

November 4, 2014

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**VIA EMAIL AND HAND DELIVERY**

Re: Submission of Evidence and Policy Statements in Administrative Civil Liability  
Complaint R5-2014-0561 in the Matter of California Sprouts, LLC; Identification of  
Witness

Ladies and Gentlemen:

Somach Simmons & Dunn represents California Sprouts, LLC (California Sprouts) in the above-referenced matter (hereinafter referred to as "ACL Complaint R5-2014-0561"). In accordance with the hearing procedures issued by your office, this letter constitutes the Evidence

and Policy Statements of California Sprouts in response to ACL Complaint R5-2014-0561, which seeks a total penalty of \$210,000 for alleged violations of the reporting requirements for the Waste Discharge Requirements for *General Order for Limited Threat Discharges of Treated/Untreated Groundwater from Cleanup Sites, Wastewater from Superchlorination Projects, and Other Limited Threat Wastewaters to Surface Water* (Limited Threat General Order).

## INTRODUCTION

California Sprouts is a small, privately held company located in Sacramento, California, and serves customers in California, Nevada, Arizona, Oregon, Washington, and Alaska. As the name suggests, the company grows different varieties of sprouts (e.g., alfalfa sprouts, mung beans, broccoli sprouts, radish sprouts, etc.) for human consumption. The growing process is hydroponic based, and California Sprouts has the highest food safety standards in the industry. The growing operation occurs at two different facilities, both located in Sacramento. At issue in this case are discharges from their facility referred to as Pacific Coast Sprout Farms where mung beans are grown. California Sprouts employs a total of 27 employees, and 12 are located at the Pacific Coast Sprout Farms facility.

The growing process for mung beans at the Pacific Coast Sprout Farms facility consists of taking sanitized seeds, and planting the seeds in bins. The mung beans are then subject to a continual spray cycle of water for approximately 1.5 hours, followed by a 1.5 hour rest period. Supply water for the operation is provided by an on-site water supply well, which is used for the mung bean growing process (hereafter referred to as the “process water”). There are no chemicals used in the growing process, and the process water is discharged into the City of Sacramento’s storm drain system.<sup>1</sup>

Because of the limited threat nature of California Sprouts’ process water, the discharge of the process water is now regulated under the Central Valley Regional Water Quality Control Board’s (Regional Water Board) Limited Threat General Order. The only Effluent Limitations applicable to California Sprouts’ discharge are (1) Acute Whole Effluent Toxicity (i.e., survival of aquatic organisms in 96-hour bioassays of undiluted waste shall be less than 70 percent, for any one bioassay and 90 percent median for any three consecutive bioassays); and, (2) a pH limit which requires all discharges to be within range of 6.5 to 8.5. (See Prosecution Team’s Evidence, Exh. 15.) Effluent monitoring requirements include daily monitoring of flow and pH, monthly monitoring for electrical conductivity, and whole effluent toxicity once during the five-year term of the Limited Threat General Order. (Prosecution Team’s Evidence, Exh. 15; see also California Sprouts’ Evidence, Exh. A.)

The circumstances leading to the issuance of ACL Complaint R5-2014-0561 are based on allegations that California Sprouts failed to timely submit self-monitoring reports as required by the Limited Threat General Order. ACL Complaint R5-2014-0561 alleges that California

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<sup>1</sup> Separate and apart from the process water is wash water that is created during sanitation of the mung beans and

Sprouts violated this requirement on 70 separate occasions, and proposes to assess a Mandatory Minimum Penalty (MMP) of \$3,000 per violation for a total penalty of \$210,000. California Sprouts takes issue with the method used to calculate the total number of violations and the number of MMPs assessed. Specifically, penalties assessed should be limited to MMPs of \$30,000 for 10 violations. The discrepancy between the number of violations calculated by California Sprouts versus ACL Complaint R5-2014-0561 results from differing interpretations of applicable statutes. In summary, California Sprouts contends that five of its late reports that were due prior to January 1, 2014, should each be subject to only one \$3,000 penalty, rather than being cumulatively assessed \$3,000 for each 30-day period following the reporting deadline. If the penalties are assessed in the manner as advocated by California Sprouts, the total amount of MMPs would be \$30,000—not \$210,000. California Sprouts contends that its legal interpretation is the proper one, and reflects and incorporates the Legislature's intent with the adoption of certain statutory provisions.

Moreover, as a practical matter, calculating MMPs for California Sprouts at \$30,000 is the right thing to do in this case. Otherwise, assessment of a fine at \$210,000 for a small company such as California Sprouts may put the company in the unfortunate situation of needing to close the business, which could affect both facilities. This could result in the loss of 27 jobs locally.

California Sprouts also takes issue with certain statements made in ACL Complaint R5-2014-0561, and provides additional information below to clarify and correct inaccurate statements made within.

### **BACKGROUND**

California Sprouts believes it is necessary to briefly explain the background and circumstances associated with the alleged penalties included in ACL Complaint R5-2014-0561. As noted earlier, discharges from Pacific Coast Sprout Farms became subject to the Limited Threat General Order on May 3, 2012.<sup>2</sup> Monitoring under the Limited Threat General Order was to begin on July 1, 2012, and the first monitoring report was due on November 1, 2012, for the third quarter of 2012. (See Prosecution Team's Evidence, Exhs. 15 and 33.) Although California Sprouts conducted monitoring for their facility, quarterly self-monitoring reports under the Limited Threat General Order were regrettably not submitted to the Regional Water Board. The failure to submit the reports was in large part due to confusion with respect to the transition from the individual permit to the Limited Threat General Order, and proposed new electronic submittal requirements. The failure to submit such reports was a mistake, and one that California Sprouts greatly regrets. (See Prosecution Teams' Evidence, Exh. 31.)

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<sup>2</sup> Prior to being subject to the Limited Threat General Order, discharges from this facility were permitted individually under Order R5-2005-0034, which was rescinded by Order R5-2012-0068. (See Prosecution Team's Evidence, Exh. 17.)

With respect to proposed electronic submittal requirements, on December 22, 2011, California Sprouts received correspondence from the Regional Water Board indicating that California Sprouts needed to attend training for electronic submittal of self-monitoring reports if their application for the Limited Threat General Order was not going to be submitted by January 18, 2012. (See Prosecution Team's Evidence, Exh. 9.) California Sprouts responded to the Regional Water Board's correspondence, and attended the training session as directed. In a follow-up electronic communication from Regional Water Board staff, further instructions were provided to California Sprouts with regard to the process for electronic submittals. (See Prosecution Team's Evidence, Exh. 14.) Although the February 24, 2012 electronic communication indicated that California Sprouts should continue to submit their self-monitoring reports in paper form as well as electronically, confusion resulted and California Sprouts attempted (unsuccessfully) to submit their quarterly self-monitoring reports electronically. (See Prosecution Team's Evidence, Exh. 31.) After several unsuccessful attempts, the California Sprouts' representative "gave up," and failed to follow through with Regional Water Board staff. At a meeting on August 15, 2014 with Regional Water Board staff, California Sprouts learned that the electronic reporting system was not available for dischargers subject to General Orders like the Limited Threat General Order. Prior to this meeting, California Sprouts had received no written communication from the Regional Water Board indicating that the electronic reporting system was not available for submittal of their self-monitoring reports. Although the lack of communication from the Regional Water Board in this instance does not excuse California Sprouts from its obligation to submit paper reports, it does explain the resulting confusion considering the great emphasis given to electronic reporting in communications between California Sprouts and the Regional Water Board.

Between May 3, 2012, and June 4, 2014, California Sprouts received virtually no communication from the Regional Water Board (except to receive copies of adopted orders and new notices of applicability for the renewed and revised versions of the Limited Threat General Order). Specifically, there was no communication from the Regional Water Board with regard to California Sprouts missing self-monitoring reports. On June 4, 2014, Mr. Dan Sholl, the General Manager of California Sprouts, received an email communication from Scientific Aid, Ms. Deirdre M. Asay, stating that based on a review of their records, the Regional Water Board had not received monitoring reports for the third and fourth quarters of 2012; the first, second, third, and fourth quarters of 2013; and the first quarter of 2014. (See Prosecution Team's Evidence, Exh. 20.) California Sprouts responded immediately to the email and submitted all missing quarterly reports by personally delivering them to the Regional Water Board's office at 11020 Sun Center Drive, Suite 200, Rancho Cordova, California. All missing reports identified in the June 4, 2014 email were time stamp as received by the Regional Water Board on June 9, 2014, just five days after receiving the email communication from Regional Water Board staff. (See Prosecution Team's Evidence, Exh. 24.)

Since then, California Sprouts has taken significant steps to improve its internal processes to ensure that all self-monitoring reports are timely filed. (See, e.g., California Sprouts' Evidence, Exhs. B and C.)

## DISCUSSION

### **A. MMPs for California Sprouts' Reporting Violations Should Be Assessed Under Water Code Section 13385.1(b)**

At issue in this case are conflicting sections of the Water Code that govern the assessment of MMPs for a discharger's failure to timely submit self-monitoring reports. Section 13385.1(a)(1) of the Water Code<sup>3</sup> requires that MMPs for a failure to timely file a discharge monitoring report be assessed for each thirty-day period following the deadline until the report is filed. (Wat. Code, § 13385.1(a)(1).) Applying this provision, ACL Complaint R5-2014-0561 assesses MMPs for California Sprouts' failure to timely file a monitoring report for Third Quarter 2012, Fourth Quarter 2012, First Quarter 2013, Second Quarter 2013, Third Quarter 2013, Fourth Quarter 2013, First Quarter 2014, *as well as* the thirty-day periods following each of these deadlines for a total of 70 violations and MMPs totalling \$210,000. (ACL Complaint R5-2014-0561, at pp. 3-5.)

ACL Complaint R5-2014-0561 fails to recognize the applicability of Water Code section 13385.1(b), which would limit the assessment of MMPs to each required report that is not timely filed as long as certain conditions are satisfied. (Wat. Code, § 13385.1(b)(1).) The Regional Water Board's Prosecution Team has taken the position that MMPs in this case may not be assessed under the provisions of section 13385.1(b) because the section became inoperative on January 1, 2014. (See Wat. Code, § 13385.1(b)(4).) In reaching this position, the Prosecution Team is essentially saying that it is not the date of the violation that matters, but the date of MMP assessment by the Regional Water Board that controls application of section 13385.1(b). California Sprouts disagrees with the Prosecution Team's interpretation of section 13385.1(b), and contends that reporting violations that occurred prior to the sunset date of January 1, 2014, can (and should) be assessed under section 13385.1(b). To find otherwise contradicts well established case law, as well as the Legislature's intent with respect to the passage of Senate Bill No. 1284 (Stats. 2010, ch. 645, § 2). (California Sprouts hereby provides true and accurate copies of the information obtained from the Official California Legislative Information website and from the California State Archives, attached hereto as Exh. D.)

#### **1. Section 13385.1(b) Substantively Affects California Sprouts' Liability and Should Be Used to Calculate the Assessment of MMPs**

It is well established that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) Thus, as a general rule, new statutes are presumed to operate prospectively unless legislative intent clearly indicates otherwise. (*Tapia v. Superior Court (The People)* (1991) 53 Cal.3d 282, 287 (*Tapia*); *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 (*Aetna*).) The converse is also true: "[S]tatutes are not to be given retrospective operation unless it is clearly made to appear that such was the legislative intent."

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<sup>3</sup> All future section references are to the Water Code unless otherwise provided.

(*Sierra Pacific Industries v. Workers' Comp. App. Bd.* (2006) 140 Cal.App.4th 1498, 1505-1506 (*Sierra Pacific Industries*)).

In determining whether a statute would have an improper retrospective application, courts distinguish between substantive and procedural statutes. (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 459 (*As You Sow*), citing *Tapia*, 53 Cal.3d at p. 289.) Substantive laws change the legal consequences of parties' past conduct by imposing new or different liabilities, and, in light of the above general rule, are consequently disfavored. (*As You Sow* at pp. 459-460.) In contrast, procedural statutes address the conduct of trials and do not involve improper retrospective application because the statute addresses conduct in the future. (*Id.* at p. 460, citing *Tapia* at p. 288.) Moreover, whether a law is substantive or procedural, is determined by the law's effect and not its form or label. (*As You Sow* at p. 460, citing *Tapia* at p. 289.)

The law in question here is the sunset of section 13385.1(b), and its affect on conduct that occurred prior to the effective date of the sunset provision. Considering the significant difference in liability between MMPs assessed under section 13385.1(a) and those assessed under section 13385.1(b) (i.e., \$3,000 for every 30 days the report is missing versus \$3,000 for each report), it is difficult to argue against section 13385.1(b), and its sunset, as being substantive in nature. Specifically, in this case, five of the seven missing reports were due prior to January 1, 2014 (the sunset date). California Sprouts' failure to file these five reports resulted in a reporting violation that occurred prior to January 1, 2014. Had the Regional Water Board taken action on these five specific missing reports prior to January 1, 2014, section 13385(b) would have been available for assessment purposes, which has significant substantive impact. Applying section 13385.1(a)(1), ACL Complaint R5-2014-0561 assessed California Sprouts with total MMPs amounting to \$210,000. (ACL Complaint R5-2014-0561 at p. 5.) Under section 13385.1(b), the same failure to submit self-monitoring reports would amount to \$30,000 in MMPs. The difference between applying section 13385.1(a) and section 13385.1(b) is \$180,000. Said differently, calculating MMPs under section 13385.1(a) results in a total assessment that is six times more than the amount that would be calculated under section 13385.1(b). Thus, for purposes of ACL Complaint R5-2014-0561, the Regional Water Board Prosecution Team's failure to consider application of section 13385.1(b) significantly affects the assessment of MMPs. And, their interpretation of the sunset provision (i.e., eliminating the applicability of section 13385.1(b) violations that occurred prior to January 1, 2014) constitutes a substantive change in law. Further, as applied by the Prosecution Team, the repeal of this statutory provision is being applied retrospectively to alleged violations that occurred prior to the January 1, 2014, sunset date. Such a result is contrary to applicable case law.

The California Supreme Court has on more than one occasion refused to apply a statute in a manner that would change the legal consequences of a party's past conduct. (*Tapia, supra*, 53 Cal.3d at p. 289.) As explained at length in *Tapia*, the California Supreme Court has consistently rejected the "retroactive" application of new statutes when they are substantive in

their effect, and when retroactive application would “impose[] a new or additional liability and substantially affects existing rights and obligations.” (*Tapia* at p. 290, citing *Aetna, supra*, 30 Cal.2d at p. 394.) As indicated above, the Regional Water Board’s Prosecution Team advocates for retroactive application of the sunset of Water Code section 13385.1(b), which is substantive in nature. Their position is not supported by relevant and applicable case law, and thus, the Regional Water Board should reject their position.

**2. The Sunset of Section 13385.1(b) is Distinguishable From the Enactment of New Legislation That is Intended to Repeal Certain Provisions of Law**

Some courts have found the repeal of a statutory right or remedy to apply immediately. (*Rio Linda Union School Dist. v. Workers Compensation Appeals Bd.* (2005) 131 Cal.App.4th 517, 528 (*Rio Linda*); *Sierra Pacific Industries, supra*, 140 Cal.App.4th at p. 1507 [“When new legislation repeals existing law, statutory rights normally end with repeal unless the rights are vested pursuant to contract or common law”.].) Although here there is no “new legislation,” the sunset provision in this statute is akin to repeal of certain provisions of the law. This line of authority, however, is distinguishable from the instant situation, and is thus not applicable.

Notably, the *Rio Linda* and *Sierra Pacific Industries* courts all dealt with the applicability of Senate Bill No. 899 (Stats. 2004, ch. 899) (SB 899). SB 899 was omnibus legislation enacted as an urgency measure to immediately address several workers’ compensation issues. (*Rio Linda, supra*, 131 Cal.App.4th at pp. 525-527 [addressing SB 899’s effect on apportionment of causation for purposes of disability awards]; *Sierra Pacific Industries, supra*, 140 Cal.App.4th at p. 1505 [discussing SB 899’s effect on guidelines deemed acceptable for determining required medical treatment].) At issue in both cases was the immediate effect of SB 899 on pending litigation and administrative claims, and not the operation of a sunset clause passed in previous legislation. (*Rio Linda* at p. 529, fn. 6.) Moreover, SB 899 contained *express* legislative language to guide its implementation and administration. In each case, the court relied heavily on this express language to determine that the Legislature intended the legislation to apply immediately to cases pending at the time it was enacted. (*Rio Linda* at pp. 528-529; *Sierra Pacific Industries* at pp. 1506-1507.) It was this inclusion of express language that led the courts to their conclusions in these cases.

The general rule, as indicated above, is that “statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.” (*Rio Linda, supra*, 131 Cal.App.4th at p. 528.) Taking the *Rio Linda* case, the court of appeal clearly found that the Legislature clearly intended for SB 899 to take immediate effect, and that the change in law was intended to apply regardless of the date of injury. (*Id.* at p. 529.) That is not the situation here with regard to section 13385.1(b), and no information exists to suggest that the Legislature intended for section 13385.1(b) to be interpreted and applied in a manner that would prevent its assessment methodology from being used for late reporting violations that occurred prior to January 1, 2014. In fact, the legislative history of the statute, discussed below, suggests otherwise.

Further, the instant case is more analogous to the factual situation in *As You Sow*, *supra*, 135 Cal.App.4th at p. 431. There, the court considered the effect of a repealed administrative regulation on the defendant's ability to assert an affirmative defense. (*Id.* at p. 436.) The regulation, California Code of Regulations, title 22, former section 12901 (Regulation 12901), provided the methods of analysis used to determine whether a discharge had occurred under Proposition 65. (*As You Sow* at p. 436.) At trial, defendant Conbraco claimed that the plaintiff's method of analysis was not approved under Regulation 12901, and thus did not support a finding that its products had resulted in a Proposition 65 discharge. (*Id.* at pp. 440-441.) The trial court agreed with the defendant, and plaintiff thereafter appealed. (*Id.* at p. 441.) While the appeal was pending, however, the Office of Environmental Health Hazard Assessment (OEHHA) repealed Regulation 12901. (*Id.* at p. 438.)

On appeal, the *As You Sow* court considered whether the defendant could continue to assert its argument under Regulation 12901 after it had been repealed. Finding first that "the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of administrative regulations," the court's analysis discussed the general rule that "statutes are not to be given a retrospective operation . . ." (*As You Sow*, *supra*, 135 Cal.App.4th at p. 459.) Citing *Tapia*, *infra*, the court discussed the differences between substantive statutes and procedural laws and how each type of statute is to be applied. (*Id.* at pp. 459-460, citing *Tapia*, 53 Cal.3d at p. 298.) Ultimately, the appellate court held Regulation 12901 to be a substantive regulation, finding that its repeal "constitute[d] more than a procedural change" because it would eliminate an affirmative defense to litigation. (*As You Sow* at p. 460.) The court affirmed the trial court's decision and refused to remand in light of Regulation 12901's repeal. At no point, did the appellate court discuss a different rule of construction to be applied in the event that a statute or administrative regulation is repealed.

Moreover, as illustrated by ACL Complaint R5-2014-0561, the Prosecution Team's reliance on section 13385.1(a) to calculate MMPs effectively shortens the operative period of section 13385.1(b). ACL Complaint R5-2014-0561 applies section 13385.1(a) to violations that occurred as far back as the Third Quarter 2012, which is more than 12 months prior to section 13385.1(b)'s sunset date. This result expressly contravenes the Legislature's intent that less stringent MMPs be assessed for reporting violations prior to January 1, 2014, assuming that certain conditions are satisfied. Accordingly, California Sprouts requests the Regional Water Board reject reliance on section 13385.1(a) for purposes of assessing MMPs in ACL Complaint R5-2014-0561 for late reporting violations that occurred prior to January 1, 2014, and instead apply section 13385.1(b) to those five late reporting violations alleged in this case.

### **3. The Legislative History of SB 1284 Does Not Support Retroactive Application of the Sunset Provision in Section 13385.1(b)**

The legislation in question that established section 13385.1(b) was specifically intended to revise the MMPs statute applicable to reporting violations, and to make such provisions more equitable. (See California Sprouts' Evidence, Exh. D, at California Environmental Protection

Agency Enrolled Bill Report, p. 2 [“The bill, [], provides exemptions that make the MMP statute more equitable in its approach to imposing MMPs for a discharger that fails to submit a discharge monitoring.”].) To the extent that the Legislature intended for certain provisions of the bill to apply retroactively, it stated so in the legislation. (See, e.g., Wat. Code, § 13385.1(e); see also California Sprouts’ Evidence, *ibid.* [“The bill would apply *somewhat* retroactively to violations for which the Board has not filed an administrative civil liability (ACL) complaint or a judicial complaint enforcement action prior to July 1, 2010, regardless of when the actual violations occurred.” Emphasis added.].) However, there is nothing in the legislative history, or in the statute itself, suggesting that violations that occurred prior to the sunset date of section 13385.1(b) would be precluded from being assessed as allowed under that section, even if such an assessment was calculated after January 1, 2014. Rather, the legislative history, and the State Water Resources Control Board’s (State Water Board) Enrolled Bill Report, specifically discuss the need for this legislation to make the imposition of MMPs more equitable in situations where effluent limitations were not violated. (California Sprouts’ Evidence, *id.* at p. 5)

Notably, in its Enrolled Bill Report, the State Water Board stated that it was in the process of developing a program “to voluntarily provide an electronic automated notification to dischargers when required self-monitoring reports are due, in order to avoid the submission of late reports.” (California Sprouts’ Evidence, Exh. D, at California Environmental Protection Agency Enrolled Bill Report, at p. 5.) The intent clearly being to assist dischargers in avoiding unnecessary MMPs for late reports, especially when no effluent violations had occurred. California Sprouts does not know if this system was ever established. Regardless, California Sprouts was not notified of its missing reports until after the January 1, 2014 sunset date.

Contrary to applicable law, the Regional Water Board’s non-action here (i.e., failing to assess MMPs for late reports prior to January 1, 2014) are giving retroactive effect to the sunset provision of January 1, 2014. The legislation (SB 1284) and its history provide no express intent for such an effect. Moreover, such an interpretation voids the original intent of section 13385.1(b) in that it would allow regional water quality control boards from giving effect to section 13385.1(b) altogether by waiting until after January 1, 2014, to notify dischargers of missing reports. Although perhaps not done purposefully, that is the situation here with California Sprouts. To avoid such an inequitable result, the Regional Water Board should apply section 13385.1(b) to California Sprouts’ late reporting violation and recalculate the MMPs accordingly.

**B. California Sprouts’ Reporting Violations That Occurred Prior to January 1, 2014, Meet the Requirements Under Section 13385.1(b) and MMPs for These Violations Should Only Be Assessed for Each Report That was Not Timely Filed**

As indicated previously, late reporting violations may be assessed under section 13385.1(b) as long as certain conditions are met. The conditions are as follows:

- (A) The discharger did not on any occasion previously receive, from the state board or a regional board, a complaint to impose liability pursuant to subdivision (b) or (c) of Section 13385 arising from a failure to timely file a discharge monitoring report, a notice of violation for failure to timely file a discharge monitoring report, or a notice of the obligation to file a discharge monitoring report required pursuant to Section 13383, in connection with its corresponding waste discharge requirements.
- (B) The discharges during the period or periods covered by the report do not violate effluent limitations, as defined in subdivision (d), contained in waste discharge requirements.

(Wat. Code, § 13385.1(b)(1).) Further, assessment under section 13385.1(b) shall only apply if the discharger “[f]iles a discharge monitoring report that had not previously been timely filed within 30 days after the discharger receives written notice, including notice transmitted by electronic mail, from the state board or regional board concerning the failure to timely file the report[,]” and, “pays all penalties assessed by the state board or regional board in accordance with paragraph (1) within 30 days after an order is issued . . . .” (Wat. Code, § 13385.1(b)(2).)

The alleged late reporting violations at issue here meet the conditions of section 13385.1(b). First, the Limited Threat General Order, which for purposes of section 13385.1(b)(A) is the *corresponding waste discharge requirements* applicable here, became effective on Pacific Coast Sprout Farms’ discharge on or about May 3, 2012, and by the terms of the Notice of Applicability, California Sprouts was to begin filing quarterly reports to determine compliance with the Limited Threat General Order on November 1, 2012. Between November 1, 2012 and June 4, 2014, California Sprouts received no communications (i.e., no complaint, no Notice of Violation, and no notice of the obligation to file) from the State Water Board or the Regional Water Board with regard to missed quarterly reports required by the Limited Threat General Order.

Second, during the period or periods covered by the missing quarterly reports, there were no effluent violations, and none are alleged to have occurred. (See ACL Complaint R5-2014-0561, Attachment A.) Third, upon receipt of an email communication from the Regional Water Board, received by California Sprouts on June 4, 2014, California Sprouts immediately prepared and submitted the missing monitoring reports. They were received by the Regional Water Board on June 9, 2014, which is clearly within the 30 day period set forth in section 13385.1(b)(2)(A). And, fourth, section 13385.1(b)(2)(B) is not yet applicable to California Sprouts because the Regional Water Board has not assessed the MMPs in this case pursuant to paragraph (1) of section 13385.1(b) (i.e., MMP for each late report rather than for each 30-day period missed). Should the Regional Water Board appropriately determine that five of the late reporting violations should be assessed under section 13385.1(b), California Sprouts commits to paying those penalties within 30 days.

Clearly, the required conditions under section 13385.1(b) are satisfied, and California Sprouts' late reporting violations that occurred prior to January 1, 2014, should be assessed according to paragraph (1) of section 13385.1(b). This would result in an MMP of \$3,000 each for the quarterly reports that were due on November 1, 2012; February 1, 2013; May 1, 2013; August 1, 2013; and, November 1, 2013. With respect to the quarterly reports that were due on February 1, 2014 and May 1, 2014, California Sprouts concedes that such violations are subject to section 13385(a) because the reporting violations occurred after the January 1, 2014 sunset date. California Sprouts further concedes that ACL Complaint R5-2014-0561 has correctly calculated proposed MMPs for these two reporting violations. Thus, the actual MMP that should be assessed on California Sprouts is \$30,000, of which \$15,000 is assessed under section 13385.1(b), and \$15,000 is assessed under section 13385.1(a).

**C. ACL Complaint R5-2014-0561 Includes Statements in Error That Should Be Corrected**

California Sprouts has reviewed ACL Complaint R5-2014-0561 and requests that it be modified as recommended below to correct inaccurate statements.

Allegation, paragraph 3: ACL Complaint R5-2014-0561 states that it is addressing late report violations that occurred from 30 April 2012 through 31 March 2014. We believe that the correct dates are from 1 November 2012 through 1 May 2014.

Allegation, paragraph 5: ACL Complaint R5-2014-0561 states that the Discharger was sent a Notice of Violation on 4 June 2014. This statement is inaccurate in that California Sprouts received an email communication from Regional Water Board staff notifying them of missing reports. The email notification was not identified as a Notice of Violation.

Allegation, paragraph 6: ACL Complaint R5-2014-0561 states that the "Discharger agreed with the violations, but asked that a portion of the MMPs be waived." This statement is inaccurate in that in their 8 August 2014 Response to the Regional Water Board's July NOV, the Discharger agreed that said reports were submitted late but in that communication, the Discharger advocated, as it does here, that section 13385.1(b) be applied to calculate MMPs for violations that occurred prior to January 1, 2014.

**D. Witnesses**

California Sprouts anticipates calling Daniel Sholl, General Manager of California Sprouts, LLC, as a witness to testify at the Regional Water Board hearing tentatively scheduled for December 4/5, 2014. Mr. Sholl may provide testimony regarding California Sprouts' operating procedures, discharge monitoring program, and the company's internal processes that are being implemented to ensure timely filing of self-monitoring reports. We estimate that Mr. Sholl's testimony may take approximately 10 minutes.

**CONCLUSION**

Based on the foregoing, California Sprouts contends ACL Complaint R5-2014-0561 incorrectly calculated MMPs for five of the alleged violations of reporting requirements as provided in Limited Threat General Order. Specifically, California Sprouts requests the Regional Water Board recalculate the assessment of MMPs for violations that occurred prior to January 1, 2014, based on section 13385.1(b), which was the statute in effect at the time of the alleged violations. This approach is consistent with California courts' general rule that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.

Sincerely,



Theresa A. Dunham

Encs: Declaration of Elizabeth M. Spence in the Matter of ACL R5-2014-0561 (Nov. 4, 2014);  
Evidence List;  
Exhibits A-D

cc (via email only):

**Prosecution Team:**

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TAD:cr

**Declaration of Elizabeth M. Spence in the Matter of ACL R5-2014-0561**

I, Elizabeth M. Spence, declare:

1. I am a paralegal with the firm of Somach Simmons & Dunn, attorneys of record for California Sprouts, LLC, in this action. I have personal knowledge of the facts set forth in this Declaration, and if called as a witness, I could and would competently testify thereto.

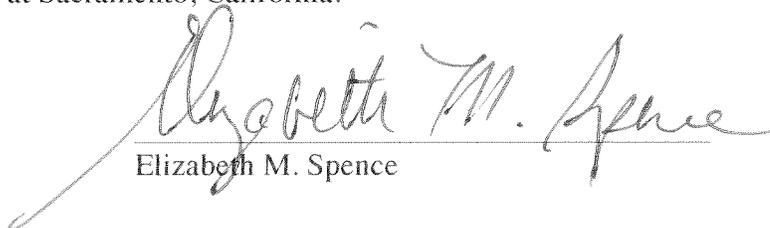
2. Between September 23, 2014 and September 30, 2014, I conducted the following research to locate legislative history for Senate Bill No. 1284 (Stats. 2010, ch. 645, § 2) (SB 1284), which amended a portion of Water Code section 13385.1:

a. I reviewed the Official California Legislative Information's website (<http://www.leginfo.ca.gov>) to locate Senate and Assembly analyses for SB 1284 and downloaded copies of legislative committee reports regarding SB 1284 from the Senate Committee on Environmental Quality, the Senate Appropriations Committee, the Assembly Committee on Environmental Safety and Toxic Materials, the Assembly Committee on Judiciary, and the Assembly Committee on Appropriations.

b. I then conducted on-site legislative research regarding SB 1284 at the California State Archives, located at 1020 "O" Street, Sacramento, California. I reviewed all available historical files for SB 1284 and marked legislative history documents for photocopying. The photocopying was done by California State Archives staff members and the copies were given to me.

3. True and correct copies of the legislative committee reports downloaded by me from the Official California Legislative Information's website and of the documents copied for me by California State Archives staff members are attached to California Sprouts' Evidence as Exhibit D.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 4th day of November 2014, at Sacramento, California.

  
Elizabeth M. Spence