



CALIFORNIA FARM BUREAU FEDERATION

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Via US Mail and Email

commentletters@waterboards.ca.gov

September 14, 2012



Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I St., 24th Flr. [95814]
P.O. Box 100
Sacramento, CA 95812-0100

Re: *Comments to SWRCB/OCC Files A-2209(a) – (e)*
September 19, 2012 Board Meeting

Dear Ms. Townsend:

The California Farm Bureau Federation is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 74,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

California Farm Bureau Federation, Monterey County Farm Bureau, San Benito County Farm Bureau, San Luis Obispo County Farm Bureau, San Mateo County Farm Bureau, Santa Barbara County Farm Bureau, Santa Clara County Farm Bureau, and Santa Cruz County Farm Bureau (collectively "Farm Bureau") petitioned the State Water Resources Control Board ("State Board") to review the actions and inactions by the Central Coast Regional Water Quality Board ("Regional Board") in issuing Order No. R3-2012-0011, adopting a Conditional Waiver of Waste Discharge Requirements For Discharges From Irrigated Lands, Monitoring and Reporting Programs Order Numbers R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03, and Certification, pursuant to the California Environmental Quality Act ("CEQA"), of the Final Subsequent Environmental Impact Report ("SEIR" or "Final SEIR"), CEQA Findings, and Statement of Overriding Considerations for the Adoption of Renewal of a Waiver of Waste Discharge Requirements for Discharges of Waste From Irrigated Lands in the Central Coast Region, Resolution Number R3-2012-0012

NANCY N. McDONOUGH, GENERAL COUNSEL

ASSOCIATE COUNSEL:

CARL G. BORDEN • KAREN NORENE MILLS • CHRISTIAN C. SCHEURING • KARI E. FISHER • JACK L. RICE

(all documents collectively referred to as “2012 Ag Order”). In conjunction with Farm Bureau’s preliminary points and authorities, Farm Bureau supported the Request For Immediate Stay submitted by the Grower-Shipper Association of Central California, *et al.* Farm Bureau continues to support that Request For Immediate Stay, as well as the Request for Stay submitted by Ocean Mist Farms and RC Farms. Farm Bureau appreciates the opportunity to provide comments on the State Board’s Draft Stay Order. Although pleased with certain aspects of the State Board’s decision on the stay requests, Farm Bureau provides the following comments and concerns.

Water Quality Standards Compliance (Agricultural Order Provisions 22 & 23)

The Draft Stay Order denies the request to stay provisions 22 and 23 of the 2012 Agricultural Order and concludes the 2004 Agricultural Order and the 2012 Agricultural Order contain substantially similar requirements regarding water quality standards. (Draft Stay Order, p. 9.) Farm Bureau respectfully asks the State Board to reexamine the differences between the two orders and amend the Draft Stay Order as necessary.

As stated in the Draft Stay Order, although “the Central Coast Water Board expects compliance with provisions 22 and 23 to be achieved by dischargers over a number of years, not immediately,” nothing within the actual terms of the Order transmits this expectation or provides legal protection to growers during the terms of the Order as management practices are implemented. (Draft Stay Order, p. 7; see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (9th Cir. 2011) 673 F.3d 880, 897, [In order for the plain language of provisions of an order to not comply as directly written, there must be clear textual support. (“Part 2.3 clarifies that Parts 2 and 3 of the Permit interact, but it offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions.”)].) The language in question here, Provisions 22 and 23, are stand-alone provisions. The provisions of the Order are not modified by or subject to any additional language that clearly states compliance with these provisions is limited by the ability to implement management practices.

The Draft Stay Order concludes “provisions 22 and 23 of the Agricultural Order are substantially the same as provisions contained in the Central Coast Water Board’s 2004 Agricultural Order.” (Draft Stay Order, p. 8.) Although there are similarities between the two Orders with regard to compliance with applicable Basin Plan provisions, nuisance, and implementation of management practices, the provisions regarding compliance with water quality standards are dissimilar.

The 2012 Agricultural Order states: “Dischargers must comply with applicable water quality standards, as defined in Attachment A, protect the beneficial uses of waters of the State and prevent nuisance as defined in Water Code section 13050.” (2012 Agricultural Order, p. 18, ¶ 22.) Under the 2004 Agricultural Order, the provision calling for compliance with water quality standards actually states: a “discharger shall not cause or contribute to exceedences of any Regional, State or Federal numeric or narrative water

quality standard.” (2004 Agricultural Order, p. 13, ¶ 3.) As seen from the plain language of the two provisions, the requirements regarding water quality compliance are different. The 2004 Order did not require *immediate compliance* with water quality standards as required under the 2012 Agricultural Order. Given that the 2012 Agricultural Order’s requirements with regard to water quality standards departs from the 2004 Order, Farm Bureau respectfully asks the State Board to reconsider the denial of the stay for Provision 22.

Individual Surface Water Discharge Monitoring and Reporting (Agricultural Order Provisions 72 & 73; Tier 3 MRP, Part 5)

Farm Bureau, its members, and the agricultural community in general understand the need to implement management practices that are protective of both surface and groundwaters. Provisions 72 and 73, along with Part 5 of the Tier 3 MRP, outline the requirements for individual surface water discharge monitoring and reporting. The Draft Stay Order only considers the costs of the preparation of the SAP and QAPP under the expectation that the State Board will resolve the petitions on the merits prior to the deadline to initiate individual surface water discharge monitoring. (Draft Stay Order, p. 23.) Farm Bureau respectfully requests the State Board to reanalyze the entire request to stay the requirement to prepare the SAP and QAPP as well as the requirement to initiate individual surface water monitoring given that these requirements are intricately intertwined and cannot and should not be separated. Notwithstanding the different cost estimates provided in response to the Notice of Public Hearing, the costs to comply with Provisions 72 and 73 and the Tier 3 MRP are substantial, and once spent cannot be recouped. Should the State Board ultimately find on the merits that these provisions and the MRP are inappropriate, money and time spent to comply now (and other non-economic harm) cannot be recovered.

Further, Farm Bureau respectfully asks the State Board to reexamine the questions of law regarding the Central Coast Regional Board’s compliance with Water Code section 13267. Section 13267 requires that the Central Coast Regional Board’s request for technical information be reasonable as compared to the burden of compiling the information, including the cost. Further, the request for such information must include a written explanation supported by evidence as to why the information is necessary. (*Ibid.* [“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.”].) Here, the 2012 Agricultural Order and Tier 3 MRP collectively fail to identify why such information is necessary from Tier 3 farms/ranches, and fail to identify evidence in the record that supports such a requirement for all Tier 3 farms/ranches. For example, there is no specific evidence that links those that arbitrarily fall within Tier 3 to actual water quality threats and, thus, there is no evidence to support the requirement for individual discharge monitoring. The 2012 Agricultural Order does not include any specifically articulated findings that explain why such individual surface

water monitoring is necessary. Although Attachment A includes a finding that states all technical and monitoring reports contained in the Order are reasonable because those subject to the Order discharge waste from irrigated lands, such a finding is generic and does not comply with the requirements of Water Code section 13267. (2012 Agricultural Order, Attachment A, p. 43, ¶ 13; see also pp. 46 *et. seq* regarding broad rationale for the Order.) This generic finding, along with other overly broad and generic findings within Attachment A, are not specifically tied to the need for individual surface water discharge monitoring and reporting and do not constitute proper findings that bridges the analytical gap between the evidence and the requirements in the 2012 Agricultural Order. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (“*Topanga*”) [findings must “bridge the analytical gap between the raw evidence and the ultimate decision or order.”]; see also *In Re Petition of the City and County of San Francisco, et al.* (Sept. 21, 1995) State Water Board Order No. WQ 95-4, pp. 10, 13.) Although the findings are numerous, they are not supported by substantial evidence in the record (*Topanga*, pp. 514-515), are broad and generic, and do not actually explain why the requirements in the 2012 Agricultural Order and MRP Orders are appropriate or contain a proper explanation as to the Central Coast Regional Board’s need for the information on an individual level.

Further, the burden of complying with this requirement is not reasonable in comparison to the Central Coast Regional Board’s need for the information. Should the State Board ultimately find on the merits that these provisions are inappropriate, money spent to comply now (and other non-economic harm) cannot be recovered. Conversely, the benefits to the environment that would occur from the implementation of these requirements in the interim while the State Water Board conducts its review are minimal. Without providing evidence, written explanations of need, and proving the reasonableness of the information requested, the Central Coast Regional Board has failed to comply with Water Code section 13267(b)(1). As such, Farm Bureau respectfully asks the State Board to amend the Draft Stay Order to grant a stay for these provisions.

**Determination of Nitrate Loading Risk Factors/Total Nitrogen Applied
(Agricultural Order Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C);
Determination of Typical Crop Nitrogen Uptake (Agricultural Order Provision 74)**

Overall, Farm Bureau supports the Draft Stay Order’s proposed stay of Provisions 68 and 74 and Tiers 2 and 3 MRPs, Part 2, section C, provisions 1-4. Farm Bureau respectfully asks the State Board to reconsider the denial of the stay regarding the requirements for reporting total nitrogen applied under Tiers 2 and 3 MRPs, Part 2, section C, provision 5. The Draft Stay Order states that since the reporting of total nitrogen is not due until October 1, 2014, a stay is not warranted. (Draft Stay Order, p. 19.) Although reporting is not due until 2014, the gathering of information needed to fulfill the reporting requirement must begin now. Thus, growers will incur economic expenses and expend substantial resources during the pendency of the review of the petitions. Given this burden, Farm Bureau respectfully asks the State Board to reconsider the denial of this provision.

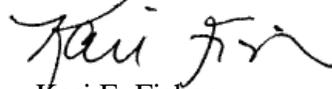
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Farm Bureau appreciates the opportunity to present our comments and concerns, not only during the public hearing on the stay requests before the State Board, but also on this Draft Stay Order. Overall, Farm Bureau supports the Draft Stay Order and encourages the State Board to adopt the Order with the amendments raised herein.

Sincerely,

A handwritten signature in black ink, appearing to read "Kari E. Fisher". The signature is fluid and cursive, with the first name "Kari" being the most prominent.

Kari E. Fisher

Associate Counsel

KEF/pkh