Board Meeting (9/19/12)
SWRCB/OCC File A-2209(a)-(e)
Deadline: 9/14/12 by 12 noon

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**On Behalf of Petitioners Jensen Family Farms, Inc.**
**And William Elliott**

**STATE OF CALIFORNIA**
**STATE WATER RESOURCES CONTROL BOARD**

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| **In the Matter of Adoption of Order No. R3-2012-0011 by the Central Coast Regional Water Quality Control Board for the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands** | **SWRCB FILES A-2209 9a)-(e)**<br><br>**STATEMENT IN RESPONSE TO SEPTEMBER 10, 2012 DRAFT DECISION RE. STAY REQUESTS** |

The September 10, 2012 Draft Decision re. Requests for Stay of the Conditional Waiver of Waste Discharge Requirements (Order Nos. R3-0011-01 – 03 of the Central Coast Regional Water Quality Control Board (hereafter "Conditional Waiver")) which, in great part, granted a stay of requested provisions of that Conditional Waiver should be amended and modified.

Specifically, the modifications required relate to the modified dates chosen by the State Water Resources Control Board relative to

1. Conditional Waiver Provision 31 which moved the compliance date from October 1, 2012 to March 31, 2013;
2. Conditional Waiver Provisions 64 and 74, and Tiers 2 and 3 MRPs, Part 2, Section C (1) – (4) which moved the compliance date from October 1, 2012 to June 1, 2013.

The other stayed Provisions were all stayed pending final resolution by this Board of the various Petitions (which the Board estimated in n. 8 on page 4 of the Draft to be "less than a year"). The "compliance" dates for the above-enumerated Provisions should, in each instance, be modified so that their respective stays are open-ended like the other stayed provisions.

That such a modification should be made is supported by a variety of reasons which sound both in the law and in common sense including, but not limited to:

1. The date-specific stays are inconsistent with the underlying reason for entry of a stay -- i.e., maintenance of the status quo pending final resolution by this Board of the pending Petitions (which the Board has not yet actually, but has indicated it will, accept for decision pursuant to 23 C.C.R. § 2050.5) – since they require costly actions to be taken by farmers which may be invalidated in whole or in part by the Board's final decision on the pending Petitions;
2. Affecting timely compliance with the date-specific provisions might moot any argument the complying agricultural entity has concerning the legality of that provision;

3. The apparent absence of any severability provision in the 2012 Conditional Waiver Order which would allow the Provisions thereof not specifically found to be unconstitutional or otherwise illegal or unauthorized to remain extant results in a situation where invalidation of any section of the Order could result in the invalidation of the entire Order. That would necessarily mean that persons complying with the date-specific stayed provisions would have no viable avenue of recovering those costs.

These modifications, at a minimum, should be made.

Having determined, in the exercise of its discretion under 23 C.C.R. 2053(c), to stay the compliance date for Provision 31 (requiring backflow prevention devices sufficient to comply with the Conditional Waiver's standards), the Board only granted a stay until March 31, 2012 for compliance with the Provision (a change from the October 1, 2012 date in the Conditional Waiver). In turn, that same discretion informed the stay of Provisions 64 and 74, and Tiers 2 and 3 MRPs, Part 2, Section C (1) – (4) (photo monitoring of streams and riparian and wetland habitat) which moved the compliance date from October 1, 2012 to June 1, 2013.

As set forth in testimony presented at the hearing as well as in the submitted Declaration of Ross N. Jensen, the costs of the installation of new devices is extreme: $20,400 for the petitioner's 6 ranches (as opposed to the $435 amount per farm forwarded by the Regional Board).[1] In turn, the costs of photo monitoring is great for many farmers. Those sums

[1] It is troubling that this Board chose to disbelieve or discount the sworn testimony of the various agricultural witnesses appearing before it during the hearing concerning the costs of compliance with various of the challenged provisions in favor of estimates provided by representatives of the Regional Board, none of whom established anything other than a bureaucratically or academically-driven value since none manage or operate farms, vineyards, or nurseries in the Central Coast Region. While bureaucratic judgment cannot always be discounted concerning such matters, it is not realistic to believe that the cost estimates of the various agricultural witnesses – all of which have a commonality without preplanning or

must necessarily be expended prior to the date(s) that the Board have indicated they would have completed their review of the pending Petitions. Thus, the "stay" granted does not do that which all such stays must and are designed to do: i.e., maintain the status quo. Their respective dates must thus be modified.[2]

Modification of those dates is required for a related reason. Should, as they now must, farmers subject to the requirements of these Provisions comply with the challenged Provisions while this matter is pending before this Board they may well render their claims concerning the illegality of the Conditional Waiver moot (as they relate to these matters). See, e.g., Wilson & Wilson v. City Council of Redwood City (2011) 191 Cal.App.4th 1550, 1575-76.

Furthermore, a determination by this Board that, for instance, a portion of the Conditional Waiver is illegal because it exceeds the Regional Board's authority or is otherwise unreasonable and capricious would likely have a far-reaching effect on the legality and survival of these Provisions. On one hand, findings regarding violations of the California Environmental Protection Act on the bases forwarded by various of the Petitions would result in invalidation of the entire 2012 Conditional Waiver as well may a finding that ex parte contacts existed between a Regional Board member and the Regional Board Staff and/or outside environmental advocates would invalidate the entire Conditional Waiver. Having expended the large amounts necessary to comply with these Provisions, farmers would be hard-pressed to recover the sums involved

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consultation with each other – are not accurate and should not be the ones adopted by the Board in its determinations here. After all, the prevailing law in California is that, for instance, the opinion of landowners of the value of their respective property is entitled to evaluation as "expert testimony" for purposes of establishing the point for which the valuation testimony was presented. See, e.g., Cal. Evid. Code § 813 (a)(2); Sacramento & San Joaquin Drainage Dist. v. Goehring (1970) 13 Cal.App.3d 58, 64.

[2] That, for instance, this Board based its stay determinations on the existence of and compliance with one or more of the 2004 Conditional Waiver conditions, it should be noted that adoption of the 2012 Conditional Waiver abrogated the prior conditions so that compliance, when it occurs, is under the new (rather than the old) Waiver.

from the Regional Board or, for that matter, this Board. On the other hand, the apparent absence of a severability provision in the Conditional Waiver that would save the entirety from being rendered illegal by the illegality of one or more of its Provisions means that, as a matter of law, such illegality could well involve in a complete invalidation of the Conditional Waiver (particularly in the absence, as here, of any stated intent by the Regional Board that severance was to occur in the event of a Provision's illegality). See, e.g., Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach (1993) 14 Cal.App.4th 312, 326. This is particularly apt since the respective Provisions of the Conditional Waiver interlock and each form a part of the hub of the Conditional Waiver. Without the Provisions the "spokes cannot stand." Id. That too would cause an irretrievable loss to the farmer.

Accordingly, the requested modifications should be made in the Draft Order. Petitioners also adopt the arguments made by other Petitioners to the extent that they do not conflict with the arguments made herein.

Date: September 13, 2012

William Elliott