



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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April 22, 2007

Dr. Karl E. Longley, Chairman
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

**RE: WASTE DISCHARGE REQUIREMENTS GENERAL ORDER FOR EXISTING
MILK COW DAIRIES (March 23, 2007 Public Draft)**

Dear Chairman Longley:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing over 91,500 farm families and individual members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Farm Bureau appreciates the opportunity to comment and hereby submits the following remarks regarding the Waste Discharge Requirements General Order for Existing Milk Cow Dairies ("Dairy General Order").

Farm Bureau's comments herein supplement and incorporate by reference our written comments on the previous iteration of the Dairy General Order. Furthermore, Farm Bureau incorporates by reference the April 20, 2007 comment letter and technical appendix submitted by the *Community Alliance for Responsible Environmental Stewardship* ("CARES") with the exception of the those provisions relating to compliance with the California Environmental Stewardship Act ("CEQA")¹.

¹ Farm Bureau worked with CARES who includes, but is not limited to, three main dairy producer membership organizations (Western United Dairymen, California Dairy Campaign, and Milk Producers Council) on various aspects of this Dairy General Order. As such, Farm Bureau is incorporating by reference rather than duplicating those comment areas that the respective organizations have in common.

This Dairy General Order as with all Regional Water Quality Control Board ("RWQCB") programs should focus on being a catalyst for regulatory progress by coordinating the various ongoing industry and agency efforts, utilizing its enforcement authority where applicable, and disseminating information as necessary to achieve water quality goals. The final draft Dairy General Order moves closer to meeting these regulatory goals, however, some remaining changes are necessary to strike a better balance between environmental regulation and economic reality. In general, those areas include, existing technical resources, integration with other regulatory programs, compliance with the California Environmental Quality Act ("CEQA"), and groundwater quality monitoring.

Groundwater Monitoring

Consistent with the requirement of the California Water Code, the Dairy General Order's groundwater monitoring provisions should reflect and balance the burden, including costs, of the requirements and should bear a reasonable relationship to the need for the data and the benefits to be obtained from the data. The Dairy General Order falls short of the Water Code's mandate by instituting a blanket monitoring approach requiring all dairies to install and implement groundwater monitoring regardless of actual risk, groundwater quality, local hydrology, and the likelihood that the wells will provide data that can be used to inform the adaptive management process. This approach to groundwater monitoring is counter intuitive and will not provide the level of data necessary to support the excessive costs.² As such, Farm Bureau recommends that groundwater monitoring be prioritized based on a risk based approach and coordinated with the dairy industry and the academic community to develop effective monitoring with appropriate feedback mechanisms.

Existing Technical Resources

The Dairy General Order requires numerous reports, technical documentation and other associated requirements for compliance that include, but are not limited to: an existing conditions report, waste management plans, nutrient management plans, salinity reports, proposed facility modifications, and monitoring and reporting programs. Farm Bureau's concerns with the economic feasibility of achieving compliance have been documented in our prior comment letter; however, assuming dairymen were able to withstand the economic burden of compliance, are there sufficient technical specialists, engineers, and/or laboratories available to perform the work that is being proposed? The ability of dairymen to comply with the Dairy General Order is limited in several aspects by the ability of associated industries to provide services. As such, we suggest the RWQCB evaluate the existing technical services to ensure there are adequate services available for compliance.

² Farm Bureau hereby incorporates by reference Dr. Thomas Harter and Dr. Deanne Meyer's April 5, 2007 letter to the Central valley Regional Water Quality Control Board .

Integration With Other Regulatory Programs

With adoption of this Dairy General Order, dairymen will soon face the difficulty of trying to evaluate their regulatory options under this program and where applicable the regulatory requirements of the Irrigated Lands Waiver Program ("ILWP"). As stated in the RWQCB's December 22, 2006 "Dairy Regulatory Program News," a dairy that owns or leases irrigated crop land, that applies dry or solid manure, and that land discharges to waters of the state, likely has the obligation to be enrolled in the ILWP. However, if that same irrigated crop land applies liquid, rather than dry or solid manure, the dairy would be ineligible for the ILWP, would be required to be covered under the Dairy General Order, and subsequently would be operating under two different regulatory programs that require distinct regulatory compliance measures. As such, we recommend that a dairy's regulatory obligation with respect to the Dairy General Order and the ILWP be carefully analyzed to ensure regulatory clarity and consistency.

Both the ILWP and the Dairy General Order have requirements for surface water quality monitoring. Given the scenario just presented, where one dairy is operating under two different regulatory programs, it would also be required to conduct water quality monitoring under those two separate programs. Farm Bureau believes that the various water quality monitoring programs and regulatory programs should be carefully integrated to provide the opportunity for economies of scale and to provide a more comprehensive view of watershed health.

California Environmental Quality Act

The RWQCB correctly finds, and the Farm Bureau supports, that the Dairy General Order is categorically exempt from CEQA for those existing dairies seeking regulatory coverage. However, Farm Bureau believes that the correct environmental baseline by which to evaluate an "existing facility" is at the time the Dairy General Order is adoption by the RWQCB not October 17, 2005. Therefore, for the reasons stated below Findings 10, 11, 19a and Attachment E of the Dairy General Order must be amended to be consistent with CEQA.

The three main exemptions applicable to the Dairy General Order allow regulatory coverage for existing facilities, enables the covered dairies to replace or reconstruct waste management systems to ensure proper function, and allows covered dairies to make improvements to their waste management systems that will result in minor alterations to land, water, and/or vegetation. In analyzing the applicability of these exemptions, the interpretative custom is to read them narrowly in order to maximize environmental protection. Limiting the scope of exemptions is consistent both with the general policy aim of CEQA to maximize environmental protection, and case law. See *Dehne v. County of Santa Clara*, 15 Cal. App. 3d 827, 842 (1981) ("exemption categories are not to be expanded or broadened beyond the reasonable scope of their

statutory language"); *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 205 (1976) (agency should not unreasonably expand scope of exemption). A narrow construction allows the full measure of environmental protection within the reasonable scope of statutory language. See *McQueen*, 202 Cal. App. 3d at 1148.

The CEQA guidelines provide that the environmental conditions "at the time the notice of preparation is published, or if no notice of preparation is published, **at the time the environmental analysis is commenced, . . . will normally constitute the baseline physical conditions** by which a lead agency determines whether an impact is significant." (Tit. 14, Cal. Code Reg. § 15125(a) (emphasis added); see also *Fat v. County of Sacramento* (2002) 97 Cal. App. 4th 1270, 1277-78 (applying section 5125(a) in the context of an initial study and negative declaration and finding the proper baseline is the environmental conditions at the commencement of CEQA review); tit. 14 Cal. Code Reg. §§ 15126.2(a); 15126.6(e)(1).)

The proper timing and importance of a proper baseline is illustrated in the context of CEQA's exemption for existing facilities and is directly applicable in this matter. For example, where a previously-approved project is being reauthorized or re-permitted, CEQA places the baseline at the time of reauthorization or re-permitting. (See, e.g., tit. 14 Cal. Code Reg. §§ 15300, 15301 ("the **operation, . . . permitting, . . . or minor alteration of existing . . . facilities . . . involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination**" is deemed to not have a significant effect on the environment) (emphasis added).)

Mindful of the narrow construction and limited scope we believe that the plain language of the applicable statutes and case law necessitates application and evaluation of the existing facilities only at adoption of the Dairy General Order.

The plain meaning and application of the existing facilities exemption is further substantiated in *Bloom v. McGurk*, where the court stated:

[T]he time at which the exemption logically operates is the time at which the responsible agency must determine whether or not to require the affected person to file an environmental impact report.³

Applying these definitions in this instance provides that the only time the RWQCB can evaluate the need for an environmental impact report and make a determination is at a properly noticed public hearing. Therefore, Farm Bureau submits that the applicable date to evaluate existing dairy facilities is the date the Dairy General Order is adopted. To further illustrate this point, we shall briefly discuss the October 17, 2005 date, the initial Report of Waste Discharge, and the contradictory positions offered in the Dairy General Order.

³ *Bloom v. McGurk*, 26 Cal. App. 4th 1307, 1314-1315 (Cal. Ct. App. 1994).

Staff's current position is that a dairy facility must have been in existence and the herd size limited to (plus or minus 15%) the number of cows reported in the Report of Waste Discharge ("ROWD") filed on October 17, 2005. This position is unsupported for a number of reasons. First, a Report of Waste Discharge is an evaluative tool which in this instance is an affirmation that the dairy is discharging or may discharge waste that could affect the quality of waters of the state⁴. Upon submission of the ROWD the RWQCB must evaluate a number of factors including, but not limited to, threat to water quality, need to issue a waiver from waste discharge requirements, establish waste discharge requirements, or prohibit the discharge. This evaluative tool (the ROWD) merely sets the regulatory ball in motion and in no way establishes the RWQCB's position or commits it to a definite course of action.

Second, the ROWD itself is speculative and inadequate to evaluate the existing conditions of the dairies because it only captures current herd sizes and doesn't contemplate the maximum permitted animals a dairy may legally house. For instance, the dairy may have undergone environmental review and obtained the necessary local permits to house 2,000 cows. However, the ROWD only asks for the current number of animals and the maximum number of mature cows in the past twelve months.

Third, the examples offered by staff and provided in the Dairy General Order itself illustrate contradictory positions. For instance, staff's current position with respect to the existing facility freezes a dairy's herd size to plus or minus fifteen percent on October 17, 2005. However, the Existing Conditions Report and comments by staff indicate that a dairy's disposal area may include land in control of the dairy acquired after October 17, 2005 so long as it is identified in the Existing Conditions Report. Juxtaposed these statements and positions are contradictory and necessitate changes to the Dairy General Order.

For the reasons stated above, Farm Bureau offers the following suggestions to the Dairy General Order:

Finding 10:

For the purposes of this Order, existing herd size is defined as the maximum number of permissible dairy cows (or equivalent number of Animal Units) as of the adoption of this Order and reported in an updated Report of Waste Discharge or in the Existing Conditions Report, plus or minus 15 percent of that reported number to account for the normal variation in herd sizes. Also included are herds above that size.

Finding 11:

⁴ CA Water Code §13260 (a)(1)

For purposes of this Order, an increase in the number of mature dairy cows (or equivalent number of Animal Units) of more than fifteen percent beyond the maximum permissible dairy cows reported in the updated Report of Waste Discharge or the Existing Conditions Report is considered an expansion.

Finding 19 a

The adoption of this Order is categorically exempt from CEQA because:

Consistent with the "existing facility" exemption of Title 14 CCR Section 15301, eligibility under this Order is limited to milk cow dairies that were existing facilities as of the adoption of this Order. This Order does not authorize expansion of use beyond that existing as the date of adoption of this Order. Restoration of, or improvements to dairy waste management systems to ensure proper function in compliance with this Order will involve minor alterations of existing private facilities.

Attachment E.

13. "Existing facility" is defined, consistent with Title 14 CCR Section 15301, as a milk cow dairy subject to Waste Discharge Requirements Order No. ____ that is fully constructed and operating as of issuance of this Order and which has subsequently undergone no expansion in the size or scope of its herd, facilities, or operation as identified in its updated Report of Waste Discharge or Existing Conditions Report

14. "Existing herd size" is defined as the maximum number of mature dairy cows or animal units reported in the updated Report of Waste Discharge or Existing Conditions Report, plus or minus fifteen percent of that reported number to account for the normal variation in herd sizes.

15. "Expansion" is defined as, but not limited to, any increase in the existing herd size (i.e., by more than 15 percent of the maximum number of mature dairy cows or equivalent number of Animal Units report in the updated Report of Waste Discharge or Existing Conditions Report required by this Order or an increase in the storage capacity of the retention ponds or acquisition of more acreage for reuse of nutrients from manure or process wastewater in order to accommodate an expansion of the existing herd size. "Expansion" does not include installation or modification of facilities or equipment to achieve compliance with the requirements of Waste Discharge Requirements General Order No. ____ so long as the modification or installation is sized to accommodate only the existing herd size.

Receiving Water Limits

Information Sheet page IS-17 establishes receiving water limitations for both ground and surface waters by converting narrative water quality standards to numeric limits without undergoing a public review process. The establishment of water quality objectives is clearly defined as a public process by the Water Code (Basin Planning). Many of the limitations in this section come from a 1985 United Nations publication that has never been through any type of review. The limitations set in this paragraph would cause great financial hardship to dairy farmers and likely could not be met by any type of irrigated agriculture. The Water Code also defines that prior to setting any water quality objective or regulatory program for agriculture that a full evaluation of costs and financing needs be conducted. That is normally done through a full Basin Plan review process and to our knowledge has not been done. This process is then reviewed by the Office of Administrative Law and again to our knowledge, this has not been done or attempted. As such, strict compliance with the water quality standards in this instance is impermissible and should be removed from the Dairy General Order.

If there are any questions regarding this matter, please feel free to contact me either by telephone at (916) 561-5614, or by electronic mail at jhewitt@cfbf.com.

Sincerely,

A handwritten signature in cursive script that reads "John Hewitt". The signature is written in black ink and is positioned above the printed name.

John Hewitt