

October 23, 2013

Ms. Lonnie Wass, Supervising Engineer
Central Valley Regional Water Quality Control Board
1685 E Street
Fresno, California 93706

Subject: COMMENTS ON THE INITIAL STUDY/MITIGATED NEGATIVE DECLARATION AND TENTATIVE WASTE DISCHARGE REQUIREMENTS FOR PARAMOUNT FARMS INTERNATIONAL, LLC ELDORADO PISTACHIO PROSSING FACILITY AND PARAMOUNT FARMING COMPANY, LLC FRESNO COUNTY

Dear Ms. Wass;

The Central Valley Regional Water Quality Control Board (Central Valley Board) published an Initial Study/Mitigated Negative Declaration on the proposed issuance of a revised Waste Discharge Requirements (WDRs) for the Paramount Farms et. al., pistachio processing facility in Fresno, California. My comments are as follows:

Comment 1: Central Valley Water Board's Authority Under CEQA

The Central Valley Board has prepared the IS/MND because they contend that the "Central Valley Water Board's proposed action to adopt revised WDRs (for the facility)...requires a California Environmental Quality Act determination". Elsewhere in the IS/MND the Central Valley Board indicates that since no other local land use entitlements are required for the proposed increase in expansion of the wastewater flows and wastewater application lands the Central Valley Board is the designated lead agency under CEQA.

The Central Valley Board is exceeding their authority by imposing a requirement for CEQA compliance on the regulated entity. First, the CVB has incorrectly defined the scope of the project. The action required by the Central Board is issuance of a WDRs. From that perspective "project" under their review is to the issuance of the WDR, not complete discretionary approval of the proposed land improvement actions needed to install the wastewater facilities.

Under CEQA a "lead agency" is defined as " the public agency which has the principal responsibility for carrying out or approving a project. Section 15051 of CEQA further states that the lead agency will normally be the agency with general governmental powers rather than agency with a single or limited purpose such as the Regional Water Board, or District Air Board, etc.

Section 15263 (Discharge Requirements) of the CEQA guidelines (Section 21083, Public Resources Code; Section 13389 Water Code) states that *"The State Water Resources Control Board and the regional boards are exempt from the requirement to prepare an EIR or a Negative Declaration prior to the adoption of waste discharge requirements, except requirements for new sources as defined in the Federal Water Pollution Control Act or in other acts which amend or supplement the Federal Water Pollution Control Act. The term "waste discharge requirements" as used in this section is the equivalent of the term "permits" as used in the Federal Water Pollution Control Act."* The proposed modifications to the existing WDR authorization is not defined by the Federal Water Pollution Control Act as a "new source" and is exempt from the requirements of CEQA.

Article 2 of Chapter 27 of Title 23 of the California Code of Regulations, states that Water Quality Control Boards are not required to comply with CEQA prior to the adoption of WDRs that serve a NPDES permit, except requirements for new sources. Article 6 of Chapter 27 exempts Regulatory Programs certified by the Secretary of Natural Resources from compliance with Chapters 3 and 4 of CEQA. These programs include the Water Quality Control (Basin)/208 Planning Program of the State and Regional Boards, and includes all water quality control plans, state policies for water quality control, and all components of California's Water Quality Management Plan as defined in Title 40 CFR.

Section 2776 of Article 6 further describes under what conditions the State and Regional Boards will serve as a lead agency under CEQA and limits the lead agency role to adoption or revision of State policy for water quality control or other plans, policies, or regulations that it adopts or revises. It does not authorize the Regional or the State Board to assume CEQA lead agency status simply because they are the first public agency to take an action.

The implication of this overreach by the Central Valley Regional Board is that by via preparation of the IS/MND the Regional Board is allowed to impose upon the discharger mitigation measures that would not otherwise be imposed in the entitlement process required by the local land use agency (Fresno County), or required under Porter-Cologne. More importantly, the Central Valley Board is exceeding its authority by using CEQA as a mean to condition the project beyond compliance with established water quality standards. The authority of the Central Valley Regional Board is limited to Porter-Cologne and the regulations promulgated to implement and enforce Porter-Cologne, including its promulgating regulations, and the Sacramento-San Joaquin Basin Plan.

Comment 2: Mitigation Measures

The IS/MND includes numerous mitigation measures that are neither supposed by law nor can be implemented as written. As an example, I refer to the the mitigation measures included in the Biological Resources section, as follows:

" Conduct protocol level surveys in advanced of trenching activities to install the new irrigation line and contact DFW and the United States Federal Wildlife Service to ensure appropriate measures will be taken to avoid or mitigate potential impacts to special status or endangered species."

The Regional Board imposed this mitigation measure on the permittee even though they acknowledge in the IS/MND that implementation of the project on the *"existing farmland would not impact any sensitive or special status biological species, riparian habitats, sensitive natural communities, federally protected wetlands, or interfere with the movement of native or migratory wildlife species. In addition, the project would not conflict with any local policies or ordinances protecting biological resources. No significant wildlife impacts are expected. The project property is currently already used for the purpose proposed in the project, with the difference of irrigation water being supplemented with diluted pistachio processing wastewater."*

The Regional Board included the mitigation based on a general recommendation by the California Department of Fish and Wildlife because the project may have a *"potentially limited impact"* on species of concern. The mitigation imposed requires the permittee to conduct multi-year surveys for various species of concern; coordinate with DFW and the US Fish and Wildlife Service; and implement *"appropriate measures to avoid or mitigation potential impacts"*, even though the "impact" would only occur within an existing planted orchard.

CEQA requires that mitigation be imposed based on a reasoned potential for a significant impact. Including mitigation simply because "it sounds like a good idea" is a misuse of CEQA and irresponsible on the part of the Regional Board. There has to be a tangible line of evidence as to the likelihood for a significant impact to occur and the mitigation imposed. I would argue that trenching to install a 12" pipeline in a high-intensity planted agricultural field would not reasonably result in a significant impact.

The Central Valley Regional Board failed to conduct a biological evaluation in accordance with professionally accepted standards, as required by CEQA, that would allow the Board to provide "substantial evidence" (as required by CEQA) of an actual potential impact. There is no evidence to suggest a biologist looked at the proposed site and made an assessment as to whether the site has any real likelihood to support the species of concern (based on specific habitat requirements of the species and the specific habitat characterizes present on the site) and failed to conduct any level of due diligence that would suggest mitigation may not, in fact, be required.

Instead, the Board conducted a cursory CEQA review and included mitigation as a means to "cover their bases". Any experienced CEQA practitioner should have advised the Regional Board that the Board wanted to boldly assert its authority as a CEQA lead agency the Board had the obligation to also take on the responsibly under CEQA to conduct a fair, and informed, environmental review.

Furthermore, CEQA requires that all mitigation measures must be feasible to undertake and complete. As established through case law¹, lead agencies are not allowed to proposed "deferred mitigation" measures not tied to performance standards and contingency plans. In this case, requiring the applicant to contact DFW and USFWS to "*ensure appropriate measures will be taken to avoid impacts*" is at best lazy on the part of the Regional Board and entirely unenforceable.

To be fair to the permittee, the mitigation has to provide some reasonable path to compliance and assurance that the mitigation will not, in and of its self, render the entire project infeasible because of the time and cost associated with mitigation that may not even be required by law. Conducting multi-year surveys for multiple species is a tremendous expense and burden to place on a permittee for a rather minor project. It is unacceptable that these expensive and time-consuming mitigation measures are being imposed on a permittee when there is no established water quality standard mandating it.

In summary, the Regional Board has no authority to assume the role of lead agency under neither CEQA nor Title 23 of the California Code of Regulations. Therefore, the proposed CEQA mitigation measures that have been incorporated as permit conditions must be rescinded. Until such time that those mitigation measures have been adopted as water quality standards, the Central Valley Regional Board does not have the authority to impose them as permit conditions. Moreover, the applicant is entitled a refund for any portion of the application fee inappropriately used by staff for the unauthorized CEQA review.

Respectively,



Kathy R. Kinsland, CISEC, QSP

Sr. Scientist/Regulatory Specialist

cc:

Fresno County, Planning Department
California Department of Fish and Wildlife, Region IV, Fresno
David Coupe, State Water Resources Control Board
Paramount Farms International, LLC,
Eldorado Pistachio Processing Plant

¹ Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296