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June 9, 2009

Mr. Steven Saiz
Regional Water Quality Control Board
Central Coast Region
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401-7906

Re: Basin Plan Triennial Review—2009

Dear Mr. Saiz:

The Grower-Shipper Association of Santa Barbara & San Luis Obispo Counties (Association) submitted comments on the Central Coast Regional Water Quality Control Board's (Regional Water Board) 2009 Triennial Review of the Water Quality Control Plan for the Central Coast Basin (Basin Plan) (2009 Triennial Review) on May 26, 2009. In addition to those comments already submitted, we provide the following additional comments for further consideration on the following issues.

Issue 3: Biostimulatory Substances Objective Revision

In our May 26, 2009 letter, the Association indicated that it opposes the Regional Water Board's efforts to establish numeric biostimulatory objectives for nutrients in the Basin Plan. Our position on this issue remains the same. However, to the extent that the Regional Water Board intends to apply numeric criteria for nutrients for the protection of aquatic life beneficial uses, we further comment that the Regional Water Board must properly adopt any such criteria as water quality objectives pursuant to all applicable provisions of the Porter-Cologne Water Quality Control Act (Porter-Cologne).

First and foremost, when adopting regulations that affect water quality in California, the Legislature has declared that factors affecting water quality "[s]hall be regulated to attain the highest water quality *which is reasonable*, considering all demands made and to be made on those waters" (Wat. Code, § 13000, emphasis added.) Further, when adopting water quality objectives, the Regional Water Board must adopt such objectives to provide for the reasonable protection of beneficial uses. (See Wat. Code, §§ 13050(h), 13241.) In other words, if the Regional Water Board determines it is appropriate to adopt a numeric biostimulation objective, the adopted objective should be set at a level that provides for *reasonable* protection of the aquatic life beneficial use—not full protection of the beneficial use.

In addition to being required to adopt an objective that provides for reasonable protection of the beneficial use, Porter-Cologne also requires the Regional Water Board to consider a number of factors when establishing any numeric objective. (See Wat. Code, § 13241.) In particular, the Regional Water Board must consider the environmental characteristics of the waterbody in question, the level of water quality that could reasonably be achieved through the coordinated control of all controllable factors, and economics (i.e., the cost of meeting the objective). (Wat. Code, §§ 13242(b), (c) and (d).) Any new objective must also be accompanied by a program of implementation, which shall include a description of the actions necessary to achieve the objective, a time schedule and program of surveillance to determine compliance. (Wat. Code, § 13241.) Finally, any water quality program that will impact agriculture, or require actions from agriculture must include an estimate of the total cost of such program as it applies to agriculture, and identify potential sources of financing to pay for such a program. (Wat. Code, § 13141.)

Thus, the adoption of any new numeric biostimulation objective and/or numeric objectives for ammonia, nitrite, nitrate, organic nitrogen, phosphate and chlorophyll a must be adopted in a manner that complies with all provisions described above. Any revisions to existing numeric objectives in the Basin Plan for dissolved oxygen, temperature, turbidity and pH must also follow and comply with the same statutory provisions.

As a final clarification to our May 26, 2009 comments on issue 3, our comment with respect to maintaining the current narrative standard should not be construed to mean that the Association supports the use of numeric biostimulatory objectives as an interpretation of the narrative standard. Our statement merely means that the narrative standard is adequate. To the extent that the Regional Water Board disagrees, any numeric biostimulatory objective must be adopted into the Basin Plan in full compliance with Porter-Cologne before being used in any regulatory context.

Issue 7: Revision and/or Clarification of Groundwater Objectives

Issue 7 would expand the application of certain groundwater objectives identified in Chapter III, Section II.A.5 of the Basin Plan to all groundwater basins. Like the adoption of new numeric objectives discussed with issue 3 above, the expansion of the application of numeric objectives must also comply with all applicable provisions of Porter-Cologne. Thus, if the Regional Water Board decides to move forward with a Basin Plan amendment to expand groundwater objectives, the proposed amendment must include full analyses and consideration of the application of such objectives to groundwaters not identified in Table 3-8.

Issue 12: Tributary Rule

As expressed in our May 26, 2009 comments, the Association is opposed to any Basin Plan amendment that would designate beneficial uses to upstream waterbodies through a tributary provision in the Basin Plan. Such an action would be inconsistent with Porter-Cologne and the Federal Clean Water Act (CWA).

Regulation under Porter-Cologne, including the designation of beneficial uses, must achieve and maintain the highest level of water quality that is reasonable considering all the demands being made on the water. (See Wat. Code, § 13000.) The blanket designation of uses through a tributary provision fails to include the appropriate analysis to determine if the designation of the use is reasonable considering all the demands made upon the water. The CWA and its implementing regulations require the state to consider the use and value of the water when designating beneficial uses. (See CWA, § 303(2)(A); see also 40 C.F.R. § 131.10(a).) Federal regulations also require the state to conduct a use attainability analysis (UAA) whenever the state designates beneficial uses that are not related to the protection of fish, shellfish, wildlife, and recreation in and on the water. (40 C.F.R. § 131.10(j)(1).) For example, to designate beneficial uses for municipal, agricultural and industrial supply, the Regional Water Board must conduct a UAA pursuant to federal regulations. Automatic designation through a tributary provision fails to comply with this requirement.

Moreover, the issue description in the Regional Water Board's document mischaracterizes the tributary provisions from the Central Valley's Basin Plan for several reasons. First, there is no "tributary rule" in the Central Valley's Basin Plan. There was at one time a tributary footnote that was deleted by the Regional Water Board in 1994 because it was being misconstrued by others. When the Regional Water Board deleted the footnote, it added the current language referenced by the Central Coast in its issues document. More specifically, the Central Valley Regional Water Board amended its Basin Plan because some entities were interpreting the footnote to designate beneficial uses to upstream tributaries. Subsequently, the Central Valley Regional Water Board reversed its previous position and determined that beneficial uses were designated through the tributary footnote. This reversed position was upheld by the State Water Resources Control Board (State Water Board) in its precedential order regarding Vacaville. (See *In the Matter of Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 for Vacaville*, Order WQO 2002-0015, at pp. 11-13.) However, a key point in the State Water Board's decision is that the uses were designated by the deleted tributary footnote—not the tributary provisions added in 1994. Since the Central Coast Basin Plan does not have, nor has it ever had, the equivalent of the tributary footnote, the Association fails to see how the proposed amendment could properly be construed to designate beneficial uses to upstream tributaries.

Second, the quote from the Central Valley's Basin Plan is a partial quote of the tributary provisions. More importantly, it fails to include the following important clarifications:

In some cases a beneficial use may not be applicable to the entire body of water. In those cases, the Regional Water Board's judgment will be applied.

It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis. (Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (April 2005) at II-2.00.)

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In light of the many legal and policy concerns associated with adoption of a tributary provision to designate beneficial uses in the Central Coast, the Association recommends that issue 12 be removed from the list of issues prioritized as part of the 2009 Triennial Review.

Issue 14: Comprehensive Basin Plan Editorial Revisions

In general, the Association does not oppose editorial revisions to the Basin Plan. However, any and all such revisions must occur through a formal Basin Plan amendment process to ensure that all recommended changes are truly editorial in nature. Too often an agency makes an “editorial” change that later has substantive legal implications. To avoid any unintended consequences, the Association recommends that all proposed editorial changes be noticed and be subject to public review and comment.

Issue 15: Groundwater Recharge Area Protection

The Association is concerned with the proposed development of land use guidelines and/or prohibitions for the protection of groundwater recharge areas. As indicated in our May 26, 2009 comments, all land use authority, guidelines and principles are properly implemented by local governments that have the police power authority to do so. It is inappropriate for the Regional Water Board to otherwise interfere with such authority. We recommend that issue 15 be deleted from the list of prioritized issues for the 2009 Triennial Review process.

Issues 16 and 17: Aquatic Habitat Protection/Riparian Buffer Zones Aquatic Life Protection

In addition to our May 26, 2009 comments on these issues, the Association further comments here on the need to comply with all applicable provisions of Porter-Cologne to the extent the Regional Water Board decides to pursue these issues as part of the 2009 Triennial Review process. As indicated above, the adoption of any new or revised water quality objective must be for the *reasonable* protection of beneficial uses, consider all enumerated statutory considerations, include an implementation plan and estimate all agricultural cost impacts.

In sum, the Association appreciates the opportunity to provide additional comments on the Regional Water Board’s proposed 2009 Triennial Review process. Based on our comments above, and those submitted on May 26, 2009, we encourage the Regional Water Board to revise the list of priority issues accordingly.

Sincerely,

Richard Quandt
President