

1 SOMACH SIMMONS & DUNN
THERESA A. DUNHAM, ESQ. (SBN 187644)
2 BRENDA C. BASS, ESQ. (SBN 306793)
500 Capitol Mall, Suite 1000
3 Sacramento, CA 95814
Telephone: (916) 446-7979
4 Facsimile: (916) 446-8199
Email: tdunham@somachlaw.com
5 Email: bbass@somachlaw.com

6 Attorneys for Interested Party Dairy Cares

7
8
9

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

10
11
12
13
14
15

*In the Matter of Reissued Waste Discharge
Requirements General Order For Existing Milk
Cow Dairies – Central Valley Region Order No.
R5-2013-0122*

SWRCB/OCC File No. A-2283(b)

DAIRY CARES' RESPONSE TO
ENVIRONMENTAL LAW FOUNDATION AND
ASOCIACION DE GENTE UNIDA POR EL
AGUA'S PETITION FOR REVIEW

16
17
18
19
20
21
22
23
24
25
26

On October 3, 2013, the Central Valley Regional Water Quality Control Board (Regional Board) adopted the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2013-0122 (2013 General Order). The General Order was reissued following a court order finding that the prior Waste Discharge Requirements General Order for Existing Milk Cow Dairies, adopted in 2007 (2007 Order), did not comply with the State Water Resources Control Board's (State Board) Resolution 68-16, titled the Statement of Policy with Respect to Maintaining High Quality of Waters in California (State Antidegradation Policy). Petitioners Environmental Law Foundation and Asociación de Gente Unida por el Agua (collectively, "Petitioners") now seek review of the 2013 General Order, claiming that it continues to violate the State Antidegradation.Policy.

27
28

Dairy Cares is a non-profit coalition formed to ensure the long-term sustainability of California's dairy farming families. Its members include numerous dairy farming cooperatives and

1 corporations, as well as other businesses that are part of the dairy and milk production supply
2 chain. Through Dairy Cares, dairy farm families are supported by dairy cooperatives, processors,
3 trade associations, and other businesses involved in the state' s dairy industry. These families are
4 committed to caring for their animals and protecting our land, water, and air resources-all while
5 providing nutritious and affordable dairy foods that support the health of millions of families. As
6 "Community Alliance for Responsible Environmental Stewardship," Dairy Cares participated as
7 an intervenor-respondent in the litigation that challenged the 2007 Order.

8 On behalf of its members, and the dairy farm families who make up those member
9 organizations, Dairy Cares submits the attached response to the Petitioners' Petition for Review
10 of the 2013 General Order (Petition for Review).

11
12 SOMACH SIMMONS & DUNN
A Professional Corporation

13
14 By: 

15 DATED: February 2, 2018.

16 Theresa A. Dunham
Attorneys for Interested Party Dairy Cares

17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 The 2013 General Order regulates the discharges of waste to groundwater from existing
3 milk cow dairies. (2013 General Order, Finding 2.) According to the Regional Board's
4 estimates, 1,300 dairies are currently regulated by the 2013 General Order.¹ (*Id.*, Finding 12, p. 3;
5 see also *id.* at p. IS-4.) The Petition for Review claims that the 2013 General Order violates the
6 State Antidegradation Policy, particularly as interpreted by the Third District Court of Appeals in
7 *Asociación de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board*
8 (2012) 210 Cal.App.4th 1255 (*AGUA*). It further claims that the 2013 General Order does not
9 comply with the Human Right to Water Act and discriminates against minority and low-income
10 communities. The 2013 General Order does none of this.

11 The 2013 General Order properly considers and applies the State Antidegradation Policy
12 to high-quality waters, including groundwater in the Central Valley. It makes required findings
13 regarding the maximum benefit to the people of the state and available best practicable treatment
14 or controls. Finally, it allows some degradation of high-quality waters, which is authorized by
15 both the State Antidegradation Policy and the Porter-Cologne Water Quality Act (Wat. Code,
16 §§ 13000 et seq.) (Porter-Cologne). The 2013 General Order was not required to consider the
17 Huma Right to Water Act, nor does it discriminate against protected classes. Thus, the State
18 Board should deny the Petitioners' claims in the Petition for Review and find that the 2013
19 General Order is consistent and compliant with all state laws and policies.

20 **II. BRIEF HISTORICAL AND LEGAL BACKGROUND**

21 **A. The State Antidegradation Policy**

22 The Petitioners primarily take issue with the Regional Board's application of the State
23 Antidegradation Policy to the 2013 General Order. The 2013 General Order regulates discharges
24 from existing milk cow dairies-that is, dairies which were in operation on October 17, 2005 and
25

26 _____
27 ¹The California Department of Food and Agriculture's 2016 annual statistics report lists only 1, 126 dairies in the
28 Central Valley, indicating that the number of dairies covered by the 2013 General Order has decreased in recent
years. (California Department of Food & Agriculture, California Dairy Statistics Annual: 2016 Data, p. 3 [available
at https://www.cdffa.ca.gov/dairy/pdf/Annual/2016/2016_Statistics_Annual.pdf].)

1 submitted a report of waste discharge by a date certain.² (2013 General Order, Finding 2.) In
2 adopting the 2013 General Order, the Regional Board was required to consider the State
3 Antidegradation Policy where permitted discharges would be released to waters of high quality.
4 (*Id.* at Finding 26, p. 8.) Importantly, the State Antidegradation Policy applies to *high-quality*
5 waters, as defined; it does not apply to all waters in the state. The State Antidegradation Policy
6 provides:

7 1. Whenever the existing quality of water is better than the quality
8 established in policies as of the date on which such policies become effective,
9 such existing high quality will be maintained until it has been demonstrated to the
10 State that any change will be consistent with maximum benefit to the people of the
11 State, will not unreasonably affect present and anticipated beneficial use of such
12 water and will not result in water quality less than that prescribed in the
13 policies.

14 2. Any activity which produces or may produce a waste or increased volume
15 or concentration of waste and which discharges or proposes to discharge to
16 existing high quality waters will be required to meet waste discharge requirements
17 which will result in the best practicable treatment or control of the discharge
18 necessary to assure that (a) a pollution or nuisance will not occur and (b) the
19 highest water quality consistent with maximum benefit to the people of the State
20 will be maintained.

21 (Resolution No. 68-16.)

22 The State Antidegradation Policy is neither a no-degradation nor a "zero discharge"
23 policy. (State Water Resources Control Board, Order No. WQ 86-8, at p. 29.) Rather, it provides
24 that a Regional Board may allow discharges to, and degradation of, high-quality waters when it
25 has analyzed the costs and benefits of that discharge and nevertheless finds that the degradation is
26 for the maximum benefit to the people of California. (*Ibid.*; Resolution No. 68-16.) Additionally,
27 the degradation so permitted may not create a condition of pollution or nuisance.

28 **B. The 2007 Order and Petitioners' Challenge to the 2007 Order**

When the Regional Board considered whether the State Antidegradation Policy would
apply to the discharges permitted under the 2007 Order, it concluded that the State
Antidegradation Policy did not apply because, although the receiving groundwater in the Central
Valley is considered high quality for certain constituents, the 2007 Order did not authorize any

²These dairies were initially regulated under the 2007 Order. (2013 General Order, Finding 2.)

1 degradation of groundwater. (See *AGUA, supra*, 210 Cal.App.4th at p. 1260.) Following the
2 Regional Board's adoption of the 2007 Order, Petitioners ~led a petition for review with the State
3 Board. Upon the State Board's decision not to consider the petition, Petitioners filed a petition
4 for writ of mandate in the Sacramento County Superior Court, alleging that the Regional Board
5 violated California law by failing to apply the State Antidegradation Policy to the 2007 Order.
6 (*Id.* at p. 1266.) The trial court denied Petitioners' writ of mandate. (*Ibid.*) Petitioners appealed
7 the trial court's denial of their petition for writ of mandate. (*Ibid.*)

8 The Third District Court of Appeals reversed the trial court and found that the Regional
9 Board's conclusion that the State Antidegradation Policy did not apply because the 2007 Order
10 did not authorize degradation, and the findings that beneficial uses of groundwater would be
11 protected that were based upon this conclusion lacked substantial evidence in support. (*AGUA,*
12 *supra*, 210 Cal.App.4th at p. 1261.) Specifically, the *AGUA* Court found that the prohibition of
13 further degradation of groundwater quality was merely hopeful when the 2007 Order did not
14 require adequate monitoring to ensure that degradation does not occur in actuality. (*Ibid.*)

15 After the Third District Court of Appeals held that the Regional Board failed to properly
16 apply the State Antidegradation Policy to the 2007 Order, it issued a remittitur to the trial court,
17 directing it to issue a writ of mandamus ordering the Regional Board to comply with the State
18 Antidegradation Policy. (*AGUA, supra*, 210 Cal.App.4th at p. 1287.) The trial court's writ of
19 mandamus directed the Regional Board to set aside the 2007 Order and reissue a general order
20 after the application of, and compliance with, the State Antidegradation Policy. The 2013
21 General Order is the result of that reissuance process, embodying the proper application of the
22 State Anti degradation Policy.

23 **C. The State Board's Draft Order for Agricultural Discharges in the Eastern**
24 **San Joaquin River Watershed Provides Helpful Guidance for**
Antidegradation Analysis of Agricultural Discharges

25 The State Board staff's Revised Second Draft Order In the Matter of Review of Waste
26 Discharge Requirements General Order No. RS-2012-0116 for Growers Within the Eastern San
27 Joaquin River Watershed that are Members of the Third-Party Group (Revised Second Draft ESJ
28 Order) considers and applies the State Antidegradation Policy and notes that the nonpoint

1 discharges from agricultural operations must be analyzed differently than point source
2 discharges.³ (Revised Second Draft ESJ Order, pp. 78-79.) Specifically, State Board staff agree
3 with an approach establishing baseline groundwater quality generally where there is a lack of
4 detailed historical water quality data throughout the area covered by the general order. (*Id.* at pp.
5 79-80.) It also notes that the Regional Board's approach of conducting a general antidegradation
6 analysis when at least some of the groundwaters are of high quality is appropriate. (*Ibid.*)

7 Additionally, the State Board staff acknowledge that the maximum benefit to the people
8 of the state analysis may properly consider social and economic impacts to the agricultural sector
9 and the associated impacts on the nation's food security and the local job economy. (Revised
10 Second Draft ESJ Order, pp. 80.) The State Board staff also note that an iterative process of
11 monitoring groundwater quality, implementing nutrient management plans, and implementing
12 other management practices based on monitoring results can constitute the best practicable
13 treatment or control for agricultural discharges. (*Id.* at p. 81.)

14 The State Board staff's discussion in the Revised Second Draft ESJ Order demonstrates
15 how the State Antidegradation Policy should be applied and evaluated in the context of General
16 Orders dealing with nonpoint sources of pollution. While some may argue that dairies are point
17 sources, in fact, dairy facilities are more like nonpoint source agricultural operations than they are
18 traditional point source type facilities. As such, the Revised Second Draft ESJ Order is helpful to
19 compare to the 2013 General Order regarding application of the State Antidegradation Policy.

20 **III. RESPONSES TO PETITIONER'S CLAIMS**

21 **A. The 2013 General Order Complies with the State Antidegradation Policy and** 22 **the Court of Appeals' Decision in AGUA**

23 Contrary to the Petitioners' claims, the Regional Board complied with the State
24 Antidegradation Policy and the Court of Appeals' decision in *AGUA* when it adopted the 2013
25 General Order. Specifically, the Regional Board applied the State Antidegradation Policy,

26 ³The State Board will consider adoption of the Revised Second Draft ESJ Order on February 7, 2018. If the State
27 Board adopts the Revised Second Draft Order as currently proposed, the argument provided here would be that of
28 the State Board and not just State Board staff. A copy of the strikethrough version of the Revised Second Draft ESJ
Order, as referenced in this Response, is available at:
https://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a2239/order.pdf.

1 improved monitoring requirements to ensure that adequate groundwater monitoring occurs to
2 limit the amount of groundwater quality degradation associated with dairy discharges, established
3 an appropriate time schedule for dischargers who cannot meet order requirements to implement
4 management improvements, established best practicable treatments or controls for four discharge
5 sources associated with dairy operations, and adequately analyzed the maximum benefit to the
6 people of the state with regard to dairy discharges.

7 Each of Petitioners' specific complaints about the 2013 General Order in relation to the
8 *AGUA* decision are addressed separately.

9 **1. The 2013 General Order Will Not Unreasonably Affect Present and**
10 **Anticipated Beneficial Uses of Receiving Waters**

11 Contrary to Petitioners' insinuations, the State Antidegradation Policy does not prevent,
12 wholesale, the Regional Board from allowing degradation of high-quality waters. By its express
13 terms, the State Antidegradation Policy authorizes some degradation of such waters as long as the
14 Regional Board can show that the change in water quality is: (1) consistent with the maximum
15 benefit to the people of the state; (2) will not unreasonably affect present and anticipated
16 beneficial use of such water; and (3) will not result in receiving water quality that exceeds
17 applicable water quality objectives. (Resolution 68-16.) In adopting the 2013 General Order, the
18 Regional Board made the required findings and properly authorized the limited degradation of
19 receiving waters due to dairy discharges.

20 The 2013 General Order contains a discharge prohibition that prevents existing dairies
21 from discharging wastes that would cause the underlying groundwater to exceed applicable water
22 quality objectives, unless that discharger is presently making improvements to the management
23 practices that are not adequately protective of groundwater under a time schedule that is as short
24 as practicable. (2013 General Order, Finding 27, p. 8; see also Groundwater Limitation 1, p. 23.)
25 The General Order further provides that the time schedule cannot exceed ten years in duration.
26 (*Id.* at Provision M, p. 29.) Thus, any degradation in excess of water quality objectives allowed
27 by the 2013 General Order is capped at a maximum of ten years. (*Ibid.*)
28

1 The Petitioners take particular issue with the 2013 General Order's inclusion of this time
2 schedule, despite the fact that such a time schedule is compliant with Porter-Cologne.⁴ Porter-
3 Cologne provides that, when issuing waste discharge requirements, the Regional Board may
4 include a time schedule at its discretion for meeting imposed requirements, including compliance
5 with water quality objectives. (Wat. Code, § 13263(c).) Thus, the Regional Board is authorized
6 to include in a general order a time schedule for meeting its requirements, even when current
7 discharges may exceed water quality objectives. The Regional Board properly exercised its
8 discretion when it included the time schedule for discharges from existing dairies in the 2013
9 General Order.

10 Based upon the lack of groundwater quality monitoring information at the time of the
11 adoption of the 2013 General Order, and other challenges facing the Central Valley's dairy
12 farmers, the Regional Board concluded that a time schedule was appropriate and that the time
13 schedule should be flexible in duration, based upon the nature of the management practice
14 improvement being made by the discharger. (2013 General Order, p. IS-18-IS-19; see also
15 Regional Board Response to Comments, Responses C.1.c and C.2.d.) Specifically, the Regional
16 Board notes that "implementation of some management practice changes, such as modification of
17 nutrient application rates or timing of nutrient application, may occur almost immediately, while
18 infrastructure changes such as corral slope modification may require a somewhat longer period of
19 time but not the entire length of time allotted to achieve compliance" with the 2013 General
20 Order. (Regional Board Response to Comments, Response C.2.d.) Therefore, the Regional
21 Board established an appropriate time schedule for dischargers to come into compliance with the
22 2013 General Order, particularly one that acknowledges that not every management practice
23 improvement will warrant the full ten-year schedule.

24 Petitioners espouse fears that management practices will be determined by the Regional
25 Board to be impracticable "in perpetuity," but provide no basis in fact or in the record for such
26 fears. Indeed, in the 2013 General Order the Regional Board included substantive requirements

27 _____
28 ⁴ Additionally, Petitioners erroneously assert that the time schedule is "undefined," when the time schedule has a
clearly defined maximum duration often years. (2013 General Order, Provision M, p. 29.)

1 for demonstrating a need for a longer time schedule for compliance and appropriately limited that
2 time schedule to a maximum length often years. (2013 General Order, Provision M, p. 29.)
3 Petitioners' fears of unmitigated degradation are primarily related to the Regional Board's
4 decision that immediate retrofits of all existing ponds is impracticable. However, the fact that the
5 Regional Board determined that requiring a specific retrofit of existing wastewater retention
6 ponds-only one potential source of waste discharges to groundwater-is economically
7 infeasible to impose immediately does not mean that such retrofits will remain infeasible for any
8 individual dairy "in perpetuity." Furthermore, the 2013 General Order clearly states that "in no
9 case may time schedules extend beyond 10 years from the date the [monitoring summary report]
10 is approved by the Executive Officer." (*Ibid.*) Thus, the flexibility built into the time schedule in
11 the 2013 General Order is based on technical and economic justifications, and capped at ten
12 years. Any further extension beyond the ten years would require amendment of the General
13 Order by the Regional Board, and any such amendment would be subject to public notice and
14 review. The 2013 General Order by its own terms cannot allow a time schedule beyond the ten
15 years. Petitioners' fears are contrary to the plain language of the 2013 General Order.

16 Moreover, to the extent that Petitioners' fears are related to future actions by the Regional
17 Board, such fears are unsupported by evidence in the record, speculative and are irrelevant as to
18 whether the Regional Board complied with the law in adopting the 2013 General Order. The time
19 schedule in the 2013 General Order complies with Porter-Cologne and does not violate the State
20 Antidegradation Policy.

21 **2. The 2013 General Order Establishes Best Practicable Treatment or**
22 **Control for Dairy Facilities**

23 The State Antidegradation Policy requires that discharges must undergo the best
24 practicable treatment or control (BPTC) necessary to ensure that pollution and nuisance will not
25 occur, as well as maintain the highest water quality consistent with the maximum benefit to the
26 people of the state. (Resolution 68-16.) The key part of this requirement is that the treatment or
27 control required must be *practicable*. Petitioners ignore this fundamental requirement and instead
28

1 focus their argument on their perceived "best" treatment or control mechanism, without any regard
2 to its practicability.

3 The BPTC standard is in almost constant flux because it considers "technical feasibility of
4 deploying new or improved treatment or control methodologies, new scientific insights regarding
5 the effect of pollutants, and the economic realities that regulated industries face," as the Regional
6 Board observed in the 2013 General Order. (2013 General Order, p. IS-12.) As each of these
7 variables changes over time, so does the assessment of the BPTC. (*Ibid.*) To determine whether
8 a treatment or control measure is practicable, the Regional Board must consider the costs
9 associated with the proposed treatment and control measure. (*Ibid.*)

10 The 2013 General Order contains BPTC for four sources of dairy wastewater discharges:
11 (1) production areas, such as milking parlors, corrals, and feed storage areas; (2) land application
12 areas; (3) new or expanded wastewater retention ponds; and (4) existing wastewater retention
13 ponds. (2013 General Order, Finding 28, pp. 8-9; see also pp. IS-14-IS-18.) For production
14 areas, the 2013 General Order requires compliance with regulations governing the design of milk
15 dairy buildings and other permit requirements related to drainage and paving so water that has
16 come into contact with feed or manure is diverted away from corrals and other facilities and
17 conveyed directly to the wastewater retention system. (*Id.* at p. IS-15.) Production areas must
18 also be designed so that clean rainwater is diverted away from manured areas. (*Ibid.*) Corrals
19 themselves must be managed to reduce infiltration and to ensure that wastes are conveyed to the
20 retention system. (*Ibid.*) For land application areas-that is, areas where dairy wastes are
21 applied as fertilizer for cropland-the Regional Board found that the BPTC is an effective
22 nutrient management plan that calculates the amount and kind of wastewater that can be applied
23 without causing adverse impacts to groundwater. (*Ibid.*; see also Finding 28.b, p. 9.) For new
24 and expanded wastewater retention ponds, the Regional Board found that the BPTC is to design
25 ponds according to requirements "more stringent than the requirements in Title 27" of the
26 California Code of Regulations. (*Id.* at Finding 28.d, p. 9.) These requirements generally require
27 either a double-lined pond with a leachate collection and removal system (Tier 1), or a pond
28 designed according to California Natural Resource Conservation Service Conservation Practice

1 Standard 313, or equivalent, which the discharger demonstrates is protective of groundwater
2 quality (Tier 2). (*Id.* at pp. IS-17-IS-18.)

3 When developing the BPTC for existing wastewater retention ponds, the Regional Board
4 undertook the aforementioned practicability analysis and found that requiring immediate
5 retrofitting of these ponds to include Tier 1 or Tier 2 pond linings was impracticable. (*Id.* at p.
6 IS-18; see also *id.* at Finding 28.c, p. 9.) Of particular importance to the Regional Board's
7 analysis was the cost of replacing a liner, which can range from \$180,000 for a single liner for a
8 smaller dairy operation's pond(s) to about \$1.4 million for a double liner for a larger operation's
9 pond(s). (*Id.* at p. IS-18.) In addition to these significant costs for retrofits, the Regional Board
10 considered evidence showing that dairy operations have experienced net losses in revenue in
11 recent years and that financing for such retrofits would be difficult to obtain, making it incredibly
12 challenging for dairies to complete retrofits and still remain in operation. (*Ibid.*) The closure of
13 dairy farm operations, in turn, would have severe negative impacts throughout Central Valley
14 communities. (*Ibid.*) Further, the Regional Board found that not all unlined ponds present threats
15 to groundwater quality, directly contrary to Petitioners' baseless concerns. (Regional Board
16 Response to Comments, Responses C.4.)

17 Based on the foregoing, the Regional Board concluded that requiring immediate retrofits
18 of all ponds to Tier 1 or Tier 2 would not be practicable. Instead, it decided that an iterative
19 process which continually gathers relevant groundwater quality data, evaluates existing pond
20 conditions and their impacts on groundwater quality, and evaluates case studies on management
21 practice or activity changes is the BPTC for existing dairy ponds. (2013 General Order, p. IS-18;
22 see also Finding 28.c., p. 9.) This approach investigates how ponds are impacting groundwater
23 and aids in prioritizing ponds for upgrade. (*Id.* at Finding 28.c, p. 9.) The Regional Board listed
24 potential management options other than requiring existing ponds to meet the standards
25 established for new or expanded ponds in its response to Petitioners' comments on the draft
26 version of the 2013 General Order, which included reducing the water level in ponds, dry-scrape,
27 and other modifications to unlined dairy ponds, such as adding bentonite clay to the pond, "may
28

1 be shown to be protective of groundwater quality under certain site conditions (soil types, soil
2 textures, depth to groundwater[,] etc.)." (Response to Comments, Responses C.4.)

3 This approach is consistent with existing State Board water quality orders and the *AGUA*
4 decision. Other State Board orders discuss that information about alternative treatment or control
5 methods and the costs of those alternatives is part of determining what is BPTC. (State Water
6 Resources Control Board, Order No. WQ 2000-07, at p. 11.) The State Board has also explained
7 that in order to evaluate the BPTC, regional boards should compare the proposed method with
8 other existing methods, and evaluate performance data and usage by similarly situated
9 dischargers. (State Water Resources Control Board, *Questions and Answers: State Water*
10 *Resources Control Board Resolution No. 68-16* (Feb. 16, 1995) [*Questions and Answers*] at p. 6.)
11 The Regional Board considered the available treatment and control options, as well as the costs
12 associated with each, and the varying hydrogeological conditions underlying dairies in the Central
13 Valley, when it determined that the methods for treatment and control set forth in the 2013
14 General Order for each of the four sources of waste discharge were the BPTC. (2013 General
15 Order, p. IS-18; see also Finding 28.c., p. 9.) This also complies with the court's direction in
16 *AGUA*, which stated that BPTC must be established for each potential source of discharges of
17 dairy wastewater. (*AGUA, supra*, 210 Cal.App.4th at p. 1284.) Specifically, the court held that
18 because the 2007 Order identified milk parlors and corrals as principal sources of groundwater
19 degradation, the order must set forth a BPTC for these discharges. (*Ibid.*) The 2013 General
20 Order lists four principal sources of groundwater degradation-production areas, land application
21 areas, new or expanded ponds, and existing ponds-and sets forth BPTC for each of these
22 sources. (2013 General Order, Finding 28, pp. 8-9; see also pp. IS-14-IS-18.) Thus, the Regional
23 Board complied with prior State Board orders and directives regarding establishing BPTC, and
24 complied with the decision in *AGUA*.

25 In addition to complying with state law regarding BPTC generally, the iterative approach
26 that the Regional Board used for existing ponds is also analogous to the approach to BPTC the
27 State Board is considering in its Revised Second Draft ESJ Order. In the Revised Second Draft
28 ESJ Order, the BPTC included monitoring of water quality and the implementation of nutrient

1 management plans when trends show that degradation is threatening beneficial uses. (Revised
2 Second Draft ESJ Order, p. 81.) The 2013 General Order similarly requires monitoring and the
3 implementation of new management practices when the monitoring results indicate that
4 degradation threatens to approach water quality objectives. (2013 General Order, p. IS-18; see
5 also Finding 28.c., p. 9.) The State Board staff find this iterative process to be sufficient as BPTC
6 under the State Antidegradation Policy in the Revised Second Draft ESJ Order. (Revised Second
7 Draft ESJ Order, p. 81.) By extension, the requirements in the 2013 General Order are adequate
8 under the State Antidegradation Policy.

9 Petitioners neither assert that retrofits to Tier 1 or Tier 2 standards are affordable, nor
10 offer any evidence contrary to the Regional Board's determination that such improvements would
11 be cost-prohibitive for dairies to implement. Similarly, Petitioners do not offer evidence that
12 management practices other than lining existing ponds to Tier 1 or Tier 2 standards are
13 demonstrably inferior to lining in all circumstances. In short, Petitioners fail to provide any basis
14 that would undermine the Regional Board's conclusions that requiring blanket and immediate
15 pond retrofits would be impracticable. The Regional Board's conclusions are supported by
16 substantial evidence and should not be disturbed.

17 Requiring retrofits to Tier 1 or Tier 2 standards is not practicable, and therefore it cannot
18 be the best practicable treatment or control. The iterative process selected by the Regional Board
19 in the 2013 General Order is the best practicable treatment or control because it gives the
20 dischargers the necessary flexibility to select the most effective management practices to protect
21 groundwater, based on their specific site conditions. The Regional Board therefore complied with
22 the State Antidegradation Policy in concluding that immediate pond retrofits are not the best
23 practicable treatment and control for waste discharges from dairy operations.

24 **3. The 2013 General Order Adequately Analyzes the Maximum Benefit**
25 **to the People of the State**

26 The State Antidegradation Policy also requires that the Regional Board determine that the
27 degradation it authorizes is "consistent with the maximum benefit to the people of the state."
28 (Resolution 68-16.) The Regional Board considers several factors in coming to this

1 determination, including the economic and social costs of the proposed discharge, the
2 environmental aspects of the proposed discharge, and the available and feasible alternatives for
3 treatment and control. (*Questions and Answers*, at p. 5.) "Cost savings to the discharger,
4 standing alone, absent a demonstration of how these savings are necessary to accommodate
5 important social and economic development, are not adequate justification for allowing
6 degradation." (State Water Resources Control Board, *Administrative Procedures Update:
7 Antidegradation Policy Implementation for NPDES Permitting*, APU 90-004 (May 1990) at
8 p. 12.) Because the State Antidegradation Policy is not a no-growth or zero-degradation policy,
9 the Regional Board may allow some degradation, provided it is consistent with the maximum
10 benefit to the people of the state and will not unreasonably affect beneficial uses. (State Water
11 Resources Control Board, Order No. WQ 86-8, at p. 29; see also 2013 General Order, p. IS-13.)

12 In approving the 2013 General Order, the Regional Board properly analyzed the permitted
13 degradation and concluded that it is consistent with the maximum benefit to the people of the
14 state. (2013 General Order, Finding 33, p. 1 O; see also pp. IS-I 9-IS-20.) Specifically, the
15 Regional Board considered the cost savings that the dischargers would receive: that the
16 allowance of some degradation over a specified period of time would save dairy operations
17 money and allow them to focus their resources on meeting water quality objectives. (*Id.* at p. IS-
18 19.) The Regional Board also concluded that meeting water quality objectives would protect the
19 beneficial uses of groundwater, including drinking water uses for communities dependent upon
20 groundwater, even if high-quality waters are somewhat degraded. (*Ibid.*) The provisions in the
21 2013 General Order ensure that degradation is allowed only up to the established water quality
22 objectives, which are set at levels to protect beneficial uses,⁵ and no higher. (*Ibid.*)

23 Contrary to Petitioners' assertions, the Regional Board did not end its analysis with
24

25 ⁵Petitioners, without basis in the State Antidegradation Policy, argue that allowing degradation up to water quality
26 objectives is not allowable, or that this would not protect beneficial uses. However, the water quality objectives are
27 set at levels that are separately determined to be protective of beneficial uses. (See Response to Comments,
28 Response C.2.a ["For nitrates, the constituent that presents the greatest threat to those who utilize groundwater as a
source of drinking water, the public health goal and the [maximum contaminant level] are identical".]) In any case,
challenging the 2013 General Order will not change the relevant water quality objectives, if that is what the
Petitioners are concerned about.

1 consideration of the cost savings to be realized by dairy operations (i.e., the dischargers). Rather,
2 the Regional Board went on to consider how the cost savings are necessary to accommodate
3 important social and economic development. The Regional Board found that the dairy industry is
4 "important to the economic well-being of the Central Valley," and that it generates a significant
5 amount of jobs in numerous sectors, including farm employees, farm and veterinary service
6 providers, animal feed growers, milk and dairy processors, and transportation service providers.
7 (2013 General Order, p. IS-19.) The Regional Board based their conclusion upon data and
8 information generated by the California Milk Advisory Board, which estimates that the dairy
9 industry in California is responsible for about \$63 billion in economic activity. (*Id.* at p. IS-20.)

10 In addition to the vital economic importance of the dairy industry, the Regional Board
11 considered the social importance of Central Valley dairy operations. The Regional Board
12 considered the fact that unemployment rates are typically high in the Central Valley, and that
13 dairy closures could result in job losses in local communities. (2013 General Order, p. IS-20.)
14 The Central Valley contains 81 percent of California's dairy farms and a significant portion of the
15 state's dairy processing facilities. (*Ibid.*) In addition to the social impacts which could result
16 from lost jobs following dairy closures, California's (and the nation's) food security could be
17 tremendously and adversely affected by dairy closures and the corresponding reduction in
18 domestically-produced milk and dairy products. (*Ibid.*)

19 Furthermore, these findings are consistent with the findings upheld by the State Board in
20 the ESJ Agricultural General WDRs. There, the State Board agreed with the Regional Board's
21 maximum benefit analysis that considered social and economic impacts to the agricultural sector,
22 and specifically that higher costs of compliance with more stringent waste discharge
23 requirements would have adverse impacts on the nation's food security and the local job market.
24 (Revised Second Draft ESJ Order, p. 80.) This demonstrates that the Regional Board's
25 substantially similar analysis in the 2013 General Order is sufficient to comply with the State
26 Antidegradation Policy.

27 Again, Petitioners fail to offer contrary or even competing evidence to rebut the Regional
28 Board's conclusions regarding the maximum benefit to the people of the state. Petitioners assert,

1 without support, that allowing degradation up to water quality objectives will result in higher
2 treatment and monitoring costs for drinking water purveyors. However, the Regional Board
3 already responded to these concerns prior to adopting the 2013 General Order and explained that
4 water quality objectives are consistent with public health goals, particularly for nitrate.
5 (Response to Comments, Response C.2.a.) The State Antidegradation Policy does not specify
6 that degradation cannot approach water quality objectives. It only requires the Regional Board to
7 consider specific factors when deciding to permit degradation of high-quality waters. (Resolution
8 No. 68-16.)

9 Finally, Petitioners allege that Finding 33 of the 2013 General Order was rejected by the
10 *AGUA* decision. This is incorrect. The *AGUA* court held that the 2007 Order's finding that the
11 State Antidegradation Policy did not apply to the order was unsupported by evidence because the
12 2007 Order merely stated that it prohibited any degradation without adequate monitoring to
13 ensure that the prohibition was being met. (*AGUA, supra*, 210 Cal.App.4th at p. 1273.) It
14 further contained an exception that "assumes that some groundwater degradation is *permitted* by
15 the [2007] Order." (*Ibid.*) In contrast, the 2013 General Order *does* apply the State
16 Antidegradation Policy and notes that degradation may in fact occur. Finding 33 expressly
17 addresses this, stating that the 2013 General Order will limit degradation "so that there will not be
18 long-term impacts to beneficial uses." (2013 General Order, Finding 33, p. 10.) Additionally, the
19 2013 General Order includes more robust monitoring requirements, and demands implementation
20 of BPTC for four sources of waste discharges to protect groundwater. (*Id.* at Findings 31-32,
21 pp. 9-10.) This further addresses deficiencies that the *AGUA* court identified in the 2007 Order.

22 The Regional Board examined each required factor in the State Antidegradation Policy
23 when developing the 2013 General Order. It also properly acknowledged that the 2013 General
24 Order will likely result in some degradation of high-quality waters, but that this degradation is
25 consistent with the maximum benefit to the people of the state. (See *id.* at pp. IS-19-IS-20.)
26 Therefore, Petitioners' assertions are misplaced.

1 **B. The Human Right to Water Act Does Not Apply to the 2013 General Order**

2 The Human Right to Water Act (the Act), Water Code section 106.3, does not apply to the
3 2013 General Order by its own terms because the 2013 General Order was a quasi-judicial action
4 by the Regional Board. Therefore, the Regional Board was under no obligation to consider it
5 when it adopted the 2013 General Order.

6 The Act went into effect on January 1, 2013 and provides: "[a]ll relevant state agencies...
7 shall consider [the human right to water] when revising, adopting, or establishing policies,
8 regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the
9 uses of water described." (Wat. Code, § 106.3(b).) Crucially, the list of actions to which the Act
10 applies are quasi-legislative actions, not quasi-judicial actions. Quasi-legislative actions include
11 adopting regulations, making new rules, and establishing policies. (See *Western States Petroleum*
12 *Association v. Superior Court* (1995) 9 Cal.4th 559, 567.) Quasi-judicial actions, on the other
13 hand, involve the "exercise of judgment, and the careful balancing of conflicting interests, the
14 hallmark of the adjudicative process." (*Langsam v. City of Sausalito* (1987) 190 Cal.App.3d 871,
15 880.) Because issuing a waste discharge requirements permit such as the 2013 General Order,
16 requires the Regional Board to exercise its judgment and balance competing interests, the action
17 was quasi-judicial, and therefore outside the scope of the Act. The Regional Board had no
18 obligation to consider the Act when it adopted the 2013 General Order. (See State Water
19 Resources Control Board, Order No. WQ 2013-0 IO I, *In the Matter of Review of Conditional*
20 *Waiver of Waste Discharge Requirements Order No. R3-2012-00J J for Discharges from*
21 *Irrigated Lands*, p. 67 ("With regard to our action in adopting this Order, [Water Code] section
22 106.3, by its terms, does not apply to the issuance of a water quality order."].)

23 In 2016, about three years after the adoption of the 2013 General Order, the Regional
24 Board adopted the human right to water as a "core value," and expanded its application beyond
25 quasi-legislative actions so as to include quasi-judicial actions, namely permitting decisions.
26 (Central Valley Regional Water Quality Control Board, Resolution No. R5-2016-0018 at p.3.)
27 However, this expansion occurred after the Regional Board adopted the 2013 General Order.
28 Thus, it was not required to consider the human right to water. Based on the state of the law

1 when the Regional Board adopted the 2013 General Order, the Regional Board's actions are
2 consistent with the Act. Accordingly, the State Board should disregard Petitioners' arguments
3 related to the 2013 General Order's compliance with the Act.

4 Regardless, the 2013 General Order does not infringe upon the human right to water. In
5 adopting the 2013 General Order and undertaking the antidegradation analysis, the Regional
6 Board protected drinking water supplies. Specifically, the 2013 General Order includes
7 provisions that protect groundwater quality and ensure that discharges will not cause groundwater
8 to exceed water quality objectives set to protect beneficial uses, such as domestic and municipal
9 uses. (2013 General Order, Finding 27, p. 8.) If monitoring shows that a discharger cannot
10 immediately comply with water quality objectives, then the 2013 General Order's included time
11 schedule will allow the discharger a specified period of time during which it must come into
12 compliance. (*Ibid.*) These provisions, together with the robust monitoring requirements included
13 in the 2013 General Order,⁶ ensure that groundwater sources meet water quality objectives,
14 thereby protecting groundwater used as drinking water.

15 **C. The 2013 General Order Does Not Have Disparate, Negative Impacts on**
16 **Protected Classes.**

17 Petitioners claim that the 2013 General Order disproportionately impacts Latino and low-
18 income communities by failing to protect groundwater from "continued degradation," which
19 purportedly rises to the level of violating one of California's antidiscrimination
20 statutes.⁷ Petitioners do not provide any legal or factual analysis in support of their
21 position. Nevertheless, for the reasons set forth below, the 2013 General Order does not violate
22 the aforementioned antidiscrimination provision.

23 Violation of California's antidiscrimination statute is necessarily tied to successfully
24 establishing a discrimination claim, which requires more than a conclusory statement of
25

26 ⁶ See, generally, 2013 General Order, Monitoring and Reporting Program, pp. MRP-I-MRP-31.

27 ⁷ Petitioners also assert that the 2013 General Order will result in violation of state and/or federal civil rights laws.
28 Petitioners failed to cite to any state or federal civil rights provisions in their petition; therefore, Dairy Cares is unable to respond to such allegations.

1 disproportionate effect. California's discrimination prohibition under Government Code section
2 11135 mirrors the language of the federal anti-discrimination statute, proscribing discrimination
3 under any program or activity receiving state (or federal) funding. (Gov. Code, § 11135(a);
4 cf. 42 U.S.C. § 2000d.) Accordingly, examples of discrimination claims brought under the
5 federal statute are illustrative in evaluating what programs or activities do--or do not---cause a
6 disparate impact under the state statute, and are therefore unlawful. (*Darensburg v. Metro.*
7 *Transp. Comm 'n* (9th Cir. 2011) 636 F.3d 511 (*Darensburg*) [court looked to federal case law as
8 guidance in analyzing state disparate claims under Government Code section 11135].)

9 The disparate impact theory of discrimination applies to governmental actions or
10 programs that are facially neutral-that is, not intentionally discriminatory-yet have a
11 disproportionately adverse effect on members of a protected class. (*Guz v. Bechtel National, Inc.*
12 (2000) 24 Cal.4th 317, 354, fn. 20.) The claim necessitates proving the disparate impact, which is
13 usually demonstrated by, at the very least, a comparison of those persons affected by the neutral
14 program or activity against those unaffected. (*Darensburg, supra*, 636 F.3d at pp. 519-520.)
15 Such a comparison involves the evaluation of the entire population affected by the policy, i.e. an
16 inquiry into the impact on the total group to which a policy or decision applies, not just a subset
17 of the population. (*Id.* at p. 520.) Bare assertions and statistics alone, unless found to be
18 reasonably reliable measures of impact, are insufficient to support a finding of disparate
19 impact. (*Id.* at p. 519.)

20 First, the 2013 General Order does not discriminate on its face and lacks any
21 discriminatory intent with regard to protected classes. Second, the Petitioners fail to provide any
22 support to their argument that certain protected classes are treated differently under the 2013
23 General Order. The Petitioners cite generally to a non-peer-reviewed whitepaper and research
24 report, respectively, in support of their disproportionate effect allegation. (Petition for Review at
25 p. 14.) However, Petitioners fail to provide a comparison of the alleged impact that the 2013
26 General Order would have on the entire population of the area affected by it, and also fail to
27
28

1 include reliable, current statistics, as is required under the disparate impacts theory.⁸ Instead,
2 Petitioners assert that the implementation of the 2013 General Order, which was developed for
3 the purpose of improving the dairy industry's compliance with water quality standards, is
4 ostensibly a failure to protect groundwater tantamount to discrimination, without any evidentiary
5 support. Petitioners assume too much, and lacking the necessary comparison, their bare assertion
6 is purely speculative.

7 Merely restating statistics concerning nitrate levels in the drinking water of certain
8 communities within an entire region of the state in support of the proposition that those
9 communities are disproportionately affected thereby is simply not enough to demonstrate a
10 disparate impact. Petitioners failed to provide the most critical element of a disparate impact
11 claim: a measure (adequate or otherwise) to which to ascribe the purported discriminatory effect
12 of the 2013 General Order. Indeed, Petitioners did not even provide an explanation as to how the
13 2013 General Order results in discrimination, let alone provide supporting, reliable statistics.
14 This is insufficient. California law demands more.

15 Further, the 2013 General Order does not impact certain ethnic or economic communities
16 within the Central Valley region area and not others. At the time of adoption, the 2013 General
17 Order applied to over 1,300 dairies distributed throughout the Central Valley, by the Regional
18 Board's estimate. (See 2013 General Order, Finding 12, p. 3.) Thus, any impact to groundwater
19 resulting from the 2013 General Order does not disproportionately affect Latinos and low-income
20 communities more than any other community, as is required in proving a disparate impact claim.
21 Instead, it would affect the population of the Central Valley as a whole, with no distinctions made
22 between the community groups or populations therein. Accordingly, the Petitioners' assertion
23 that the 2013 General Order disproportionately affects low-income and Latino communities
24 within the Central Valley region is without merit.

25
26
27 _____
28 ⁸ The two documents upon which Petitioners rely to support their proposition of disproportionate impact were released in 2005 and 2011, years prior to the issuance of the 2013 General Order.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

D. The 2013 General Order Complies With and Does Not Obviate the State Antidegradation Policy

As described above, the Regional Board complied with the State Antidegradation Policy in adopting the 2013 General Order. Contrary to Petitioners' claims, the Regional Board did not erase the State Antidegradation Policy. In fact, the Regional Board properly applied the State Antidegradation Policy and considered the factors required in the policy. (2013 General Order, pp. IS-11-IS-21.)

Petitioners appear to believe erroneously that the State Antidegradation Policy is a no-degradation or zero-discharge policy, when it is not. Instead, the State Antidegradation Policy clearly allows for the degradation of high-quality waters, provided the Regional Board makes the required findings. (Resolution No. 68-16; see also 2013 General Order, Finding 26, p. 8.) The Regional Board has done so. (See Part III.A above; see also 2013 General Order, pp. IS-11-IS-21.) Furthermore, due to historical data gaps regarding the baseline water quality for groundwater underlying dairies, and the fact that most underlying groundwater is considered high quality for at least one constituent of concern, the Regional Board elected to apply the State Antidegradation Policy to all areas covered by the 2013 General Order to be more protective of groundwater in the Central Valley. (2013 General Order, p. IS-14.)

The Regional Board considered and applied the State Antidegradation Policy when it adopted the 2013 General Order. In doing so, it has not erased or overridden the State Antidegradation Policy, but rather actively complied with its requirements and the requirements of California law.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

Based on the foregoing reasons, Dairy Cares requests that the State Board deny Environmental Law Foundation and Asociación de Gente Unida por el Agua's claims in the Petition for Review and find that the 2013 General Order is consistent with California law, specifically with the State Antidegradation Policy.

SOMACH SIMMONS & DUNN
A Professional Corporation

By:  _____

DATED: February 2, 2018.

Theresa A. Dunham
Attorneys for Real Party in Interest East San Joaquin Water Quality Coalition

PROOF OF SERVICE
(State of California)

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On February 2, 2018, I served the following document(s):

DAIRY CARES' RESPONSE TO ENVIRONMENTAL LAW FOUNDATION AND ASOCIACION DE GENTE UNIDA POR EL AGUA'S PETITION FOR REVIEW

XX Via electronic service to the electronic mail addresses set forth below:

Philip G. Wyels, Assistant Chief Counsel
State Water Resources Control Board
philip.wyels@waterboards.ca.gov

Phoebe Seaton, Esq.
Leadership Counsel for Justice and
Accountability
pseaton@leadershipcounsel.org

Clay Rodgers, Assistant Executive Officer
Central Valley Regional Water Quality
Control Board, Fresno Office
clay.rodgers@waterboards.ca.gov

Lynne Saxton, Esq.
Saxton & Associates
lynne@saxtonlegal.com

Adam Laputz, Assistant Executive Officer
Central Valley Regional Water Quality
Control Board
adam.laputz@waterboards.ca.gov

James Wheaton, Esq., President
Lowell Chow, Esq.
Environmental Law Foundation
wheaton@envirolaw.org

Andrew Altevogt, Assistant Executive Officer
Central Valley Regional Water Quality
Control Board
andrew.altevogt@waterboards.ca.gov

Susana De Anda, Coordinator
Asociación de Gente Unida por el Agua
susana.deanda@communitywatercenter.org

Clint Snyder, Assistant Executive Officer
Central Valley Regional Water Quality
Control Board
clint.snyder@waterboards.ca.gov

David W. Smith, Chief
Permits Office
U.S. EPA, Region 9
smith.davidw@epa.gov

Pamela Creedon, Executive Officer
Central Valley Regional Water Quality
Control Board
pamela.creedon@waterboards.ca.gov

Ken Greenberg, Chief
Clean Water Act Compliance (NPDES)
U.S. EPA, Region 9
greenberg.ken@epa.gov

Lori T. Okun, Esq.
Office of Chief Counsel
State Water Resources Control Board
lori.okun@waterboards.ca.gov

Patrick Pulupa, Esq.
Office of Chief Counsel
State Water Resources Control Board
patrick.pulupa@waterboards.ca.gov

Stephanie Yu, Esq.
Office of Chief Counsel
State Water Resources Control Board
stephanie.yu@waterboards.ca.gov

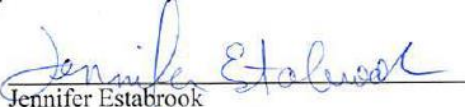
David Lancaster, Esq.
Office of Chief Counsel
State Water Resources Control Board
David.lancaster@waterboards.ca.gov

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Laurel Firestone, Esq.
Community Water Center
laurel.firestone@communitywatercenter.org

Nathaniel Kane, Esq.
Environmental Law Foundation
nkru1e@envirolaw.org

I declare under penalty of perjury that the foregoing is true and correct. Executed on
February 2, 2018, at Sacramento, California. ...


Jennifer Estabrook