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14
15 Attorneys for Plaintiffs

16 **UNITED STATES DISTRICT COURT**

17 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

18
19 BERNADETTE BLACKWOOD, individually and as guardian ad litem
20 for K.B. and E.B., et al.,

21 Plaintiffs,
22 v.
MARY DE VRIES, individually and
23 dba N&M DAIRY (aka N&M
24 DAIRY # 1 and N&M DAIRY # 2)
and as trustee of the NEIL AND
25 MARY DE VRIES FAMILY
26 TRUST; et al.,

27 Defendants.

Case No.: ED CV 14-00395 JGB SPx

DECLARATION OF DEBORAH ROSENTHAL IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE INADMISSIBLE EVIDENCE PROFFERED BY DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS

Date: July 14, 2014

Time: 9:00 a.m.

Courtroom: 1; Hon. Jesus G. Bernal

28

I, Deborah Rosenthal, declare as follows:

1. I am an attorney admitted to practice law before all the courts of the State of California and before this Court, and am an attorney with the law firm of SIMMONS BROWDER GIANARIS ANGELIDES & BARNERD LLC, attorneys of record for plaintiffs herein. I am familiar with the pleadings, records, and other documents that comprise the case file, as well as the facts underlying this case. I am familiar with the procedural history of this case. The matters stated herein are true to my own personal knowledge, except as otherwise stated. If called upon as a witness, I could and would competently testify to the following facts.

2. Attached as Exhibit 1 is a true and correct copy of the Lahontan Regional Water Quality Control Board Cleanup and Abatement Order R6V-2013-0103 for N&M Dairy, Helendale, San Bernardino County, WDID No. 6B368010004, dated December 12, 2013. A copy of this Order was attached as Exhibit E to the Declaration of Lee Smith and offered in support of defendants' motion to dismiss. See Docket Entry No. 35-1 at p. 58 of 132.

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3. Attached as Exhibit 2 is a true and correct copy of the Declaration of Lee N. Smith In Support of Motion of Defendants' to Dismiss for Lack of Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted (without exhibits). This declaration was filed by defendants in support of their motion to dismiss, along with Exhibits A-J thereto. See Docket Entry No. 35.

4. Attached as Exhibit 3 is a true and correct copy of the document that defendants attached as Exhibit C to the Smith Declaration supporting their motion to dismiss. This document purports to be an email from an email user named "justin ervin" to "Patty Kouyoumdjian" at the Water Board. See Docket Entry No. 35-1 at p. 40 of 132.

5. Attached as Exhibit 4 is a true and correct copy of the document that defendants attached as Exhibit I to the Smith Declaration supporting their motion to dismiss. This document is titled: "Order on Demurrer to First Amended Complaint," filed on May 15, 2012, in the Superior Court of California, County of Contra Costa. [Docket Entry No. 35-1 at p. 113 of 132.]

6. On June 14, 2014, and again on June 16, 2014, I conferred with defense counsel Lee Smith regarding plaintiffs' intent to make this motion and regarding the contents of this motion. The parties were unable to resolve

their dispute over the admissibility of Exhibits C and I to defendants' motion to dismiss, through conference of counsel.

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

Executed on June 16, 2014, in San Francisco, California.

Deborah R. Rosenthal

EXHIBIT 1

Lahontan Regional Water Quality Control Board

December 12, 2013

Neil and Mary De Vries
13025 Shasta Court
Rancho Cucamonga, CA 91739-1729

CLEANUP AND ABATEMENT ORDER R6V-2013-0103 FOR N&M DAIRY, HELENDALE, SAN BERNARDINO COUNTY, WDID NO. 6B368010004

I am issuing Cleanup and Abatement Order (CAO) R6V-2013-0103 which replaces CAO R6V-2011-0055 and CAO R6V-2011-0055A1 in entirety. The new CAO requires the cleanup of N&M Dairy and provides for uninterrupted replacement water to residences served by private domestic wells containing concentrations of nitrate and total dissolved solids.

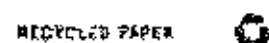
Your efforts are commended to stop the ongoing contamination by removing the dairy cows from the area. I also recognize how difficult this has been for your family. I am encouraged that you will complete the quarterly sampling and analysis this week and have been cooperatively working with Water Board staff to address the contaminated groundwater situation.

If you have questions or comments regarding this matter, please direct them to Eric Taxer at ETaxer@waterboards.ca.gov (530) 542-5434 or to Scott Ferguson at SFerguson@waterboards.ca.gov (530) 542-5432.

PATTY Z. KOUYOUMDJIAN
EXECUTIVE OFFICER

Enclosure: Cleanup and Abatement Order No. R6V-2013-0103
Settlement Agreement and Stipulation for Entry of Order No. R6V-2013-0075

cc: N&M Mailing List



CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION

CLEANUP AND ABATEMENT ORDER NO. R6V-2013-0103

WDID NO. 6B368010004

REQUIRING NEIL AND MARY DE VRIES
TO CLEAN UP AND ABATE THE EFFECTS OF DISCHARGING NITRATE CONTAMINANTS TO THE GROUNDWATERS OF THE MOJAVE RIVER HYDROLOGIC UNIT

San Bernardino County

The California Regional Water Quality Control Board, Lahontan Region (Water Board) finds:

FINDINGS

N&M Dairy Facility

1. Neil and Mary de Vries as the operators of N&M Dairy and the trustees of the Neil and Mary de Vries Family Trust (hereafter the "Discharger") own a 909-acre property adjacent to the Mojave River, located at 18200 and 36001 Lords Road, and on Indian Trails and Wild Road, in Helendale, San Bernardino County. The property includes San Bernardino County Assessor's Parcel Numbers 466-041-01, -17, and -20 through -23; parcel numbers 466-091-15, -17, and -26; parcel numbers 466-101-06, and 07; and parcel number 466-111-02.

2. On June 13, 2001, the Water Board adopted Board Order No. 6-01-38, Revised Waste Discharge Requirements, for dairy-related wastes discharges (e.g., cow manure and urine in corral areas, dairy wash water discharged to unlined lagoons, feed, storm water runoff discharged to unlined depressions/basins) at the N&M Dairy (Dairy). Board Order No. 6-01-38 requires water quality protective measures, prohibits waste management, treatment, and discharges from the Dairy causing exceedances of water quality objectives for groundwater and surface water, and prohibits the creation of nuisance and/or pollution conditions. Board Order No. 6-01-38 also includes Monitoring and Reporting Program No. 01-38 that, in part, requires groundwater monitoring to evaluate the impacts of dairy-related waste discharges on groundwater quality.

Discharge Findings

3. Water Board staff sampled residential wells in the vicinity of several dairy facilities, including four near N&M Dairy, between January 7, 2010 and March 9, 2010. The results of that sampling effort, shown in the following table, indicate that N&M Dairy is a source of nitrate and total dissolved solids (TDS) contaminants in groundwater that exceed Maximum Contaminant Levels and adversely affect area residential drinking water wells.

Location	Nitrate as N (mg/L)	TDS (mg/L)
Up-gradient Residential Well at 17950 Lords Road (sampled February 26, 2010)	1.6	310
Up-gradient Residential Well at 29442 Bullion Road (sampled February 26, 2010)	0.23	420
Down-gradient Residential Well at 19741 National Trail Highway (sampled March 9, 2010)	18	810
Down-gradient Residential Well at 19456 National Trail Highway (sampled January 7, 2010)	18	780
Maximum Contaminant Level	10	500 (recommended limit) 1,000 (upper limit) 1,500 (short term limit)

4. On October 21, 2010, the Water Board issued Investigative Order No. R6V-2010-0044 (2010 Investigative Order) requiring the Discharger provide a workplan to investigate the extent and occurrence of nitrate and TDS in domestic water supply wells that could be affected by waste discharges from the Dairy and to summarize the results of the groundwater investigation. The associated monitoring results indicate that the impacted groundwater migrated beyond the Dairy and adversely affected a number of residential wells down-gradient of the Dairy[1].

5. The "Final Report - Neighboring Domestic Supply Well Sampling," dated June 4, 2011 (June 4, 2011 Report), submitted by the Discharger to the Water Board on June 7, 2011, identifies the presence of nitrate in groundwater down-gradient from the Dairy. The June 4, 2011 Report also identifies nitrate contaminants in groundwater originating at the Dairy. The groundwater sampling results provided in the June 4, 2011 Report document nitrate and TDS concentrations down-gradient and cross-gradient from the Dairy exceeding the Maximum Contaminant Level for nitrates and the Secondary Maximum Contaminant level for TDS. The June 4, 2011 Report states (page 6) that the, "...pattern of nitrate observed in the N&M Dairy monitoring wells, coupled with the results of neighboring domestic supply wells (showing the highest nitrate in wells near agricultural fields), indicates that agricultural operations may be the largest contributor to the nitrate observed in the groundwater beneath the general study area."

[1] Finding No. 15 of Amended CAO No. R6V-2011-0055-A1 states that approximately eight (8) down-gradient residential wells exceeded the nitrate as nitrogen MCL (10 mg/L), and approximately 11 down-gradient residential wells exceeded the TDS recommended SMCL (500 mg/L).

6. In its October 27, 2011 report, the Discharger asserts that the Dairy's irrigated fodder crops fields are likely the most significant contributor to nitrate in the groundwater compared to other potential dairy waste sources (corrals, wastewater ponds, and stockpiled manure).

7. The table below documents ranges of contaminant levels in on-site monitoring wells that were reported in the Discharger's self-monitoring reports over the last five years.

Sample Date	Range of Nitrate as Nitrogen Concentrations (mg/L)	Range of TDS Concentrations (mg/L)
May 21, 2008	5.3 to 28.4	509 to 3,560
December 22, 2008	3.9 to 31.9	741 to 3,410
May 4, 2009	3.0 to 32.2	621 to 3,210
December 9, 2009	8.6 to 16.4	1,100 to 3,620
April 26, 2010	8.5 to 14.1	802 to 4,440
December 9, 2010	8.5 to 16.4	848 to 3,020
May 9, 2011	7.4 to 20.5	508 to 3,230
December 5, 2011	1.7 to 37.2	526 to 3,180
May 16, 2012	1.7 to 32.0	442 to 3,120
December 4, 2012	1.3 to 28.4	458 to 3,710

8. Water Code section 13050(l) defines "pollution" as an alteration of the water quality to a degree that unreasonably affects either beneficial uses or facilities that serve these beneficial uses.

9. Water Board staff finds that N&M Dairy has discharged waste into waters of the state in violation of Basin Plan requirements and has caused or contributed waste to be discharged to groundwater beneath and down-gradient of the Dairy. The discharge of waste creates or threatens to create a condition of pollution where nitrate as N and TDS concentrations beneath and down-gradient of the Dairy exceed drinking water standards. The affected groundwater is no longer useable for drinking or domestic supply purposes. This alteration is unreasonable where the aquifer, which is currently designated and used for drinking water, is no longer suitable for this beneficial use. The Dairy's discharges have unreasonably affected the water for municipal and domestic supply beneficial uses, and therefore, based on the evidence, Water Board staff finds that the Dairy has caused a condition of pollution.

Regulatory Background

10. The conditions described in Findings Nos. 3 through 9, above, constitute violations of the following waste discharge requirements specified by Board Order No. 6-01-38.

Discharge Specification I.B.2 (Chemical Constituents)

"Ground water shall not contain concentrations of chemical constituents in excess of the maximum contaminant level (MCL) or secondary maximum contaminant level (SMCL) based upon drinking water standards specified in the following provisions of Title 22 of the California Code of Regulations:

a. Table 64431-A of Section 64431 (Inorganic Chemicals);

e. Table 64449-B of Section 64449 (SMCLs – Ranges)."

Discharge Specification I.C.4.c

"The discharger shall not cause a pollution as defined in Section 13050 of the California Water Code, or a threatened pollution."

11. The Water Board issued Cleanup and Abatement Order (CAO) No. RV6-2011-0055 on August 2, 2011, in response to the groundwater monitoring results referenced in Finding Nos. 4 and 5, above, and the resulting violation of waste discharge requirements discussed in Finding No. 10, above. The CAO requires the Discharger to sample residential wells in a specified Study Area, provide replacement water as specified, and provide sampling reports to the Water Board on a quarterly basis.

12. The Water Board issued Amended CAO No. R6V-2011-0055-A1 on January 19, 2012 to (1) revise the sampling/reporting frequency and constituents to be analyzed, (2) revise the nitrate as N and TDS concentration action limits for providing replacement water, (3) revise the monitoring sites; (4) revise the response time for providing replacement water; and (5) revise the study area boundaries.

13. On December 12, 2013, the Water Board adopted Board Order No. R6V-2013-0075, Settlement Agreement and Stipulation for Entry of Order that included consideration, in part, of the following:

a. Acknowledgment that the Discharger's dairy operations will no longer be a future threat to water quality where the Discharger is in the process of voluntarily closing the Dairy;

b. The requirement to properly remove and dispose of the remaining dairy-related waste (i.e., manure and hardpack from the corrals, wash water lagoon contents, manure stockpiles, manure spread on non-cultivated lands);

c. Providing uninterrupted replacement water to those residents within the Study Area whose wells produce groundwater nitrate as N concentrations of or above 7 mg/L, and/or groundwater TDS concentrations of or above 815 mg/L;

d. Continuing to monitor Facility monitoring wells and residential wells down-gradient of the Facility;

e. Replacing CAO Nos. R6V-2011-0055 and R6V-2011-0055-A1 to continue requiring the Discharger to provide replacement water and to consolidate and revise monitoring and reporting requirements for the Discharger.

14. CAO No. R6V-2011-0055 and its amendment will be replaced by this Order. This Order (1) reflects that dairy operations at the property have ceased and dairy-related wastes have been removed and/or any remaining waste is undergoing composting; (2) consolidates and modifies groundwater monitoring requirements from Amended CAO No. R6V-2011-0055-A1 and Monitoring and Reporting Program No. 01-38; and (3) identifies decision points and threshold limits for determining when supplying replacement water must be initiated or can be discontinued. This Order also requires the submittal of the monitoring report for groundwater monitoring conducted in December 2013, as required by Amended CAO No. R6V-2011-0055-A1.

REGULATORY AUTHORITY

15. Water Code section 13304, subdivision (a) states:

"Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

16. The Findings above, establish that the Discharger has discharged waste into groundwater, a water of the state, in violation of its waste discharge requirements. As elaborated in Finding No. 8, the discharge of waste to groundwater has also created a condition of pollution where nitrate as N and TDS concentrations exceed drinking water standards and groundwater is no longer useable for drinking or domestic supply purposes. Such discharges have unreasonably affected the

municipal and domestic beneficial uses of the groundwater. Therefore, upon a finding that the Discharger has caused a condition of pollution, the Water Board is authorized to issue this Cleanup and Abatement Order pursuant to Water Code section 13304.

17. Water Code section 13267, subdivision (b) states:

"In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

18. The Findings above establish that the Discharger has discharged waste to waters of the Lahontan Region. The Water Board is authorized to require technical or monitoring reports to evaluate the continued impacts of the waste discharges to the area groundwater.

19. The Discharger has ceased dairy operations and is in the process of removing the remaining portions of the dairy waste from the property. Barring potential new pollution sources, it is expected that closing the Dairy will result in decreased groundwater concentrations of nitrate as N and TDS. The monitoring reports required by this Order are necessary to:

a. Evaluate the effects on groundwater quality from the removal of dairy waste and dairy operations on the property;

b. Monitor the progress towards restoring the drinking water beneficial use; and

c. Ensure replacement water is supplied to residents within the Affected Area.

20. Issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Public Resources Code, section 21000 et seq.) pursuant to California Code of Regulations, Chapter 3, title 14, section 15321, subdivision (a)(2).

THEREFORE, IT IS HEREBY ORDERED that Cleanup and Abatement Order No. R6V-2011-0055 and its amendment, Cleanup and Abatement Order No. R6V-2011-0055-A1, are hereby rescinded, and that pursuant to Water Code sections 13304 and 13267, the Discharger shall comply with the following technical, monitoring, and reporting requirements:

A. ORDERS

1. Supply uninterrupted replacement drinking water service (i.e., bottled water or equivalent) for consumption and cooking to all residences served by private domestic wells within the Affected Area (see Attachment A) where nitrate as N concentrations have been detected at or above 7 mg/L, or where TDS concentrations have been detected at or above 815 mg/L. Furthermore, the Discharger shall supply uninterrupted replacement drinking water service to any new additional residences in the Affected Area (Attachment A) served by private domestic wells affected as soon as possible but no later than two weeks of determining that the private well at the residence exhibits a nitrate as N concentration of 7 mg/L or above for the first time, or exhibits a TDS concentration of 815 mg/L or above for the first time.

   The Affected Area (Attachment A) is defined by the following boundaries in the USGS Wild Crossing and Hodge 7.5-minute quadrangles: the western edge begins 0.2 miles west of the intersection of Indian Trails Road and Lords Road. The eastern boundary ends 0.25 miles west of the intersection of Hinkley Road and National Trails Highway. The northern boundary follows the approximate center line of the Mojave River north of National Trails Highway. The southern boundary is approximately 0.27 miles south of National Trails Highway and runs parallel to National Trails Highway.

   The Water Board has the authority to amend this Order as appropriate when information submitted by the Discharger, or from other appropriate sources, warrants a modification of the current Affected Area boundary (see Attachment A). Such modification may result in either a decrease or increase of the Affected Area boundary. Groundwater monitoring and replacement water requirements will also change consistent with any such modification of the Affected Area boundary.

2. No later than **January 15, 2014**, submit to the Water Board a monitoring report containing the following information for the December 2013, sampling event that occurred under the terms of Cleanup and Abatement Order No. R6V-2011-0055, as amended:

   a. Laboratory results and associated quality assurance/control documentation from the respective sampling event conducted the month prior to the reporting period;

   b. List of all residences that are receiving uninterrupted replacement water; and

c. Written documentation of efforts to sample wells for those property owners/residents that have declined to have their residential wells sampled.

3. **Thirty (30) days prior to each groundwater sampling event** described in Directive No. 4, below, the Discharger shall visit all well locations in the Affected Area whose respective property owners and/or property tenants (including new property owners and new tenants) have not already been notified of the potential for elevated nitrate and TDS concentrations in the groundwater, or have not already provided permission for well sampling. The Discharger shall provide the respective property owners and/or property tenants notice of the following:

   a. How beneficial uses are affected from elevated nitrate and TDS in groundwater at levels greater than that allowed under the Basin Plan, and information (e.g. pamphlets or flyers already prepared by CDPH or other local health agency) regarding the potential health concerns from consuming water with elevated nitrate concentrations;

   b. A request for consent to sample the domestic supply well(s) providing water to the property occupant (owner and/or tenant) at a maximum frequency of every nine months; and

   c. The existing contact information of the property owner and/or tenant along with a request for updated contact information.

   In cases where the Discharger cannot access the property for purposes of notification, a written notice will be left in a prominent location at the property. If any property owner or tenant declines to have their private domestic water well sampled, such a decision, including a nonresponsive to the notice, must be documented and submitted with the associated monitoring report (described in Directive No. 5, below).

4. No later than **September 10, 2014, and every nine months thereafter (i.e., June 2015, March 2016, December 2016, etc.)** collect groundwater samples from the following monitoring wells, in addition to any identified pursuant to Directive No. 3, above:

   a. Former N&M Dairy Facility Monitoring Wells Nos. MW-1, MW-2, MW-3, and MW-4.

   b. Domestic Wells neighboring the former N&M Dairy Facility, Well Nos. 1, 3B, 4, 5, 7, 8, 8A, 9, 9A, 9D, 11, 12, 13, 14, 17, 18, 19, 22, 23, 24, 25, 33, 41, 50, 51, 52, 53, 54, 55, 56, and 57.

   All groundwater samples shall be analyzed for nitrate as N and TDS by a California-certified laboratory.

5. If the monitoring results identify a well that exhibits a nitrate as N concentration at or exceeding 7 mg/L for the first time, or if the monitoring results of the monitoring identify a well that exhibits a TDS concentration at or exceeding 815 mg/L for the first time, the Discharger must notify the Lahontan Water Board of this information **within 48 hours of the Discharger or their representative becoming aware of such monitoring results**.

6. By **October 15, 2014, and every nine months thereafter (i.e., July 15, 2015, April 15, 2016, January 15, 2017, etc.)** submit to the Lahontan Water Board a monitoring report containing the following information:

   a. Laboratory results and associated quality assurance/control documentation from the respective sampling event conducted the month prior to the reporting period;

   b. List of all residences that are receiving uninterrupted replacement water; and

   c. Written documentation that those property owners/residents have declined to have their residential wells sampled.

7. The Discharger may cease providing uninterrupted replacement water at any individual residence only when one of the two following conditions is met at the specific individual residence's well being evaluated:

   a. Groundwater nitrate as nitrogen and TDS concentrations are below 7 mg/L and 815 mg/L, respectively, for two consecutive nine-month sampling periods; or

   b. Groundwater nitrate as nitrogen and TDS concentrations are below 7 mg/L and 815 mg/L, respectively, for four consecutive three-month sampling periods (i.e., the Dischargers may elect to collect groundwater samples on a quarterly basis and submit the results to the Lahontan Water Board with notification that uninterrupted replacement water will no longer be provided based upon the monitoring results).

   The Discharger must notify the respective property owner/tenant and submit the test result documentation to the Lahontan Water Board.

REPORTING REQUIREMENTS

1. **Signatory Requirements.** All reports required under this Cleanup and Abatement Order shall be signed and certified by the Discharger or by a duly authorized representative of the Discharger and submitted to Water Board staff. A person is a duly authorized representative of the Discharger only if: (1) the authorization is made in writing by the Discharger and (2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.)

2. **Certification.** Include the following signed certification with all reports submitted pursuant to this Order:

   "I certify under penalty of perjury under the laws of the State of California that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons directly responsible for gathering the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

3. **Report Submittals.** All monitoring and technical reports required under this Order shall be submitted to:

   California Regional Water Quality Control Board – Lahontan Region
   14440 Civic Drive, Suite 200
   Victorville, CA 92392

   California Regional Water Quality Control Board – Lahontan Region
   2501 Lake Tahoe Boulevard
   South Lake Tahoe, CA 96150

B. NOTIFICATIONS

1. **Cost Recovery.** Pursuant to Water Code section 13304, the Water Board is entitled to, and may seek, reimbursement for all reasonable costs actually incurred by the Water Board to investigate unauthorized discharges of wastes and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial actions required by this Order.

2. **Requesting Administrative Review by the State Water Board.** Any person aggrieved by an action of the Water board that is subject to review as set forth in Water Code section 13320, subdivision (a), may petition the State Water Resources Control Board (State Water Board) to review the action. Any petition must be made in accordance with Water Code section 13320 and California Code of Regulations, title 23, section 2050 and following. The State Water Board must receive the petition within 30 days of the date the action was taken, except that if the thirtieth day following the date the action was taken fall on a Saturday, Sunday, or state holiday, then the State Water Board must receive the petition by 5:00 p.m. on the next business day. Copies of the law and regulation applicable to filing petitions may be found on the internet at http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml or will be provided upon request.

3. **Modifications.** Any modification to this Order shall be in writing and approved by the Executive Officer, including any potential extensions. Any written extension request by the Discharger shall include justification for the delay.

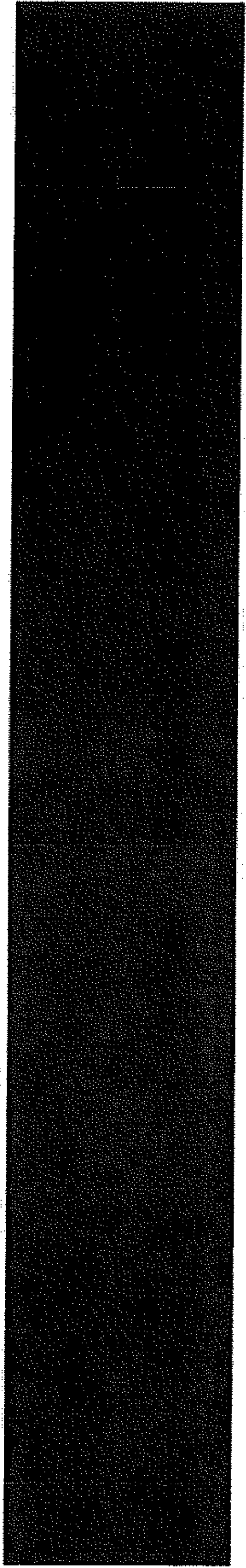
4. **Enforcement Notification.** Failure to comply with the requirements of this Cleanup and Abatement Order may result in additional enforcement action, which may include pursuing administrative civil liability pursuant to Water Code sections 13268, 13350, and/or 13385, or referral to the Attorney General of the State of California for such legal action as she may deem appropriate.

5. **No Limitation of Water Board Authority.** This Order in no way limits the authority of this Water Board to institute additional enforcement actions or to require additional investigation and cleanup of the site consistent with the Water Code. This Order may be revised as additional information becomes available.

Ordered by: PATTY Z. KOUYOUMDJIAN
EXECUTIVE OFFICER

Dated: Dec. 12, 2013

Attachments: A. Map of Affected Area
B. Water Code section 13267 Fact Sheet



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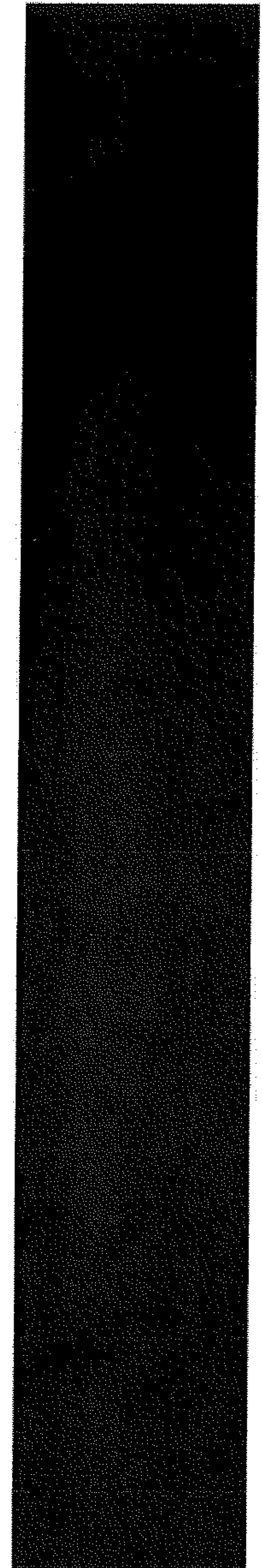
ATTACHMENT A

MAP OF AFFECTED AREA



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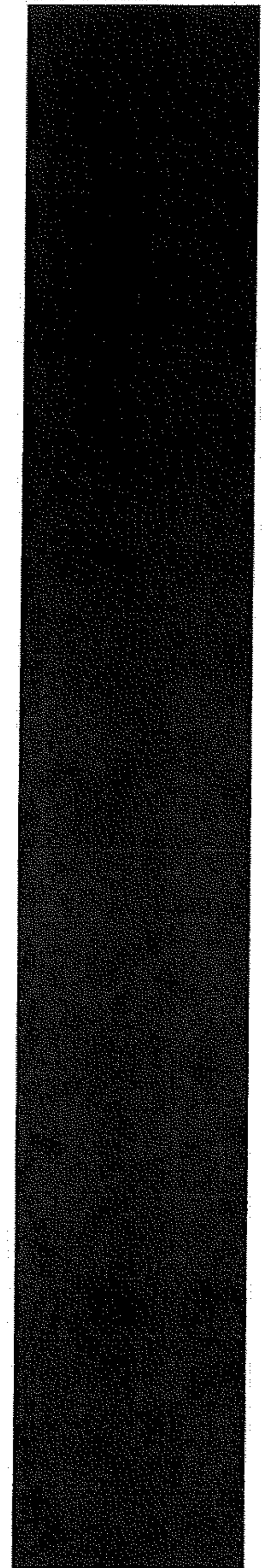

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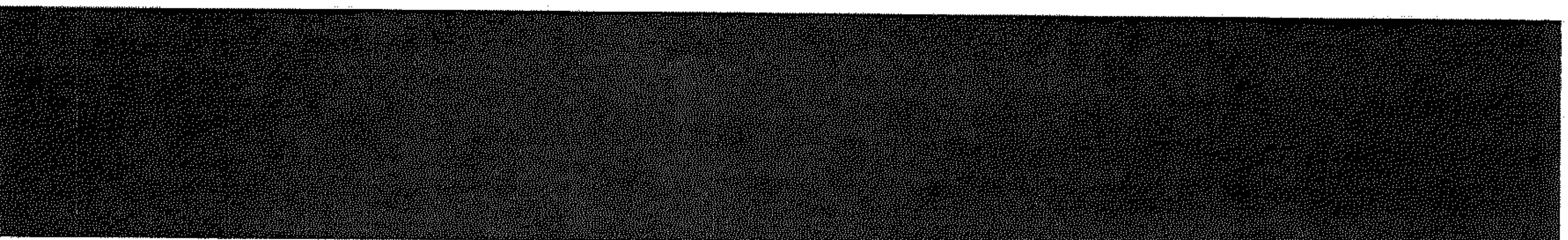

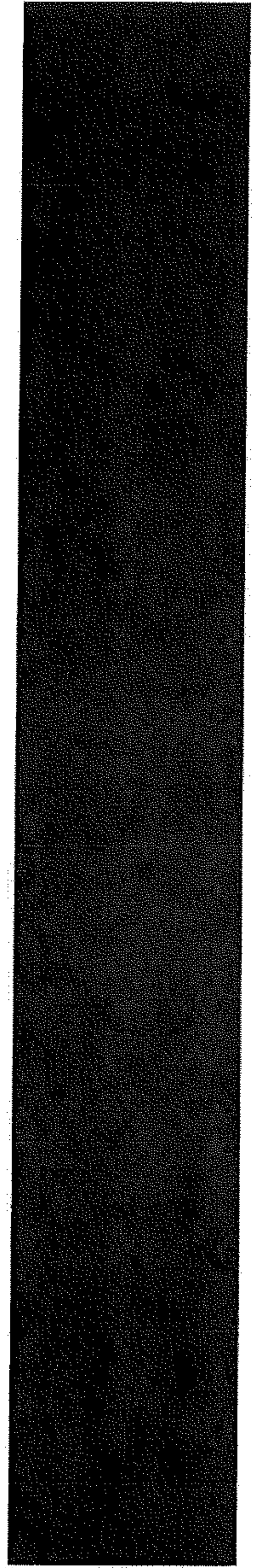

ATTACHMENT B

WATER CODE SECTION 13267 FACT SHEET

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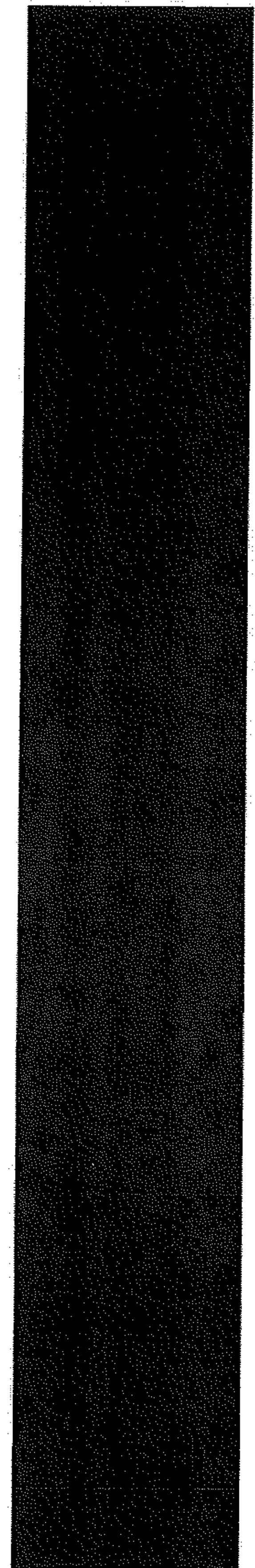

California Environmental Protection Agency – Ca. Regional Water Quality Control Board, Lahontan Region

Fact Sheet – Requirements for Submitting Technical Reports Under Section 13267 of the California Water Code
October 8, 2008

What does it mean when the regional water board requires a technical report?

Section 13267[1] of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged...waste that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires".

This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so?

Providing the required information in a technical report is not an admission of guilt or responsibility. However, the information provided can be used by the regional water board to clarify whether a given party has responsibility.

Are there limits to what the regional water board can ask for?

Yes. The information required must relate to an actual or suspected discharge of waste, and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The regional water board is required to explain the reasons for its request.

What if I can provide the information, but not by the date specified?

A time extension can be given for good cause. Your request should be submitted in writing, giving reasons. A request for a time extension should be made as soon as it is apparent that additional time will be needed and preferably before the due date for the information.

Are there penalties if I don't comply?

Depending on the situation, the regional water board can impose a fine of up to $1,000 per day, and a court can impose fines of up to $25,000 per day as well as criminal penalties. A person who submits false information is guilty of a misdemeanor and may be fined as well.

What if I disagree with the 13267 requirement and the regional water board staff will not change the requirement and/or date to comply?

Any person aggrieved by this action of the Regional Water Board may petition the State Water Board to review the action in accordance with Water Code section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must *receive* the petition by 5:00 p.m., 30 days after the date of the Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

Claim of Copyright or other Protection

Any and all reports and other documents submitted to the Regional Board pursuant to this request will need to be copied for some or all of the following reasons: 1) normal internal use of the document, including staff copies, record copies, copies for Board members and agenda packets, 2) any further proceedings of the Regional Board and the State Water Resources Control Board, 3) any court proceeding that may involve the document, and 4) any copies requested by members of the public pursuant to the Public Records Act or other legal proceeding.

If the discharger or its contractor claims any copyright or other protection, the submittal must include a notice, and the notice will accompany all documents copied for the reasons stated above. If copyright protection for a submitted document is claimed, failure to expressly grant permission for the copying stated above will render the document unusable for the Regional Board's purposes, and will result in the document being returned to the discharger as if the task had not been completed.

If I have more questions, who do I ask?

Requirements for technical reports normally indicate the name, telephone number, and email address of the regional water board staff person involved at the end of the letter.

[1] All code sections referenced herein can be found by going to www.leginfo.ca.gov . Copies of the regulations cited are availabl from the Regional Board upon request.

EXHIBIT 2

Dale C. Campbell, State Bar No. 99173
Lee N. Smith, State Bar No. 138071
weintraub tobin chediak coleman grodin
Law Corporation
400 Capitol Mall, 11th Floor
Sacramento, California 95814
(916) 558-6000 – Main
(916) 446-1611 – Facsimile

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BERNADETTE BLACKWOOD, individually and as guardian ad litem for K.B. and E.B.; et al.,

Plaintiffs,

vs.

MARY DE VRIES, individually and dba N&M DAIRY (aka N&M DAIRY #1 and N&M DAIRY #2) and as Trustee of the NEIL AND MARY DE VRIES FAMILY TRUST, et al.,

Defendants.

Case No. EDCV14-00395 JGB (SPx)

DECLARATION OF LEE N. SMITH IN SUPPORT OF MOTION OF DEFENDANTS' TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Date: July 14, 2014
Time: 9:00 a.m.
Courtroom 1, Hon. Jesus G. Bernal

Complaint served: 03.06.14
Current response date: 03.27.14
New response date: 06.11.14

I, Lee N. Smith, declare as follows:

1. I am over eighteen years old, am competent to testify and have personal knowledge of the matters set forth in this "Declaration of Lee N. Smith in Support of Motion of Defendants to Dismiss for Lack of Jurisdiction" ("Declaration") and could and would testify to the matters set forth in this Declaration if called as a witness in this matter.

1 2. I am an attorney at law licensed to practice before all the courts of
2 the state of California, am a shareholder in Weintraub Tobin Chediak Coleman
3 Grodin Law Corporation and, as such, am one of the attorneys representing
4 Defendants in this matter. I submit this Declaration in Support of Defendants'
5 Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim upon
6 which Relief Can Be Granted, currently scheduled for July 14, 2014.
7 3. Exhibits A through H are true and correct copies of documents that
8 were in the Lahontan Regional Water Board files, or on their website.
9 EXHIBIT A: Board Order No. 6-01-38; Revised Waste Discharge
10 Requirements for Neil and Mary DeVries, N&M Dairy;
11 EXHIBIT B: N&M Dairy Amended /Original CAO 6V-2011-0555-
12 A1 Neil and Mary DeVries, 1/19/2012;
13 EXHIBIT C: Justin Ervin Comments to Draft Settlement Agreement
14 9/12/2013;
15 EXHIBIT D: Settlement Agreement and Stipulation for Entry of Order
16 Between N&M Dairy and Lahontan Regional Board;
17 EXHIBIT E: Cleanup and Abatement Order R6v-2013-0103, Neil
18 and Mary DeVries, 12/12/2013;
19 EXHIBIT F: Email and Comments on Behalf of Helendale Residents,
20 Jessica Culpepper;
21 EXHIBIT G: Lahontan Regional Water Quality Control Board
22 Response to Comments on Proposed Settlement 10/3/2013;
23 EXHIBIT H: Lahontan Water Quality Control Board 8/29/2013,
24 Request for Comments on Proposed Settlement and Stipulation for Order;
25 4. Exhibit I is a true and correct copy of a State Court Decision that was
26 downloaded from the Contra Costa County Superior Court's website.
27 / / /
28 / / /

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EXHIBIT I: Schaeffer v. Gregory Village Partner L.P. MSC11-01307 Order on Demurrer to First Amended Complaint, Superior Court, Contra Costa County;

5. Exhibit J is a true and correct copy of pages from the website maintained by the State Water Board. The documents involve Board changes per legislation that was recently passed.

EXHIBIT J: Framework for Implementation of Health and Safety Code section 25204.6, subdivision (b);
htttp://www.waterboards.ca.gov/water_issues/programs/land_disposal/sb1082frame.shtml

I have read the foregoing Declaration and hereby declare under penalty of perjury under the laws of the state of California and the United States that the matters set forth in this Declaration are true and correct as of my own personal knowledge.

Dated this 11th day of June, 2014, at Sacramento, California.

/s/ Lee N. Smith

Lee N. Smith

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EXHIBIT 3

From: justin ervin
Sent: Thursday, September 12, 2013 3:54 PM
To: Kouyoumdjian, Patty@Waterboards;

Subject: RE: Transmittal of Proposed Settlement Agreement and Stipulation for Entry of Order for the N&M Dairy and Neil and Mary de Vries

First off I would like to say I am glad that the worst neighbor we have ever had is out of buisness and after 13 years I can use my property again. the flies have almost gone away along with that stinch of rotten cow shit however why would we let these guys off the hook for administrative costs (tax payers money). why would we allow the victorville office to handle any of this matter they were a large part of the problem if they were not sucking up to the dairy and just did there job instead of waiting for the residents along the river to start drinking cow piss we would not have had this problem to start with(monitoring the wells) all they needed to do was get off there rears and go look at the numbers!!!!. we need to know that Plaziak and Pour will not be involved in anymore decisions with this dairy . Also you seemed to forget the 10 other years that the Devries Dairy never listened to anything anyone would say to them whether it be the water board , vector control or any of there neighbors . also to this date they still have not moved anymore manuer oh...... excuse me compost that alone has saved them over 500 thousand they deserve no credit for the crap they moved a couple years ago because there was no official number on what was moved you certainly don't believe the bullshit numbers they gave you!!!!. also why would we ever change (lower or raise)our water standards the standard that the rest of this state uses should be the same standard we use. they can keep there contaminated land and we should not allow them to operate any business on that property we should never reward belligerent story tellers with a long track record (13 years)of ignoring the laws of this state or country. They should have to supply drinking water indefinitely to all affected parties until the water contamination drops well below the standard or N & M replaces there water supply. How was there a cost of closing the dairy they made money on the beef and the equipment also we know the next move is to sell the water rights???? then maybe lease some of the property ???also gain some tax exemption on that property they are giving (bless their little hearts) away.

EXHIBIT 4

ELECTRONICALLY FILED
5/15/2012
K. TORRE, CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA - MARTINEZ
BY: S. PASSOT, DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CONTRA COSTA COUNTY

RYAN SCHAEFFER, et al. PLAINTIFF V. GREGORY VILLAGE PARTNERS, L.P. et al. DEFENDANTS	MSC11-01307 ORDER ON DEMURRER TO FIRST AMENDED COMPLAINT

On March 22, 2012 the Court issued its written tentative ruling on defendants' demurrers to plaintiffs' first amended complaint. Defendants timely requested oral argument which was, therefore, held the following day. Defendants' arguments centered on whether this Court has jurisdiction over plaintiffs' first cause of action, which is brought under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq. The Court took the matter under submission. It now rules as follows.

I. The Jurisdictional Issue

A. The Issue Stated

Four sets of defendants, *viz.*, (i) Chevron U.S.A., Inc., (ii) Central Contra Costa Sanitary District, (iii) MB Enterprises, Inc., Massoud Ebrahimi and Bhagdeep Dhaliwal and (iv) Gregory Village Partners, L.P. and VPI, Inc. demurred to the first cause of action on the grounds this court lacks subject matter jurisdiction over plaintiffs' RCRA claims.

1 They argue that 42 U.S.C. §6972(a) vests exclusive jurisdiction to hear RCRA actions in
2 federal courts. They rely on the "plain meaning" of the statute and the fact that most courts that
3 have considered the matter have found such exclusive jurisdiction.
4 Plaintiffs disagree. They rely on *Davis v. Sun Oil*, 148 F.3d 606 (6th Cir. 1998) which
5 reasoned from general principles (as enunciated in cases such as *Tafflin v. Levitt,* 493 U.S. 455
6 (1990) and *Yellow Freight Systems v. Donnelly,* 494 U.S. 820 (1990)) to reach the conclusion
7 that there is concurrent jurisdiction. Plaintiffs also urge the Court to draw analogies from other
8 federal statutes with language similar to that found in RCRA.
9 Thus, the key question can be stated simply: is there exclusive federal jurisdiction over
10 claims brought under RCRA?
11 B. Binding and Persuasive Precedent
12 This Court is bound to follow the law as stated by the United States Supreme Court, the
13 California Supreme Court and the California Courts of Appeal. *Auto Equity Sales, Inc. v.*
14 *Superior Court* (1962) 57 Cal. 2d 450, 455; *People v. Greenwood* (1986) 182 Cal. App. 3d 729,
15 735 (reversed on other grounds by *California v. Greenwood* (1988) 486 U.S. 35). The parties
16 have cited no case from the United States Supreme Court, the California Supreme Court or the
17 California Courts of Appeal that answers that question.
18 The parties have cited a number of federal District Court and federal Court of Appeals
19 opinions. Thus, it is important to note that "California courts are not bound by the decisions of
20 lower federal courts even on federal questions. [Cite omitted.] They are but persuasive
21 authority." *People v. Neer* (1986) 177 Cal. App. 3d 991, 1001-2; *People v. Weeks* (2008) 165
22 Cal. App. 4th 882, 888.
23 Even if they were binding, as the parties note, the lower federal courts have reached
24 contrary conclusions on the question: is there exclusive federal jurisdiction over claims brought
25 under RCRA? One circuit has held that the answer is "yes." *Blue Legs v. United States Bureau*

1 *of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) (Tribal court has no jurisdiction over
2 RCRA claim, therefore exhaustion not required). One circuit has held the answer is "no."
3 *Davis, supra.*
4 Two other circuits – the Third and Seventh – have said that the answer is "yes."
5 However in those cases the parties did not argue the point. *Raritan Baykeeper v. NL Industries,*
6 *Inc.*, 660 F.3d 686. 693 (3rd Cir. 2011) ("Raritan Baykeeper argues, and the Defendants do not
7 dispute, that this action could not have been brought in state court because federal courts have
8 exclusive jurisdiction over RCRA and CWA citizen suits); *Adkins v. VIM Recycling*, 644 F.3d
9 483, 500 (7th Cir. 2011) ("VIM conceded at oral argument that the federal courts have exclusive
10 jurisdiction over the plaintiffs' "endangerment" claim."[1]). Thus, the Courts' observations do not
11 constitute holdings. *Carpenter v. Santa Monica* (1994) 63 Cal. App. 2d 772, 786 (Noting "[i]t is
12 elementary…that a decision which fails to consider a point of law cannot be considered as
13 authority on that point.")
14 A fifth – the First Circuit – has recognized the split in the cases without necessarily
15 accepting either position. *Chico Service Station, Inc. v. SOL Puerto Rico Limited*, 633 F.3d 20,
16 30-31(1st Cir. 2011) (citing both *Blue Legs* and *Davis* and then taking no position: "Regardless
17 of whether the jurisdiction conferred by Congress is exclusive….While we are not prepared to
18 rule out categorically the possibility of abstention in a RCRA citizen suit…")
19 The parties also cite a number of District Court cases. *Middlesex County Board of*
20 *Chosen Freeholders v. New Jersey Department of Environmental Protection*, 645 F. Supp. 715,
21 719-20 (D.N.J. 1986) (holding 42 U.S.C. § 6972(a) grants exclusive jurisdiction to federal
22 courts); *White and Brewer Trucking, Inc. v. Leroy Donley*, 952 F. Supp. 1306 (C.D. Ill. 1997);
23 *Spillane v. Commonwealth Edison Co.*, 291 F. Supp. 2d 738, 732 (N.D. Ill. 2003) (citing *White*
24 *& Brewer*); *K-7 Enterprises L.P. v. Jester*, 562 F. Supp. 2d 819, 827 (E.D. Tex. 2007); *Marrero*
25

[1] The *Adkins* court notes that the majority of courts have found exclusive jurisdiction, but noted the cases holding the contrary. *Id.* at 500, n.7.

1 *Hernandez v. Esso Standard. Oil Co.*, 597 F. Supp. 2d 272, 282 (D.P.R. 2009) (citing *Blue*
2 *Legs)*; *City of Waukegan v. Arshed*, 2009 U.S. Dist. LEXIS 13986 (N.D. Ill. 2009) ("Indeed
3 although not entirely a settled matter, most courts have held that RCRA actions are exclusively
4 federal." at p. *4); *Snellback Properties, L.L.C. v. Aetna Development Corp.*, 2009 U.S. Dist.
5 LEXIS 48180 (N.D. Ill. 2009) (citing *Blue Legs* and *Waukegan*); *Remington v. Mathson*, 2010
6 U.S. Dist. LEXIS 29187 (N.D. Cal. 2010) (noting split in authority but following majority to
7 hold exclusive federal jurisdiction); *Interfaith Community Organization v. PPG Industries, Inc.*,
8 702 F.Supp.2d 295 (D. N.J. 2010) (noting split in authority but following majority to hold
9 exclusive federal jurisdiction).[2]

10 What is notable about these federal cases is that they do not explicitly discuss the United
11 States Supreme Court precedent that addresses how to determine whether a statute creates
12 exclusive federal jurisdiction.[3]

13 C. How To Reason Through the Issue

14 Of course, California courts must analyze a question of concurrent or exclusive federal
15 jurisdiction using the principles enunciated by the United States Supreme Court. *Kingston*
16 *Constructors, Inc. v. Washington Metropolitan Area Transit Authority* (1997) 14 Cal. 4th 939,
17 947-948.

18 There is a significant line of United States Supreme Court authority that sets out the
19 relevant principles to be applied. A 1963 case traces the doctrine back at least to 1876.
20
21
22
[2] There are at least two state court decisions that bear on this question. Defendants cite *Jilot v. State of Colorado*, 944 P.2d 566
23 (Colorado Court of Appeals, 1996) which held there was no state court jurisdiction over a RCRA claim. On the other hand,
United Water New York, Inc. v. Hudson Technologies, Inc. 181 Misc. 2d 984 (N.Y. Supreme Court, 1999) held there was such
24 jurisdiction. Of course, neither case is binding on this court. And for the reasons stated in this opinion, this Court respectfully
disagrees with *Jilot* and agrees with *United Water*.

25 [3] A number of them rely on the "'shall' is mandatory" argument discussed below. *Middlesex County, White & Brewer Trucking, Spillane, K-7 Enterprises* and *Marrero Hernandez*. To that extent, they are not necessarily inconsistent with the Supreme Court's jurisprudence. However none explicitly analyzes the question in the manner set forth by the Supreme Court.

> We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule [footnote omitted.] This Court's approach to the question of whether Congress has ousted state courts of jurisdiction was enunciated by Mr. Justice Bradley in *Claflin v. Houseman*, 93 U.S. 130, and has remained unmodified through the years. "The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises . . . [and] the result of these discussions has, in our judgment, been . . . to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." 93 U.S., at 136. See *Robb v. Connolly*, 111 U.S. 624; *Second Employers' Liability Cases*, 223 U.S. 1, 56-59; *St. Louis, B. & M. R. Co. v. Taylor*, 266 U.S. 200; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245; *Brown v. Gerdes*, 321 U.S. 178, 188 (concurring opinion).
>
> *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-508 (1962).

Most recently, that principle has run through *Gulf Offshore Co. Div. of Pool Co. v. Mobil Oil Corp.* 453 U.S. 473 (1981), *Tafflin v. Levitt*, 493 U.S. 455 (1990), and *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990). For example, in *Tafflin*, Justice O'Connor wrote,

> We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual

1 sovereignty, we have consistently held that state courts have inherent authority,
2 and are thus presumptively competent, to adjudicate claims arising under the
3 laws of the United States. See, *e.g., Houston v. Moore,* 5 Wheat. 1, 25-26 (1820);
4 *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876); *Plaquemines Tropical Fruit*
5 *Co. v. Henderson*, 170 U.S. 511, 517 (1898); *Charles Dowd Box Co. v. Courtney*,
6 368 U.S. 502, 507-508 (1962); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S.
7 473, 477-478 (1981). As we noted in *Claflin*, "if exclusive jurisdiction be neither
8 express nor implied, the State courts have concurrent jurisdiction whenever, by
9 their own constitution, they are competent to take it." 93 U.S., at 136; see also
10 *Dowd Box, supra*, at 507-508 ("We start with the premise that nothing in the
11 concept of our federal system prevents state courts from enforcing rights created
12 by federal law. Concurrent jurisdiction has been a common phenomenon in our
13 judicial history, and exclusive federal court jurisdiction over cases arising under
14 federal law has been the exception rather than the rule"). See generally 1 J. Kent,
15 Commentaries on American Law *400; The Federalist No. 82 (A. Hamilton); F.
16 Frankfurter & J. Landis, The Business of the Supreme Court 5-12 (1927); H.
17 Friendly, Federal Jurisdiction: A General View 8-11 (1973).
18 This deeply rooted presumption in favor of concurrent state court jurisdiction is,
19 of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction
20 over a particular federal claim. See, *e. g., Claflin, supra*, at 137 ("Congress may,
21 if it see[s] fit, give to the Federal courts exclusive jurisdiction") (citations
22 omitted); see also *Houston, supra* at 25-26. As we stated in *Gulf Offshore*:
23 "In considering the propriety of state-court jurisdiction over any particular federal
24 claim, the Court begins with the presumption that state courts enjoy concurrent
25 jurisdiction. Congress, however, may confine jurisdiction to the federal courts

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1 either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction
2 can be rebutted by an explicit statutory directive, by unmistakable implication
3 from legislative history, or by a clear incompatibility between state-court
4 jurisdiction and federal interests." 453 U.S., at 478 (citations omitted).
5 *Tafflin, supra,* at 458-460.

6 The question, then, is whether RCRA contains an "explicit statutory directive" or
7 whether its legislative history contains an "unmistakable implication". (The parties do not argue
8 that there is "a clear incompatibility between state-court jurisdiction and federal interests.")

9 1. Is there an "explicit statutory directive?"

10 The statute says, in relevant part,

11 (a) ...Except as provided in subsection (b) or (c) of this section, any person may
12 commence a civil action on his own behalf--
13 (1) ...
14 (B) against any person, including the United States and any other
15 governmental instrumentality or agency, to the extent permitted by the eleventh
16 amendment to the Constitution, and including any past or present generator, past
17 or present transporter, or past or present owner or operator of a treatment,
18 storage, or disposal facility, who has contributed or who is contributing to the
19 past or present handling, storage, treatment, transportation, or disposal of any
20 solid or hazardous waste which may present an imminent and substantial
21 endangerment to health or the environment; ...
22 Any action under paragraph (a)(1) of this subsection shall be brought in the
23 district court for the district in which the alleged violation occurred or the alleged
24 endangerment may occur. ...
25 42 USCS § 6972 (Underlining added.)

Defendants stress the underlined phrase. They argue that "shall" is mandatory and creates exclusive jurisdiction in the United States District Courts.[4] Plaintiffs say that "shall" is insufficient to carry the burden of the tests stated in *Charles Dowd, Gulf Offshore, Tafflin* and *Yellow Freight*. Plaintiffs also assert the underlined phrase must be read together with the clause immediately following it. That shows, plaintiffs say, that the quoted language is really a venue provision.

To understand what the Supreme Court means by an "explicit statutory directive" the Court starts with the United States Supreme Court cases identified above. Unfortunately, none uses quite the same language as RCRA. The statute in *Yellow Freight* provided that federal district courts "shall have jurisdiction" (494 U.S. at 823); in *Gulf Offshore Co.* the statute granted federal district courts "original jurisdiction" (453 U.S. at 478-9); in *Tafflin* the statute provided that any person "may sue…in any appropriate United States District Court" (493 U.S. at 460); and in *Dowd Box Co.* the statute provided "suits…may be brought in any district court of the United States…" (368 U.S. at 502). None of these was found to provide *exclusive* federal jurisdiction. The presumption of concurrent state court jurisdiction prevailed in each case.

The language in RCRA is a bit stronger than the language in Title VII of the Civil Rights Act construed in *Yellow Freight* or the language in the Outer Continental Shelf Lands Act of 1953 construed in *Gulf Offshore Co.* Instead of "shall have jurisdiction" it says "shall be brought." The Court has found no case that construes the latter phrase.[5]

Thus, the Court looks to other statutes and cases to see how "shall be brought" has been used by Congress. An obvious place to start is CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9613(b), which was the next

[4] Many of the federal court decisions cited by defendants rely on the "'shall' is mandatory" argument. See, *e.g., Blue Legs, Middlesex County, White & Brewer Trucking, Spillane,* and *K-7 Enterprises, supra.*

[5] The parties' briefs are largely silent on this question.

major piece of environmental legislation enacted by Congress after RCRA, which was enacted in 1976. In CERCLA Congress said,

> (b) Jurisdiction; venue. Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.
>
> 42 U.S.C. 9613(b).

Congress clearly specified "*exclusive* original jurisdiction." It also wrote a separate sentence providing where venue "shall lie."

Of significance, CERCLA also contains a separate "citizens suit" venue provision which is phrased in language identical to the RCRA provision at issue. 42 U.S.C. 9659(b)(1) reads,

> (b) Venue.
>
> (1) Actions under subsection (a)(1). Any action under subsection (a)(1) shall be brought in the district court for the district in which the alleged violation occurred.

Thus, in 1980, only four years after passage of RCRA, Congress used the language identical to that in RCRA to specify venue, not jurisdiction.[6]

The Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §11001 et seq. is similar. Its jurisdictional grant, in § 10046(c) says, "The district court shall

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[6] In 1976, Congress used the same language ("…any civil action…shall be brought in the United States district court for the district in which the alleged violation occurred...") in the citizen suit provision of the Toxic Substance Control Act. 42 U.S.C. 2619(a). However the only case the Court has found that speaks to the issue of state versus federal jurisdiction is *In re Methyl Tertiary Butyl Ether Products Litigation*, 510 F. Supp. 2d 299, 327 (S.D.N.Y. 2007). But there, the parties did not dispute that federal courts have exclusive jurisdiction. Thus, the issue was neither litigated nor decided.

have jurisdiction…." (That is the language that has been held to preserve concurrent jurisdiction. *Yellow Freight.*) But then, when establishing venue for citizen suits, it uses the RCRA formulation: "Any action…shall be brought in the district court for the district in which the alleged violation occurs." In EPCRA, that language describes venue, not jurisdiction.[7]

On the other hand the Social Security Act also uses the language found in RCRA. 42 U.S.C. §405(g) specifies that any action to review a decision of the Commissioner of Social Security "shall be brought in the district court of the United States for the judicial district in which the plaintiff resides…" At oral argument, Chevron U.S.A.'s counsel referred the Court to *Jackson v. Astrue,* 506 F.3d 1349 (11th Cir. 2007). The case takes as its premise that exclusive jurisdiction is vested in the federal courts. The question seems not to have been disputed by plaintiff. Nonetheless, it seems likely that the "shall be brought" language is generally construed in the world of Social Security litigation to require suits to be brought in federal court. Certainly, that is what the United States' government's information pamphlets say. See, *e.g.* "The Appeals Process" SSA Publication No. 05-10041, January 2008.[8]

Thus, it appears the formulation "shall be brought" has been used by Congress to specify venue (CERCLA and EPCRA) and, in at least one instance, jurisdiction (Social Security). As to RCRA, that leaves a few possibilities. One, that the statute did not explicitly contain a jurisdiction clause, relying instead on general federal question jurisdiction; the language in question being a venue provision. Two, that Congress intended the language in question to be

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[7] Central Contra Costa Sanitary District and Gregory Village Partners argue that the Clean Water Act is instructive, citing *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 542 F.3d 1235 (9th Cir. 2008). That case does not help defendants. First, the question in that case was whether original jurisdiction lay with the district court or the court of appeals when the EPA administrator fails to perform a non-discretionary duty under the Clean Water Act. Second, the language in the Clean Water Act on which defendants would rely is found in 33 U.S.C. 1365(a). It says "[t]he district courts shall have jurisdiction…" That is the very language which the Supreme Court has said does not create exclusive jurisdiction. *Yellow Freight.*

[8] Found at http://www.ssa.gov/pubs/10041.html#a0=1. Last accessed May 9, 2012.

both a jurisdiction and venue provision. Three, that "Congress did not specifically deal with the question." *Davis, supra* at 612.

As noted above, the United States Supreme Court has held repeatedly that there is a "deeply rooted presumption in favor of concurrent state court jurisdiction." *Tafflin, supra* at 478. For there to be exclusive jurisdiction, "Congress must affirmatively oust…the state courts of jurisdiction over a particular federal claim." *Id.*

As the Sixth Circuit has said,

> Congress is well-versed in the intricacies of concurrent and exclusive federal court jurisdiction and the need for an explicit withdrawal of concurrent jurisdiction. See 29 U.S.C. § 1132(e)(1) (explicitly granting district courts "exclusive jurisdiction" for most actions arising under ERISA, while explicitly preserving concurrent state court jurisdiction for ERISA actions under subsection (a)(1)(B)). *See also Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (noting that Congress, when it seeks to divest state courts of jurisdiction, uses either the phrase "exclusive of the courts of the States" or the words "only" or "exclusive" in reference to the federal courts) (citing, among others, 15 U.S.C. § 80a-35(b)(5) (Investment Company Act of 1943); 15 U.S.C. § 78aa (Securities Exchange Act of 1934); 18 U.S.C. § 3231 (criminal cases); 28 U.S.C. § 1334 (bankruptcy cases)).
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> *Holmes Financial Associates v. Resolution Trust Corp.*, 33 F.3d 561, 565-566 (6th Cir. 1994)

Indeed, the Supreme Court has recently made a similar point. See, *Mims v. Arrow Financial Services, LLC,* 132 S.Ct. 740, 750 (2012) ("…while drafting the TCPA, Congress knew full well how to grant exclusive jurisdiction with mandatory language.")

1 In RCRA, Congress has used language that is equivocal at best. The statutory language
2 is susceptible of different interpretations, as discussed above. It seems somewhat contradictory
3 to say that ambiguous language is "explicit." Congress is capable of using explicit language. It
4 did not use such language here.
5 Thus, the Court finds that RCRA does not contain an "explicit statutory directive" that
6 "affirmatively ousts…the state courts of jurisdiction."
7 2. Is there an "unmistakable implication" in the legislative history?
8 That raises the second prong of *Tafflin*: whether there is an "unmistakable implication
9 from legislative history." *Tafflin*, 453 U.S. at 478. There is some question about whether
10 Justice Stevens' decision in *Yellow Freight* deleted the second prong of *Tafflin* from concurrent
11 jurisdiction jurisprudence. See *Holmes Financial Associates, supra* at 565. However, even if it
12 remains, there is not an "unmistakable implication" in the legislative history cited by the parties.
13 The only argument made from the legislative history is that which is discussed in
14 *Middlesex County Board of Chosen Freeholders, supra.* There the Court quoted from a House
15 Report which said,
16 Although the Committee has not prohibited a citizen from raising claims under
17 state law in a Section 7002 action, the Committee expects courts to exercise their
18 discretion concerning pendent jurisdiction in a way that will not frustrate or delay
19 the primary goal of this provision, namely the prompt abatement of imminent and
20 substantial endangerments. H.R. Report No. 98-198 at page 53, reprinted in
21 1984 *U.S. Code Cong. and Ad. News* at page 5612.
22 *Middlesex, supra* at 719-20.
23 Note first, that this was written in 1984, eight years after the original enactment of the
24 RCRA section in question. Public Law 94-580, Section 7002(a). Thus, it is not a statement by
25 the same Congress that originally enacted the jurisdiction provision.

1 But, even giving it full weight, that passage does not create an "unmistakable
2 implication" of exclusive jurisdiction. It simply means that whenever federal courts have
3 RCRA cases with pendent state law claims, "they should exercise their discretion…in a way that
4 will not frustrate or delay the primary goal" of the provision that secures the prompt abatement
5 of an imminent and substantial endangerment. That does not say that only federal courts will
6 have these claims. It does not say that state courts will not be hearing them. It only states an
7 "expectation" of what will happen if one of these cases ends up in federal court. It does not
8 meet *Tafflin's* second prong, even if that prong survives *Yellow Freight.*

9 D. Conclusion

10 For these reasons, the Court concludes there is neither an "explicit statutory directive"
11 withdrawing concurrent state court jurisdiction nor an "unmistakable implication" in the
12 legislative history that federal courts have exclusive jurisdiction over RCRA claims.
13 Defendants' demurrers are overruled to the extent they are based on an argument that only
14 federal courts have jurisdiction to hear RCRA claims.

15 II. The Remainder of the Demurrers

16 In all other respects, the Court's tentative ruling of March 22, 2012 is affirmed in full.

17 III. Summary of Rulings

18 For the reasons given above:

19 Chevron U.S.A.'s demurrers to the first cause of action are overruled. Its demurrer to
20 the ninth cause of action is sustained without leave to amend. Its demurrer to all causes of
21 action on the grounds the facts alleged show no connection between Chevron U.S.A. and the dry
cleaning operations at issue is overruled.

22 Contra Costa County Sanitation District's demurrers to the first cause of action are
23 overruled. Its demurrers to the second and fourth causes of action are overruled. Its demurrer to
24 the third cause of action is sustained with 15 days leave to amend. Its demurrer to the seventh
25 cause of action is sustained with 15 days leave to amend. Its demurrer to the ninth cause of
action is sustained without leave to amend. Its demurrers to the fifth, sixth, eighth, tenth and

1 twelfth causes of action for failure to state a claim against a government agency based on statute
2 or contract are sustained with 15 days leave to amend. Its demurrers to the second through
3 thirteenth causes of action for failure to plead facts with sufficient particularity under the
4 Government Claims Act are overruled.

5 The demurrers of M.B. Enterprises, Bhagdeep Dhaliwal and Massoud Ebrahimi ("MB
6 Enterprises") to the first cause of action are overruled. MB Enterprises' demurrers to the
7 second, third, fourth and fifth causes of action are sustained with 15 days leave to amend. MB
8 Enterprises' demurrers to the sixth, seventh, tenth and twelfth causes of action are overruled.
9 MB Enterprises' demurrer to the eighth cause of action is sustained with 15 days leave to
10 amend. MB Enterprises' demurrer to the ninth cause of action is sustained without leave to
11 amend. MB Enterprises' demurrer to all causes of action on the grounds there are insufficient
12 facts to allege a nexus between them and the dry cleaning operations is overruled.

13 The demurrers of Gregory Village Partners, L.P. and VPI, Inc. ("GVP") to the first cause
14 of action are overruled. GVP's demurrers to the second and fourth causes of action are
15 sustained with 15 days leave to amend. GVP's demurrer to the fifth cause of action is sustained
16 with 15 days leave to amend. GVP's demurrer to the twelfth cause of action is overruled.
17 GVP's demurrers to the sixth and seventh causes of action are sustained with 15 days leave to
18 amend. GVP's demurrer to the eighth cause of action is overruled. GVP's demurrer to the ninth
19 cause of action is overruled. GVP's demurrer to the tenth cause of action is sustained with 15
20 days leave to amend. GVP's demurrer to the thirteenth cause of action is sustained with 15 days
21 leave to amend. GVP's demurrer to the eleventh cause of action is overruled.

22 Date: May 15, 2012

Digitally signed by Barry Goode
DN: cn=Barry Goode, c=US, o=Superior Court, ou=Judge
Date: 2012.05.15 08:15:11 -07'00'

Barry P. Goode
Judge, Superior Court

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