	mg/l	Grab	Monthly
Ammonia	mg/l	Grab	Monthly
Kjeldahl Nitrogen	mg/l	Grab	Monthly
20 °C BOD <sub>5</sub>	mg/l	Grab	Monthly
COD	mg/l	Grab	Monthly
<u>General Minerals</u>	mg/l	Grab	Monthly

<sup>1</sup> Monitoring frequency shall be reduced to quarterly when the full extent of groundwater pollution is determined by Board staff.

### Evaluation and Corrective Action

Following each sampling event, the Discharger shall determine whether there are statistically significant increases over concentration limits for each parameter and constituent analyzed using the statistical procedure established above. If the Discharger or the Board finds there is a statistically significant increases in indicator parameters or waste constituents over the concentration limits at the point of compliance, the Discharger shall notify the Board, or acknowledge the Board's findings, and submit, within 90 days, either a report demonstrating water quality protection standards were not exceeded, or an evaluation monitoring program. The evaluation monitoring program must be designed to determine the horizontal and vertical extent of pollution and to provide sufficient information to design a corrective action program.

Upon completion of the evaluation monitoring program, the Discharger shall submit a technical report containing a plan and time schedule for implementing a corrective action program designed to achieve compliance with water quality protection standards.

### WATER SUPPLY MONITORING

A sampling station shall be established where a representative sample of water supply can be obtained<sup>1</sup>. Water supply monitoring shall include at least the following:

<u>Constituents</u>	<u>Units</u>	<u>Sampling Frequency</u>
General Minerals	mg/l	Monthly

<sup>1</sup> If supply water is provided by a water purveyor, information on TDS and EC may be obtained from the Purveyor.

<sup>2</sup> If the source water is from more than one well, the conductance shall be reported as a weighted average and include copies of supporting calculations.

### RECLAMATION AREA MONITORING

The Discharger shall monitor the reclamation area daily while there is a discharge. Monitoring shall identify: (1) the area(s) receiving fresh water and the areas receiving wastewater; (2) the type of crop(s) grown at each area; and (3) the monthly average hydraulic loading rate (in gpd) to each area. It shall also include calculations for BOD<sub>5</sub>, chloride, sulfate, and total nitrogen loading rates (in lbs/acre-day); and notations based on visual observations on whether insects and/or objectionable odors are present in the reclamation area. The Discharger shall track presence and absence of standing water in each disposal/reclamation area check. The amount of water present in each check shall be recorded on a daily basis (in inches). The data shall be presented in tabular format and be accompanied by a map showing the location of and appropriate numerical designation for each check. These monitoring data shall be submitted along with the monitoring report the following month. Where remedial action is necessary, the Discharger shall briefly explain in the transmittal what action has been taken or is scheduled to be taken.

**A. HYDRAULIC LOADING MONITORING**

The Discharger shall monitor the reclamation area daily while there is a discharge. Monitoring shall identify: (1) the area(s) receiving fresh water and the areas receiving wastewater; (2) the type of crop(s) grown at each area; (3) the monthly average hydraulic loading rate (in gpd) to each area; (4) presence and absence of standing water in each disposal/reclamation area check; (5) amount of water present in each check shall be recorded on a daily basis (in inches); (6). The data shall be presented in tabular format and be accompanied by a map showing the location of and appropriate numerical designation for each check. It shall also include calculations for BOD<sub>5</sub>, chloride, sulfate, and total nitrogen loading rates (in lbs/acre-day); and notations based on visual observations on whether insects and/or objectionable odors are present in the reclamation area. These monitoring data shall be submitted along with the monitoring report the following month. Where remedial action is necessary, the Discharger shall briefly explain in the transmittal what action has been taken or is scheduled to be taken.

**B. SOIL MONITORING**

The Discharger shall establish, with concurrence of Board staff, five soil-profile monitoring locations and two representative background locations (i.e., that historically have not received process wastewater). The samples shall be collected and analyzed for at least the following constituents:

<u>Constituents</u>	<u>Units</u>	<u>Soil Profile</u>	<u>Frequency</u>
EC	µmhos/cm	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Soil pH	pH	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Buffer pH	mg/kg as CaCO <sub>3</sub>	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Total Alkalinity	mg/kg as CaCO <sub>3</sub>	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Total Organic Carbon	% dry weight	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Cation Exchange Capacity	meq/100 gms	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Ammonia	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Nitrate (as N)	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Kjeldahl-Nitrogen (as N)	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Total Nitrogen	mg/kg	Calculated	Semi-Annually <sup>2</sup>
Phosphorus	mg/kg	6 inches	Semi-Annually <sup>2</sup>

<sup>1</sup> Samples shall be collected at 6 inches, 2 feet, 4 feet, and 6 feet.

<sup>2</sup> Each location shall be sampled in April and October.

Resulting data shall be submitted with the monthly self-monitoring reports for June and January, respectively.

**REPORTING**

Monthly monitoring reports containing results of monitoring conducted during the month shall be submitted to the Board by the first day of the second month following the month of sample collection. Monitoring data sampled quarterly or annually shall be submitted with the monthly monitoring report for the last month of the calendar quarter or year, respectively.

REVISED MONITORING AND REPORTING PROGRAM  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

6

the constituents, and the concentrations are readily discernible. The data shall be summarized in such a manner that illustrates clearly whether the Discharger complies with waste discharge requirements, including calculation of all averages, etc.

If the Discharger monitors any pollutant at the locations designated herein more frequently than is required by this Order, the results of such monitoring shall be included in the discharge monitoring report.

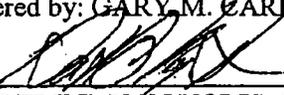
By 1 February of each year, the Discharger shall submit a written report to the Executive Officer containing the following:

- a. The names, titles, and general responsibilities of persons operating and maintaining the treatment system and/or managing the discharge to the reclamation area.
- b. The names and telephone numbers of persons to contact regarding the treatment system and/or discharge for emergency and routine situations.
- c. A certified statement of when the flow meter and other monitoring instruments and devices were last calibrated, including identification of who did the calibration (Standard Provision C.4).
- d. A statement whether the reclamation management plan reflects current operations, and the dates when these documents were last reviewed for adequacy.

The Discharger may also be requested to submit an annual report to the Board with tabular and graphical summaries of the monitoring data obtained during the previous year. Any such request shall be made in writing. The report shall discuss the corrective actions taken and planned to bring the discharge into full compliance with the waste discharge requirements. All reports submitted in response to this Order shall comply with the signatory requirements in Standard Provision B.3.

The Discharger shall implement the above monitoring program on upon receipt.

Ordered by: GARY M. CARLTON, Executive Officer

By:   
BERT E. VAN VORIS, Supervising Engineer

*Revised*

*30 AUGUST 2000*

Exh. C



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June 17, 2005

3630.19116.1

**VIA FACSIMILE AND FEDERAL EXPRESS**

Mr. Thomas R. Pinkos  
Executive Officer  
Regional Water Quality Control Board  
Central Valley Region  
11020 Sun Center Drive, #200  
Rancho Cordova, CA 95670-6114

**Re: Request for Action to Modify the Waste Discharge Requirements  
for Hilmar Cheese Company, Order No. 97-206**

Dear Mr. Pinkos:

Our firm represents the Hilmar Cheese Company ("Hilmar"). Pursuant to the authority granted to the Central Valley Regional Water Quality Control Board ("Regional Board") under Water Code §13263(e), we respectfully request on behalf of Hilmar that the Regional Board take immediate action to make the below requested modifications to Hilmar's Waste Discharge Requirements, Order No. 97-206 (the "Permit").

As is noted below, upon review of the Permit during a recently proposed enforcement action, Hilmar has discovered that many of the Permit's requirements and the Basin Plan provisions upon which these requirements were based are inconsistent with recent court and State Board rulings and with the requirements of state law and regulations. With invalid provisions in its Permit, Hilmar remains subject to unnecessary administrative enforcement and the continued potential for the imposition of penalties. For these reasons, and because portions of the Permit are neither economically viable nor environmentally sustainable, Hilmar requests that the Regional Board modify Hilmar's Permit, in the respects discussed below, pursuant to the authority granted to the Regional Board under Water Code §13263(e).

Factual Background:

The Regional Board adopted the Permit at issue on September 19, 1997, to regulate the operation of Hilmar's wastewater discharge to land. At the time that the Permit was adopted, the monthly average electrical conductivity ("EC") levels in Hilmar's discharge were determined to be 1900  $\mu$ mhos/cm at 25°C using data from October 1994 to April 1997. *See* Permit at Finding 2. Notwithstanding this fact, the Regional Board adopted a limit for EC in the permit of 900  $\mu$ mhos/cm. *See* Permit, Discharge Specification B.2.

In order to meet this new requirement in the Permit, Hilmar proposed, with Regional Board Staff support, to treat its wastewater with a patented V-SEP® vibrating membrane system using nanofiltration membranes, sending the treated wastewater to the reclamation area in order to meet Permit requirements. *See* Permit at Finding 12; April 2005 ACL Staff Report at page 4. With this system, Hilmar anticipated that the average Phase I wastewater quality would be 1390 µmhos/cm by March of 1998, and Phase II wastewater quality would be 880 µmhos/cm by March of 1999. *Id.* Due to technological difficulties and failures to perform as anticipated, Hilmar was unable to meet the Permit's requirement for EC levels consistently.

In April of 2000, Hilmar submitted a new Report of Waste Discharge ("ROWD") requesting an increase in flow from 0.75 million gallons per day ("mgd") to 1.25 mgd. In addition, Hilmar proposed to meet the Permit's other requirements, including the limit for EC, by treating 65 percent of the wastewater and combining that treated wastewater with separated low suspended solids wastewater flows to meet the discharge requirements.

In order to address concerns raised by and to meet additional requirements imposed by the Regional Board,<sup>1</sup> Hilmar altered its proposed treatment process by proposing to pass all flow through a two-stage system of ultrafiltration and reverse osmosis ("UF/RO"), which went on line in December of 2000. This was a significant change in course away from land treatment. In addition, significant problems continued to occur, including the inability to process all wastewater flows, premature failure of membranes, and very high operation and maintenance costs.

Accordingly, Hilmar was compelled commencing in 2002, yet again with Regional Board Staff support, to change course away from its original plan for land treatment and to take a different approach in its efforts to comply with its Permit, including addition of physico-chemical dissolved air flotation thickeners, anaerobic treatment, and aerobic polishing along with sand filters and reverse osmosis membranes.<sup>2</sup> In its continued attempts to meet the Permit's discharge specification for EC of 900 µmhos/cm, Hilmar continues to implement innovative treatment technologies and processes at considerable expense.

Upon review of the Permit during a recently proposed enforcement action, Hilmar has discovered that many of the Permit's requirements and the Basin Plan provisions upon which these requirements were based are inconsistent with recent court and State Board rulings and

<sup>1</sup> *See* Hilmar's February 2001 ROWD at pg. 3-4 revised in response to letters from the Regional Board to Hilmar on June 2, 2000 and August 2, 2000. Because these new interpretations of the requirements imposed upon Hilmar were not part of a formal permit modification or reissuance proceeding, Hilmar had no appeal rights to challenge these new interpretations and mandates.

<sup>2</sup> Sand filters were only used briefly on aerobic polisher decants before reverse osmosis. Because these filters did not work well in that circumstance, the sand filters were pulled from service soon after.

with the requirements of state law and regulations. With invalid provisions in its Permit, Hilmar remains subject to unnecessary administrative enforcement and the continued potential for the imposition of penalties. For these reasons, and because the 900  $\mu\text{mhos/cm}$  EC limit is neither economically viable nor environmentally sustainable, Hilmar requests once again that the Regional Board modify Hilmar's Permit, as discussed in more detail below, pursuant to the authority granted to the Regional Board under Water Code §13263(e).

It should be noted that Hilmar previously requested and continues to request modifications (*e.g.*, for increased EC and flow limits) to its Permit, which is outdated and inconsistent with law and with judicial and State Board determinations made subsequent to the issuance of the Permit. The Regional Board's failure to modify the Permit has allowed the Regional Board to propose an enforcement action related to Permit requirements that were adopted in a manner contrary to law and that have not been renewed in nearly eight (8) years. A failure to act on Hilmar's request would be clearly erroneous and an abuse of discretion.

It should also be noted that, had the Permit been adopted in the manner and in accordance with the state law and regulations cited herein, Hilmar could have proceeded with its original plan to combine flows and utilize land treatment in order to meet a groundwater EC limit with a point of compliance in the downgradient wells. In that instance, there would have been far fewer, if any, exceedances to note for the period set forth in the currently pending Administrative Civil Liability complaint against Hilmar.

Specific Modification Requests:

1. Modify the Discharge Specification for Electrical Conductivity (EC)

In the Discharge Specifications section of Hilmar's Permit, the Regional Board improperly imposed the following specification:

"Effective 15 March 1999, the EC of the discharge shall not exceed 900  $\mu\text{mhos/cm}$ ."

See Permit, Discharge Specification B.2. There are several problems with this specification that require modification.

a. The Regional Board Improperly Imposed Discharge Specifications Presumably Based On The Chemical Constituents Narrative Water Quality Objective's Incorporation by Reference of Drinking Water Standards.<sup>3</sup>

The Regional Board included discharge specifications derived from the drinking water Maximum Contaminant Levels ("MCLs") specified in Title 22 of the California Code of Regulations. *See* 22 C.C.R. §64400.70; Permit at Finding 19, Discharge Specification B.2. The use of a secondary MCL to set discharge requirements was not valid for the following reasons: 1) the adoption and implementation of the Chemical Constituents narrative water-quality objective violated state law; 2) MCLs are not directly applicable to discharges that may reach a ground water basin; rather, MCLs were promulgated to apply to drinking water purveyors at the "end of tap;" 3) the Regional Board incorrectly implemented Title 22 by utilizing the lowest number for EC; 4) the Regional Board failed to comply with Water Code section 13263(a) when imposing an EC limit based on MCLs; and 5) the Regional Board failed to set an averaging period for the EC limit consistent with the Basin Plan or MCLs. These issues are discussed in more detail below.

1) The Regional Board's Adoption and Implementation of the Chemical Constituents Narrative Water Quality Objective Violated State Law.

Assuming that the Permit was based on the requirements of the Basin Plan, then the Regional Board's adoption of the narrative water quality objective for "Chemical Constituents," specifying that ground waters designated for use as domestic or municipal supply ("MUN") shall not contain concentrations of chemical constituents in excess of the MCLs in effect at the time the chemical constituents objective was adopted *and including any prospective, future changes to the MCLs contained in Title 22*, violated the Water Code. *See* Basin Plan at III-10.00; Water Code § 13241 and 13000. Water Code section 13241 requires the Regional Board to consider the social, environmental and economic impacts of water quality objectives prior to adoption. *See* Water Code §13241(a)-(f). Furthermore, Water Code section 13242 requires that the Regional Board adopt an implementation plan for meeting the adopted objectives and a timeline for doing so. Moreover, under Water Code section 13240, Basin Plans and the objectives contained therein must be reviewed and revised periodically. We are aware of no evidence to indicate that the Regional Board complied with Water Code sections 13241 or 13242 when it initially adopted the water quality objective for Chemical Constituents and the

<sup>3</sup> Since the Regional Board did not specifically identify the water quality objective used to impose the lowest Title 22 criterion in Finding 16 of the Permit or the use being protected, Hilmar presumes that the Regional Board used the "Chemical Constituents" water quality objective for ground waters at Basin Plan page III-9.00. The Regional Board's failure to identify in the Permit the water quality objective being implemented and the use being protected (thereby failing to include findings and evidence in support of its decision) violated state law. *See* Water Code §13263(a); *Topanga Assn for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974); *California Edison v. SWRCB*, 116 Cal. App. 751, 761 (1981).

corresponding MCLs in effect at that time, or that the Regional Board has met its statutory mandate to review and revise this objective as required under Water Code section 13240.<sup>4</sup>

Additionally, by using a prospective, incorporation-by-reference method of adopting water quality objectives for ground water basins designated MUN, the Regional Board abdicated its responsibility to consider the factors contained in Water Code sections 13241 and to develop an implementation plan under Water Code section 13242 each time a new or more stringent MCL was or is incorporated into Title 22.<sup>5</sup>

Furthermore, through the use of the prospective, incorporation-by-reference method of adopting water quality objectives for those water bodies or ground water basins designated MUN, the Regional Board failed to comply with the applicable public notice and participation requirements of the Water Code. *Id.* at 7; see also Water Code §13244. Finally, by utilizing this short-cut method of adopting water quality objectives, the Regional Board failed to comply with Water Code section 13000, providing for reasonable water quality regulation.

2) MCLs Are Not Intended to Apply Directly to Discharges.

MCLs do not apply to wastewater discharges, but rather apply only to the direct supply of water to the public for drinking water purposes.<sup>6</sup> The MCLs set forth in Title 22 of the California Code of Regulations were intended only to apply to drinking water treatment facilities at the tap or point-of-use, not as discharge specifications for wastewater discharges to land. See 22 C.C.R. §64431 and §64444.<sup>7</sup> Since the effluent produced by Hilmar is not used for direct potable purposes, the Title 22-based EC limit imposed in the Permit was and remains unnecessarily restrictive and inappropriate.

<sup>4</sup> To the extent that the EC limit was based upon another groundwater objective, such as the Toxicity objective, that objective suffers from similar legal and procedural infirmities.

<sup>5</sup> See accord Office of Administrative Law ("OAL"), Notice and Decision Re: Approval and Partial Disapproval of a Rulemaking Action on the Adoption of the Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (OAL File No. 00-0317-15) (Apr. 28, 2000). This decision, entered after the 1994 Basin Plan and Permit were adopted, determined that prospective incorporation-by-reference "is of dubious validity." *Id.* at 6.

<sup>6</sup> See accord 22 C.C.R. §64449(a) (stating that secondary MCLs shall not be exceeded in the water supplied to the public). Under Title 22, monitoring for EC is only required by public water purveyors annually or triennially unless waived, not on a daily basis as is required in Hilmar's Permit. See 22 C.C.R. §64449(c) and (h); Permit Monitoring and Reporting Program at 1.

<sup>7</sup> Even if the MCLs were properly applied as water quality objectives to groundwater, discharge requirements in permits may differ from the water quality objectives established in a Basin Plan and may even exceed those objectives. See SWRCB Order No. WQ 2005-0005, *infra* footnote 6, at 12-13. Furthermore, these objectives may be superseded by natural background concentrations where those natural concentrations exceed the water quality objective. See Basin Plan at IV-17.00.

The Permit's use of Title 22 criteria is inconsistent with how the Department of Health Services ("DHS") uses and enforces MCLs. Secondary MCLs, like the one for EC, are set for constituents that may adversely affect the taste, odor, or appearance of drinking water, and are directly related to consumer "acceptance" or "dissatisfaction" with the drinking water provided through a community water system. *See* 22 C.C.R. §64449(a).

If a secondary MCL for a constituent contained in Table 64449-A is exceeded in drinking water, an investigation by DHS and a study by the water supplier is required to determine actual consumer acceptance or dissatisfaction with the drinking water that does not meet the particular MCL. *See* 22 C.C.R. §64449(d). If there is no community water system, as in this case, there are no consumers to be surveyed and, thus, no acceptance or dissatisfaction to measure. Instead, Hilmar is exposed to serious liability for non-compliance, unlike situations where MCLs are exceeded under drinking water regulations. *See, e.g.*, Water Code §13350.

In addition, DHS is permitted to waive the requirement to meet secondary MCLs based upon consumer acceptance or economic considerations. *See* 22 C.C.R. §64449 (e)(1) and (2). However, exceedances of secondary MCLs included in Hilmar's Permit, and interpreted by the Regional Board to be a rigid end-of-pipe discharge specification, may subject Hilmar to liability under the Water Code. *See, e.g.*, Water Code §§13350. Such a result was never intended by Title 22. Thus, the inclusion of secondary MCLs as enforceable discharge specifications, as was done in Hilmar's Permit, was unwarranted and inappropriate.

Moreover, the Regional Board was required to consider dilution, attenuation, aquifer capacities, recharge volumes, and soil adsorption prior to setting effluent limits to protect groundwater. *See* State Board Order WQO 2003-009 at 5 (July 16, 2003). These considerations were not taken into account prior to imposing the 900  $\mu\text{mhos/cm}$  limit for EC. Thus, Hilmar requests that these considerations be undertaken now with information Hilmar has provided to the Regional Board. *See e.g.*, "Revised Antidegradation Analysis for HCC Irrigation Water" submitted to the Regional Board by Brown and Caldwell on March 15, 2002.

3) The Regional Board Incorrectly Utilized Only One Number for EC From Title 22.

Title 22 sets forth Secondary MCLs as ranges. *See* 22 C.C.R. §64449 at Table 64449-B. For EC, the MCLs range from 900 to 1600  $\mu\text{mhos/cm}$  with an allowable short term high of 2,200  $\mu\text{mhos/cm}$ . *Id.* The Discharge Specification for EC in Hilmar's Permit failed to include a range of values equivalent to the Secondary MCL from which it was derived.

Instead, ignoring the range of possible MCL values, the Regional Board imposed Hilmar's discharge specifications at the lowest end of the range with no consideration of any

other number,<sup>8</sup> and without consideration of the fact that drinking water can be legally served up to 2,200  $\mu$ mhos/cm of EC without adverse legal consequence. The Regional Board's failure to consider the other alternative values in the range constituted an abuse of discretion. Water Code §13000 and §13263(a). For these reasons, the Permit should be modified, at the very least, to coincide with the full range of values provided in Title 22 to be applied as a groundwater limitation.

4) The Regional Board Failed to Comply with Water Code Section 13263(a) When Imposing Permit Limits Based on Title 22 Drinking Water Standards.

The Regional Board, when prescribing waste discharge requirements, must take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241. See Water Code §13263(a) (emphasis added). As discussed above, the Regional Board included discharge specifications in the Hilmar Permit based on Title 22 drinking water standards. When doing so, the Regional Board failed to consider the actual uses to be protected, the water quality objectives reasonably required to protect the actual uses being made of the local groundwater, and each of the factors required to be considered under Water Code section 13241. *Id.*

Even if the Regional Board had undertaken these considerations when the Permit was adopted, the economic considerations have changed. Hilmar and the Regional Board anticipated that the salinity (EC) limits were "based on best available technology and revised cropping and irrigation practices." See Permit at 6, Finding 24. However, the anticipated "best available technology" did not work as anticipated and, coupled with the additional requirements imposed by the Regional Board outside of the permitting process (see *supra* footnote 1), Hilmar was unable to consistently meet the Permit's EC requirement.

For these reasons, the 13241 analysis must be done or redone to determine whether the new technologies and processes needed to meet the Permit's EC requirement are "reasonable" in accordance with the requirements of state law. Water Code §13000 and §13263(a). In addition, since the Regional Board has never formally considered the current cost of compliance with the EC limit in Hilmar's permit, the Regional Board must now consider the costs and environmental consequences of Hilmar's new technologies and processes. The facilities utilized under the Permit require a great deal of energy and create multiple truckloads

<sup>8</sup> In fact, in 1995 when requested by Hilmar to amend the Permit limit for EC, the Regional Board wrongly determined that "a 1300  $\mu$ mhos/cm EC limit does not comply with the Basin Plan." See Regional Board Memorandum Regarding Hilmar Cheese Company – Review of Technical Reports, from Jose Angel to Larry Beatty at 2 (May 15, 1995). This 1300  $\mu$ mhos/cm level clearly falls within the 900 to 1600  $\mu$ mhos/cm range set forth in 22 C.C.R. §64449.

of brine waste being hauled to the Bay Area for disposal, which may cause unanticipated energy use and air quality impacts.<sup>9</sup> The Regional Board never considered these impacts under Water Code section 13263(a) or under the California Environmental Quality Act.<sup>10</sup>

5) The Discharge Specification is Unconstitutionally Vague for Failing to Specify a Valid Duration or Averaging Period Upon Which to Judge Compliance.

In most cases, MCLs are intended to be applied as 12-month averages. See 22 C.C.R. §64432. Thus, the imposition of an MCL-based permit limit without specifying the applicable averaging period was improper.

Furthermore, the inclusion of requirements based on secondary MCLs (*e.g.*, EC) is especially problematic since EC is an *aesthetic* concern, not a primary drinking water standard. Thus, the secondary MCL upon which the EC requirement was imposed for aesthetic reasons does not require short-term (*e.g.*, weekly, daily, or instantaneous) average restrictions. Further, since MCLs are conservatively adopted to protect for 70 years of consistent exposure, annual averages are adequately protective. See 22 C.C.R. §64432. The Regional Board should have considered and specified appropriate long term averages. See *accord* State Board Order WQO 2003-009 at 7 (July 16, 2003).

A long term average would also be consistent with water quality objectives contained in the Basin Plan. The EC objective for the Sacramento River requires that EC meet certain levels as a 50th or 90th percentile value based upon the previous 10 years of record. See Basin Plan, page III-7.00, Table III-3. For these reasons, the EC limit must be modified to specifically set the requirement as a percentile of a multi-year average to be consistent with the Basin Plan, or a 12-month average to be consistent with the intent of Title 22.

b. The Regional Board Staff Unlawfully Amended the Permit Without Providing Public Notice and Comment and a Public Hearing.

After the Permit's adoption in 1997, the Regional Board improperly and unlawfully amended the Permit to require conditions different than the requirements set forth in the formally adopted Permit. For example, the Regional Board changed Hilmar's Monitoring

<sup>9</sup> "[O]peration of a large-scale reverse osmosis treatment plant would result in the production of highly saline brine. . . . Any decision that would require use of reverse osmosis. . . should involve thorough consideration of the expected environmental benefits." *In the Matter of the Petition of City of Manteca*, SWRCB Order No. WQ 2005-0005 at 12 (March 16, 2005) (although this Order may not be precedential, it is certainly persuasive on the points raised).

<sup>10</sup> Water Code section 13389 does not work to shield or exempt the Regional Board from considering environmental costs and impacts under CEQA (Pub Res. Code §21000 et seq.) since this Permit is not a federal permit issued under the Clean Water Act. See *Committee for a Progressive Gilroy v. SWRCB* (1987) 192 Cal. App. 3d 847, 862.

and Reporting Program (“MRP”) to alter the point of compliance determination. See MRP No.97-206 (revised January 31, 2001).<sup>11</sup> This change was made without a formal hearing on the changes and without compliance with state law requirements related to monitoring. See e.g., Water Code §13263(a) (“regional board, after any necessary hearing, shall prescribe requirements”); §13267(b)(1) and §13225(c) (requiring burden and benefit analysis for any monitoring requirements). Such a modification was also an illegal delegation of authority to staff. See Water Code §13323(a)(2); *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region*, San Francisco Superior Court, Consolidated Case No.500527, Order Granting Petition for Writ of Mandate and Statement of Decision (Nov. 14, 2003)(“State law prohibits the Board from delegating its authority to issue or modify waste discharge requirements.”) For this reason, the Regional Board must interpret the Permit’s point of compliance as adopted, including using the original point of compliance for both discharge specifications and groundwater limitations.

c. The State Board has Ruled Contrary to the Regional Board’s Past Regulation of EC.

In the matter of the State Board’s *Own Motion Review of the City of Woodland*, the State Board determined that when the Regional Board applies narrative objectives, the Regional Board must evaluate whether the specific numerical values used “are relevant and appropriate to the situation at hand.” See State Board Order No. WQO 2004-0010 (April 22, 2004). Applying an EC value without further study as to its general applicability, was found by the State Board to be inappropriate. *Id.* at 7. The State Board found that “the true suitability of a given water depends on the specific conditions of use and on the management capability of the user.” *Id.* In the *Woodland* case, as is the case here, the specific uses of the waters in question were not studied to determine an appropriately protective EC value given the actual and probable future uses of the waters in question.

The State Board made it clear that guidance numbers for EC (such as the MCLs) “cannot be interpreted as an absolute value.” *Id.* Rather, the Regional Board must determine whether site-specific conditions applicable to Hilmar’s discharge allow some relaxation in the value imposed. *Ibid.*; see also Water Code §13263(a). That was not done in this case when the Hilmar Permit was adopted, or when the Regional Board denied Hilmar’s previous request to raise the EC limit to 1300  $\mu$ mhos/cm in 1995.<sup>12</sup>

<sup>11</sup> See also *supra* footnote 1.

<sup>12</sup> See Regional Board Memorandum Regarding Hilmar Cheese Company – Review of Technical Reports, from Jose Angel to Larry Beatty (May 15, 1995). In this Regional Board memo, as with the Woodland permit requirement for EC overturned by the State Board, the Regional Board improperly relied upon agricultural salinity goal values for EC without determining the local applicability of those values. *Id.* at 2.

When a regulation or other statutory interpretation by an administrative agency appears to be erroneous because of subsequent administrative or judicial decisions, it is the agency's duty to conform to the correct interpretation. *See Pacific Motor Transport Co. v. State Board of Equalization*, 28 Cal. App. 3d 230, 242 (1972). Otherwise, the agency would be allowed to function in a manner "wholly unintended by the law." *Id.* Furthermore, the State Board has specifically found that "the treatment of [State Board] decisions and orders as precedent helps provide greater consistency and predictability in agency decision making." *See In the Matter of Fishery Protection and Water Right Issues of Lagunitas Creek*, State Board Order No. WR96-1 at p. 22, n.11 (1996).

d. Requested Action Regarding EC

For the above reasons, Hilmar respectfully requests that the Regional Board take immediate action to modify the discharge specification for EC currently contained in Hilmar's Permit. Since, as is discussed above, judicial case law and orders issued by the State Board specifically state that the Regional Boards are required to make findings based on the facts and site-specific conditions in each case, and support those findings with substantial evidence, the Regional Board must address this issue and revise Hilmar's Permit to either omit the EC limit until further studies are performed to determine the necessary and applicable water quality objective for EC, or increase the EC limit to coincide with the full range of values set forth in the secondary MCL for EC and apply the limit as a *groundwater* limit based on a long-term average using the originally imposed point of compliance in the downgradient wells. In addition, Hilmar requests that these modifications be made retroactive to at least January 27, 2002.<sup>13</sup>

2. Modify the Flow Limit to Reflect Expected Flows

In addition to asking for modifications of the EC requirements, Hilmar has also made several requests that the Regional Board modify the flow requirements for the Hilmar plant. The Reports of Waste Discharge submitted by Hilmar to the Regional Board in April of 2000 and February of 2001 requested 1.25 mgd and 1.5 mgd, respectively. These requests made under Water Code §13260 never resulted in formal permit modifications, but were considered to be acquiesced to and deemed approved by the Regional Board under Water Code section 13264(a)(2).

<sup>13</sup> Because the Water Code does not expressly preclude retroactive modifications, Regional Boards possess the inherent authority to make such modifications. Precedent for such modifications exist. For example, the Los Angeles Regional Board recently modified two permits to include retroactively applicable interim effluent limits for chloride, which became effective on a date prior to adoption of the modification order. See Orders R4-2005-0031 and R4-2005-0032 (May 5, 2005).

Mr. Thomas R. Pinkos  
June 17, 2005  
Page Eleven



Notwithstanding these former implicit approvals, Hilmar would like the Permit to be modified to expressly authorize flows of up to 2 mgd averaged over a calendar month.

If you have any questions regarding this request, please contact me. Thank you in advance for your cooperation in making these requested modifications to Hilmar's Permit.

Very truly yours,

A handwritten signature in black ink, appearing to read "Craig S. Bloomgarden". The signature is fluid and cursive, with a long horizontal stroke at the end.

Craig S. Bloomgarden

CSB/ms

cc via e-mail:

Mr. John Jeter

Mark Fogelman, Esq.

Melissa A. Thorne, Esq.

Courtesy copy via mail:

M. Catherine George, Esq.

19116:6450837.5

Exh. D



Author's Direct Dial: (213) 599-3481  
E-Mail: cbloomgarden@steeffel.com

July 13, 2005

3630.19116.1

**VIA FEDERAL EXPRESS**

Mr. Thomas R. Pinkos  
Executive Officer  
California Regional Water Quality Control Board  
Central Valley Region  
11020 Sun Center Drive, #200  
Rancho Cordova, CA 95670-6114

**Re: Supplemental Information Supporting Request for Action to Modify  
the Waste Discharge Requirements for Hilmar Cheese Company,  
Order No. 97-206**

Dear Mr. Pinkos:

As you know, our firm, representing Hilmar Cheese Company ("Hilmar"), has requested that the Regional Board take immediate action under Water Code §13263(e) to retroactively modify Hilmar's Waste Discharge Requirements, Order No. 97-206 (the "Permit"). The following provides supplemental information to support our previous request.

- 1) The Regional Board's Adoption of Hilmar's Permit Violated State Law.
  - a) The Regional Board Failed to Consider the 13241 Factors.

Water Code section 13241 requires the Regional Board to consider the social, environmental and economic impacts of water quality objectives prior to adoption. See Water Code §13241(a)-(f).<sup>1</sup> Furthermore, Water Code section 13263(a) requires that the Regional Board *reconsider* these same factors when issuing waste discharge requirements (WDRs).<sup>2</sup>

<sup>1</sup> The early Basin Planning efforts also recognized that "technical or economic compromises were a necessary part of the development of objectives. These aspects of the adoption procedure should not be underestimated and, in fact, should only be abandoned in favor of conclusive technical information. . . . Certain critical objectives have considerable effect on the development or operation of the state's water resources system or on the economy of particular segments of the state. Such objectives should not be established without careful consideration of these effects." 1975 Basin Plan at I-4-1, RWQCB\_01519.

<sup>2</sup> Contrary to this requirement, the Regional Board is on record stating that "we do not have to re-justify the objectives that the Regional Water Board has previously adopted." See Response to Comments (Nov. 1993 draft Basin Plan) at 1, RWQCB\_12598. While the review at the objective-setting phase reviews the 13241 factors at a macro, or basin-wide, level, the subsequent review under 13263 is supposed to be a double-check at the micro, or

(continued...)

Mr. Thomas R. Pinkos  
July 13, 2005  
Page Two



We are aware of no evidence to indicate that the Regional Board complied with Water Code section 13241 when it initially adopted the groundwater quality objectives in the Basin Plan, or Water Code section 13263 when it adopted Hilmar's Permit.

The State Board and many regional boards in this State have long been of the opinion that the section 13241 factors need not be reconsidered upon issuance of WDRs to implement objectives contained within a Basin Plan.<sup>3</sup> See *Attachment 1*, State's Request for Rehearing in *Burbank v. State Water Resources Control Board et al.*, Supreme Court Case No. S119248 (filed April 19, 2005). However, the initial basin planning document for this Regional Board stated that:

"The Regional Board, in setting waste discharge requirements, will consider, among other things, the potential impact on beneficial use within the area of influent of the discharge, the existing quality of receiving waters, and the appropriate water quality objectives."

See Water Quality Control Plan Report Abstract, at 63, RWQCB\_01402 (emphasis added). This analysis tracks many of the same requirements contained in Water Code sections 13241 and 13263.

A recently finalized California Supreme Court decision confirms that such an analysis and reconsideration must be performed prior to adoption of any non-federal WDRs. See *City of Burbank v. State Water Resources Control Board, et al.*, 35 Cal.4th 613 (April 4, 2005 (made final upon denial of rehearing on June 29, 2005).) The Supreme Court stated the following:

"Section 13263 directs regional boards, when issuing waste discharge requirements, to take into account various factors including those set out in section 13241. Listed among the 13241 factors is "[e]conomic considerations." ([Water Code ] § 13241, subd. (d).) The plain language of sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the cost of compliance when setting effluent limits in a wastewater discharge permit."

*Id.* at 625.

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(continued...)

permit, level to make sure that the factors still justify the requirements being imposed and ensure that such requirements are not unreasonable and are necessary to protect the actual beneficial uses being made of local ground water. Water Code §13263, §13000.

<sup>3</sup> Section 13263 is not the only provision of the Water Code requiring a reconsideration of the 13241 factors. Section 13281 also requires that the regional board consider the 13241 factors when issuing a decision not to permit individual disposal systems. See Water Code §13281(a).

“State law, as we have said, allows a regional board to consider a permit holder’s compliance cost to *relax* pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit. ([Water Code] §§ 13241 & 13263).”

*Id.* at 627, footnote 7 (emphasis in original).

Since a 13241 analysis was not performed when the Hilmar permit was adopted, that permit failed to comply with law and must be modified to comply with this recent Supreme Court ruling.<sup>4</sup>

An analysis of the objectives and the 13241 factors at the permitting stage comports with the Regional Board’s intentions when adopting the narrative objectives for groundwater at issue here. *See* RWQCB’s Response to Comments (November 1993 draft Basin Plan) at 5, RWQCB\_12602 (“When considering a permit, the Regional Water Board will consider all available information, including economics and environmental impacts.”), and at 2, RWQCB\_12599 (“Economic impacts and achievability can be assessed on a case-by-case basis when we adopt a permit.”)(emphasis added); *see also* 1994 Basin Plan Amendments Staff Report at 42 (1994), RWQCB\_06132 (stating economic considerations and other factors will be taken into account in adopting WDRs for individual dischargers). Where compliance with the proposed limitations cannot be achieved by reasonable efforts, review of the appropriateness of the underlying water quality objectives may be required. SWRCB Order No. WQ 82-5 at 3 (May 20, 1982) *citing* SWRCB Order No. 81-5 at pg. 6. Since the Regional Board failed to comply with Water Code requirements when adopting Hilmar’s Permit, and since recent California Supreme Court jurisprudence mandates such compliance, the Regional Board must reopen and modify Hilmar’s Permit to reconsider the EC limit imposed therein.

b) The Regional Board Failed to Follow the “Best Efforts” Approach

“The ‘best efforts’ approach involves (a) making a showing that the constituent is in need of control and (b) establishing limitations which the discharger can be expected to achieve using reasonable control efforts. Factors which should be included in the ‘best efforts’ analysis include (a) the water supply available to the discharger; (b) the past effluent quality of the discharger; (c) the effluent quality achieved by other similarly situated dischargers;<sup>5</sup> (d) the good faith efforts of the discharger to limit the discharge of the constituent; and (e) the measures

<sup>4</sup> *See accord* 40 C.F.R. §122.62(a)(3). Although the federal NPDES rules are not applicable in this case, they are persuasive to demonstrate that permits are routinely modified upon Court rulings. In this case, a judicial decision after the permit was issued would be grounds for modification of the permit. *See Pacific Motor Transport Co. v. State Board of Equalization*, 28 Cal. App. 3d 230, 242 (1972)(When a regulation or other statutory interpretation by an administrative agency appears to be erroneous because of subsequent administrative or judicial decisions, it is the agency’s duty to conform to the correct interpretation).

<sup>5</sup> It should be noted that historically food processing wastewater was included in a Regional Board waiver so long as an operating and maintenance plan was approved. *See* Central Valley Regional Board Resolution No. 82-036, RWQCB\_21956-9.

necessary to achieve compliance.” SWRCB Order No. WQ 82-5 at 3 (May 20, 1982) *citing* SWRCB Order No. 81-5 at 4-5. Had this analysis been performed, it would have been clear that the EC limit being imposed upon Hilmar was unreasonable and likely unachievable. Upon reopening the permit, the “best efforts” analysis must be undertaken.

2) The Regional Board’s Narrative Objectives for Ground Water Violated State Law.

a) Prospective Incorporation by Reference of Drinking Water Standards.

The original Chemical Constituents objective for groundwater did not contain a *prospective* incorporation by reference, it merely read as follows:

“Groundwaters designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the limits specified in California Administrative Code, Title 17, Chapter 5, Subchapter 1, Group 1, Article 4, Section 7019, Tables 2,3, and 4, listed here in Tables A, B, and C.

Groundwaters designated for use as agricultural supply (AGR) shall not contain concentrations of chemical constituents that adversely affect such beneficial use.”

Water Quality Control Plan Report Abstract at 77, Table 15, RWQCB\_01418. Prior to this time, water quality objectives for groundwater had not been set. Therefore, all groundwater objectives were new additions in the 1975 Basin Plan. 1975 Basin Plan at Appendix B, page B-1, RWQCB\_01813.

In 1989, the Basin Plan’s Chemical Constituents objective for groundwater appear to have been changed once again. This version read as follows:

“Ground waters shall not contain chemical constituents in concentrations that adversely affect beneficial uses.

Ground waters designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels specified in California Code of Regulations, Title 22, Division 4, Chapter 15.

Ground waters designated for use as agricultural supply (AGR) shall not contain concentrations of chemical constituents that adversely affect such beneficial use.”

Second Edition of Basin Plan (draft 1988) at III-12, RWQCB\_04507; see also Second Edition Basin Plan (Third Printing 1992) at III-10, RWQCB\_03713. This edition was the first time that the Basin Plan specifically referenced maximum contaminant levels (MCLs); however, this incorporation by reference was still not prospective.

In 1994, the Regional Board's modified Chemical Constituents objective, which was later approved by the State Water Board on February 16, 1995, was amended as follows:

"Ground waters shall not contain chemical constituents in concentrations that adversely affect beneficial uses.

At a minimum, ground waters designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels (MCLs) specified in California Code of Regulations, Title 22, Division 4, Chapter 15 or Title 40, Code of Federal Regulations, Parts 141 and 143, whichever is more restrictive.

~~Ground waters designated for use as agricultural supply (AGR) shall not contain concentrations of chemical constituents that adversely affect such beneficial use."~~

See Oct. 4 Draft of 1994 Basin Plan at III-11, RWQCB\_06034, RWQCB\_15033.

However, on May 10, 1995, the Office of Administrative Law ("OAL") issued its Notice of Approval and Disapproval, and Reasons for Approval and Disapproval of Parts of a Rulemaking Action on the 1994 Basin Plan Amendments (OAL File No. 95-0328-01). This approval/disapproval decision on the 1994 Basin Plan determined that "[a] prospective incorporation-by-reference (one that automatically incorporates future changes to an incorporated document) is of dubious validity." *Id.* at 10. However, the OAL conditionally approved of the Chemical Constituents language so long as the Regional Board made allegedly "nonsubstantive clarifications" that included the prospective incorporation by reference language. *Id.* at 3-4. The new language was as follows:

"At a minimum, ground waters designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels (MCLs) specified in following provisions of Title 22 of the California Code of Regulations, Title 22, Division 4, Chapter 15 or Title 40, Code of Federal Regulations, Parts 141 and 143, whichever is more restrictive, which are incorporated by reference into this plan: Tables 64431-A (Inorganic Chemicals) and 64431-B (Fluoride) of Section 64431, Table 6444-A (Organic Chemicals) of section 64444, and Tables 64449-A (Secondary Maximum Contaminant Levels-Consumer Acceptance Limits) and 64449-B (Secondary Maximum Contaminant Levels-Ranges) of Section 64449. This incorporation by reference is prospective, including future changes to the incorporated provisions as the changes take effect. At a minimum, ground waters designated for use as domestic or municipal supply (MUN) shall not contain lead in excess of 0.015 mg/l. To protect all beneficial uses, the Regional Water Board may apply limits more stringent than MCLs."



The Regional Board included the OAL language in the next reprint of the Basin Plan without subsequent public comment or hearing on or State Board approval of these changes in violation of state law. *See* Basin Plan language, RWQCB\_14306-7; Water Code §13244, §13245. Further, the Regional Board failed to comply with Water Code sections 13241 and 13242 in relation to this expansion of the objectives contained in the Basin Plan.

By modifying the Basin Plan's Chemical Constituents groundwater objective upon the OAL's request to contain language prospectively incorporating by reference MCLs from the Department of Health Services' drinking water standards to apply as ground water quality objectives for ground water basins designated MUN, the Regional Board abdicated its responsibility to consider the factors contained in Water Code sections 13241 and to develop an implementation plan for these incorporated objectives as required under Water Code section 13242. This analysis was required when the prospective incorporation language was placed in the Basin Plan, and then each time a new or more stringent MCL is newly incorporated into Title 22.

The use of the prospective, incorporation-by-reference method of adopting water quality objectives for those water bodies or ground water basins designated MUN violates the requirement that affected state and local agencies be consulted with and their concerns be considered, the applicable public notice and participation requirements of the Water Code, and the requirement that changes to a Basin Plan must be approved by the State Board before those changes become effective. *See* Water Code §§13240, 13244, and 13245.

Contrary to findings made by the OAL and Regional Board,<sup>6</sup> deferral of these obligations to the Department of Health Service's (DHS) MCL adoption hearings is inappropriate and unlawful because DHS does not adopt MCLs with the intent and understanding that the MCLs will be used for any other purpose than drinking water standards applied to public water agencies' supply of tap water to the public. DHS does not notify dischargers of potential changes to MCLs to provide them with an opportunity to review and comment on proposed changes, and DHS does not comply with the explicit Water Code or CEQA requirements for adoption of Basin Plans and water quality objectives.<sup>7</sup> Therefore, the Regional Board cannot delegate its Basin Planning powers to DHS,<sup>8</sup> and cannot rely on DHS

<sup>6</sup> *See* OAL File No. 95-0328-01 at 12, RWQCB\_15036 (OAL approved the prospective incorporation-by-reference of specified standards for drinking water adopted by the Department of Health Services (DHS) for waters designated by the Regional Board as MUN in part because "the public has a continuing opportunity to participate in proposed changes to the drinking water standards."); *see also* RWQCB\_21798 (The Regional Board stated that DHS "adopts new MCLs in a public process that is essentially the same as the process the Regional Board would go through to adopt objectives. There would be no purpose for the Regional Board to consider the same information that has already been considered in an open, public process by DHS. The MCLs become water quality objectives that must be met to protect the drinking water beneficial use.")

<sup>7</sup> Since DHS is not adopting the MCLs as water quality objectives, their CEQA analysis does not extend to potential impacts of applying these numbers as water quality objectives to all waters of the State.

<sup>8</sup> The Regional Board's delegation powers only allow delegation of certain activities and only to the Board's Executive Officer. *See* Water Code §13223(a). Delegation of basin planning activities to DHS is not authorized.

hearings as an adequate substitute for its own mandatory water quality objective-setting procedures.

b) The 1994 Addition that More Stringent Limits May be Applied.

In the 1994 Basin Plan Amendments' Staff Report, the Regional Board stated "the Regional Water Board reviews the water quality objectives, and the limits described, on a case-by-case basis and applies limits to assure protection of all beneficial uses. This may result in the need to apply limits more stringent than MCLs." 1994 Basin Plan Amendments Staff Report at 29, RWQCB\_06119. The Staff-recommended alternative, which was ultimately adopted by the Regional Board, was to "update the water quality objectives to ensure that the water quality objectives are also at least as stringent as the federal Primary MCLs." RWQCB\_06120. This alternative also provided language to clarify that the Regional Board "may apply limits more stringent than state and federal Primary MCLs and Secondary MCLs (SMCLs) to ensure the reasonable protection of beneficial uses and the prevention of nuisance." *Id.*

The Regional Board failed to comply with state law requirements when adopting the following new language into the Chemical Constituents objective: "To protect all beneficial uses, the Regional Water Board may apply limits more stringent than MCLs." Since the "limits more stringent than MCLs" were not defined specifically in the language of the Basin Plan, it would have been impossible to conduct a 13241 analysis on these undefined limits. Furthermore, the Regional Board erroneously concluded that "this alternative would provide consistency with existing federal standards, and clarification with respect to existing water quality objectives; therefore, attainability is not in question and no environmental or economic consequences are anticipated." RWQCB\_06122. This assumption of attainability and no environmental or economic consequences was unsupported by the record. MCLs are standards set to apply to tap water, not to untreated ground water, so attainability *was* in question. In addition, Hilmar is a clear example of the costs and environmental consequences of imposing MCLs or more stringent limits. Hilmar has thus far spent nearly \$80 million in search of attaining its EC limit. The Regional Board's failure to consider the consequences of its actions was unconscionable and unlawful.

c) The 1994 Addition of a Toxicity Objective for Groundwater.

The Regional Board added a Toxicity objective for groundwater to the Basin Plan in 1994 due to their analysis that "the existing ground water objectives lack clarity and comprehensiveness with respect to toxicity." 1994 Basin Plan Amendments Staff Report at 39, RWQCB\_06129. Despite its contradictory determination that the "beneficial uses of ground waters threatened and impacted by toxic substances are already protected in the existing Basin Plan pursuant to the water quality objective for Chemical Constituents," the Regional Board Staff recommended that the "Basin Plan language should be more specific to ensure adequate protection against toxic effects." (RWQCB\_06129). The proposed, and ultimately adopted, Toxicity objective for groundwater was designed to clarify "the existing approach to applying

the existing narrative ground water objective for Chemical Constituents in cases where either no MCL is available or the MCL is not sufficiently limiting to protect beneficial uses.” RWQCB\_06131. In other words, the objective would allow the Regional Board to pick virtually any number at all to implement this narrative objective. All this would be done outside of the public objective-setting process, thereby removing a true 13241 analysis from that process. Instead, the Regional Board cursorily concluded, without supporting evidence, that, for its new Toxicity objective, “attainability is not in question and this alternative has no new environmental or economic consequences.” *Id.*

The Regional Board recognized that because it had not determined the actual numbers to be imposed, “it is not feasible to perform a meaningful economic analysis of its impacts at this time. To implement this Basin Plan language, the Regional Water Board will weigh economic considerations along with other factors in adopting enforcement orders and waste discharge requirements for individual discharges.” 1994 Basin Plan Amendments Staff Report at 42, RWQCB\_06132. Unfortunately, when adopting Hilmar’s Permit and recently proposed enforcement orders, these considerations were not undertaken. Thus, the Regional Board has never considered the 13241 factors for the Toxicity objective. This failure violates state law. *See e.g.*, Water Code §13241, 13263, 13000.

Compliance with the objective was muddled further by the late addition of language in the Basin Plan stating that “For permitting purposes, it is important to clearly define how compliance with the narrative toxicity objectives will be measured. Staff is currently working with the State Water Board to develop guidance on this issue.” *See* Late Revisions to October 1994 Basin Plan (Nov. 23, 1994), RWQCB\_12588. Thus, because this determination of compliance with the Toxicity objective was indefinitely deferred and has never been clarified, this objective is too vague to be used for permitting and enforcement purposes.

3) The Regional Board Failed to Have an Implementation Plan to Meet the Imposed De Facto EC Objectives.

Water Code section 13242 requires an implementation plan for all water quality objectives. Water Code §13242; *see accord* Regional Board Staff Report for the 1994 Basin Plan Amendments at 3, RWQCB\_06093. No such plan exists for meeting a 900  $\mu\text{mhos/cm}$  EC objective, or for the narrative Chemical Constituents or Toxicity ground water objectives from which the *de facto* 900  $\mu\text{mhos/cm}$  EC objective was derived. From the beginning, regional boards were given guidance that they should be “sensitive to the feasibility of implementing a management plan to meet the objective.” *See* Management Memorandum No. 18 (RWQCB\_00309, \_00311)(1972). Situations were to be recognized in which maintenance of present conditions was not feasible, and that some degradation must be accepted with any implementation plan. *Id.* at RWQCB\_00311. The recognition also existed that “there will be certain situations where it is clearly impractical to devise management plans to maintain quality in all basins if waters are to be used. Some basins must be designated “salt sinks” to provide for disposal of saline wastes from surrounding basins.” *Id.*

These types of considerations were never made because no salt management plan or implementation plan for salt objectives (including EC) were or have been established by the Regional Board for the groundwater in the Hilmar area. This failure invalidates the groundwater objectives and any permits issued based on these invalid objectives.

4) The Regional Board Failed to Perform Meaningful Periodic Reviews of Basin Plan Objectives.

Water Code section 13240 requires that the Regional Water Board periodically review its water quality control plans, and the beneficial uses, water quality objectives, and implementation plans contained therein. Water Code §§13240, 13050(j). In its initial Basin Plan, the Regional Board made a commitment that “water quality objectives will be reviewed periodically by the Regional Board as new information becomes available and will be the subject of public hearings at least once during each three year period.” Water Quality Control Plan Report Abstract, at 61, RWQCB\_01402; 1975 Basin Plan at I-4-1, RWQCB\_01519. The only real review of the Basin Plan’s objectives at issue in relation to the 1997 Hilmar Permit occurred in 1994, and have not occurred since, despite requests from interested persons to do so. *See e.g.*, Letter from County of Sacramento Public Works Agency to Gary Carlton, Executive Officer, Regional Board (April 30, 1998) at 1, RWQCB\_21036 (specifically requesting review of the Chemical Constituents for groundwater and the narrative Toxicity objective). A single meaningful review in a thirty year time frame does not comport with section 13240’s requirement for periodic review, nor with the Regional Board’s past commitment for public review every three years.

5) The Regional Board violated California Environmental Quality Act.

The California Environmental Quality Act (“CEQA,” Cal. Pub. Res. Code §§21000 *et seq.*) requires that public agencies evaluate the impacts of projects for the purposes of: (1) avoiding, reducing, and preventing environmental damage; and (2) providing information to decision-makers and the public concerning the environmental effects of proposed actions, to promote informed self-government. (*See e.g., Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 259 (1972).) To achieve these purposes, CEQA must be “interpreted in such manner as to afford the fullest possible protection to the environment . . .” (*Laurel Heights Improvement Assn. v. Regents of Univ. of California*, 47 Cal.3d 376, 390-92 (1988)).

Section 21080.5 of the Public Resources Code provides that a regulatory program of a state agency shall be certified by the Secretary for Resources as being exempt from the requirements for preparing an Environmental Impact Report (“EIR”), negative declaration, and initial studies if the program meets certain criteria. Water quality control planning by regional boards is one of the exempt programs. 14 C.C.R. §15251(g). However, even though an EIR need not be prepared, the Regional Board, when adopting a Basin Plan, must prepare a functional equivalent to substitute for the EIR process. This substitute document must contain a description

of the proposed activity, and either alternatives and mitigation to avoid or reduce any significant or potentially significant effects on the environment, or a statement that the agency's review, supported by a checklist, found no significant or potentially significant effects on the environment. 14 C.C.R. §15252.

When the Regional Board adopted the groundwater objectives discussed herein, its environmental documentation was incomplete. The Regional Board failed to identify significant or potentially significant effects on the environment, including increased air quality impacts from trucking brine wastes from the treatment processes required to meet the objectives, increased energy usage from those same treatment processes, water quality impacts to other watersheds from brine waste discharge, or any other potential effects, and failed to properly analyze alternatives or provide adequate mitigation measures for any potential effects. *See* 1994 Environmental Checklist, RWQCB\_06165 to RWQCB\_06178. In fact, these impacts could not be properly analyzed because the narrative groundwater objectives are too vague to be able to identify the actual number that will be imposed to protect the beneficial uses. Without being able to identify the number to be met, the impacts of meeting that number cannot be properly analyzed. Thus, the performance of a CEQA analysis at the subsequent permitting stage was critical.

In this case, however, the Regional Board failed to undertake a CEQA analysis at the permit adoption stage and the Regional Board cannot properly claim an exemption under Water Code section 13389. Section 13389 does not work to shield or exempt the Regional Board from considering environmental costs and impacts under CEQA (Pub. Res. Code §21000 et seq.) since this Permit is not a federal permit issued under the Clean Water Act. *See Committee for a Progressive Gilroy v. SWRCB* (1987) 192 Cal. App.3d 847, 862. This failure to comply with CEQA provides another reason why the permit should be reissued in compliance with state law.

6) The Failure to Specify a Valid Averaging Period Upon Which to Judge Compliance Violated Water Board Guidance.

From the initial guidance given to the original Basin Plan contractors in 1972, it was clear that water quality objectives were to be set with specific averaging periods included. The original recommendation was to provide "actual mean or average numerical objectives." *See* Management Memorandum No. 18 (RWQCB\_00309, \_00311)(1972). It was further recommended that objectives "should be expressed in a statistical manner to take into account natural fluctuations in measured values." *Id.* at RWQCB\_00311.

The recommended guidelines for EC issued to the Basin Planning contractors in 1972 actually specified that EC objectives for freshwater be set as a value not to be exceeded in more than 20% of any 20 consecutive samples nor in any three consecutive samples. *See* Management Memorandum No. 20, Attachment 2 (RWQCB\_00342)(1972). Furthermore, this document stated that "reliable upper limits are not available," and did not recommend that EC be set as a "never exceeded" value. *Id.* at RWQCB\_00342, \_00338.

No need exists for a short term average for EC since there is no aquatic life use of groundwater and no indication in the record that higher levels of EC causes proven adverse effects on local beneficial uses (e.g., local crops using the current management methods) or toxicity.<sup>9</sup> See Response to Comments (Nov. 1993 draft Basin Plan) at 1, RWQCB\_12598 (noting that the use of instantaneous maximum concentrations was to protect “primarily aquatic life beneficial uses,” which could cause adverse impacts “even if they were exceeded for only a short time.”).

In this case, the EC limit appears to have been set to protect the drinking water beneficial use, but drinking water standards are set with an allowable short term high of 2,200 µmhos/cm. See 22 C.C.R. §64449 at Table 64449-B. That was not the value selected by the Regional Board as a short term limit. Instead, the Regional Board arbitrarily selected the lowest point in the possible range without specifying an applicable averaging period and without supporting evidence that this value was reasonable, achievable, and necessary to protect beneficial uses.

An averaging period is required so that water quality objectives are consistently and fairly applied. A recent ruling from the Fourth Circuit Court of Appeal held that U.S. EPA could not define a particular regulatory term differently under different programs under the same act. See *United States v. Duke Energy*, [cite for case no. 04-1763] (4th Cir., June 15, 2005) upholding 278 F. Supp. 2d 619 (M.D.N.C. 2003). The Fourth Circuit cited a United States Supreme Court decision that prohibited defining the same statutory term differently in different programs. *Rowan Cos. v. United States*, 452 U.S. 247 (1981). Similarly, the Regional Board may not declare in the Hilmar case that the EC limit is a not-to-exceed instantaneous or daily maximum value when other permits issued by this same Regional Board have included EC limits that were expressly set forth as six-month averages based on the same or similar narrative objectives. See e.g., *City of Woodland* permit, R5-2003-0031 at page 21 (although EC limit was removed, it was originally set forth as a 6-month average).

7) The Regional Board Arbitrarily Assigned Beneficial Use Designations.

The Regional Board admitted that collecting information as to the existing and potential beneficial uses of all groundwater “would require an expenditure of staff resources far beyond current and projected funding levels. . . . Water bearing zones must be delineated both horizontally and vertically because vertical stratification of water bearing zones could result in differences in existing and potential beneficial uses of shallow versus deep ground water. Detailed site-specific geologic information would be required to delineate these differences. An extensive effort to fill data gaps, and to address inaccuracies and insufficiencies would be necessary.” See 1994 Basin Plan Amendments Staff Report at 25, RWQCB\_06115. This

<sup>9</sup> Secondary MCLs, like the one for EC, are set for constituents that may adversely affect the taste, odor, or appearance of drinking water, and are directly related to consumer “acceptance” or “dissatisfaction” with the drinking water provided through a community water system. See 22 C.C.R. §64449(a). This level has no relation to or reasonable potential to cause toxicity.

alternative, although not selected by the Regional Board, would have been able to “eliminate the inadequacies of the current ground water beneficial use designations.” *Id.* Thus, the Regional Board admitted that there was an inaccuracy in its manner of designating beneficial uses of groundwater. *See also id.* at 26, RWQCB\_06116 (“staff has identified inadequacies and a lack of clarity in the existing Basin Plan which have resulted in the need to modify beneficial use designations. . .”).

Instead of making site-specific determinations of the past, present, and probable uses of each ground water basin as is required by law, the Regional Board took the far easier and less accurate path of imposing blanket use designations on all ground waters, whether these designations reflected actual attainable uses or not. *See* 1994 Basin Plan Staff Report at 27, RWQCB\_06117 (designating “agricultural supply, industrial service supply, and industrial process supply as beneficial uses designations in the Basin Plan for all ground waters of the Region.”). This failure to regulate site-specifically led to overly stringent requirements and unreasonable and imprecise regulation in the Hilmar Permit.

8) The Regional Board Failed to Adopt a Mixing Zone for the Limits Imposed.

The supporting documentation for the 1994 Basin Plan Amendments state that:

“The objectives contained in this plan, and any State or Federally promulgated objectives applicable to the basins covered by the plan, are intended to govern the levels of constituents and characteristics in the main water mass unless otherwise designated. They may not apply at or in the immediate vicinity of effluent discharges, but at the edge of the mixing zone if areas of dilution or criteria for diffusion or dispersion are defined in the waste discharge specifications.”

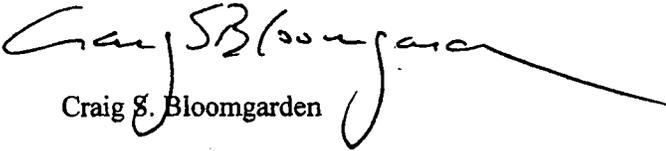
RWQCB\_12497. The Regional Board failed to include a mixing zone within which the water quality objective does not apply. *See* Late Revisions to the October 1994 Draft Basin Plan, RWQCB\_12587. Recent State Board precedent held that the Regional Board was required to consider dilution, attenuation, aquifer capacities, recharge volumes, and soil adsorption prior to setting effluent limits to protect groundwater. *See* State Board Order WQO 2003-009 at 5 (July 16, 2003). These considerations were not taken into account prior to imposing the 900  $\mu$ mhos/cm limit for EC in the Hilmar Permit. *See supra* footnote 4 (requirement to conform regulation based on new precedent). Therefore, the Permit must be reopened to consider inclusion of mixing zones, or factors related to dilution, attenuation, and soil adsorption.

Mr. Thomas R. Pinkos  
July 13, 2005  
Page Thirteen



The reasons set forth herein provide additional support for Hilmar's request that the Regional Board act to retroactively modify the discharge specification for EC currently contained in Hilmar's Permit. If you have any questions regarding Hilmar's request, please contact me.

Very truly yours,

  
Craig S. Bloomgarden

CSB/ms

cc via e-mail:

Mr. John Jeter  
Mark Fogelman, Esq.  
Melissa A. Thorne, Esq.

Courtesy copy via Federal Express:

M. Catherine George, Esq.  
Tracy Winsor, Esq.  
Russell Hildreth, Esq.

19116:6457077.1

Exh. E



**Justin H. Hickox**  
Secretary for  
Environmental  
Protection

# California Regional Water Quality Control Board

Central Valley Region

Robert Schneider, Chair

JAN 3 2002



Gray Davis  
Governor

Sacramento Main Office

Internet Address: <http://www.swrcb.ca.gov/rwqcb5>  
3443 Routier Road, Suite A, Sacramento, California 95827-3003  
Phone (916) 255-3000 • FAX (916) 255-3015

2 January 2002

Mr. John Jeter  
Hilmar Cheese Company  
9001 North Lander Avenue  
Hilmar, CA 95324

I wanted to provide you with an update and follow up to the meeting we had at your company facility in Hilmar. When we toured your plant and observed waste treatment and disposal operations, I was favorably impressed with the efforts Hilmar has undertaken to improve wastewater management practices at the facility.

At our meeting we discussed some concerns of ours regarding the adequacy of your proposals to address remaining wastewater management issues so that we could draft tentative requirements for the Board's consideration. Those concerns related to potential bypass of the treatment system, water quality degradation in domestic water supply wells adjacent to the plant, and the continued use of the former waste disposal area. We agreed that you would provide an additional report addressing in detail how our concerns would be addressed. Our staff has since reviewed your report. I wanted to inform you of the results of that review and how we will address the as yet unresolved areas of concern.

1. **Bypass of the treatment system.** Your report indicates that Hilmar will have a long term solution in place within two years. Our review left us uncertain as to the details of how you propose to accomplish this. Nevertheless, we intend to include within the tentative requirement a schedule phasing in a prohibition of bypass of the treatment system.
2. **Adjacent Domestic Supply wells.** Our staff review indicates that some of these wells may be impaired for their intended usage. We intend to include in the requirements that additional sampling and evaluation be conducted to ensure that these wells are adequately protected.
3. **Prior Waste Reclamation Area.** Monitoring indicates there are constituents in the ground water that exceed water quality objectives. As required by State Water Resources Control Board Resolution 92-49, we intend to include provisions to further evaluate groundwater quality and determine what level of remediation, if any, is required.

We will be drafting updated requirements that govern your increased wastewater flow at the plant and include terms that ensure the above issues are properly addressed. I wanted to let you know of our

**California Environmental Protection Agency**



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John Jeter

- 2 -

27 December 2001

review prior to circulation of tentative requirements for public comment, which could be two months away. I want to also acknowledge the level of effort that you and your staff have expended to bring your waste treatment and disposal operation to its current status.

If you wish to discuss this further, please contact Loren J. Harlow in our Fresno Office at (559) 445-5116.



GARY M. CARLTON  
Executive Officer

cc: Thomas J. Mingee, Brown and Caldwell, 2701 Prospect Park Drive, Rancho Cordova

Exh. F



# California Regional Water Quality Control Board Central Valley Region

Robert Schneider, Chair

**FILE**



Gray Davis  
Governor

Vinston H. Hickox  
Secretary for  
Environmental  
Protection

Fresno Branch Office  
Internet Address: <http://www.swrcb.ca.gov/~rwqcb5>  
3614 East Ashlan Avenue, Fresno, California 93726  
Phone (559) 445-5116 • FAX (559) 445-5910

31 January 2001

Mr. John Jeter, CEO  
Hilmar Cheese Company  
9001 North Lander Ave.  
Hilmar, CA 95324

## REVISED MONITORING AND REPORTING PROGRAM NO. 97-206, HILMAR CHEESE COMPANY, MERCED COUNTY

On 30 August 2000 we issued Hilmar Cheese Company (HCC) a Notice of Violation (NOV) containing a technical attachment (hereafter Attachment A), which outlined submittals required by the NOV and a revised Monitoring and Reporting Program No. 97-206 (hereafter revised MRP). Attachment A required, in part, graphs of the laboratory analytical data (Item No. 3), all monitoring analytical data obtained during the history of the site (Item No. 4), and a comprehensive analysis of the groundwater degradation underlying the HCC site (Item No. 5). The revised MRP increased the number of parameters and the frequency of monitoring of effluent and groundwater, required monitoring of hydraulic loading of the reclamation area, and extended due dates for reports.

On 16 October 2000, we received a report entitled *Notice of Violation Attachment A Response* (response). Our review indicates a need for information on minerals not included in the August MRP revision to be added to the *General Minerals Analyte List* for groundwater and effluent monitoring (page 2 of the revised MRP). Accordingly, the MRP has been revised again (31 January 2001) to include monitoring for aluminum, ammonia, boron, calcium, iron, phosphorus, sulfate, sulfite, and sulfide. The updated revised MRP also establishes that nitrate and ammonia monitoring data shall be reported as nitrogen. Further, we added fecal and total coliform groundwater monitoring, as high levels of coliform organisms could occur in groundwater given the high levels of BOD in groundwater beneath the HCC site.

In reviewing HCC's groundwater data, wastewater is obviously mounding under the reclamation area such that groundwater passing through all wells constructed along the perimeter of the area reflect downgradient water quality, as does the groundwater passing through the drain immediately west of Check No. 8. Our interpretation of the influence of the HCC's waste constituents on the area differs significantly from that of your consultant. Much of this derives from misinterpretation and subsequent misapplication of "points of compliance" by the consultant so that adverse effects from the discharge appear minimal and nonexistent. Accordingly, we have revised the "Point of Compliance" section to minimize misinterpretation of the Board's intent.

California Environmental Protection Agency



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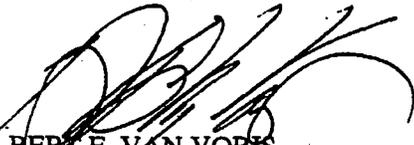
31 January 2001

Further, we have added the following sentence to the Groundwater Monitoring, under "Sampling" (page 3 of the revised MRP), as the tile drain appears to be a significant outlet for waste constituents:

"The Discharger shall also monitor the quantity and quality of groundwater flowing through the tile drain immediately west of Check No. 8."

By **16 February 2001**, please submit a work plan and time schedule to provide the ability to monitor the groundwater flowing through the tile drain west of Check No. 8. Further, implement the enclosed revised MRP (31 January 2001) **immediately**. These modifications and additions will help accurately assess the situation at HCC and ultimately allow the Board to consider revising HCC's waste discharge requirements to allow for increased discharges. At that time, a reduction in the number of constituents and frequency of monitoring can be evaluated.

If you have any questions regarding these matters, please call me at the above number or have your staff call Dale Harvey at (559) 445-6190 or Gary Gagliolo at (559) 445-5576.



BERT E. VAN VORIS  
Supervising Engineer  
RCE No. 24105

Enclosure

cc: Mr. Gary Carlton, Executive Officer, Central Valley Regional Water Quality Control Board,  
Sacramento  
Mr. Tedd Struckmeyer, Hilmar Cheese Company, Inc., Hilmar  
Mr. Tom Mingee, Brown and Caldwell, Sacramento  
Mr. Ronald Crites, Brown and Caldwell, Sacramento

HCC revised MRP ltr 1/31/01

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

REVISED MONITORING AND REPORTING PROGRAM NO. 97-206

FOR  
HILMAR CHEESE COMPANY, INC.  
HILMAR WHEY, INC.  
HILMAR CHEESE COMPANY PROPERTIES PARTNERSHIP  
ALVIN A. AND DEVONA WICKSTROM  
KATHY AND DELTON NYMAN dba DELTON NYMAN'S FARM  
AND  
JOSE G. AND MARIE C. SILVEIRA  
MERCED COUNTY

Specific sample station locations shall be established with concurrence of the Board's staff, and a description of the stations shall be submitted to the Board and attached to this Program.

**EFFLUENT MONITORING**

Effluent samples shall be collected from the last connection just prior to discharge to the collection sump and reclamation area. Effluent samples should be representative of the volume and nature of the discharge. **By 15 March 1998**, the Discharger shall establish a revised sampling station to collect representative effluent samples from the completed V-SEP® pretreatment system. This revised sampling location shall be down stream of the last membrane unit and just prior to discharge to the collection sump and reclamation area. Time of collection of a grab sample shall be recorded. Effluent monitoring shall be effective throughout the processing season and include at least the following:

<u>Constituents</u>	<u>Units</u>	<u>Type of Sample</u>	<u>Sampling Frequency</u>
Flow	mgd	Metered	Continuous
20°C BOD <sub>5</sub>	mg/l	Grab	Weekly
Nitrate-Nitrogen	mg/l	Grab	Weekly
Kjeldahl Nitrogen	mg/l	Grab	Weekly
EC (Specific Electrical Conductance @ 25°C)	µmhos/cm	Field	Daily
COD	mg/l	Grab	Weekly
<u>General Minerals<sup>1</sup></u>	mg/l	Grab	Weekly

<sup>1</sup> See next page for list of General Mineral Analytes.

General Minerals Analyte List

Symbol		Symbol		Symbol	
Al	Aluminum	EC	Conductivity (µmhos/cm)	pH	pH (std units)
Alk	Alkalinity (as CaCO <sub>3</sub> )	---	Hardness (as CaCO <sub>3</sub> )	K	Potassium
NH <sub>3</sub>	Ammonia (as N)	OH	Hydroxide (as CaCO <sub>3</sub> )	Na	Sodium
HCO <sub>3</sub>	Bicarbonate*	Fe	Iron	SO <sub>4</sub>	Sulfate
B	Boron	IDS	Inorganic Dissolved Solids	SO <sub>3</sub>	Sulfite
Ca	Calcium	Mg	Magnesium	SO <sub>2</sub>	Sulfide
CO <sub>3</sub>	Carbonate (as CaCO <sub>3</sub> )	Mn	Manganese	TDS	Total Dissolved Solids
Cl	Chloride	P	Phosphorus		

\* Must state whether bicarbonate is reported as either calcium carbonate (CaCO<sub>3</sub>), or bicarbonate (HCO<sub>3</sub>).

**Sample Collection and Preservation:** Using proper sampling methods and appropriate sample containers is critical in obtaining valid results for general minerals analyses. Any sample placed in an acid-preserved bottle must first be filtered or you risk the chance of increasing the concentration of metals to non-representative values and making cation/anion balance impossible. If field filtering is not feasible, collect samples in unpreserved containers and submit to the laboratory within 24-hours with a request (on the chain-of-custody form) to immediately filter then preserve the sample.

**Sample Analysis:** Inform the laboratory that you are interested in "total dissolved metals" and write this on your chain-of-custody form in the same box as "General Minerals." This step should help insure that the laboratory filters samples before they are preserved.

### GROUNDWATER MONITORING

By 15 January 1998, the Discharger shall develop a groundwater monitoring program for this site. The program shall be designed to (1) determine the vertical and lateral extent of existing groundwater degradation associated with previous on-site discharges; (2) provide the best assurance of the earliest possible detection of further impacts to groundwater due to current discharges from this facility; and (3) provide the best assurance of the earliest possible detection of whether current application of wastewater and/or freshwater to the reclamation area are causing the existing ground water pollution to spread.

#### Point of Compliance

Compliance with groundwater limitations shall be determined at monitoring points represented by wells forming a vertical line that extends into and through the uppermost layer of water of the uppermost aquifer underlying the reclamation area, as defined in Waste Discharge Requirements Order No. 97-206. Except for background monitoring wells, every monitoring well intended to measure the effects of the discharge shall be either hydraulically below or hydraulically downgradient from the point of discharge yet as close to the downgradient edge of the reclamation area as practicable. A boundary monitoring well defines a point on a vertical surface representing the maximum horizontal extent of the reclamation area where a particular groundwater limitation applies or a point within the reclamation area where a limit applies. Monitoring wells shall be properly constructed and capable of yielding samples representative of the uppermost aquifer layer.

Boundary monitoring wells for purposes of satisfying groundwater limitations in Waste Discharge Requirements Order No. 97-206 include the following monitoring wells (MWs): MW-4, MW-7, MW-8, MW-9, MW-10, and MW-15. In addition, as evidence indicates the tile drain immediately west of Check No. 8 intercepts shallow groundwater, the water within the tile drain will be considered the same as groundwater and another monitoring point.

REVISED MONITORING AND REPORTING PROGRAM  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

Reclamation area monitoring wells shall measure the quality of groundwater immediately beneath the reclamation area, and include MW-1, MW-2, MW-5, and MW-6.

The program shall include a sufficient number of background groundwater monitoring wells installed at appropriate locations and depths to represent the quality of groundwater unaffected by the discharges from the facility. All well locations and construction features are subject to the review and concurrence of the Executive Officer.

All deep monitoring wells and all shallow monitoring wells beyond the boundary of the reclamation area are investigatory wells for the purpose of determining impacts from past discharges and in helping future decisions of the Discharger and Board in determining appropriate remediation.

**Sampling**

The monitoring program shall include a detailed description of the sampling and analytical procedures used during monitoring to assure that monitoring results provide a reliable indication of water quality at all background and monitoring points.

The Discharger shall sample all groundwater-monitoring wells monthly and report depth to groundwater. In addition to reporting groundwater elevation relative to mean sea level, the Discharge shall report groundwater elevation relative to the established reference elevation and the ground surface elevation, as established in Table 3-5 of *Monitoring Well Network Program Groundwater Analysis Report* (Nolte and Associates, February 1999). Sampling shall include nitrogen forms (total Kjeldahl nitrogen, nitrate, nitrite, and ammonia), coliform (fecal and total), and General Minerals. The groundwater surface elevation (in feet and hundredths, USGS datum) in all wells shall be measured at the time of sampling (prior to purging) and used to determine the velocity and direction(s) of ground water flow. Contour maps shall be prepared from the complete groundwater elevation data set and submitted with monthly self-monitoring reports. The Discharger shall also monitor the quantity and quality of groundwater flowing through the tile drain immediately west of Check No. 8. All groundwater monitoring data and analyses required herein shall be submitted in hardcopy tabular form with monthly self-monitoring reports as well as on electronic media in a form and format acceptable to the Executive Officer. Resulting chain of custody forms and lab sheets shall also be submitted. All approved monitoring wells shall be sampled and analyzed for monitoring parameters and constituents of concern as indicated and listed herein. Groundwater monitoring for all indicator parameters and constituents of concern shall be collected from wells in the approved monitoring network and analyzed as follows:

<u>Constituent</u>	<u>Unit</u>	<u>Type of Measurement</u>	<u>Frequency<sup>2</sup></u>
Fecal Coliform	MPN <sup>1</sup> /100ml	Grab	Monthly
Total Coliform	MPN <sup>1</sup> /100ml	Grab	Monthly
Nitrate (as N)	mg/l	Grab	Monthly
Kjeldahl Nitrogen	mg/l	Grab	Monthly
20 °C BOD <sub>5</sub>	mg/l	Grab	Monthly
COD	mg/l	Grab	Monthly
<u>General Minerals</u>	mg/l	Grab	Monthly

<sup>1</sup> Most probable number per 100 milliliters.

<sup>2</sup> Monitoring frequency shall be reduced to quarterly when the groundwater situation has been fully defined and the impacts of the discharge can be properly monitored and controlled with less data.

### WATER SUPPLY MONITORING

A sampling station shall be established where a representative sample of water supply can be obtained<sup>1</sup>.  
2. Water supply monitoring shall include at least the following:

<u>Constituents</u>	<u>Units</u>	<u>Sampling Frequency</u>
General Minerals	mg/l	Monthly

<sup>1</sup> If supply water is provided by a water purveyor, information may be obtained from the Purveyor.

<sup>2</sup> If the source water is from more than one well, the weighted average of constituent concentrations from each well shall be reported.

### RECLAMATION AREA MONITORING

The Discharger shall monitor the reclamation area daily while there is a discharge. Monitoring shall identify: (1) the area(s) receiving fresh water and the areas receiving wastewater; (2) the type of crop(s) grown at each area; and (3) the monthly average hydraulic loading rate (in gpd) to each area. It shall also include calculations for BOD<sub>5</sub>, chloride, sulfate, and total nitrogen loading rates (in lbs/acre-day); and notations based on visual observations on whether insects and/or objectionable odors are present in the reclamation area. The Discharger shall track presence and absence of standing water in each disposal/reclamation area check. The amount of water present in each check shall be recorded on a daily basis (in inches). The data shall be presented in tabular format and be accompanied by a map showing the location of and appropriate numerical designation for each check. These monitoring data shall be submitted along with the monitoring report the following month. Where remedial action is necessary, the Discharger shall briefly explain in the transmittal what action has been taken or is scheduled to be taken.

#### A. HYDRAULIC LOADING MONITORING

The Discharger shall monitor the reclamation area daily while there is a discharge. Monitoring shall identify: (1) the area(s) receiving fresh water and the areas receiving wastewater; (2) the type of crop(s) grown at each area; (3) the monthly average hydraulic loading rate (in gpd) to each area; (4) presence and absence of standing water in each disposal/reclamation area check; and (5) amount of water present in each check from daily records (in inches). The data shall be presented in tabular format and be accompanied by a map showing the location of and appropriate numerical designation for each check. Monitoring shall also include calculations made to determine BOD<sub>5</sub>, chloride, sulfate, and total nitrogen loading rates (in lbs/acre-day); and notations based on visual observations on whether insects and/or objectionable odors are present in the reclamation area. These monitoring data shall be submitted along with the monitoring report the following month. Where remedial action is necessary, the Discharger shall briefly explain in the transmittal what action has been taken or is scheduled to be taken.

#### B. SOIL MONITORING

The Discharger shall establish, with concurrence of Board staff, five soil-profile monitoring locations and two representative background locations (i.e., that historically have not received process wastewater). The samples shall be collected and analyzed for at least the following constituents:

REVISED MONITORING AND REPORTING PROGRAM  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

-5-

<u>Constituents</u>	<u>Units</u>	<u>Soil Profile</u>	<u>Frequency</u>
EC	µmhos/cm	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Soil pH	pH	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Buffer pH	mg/kg as CaCO <sub>3</sub>	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Total Alkalinity	mg/kg as CaCO <sub>3</sub>	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Total Organic Carbon	% dry weight	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Cation Exchange Capacity	meq/100 gms	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Ammonia (as N)	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Nitrate (as N)	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Kjeldahl-Nitrogen (as N)	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Total Nitrogen	mg/kg	Calculated	Semi-Annually <sup>2</sup>
Sulfate	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Sulfite	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Sulfide	mg/kg	6 feet <sup>1</sup>	Semi-Annually <sup>2</sup>
Phosphorus	mg/kg	6 inches	Semi-Annually <sup>2</sup>

<sup>1</sup> Samples shall be collected at 6 inches, 2 feet, 4 feet, and 6 feet.  
<sup>2</sup> Each location shall be sampled in April and October.

Resulting data shall be submitted with the monthly self-monitoring reports for June and January, respectively.

### REPORTING

Monthly monitoring reports containing results of monitoring conducted during the month shall be submitted to the Board by the first day of the second month following the month of sample collection. Monitoring data sampled quarterly or annually shall be submitted with the monthly monitoring report for the last month of the calendar quarter or year, respectively.

In reporting the monitoring data, the Discharger shall arrange the data in tabular form so that the date, the constituents, and the concentrations are readily discernible. The data shall be summarized in such a manner that illustrates clearly whether the Discharger complies with waste discharge requirements, including calculation of all averages, etc. Copies of the original laboratory reports shall also be included as an appendix to each report.

If the Discharger monitors any pollutant at the locations designated herein more frequently than is required by this Order, the results of such monitoring shall be included in the discharge monitoring report.

By 1 February of each year, the Discharger shall submit a written report to the Executive Officer containing the following:

- a. The names, titles, and general responsibilities of persons operating and maintaining the treatment system and/or managing the discharge to the reclamation area.
- b. The names and telephone numbers of persons to contact regarding the treatment system and/or discharge for emergency and routine situations.
- c. A certified statement of when the flow meter and other monitoring instruments and devices were

REVISED MONITORING AND REPORTING PROGRAM  
HILMAR CHEESE COMPANY, INC., et al.  
MERCED COUNTY

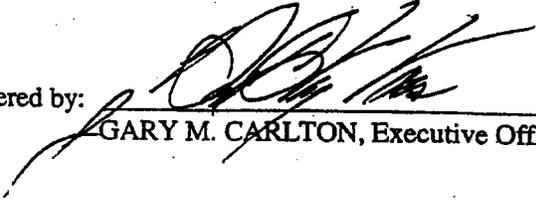
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- last calibrated, including identification of who did the calibration (Standard Provision C.4).
- d. A statement whether the reclamation management plan reflects current operations, and the dates when these documents were last reviewed for adequacy.

The Discharger may also be requested to submit an annual report to the Board with tabular and graphical summaries of the monitoring data obtained during the previous year. Any such request shall be made in writing. The report shall discuss the corrective actions taken and planned to bring the discharge into full compliance with the waste discharge requirements. All reports submitted in response to this Order shall comply with the signatory requirements in Standard Provision B.3.

The Discharger shall implement the above monitoring program upon receipt.

Ordered by:

  
GARY M. CARLTON, Executive Officer

REVISED 31 January 2001

# Exhibit D

**Hilmar Cheese Company**  
**Projected Capital Spending 1998 thru 2000**

	<u>Original</u> <u>(Feburary, 1998)</u>	<u>Current</u> <u>(July, 1999)</u>	<u>Difference</u>
<b><u>Expansion Projects:</u></b>			
Wastewater	\$3,800	\$6,800	\$3,000
Lactose	12,650	25,135	12,485
Protein	5,200	15,861	10,661
Dry Warehouse Expansion	0	2,400	2,400
Cheese	7,000	15,428	8,428
Milk Receiving	1,800	7,700	5,900
Boiler/Cooling	0	1,025	1,025
Fines room processing	0	220	220
Other	635	1,020	385
	<u>31,085</u>	<u>75,589</u>	<u>44,504</u>
AMPC reimbursement	0	(5,673)	(5,673)
	<u>31,085</u>	<u>69,916</u>	<u>38,831</u>
<b>Non expansion projects:</b>	<u>23,898</u>	<u>21,574</u>	<u>(2,324)</u>
	<u>\$54,983</u>	<u>\$91,490</u>	<u>\$36,507</u>
New volumn capacity(1000 lbs/day)	7,500	9,100	
Capacity in 1998	5,200	5,200	
Increase in capacity	<u>2,300</u>	<u>3,900</u>	

4/29/2005

## HCC EXPANSION

	Dec-00 <u>Original Cost</u>		
Administrative	4,940		
Cheese Processing equipment	68,834		
Protein	18,992		
Lactose	41,209		
Dry Storage	1,450		
Water Treatment	15,818		
Land	<u>2,601</u>	<u>Daily Capacity</u>	<u>Capital Inv. per Annual lb.</u>
	<u>\$153,844</u>	8,900	<u>\$0.047</u>
Expansion capital	<u>\$6,000</u>	1,000	<u>\$0.016</u>
Other Capital Costs:			
Visitor Center/Cheese Theater	5,430		
Proliant Investment	8,163		

4/29/2005

**EXPANSION UPDATE**  
**2-May-02**

**Critical Steps:**

1	Finalize Location	05/22/02
2	Water Treatment	
	Tentative agreement with Turlock	06/01/02
	Final Agreement	07/31/02
3	C.U.P.	
	File request	06/01/02
	Final approval	12/31/02
4	Plant configuration and cost	
	Preliminary costs for each option	07/15/02
	Whey market and product analysis	08/31/02
	Final configuration and cost estimates	09/30/02
5	Final Board approval	09/30/02
6	Milk recruitment	
	Volumes finalized	07/31/02
	Start milk recruiting	09/30/02
7	Financing	
	Initial presentations started	07/31/02
	Finalize commitment	10/31/02
	Loan documents completed	12/31/02
8	Construction	
	Initial equipment orders	09/30/02
	Construction starts	01/01/03
	Construction completed	05/01/04

Hilmar Cheese Consolidated  
Capital Spending

Projected Capital Spending

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
<b>Expansion Projects:</b>											
Employer pending		420,000									
Waterfall Solution Phase II		2,390,000									
Waterfall Equipment Phase II		2,570,000									
Waterfall Phase IV			2,000,000								
Water Wall											
Ammachi Room Compressors, Condensers											
Boiler Expansion Body		285,000									
Lactose Expander Expansion		675,000									
Lactose Dyer Addition(Crystallizer, Ternas, VFB, BS		350,000									
Lactose Dyer Building											
Lactose Redesigner Addition	2,390,000										
Lactose Peermade Concentration	9,470,000										
Lactose Vitrifier/asef/MPowder Upgrades	6,389,000										
Lactose MPowder upgrade	303,000										
Lactose Fermenter Expander/Crystallizer	2,405,000	2,885,000									
WPC Tanks		1,800,000									
Whey Separator #2	219,000		3,540,000								
Plant 1 Ternas	325,000										
Plant #4 to 2.7 m lbbdry	1,500,000										
Plant #4 Building Expansion		10,115,000									
Plant #4 to 4.0 m lbbdry		2,913,000									
Protein Liquid still to 3,000,000 m lbbdry			1,000,000								
Protein Separator equipment		2,555,000	1,500,000								
Fines Room and Equipment		1,100,000									
Protein Dryer		220,000									
Maintenance Shop expansion		10,150,485									
Milk ReceivingCream/Condensed		300,000									
Total Expansion	6,709,000	37,991,455	1,409,000	8,904,000	0	0	0	0	0	0	0
Protein Super High GI											
Cheese Lab/Shipping office											
Lactose Offices	550,000	750,749		1,500,000							
Visitor Center		150,000									
Protein Scale up Plant			300,000								
Milko Fraction											
WPC 3rd Deline equipment	1,400,000		1,500,000	2,300,000							
Traffic Lights		150,000									
Lactose New products		45,000									
New Finlayca			1,409,000								
MK Receiving/Trackers break room				2,000,000	2,000,000	2,000,000					
Site Patching		259,475									
Dry Maintenance for Cheese		200,000									
Land Acquisitions		409,000									
600 Cheese equipment		750,000									
Purchase of Lacted Assets		1,250,000									
Administrative Office remodel			2,300,000								
Acquisitions/Expansion	230,000			17,690,000							
Replacement and Maintenance Capital											
Land Acquisitions	3,307,747	3,853,700	3,857,231	7,510,200							
AMPC Remodelment	34,077,747	45,348,330	17,737,231	14,670,530							
Project Tools without Land	1,141,190	769,000	2,300,000								
Maintenance Capital spending % Original cost	\$ 32,936,247	\$41,206,980	\$14,297,231	\$14,670,300	\$11,635,931	\$12,357,702	\$42,717,228	\$15,126,531	\$16,894,058	\$16,899,861	\$17,378,189
* Capex projects first quarter			6.0%	5.0%	6.0%	6.0%	7.0%	6.0%	6.0%	6.0%	6.0%

# Exhibit E



# California Regional Water Quality Control Board

Central Valley Region

Robert Schneider, Chair

cc: Jedd  
Warren ✓  
JAN 3 2002

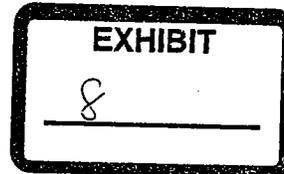


Gray Davis  
Governor

Justin H. Hickox  
Secretary for  
Environmental  
Protection

Sacramento Main Office  
Internet Address: <http://www.swrcb.ca.gov/rwqcb5>  
3443 Routier Road, Suite A, Sacramento, California 95827-3003  
Phone (916) 255-3000 • FAX (916) 255-3015

2 January 2002



Mr. John Jeter  
Hilmar Cheese Company  
9001 North Lander Avenue  
Hilmar, CA 95324

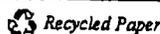
I wanted to provide you with an update and follow up to the meeting we had at your company facility in Hilmar. When we toured your plant and observed waste treatment and disposal operations, I was favorably impressed with the efforts Hilmar has undertaken to improve wastewater management practices at the facility.

At our meeting we discussed some concerns of ours regarding the adequacy of your proposals to address remaining wastewater management issues so that we could draft tentative requirements for the Board's consideration. Those concerns related to potential bypass of the treatment system, water quality degradation in domestic water supply wells adjacent to the plant, and the continued use of the former waste disposal area. We agreed that you would provide an additional report addressing in detail how our concerns would be addressed. Our staff has since reviewed your report. I wanted to inform you of the results of that review and how we will address the as yet unresolved areas of concern.

1. **Bypass of the treatment system.** Your report indicates that Hilmar will have a long term solution in place within two years. Our review left us uncertain as to the details of how you propose to accomplish this. Nevertheless, we intend to include within the tentative requirement a schedule phasing in a prohibition of bypass of the treatment system.
2. **Adjacent Domestic Supply wells.** Our staff review indicates that some of these wells may be impaired for their intended usage. We intend to include in the requirements that additional sampling and evaluation be conducted to ensure that these wells are adequately protected.
3. **Prior Waste Reclamation Area.** Monitoring indicates there are constituents in the ground water that exceed water quality objectives. As required by State Water Resources Control Board Resolution 92-49, we intend to include provisions to further evaluate groundwater quality and determine what level of remediation, if any, is required.

We will be drafting updated requirements that govern your increased wastewater flow at the plant and include terms that ensure the above issues are properly addressed. I wanted to let you know of our

*California Environmental Protection Agency*



The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov/rwqcb5>

John Jeter

- 2 -

27 December 2001

review prior to circulation of tentative requirements for public comment, which could be two months away. I want to also acknowledge the level of effort that you and your staff have expended to bring your waste treatment and disposal operation to its current status.

If you wish to discuss this further, please contact Loren J. Harlow in our Fresno Office at (559) 445-5116.



GARY M. CARLTON  
Executive Officer

cc: Thomas J. Mingee, Brown and Caldwell, 2701 Prospect Park Drive, Rancho Cordova

# Exhibit F

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

CENTRAL VALLEY REGION

ACL COMPLAINT NO. R5-2005-0501

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

IN THE MATTER

**CERTIFIED COPY**

OF

HILMAR CHEESE COMPANY, INC.

HILMAR WHEY PROTEIN, INC.

MERCED COUNTY

---

VOLUME II OF THE DEPOSITION OF

**BERT VAN VORIS**

Wednesday, August 24, 2005

**NOTICING ATTORNEY: CRAIG S. BLOOMGARDEN, ESQ.**

REPORTED BY: NANCY R. WALLACE, RPR, CSR NO. 10353

**Marcus**  
DEPOSITION REPORTING

5½ W. Pine Street, Suite 6 Lodi, CA 95240 Office: 800-682-2323 Fax: (209) 333-1133  
e-mail [marcusdepo@sbcglobal.net](mailto:marcusdepo@sbcglobal.net) [www.marcusdepo.com](http://www.marcusdepo.com)

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THE WITNESS: Some issues.

MR. BLOOMGARDEN: Q. There may have been others as well.

A. Yes.

Q. Okay. And going back to Exhibit 8, the January 2, 2002 letter -- you can put Exhibit 20 aside for the moment.

As we discussed earlier as referenced at the bottom of the first page, the intention at the time was for staff to draft updated waste discharge requirements, correct?

A. Yes.

Q. And the next sentence makes reference to circulation of tentative requirements for public comment within the next two months, correct?

A. Correct.

Q. Did that happen, to your recollection?

A. It did not.

Q. And as we discussed earlier, those -- the tentative requirements at this time were contemplated to both include a provision governing increased wastewater flow at Hilmar's plant as well as a schedule phasing in of prohibition of bypass of the treatment system, correct?

A. Correct.

Q. Had those tentative requirements been issued and updated permit been provided to Hilmar thereafter as contemplated by this letter, would we

1 be sitting here today dealing with this ACL?

2 A. I think so, because I had three previous  
3 orders that had the same kind of schedule that  
4 weren't met, and that was why I thought a  
5 cease-and-desist order would be more effective.

6 Q. Would we be sitting here on the same ACL or  
7 do you think we would be sitting here on a different  
8 ACL for not meeting the time schedule in either an  
9 updated WDR or a cease-and-desist order?

10 MR. HILDRETH: Calls for speculation.

11 MR. BLOOMGARDEN: Q. Couldn't it be the  
12 latter?

13 A. Say it again, please.

14 Q. Okay. You indicated that you think we would  
15 still be dealing with an ACL, correct?

16 A. Correct.

17 Q. My question for you is wouldn't it -- and  
18 your assumption is that Hilmar would not have been  
19 able to have met the time schedule either in the  
20 updated WDR or in a cease-and-desist order,  
21 correct?

22 A. Not exactly.

23 Q. Okay. What do you mean by that?

24 A. If you eliminate the "able," then I would say  
25 yes. I just don't think they would have met it.

26 Q. Okay.

27 A. Whether they were able or not.

28 Q. Okay. I didn't mean by the word "able" to

1 change the context of the question.

2 So your assumption is that Hilmar would not  
3 have met a time schedule either in an updated WDR or  
4 a cease-and-desist order, correct?

5 A. Yes.

6 Q. And thus that we would still be addressing an  
7 ACL today?

8 A. Yes.

9 Q. And that would be a different ACL, correct?

10 A. Yes.

11 Q. It would be an ACL that was dealing with  
12 proposed penalties beginning after the end of  
13 whatever the time schedule was as opposed to dating  
14 back to January 2 of 2002?

15 A. Yes.

16 Q. And of course since we -- there was no  
17 updated WDR or cease-and-desist order issued and we  
18 don't know what the revised requirements may have  
19 been and we don't know what the schedule may have  
20 been, we really don't know whether Hilmar would have  
21 been able to have met those requirements in the  
22 schedule, correct?

23 A. Correct.

24 Q. Now, do you recall following -- following  
25 this January 2, 2002 letter, did the board staff  
26 receive from Hilmar any proposed schedule for coming  
27 into compliance with the 900 EC limit?

28 A. I don't recall.

# Exhibit G



# HILMAR CHEESE COMPANY'S WASTEWATER TREATMENT & RECYCLING FACILITY

Hilmar Cheese Company has undertaken a pioneering research and development effort to implement wastewater treatment technologies. Environmental engineers and experts were brought in from around the world to design the systems. Today, Hilmar Cheese Company is operating its own onsite, state-of-the-art water treatment facility. This comprehensive system has evolved to meet the increasing, and unprecedented, requirements imposed by local regulators and now features a four-stage process. The process involves the removal of suspended milk solids, anaerobic digestion of most organics to biogas, aerobic polishing to remove residual organics and nitrogen, and filtration of excess salts resulting in clean irrigation water for beneficial agricultural use. The fully integrated system represents the single largest investment in water treatment technology made by any food processing facility in California.

## TREATMENT STAGES: 1. SUSPENDED SOLIDS REMOVAL 2. ANAEROBIC DIGESTION 3. AEROBIC POLISHING 4. REMOVAL OF SALTS

START

