



August 27, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814

RE: Public Hearing On Stay Request; SWRCB/OCC Files A-2209(c) and (d)

The Environmental Defense Center (EDC) submits these written responses to the questions posed under section “ISSUES TO BE ADDRESSED” of the State Water Resources Control Board’s “Revised Notice of Public Hearing on Stay Request” dated August 21, 2012.

EDC is a non-profit public interest law firm that represents community organizations in environmental matters affecting the Central Coast. EDC was at the table in 2004, when the first Central Coast Region Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (“Conditional Waiver” or “Order”) was adopted. EDC participated in a stakeholder group convened by the Regional Board in 2009, and EDC participated in a privately mediated negotiation process with other environmental groups and representatives from agriculture in 2011. In addition, EDC commented on the February 2010, November 2010 and March 2011 Draft Orders, and EDC attended and participated in the public hearings and workshops hosted by the Regional Board and related to the Conditional Waiver from 2010 to 2012.

Throughout the recent exercise which lead to the ultimate adoption of the March 2012 Conditional Waiver, the same circular conversations have obfuscated and delayed both the legal process which the Regional Board is beholden to and the practical objective of achieving water quality improvements on the Central Coast (a second and vastly more important duty of the Regional Board). Each successive iteration of the Draft Order was informed by stakeholder comments and participation, and in fact what started as a robust and well-crafted order in 2010 was significantly “watered down” in response to agriculture’s many objections. The resulting March 2012 Order barely passes inspection, but it is nonetheless a critical improvement over the original 2004 Conditional Waiver.

In particular, the monitoring and reporting requirements which are new to the 2012 Order are necessary for its success. Among other things, these provisions will: (a) require the collection of meaningful data which is qualitatively and quantitatively superior to data

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collected under the 2004 Order; (b) increase individual accountability among the discharger community and decrease communal costs; (c) allow for more efficient and effective enforcement actions by the Regional Board; and (d) provide the public with more accurate and useful information (as compared to the 2004 Order).

The 2004 Order was a first step. In eight years, however, the 2004 Order has failed to prevent agricultural operations from causing “widespread and serious impacts on people and aquatic life” on a regular and ongoing basis. Domestic and public water supplies have been significantly contaminated with nitrates and other agricultural pollutants, in many cases at levels that far exceed applicable drinking water standards. Similarly, toxic surface water discharges from irrigation ditches continue to regularly violate water quality standards. And trends in the use of riparian vegetation buffers to protect against sedimentation, nutrient loading, and temperature increases are going in exactly the wrong direction. (Regional Board Staff Preliminary Draft Report, Feb. 1, 2010, p. 16.) The severity of the problem is demonstrated by the existing Section 303(d) impaired waterbodies list for the Central Coast region. Order R3-2012-0011 represents an opportunity to fix the problems on our Central Coast and make sure that we all have water for drinking, for agriculture and for habitat, for the long and foreseeable future.

We urge the State Board to protect the public interest and immediately dispense with these stay requests. As noted in EDC’s preliminary response to the requests from petitioners in SWRCB/OCC Files A-2209(b)-(e) to stay some or all provisions of the 2012 Conditional Waiver, agriculture has failed to meet the burden of proof required by California Code of Regulations Title 23, Section 2053(a). This failure is illustrated in the ISSUES TO BE ADDRESSED, which focus on whether petitioners and/or the public interest will be harmed by a stay. Notably, the ISSUES TO BE ADDRESSED do not reference any of the “substantial questions of fact or law” alleged by petitioners.

We look forward to continuing this vital conversation before the State Board, but your August 30 hearing should be the final word on this matter. Specific responses to the ISSUES TO BE ADDRESSED are below.

Provide cost estimates, and the underlying assumptions for those cost estimates, for specific actions through the end of 2013 necessary to comply with each of the following provisions. Each provision should be addressed separately. Where feasible, cost estimates should be expressed as both per acre and total farm costs. Ranges of costs are acceptable.

EDC does not have direct access to the cost figures requested by the State Board, nor do we currently have funding available to retain an expert on these matters. We therefore respectfully defer to the expertise of the Regional Board when discussing costs of the regulatory program. The following discussion is necessarily general.

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Installation of back flow prevention devices (Provision 31)

As stated in the Staff Report for March 14-15, 2012, on pages 22-23:

The [2012 Order] is scaled based on threat to water quality and lessens or maintains existing requirements for approximately 97% of farms and 86% of the irrigated acreage in the region. The [Order] does include requirements to monitor groundwater (twice in the first year) and install backflow prevention devices on wells where chemicals are applied and *most growers have indicated they are already implementing these practices.*

(Emphasis added.) Throughout the above-referenced processes, agriculture has consistently complained about the costs of implementing provisions of the Conditional Waiver. Large numbers are used to demonstrate the “massive” new expenditures that will be necessitated by “new” requirements. These cost estimates, however, generally fail to take into account that: (a) many practices are already utilized, and costs are therefore already internalized, (b) the vast majority of growers (97% of farms) will not be required to implement new practices or incur new costs, and (c) costs to those growers in Tier 3, for example, who cultivate thousands of acres and generate millions of dollars of revenue are *relatively* minimal.

Maintenance of containment structures (Provision 33)

The Staff Report for March 14-15, 2012, notes on page 17:

Agricultural representatives also submitted their estimates of costs regarding [the 2012 Order] The report is flawed in several ways, as described below, and therefore is not an actual cost analysis or cost comparison, and cannot be evaluated as such. . . . Some of the assumptions overestimate the number of farms and acreage in tiers of the [2012 Order], and if and how some of the [2012 Order] Conditions apply to farms, hence overestimating costs. For example, the costs include all dischargers (in all tiers) constructing containment structures and all Tier 3 dischargers installing riparian buffers. Neither of these requirements apply, so the resulting cost information is not valid.

Again, petitioners attempted to conflate the costs of Tier 3 requirements with overall costs of the 2012 Order. Costs associated with Tier 3 requirements must be considered *relative* to both the costs which Tier 3 dischargers impose on the public trust *and* the revenues associated Tier 3 operations. We understand that many growers operate on increasingly thin margins, and no stakeholder associated with this process has indicated a desire to convert lands out of agriculture. In fact, a purpose of this Conditional Waiver should be to support and/or incentivize sustainable agriculture which can provide long-term stewardship to the public trust. Similarly, a purpose of the Conditional Waiver should be to identify and clean up those operations which present the highest threats to water quality.

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Explain the benefit to the environment or to the irrigated lands regulatory program that will accrue from compliance with the following provisions prior to the end of 2013:

Annual compliance form reporting (Provision 67, MRPs Tiers 2-3, Part 3)

As noted above, monitoring and reporting requirements are critical provisions of the Conditional Waiver. The regulatory program will not function without adequate measures for determining compliance. Similarly, the affected public will not have confidence in a program which is designed to protect public health and the environment but which has no tangible metrics.

As stated in the Regional Board's Staff Report for February 1, 2010, on page 19, the 2004 Order lacked "clarity and focus on water quality requirements" and did not include "adequate compliance and verification monitoring."

Determination of nitrate loading risk factors, determination of total nitrogen applied (Provision 68, MRPs Tiers 2-3, Part 2, Section C)

As stated in the Staff Report for March 14-15, 2012, on page 7-8:

The [2012 Order] prioritizes conditions to control nitrate loading to groundwater and impacts to public drinking water systems (Finding #6). Extensive studies and empirical data verify that fertilizer from irrigated agriculture is the overwhelming source of nitrate pollution in groundwater in intensively farmed areas such as the lower Salinas Valley and lower Santa Maria Valley. According to the most recent data from California Department of Public Health in the Water Board's GeoTracker database, as of the date of this staff report, approximately 273 public supply wells (serving hundreds of thousands of people) exceed the state drinking water standard and must be treated before it can be provided to the consumer. In parts of the Salinas groundwater basin, more than 33% of the public supply wells used for drinking water exceed the drinking water standard and require treatment. In the Santa Maria groundwater basin, more than 29% of public supply wells used for drinking water exceed the drinking water standard and require treatment. Municipalities and water purveyors in many areas must treat drinking water to remove nitrates before providing the water to customers. The cost to municipalities and the public for treating drinking water polluted by nitrate is estimated to be in the hundreds of millions of dollars, and the cost is increasing over time as the pollutant loading continues.

"Addressing Nitrate in California's Drinking Water," by Thomas Harter and Jay R. Lund, available at <http://groundaternitrate.ucdavis.edu/>, states on page 2 that "inconsistency and inaccessibility of data prevent effective and continuous assessment." Nonetheless, the report concludes that "nitrate loading reductions are possible, some at modest cost." *Id.* Cleaning up historic and ongoing nitrogen exceedences on the Central Coast will take time and a concerted effort on behalf of all dischargers. As noted above, nitrogen contamination is one

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of the most pressing water quality issues in our region, and we must take action *now* to begin remedying it.

Individual surface water discharge monitoring and reporting (Provisions 72 and 73, MRP Tier 3, Part 5)

The 2004 Order itself states that in time “increased reporting and monitoring may be required in order to ensure that water quality is improving.” (Central Coast Regional Board Order No. R3-2004-0117, p. 3.) While the Cooperative Monitoring Program (CMP) has produced useful data, a critical flaw of the 2004 Order was a lack of individual discharge monitoring. Ambient data produced through the CMP does allow the Regional Board and stakeholders to identify general long-term water quality trends; however the data does not allow for the identification of specific discharges. Staff Report for March 14-15, 2012, p. 6.

Toxicity monitoring is illustrative of the benefits that can be achieved by the irrigated lands regulatory program by the end of 2013. It is widely acknowledged that nutrient contamination is a historic problem with no short-term solution. Acute toxicity in surface waters, on the other hand, is a problem which can be addressed immediately. Without individual or site-specific monitoring for toxicity, however, it will be impossible for the Regional Board and growers to take corrective action. We already know where there are toxic “hotspots,” and we often know the general source(s) of toxic discharge. See, for example, The California Water Boards’ Annual Performance Report – Fiscal Year 2010-11, available at http://www.waterboards.ca.gov/about_us/performance_report_1011/ecosystems_docs/toxicity_outcome_measure.pdf (“The difference in water toxicity between agricultural and undeveloped areas was statistically significant; and . . . [g]reater water toxicity was observed in agricultural relative to urban sites.”) The 2010-11 Performance Report also indicates that current monitoring efforts are not adequate to address toxicity problems.

In addition, there is a widespread gap in the availability of groundwater quality data throughout the region. Groundwater is directly linked to surface water quality through surface-to-groundwater interactions and through tail water discharges. Without groundwater data, the Regional Board and stakeholders are unable to evaluate whether the current program is improving groundwater quality over time. Without groundwater data, it is also impossible for growers to make certain informed decisions regarding nutrient management.

Individual or site-specific monitoring would provide useful, cost-effective, timely, and easily obtained information to assist discharges to identify pollutant sources, implement corrective actions, and revise best management practices (BMPs).

CONCLUSION

By the time the 2012 Order was adopted, the original (five-year) 2004 Order was almost eight years old, and stakeholders had been discussing it for more than three years. The 2012 Ag Order will itself be subject to revision in five years or less, and the Regional Board has jurisdiction to revisit components of the program at any time between now and

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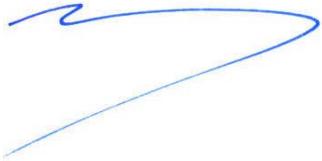
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then. Additional time spent debating the finer points of the 2012 Order – and consequently delaying its implementation – is time wasted. It is time to move forward.

Petitioners' attempt to delay implementation of the 2012 Ag Order threatens human health and our environment; in fact, petitioners' short-sighted view of the "costs" of the Conditional Waiver ignore the very real threat that agricultural discharges pose *to agriculture itself*. Agriculture, as petitioners and others have pointed out, is completely dependent on reliable supplies of fresh, clean water. The public interest depends on clean water, and both the State and Regional Boards are tasked with protecting and enhancing water quality.

We urge you to deny these stay requests.

Sincerely,



Nathan G. Alley
Staff Attorney