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Via email to: commentletters@waterboards.ca.gov

Pursuant to the State Water Resources Control Board's September 10, 2012 notice, Petitioners Monterey Coastkeeper, San Luis Obispo Coastkeeper, and Santa Barbara Channelkeeper (collectively "Environmental Petitioners") submit this additional written response opposing the Draft Stay Order SWRCB/OCC FILES A-2209 (a) - (e) (Stay of Order No. R3-2012-0011).

In the draft stay order the State Water Resources Board stays the following provisions of R3-2012-011 and the related monitoring and reporting requirements.

- Provision 31 (Backflow prevention devices): compliance deadline stayed, but only until March 1, 2013;
- Provision 33 (Containment structures): stayed until the petition is resolved on the merits;
- Provision 44.g. (Practice effectiveness and compliance): stayed until the petition is resolved on the merits;
- Tiers 2 and 3 MRPs, Part 3, Section A.1.k (Annual Compliance Form: Nitrate Loading Risk Factors): stayed until the petition is resolved on the merits;
- Tiers 2 and 3 MRPs, Part 3, Section A.1.m (Annual Compliance Form: Photo Monitoring): compliance deadline stayed, but only until June 1, 2013 (for reporting in October 2013);
- Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C, section 1-4 (Determination of nitrate loading risk factors): stayed until the petition is resolved on the merits;
- Provision 69; Tiers 2 and 3 MRPs, Part 4 (Photo monitoring): compliance deadline stayed, but only until June 1, 2013; and,
- Provision 74 (Typical crop nitrogen uptake): stayed until the petition is resolved on the merits.

Environmental Petitioners believe no basis has been established that harm will come to agricultural interests from these provisions. In the absence of a clear demonstration of harm, a stay is inappropriate under the standard acknowledged by the State Board in its notice of hearing: "A stay of the Order may be granted only if petitioners allege facts and produce proof of (1) substantial harm to themselves or to the public interest if a stay is not granted, (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and (3) substantial questions of fact or law regarding the permit."

Wild estimates have been offered by growers as to the costs they might incur but no financial context has been offered to help judge those costs. Agriculture on the Central Coast is a six billion dollar industry. Agricultural interests attacked the Environmental Petitioners use of gross crop value taken from the industry's own reports but offered no alternative metric to evaluate their

alleged cost estimates. Even if taken at face value, how can a $20,000 cost be claimed as "harm" within a six billion dollar industry if no frame is given? Neither the Agricultural Petitioners nor the SWRCB have established any harm to agricultural businesses.

We continue to assert that public health and the environment will be harmed by issuance of any stay or delay in implementation of Oder R3-2012-011. The severe pollution of Central Coast surface and groundwater is and well documented (see "Report on Water Quality Conditions" at http://www.waterboards.ca.gov/rwqcb3/water_issues/programs/ag_waivers/docs/12_09_2010_staffrpt/AgOrder_AppG.pdf prepared for the CEQA certification process). The State Water Resources Control Board is well aware of these challenges (see Attachments 3, 4 and 5 of Environmental Petitioners August 27 submission to the SWRCB). Agricultural Petitioners made no effort whatsoever to provide evidence that public health and environmental harm will not occur.

Further, we cannot understand the SWRCB's concern that "the costs are to be incurred by a whole sector of the Central Coast economy." Never challenged by any party is the RWQCB's assertion that Tier 1 growers will have less burden than they did under the 2004 Order and Tier 2 growers will have about the same they did before. Only Tier 3 growers - those few growers that pose the greatest risk to human health and the environment - will have a greater burden. 110 of the 3600+ farms – only 3-percent -- will see a greater burden; and these are the largest and highest risk operations with close proximity to agriculturally impaired waters. We do not believe this cost burden rises to the level of warranting the "extraordinary" action of a stay.

Finally, we believe that the Regional Board staff has consistently endeavored to reduce confusion, answer questions, and outreach to the agricultural community. We can say from much personal experience over the past four years that at least some of the confusion has been spread by certain members of the agricultural community who have very deliberately spread misinformation.

In addition, we have the following comments on each specific provision now proposed to be stayed:

Provision 31 (Backflow prevention devices): compliance deadline stayed, but only until March 1, 2013. The Order was passed on March 15, 2012 and the Environmental Petitioners believe there has been ample time for Central Coast growers to come into compliance with this provision. Further, growers have the simple and long practiced option of not fertigating their fields if they do not chose to install backflow devices. And finally, stay proponents inexplicably argued the Order was not specific as to the requirements; the order is quite specific as acknowledged by the SWRCB and states "backflow prevention devices used to protect water quality must be those approved by USEPA, DPR, CDPH, or the local public health or water agency." The order is clear and specific; ample time has been given; and alternatives exist.

Provision 33 (Containment structures): stayed until the petition is resolved on the merits. By staying the provision that states, "Dischargers who utilize containment structures (such as retention ponds or reservoirs) to achieve treatment or control of the discharge of wastes must manage, construct, or maintain such containment structures to avoid percolation of waste to groundwater that causes or contributes to exceedances of water quality standards, and to minimize surface water overflows that have the potential to impair water quality" the SWRCB is allowing discharges to groundwater that contribute to exceedances of water quality standards. Such exceedances have been shown to endanger public health and the environment. In its draft Stay Order the SWRCB states that RWQCB staff testimony offered no alternatives to lining ponds and that implementation of this provision would "generate more surface water runoff." We believe this is not the case. The Regional Board's submission in advance of the hearing details several sources of guidelines for reducing flows and

loads entering ponds: "NRCS and RCDs provide information and assistance to growers on standard industry practices to construct and maintain agricultural containment structures. These methods and practices include, but are not limited to the following:

- minimize volume of water in containment structure to minimize percolation;
- minimize percolation via a liner or low permeability soil floor;
- chemical treatment (e.g., enzymes);
- biological treatment (e.g., wood chips);
- contained water is recycled or reused to prevent infiltration or discharge."

(Regional Board submission to the State Board, dated August 27, 2012, at page 18). In addition, the Environmental Petitioners specifically reiterated that growers could better manage irrigation water to reduce flows, better manage nutrients and pesticides to reduce loads entering the ponds, and could install woodchip bioreactors to treat the water before it enters the ponds. The SWRCB Stay Order cites confusion about the lining of containment structures. The RWQCB has repeatedly stated that there is no requirement to line ponds and therefore the cost to line ponds is irrelevant.

Provision 44.g. (Practice effectiveness and compliance): stayed until the petition is resolved on the merits. The proposed stay delays requirements for monitoring, evaluating the effectiveness of farm practices, and public reporting that were imposed by the Regional Board's order, some for a period of months, and some until the ultimate resolution of the petitions. There can be nothing more basic to a waiver than effectiveness and compliance monitoring and reporting; without this basic provision in place the Order is no longer protective of public health and the environment and no longer serves the public interest. Agricultural Petitioners argued that effectiveness and compliance monitoring are new to the 2012 Order. This is not the case, the 2004 Order includes in its definition of monitoring: "management practice implementation and effectiveness monitoring". By staying this provision we believe the SWRCB is rolling back a provision previously required in the 2004 Order and one that is required by law (Water Code section 13269(a)(2) which mandates public disclosure of verification and effectiveness monitoring).

Tiers 2 and 3 MRPs, Part 3, Section A.1.k (Annual Compliance Form: Nitrate Loading Risk Factors): stayed until the petition is resolved on the merits. While the SWRCB found that the Ag Petitioners had not met their burden, the State Board has stayed determination of the nitrate hazard index and nitrogen uptake on their own motion. We reiterate our testimony that determination of the nitrate hazard index is incredibly easy requiring choices from four drop-down menus. In addition, this determination can be extremely informative; the user can keep crop and soil type constant and can change both the depth of rip and the irrigation method. The changes in the index can inform ways to reduce percolation of waste to groundwater. The SWRCB seems to base their stay order on "concerns and questions about the reliability of the methodologies." We point out that the index was developed by the Water Resources Center of the University of California. While any research findings and recommendations will have naysayers, the Index is well researched and documented.

Tiers 2 and 3 MRPs, Part 3, Section A.1.m (Annual Compliance Form: Photo Monitoring): compliance deadline stayed, but only until June 1, 2013 (for reporting in October 2013). The Order was passed on March 15, 2012 and the environmental petitioners believe there has been ample time for Central Coast growers to come into compliance with this provision. While we believe a stay is not warranted, we believe an extension of the time would be best facilitated by an administrative action by the RWQCB itself.

Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C, section 1-4 (Determination of nitrate loading risk factors): stayed until the petition is resolved on the merits; Provision 69; Tiers 2 and 3 MRPs, Part 4 (Photo monitoring): compliance deadline stayed, but only until June 1, 2013; and, Provision 74

(Typical crop nitrogen uptake): stayed until the petition is resolved on the merits. These provisions are corresponding reporting requirements for monitoring provisions already discussed above. We believe reporting is an essential motivator for compliance. While it makes no sense to have a reporting requirement for a provision where the basic information gathering has been stayed (nitrate risk, crop nitrate uptake), we strongly believe the information should both be gathered and reported.

Although the Order certainly will not stop all harm posed by agricultural discharges, timely implementation of its initial requirements is critical to laying the groundwork for future reductions in the most egregious pollution. The Order's provisions build upon the initial monitoring and reporting requirements highlighted in the Revised Notice and discussed in this letter. Granting any stay to all or part of the Agricultural Order will result in continued immediate harms to public health and the environment. Finally, the proposed stay would leave in place a confused set of conditions that may not constitute a valid waiver pursuant to the Porter Cologne Act.

Sincerely,

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