



by *electronic mail*

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Re: Comments on Michael Vander Dussen DBA Double Diamond Dairy WDR's

Regional Board Members and Staff:

On behalf of the Environmental Law Foundation, AGUA and the California Sportfishing Protection Alliance, I offer the following comments on Proposed Order R5-2008-XXXX, (hereinafter "Proposed Order") for Michael Vander Dussen, DBA Double Diamond Dairy, Merced County (hereinafter "Double Diamond Dairy").

To begin with, ELF, CSPA and AGUA are pleased that the Regional Board has added monitoring requirements to a CAFO WDR Order. However, much more is required in order to meet state anti-degradation requirements: the order must protect and maintain existing water quality, and the order must apply best practicable treatment and control. Because this order does neither, it is in violation of State Resolution 68-16. Further, this dairy should be required to obtain a NPDES permit in conjunction with the WDR's, as is required by EPA, in other regions of the state, and in other states nationwide.

1) The Proposed Order Does Not Meet State Antidegradation Requirements.

- a) The Proposed Order Does Not Protect Existing Beneficial Uses for Groundwater.  
State Resolution 68-16, the State Antidegradation Policy, requires that existing high quality waters of the state be maintained and protected. This requirement applies to groundwater. However, the Proposed Order allows ongoing degradation of the groundwater despite ample evidence that groundwater is already being degraded. The "interim limits for groundwater" explained in C(1)(a) at p.13 suggest groundwater contamination levels are already far in exceedance of recommended standards listed later in the Order's Information Sheet, p.11. The Regional Board must protect beneficial uses for groundwater and issue permit limits to effect this requirement. The failure to do so in the Proposed Order constitutes a violation of State Resolution 68-16.

When the Board explains that “final groundwater limitations will be developed based on the results of the BPTC evaluation,” this reflects a backwards approach to protecting water quality. See p. 13, Sec. C(2). In essence, the statement suggests that limits will be set based on whatever technology is ultimately chosen, rather than setting pollutant limits based on protecting beneficial uses and then mandating technology controls to meet those limits, as the permitting system was designed and intended. This is particularly troubling given the circularity that BPTC, in turn, will be determined by the Regional Board based on whether the current technology is proven or not in the BPTC Technical Evaluation. ELF believes the Regional Board should set final limits on groundwater levels in order to maintain and protect beneficial uses, and not to accommodate use of less stringent technology controls.

A separate point should be made about the mandatory groundwater monitoring as a means to protect water quality: assuming the monitoring actually could demonstrate that a particular discharger was responsible for violating water quality standards, it will take too long for this approach to make meaningful improvements to the area's groundwater. In fact, groundwater specialist Thomas Harter stated in groundwater meetings with the Central Valley Board that infiltration of nitrates from the surface to the groundwater may take anywhere from ten to thirty years, depending on soil and other variables. This approach does nothing to protect groundwater in the near-term despite ample evidence that additional protections are now critical, and virtually guarantees ever-increasing nitrate levels in the interim. Worse, once this hypothetical pollution from a particular facility is finally demonstrated, Harter's calculus suggests it will take another ten to thirty years for the infiltration to fully abate. For this reason, as with others, a monitoring-based approach is both backward and moreover unprotective of water quality.

b) The Proposed Order Does Not Apply Best Practicable Treatment or Control

As with the General Order upon which the present order is based, the Double Diamond order does not require the best practicable treatment or control (“BPTC”), in violation of State Resolution 68-16. This problem begins with the Regional Board Board's use of the term “BPTC”, variously claiming both the current conditions (page 5) and future conditions (page 8) at the facility meet the standard.

Despite its earlier contention on Page 5, the Regional Board acknowledges that the current permit requirements do not meet BPTC because the Proposed Order requires BPTC on all future construction and expansion of retention ponds. See Proposed Order at p.8. In fact, the NRCS standard cited requires additional levels of protection when groundwater is endangered, as is clearly the case in this area. These requirements must apply to current facilities as well. The Regional Board may provide discharger with a compliance schedule to comply with this requirement.

Strangely, this discharger expanded his herd size by more than 15% and yet the permit does not mandate more stringent pollution requirements accordingly. Based on the dates of construction of those ponds, the conclusion is that the retention ponds

were constructed before it applied for WDR's so that they avoid these new construction requirements. The General Dairy WDR mandates that a dairy expanding its herd more than 15% must apply for an individual WDR in order to impose additional measures on expanding dischargers. Double Diamond is applying for individual WDR's here for precisely this reason. Thus the proposed order should require the same BPTC required for future facilities for the current facilities at Double Diamond even more so because this is a permit for a facility lacking up-to-date pond retention technology, and yet seeks to significantly expand its herd size.

Likewise, the Proposed Order requires a "BPTC Technical Evaluation" to determine that the existing conditions are protective of groundwater p. 16, when the Regional Board already knows based on the monitoring reports that the groundwater is not being protected and BPTC is not currently being applied. BPTC in turn is not determined based on whether existing conditions are sufficient to prevent degradation, but rather a technical standard *a priori* designed to prevent contamination—just like the Order's requirements for future retention ponds.

c) The Proposed Order Declares that the Nutrient Management Plan Meets Requirements Of The State Antidegradation Policy Without Explanation.

The Proposed Order states that "A Nutrient Management Plan that meets the requirements in Attachment C is consistent with Resolution 68-16. Proposed Order at p.11. It is unclear how or why this is so. The Regional Board must explain how the Nutrient Management Plan in Attachment C is consistent with the State Antidegradation Policy.

2. The Proposed Order Fails to Adequately Protect Groundwater During Third Party Application of Waste.

The Proposed Order lacks any restriction on third party disposal of solid waste on land. The same requirements applicable to the discharger for land application and monitoring must apply to third parties in order for the Proposed Order to be protective of water quality. Failure to do so constitutes a violation of State Resolution 68-16 for failure to protect and maintain water quality.

3. The Regional Board Must Also Issue A NPDES Permit Along With The WDR

As the Regional Board is aware, CAFOs are required to obtain NPDES permits under the proposed CAFO Rule pursuant to the Clean Water Act and the Second Circuit's CAFO decision. There is little doubt on this point outside of the Central Valley, as other Regional Boards in the State require both NPDES and WDR permits for Dairies and other CAFO's. *See, e.g.* General CAFO WDR's for Santa Ana and Colorado River Regions, R8-2007-001 and R9-2008-0001. It is at best unclear and most likely illegal to decline to issue a NPDES permit for this facility, and the Regional Board should explain why it does not feel these permits are necessary in the Central Valley when they are in fact considered necessary in the rest of the State, and by the Federal Government.

Therefore, this permit should be jointly issued under the NPDES permitting system, with the corresponding limitations. In the alternate, a NPDES permit could be issued in tandem with the WDR's. Either way, a NPDES permit should be a component of this Proposed Order.

Thank you for your time in considering these comments. Should you have any questions on these comments, I welcome the opportunity to clarify them for you.

Respectfully Submitted,

Adam Lazar