

Grower-Shipper Association of Central California
Grower-Shipper Association of Santa Barbara and San Luis Obispo
California Strawberry Commission
Central Coast Vineyard Team
Central Coast Groundwater Coalition
Wine Institute
Sustainable Ag Water Corporation
Western Growers
Paso Robles Wine Country Alliance
California Farm Bureau Federation
Monterey County Farm Bureau
Santa Barbara County Farm Bureau
Santa Cruz County Farm Bureau
San Benito County Farm Bureau
San Luis Obispo County Farm Bureau
Santa Clara County Farm Bureau
San Mateo County Farm Bureau

November 5, 2018

Jean Pierre Wolff, Chair
California Regional Water Quality Control Board, Central Coast Region
895 Aero Vista Place
San Luis Obispo, CA

SUBJECT: Staff Report for Regular Meeting of November 8-9, 2018

Dear Chair Wolff:

The above-listed organizations have reviewed the Staff Report for Item No. 5, Agricultural Order 4.0 Requirement Options, scheduled for the November 8-9, 2018 Central Coast Regional Water Quality Control Board (Central Coast Water Board) meeting. We appreciate having the opportunity to review the Staff Report in advance of the meeting, and appreciate that there will be a public comment period subsequent to the November 8-9, 2018 Board meeting. However, in advance of the November 8-9, 2018 Board meeting, we wanted to share with the Board some of our deep concerns with conclusions set forth in the Staff Report, and the options set forth based on these conclusions.

Most importantly, the Staff Report claims that numeric limits are now required to ensure compliance with the state's Nonpoint Source Policy (NPS Policy) based on the recent decision in *Monterey Coastkeeper v. State Water Resources Control Board* (Cal. Ct. App., Sept. 18, 2018, No. C080530) 2018 WL 5024165. We fundamentally disagree with this

conclusion and characterization of the court’s opinion. Our reasons for disagreeing with this conclusion are discussed further below.

Furthermore, we believe that the Staff Report and proposed options mischaracterize application of certain elements from the State Board’s precedential provisions contained in Order WQ 2018-0002 (East San Joaquin Order), and that the options presented are not consistent with direction previously provided by this Board. This letter briefly summarizes our reasons for disagreeing with the Staff Report and the proposed options. We will continue to expand on these comments during the actual public *comment* period. However, considering the importance of these issues, and the fact that they are fundamental to the options presented in the Staff Report, we believe it necessary to share our position with the Board at this earliest opportunity.

I. NPS Policy and Application of *Monterey Coastkeeper v. State Water Resources Control Board*

Within the Staff Report, conclusions are made regarding legally required components of a nonpoint source program as mandated by the Nonpoint Source Policy (NPS Policy) and the appellate decision in *Monterey Coastkeeper v. State Water Resources Control Board*. Unfortunately, the conclusions regarding legally required elements are fundamentally flawed and must be addressed at the onset, prior to the ongoing development of Ag Order 4.0.

Regarding the NPS Policy, the Staff Report states that the NPS Policy, specifically key elements 1 and 3, requires quantifiable milestones, specifically in the form of numeric limits. (Staff Report, p. 5.) The NPS Policy, including key elements 1 and 3, requires no such thing. Rather, key element 1 states that nonpoint source pollution must be addressed in a manner that achieves and maintains water quality standards. Key element 3 requires time schedules and milestones that are designed to measure progress toward achieving water quality standards. The Staff Report’s extreme view of the NPS Policy ignores the nature of nonpoint source pollution, and the Central Coast Regional Board’s expressed approach for addressing nonpoint source pollution as outlined in the Basin Plan.

In addition to misstating the requirements of the NPS Policy, the Staff Report also misstates the holding in *Monterey Coastkeeper v. State Water Resources Control Board*. Similar to the NPS Policy not requiring numeric limits, the appellate court in *Monterey Coastkeeper* did not conclude that numeric limits are a necessary element of an NPS control implementation program. Rather, the holding in *Coastkeeper* was limited and fact specific.¹

¹ It is important to highlight that the Court of Appeal concluded “Provision No. 83.5 is the crux of this dispute” regarding compliance with the NPS Policy. (*Monterey Coastkeeper v. State Water Resources Control Board* (Cal. Ct. App., Sept. 18, 2018, No. C080530) 2018 WL 5024165, at *15.) The Court of Appeal **did not** conclude that the State Board’s revised Ag Order in its entirety failed to contain time schedules and milestones, as required by NPS Policy key element 3. Rather, the Court of Appeal found that the modified Ag Order did in fact contain time schedules and milestones for numerous provisions that comply with the NPS Policy and key element 3, such as backflow prevention devices, abandoned groundwater wells, and reduction in turbidity or sediment load, nutrients, and nitrogen.

The Court of Appeal found, regarding the specific permit revised by the State Board, that “the State Board is rewriting--or amending--the NPS Policy by **replacing the required element of specific time schedules and quantifiable milestones with a vague requirement of ‘improved’ management practices and a ‘conscientious effort.’**” (*Monterey Coastkeeper v. State Water Resources Control Board* (Cal. Ct. App., Sept. 18, 2018, No. C080530) 2018 WL 5024165, at *16.) Thus, since the State Board’s revised Ag Order permit contained Provision 83.5 that required a conscientious effort to improve management practices rather than specific time schedules, the Court of Appeal concluded that the permit did not comply with the NPS Policy because it could not be determined that there would be a “‘high likelihood’ the program will succeed in achieving its objectives, as required by NPS Policy.” (*Ibid.*)

Contrary to statements in the Staff Report concluding otherwise, the Court of Appeal did not state that an NPS control implementation program is required to include numeric limits. Nowhere in the Court of Appeal’s decision did the court conclude or even allude that numeric limits are required in an order regulating nonpoint source discharges for that order to be in compliance with the NPS Policy. To surmise from the Court of Appeal’s decision that numeric limits are now a required element of the NPS Policy is to do what the Court of Appeal explicitly admonished against (i.e., mischaracterizing the NPS Policy). The Court of Appeal found such an action to be improper and that it “‘flies in the face of the clear language and purpose of the interpreted provision.’” (*Id.* at 16.)

In addition to the above, there are other mischaracterizations of the NPS Policy and application of the decision in *Monterey Coastkeeper*, which will be elaborated upon during future public comment periods. Nevertheless, we wanted to raise a few important key issues now in order to prevent the development of legally flawed alternatives and options.

II. Application of East San Joaquin Order

As currently presented, the Staff Report identifies precedential elements from the East San Joaquin Order in narrative form but does not explain or identify in the Tables what provisions are considered to be consistent with the State Board’s directives. Further, the narrative discussion in the Staff Report eliminates the option of Third-Party based programs. If agreed upon by Central Coast Growers and the Central Coast Water Board, that option is explicitly noted in the East San Joaquin Order as an option to meet all or parts of the Central Coast’s irrigated lands order’s mandates. (East San Joaquin Order, page 21, footnote 64.) We find this lack of information and omission with respect to application of the East San Joaquin Order a fundamental flaw for moving the discussion forward.

Moreover, many of the requirements identified in the Staff Report, and specifically in the Tables, are not precedential elements with the East San Joaquin Order and may in fact directly contravene the State Board’s directives.

(*Ibid.*) The Court of Appeal’s limited holding found fault with the terms of Provision 83.5, as that specific provision failed to contain concrete time schedules and milestones. (*Id.* at *15-16.)

First, nothing with the East San Joaquin Order mandates, encourages, or suggests that numeric limits are required in an irrigated lands program. In fact, the East San Joaquin Order suggests the opposite:

“In a permit for a traditional point-source facility, the water boards set a water quality-based effluent limitation to be met at the discharge point and require monitoring of the discharge to verify that the limitation is being met. As we will discuss in greater detail in the section on surface water and groundwater quality monitoring, in a landscape-based, nonpoint source program such as the irrigated lands regulatory program, **monitoring the numerous and sometimes indeterminate set of all farm discharge points to surface water and groundwater is an impractical, prohibitively costly, and often ineffective method for compliance determination and the Nonpoint Source Policy accordingly does not mandate such monitoring.** As a result, a nonpoint source regulatory program simply may not yield enough data to conclusively establish whether a specific individual discharger is in fact causing or contributing to exceedances. Recognizing this challenge, the Nonpoint Source Policy provides that, although management practice implementation is not a substitute for actual compliance with water quality requirements, **a schedule of management practice implementation, assessment, and adoptive management may act as a proxy for assessing regulatory program progress.**” (East San Joaquin Order, pp. 18-19.)

From this, and the fact that the East San Joaquin Order does not revise the underlying WDR to include numeric limits such as those proposed here, we can confidently conclude that numeric limits are not mandated by the East San Joaquin Order, or the State Board’s interpretation of its own policy – the NPS Policy. Rather, the State Board finds that management practice implementation, assessment, and adaptive management may act as a proxy for assessing regulatory program progress.

Second, Table 1 includes in both Option 1 and Option 2 a requirement for individual discharge groundwater monitoring if a ranch exceeds a numeric discharge limit. This requirement is contrary to findings in the East San Joaquin Order. Specifically, the order states as follows: “Groundwater quality monitoring does not yield data responsive enough to above-the-ground impacts to allow correlation of management practices and water quality outcomes, except under very limited conditions.” (East San Joaquin Order, p. 65.) Rather, the State Board found that a better method is use of the multi-year A/R ratio analyzed in concert with the A-R difference, and that this was a primary tool for management, reporting, and oversight. Not only does the State Board not support monitoring as proposed in the Table, but the State Board also sees using A/R and A-R as a tool for management – not a method for imposing numeric limits.

Third, Table 1 proposes to use A/R and A-R to establish discharge limits and fertilizer application limitations. Putting aside for now the legality of the Central Coast Water Board’s authority to even impose application limits, using A/R and A-R to establish discharge limits is inconsistent with and contrary to the East San Joaquin Order. In the East San Joaquin Order, the State Board directed the Central Valley Water Board to work with others, including other

regional boards, to establish target values for each crop after removed coefficients were available. The State Board then further stated that it was premature to project the manner in which the multi-year A/R ratio target values might serve as regulatory tools, and that should there be a change in the regulatory approach, there would be an Expert Panel first. (East San Joaquin Order, p. 73-74.) Establishing discharge limits at this point in time based largely on A/R and A-R directly contradicts the State Board's direction.

There are other inconsistencies between the East San Joaquin Order and the Staff Report that we will address in future communications. At this juncture, however, we wanted to highlight just a few issues that are critical to having a constructive dialogue for the development of Ag Order 4.0. **With respect to application of the East San Joaquin Order, we request that the Central Coast Water Board direct staff to revisit the Tables and the options and work with agriculture representatives, the State Board, and others to ensure consistency with the State Board's East San Joaquin Order.**

III. Consistency with Central Coast Water Board Direction

Throughout this year the Central Coast Water Board has heard numerous presentations and had many public discussions leading up to their review of this Staff Report. Certain agricultural groups brought together concepts for inclusion in this Board meeting packet at this point in the process because we have heard directly from Board members that they want agriculture to bring forward solutions, explain how incentives could work, and illustrate how a balanced program that works toward further water quality protection and a sustainable industry, can be achieved. We believe this was said with an acknowledgement that agriculture supports our communities by creating a safe food supply for the state and nation, and significantly drives the Central Coast economy and availability of jobs.

Unfortunately, the matrix of concept options in the Staff Report fails to reflect any of the approaches agriculture spoke of generally in meetings with staff over these last many months. This is very unfortunate as considerable effort was spent in building agricultural community support for the concepts which were detailed in an October 8 proposal signed by most of the organizations signing this letter. We also fail to see how this Report reflects many of the comments made by Central Coast Water Board members over the last year in public meetings. Specifically, at the March Board Meeting we heard Board members speak about the importance of incentives, streamlining permits, and regulatory alignment for water quality projects.

Then in May, we heard Board comments noting the importance of engaging technical support and research assets from all sources, with an eye to focusing on the way in which a farmer would look at something versus just "off the shelf" scientific theory. It was noted that the more growers implementing these policies are involved in those dialogues, the more value and confidence in the final product. Board members requested from agriculture more clarity about how incentives and disincentives could work. It was noted that in practice the Central Coast Water Board might be focused on an outcome, but implementation requirements might be contradictory to what the Water Board is trying to do, or in some way causes disruption or

negative impacts to farmers. A Board member noted that all stakeholders need to make sure remain active in the dialogue, as controversial as it might be sometimes.

We also heard in May that the Water Board is trying to solve a problem but the goal is not to reduce agricultural productivity on the Central Coast but rather agriculture should continue to grow and be a vibrant part of the Central Coast way of life. The Board member specifically said that we need to allow for experimentation, seeking out new practices, new techniques, and utilizing new knowledge and that we will get there when the regulators are also collaborators with the agricultural community. There was acknowledgement that this is a very difficult dialogue because we do have different goals and missions, but we must try.

The May meeting also brought about discussion from Board members about the importance of a spirit of collaboration and locally driven experimental approaches, specifically referencing double-loop learning so organizationally people can learn from their experiences and integrate across multiple experiments. Additionally, comments were that the Board is looking for tools to determine real-time nitrate pathways, and how to help famers understand the information while still ensuring economic feasibility.

In September, we heard discussion about challenges and fairness stemming from situations where someone has a dramatically different amount of N in well water than their neighbor. There were also Board comments about the labor availability crisis, its influences on economic pressures and the role of that challenge being felt industry-wide, as well as how a grower efficiently plans their cropping systems. There was also support for the idea of a Technical Advisory Committee and more education from Central Coast Regional Board staff to growers regarding areas of surface water impairment. Finally, we heard Board member comments noting that the Central Coast Water Board doesn't want to eliminate flexibility, and that there has been progress.

IV. Inclusion of Agriculture's Ideas

Taking these and other discussions into consideration, as well as precedential requirements in the East San Joaquin Order, the NPS Policy and the Court of Appeal decision, certain Central Coast agricultural groups came together to craft a concept paper to set a foundation for greater collaboration in developing a new order that is focused on improving water quality while allowing for a robust and sustainable agricultural industry, national food source, local economy, and employment driver. In this concept paper, we focused on the precedential elements of the State Water Board's East San Joaquin Order and on management practice implementation and assessment. Perhaps most importantly, our concept included the forgotten and critical step of education and outreach with a focus on site-specific adaptive management. We also provided a realistic methodology to ease the reporting burden of the AR metrics for our highly diverse cropping systems. The Staff Report and the options presented fail to reflect many of the ideas expressed by Central Coast Water Board members and agriculture that would meet the intent of NPS Policy, and streamline reporting requirements for useful data and for continual improvement of management practices that would ultimately lead to improved water quality. This leaves farmers feeling frustrated, disappointed and uncertain with respect to the necessary dialogue that needs to continue for the development of Ag Order 4.0.

V. Conclusion

We strongly disagree with the fundamental conclusions contained in the Staff Report with respect to numeric limits, the NPS Policy, the East San Joaquin Order and inconsistency with previous Board member direction and felt it imperative to address these immediately by providing a letter within the comment period for the November 8-9, 2018 Board meeting. Numeric limits are not supported by NPS Policy, the outcome of the appellate decision in *Monterey Coastkeeper v. State Water Resources Control Board*, nor are they supported by the language in the East San Joaquin Order. Regarding the East San Joaquin Order, it is important that the Central Coast Regional Board fulfill precedential aspects without creating a new regulatory structure that is not compatible with technical, social and economic constraints of irrigated lands in our region.

To address these fundamental issues, we are asking the Central Coast Water Board to direct staff to work with agricultural stakeholders immediately on developing options different from those in the Staff Report that are consistent with the State Board's direction as well as the Court of Appeals decision. These new additional options must be available prior to March 2019. To that end, we will commit to redoubling our efforts to meet with staff and the Board to make sure other viable options are part of the Board's choices in March 2019.

Sincerely,



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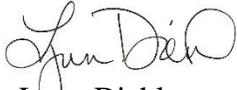
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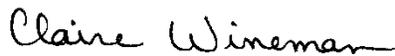
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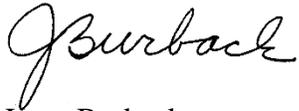
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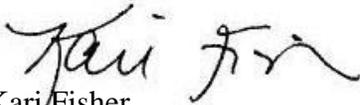
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