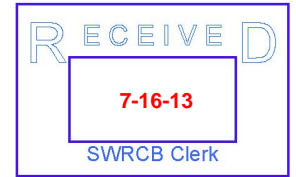




July 16, 2013

Ms. Jeanine Townsend
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State Water Resources Control Board
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Via email to: commentletters@waterboards.ca.gov



Re: Comments to A-2209(a)-(e) – July 23 Board Workshop

Thank you for the opportunity to offer comment to the consolidated petitions of the Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 (and the associated Monitoring and Reporting Requirements) and the State Water Resources Control Board DRAFT Findings and Order. These comments are made on behalf of Santa Barbara Channelkeeper, San Luis Obispo Coastkeeper, and Monterey Coastkeeper (a program of The Otter Project) (“Keepers”). The Keepers have many years of experience dealing with the water quality challenges facing the Central Coast including agricultural discharges and have been continuously involved in the Irrigated Agriculture Regulatory Program since at least 2008.

These are the conditions that can be seen in our region any day of the week, spring through fall:



Tembladero Slough before it empties into Elkhorn Slough and the Monterey Bay National Marine Sanctuary, Monterey Co.

These comments are being submitted for the State Water Resources Control Board (“SWRCB”) workshop being held on July 23, 2013, four years and eight months after the Executive Officer of the Central Coast Regional Water Quality Control Board (“CCRWQCB”) first convened a panel to draft the Agricultural Waiver and more than one year and four months after the adoption of the Waiver by the

CCRWQCB. This workshop is one of literally over 100 meetings, workshops, hearings, and discussions on this topic. While it is true that the authors of this letter, similar to multiple agricultural interests, are petitioning the adopted order, our petition would likely have been withdrawn were it not for agriculture's multiple petitions and requests, which include a request to overturn the entire 2012 Waiver (reverting to the 2004 Waiver). This is not an issue of a Central Coast decision being improperly discussed and decided; this is an issue of agriculture using its considerable influence and political clout to delay and iteratively lobby for an ever weakening set of regulations. Further weakening of the regulations will most likely not result in appeasement of agriculture's concerns but will likely result in lawsuits being filed by agricultural interests regardless.

Background

The CCRWQCB adopted its first Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands under revised section 13269 on July 9, 2004, which expired on July 9, 2009. In late 2008, the CCRWQCB took steps to develop a new conditional waiver. That process included the formation of an Advisory Panel with stakeholders, iterative drafts of a new order prepared and proposed by CCRWQCB staff, multiple hearings and workshops by the CCRWQCB, extensive comments from the public, scoping sessions, and multiple proposals from various groups, some of which submitted several different proposals over time.

During this lengthy and extensive public process, the 2004 waiver, which was slated to expire by its own term on July 9, 2009, was kept in place despite the CCRWQCB's unambiguous conclusion that it was not adequate to protect water quality. By a vote of the CCRWQCB, the 2004 waiver was extended, first, until July 10, 2010, and then again until March 31, 2011. It was administratively extended for a third time on March 29, 2011, this time by CCRWQCB staff instead of the Board itself, and for a fourth time on September 30, 2011, again by CCRWQCB staff. During each of these extension periods, outreach by staff and input from stakeholders, particularly agricultural interests, continued. The language of the proposed new waiver, which was first put forward by the CCRWQCB in February 2010, has been repeatedly revised over the last two years to accommodate concerns and objections expressed by growers.

The Advisory Panel: In a letter dated December 12, 2008, then CCRWQCB Executive Officer Roger Briggs invited various stakeholders to participate on a panel to assist in the development of a new waiver. The goals of the new waiver were stated as:

- Eliminate toxic discharges of agricultural pesticides to surface waters and groundwater;
- Reduce nutrient discharges to surface waters to meet nutrient standards;
- Reduce nutrient discharges to groundwater to meet groundwater standards;
- Minimize sediment discharges from agriculture lands; and
- Protect aquatic habitat (riparian areas and wetlands) and their buffer zones.

The composition of the panel was heavily weighted towards agricultural interests: 12 members representing the agricultural industry and growers, four members representing environmental organizations, two CCRWQCB staff, two agricultural academics, and two agencies. The Advisory Panel first met on December 18, 2008 and, thereafter, met monthly through September 2009. Gita Kapahi from the SWRCB moderated the sessions, but the group was unable to reach any consensus.

Staff Drafts: Following dissolution of the Advisory Panel, the CCRWQCB directed its staff to distribute a preliminary report and preliminary draft order for the regulation of discharges from irrigated lands, which they did on February 1, 2010. The preliminary report demonstrated in painstaking detail that the 2004 waiver was not consistent with water quality objectives for the region and did not comply with Water Code section 13269. Despite the existence of that waiver, staff found that impairment of

beneficial uses by agricultural pollutants was widespread and severe and that the situation generally was not improving. Specifically, staff summarized the situation as follows:

“Agricultural discharges (primarily due to contaminated irrigation runoff and percolation to groundwater) are a major cause of water quality impairment. The main problems are:

1. In the Central Coast Region, thousands of people are drinking water contaminated with unsafe levels of nitrate or are drinking replacement water to avoid drinking contaminated water. The cost to society for treating polluted drinking water is estimated to be in the hundreds of millions of dollars.
2. Aquatic organisms in large stretches of rivers in the entire region’s major watersheds have been severely impaired or completely destroyed by severe toxicity from pesticides.

These impairments are well documented, severe, and widespread. Nearly all beneficial uses of water are impacted, and the discharges causing the impairments continue. Immediate and effective action is necessary to improve water quality protection and resolve the widespread and serious impacts on people and aquatic life.”

Preliminary Draft Staff Recommendations for an Agricultural Order (Feb. 1, 2010): Staff recognized that the 2004 waiver focused on enrollment, education, and outreach, but lacked clarity and a focus on water quality requirements and did not include adequate compliance and verification monitoring. The draft new waiver proposed by staff was intended to address those issues and bring the waiver into compliance with section 13269 of the Porter-Cologne Water Quality Control Act. In response to the February 2010 draft waiver, the CCRWQCB received extensive public comment and invited alternative proposals. Three alternative proposals were submitted by: 1) the California Farm Bureau Federation, 2) OSR Enterprises, Inc., and, as a group, 3) the Environmental Defense Center, Monterey Coastkeeper, Ocean Conservancy, Santa Barbara Channelkeeper, and the Santa Barbara Chapter of Surfrider Foundation. The CCRWQCB analyzed these submissions in subsequent staff reports and held two follow-up public workshops, on May 12, 2010 and July 8, 2010, during which it accepted additional public comment and allowed key stakeholders, including various agricultural industry representatives, to make formal presentations.

In response to ongoing public comment, and specifically in response to the criticisms of the agricultural community, staff continued to revise the original draft waiver over the next two years, producing a total of five new versions for public review and consideration at CCRWQCB meetings on November 19, 2010, March 17, 2011, May 4, 2011, September 1, 2011, and March 15, 2012. The CCRWQCB held at least one additional public workshop on February 3, 2011, and staff continued thereafter to meet individually with various stakeholders. In an attempt to appease growers, every iteration of staff’s draft waiver was less protective of the environment, and required less of the farming community, than the previous version. The time for reporting and compliance was extended in each draft. Additional changes to the drafts included:

<u>Iteration</u>	<u>Individual monitoring</u>	<u>Pesticide List</u>	<u>Nitrate discharges to groundwater</u>	<u>Buffer from impaired waters of the state.</u>
<u>February 2010</u>	All	Comprehensive list of 50+ pesticides that can cause toxicity	Require Compliance with Drinking Water Standards (“DWS”) in 6 years	50, 75, and 100 feet.
<u>November 2010</u>	Tier 3 only	Diazinon and chlorpyrifos only	Tier 3: Achieve nitrate balance ratio within 3 years. DWS compliance in discharge within 4 years	30 feet.
<u>March 2011</u>	Tier 3 Only	Diazinon and chlorpyrifos only	Tier 3: Nitrate balance ratio within 3 years; annual reduction in loading to groundwater	Protect existing habitat.
<u>March 2012</u>	Tier 3 only	Diazinon and chlorpyrifos only	Nitrate balance ratio reported but no compliance standard	Protect existing habitat.

CEQA Process: Concurrent with this administrative process, the CCRWQCB undertook actions to comply with the California Environmental Quality Act (“CEQA”). On August 10, 2010 the CCRWQCB held a CEQA scoping meeting, and on October 14, 2010, the CCRWQCB released a “Notice of Preparation of a Draft Subsequent Environmental Impact Report.” On November 19, 2010, the CCRWQCB released a Draft Subsequent Environmental Impact Report (“SEIR”) and accepted public comments on the document. This document was intended to tier to the earlier CEQA review prepared in connection with the 2004 waiver and to update that analysis for the proposed new waiver. On March 2, 2011, the CCRWQCB issued a Final SEIR, making minor clarifications and responding to public comments. On August 10, 2011, the Board issued an Addendum to the Final SEIR to address intervening revisions to the draft waiver.

The Ag Alternative: The agricultural community availed itself fully of the public process. The California Farm Bureau Federation submitted at least five proposals over the course of the process, additional and subsequent to the original proposal it had submitted in April 2010. First, on December 3, 2010, it submitted a “Draft Central Coast Agriculture’s Alternative Proposal for the Regulation of Discharges from Irrigated Agricultural Lands” (the “Ag Alternative”). The organization subsequently submitted revised alternative language on March 17, 2011, May 4, 2011, February 14, 2012, and March 14, 2012. Each of these submissions was intended as a less burdensome alternative to the staff proposal, which itself was being continually weakened with each iteration. And each time, the California Farm Bureau Federation only made its alternative available to the public during a presentation at the Regional Board meeting where it was to be considered, thus preventing the public from being able to meaningfully review and consider it in advance of the meeting or to effectively respond to it.

Outreach, Public Hearings, and Meetings with Staff: From May 2010 through March 2012, there were eight full days of public hearings and workshops. Hundreds of in-person comments and scores of stakeholder group presentations were made to the CCRWQCB during the public hearings and many hundreds of written comments were submitted. In addition, CCRWQCB staff conducted extensive outreach to grower organizations, and repeatedly offered to meet with anyone. See Central Coast Water Board – Agricultural Order Renewal, Stakeholder Outreach Meetings and Events (updated Feb. 14, 2012), available at http://www.waterboards.ca.gov/rwqcb3/water_issues/programs/ag_waivers/docs/ag_order/outreach_021412.pdf. Indeed, the CCRWQCB and its staff have commented that the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands was given the most extensive and thorough public process in the CCRWQCB's history.

On March 15, 2012, with all members present, the CCRWQCB unanimously adopted the Order No. R3-2012-0011 (along with specific monitoring criteria for each of the three tiers of enrolled dischargers in Orders Nos. R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03).

Adoption of the Stay Order: Following the CCRWQCB's adoption of the 2012 Conditional Waiver, both agricultural interests and environmental interests petitioned the SWRCB for review of the decision pursuant to Water Code § 13320(a). Agricultural interests also requested that the SWRCB stay certain provisions of the Conditional Waiver pending its review of the merits of the challenges to the CCRWQCB's decision. On June 26, 2012, the SWRCB invited responses to these requests for stay (Letter from Michael Lauffer, SWRCB, Inviting Responses to Requests for Stay (June 26, 2012)). In this invitation, the SWRCB specified the criteria necessary for issuance of a stay: "[A] stay may be granted only if petitioners allege facts and produce proof of (1) substantial harm to the petitioner or to the public interest if a stay is not granted, (2) a lack for [sic] 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 orders." Environmental petitioners opposed the stay requests, noting, among other things, that monitoring is a necessary precursor to implementing water quality improvements and that the longer practice effectiveness and compliance verification is delayed, the slower the cleanup process. In addition, the environmental petitioners opposed the further weakening of the Conditional Waiver and the further delays the stay imposed.

On August 30, 2012, the SWRCB held an evidentiary hearing on the stay requests, at which several of the petitioners were named parties and during which many other environmental organizations provided written or oral comments. Following the hearing, the SWRCB issued a draft stay order SWRCB/OCC FILES A-2209(a)-(e), on September 10, 2012.

Pursuant to the SWRCB's September 10, 2012 notice, Petitioners submitted written responses on September 14, 2012, opposing the draft stay order.

On September 18, 2012, the SWRCB circulated a revision of its proposed draft Stay Order. The SWRCB then held a meeting on September 19, 2012, at which it heard additional comments and directed parties to engage in further discussions to reach a compromise on the proposed stay. During that meeting, the SWRCB took action to adopt a final Stay Order.

The final Stay Order was certified by the clerk of the SWRCB on October 25, 2012, and served on parties on October 30, 2012.

In adopting the final Stay Order, the SWRCB found that on several provisions of the stay request the parties requesting the stay had failed to satisfy the three necessary criteria for issuing a stay set forth in title 23, section 2053 of the California Code of Regulations. Nevertheless, the SWRCB granted a stay of several other provisions of the Conditional Waiver, citing its discretion under title 23, section 2053(c) of the California Code of Regulations.

Santa Barbara Channelkeeper, San Luis Obispo Coastkeeper, The Otter Project, and California Sportfishing Protection Alliance Request for Preliminary Injunction: On November 11, 2012

environmental organizations filed a writ of mandate against the SWRCB claiming that the Board's Order WQ 2012-0012 ("Stay Order"), was incorrect and requesting judicial review:

"Through the Stay Order, the State Board has temporarily and in some instances indefinitely eliminated certain provisions of Order No. R3-2012-0011, a Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands ("Conditional Waiver"), and associated Monitoring and Reporting Program Orders No. R3-2012-0011-01, R3-2012-0011-02, and R3-2012-0011-03 and Resolution No. R3-2012-0012, issued by the Central Coast Regional Water Quality Control Board ("Regional Board") on March 15, 2012. The Conditional Waiver is currently in effect, but only in part. The State Board has stayed multiple provisions in the Waiver, including the critical Provision 44(g), which establishes practice effectiveness and compliance verification requirements that are necessary for compliance with California Water Code section 13269(a)(2) and the State Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program ("NPS Policy"). Because the non-stayed portions of Order No. R3-2012-001 lack a compliance verification condition, the conditional waiver now in effect is inconsistent with California Water Code sections 13269(a)(1) and (2), and is therefore unlawful."

The writ was heard in Sacramento Superior Court before Judge Timothy Frawley on February 8, 2013. The State had argued that the stay was temporary and that the petitions would be decided very quickly, before October 1st. Judge Frawley denied the preliminary injunction and ruled that the petitioners had not proven irreparable harm. However, the Judge in his verbal remarks added that on the facts before him he agreed with the petitioner's claims and he invited the petitioners back in his court if the petitions were not resolved by October 2013.

"Keepers" Petition of the Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 (and MRPs), Petition A-2209(a)

On April 16, 2012, The Otter Project (Monterey Coastkeeper), Santa Barbara Channelkeeper, and San Luis Obispo Coastkeeper (Keepers), filed a petition of Conditional Waiver Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011. The petition speaks for itself and will not be wholly repeated here. In its essence the petition argues:

"This appeal concerns the Regional Board's improper application of California Water Code section 13269 to agricultural discharges in light of ongoing water quality degradation in the Central Coast. Although many different agricultural pollutants contribute to the impairment of beneficial uses within the Central Coast Region, nitrate contamination is perhaps the single greatest threat to drinking water supplies and public health. In adopting the Final Order on March 15, 2012, the Regional Board substantially weakened staff's proposed controls on nitrate discharges. As a result, the Final Order is inconsistent with the Water Quality Control Plan for the Central Coast Region ("Basin Plan"), is not in the public interest, and is not supported by evidence in the record."

And specifically:

"Among the Tier 3 standards proposed by staff, one of the most important was the requirement that Dischargers with High Nitrate Loading Risk farms/ranches "meet the nitrate balance ratio targets." This proposed requirement was developed over the course of several years as staff collected and analyzed data and public input. At the March 15, 2012 meeting where the new waiver was finally adopted, however, the Regional Board arbitrarily revised this requirement; the Final Order now requires only that Tier 3 dischargers "report progress towards . . . nitrate balance ratio milestones." Order No. R3-2012-0011, Part F, Section 78. By replacing the word "meet" with "make progress," the Regional Board effectively eliminated any requirement to satisfy nutrient ratio balancing targets. Moreover, the hard "targets" previously established by

the Draft Order became soft "milestones" by which the Board will measure success in future years."

All parties believe that nitrate pollution of surface and ground waters threatens the health and safety of our region's people and environment. By eliminating the requirement to meet and report a nitrate balance ratio, the CCRWQCB has removed any enforceable standard for controlling nutrient pollution to groundwater. For what we all can agree is one of the most critical water pollution issues facing our State and people, there becomes literally no regulatory control.

We ask that the SWRCB restore Tier 3 (less than 100 farms) Provision 78 to its original intent before CCRWQCB revision. We request that Provision 78 read:

78. By October 1, 2015, Tier 3 Dischargers with High Nitrate Loading Risk farms/ranches must ~~report progress towards~~ meet the following Nitrogen Balance ratio ~~milestones~~ targets or implement an alternative to demonstrate an equivalent nitrogen load reduction. The Nitrogen Balance ratio refers to the total number of nitrogen units applied to the crop (considering all sources of nitrogen) relative to the typical nitrogen uptake value of the crop (crop need to grow and produce, amount removed at harvest plus the amount remaining in the system as biomass).

a. Dischargers producing crops in annual rotation (such as a cool season vegetables in a triple cropping system) must ~~report progress towards~~ meet a Nitrogen Balance ratio target equal to one (1). A target of one (1) allows a Discharger to apply 100% of the amount of nitrogen required by the crop to grow and produce yield for every crop in the rotation. (Nitrogen applied includes any product, form or concentration, including but not limited to, organic and inorganic fertilizers, slow release products, compost, compost teas, manure, extracts, nitrogen present in the soil and nitrate in irrigation water.)

b. Dischargers producing annual crops occupying the ground for the entire year (e.g., strawberries or raspberries) must ~~report progress towards~~ meet a Nitrogen Balance ratio target equal to 1.2. A target of 1.2 allows a Discharger to apply 120% of the amount of nitrogen required by the crop to grow and produce a yield.

~~c. Beyond three years, Dischargers must demonstrate improved irrigation and nutrient management efficiency, improved Nitrogen Balance ratios, and reduced nitrate loading to groundwater. In the long term, the Nitrogen Balance ratio should compare the total amount of nitrogen applied to the crop against the total nitrogen removed at harvest, rather than the typical nitrogen crop uptake, to accurately calculate the nitrogen remaining and available to the crop or that could lead to groundwater.~~

In the alternative to restoring the language we ask that the SWRCB commit to a numeric standard for discharge of nitrates to ground and surface waters by a date-certain within the term of this Waiver.

In its Draft Order the SWRCB suggests finding against the Keepers petition and eliminating Provision 78 in its entirety:

"Going into the March 14-15, 2012 Central Coast Water Board hearing, the proposed Draft Agricultural Order Provision 78 stated that the relevant dischargers "must meet," as opposed to "report progress toward," the nitrogen balance ratio targets. The provision was amended in response to [agriculture's] comments at the hearing. The Keepers argue that elimination of the firm and measurable requirement that would have applied to nitrate discharges to groundwater rendered the Agricultural Order inconsistent with the water quality objectives in the Central Coast Basin Plan and with Water Code section 13269's mandate that any waiver of waste discharge requirements be in the public interest.

We have already stated above that we view the balance ratio required to be calculated by the dischargers in the INMP to be at best an estimate of the relationship between the nitrogen employed by the discharger and the nitrogen needed by the crop. Similarly, the target ratios advocated by the Central Coast Water Board and the Keepers are approximations of a complex relationship between nitrogen application and crop uptake. We are keenly aware of the benefit and necessity of providing targets to encourage and measure progress in reducing pollutant discharges in agricultural regulatory programs. However, because of the speculative and overly simplistic nature of both the calculated ratios relevant to each farm and of the target ratios, we see little to be gained from asking the dischargers to even “make progress toward” these particular targets. As such, we disagree with the Keepers that the nitrogen balance ratio targets are in fact firm and measurable requirements. We will ask the Expert Panel to determine whether the targets can be reformulated to support some firm and measurable requirement or if an alternative approach, such as soil profile monitoring or monitoring of a regional network of monitoring wells would be preferable.

We shall delete Provision 78.”

The original text of Provision 78 (including “meet” and “target”) allowed growers to express the “typical nitrogen uptake value of the crop” without any reference or verifiable citation; the grower could simply state what he/she believed to be the typical nitrogen uptake value of the crop. By then “showing their work” and reporting the uptake value and the nitrogen applied, the CCRWQCB staff would be able to gather history and experience of typical nitrogen uptake values of the crops in an efficient and region-specific manner. Over time, staff would be able to see inconsistencies in reported values and achieved ratios. Entirely removing Provision 78 robs the staff and public – including growers – of the benefit of combined experience.

Removing Provision 78 and the associated public reporting requirements leaves staff and the public with no measure or even reasonable guess as to how much nitrogen could be discharged as we are left with nitrogen applied but no estimate of nitrogen removed by harvest. Asking “the Expert Panel to determine whether the targets can be reformulated to support some firm and measurable requirement or if an alternative approach, such as soil profile monitoring or monitoring of a regional network of monitoring wells would be preferable” is far too uncertain to satisfy the public interest in the Keepers’ opinion.

Please consider this example. If growers report nitrogen load as we all agree they should we have the following (misleading) information. This table is what the SWRCB DRAFT Order would require and gives us essentially no useful information.

Remedial Nitrogen Budget			
	<i>Grower One</i>	<i>Grower Two</i>	<i>Grower Three</i>
<i>Crop</i>	<i>Crop A/Crop A</i>	<i>Crop A/Crop A</i>	<i>Crop A/Crop B</i>
<i>Nitrogen lbs/acre fertilizer applied</i>	220	260	270
<i>Nitrogen in soil and water lbs / ac</i>	20	30	40
<i>Total Nitrogen “Applied”</i>	240	290	310

It is only when we add in data on nitrogen uptake that we have a picture that leads us to clearer picture

Remedial Nitrogen Budget			
	Grower One	Grower Two	Grower Three
Crop	<i>Crop A/Crop A</i>	<i>Crop A/Crop A</i>	<i>Crop A/Crop B</i>
<i>Nitrogen required by crop</i>	240	240	310
<i>Nitrogen lbs/acre fertilizer applied</i>	220	260	270
<i>Nitrogen in soil and water lbs / ac</i>	20	30	40
<i>Total Nitrogen "Applied"</i>	240	290	310
<i>Ratio</i>	1.0	1.2	1.0

We now see that both growers 1 and 2 are applying appropriate amounts of fertilizer and they are in fact “pumping and treating” water to actually reduce nitrates in groundwater.

The SWRCB suggests that the nitrogen required by a crop is an “estimate” or “speculative and overly simplistic.” To suggest this is to say that nutrient balancing that has been practiced by educated and responsible growers and consultants for the past two decades is the same. It is true that for some crops there is limited information; but for most major crops it is known and widely used.

Again, we ask that Provision 78 be restored to its “meet” and “target” text or that some firm and measurable (and measured and reported) requirement or standard be put in its place by date-certain within the term of this Waiver complete with targets and time schedule. Because “nitrogen uptake value” is undefined and staff has stated that it is self-reported, we believe complete restoration of Provision 78 is the most flexible and least burdensome option.

Additional Issues Within the Draft Order – Support

We are gratified that the SWRCB has taken steps to deny many of the agricultural petitioner’s attempts to weaken the Waiver. We generally agree with the SWRCB’s attempt to recognize that few regulations are perfect and at times we must make progress with the best information and the best judgment of the moment – especially in a case as this where there is demonstrated threat and harm to human health and the environment. Specifically and without comment here we generally support:

- (A) Dismissal of the due process claims
 - Ex parte claims
 - Notice and Opportunity to be Heard claims;
- (B) The CCRWQCB’s appropriate action under Water Code Sections 13141 and 13241;
- (C) The SWRCB’s finding that the tiering criteria are reasonable including provisions for review by the CCRWQCB;
- (E) Clarification and affirmation of Farm Practice Effectiveness Compliance and reporting (we have a single caveat: We believe use of the word “magnitude” is very vague and we suggest “estimated discharge rate, i.e. estimated cfs or gpm.” We believe growers are familiar with these measures);
- (F) The SWRCB’s affirmation of groundwater monitoring;
- (G) Clarification of Photo Monitoring;
- (I) Affirmation and clarification of the Provisions Addressing Nitrogen Application, Item 1 and 2 only (we support Items 1 and 2, and oppose Items 3 and 4)
 - Affirmation that Nitrate Loading Risk Level determination uses the best currently available methodology;
 - Clarification that total nitrogen applied must include fertilizer products, nitrogen concentration in irrigation water, and total nitrogen available in the soil;
- (J) Affirmation of the requirement for a water quality buffer plan;

- (K) Clarification of good faith attempts to control pollutant discharges; and
- (L) Clarification of the Annual Compliance Form. (We assume the Annual Compliance form will be restored to the pre-stay condition, with SWRCB clarifications, of course)

Additional Issues Within the Draft Order – Oppose

We oppose in whole or in part the following DRAFT changes:

- (D) Containment Structures – Avoid / Minimize. The DRAFT Order proposes (and we oppose) the following:

“33. 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~~ minimize 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.”

We know of no provision in State Water Code that allows discharges of waste to ground or surface water that causes or contributes to exceedances of water quality standards as long as that discharge is “minimized.” It is our opinion that this change is contrary to what is allowed by law. We believe “avoid” is the appropriate word and we support the original language. To further parse and clarify, we support the additional contribution of the SWRCB clarifying compliance methods as may be appropriate for individual farms;

- (I. (3) Nutrient Management Plan). We can think of very few parameters more important to be publicly reported than the Irrigation and Nutrient Management Plans (INMP) of Tier 3 dischargers with high nitrate loading risk. As detailed in the discussion of this point, the INMP includes the following points which we feel must be publicly reported:
 - (1) identification of crop nitrogen uptake values;
 - (2) annual balance of nitrogen applied per crop compared to typical crop nitrogen uptake for each farm or nitrate loading risk unit;
 - (3) annual estimation of nitrogen loading to groundwater and surface water; and
 - (4) annual evaluation of reductions in nitrate loading to groundwater due to practice implementation.

For discussion of our concern with points (1) and (2), please refer to the above section, **“Keepers” Petition of the Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 (and MRPs), Petition A-2209(a).**

Reporting of points (3) and (4) will reflect the growers’ understanding that over-applied nitrogen can become loads to ground and surface waters, and that the grower is taking steps to reduce those loads if necessary.

We believe, as with “Practice Effectiveness Compliance,” that the Water Code requires public reporting of critical components of the INMP: Any waiver of individual waste discharge requirements must be conditional and “shall” include monitoring requirements “designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver’s conditions.” Cal. Water Code § 13269(a)(2). The results of this monitoring “shall” be made available to the public. Id.

To further parse the DRAFT Order, we are undecided on whether the INMP must be certified by a qualified professional. We look forward to further discussion of this point. We believe (but do not know) that most Tier 3 farms/ranches already utilize certified professionals for this work and we do not see the burden of the certification requirement.

- (I.(4) Nitrogen Balance Ratios, Provision 78). Please refer to **“Keepers” Petition of the Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 (and MRPs), Petition A-2209(a)** for discussion of this point.

Additional Issues in Need of Further Discussion

- (H) We agree with the SWRCB’s general affirmation of Individual Surface Water Discharge Monitoring. We disagree or oppose the following points:
 - We strongly disagree with the statement, “The better approach may be to rely on receiving water monitoring data and to require the third party monitoring groups administering receiving water monitoring to pursue exceedances with increasingly focused monitoring in upstream channels designed to narrow down and identify the sources of the exceedances.”

The only way to verify that individual tailwater discharges to impaired streams are not contributing to water quality impairments is to monitor individual tailwater discharges. No matter how fine the scale, in-stream receiving water monitoring simply does not provide the information necessary to verify whether growers discharging to impaired waters are in compliance with water quality standards.

Further, the SWRCB is not recognizing the nuances of third party monitoring groups. These groups are managed and governed by the growers themselves. At least in the case of the Central Coast’s Water Quality Preservation Inc., the board of directors is comprised entirely of growers. These third party groups often become powerful advocacy organizations governed by a board of growers and representing the interests of hundreds of growers, and we believe this has been the case in the Central Coast throughout this lengthy process of updating the Agricultural Order. It should be recognized that delegating the discretionary authority to perform follow-up monitoring of fellow growers creates a conflict of interest for many third party groups. For this reason, individual monitoring needs to remain an explicit requirement for Tier 3 growers.

Finally, the Central Coast has tried exactly what is suggested in the SWRCB’s DRAFT Order: Water Quality Preservation Inc. was to pursue exceedances up-watershed. Preservation Inc. did pursue the exceedances to their source, and then refused to report the monitoring results or the sources of the exceedances to the CCRWQCB or to the public.

- We oppose the DRAFT Order’s plan to strike the requirement to monitor containment structures. The SWRCB’s related decision to merely minimize, rather than avoid, percolation to groundwater makes this requirement essential to verifying that containment structures are not contributing to groundwater impairment. The SWRCB claims: “The water in containment structures is generally re-applied to the fields, and there is no significant benefit to characterizing the quality of that water unless it will reach surface waters.” We know of nothing in the record that supports this claim and it

is our belief that re-use of water from tailwater ponds and containment structures is seldom the case. We believe that more often, water in containment structures percolates or evaporates (concentrating contaminants in the remaining water that percolates). Regardless of our belief, we request that the SWRCB indicate where in the record we can find the basis for their statement.

We believe these tailwater ponds are most similar to the containment structures at Confined Animal Feeding Operations (CAFOs) and that the SWRCB is not following their own guidance dated February 22, 2013 with the subject heading "ASOCIACIÓN DE GENTE UNIDA POR EL AGUA V. CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD: NEW CASE INTERPRETING STATE WATER RESOURCES CONTROL BOARD RESOLUTION 68-16." We believe that without thorough monitoring including of receiving waters, individual monitoring of high-risk discharges, and monitoring of waters within containment structures, the SWRCB and CCRWQCB cannot assure that degradation of State ground and surface waters is not occurring.

We oppose striking Tier 3 MRP Part 5.A.8. and the associated Table 5B.

- Cumulative Loss of Groundwater Protections. The SWRCB should recognize that its decision to eliminate containment structure monitoring requirements in this DRAFT Order poses extra significance in light of the SWRCB's proposed rejection of requirements to meet or make progress towards nitrogen ratio balance targets. These two combined provisions make up the entirety of what assurances are provided in the DRAFT Order to verify that growers do not continue to contribute to groundwater impairments. No additional verification monitoring mechanisms to evaluate inputs to groundwater are provided. By eliminating both of these provisions, the SWRCB has severely hampered this program's ability to address one of the Central Coast Region's most severe and pervasive problems, contaminated groundwater. In light of this reality, we ask the SWRCB to give due consideration of our recommendations to strengthen groundwater loading monitoring provisions.
- (M) Time schedule. As we have noted in the first half of this comment letter, these comments are being submitted for a SWRCB workshop being held on July, 23, 2013, four years and eight months after the executive officer of the CCRWQCB first convened a panel to draft the Agricultural Waiver and more than one year and four months after the adoption of the Waiver by the CCRWQCB. We simply cannot willingly agree to repeated delays and extensions. Many of the strikeouts and extensions detailed in the Time Schedule reflect changes we oppose.
- Expert Review Panel. We generally agree that this issue is difficult and that the science around agriculture's impacts on water quality is evolving. We, again, commend the CCRWQCB and SWRCB for recognizing the severity of the problems and moving ahead with the best available solutions.

Too often thorny questions are thrown to expert panels for study without a specific focus or timeline for deliverables. There will never be a perfect solution for many issues; additional study will always be needed. Additional study is not a *solution*.

In its conclusion the SWRCB writes, "An expert panel shall be convened to provide a more thorough analysis and long-term statewide recommendations regarding many of the issues implicated in the Agricultural Order, including indicators and methodologies for

determining risk to surface and groundwater quality, targets for measuring reductions in risk, and the use of monitoring to evaluate practice effectiveness.”

We believe this language is far too vague. Specifically, we would like to understand:

- Who will be on the Panel and what stakeholder interests, if any, will be represented?
- What are the specific questions the SWRCB will ask the Panel to offer recommendations on?
- What relative priority does the SWRCB give each individual question?
- What is the format and timeline for each question/deliverable?

This Waiver expires March 14, 2017. We believe that science is ever-evolving and that most questions are never “settled.” With that in mind, we believe all recommendations responding to questions passed to the Expert Panel must be received in advance of the consideration of the next Waiver, by March 2016 and must be based on the best available science and information.

An Additional Issue in Need of Clarification – Cooperative Groundwater Monitoring

The Waiver explicitly states the requirements for individual groundwater monitoring for Tier 1 and Tier 2 growers; Tier 3 growers have additional requirements. These requirements have not been stayed and are affirmed in the DRAFT SWRCB Order. Requirements as excerpted directly from the Tier 1 MRP, Part 2, include:

“2. Dischargers must sample at least one groundwater well for each farm/ranch on their operation. For farms/ranches with multiple groundwater wells, Dischargers must sample the primary irrigation well and all wells that are used or may be used for drinking water purposes. Groundwater monitoring parameters must include well screen interval depths (if available), general chemical parameters, and general cations and anions listed in Table 3.

3. Dischargers must conduct two rounds of monitoring groundwater wells, one sample collected during fall (September - December) and one collected during spring (March - June). The first round of monitoring must be completed by December 2012. These two rounds of monitoring must be repeated every 5 years.” Emphasis added.

Tier 1 MRP. Part 2 also reads:

“6. In lieu of conducting individual groundwater monitoring, Dischargers may participate in a cooperative groundwater monitoring effort to help minimize costs and to develop an effective groundwater monitoring program. Qualifying cooperative groundwater monitoring and reporting programs may include, but are not limited to, regional or subregional groundwater programs developed for other purposes as long as the proposed cooperative groundwater monitoring program meets the Central Coast Water Board’s general purpose of characterizing groundwater quality and ensuring the protection of drinking water sources. At a minimum, the cooperative groundwater monitoring effort must include sufficient monitoring to adequately characterize the groundwater aquifer(s) in the local area of the participating Dischargers, characterize the groundwater quality of the uppermost aquifer, and identify and evaluate groundwater used for domestic drinking water purposes.”

We do not believe this statement in any way suggests that less can be done than what is required by the “individual” groundwater monitoring program. This provision also specifically lays out the minimum requirements for a cooperative groundwater monitoring plan:

- characterize the groundwater aquifer(s) in the local area of the participating Dischargers
- *and* characterize the groundwater quality of the uppermost aquifer

- *and* evaluate groundwater used for domestic drinking water purposes.

Very recently, on July 11, 2013, the CCRWQCB's interim executive officer approved a cooperative monitoring program that explicitly does not meet the expectations of individual monitoring or the minimum objectives set forth in the Waiver. The Central Coast Cooperative Groundwater Program specifically states:

"The cooperative program will undertake two related technical tasks; locating and sampling domestic supply wells on member owned/leased land, and characterizing groundwater aquifers in the CCCGP region with a focus on shallow groundwater."

"The primary focus is characterization of the domestic drinking water-supply aquifer."

These tasks represent a blending of the three discreet minimum requirements found in the Waiver and they represent a circumvention of the Waiver's individual monitoring requirements. All parties agree that protecting public health is a priority; nearly all parties agree -- and the Waiver requires -- that all wells covered by the Waiver that supply drinking water must be tested and results publicly reported. Yet the Central Coast Cooperative Groundwater Program [CCCGP] specifically states:

"In summary, a staged approach will be used to identify wells for sampling within member parcels.

- Stage 1 – domestic drinking water supply wells with depth and screened interval information. Within those wells identified in Stage 1, wells will be selected that 1) provide essential information about the quality of drinking water based on the analysis of existing data, 2) are accessible and 3) will provide good quality groundwater samples.
- Stage 2– If there are wells with depth and screened interval information on non-member parcels, this will greatly improve the certainty in the characterization of domestic drinking water quality, we will work with Water Board staff to gain access and sample these wells.
- Stage 3 – if after Stages 1 and 2 an insufficient number of wells are identified to effectively characterize drinking water quality within reasonable certainty in specific areas, domestic water supply wells without depth and screened interval information will be sampled."

The Plan further states:

"The CCCGP expects to identify a sufficient number of wells in the first two stages that when combined with existing data, will result in adequate characterization of drinking water quality."

In other words, the Central Coast Cooperative Groundwater Program has no intention of testing and reporting results from every, or even most, wells that supply drinking water. This avoidance of monitoring and reporting is made possible because the program takes the three discreet minimum objectives and blends them into a single objective of "characterization of drinking water quality." We do not understand how not testing wells supplying drinking water, under the scope of the Waiver, could be in the public interest.

We ask that the SWRCB affirm the objectives stated in the Waiver's Monitoring and Reporting Programs, Part 2. We also ask that the SWRCB allow – as it has done throughout the DRAFT Order – CCRWQCB review of a decision made by the Executive Officer if requested by a member of the public. In this case, we ask that we be allowed to retro-actively request review of this decision.

In conclusion

Santa Barbara Channelkeeper, San Luis Obispo Coastkeeper, and Monterey Coastkeeper (a program of The Otter Project) appreciate the opportunity to comment on the consolidated petitions and the DRAFT SWRCB findings and Order. Quoting the CCRWQCB, we believe “These impairments are well documented, severe, and widespread. Nearly all beneficial uses of water are impacted, and the discharges causing the impairments continue. Immediate and effective action is necessary to improve water quality protection and resolve the widespread and serious impacts on people and aquatic life.”

Thank you for your attention and consideration.

Sincerely,



Kira Redmond
Executive Director
Santa Barbara Channelkeeper

SS / for GRH

Gordon Hensley
Executive Director
San Luis Obispo Coastkeeper



Steve Shimek
Executive Director
The Otter Project