

VIA EMAIL TO Clerk of the Board, commentletters@waterboards.ca.gov

September 18, 2014

Felicia Marcus, Chair
State Water Resources Control Board 1001 "I" Street
Sacramento, CA 95814

Re: 9/23/14 BOARD MEETING, Item 8, "Consideration of a proposed Resolution adopting emergency regulations revising the core regulatory fee schedules contained in Title 23, Division 3, Chapter 9, Article 1, Sections 2200, 2200.5, 2200.6, 2200.7 and Title 23, Division 3, Chapter 28, Article 1, Section 3833 of the California Code of Regulations – **Oppose**

Dear Chair Marcus:

On behalf of Dairy Cares, thank you for the opportunity to submit the following comments regarding the above-referenced proposed Resolution.

Dairy Cares is a coalition of California's dairy producer and processor organizations, including the state's largest producer trade associations (Western United Dairymen, California Dairy Campaign, Milk Producers Council, California Farm Bureau Federation and California Cattlemen's Association) and the largest milk processing companies and cooperatives (including California Dairies, Inc., Dairy Farmers of America-Western Area Council, Hilmar Cheese Company, and Land O'Lakes, Inc.). Formed in 2001, Dairy Cares is dedicated to promoting the long-term sustainability of California dairies.

Dairy Cares opposes the State Water Resources Control Board's (hereafter "Board") adoption of the proposed resolution. We request instead that fees for all Confined Animal Facilities (hereafter "CAF") as identified in staff report for Item 8, and in Attachments 2 and 3 of same, be set at the same level as those imposed on these Dischargers during the 2013-14 fiscal year. Concurrently we suggest an immediate moratorium be placed on any further fee increases related to the CAF program until the SWRCB can take the following recommended steps:

- Identify and document that all cost increases proposed for the CAF program are “reasonably associated” with actual costs necessary to regulate CAFs;
- Identify and document that, prior to establishing the 2014-15 fee schedule and since adoption of the 2013-14 fee schedule, the Board complied with California Water Code Section 13260 (d) (1) (D), which states among other requirements that the “pricing mechanism of the commodity produced” must be considered; and
- Conduct public workshops toward preparing and forwarding recommendations to the Governor and Legislature, intended to provide a reasonable annual cap on cost increases for dairies and other businesses adversely affected by skyrocketing, out-of-control, exponential increases in fees.

We further recommend:

- The Board reject a proposal to adopt fees for dairies in Region 1 (North Coast) during the 2014-15 year due to a lack of opportunity for public input into whether and how appropriate fees should be set, and
- The Board reject proposed changes in the fee discount schedule for the California Dairy Quality Assurance Program (hereafter “CDQAP), because of the harm those changes will cause to the successful CDQAP program and poor public policy outcomes that would result from this decision.

SUMMARY OF COMMENTS

Dairy Cares’ detailed comments are summarized as follows:

- I. Fees are not reasonably related to the activities of the fee payers for which the fees are charged.
- II. The Board did not comply with Water Code Section 13260 in setting the increased fees.
- III. CAF fees have more than quadrupled since 2005-06; the unreasonable and unsustainable increases harm dairy operators’ ability to recover from severe economic losses over the past five years.
- IV. The staff proposal to cap the CDQAP discount arbitrarily increases fees for some dairies damages the program and creates poor public policy results by transferring benefits from environmentally certified dairies to non-certified dairies.
- V. The Board improperly concluded that fees for North Coast dairies regulated via waiver of Waste Discharge Requirements (“WDRs”) should be equivalent to WDR-regulated CAFs.
- VI. The Board did not provide meaningful or timely opportunity for North Coast dairies to have input on fees for waiver program dairies.

DETAILED COMMENTS

I. Fees are not reasonably related to the activities of the fee payers for which the fees are charged.

Generally, regulatory fees are valid only “so long as [the fee] does not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged.” (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421 (“*Farm Bureau*”), p. 437, see also Cal. Const. art. XIII A, §3(b)(3) [excluding from the definition of a tax a “charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”].) The burden to demonstrate this proportionality lies with the government. (see Cal. Const. art. XIII A, §3(d).) Section 3(d) provides:

The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.

Here, the Board has not demonstrated that the fees imposed on dairies are no more than necessary to cover the reasonable costs of the Board’s activities related to dairies.¹ The Board should not only identify those programs that are proposed to be funded through the increased fee, but appropriately describe how dairies impact those programs sufficient to justify the fee amounts. Without this information, it is not possible to determine whether the Board has complied with Article XIII A of the California Constitution.

II. The Board did not comply with Water Code Section 13260 in setting the increased fees.

Water Code section 13260 provides that “[e]ach person who is subject to subdivision (a) or (c) shall submit an annual fee according to a fee schedule established by the [Board].” Subdivision (d) of Section 13260 requires the Board to consider certain factors in setting the amount of any fee imposed on a confined animal feeding and holding operation, including dairies. Among those factors is “[t]he pricing mechanism of the commodity produced. (Water Code section 13260 (d)(1)(D)(v). The Board’s proposed increased fee does not, as mandated by Water Code section 13260, consider the pricing mechanism of the commodity produced. The Board needs to

¹ Moreover, Water Code section 13260 does not authorize the Board to increase fees in order to create a reserve fund. (See Water Code section 13260(d)(1)(B) [fees can only be set in amount *equal* to the amount necessary to recover costs].)

maintain the existing fee levels and conduct an analysis of any proposed increase in fees consistent with Water Code section 13260(d)(1)(D).

III. CAF fees have more than quadrupled since 2005-06; continued unreasonable and unsustainable increases harm dairy operators' ability to recover from severe economic losses over the past five years.

Spending budgets for the CAF have quadrupled since 2005-06, from \$1.15 million to \$4.6 million, even as the number of dairies in the state dropped by more than 500, leaving far fewer operations to regulate. In the last three years alone, program spending has increased by 39 percent, even though there have been no increases in staff at all during that period.

By any objective standard, the costs of the program have continued to spiral upward and out of control. Other than potential compliance with Water Code Section 13260 (which we assert the Board has not complied with as evidenced by the staggering fee increases themselves), the Board has failed to implement a mechanism that assures fee increases remain in line with the ability of businesses to protect their margins.

As we reported in our comments to you during last year's fee increase adoption, the dairy industry has experienced historic economic damage over the last several years, including loss of 478 dairies between the end of 2006 and the end of 2013. An additional 30 dairies closed in the first half of 2014.

CDFA reports that in the past seven years, "cost of production" has exceeded the "California overbase price," a benchmark of how much producers earn for milk, in five of those years. Losses were worst in 2009 when cost of production exceeded the overbase price by more than \$6.05 per hundredweight.

The dairy economy has recovered some in 2014, but surviving dairies have not fully recovered from the losses of previous years and production costs continue to trend upward, including costs of feed. The drought has continued to exacerbate this situation and increased risk for producers. Rises in milk prices of recent months tend to be cyclical and cannot be counted on to continue through next year, let alone for the foreseeable future.

In contrast, steady and sharp increases in Board fees have become a reliable trend, one that worsened the economic hardships during recent years. Now, dairies struggling to recover are facing the likelihood of attempting to do so with an additional \$1 million in fees spread among their declining numbers.

IV. The staff proposal to cap the CDQAP discount arbitrarily increases fees for some dairies damages the program and creates poor public policy results by transferring benefits from environmentally certified dairies to non-certified dairies.

The award-winning CDQAP partnership has provided education and outreach to dairy producers and consultants for more than 16 years, including an Environmental Stewardship Certification

program. Certification provides independent, third-party verification to the Board and to dairy producers that operators are in compliance with all applicable water quality and air quality regulations. As a result, the Board has in past years granted a 50 percent fee discount to dairies that invest the extra time, effort and funds needed to achieve and maintain voluntary certification.

The Board now proposes to cap the discount at \$2,500 annually, which would effectively raise fees dramatically for larger CDQAP-certified dairies, in some cases by as much as 90 percent. Dairy Cares' member organizations are unanimously opposed to this proposed change in the discount structure for several reasons.

First, this proposal arbitrarily increases fees for some dairies but not others based solely on size, when a progressive fee structure is already in place. This has the effect of increasing fees for larger dairies twice, without any evidence to support why they, and they alone, should bear this cost.

Second, the proposal has the effect of transferring funds from large CDQAP Environmental Stewardship Certified dairies to other dairies (by reducing their fees correspondingly) whether those dairies are certified or not. We submit that this amounts to poor public policy, essentially punishing CAFs that have gone the extra mile to participate in a Board-sanctioned, voluntary stewardship certification effort, and transferring part of the lost benefits to uncertified CAFs. This sends the wrong message to all concerned.

Finally, we submit that this will damage the credibility of the CDQAP program, by retracting previously promised benefits to current participants that have already made the efforts and investments needed for certification. CDQAP is relied upon by the Board, various regional water quality control boards, air quality agencies and all California dairy organizations to serve as the chief conduit of environmental compliance information and assistance to the dairy community. As such, it is a disservice to our common interests to cause damage to this important program.

For all these reasons, Dairy Cares opposes changing the CDQAP discount structure, regardless of other actions the Board considers related to fees.

V. The Board improperly concluded that fees for North Coast dairies regulated via waiver of Waste Discharge Requirements (“WDRs”) should be equivalent to WDR-regulated CAFs.

In the staff report, the Board proposes to assess a new annual fee to dairy facilities (primarily if not entirely in Regional Board 1 and 2 jurisdiction) enrolled in a waiver of WDRs. The report opines that “the amount of the proposed fees is the same as the amount of the fees paid by dairies that have been issued WDRs, because the amount of State Water Board and regional water quality control board staff oversight for dairies is approximately the same, regardless of whether the dairy has been issued WDRs or a waiver of WDRs.”

Based on direct experience in compliance assistance and other related endeavors with dairies enrolled in the waiver program, Dairy Cares members strongly disagree with this finding, and

assert that the level of oversight necessary for waiver program dairies is significantly less. Furthermore, the Board has not provided any evidence in the administrative record to support such a finding. As such, we believe it is premature to set fees at all and that additional information is needed before any fees can be set.

VI. The Board did not provide meaningful or timely opportunity for North Coast dairies to have input on fees for waiver program dairies.

Dairy Cares asserts that charging fees to dairies that have not previously been charged such fees, and for dairies that have been regulated under waivers of WDR, is a novel rather than a routine undertaking. Dairies regulated under WDRs have become accustomed to annual adjustments to fees via emergency regulation, and while they may not know exactly what the fees will be each year, they are at least aware they will be billed annually.

This is not the case for waiver program dairies in the North Coast. Dairies were only recently notified that a fee was proposed, and they were given no meaningful opportunity to participate or provide input in the decision-making process as to whether a fee was appropriate, when the fee should be initiated, or what might constitute a fair amount for such a fee.

Dairy Cares suggests that prior to consideration of a fee structure for waiver-program dairies, the Board should hold workshops in the vicinity of the dairies to solicit comments on the level of oversight needed for dairies regulated via the waiver program, and appropriate timing and amounts of fees.

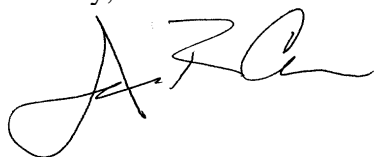
The Board should also allow a reasonable amount of time before implementing any fee to allow for dairies to take actions to properly prepare, including planning farm budgets and potentially pursuing CDQAP certification to mitigate fees. We submit that fees charged in the 2014-15 budget year would be inappropriate and premature for the reasons listed here.

Conclusion

For the reasons stated above, Dairy Cares opposes adoption of the proposed Resolution without sufficient modifications to address our concerns. Our coalition is committed to working with your staff and Board to identify alternatives that will allow the Board to meet its obligations without serious adverse economic consequences to dairies. We look forward to assisting you in such a process.

Once again, thank you for the opportunity to provide comments.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Z. Q.", with a large, stylized initial "A" and a long, sweeping underline.

J.P. Cativiela
Program Coordinator

C: Charles "Chuck" Ahlem, Chairman, Dairy Cares
Michael Boccadoro, Executive Director, Dairy Cares
Theresa "Tess" Dunham, Somach, Simmons and Dunn
Dan Kelly, Somach, Simmons & Dunn
Paul Sousa, Environmental Services Director, Western United Dairymen
Kevin Abernathy, Director of Regulatory Affairs, Milk Producers Council
Dr. Michael Payne, Director, California Dairy Quality Assurance Program
Denise Mullinax, Associate Director, California Dairy Quality Assurance Program
Lynne McBride, Executive Director, California Dairy Campaign