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September 3, 2013

Felicia Marcus, Chair
Frances Spivy-Weber, Vice Chair
Tam M. Doduc, Member
Steven Moore, Member
Dorene D'Adamo, Member
Thomas Howard, Executive Director
Jeanine Townsend, Clerk of the Board
California State Water Resources Control Board
1001 I. Street, 24th Floor
Sacramento, California 95814

Re: Comments to A-2209(a)-(e) – September 10, 2013 Board Meeting
Jensen Family Farms and William Elliott

Dear Board Chairperson, Members, Mr. Howard, and Ms. Townsend:

While we still maintain our previously expressed views concerning the programmatic weaknesses, illegality, unconstitutionality, and other matters pertaining to the Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0011 approved by the Central Coast Water Quality Control Board and concerning which the State Water Resources Board has issued draft orders of review ("Conditional Waiver"), the matters upon which comment is made in this letter are restricted to modifications (appearing through red-lining and red-texting) contained in the August 20, 2013 Draft (SWRCB/OCC Files A-2209(a)-(e)).[1] These are presented in the order in which they arise in the Draft rather than according to their importance.

1. Termination/Modification Of The Conditional Waiver (Draft at p. 5 n. 9). Without commenting upon the correctness of the assertion that the Regional and/or State Water Board can revise, at will, the Conditional Waiver, the following phrase should be added at the end of the footnote text in order to clarify

[1] We join in and incorporate by reference the arguments, observations, and comments submitted by our fellow agricultural petitioners (California Farm Bureau Federation, Ocean Mist Farms and RC Farms, and Grower-Shipper Associations) – to the extent that they are not inconsistent with the arguments, observations and comments contained in this letter.

that any such revision may be done only following public comment and meetings as required by California's administrative procedure act:

> "... Wat. Code, § 13269, subd. (a)(2) [recognizing that termination may occur at any time] **subject to notice of any necessary meeting by publication pursuant to Section 11125 of the Government Code**." (Emphasis of suggested modification)

2. Amendment of Provision 11 (Draft at p. 15). As it now provides as appearing in the first paragraph of page 15, Provision 11 reads, in pertinent part,

> "The Executive Officer may waive the requirements for TAC review of a project or program if the Executive Officer determines that the specified representatives are unavailable for serving on a TAC...."

In order to safeguard against abuses by an Executive Officer, the failure to appoint one of the representatives should not deprive the remaining members of the TAC from fulfilling their regulatory function. Thus, the phrase "a quorum" should be added to that the provision will state:

> "The Executive Officer may waive the requirements for TAC review of a project or program if the Executive Officer determines that **a quorum of** the specified representatives is not available for serving on a TAC...." (Emphasis on suggested modification)

3. Water Quality Standards Compliance, Provisions 22-23 (Draft at p. 23). The ultimate sentence of the first paragraph appearing at p. 23 provides that ...

> "... the Central Coast Water Board made it sufficiently clear in the Agricultural Order that it will not take enforcement action against a discharger for violations of Provisions 22 and 23 where that discharger is implementing and improving management practices to address discharges impacting water quality."

The phrase "implementing and improving" should be made disjunctive rather than conjunctive. The meaning attaching to "improving" in this context is unclear and assumes that the specific management practice may be or is capable of being "improved" even when it is an industry-wide practice not capable of improvement under existing practices and technology. If the terms were made disjunctive so that a discharger would comply with Provisions 22 and 23 by either implementing management practices to address discharges impacting water **or** improving the ones he already has in place, the same overall goal would be accomplished without exposing the farmer to potential liability. This is, of course, consistent with changes made by the State Board Staff in the final paragraph of page 24 concerning Provision 82 and the "wide range of factors" in determining whether a Tier 3 discharger is effectively controlling the relevant pollutants

which list "management practice implementation" without tying that to "management practice improvement."

Conforming modifications in the remainder of the discussion and modifications of Provision 22 and 23 should be made.

4. Water Quality Standards Compliance, Provisions 22-23 (Draft at p. 24). The Staff has recommended changes on page 24 to Provisions 22 that seek to "clarify that the appropriate requirement is for dischargers to not 'cause or contribute to exceedances of water quality standards," rather than "comply with water quality standards" as well as to Provisions 87A concerning the implementation of "management practices that prevent or reduce discharges of waste that are causing or contributing to exceedances …" This language should be modified by adding the word "increased." As it now stands, the penultimate paragraph on page 24 provides:

> "We also edit Provision 22 to clarify that the appropriate requirement is for dischargers to not "cause or contribute to exceedances of water quality standards" rather than "comply with water quality standards."

That should be modified to provide:

> "We also edit Provision 22 to clarify that the appropriate requirement is for dischargers to not "cause or contribute to **an increase in** exceedances of water quality standards" rather than "comply with water quality standards." (Emphasis on requested modification)

That same change should – plus another to clarify that the management practices in place rather than to be proposed in the future by the discharger are sufficient -- be made to revised Provision 87(A) so that it provides:

> "To comply with Provisions 22, 23, and 84-87 of this Order, Dischargers must (1) implement **or continue to implement** management practices that prevent or reduce discharges of waste that are causing or contributing to an **increase** to exceedances …" (Emphasis on requested modification)

5. Containment Structures (Draft at p. 25). The most recent Draft modifies Provision 33 by deleting the word "minimize" in the context of percolating waste to groundwater. Instead, it chooses to make the standard absolute: all percolating waste to groundwater must cease when containment structures are used. Since perfection and complete actual compliance with the terms of the Conditional Waiver are no longer required as set forth in the Draft, the term "minimize" accomplishes in the context of containment structures the good faith that now marks overall compliance with the Conditional Waiver's terms.

6. Notice By Dischargers/Third Party Monitoring Group To Users (Draft at p. 31 et al.) For the first time the Draft proposes that, relative to well water monitoring, the discharger or the third party monitoring group of which he/it is a member notify "users" of the

monitored well water when a well is identified as exceeding any MCL. As it now provides, beginning with the ultimate paragraph of page 31 and continuing in to page 32:

> "Finally, we recognize the potential severity and urgency of the health issues associated with drinking groundwater with high concentrations of nitrates, and we will require that the discharger conducting individual groundwater monitoring or the third party conducting cooperative groundwater monitoring notify the users when a well is identified as exceeding any MCL.
>
> We shall amend Section A.6 of Part 2 of the Tier 1, 2, and 3 MRPs, and add Section 7.A to Part 2 of the Tier 1, 2, and 3 MRPs as follows:
>
> > '.... 7. If a discharger conducting individual groundwater monitoring or a third party conducting cooperative groundwater monitoring determines that water in a well that is used or may be used for drinking water exceeds any Primary or Secondary MCL, the discharger or third party must notify the Regional Board and users of that water of the exceedance within 30 days. Where the exceedance is of 45 mg/l of Nitrate as No3 or 10 mg/l of Nitrate + Nitrate (as N), the discharger or third party must provide notice to users within 24 hours of learning of the exceedance and include the following information in the notice in both English and Spanish ... ♦ Direction to share the notice with all the other people who drink the well water, especially those who may ot have received the notice directly (for example, people in apartments, nursing homes, schools, and businesses), by posting the notice in a public place or distributing copies by hand or mail.'"

The requirement that the discharger or the third party group notify users directly must be deleted from this provision and other portions of the Draft where similar statements are made (see, e.g., p. 68 [¶ 6], 38).

While no question exists that the State Board may order dischargers and/or third party cooperative monitors to notify the Regional Board of such exceedances in the time frames set as stated above under such statutory authorizations as Cal. Water Code § 13260,[2] no authority appears to exist under which it may specifically and as a matter of policy shirk its responsibility and order the dischargers to contact users directly in either time frame. Prudential considerations also support changing the notification duty. A notice of the type specified coming from a discharger – particularly in view of the State Board's other finding, at page 38 of the Draft that "Discharges that have commingled with discharges from another farm/ranch are considered to have left the

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[2] This provision states that dischargers shall file with the regional board a report of discharges.

control of the discharger" – is tantamount to an admission against interest that he/it is liable for any proximate injury caused by ingestion of or exposure to the well water. This is particularly true when the specifics of the required notice set forth in the Draft are factored in: e.g., that purported "potential health effects associated with consuming the water, including the following:

> Nitrate: Infants below the age of six months who drink water containing nitrate in excess of the MCL may quickly become seriously ill and, if untreated, may die because high nitrate levels can interfere with the capacity of the infant's blood to carry oxygen. Symptoms include shortness of breath and blueness of the skin. High nitrate levels may also affect the oxygen-carrying ability of the blood of pregnant women.
>
> Nitrate: Infants below the age of six months who drink water containing nitrate in excess of the MCL may become seriously ill and, if untreated, may die. Symptoms include shortness of breath and blueness of the skin.'"

The discharger/group must, of course, immediately notify the Regional Board. But it is singularly the duty and responsibility of the Regional Board to notify the "users." Indeed, it is only the Regional Board – and not discharger or the group monitor – that would know who the "users" of the well water are. That information is, of course, of the type which is collected by the Regional Board as part of its general duties and responsibilities.

7. Amendment To Provision 69 (Draft at p. 34). The Draft recommends the inclusion of the following ultimate sentence to Provision 69 relative to photo monitoring: "maintained in the Farm Plan and must be submitted upon request of the Executive Officer." The term "good faith" should be added to modify "request" so that the provision reads "… must be submitted upon good faith request of the Executive Officer."

8. Time Schedules (Draft at pp. 60-64). According to the explicit terms of Water Code § 13269(a)(2), a conditional waiver such s this "may not exceed five years in duration. And yet these schedules repeatedly set "compliance" times more than five years after the waiver's effective date. See, e.g., Table 3, p. 60 (regarding submission of photo documentation through 2017 and every four years thereafter), Table 4, p. 62 (regarding Nitrate Waste Discharges to Groundwater),m Table 6, p. 63-64 (regarding Tier 3 dischargers with farms/ranches). These time schedules must be modified to be consistent with the 5-year duration of the conditional waiver.

Very truly yours,

cc. All persons/entities on Appendix A hereto

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