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Monday, January 09, 2017

John M. Robertson
Executive Officer
California Regional Water Quality Control Board, Central Coast Region
895 Aerovista Place
Suite 101
San Luis Obispo, CA 93401

Via Email

RE: Draft Conditional Waiver of Waste Discharge Requirements from Irrigated Lands, Draft Order No. R3-2017-002

Dear Mr. Robertson,

The below-signed organizations write to oppose the adoption in its current form of the Draft Conditional Waiver of Waste Discharge Requirements from Irrigated Lands (“Draft Waiver”) proposed for adoption in March, 2017 by the California Regional Water Quality Control Board, Central Coast Region (“Regional Board”). The Draft Order as written violates Water Code 13269, the state’s Nonpoint Source Policy, and the state’s Antidegradation Policy.

The reason for these failures is that the Draft Waiver is almost a verbatim copy of the modified Conditional Waiver approved by the Regional Board in 2012, modified by the State Water Resources Control Board in 2013, and invalidated by an order of the Sacramento Superior Court in May, 2015. (*Monterey Coastkeeper v. California State Water Resources Control Bd.*¹ (Super. Ct. Sacramento County, 2015, No. 34-2012-80001324.) The Regional Board, rather than taking the weakness of the 2012 Waiver to heart, has chosen instead to delay making any substantial changes to irrigated lands regulation in the Central Coast while the legal proceedings continue. This delay means that no progress will be made toward achieving water quality objectives for years. Rather than sitting on its hands, the Regional Board should take this opportunity to follow the direction of the court, the Water Code, and the state’s water quality policies and issue a strong order that will protect water users and the environment.

¹ In the Matter of Review of the Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 for Discharges from Irrigated Lands (State Water Resources Control Bd., 2013) (“2012 Waiver”).

The Court found four major flaws in the 2012 Waiver. First, it failed to comply with Water Code section 13269 because it contained no enforceable standards that would lead to improved water quality. (*Monterey Coastkeeper, supra*, at 32-4.) Second, it violated the Nonpoint Source Policy because it lacked monitoring requirements sufficient to verify compliance, a specific time schedule leading to compliance, and actions required to be taken if management practices fail to produce improvement. (*Id.* at 38.) Third, the Regional Board failed to comply with the procedural requirements of the state's Antidegradation Policy. (*Id.* at 39.) And fourth, the court found that the waiver lacked adequate monitoring provisions. (*Id.* at 41-2.)

The Draft Waiver addresses none of these problems. The primary changes from the 2012 Waiver are updated deadlines.² As a result, every flaw identified by the Court remains a feature of the Draft Waiver.³

The Regional Board's stated strategy is to attempt to avoid legal uncertainty by waiting for all appeals to conclude before taking any substantive action. But this strategy rewards the Regional Board for bad behavior. The Board cannot use litigation based on the 2012 Waiver's weakness as a basis for delay in fixing its problems. In any event, the 2017 waiver is a new proceeding and the Board is required to comply with the Porter-Cologne Act and state water quality policies, which the Draft Waiver fails to do.

First, as detailed in the Court's order, the 2012 Waiver contained significant deficiencies. Among other things, the Draft Order, like the 2012 Waiver, fails to move the Central Coast region towards compliance with water quality standards in any meaningful way. A waiver must be consistent with "any applicable state or regional water quality control plan...." (Wat. Code § 13269, subd. (a).) The Central Coast Basin Plan provides that "[w]astewaters percolated into the ground waters shall be of such quality at the point where they enter the ground so as to assure the continued usability of all ground waters in the basin."⁴ And it must comply with the Nonpoint Source Policy, which requires, among other things, compliance with water quality objectives, specific time schedules with quantifiable

² In the section of the Draft Waiver discussing CEQA compliance, the draft states that it is "substantially similar to the 2012 Agricultural Order." (Draft Waiver, ¶ 40.)

³ There is at least one positive change: an increased number of growers and acreage will be subject to the requirement to report total nitrogen applied. (Draft Waiver, at ¶ 68.) But this improvement does not change the conclusion of this letter.

⁴ The Basin Plan also adopts a drinking water Maximum Contaminant Level of 45 mg/L as nitrate (NO₃). (Regional Water Quality Control Board, Central Coast Region, *Water Quality Control Plan for the Central Coast Basin*, March 2016 Edition at 3-7, 5-5, http://www.waterboards.ca.gov/centralcoast/publications_forms/publications/basin_plan/current_version/2016_basin_plan_r3_complete.pdf; see also Draft Waiver, Attach. A at ¶ 42)

milestones towards compliance, and feedback measures that allow the Regional Board as well as the public to assess and verify the program's effectiveness.⁵

The Draft Waiver, like the 2012 Waiver, contains no numeric standards for discharge and relies entirely on management practices to improve water quality. But the Draft Waiver contains insufficient monitoring to allow the Board, the public, or growers themselves to identify which farms are contributing to pollution. And even were those operations identified, the Draft Waiver contains no specific standards tying "improved" management practices to reduced discharge. These failures were at the heart of the court's decision in *Monterey Coastkeeper* and they persist in the Draft Waiver.

The Regional and State Boards have long emphasized that pollution from irrigated lands is a difficult problem that will take time to solve. This is undoubtedly true. But section 13269 and the Nonpoint Source Policy do not allow the Regional Board to delay indefinitely. Key Element 3 of the Nonpoint Source Policy requires the Regional Board to set out a specific time schedule leading to compliance and to set quantifiable milestones measuring progress. "The time schedule may not be longer than that which is reasonably necessary to achieve ... water quality objectives."⁶ The 2012 Waiver failed to set such a schedule and such milestones; nor does the proposed 2017 replacement. Instead of setting a time schedule leading towards compliance with water quality objectives, it defers any consideration of such a schedule to 2020 at the earliest. This delay violates the Nonpoint Source Policy.

And even if the 2012 Waiver survives review, a 2017 version that is virtually identical may not. The Draft Waiver is a new proceeding and will be based on a new administrative record—a record which now contains five more years of data showing deteriorating water quality in the Central Coast. Like the 2012 Waiver, the Draft Waiver purports to represent an iterative approach to achieving compliance by requiring gradually improving management practices. This approach may have made sense in 2004, when data on water quality in the Central Coast was more scarce. But now after twelve years of data collection, it is becoming clear that the problem is not getting better. In fact, it is getting worse. And the Regional Board now has reviewed three years of Total Nitrogen Applied data, which shows that growers are still applying very high levels of nitrogen to their crops. And the groundwater testing and characterization reports prepared under the 2012 Waiver have revealed ongoing high levels of groundwater contamination. The Regional Board now also has the benefit of a report to the Legislature detailing the ongoing harm from nitrate in groundwater, especially to members of low-income communities.⁷

⁵ State Water Resources Control Board (2004) Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program ("Nonpoint Source Policy"), http://www.waterboards.ca.gov/water_issues/programs/nps/docs/plans_policies/nps_iepolicy.pdf

⁶ Nonpoint Source Policy, at 13.

⁷ Thomas Harter and Jay. R. Lund, *Addressing Nitrate in California's Drinking Water* (2012), <http://groundwaternitrate.ucdavis.edu/>.

Thus whether or not the State Board was right in 2013 that it lacked sufficient data to require growers to meet nutrient balance ratios, that conclusion is likely no longer correct for 2017. At the very least, the Regional Board must analyze this new data and determine whether the 2012 waiver was successful and if stricter standards are necessary. And if the Regional Board's position is still, as it was in 2012, that an iterative program is the proper way to design a regulatory program for irrigated lands pollution, then each iteration must be stricter than the last to ensure continual improvement in water quality until the basin reaches compliance with water quality objectives. To change nothing from the 2012 Waiver until 2020 not only violates the Water Code and the Nonpoint Source Policy but the Regional Board's own strategy for implementing this program.

The work to replace the 2012 Waiver with an order that actually makes progress towards achieving water quality objectives should begin now. The Regional Board has had the twelve years since 2004 to collect data, study management practices, and come up with a plan. It has had five years since the 2012 Waiver to plan for its replacement. The law requires quantifiable progress and the Regional Board has so far failed to deliver it.

In order to comply with the Porter-Cologne Act and the Nonpoint Source Policy, the new waiver should, at a minimum, include:

- Enforceable nitrogen balance ratios.
- Specific time schedules with quantifiable milestones that lead towards achieving compliance with water quality objectives.
- Monitoring requirements that allow the Regional Board and the public to ensure that growers are implementing management practices that reduce nitrogen loading.
- Monitoring that allows the Regional Board and the public to identify growers that are not complying with the waiver's requirements.
- Changes to the tiering system to ensure that all growers who contribute to exceedances are subject to meaningful regulation and monitoring. These might include:
 - Adding pyrethroids and neonicotinoids to the list of pesticides the use of which automatically requires a grower to be placed in Tier 3. These pesticides are known to be in heavy use in the Central Coast and are known to be causing serious surface and ground water impairments.⁸
 - Imposing a requirement that growers show a significant, quantifiable reduction in discharge before approval of a move to a lower tier. Simply switching pesticides should not be sufficient. (See *Monterey Coastkeeper, supra*, at 35.)

⁸ The Draft Waiver discusses this problem but then does nothing to address it. (Draft Waiver, Attach A at ¶¶ 83-86.)

- A significant increase in the percentage of both operations and acreage that are subject to Tier 3 requirements.⁹
- An antidegradation analysis and full compliance with the state's Antidegradation Policy as interpreted in *Asociation de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255. The Draft Waiver delays any meaningful consideration until 2020. It is clear that water quality in the Central Coast is being degraded and yet the Draft Waiver proposes further delay. Full compliance includes:
 - Immediate application of Best Practicable Treatment and Control ("BPTC"). The current order improperly delays these requirements. (Draft Waiver, Attach. A, at ¶ 27 ("The Central Coast Water Board is in the process of evaluating BPTC methods.") The Regional Board must impose BPTC, not simply consider its options.
 - Address the maximum benefit to the people of the state. The Draft Order suggests, rightly, that "the affected public should not generally have to incur costs to treat drinking water supplies." (Draft Waiver, Attach. A, ¶ 28.) But it provides no enforceable mechanism for how this will be achieved. Nor does it answer the question of whether allowing continued degradation, as this Draft Waiver will do, will contribute to the maximum benefit of the people.
 - Immediately implement adequate monitoring requirements. (See Draft Waiver, Attach. A, ¶ 29.) Every year where the Board delays adoption of robust monitoring is a year where the opportunity to collect data is lost.
- Comply with the Human Right to Water Act. (Wat. Code § 106.3.) The Regional Board must consider whether this waiver promotes the State's declared policy that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." Although the Draft Waiver gestures towards the Human Right to Water Act, it does not actually consider whether the order will negatively affect residents' access to water. (See Draft Waiver, Attach. A at ¶ 12.)
- Replace photo monitoring with another regulatory program aimed at recording and stopping destruction of wetland and riparian habitat.

We understand that Regional Board is under pressure to have a new waiver in place in 2017 to replace the expiring 2012 Waiver. However, it cannot use the weakness of the 2012 Waiver and the ongoing litigation to address that weakness as an excuse to avoid the work of crafting a new waiver that complies with the law and is protective of water quality.

⁹ While the Draft Waiver increased the number of growers that are required to submit Total Nitrogen Applied reports, it does not expand the number of growers that are subject to the moderately stricter pollution control requirements of Tier 3. Meanwhile, the number of growers in Tier 3 has plummeted.

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We thank you for the opportunity to comment on this proposal. The Environmental Law Foundation would like to request fifteen minutes for oral comment at the March Regional Board meeting.

Sincerely,



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