



September 14, 2012

Via Electronically Only

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
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commentletters@waterboards.ca.gov

**RE: Comments to SWRCB/OCC File A-2209(a)-(e) – September 19, 2012
Board Meeting**

Dear Ms. Townsend:

Our firm represents the Grower-Shipper Association of Central California, the Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, and Western Growers (hereafter collectively referred to as “Grower-Shipper”). On their behalf, we appreciate the opportunity to comment on the Draft Order on Request for Stay *In the Matter of the Petitions of Ocean Mist Farms and RC Farms; Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, and Western Growers* (Draft Stay Order). Overall, Grower-Shipper supports the Draft Stay Order and encourages State Water Resources Control Board (State Water Board) adoption of the Draft Stay Order. However, upon review, Grower-Shipper respectfully requests that the State Water Board consider amending the Draft Stay Order at its September 19, 2012 meeting to include a few clarifications as identified below, and to include a stay of the individual surface water monitoring requirements for growers with farms and ranches in tier 3. Our requested clarifications and additional explanations for including individual surface water monitoring are provided here.

I. Clarifications

A. Determination of Nitrate Loading Risk Factors/Total Nitrogen Applied (Agricultural Order Provision 68; Tiers 2 and 3 MRPs, Part 2, Section C); Determination of Typical Crop Nitrogen Uptake (Agricultural Order Provision 74)

Grower-Shipper supports the Draft Stay Order's proposed stay of provisions 68 and 74 of Order No. R3-2012-0011, and the associated provisions in the Tiers 2 and 3 MRPs.¹ However, Grower-Shipper believes that it is also necessary to include the requirement for the reporting of total nitrogen applied as part of the stay. According to the Draft Stay Order, the State Water Board proposes to not include this reporting provision as part of the stay because, "reporting is not due until October 1, 2014." While that may be technically correct, that proposed finding does not take into account the fact that growers will need to begin collecting and recording such information beginning as early as October 1, 2013.

In recent workshops with staff from the Central Coast Regional Water Quality Control Board (Central Coast Water Board), staff has indicated that the reporting period runs from October 1 through September 30 of each year. Accordingly, information that must be reported on October 1, 2014, must start being collected on October 1 of 2013. As testified to by Dr. Lowell Zelinski, collecting this type of information would include accounting for all fertilizers applied, including testing and documenting the level of nitrogen in irrigation water and soil samples. For soil samples alone at an estimated \$100 per sample for 20,000 plantings a year for one grower, the annual cost would be an estimated \$2,000,000. (Declaration of Lowell Zelinski in Support of Petitioners California Farm Bureau Federation, et al. and Grower-Shipper Association of Central California, et al.'s Response to State Water Board's Notice of Public Hearing on Stay Request, ¶ 25.) Even if a grower were only required to conduct such tests for several months before the State Water Board reached a decision on the merits, the cost would be substantial. Thus, Tiers 2 and 3 MRPs, Part 2, section C, provision 5 must also be included in the State Water Board's Draft Stay Order.

Moreover, if the provision with respect to reporting total nitrogen applied is not stayed, growers will need to make database decisions far in advance of October 1, 2013, to record the information, assuming that it must be reported on October 1, 2014. (See Declaration of Kay Mercer in Support of Petitioners California Farm Bureau Federation, et al. and Grower-Shipper Association of Central California, et al.'s Response to State Water Board's Notice of Public Hearing on Stay Request, ¶¶ 10-12.) In other words, just because the actual reporting date is not until October 1, 2014, substantive and expensive decisions must be made well in advance to meet the reporting requirement if it is not stayed.

¹ Grower-Shipper does not agree with the statement that Agricultural Petitioners did not meet their burden of showing substantial harm. Nonetheless, Grower-Shipper agrees with the proposed conclusion in the Draft Stay Order and will not request further clarification with respect to this specific finding.

Accordingly, we respectfully request that the State Water Board revise the Draft Stay Order to include a stay for Tiers 2 and 3 MRPs, Part 2, section C, provision 5.

B. Annual Compliance Form (Agricultural Order Provision 67; Tiers 2 and 3 MRPs; Part 3)

With respect to the Annual Compliance Form, the Draft Stay Order proposes that some of the information requested should be stayed based on other determinations in the Draft Stay Order. We agree. However, the Draft Stay Order does not refer to all of the provisions in the Annual Compliance Form that should be stayed. Assuming that the draft Annual Compliance Form submitted by the Central Coast Water Board as Exhibit 23 is provided to growers, the following additional sections from the Annual Compliance Form must also be stayed:

- Section G, Water Containment Characteristics of the Annual Compliance Form requests information with respect to the existence of water containment structures as well as the type of treatment or control that is used to minimize and/or prevent percolation of waste to groundwater. Such questions here are directly related to the containment structure provision 33 of Order No. R3-2012-0011, which is proposed to be stayed in the Draft Stay Order. Thus, this section of the Annual Compliance Form must also be stayed.
- Section H, Water Quality Management Practices, includes subsections that request information with respect to practice assessment and practice outcome(s). This requested information appears to be directly related to Agricultural Order Provision 44.g, which is proposed to be stayed in the Draft Stay Order. Thus, the subsections requesting practice assessment and practice outcome information must also be stayed.

Moreover, the Draft Stay Order provides no guidance with respect to information that has already been submitted to the Central Coast Water Board. Because growers have been anxious about meeting the October 1, 2012 deadline, we presume that some have already provided information to the Central Coast Water Board on the Annual Compliance Form that has not been modified in accordance with the Draft Stay Order. If such information has been provided, we believe it appropriate for the State Water Board to direct the Central Coast Water Board to delete the information that is directly related to the stayed provisions. Those that sought to comply in advance should not be put at a disadvantage as compared to others.

II. Individual Surface Water Monitoring

The Draft Stay Order proposes to deny the stay request for individual surface water monitoring requirements by bifurcating out the sampling and analysis plan (“SAP”) and quality assurance project plan (“QAPP”) portions from the requirement in their totality. By bifurcating these portions, the Draft Stay Order then finds that costs for preparation of such

documents to be generally relatively inexpensive and therefore that Agricultural Petitioners have not met their burden to show harm. In reaching this conclusion, the State Water Board dismisses estimated costs submitted by Grower-Shipper and instead relies on the Central Coast Water Board's claim that a template will be available. We believe that the Draft Stay Order incorrectly dismisses costs submitted by Grower-Shipper and substantially underestimates the level of effort necessary to prepare SAPs and QAPPs necessary to comply with provision 72 of Order No. R3-2012-0011, and Tier 3 MRP, Part 5, section A.

Specifically, as part of the SAP, a tier 3 grower must identify the number and location of discharge points. For point source dischargers this is a rote and easy process. However, for agriculture, identification of such discharge locations is not an easy task. The Tier 3 MRP, Part 5, section A, provision 7 requires the selection of discharge points that "characterize at least 80% of the estimated irrigation run-off discharge volume from each farm/ranch at the point in time the sample is taken, including tailwater discharges and discharges from tile drains. Sample must be taken when irrigation activity is causing maximal run-off." (Tier 3 MRP, p. 16.) To properly characterize 80% of the estimated irrigation run-off, site visits during maximum irrigation activities will need to occur.² Depending on the size of the farm/ranch and the irrigation activity, more than one site visit may be necessary. Further, preparing a SAP that ensures sampling will occur during the events as required by the Tier 3 MRP, Part 5, section A, provision 7 will require careful planning and consultation with the grower and their anticipated farming schedule for the upcoming year. In other words, the logistics of complying with the Tier 3 MRP are not as simple as identifying current points of discharge, and the availability of a template does not negate the level of work necessary to ensure that a SAP and QAPP comply with U.S. EPA requirements.

Further, the Draft Stay Order cites to Central Coast Water Board costs for a QAPP only, and fails to account for the fact that the SAP is a separate document from a QAPP that requires separate preparation. As indicated above, preparation of the SAP in accordance with the provisions in the Tier 3 MRP will require a fair amount of effort considering the need for site visits. Accordingly, the cost estimate of \$28,800 provided by Grower-Shipper for preparing both the SAP and QAPP is not inflated. Further, the Grower-Shipper cost estimate did anticipate the use of a template currently in existence from U.S. EPA. (See Declaration of Michael L. Johnson in Support of Petitioners California Farm Bureau Federation, et al. and Grower-Shipper Association of Central California, et al.'s Response to State Water Board's Notice of Public Hearing on Stay Request, ¶¶ 8-9.)

Finally, the Draft Stay Order states that the Agricultural Petitioners did not meet their burden of showing substantial questions of fact or law specific to the preparation of a SAP and QAPP. We disagree. First, the requirement for a SAP and QAPP are part of the individual surface water monitoring requirement and should not be considered separately

² In the Salinas Valley, many fields are now dormant until early next year. Thus, for some fields, it may not be possible to identify the locations to account for 80% of the maximum runoff until March of next year when these now dormant fields are being irrigated at their maximum level.

Ms. Jeanine Townsend

Re: Comments to SWRCB/OCC File A-2209(a)-(e) – 9/19/12 Board Meeting

September 14, 2012

Page 5

from the requirement as a whole. If the State Water Board ultimately finds that individual surface water monitoring is not appropriate as adopted in Order No. R3-2012-0011, growers will have *wasted* time and money having SAPs and QAPPs prepared. Such documents are not necessary, other than for the purpose of conducting individual surface water monitoring. Second, Grower-Shipper has raised significant issues of both fact and law with respect to the individual surface water monitoring requirement. Although regional water quality control boards may require monitoring under the Water Code, such discretion is not unfettered, and the Central Coast Water Board must satisfy the burden of the cost as compared to the need for the information. As shown in the Grower-Shipper Petition and Request for Stay, the burden of individual surface water monitoring as adopted in Order No. R3-2012-0011 does not justify the need for the information. At the very least, it is a question of fact and law for consideration by the State Water Board on its review of the merits. Accordingly, Grower-Shipper has satisfied all three prongs of the stay analysis with respect to this requirement in its totality and such provisions, including preparation of the SAP and QAPP, should be stayed until the State Water Board rules on the merits.

In conclusion, we request that the State Water Board adopt the Draft Stay Order with the modifications discussed above. Further, Grower-Shipper reserves the right to file an additional request for stay of provisions denied or not addressed in the Draft Stay Order if the State Water Board's review process exceeds the timeframe currently anticipated. There are many provisions within Order No. R3-2012-0011 that may become effective if the State Water Board's process on the merits is not completed by the fall of 2013.

Sincerely,

A handwritten signature in cursive script that reads "Theresa A. Dunham". The signature is written in black ink and is positioned below the word "Sincerely,".

Theresa A. Dunham

cc (via email only): Attached Service List

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