

**From:** Felice Pace <unofelice@gmail.com>  
**To:** SOlson@waterboards.ca.gov; RFitzgerald@waterboards.ca.gov; BZabinsky@waterboards.ca.gov; DLeland@waterboards.ca.gov; MStJohn@waterboards.ca.gov  
**CC:** willharling@gmail.com; shadoh@mcn.org; ptb92day@gmail.com; phiggins@humboldt1.com; lyra@srrc.org; luna@mkwc.org; konrad@klamathriver.org; . . .  
**Date:** 5/13/2012 11:18 AM  
**Subject:** Comments and Recommendations on draft Scope and Framework for the Ag Regulation Program  
**Attachments:** Ltr to NCWQCB\_Input&Recommends\_Framework&Scope.docx

Felice Pace

28 Maple Road Klamath, Ca 95548 707-954-6588 unofelice@gmail.com

To: David Leland, Matt St. John, Ben Zabinski, Rebecca Fitzgerald, Samantha Olson

Cc: Northcoast CWA allies

Date: May 12, 2012

Re: Comments and Recommendations on: Water Quality Compliance Program for Discharges from Agricultural Lands in the North Coast Region (Program), Draft Program Scope and Program Framework, 04/26/2012

Dear NCWQCB leaders and staff,

These comments are made on behalf of the Klamath Forest Alliance, the Redwood Chapter and the North Group of the Sierra Club and for me as an individual.

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\*Background\*

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Last week I attended sub-group meetings in Tulelake and Yreka at which staff presented the draft framework and at which advisory group members and members of the public asked questions and made comments. I have considered these presentations, questions and comments and I have reviewed the document in light of them. Here are the resulting comments and recommendations.

\*Our Perspective\*

Our perspective includes:

- Non-point pollution from agriculture (along with urban stormwater) is now the #1 factors degrading rivers, estuaries and other streams nation-wide.
- Decades long efforts to effectively regulate agricultural operations via best management practices have failed in the Chesapeake, the Everglades, the Great Lakes and in many other parts of the country.
- Efforts to effectively regulate agricultural pollution are relatively new in California. Nevertheless, several regulatory programs have been in place for a few years. Progress has been slow at best and it remains unclear whether these programs will be effective.
- Agricultural pollution is a major factor degrading many Northcoast Rivers and streams. In particular, the Klamath, Scott, Shasta and Russian Rivers are impaired in whole or in major part by nutrient, temperature, dissolved oxygen and sediment pollution for which agricultural lands and operations are responsible.

\*We cannot clean up the Scott, Shasta, Klamath and Russian Rivers and restore beneficial uses unless and until agricultural pollution is

effectively regulated. Many other Northcoast rivers and other streams – or significant sections of them – also suffer loss of water quality and degradation of beneficial uses as a result of agricultural pollution. Flow impairments and stream dewatering due to excessive diversion of surface flow is also a factor in the loss of water quality in many Northcoast rivers and other streams.\*

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**\*Applicable Law\***

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The Program adopted by the NCWQCB must comply with California Water Code Section 13242 <<http://law.onecle.com/california/water/13242.html>>. The requirements in the code are there for a reason and they are the law. They are therefore the yardstick by which the NCWQCB must judge whether the Program developed by staff meets the requirements of the Clean Water Act and Porter-Cologne Act. They are also the primary yardstick we use below and will use in the future to judge whether the Program which staff presents to the Board is adequate and lawful.

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**\*Comments and Recommendations\***

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**\*1. Scope of Program:\***

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Based on careful study of the draft Program Scope and Framework, consideration of meeting presentations and discussions, investigation at the state level and study of several agricultural pollution control programs developed in other regions, we have the following input on Program Scope:

- Agricultural permitting should not be fragmented into several permits and processes. Doing that would create an unfair burden on regulated agricultural operations/ownerships and would likely result in strong objections from the Farm Bureau and others at the state approval level. That means the Program currently being developed should “cover” integrated agricultural operations including but not limited to operations where forage is grown using irrigation and where all or a portion of that forage is fed to livestock which are part of the same operation or ownership.
- The state-wide process for dryland grazing is not yet a program under development with a budget and a time-line. It is currently only a work group. It would be imprudent for the NCWQCB to rely on a state-wide process which is currently only aspirational.
- Based on discussions with a the coordinator of the SWRCB grazing work group, we believe the state-wide process for dryland grazing (when it does become a program with a budget and time-line) will not be designed to address small AFOs and CAFOs which are part of integrated operations which also produce forage crops.
- Small AFOs and CAFOs which are part of integrated operations producing hay and other forage on irrigated lands for feeding to livestock are not effectively regulated under the recently-adopted Dairy/large CAFO Program and are unlikely to be addressed in a future state-wide dryland grazing program. Therefore, these operations should be regulated in this program.
- The standard for whether an operation must be actively regulated under this program must be the impact and potential impact the operation has or potentially could have on the quality of waters of the state. Whether the operation is commercial or a “hobby farm” or an education program (FFA, etc.) is irrelevant. As you heard in the sub-group sessions, acreage is

also not a good surrogate for potential to pollute; therefore acreage should not be used to determine if an operation or ownership falls within the scope of the program.

\*Recommendations on Program Scope:\*

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1. The Program should apply to all agricultural operations within the region – whether “commercial”, “hobby” or “educational” – that generate gross receipts of \$1,000 or more with the following exceptions: a. CAFOs/AFOs which are required to enroll as part of the Dairy/large CAFO program, and b. operations which are exclusively dryland grazing (i.e. where livestock are not fed forage grown as part of the operation and/or the operation does not include other types of agriculture).
2. As recommended by agricultural folks and others at the sub-regional meetings and to comply with CWC S.13242, those operations/ownerships “covered” by the program must enroll and must be evaluated by NCWQCB (or qualified 3rd parties) to determine the proper level of regulation needed to assure that water quality and beneficial uses are protected and – where necessary - restored.

\*2. Program Framework:

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We support “tiering” which we take to mean that agricultural operations and ownerships which are currently not polluting (discharging) and which have a low or remote potential to pollute should have the least stringent requirements. Likewise operations which are currently discharging and which have a high potential to pollute should have the most stringent requirements.

As affirmed universally by agricultural producers at the two sub-regional meetings I attended, tiering can only properly be applied once the operation/ownership is evaluated on the ground by a person or persons trained and competent to determine: a. if an operation/ownership is discharging, and b. the potential for the operation/ownership to discharge – including potential to discharge via overland flow of stormwater.

While we are sympathetic to the staff’s concern that staffing levels might be inadequate to implement the Program, we note the following:

- Applicable laws and codes do not allow the NCWQCB to provide CWA/P-C “coverage” unless that “coverage” can reasonably be expected to adequately control pollution from “covered” entities (operations/ownerships).
- Universal enrollment by all “covered” entities and evaluating each entity on the ground to determine which tier should apply need not be accomplished in total during a single season or year. Operation/ownership acreage and whether the operation/ownership is in an impaired watershed are two factors that can be considered in scheduling the initial evaluation necessary to determine the appropriate “tier” in which to place the operation/ownership.

\*Recommendations on Program Framework:\*

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1. Education needs to be integrated into the Framework and the Program. This needs special attention because the NCWQCB has not adequately integrated education of the regulated community into its other programs, i.e. this is an organizational weakness. NCWQCB managers should consider bringing in an educational specialist to evaluate all its programs and to make recommendations on where and how education can be used to make NCWQCB programs more effective. Staff should consider including the following approaches in the education component of the Agricultural Program: a.

placing educational materials in mailings already going out to the regulated community, b. creating and placing educational features with media throughout the region – including specialized agricultural media, c. collaborative education programs with the NRCS, UC Extension and other agencies, d. requiring agricultural operators to complete certain courses and certifications.

2. Stormwater needs to be integrated into the scope section and into the tiering. It is our experience that delivery of waste via stormwater is a major problem in our region where rainfall can reach 100 inches per year. In dryer portions of the region (10-15 inches per year), intense thunderstorms are a regular seasonal occurrence. Combined with steep slopes and sparse natural vegetation, intense thunderstorms are likely to result in delivery of sediment and other pollutants - particularly in sparsely vegetated lands common when annual rainfall is less than 20 inches per year.

3. Just as all agricultural programs “covered” under this program must enroll and be evaluated; all those “covered” must also be required to report discharges of waste within 2 weeks of the discharge.

4. We are comfortable with the concept of diminishing requirements as an operation/ownership demonstrates over time that it is operating in a responsible manner, i.e. adequately controlling discharges of waste as well as the risk of discharging waste. However, just as “coverage” does not go away, neither should regulation totally go away. At minimum, an annual filing in which the operator/owner certifies maintenance of effort, reports any changes in the nature or intensity of operations, and lists all discharges which occurred and were reported during the past year should be required in order to satisfy the standard of CWC S. 13242.

5. We remain concerned about Third Party Certification. The concern is that those performing 3rd party certification will not be sufficiently trained and qualified to evaluate the significance of a given discharge or to correctly evaluate discharge risks. We are also concerned that some 3rd party certifiers are too close to and dependent on the regulated community. If third party certification is going to be used in this program, at minimum the NCWQCB will need to develop and implement protocols to be used by third party certifiers to evaluate discharges and risk of discharges. The NCWQCB will likely also need to provide or require appropriate training for third party certifiers on how to evaluate discharges and risk of discharge. In other words, NCWQCB should not delegate its regulatory authority unless and until it can certify with reasonable assurance that a third party is qualified to evaluate discharges and risk of discharge. To make this concrete, what are the qualifications of the Wine Institute which prompt staff to consider them an appropriate 3rd party certifier? And specifically for the Wine Institute and other organizations staff is considering as 3rd party certifiers, what makes them competent to evaluate discharges and risk of discharges?

6. “Drainwater” is used throughout the Draft Framework but is nowhere defined. Do you mean water from constructed (tile) drains; or do you mean water that drains off the land in either a natural or constructed conveyance? We suggest including definitions and in those definitions using “drainwater” to refer to constructed (tile) drains and “stormwater” to refer to water that drains off the land via overland flow, a natural conveyance or a constructed conveyance that is not a drain, i.e. a simple ditch.

7. With respect to roads, use miles per acre, not miles of road. We also strongly recommend using geomorphic criteria as part of determining the risk that a road will deliver sediment to a stream. Roads located on high risk terrains common in the Klamath Mountains and Coast Range are high risk for failure during major storm events and can deliver massive amounts of sediment to streams. High risk terrains include deep-seated “dormant” landslides (earthflows), steep headwalls, debris basins and glacial till deposits. Other programs the NCWQCB has developed – most notably the forest road WDRs – do not adequately address the risk of catastrophic road failure and sediment delivery from roads on high risk geomorphic terrains. This Program should not make the same mistake.

\*The Fee Issue\*

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No one likes a fee. However, the law is clear: any/all fees must be based on the cost of regulating the entity paying the fee. It is extremely improbable that the SWRCB – or the governor – would allow this program to use a fee structure that is not directly related to the amount of staff time necessary to provide “coverage” to a given entity and to evaluate whether the Program is being effective at the ownership/operator level (Implementation and Effectiveness Monitoring) and at the watershed level (ambient water quality monitoring).

The idea that fees are a heavy burden is being emphasized by Ag representatives and accepted by NCWQCB staff without presenting any data to support the assertions. For example, what is the rate of failure for Ag operations in the region and has this increased in recent years? This is the sort of information NCWQCB staff should be asking Ag folks who are asserting the hardship argument to produce. The last two years have seen record Ag income and profits nation-wide. Livestock, grain and hay prices are at all-time highs. The assertion that Ag producers cannot afford the cost of doing business rings hollow without supporting documentation.

That said, we and the vast majority of the environmental community have always supported assistance for those for whom compliance costs create real hardship. The assistance, however, should be on a case by case basis for those with demonstrated need. Using the issue of potential hardship for some operators as justification for exempting broad classes of operators from regulatory compliance – which appeared to be where some Ag and county folks would like - is not acceptable...or legal. Exemption from otherwise applicable CWA regulation and related fees is only legal where it is based on actual \*de minimus\* impact and actual \*de minimus\* risk of discharge. As we and many others have noted, determining what is and is not \*de minimus\* must be determined on-the-ground via staff review and evaluation of the operation/ownership.

The staff should not hold out to operators/ owners a false hope that a fee structure not directly tied to the cost of providing “coverage” is possible. Likewise, you do not have the option of reducing requirements in order to lower a fee; to comply with CWC S.13242 you must do the amount of work needed to reasonably assure that “covered” operations/ownerships are adequately limiting discharges and adequately addressing discharge risks.

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\*Additional Recommendations\*

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1. We think a Conditional Waiver is the proper approach for this program at this time. We need the 5 year reviews for one or two cycles in order to refine the program, i.e. to make it more effective and appropriate. We also need to see if the desired impact on ambient water quality (improvement or maintenance of high quality) is being achieved.
2. As we noted at the Yreka meeting, there are several types of monitoring. We strongly recommend Implementation and Effectiveness Monitoring using essentially the water quality BMP monitoring design used by the US Forest Service in California. What this entails is randomly selecting a subset of operators/ownerships each year and checking them to determine: a. if BMPs were properly implemented (Implementation Monitoring) and b. if the BMPs were effective in controlling pollution (Effectiveness Monitoring). We also strongly recommend ambient water quality monitoring at selected sites to determine progress in meeting water quality standards and/or maintaining high quality waters. Ambient WQ monitoring should establish a baseline and should then be conducted in the fourth year of waiver operation so as to be available to inform the renewal of the waiver in year 5. Wherever possible, the sites for ambient WQ monitoring should be selected in a manner that facilitates staff focusing

on sub-watersheds where pollution reduction or maintenance of high quality waters is not occurring.

3. We do not accept the assertion that riparian grazing is either necessary or effective in controlling unwanted, non-native vegetation (aka "noxious weeds"). In fact, just the opposite is the case. We have observed riparian grazing in many locations for many years. Any positive results of riparian grazing for control of undesired, non-native plants are more than cancelled by the resulting ground (hoof trampling) soil disturbance which favors undesired, non-native plant propagation. This same hoof trampling results in the creation of fine sediment which is most certainly delivered to streams during subsequent high water periods. In addition, grazing riparian areas usually results in desirable vegetation being consumed and this negatively impacts stream temperature. We are still waiting for you or the Ag folks on the committee to produce peer reviewed research which indicates that riparian grazing is effective in eliminating unwanted vegetation and that this can be done without destroying desired vegetation and without delivering sediment to streams. Please note that we are not referring to research conducted on dry, open rangelands. We strongly recommend that NCWQCB staff not accept the assertion that grazing riparian areas is needed to control unwanted vegetation unless and until Ag committee members can produce definitive research applicable to our Northcoast/Klamath riparian areas.

We want to encourage NCWQCB staff to post on the NCWQCB web site all comments on the Draft Scope and Framework which you receive from Committee members or, alternately, to distribute all comments received to all members of the Committee. In order to work for consensus recommendations, all committee members need to be aware of the rationales, suggestions and positions of other committee members.

These comments and recommendations are respectfully submitted on behalf of Klamath Forest Alliance, the Redwood Chapter and the North Group of the Sierra Club and on my own behalf.

(Via E-Mail)

Felice Pace

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Felice Pace  
Klamath, CA 95548  
707-954-6588

"we must always seek the truth in our opponents' error and the error in our own truth."

- Reinhold

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