

1 KRISTEN T. CASTAÑOS (SB #198672)

kristen.castanos@stoel.com

2 WESLEY A. MILIBAND (SB #241283)

wes.miliband@stoel.com

3 JULIET H. CHO (SB #271437)

juliet.cho@stoel.com

4 STOEL RIVES LLP

500 Capitol Mall, Suite 1600

5 Sacramento, CA 95814

Telephone: (916) 447-0700

6 Facsimile: (916) 447-4781

7 Attorneys for Respondent
8 THE MORNING STAR PACKING COMPANY,
9 L.P.

10 BEFORE THE CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

11 STATE OF CALIFORNIA

12
13 In the Matter of The Morning Star Packing
14 Company, L.P.,

15 Respondent.

TENTATIVE CEASE AND DESIST
ORDER R5-2016-XXXX

**THE MORNING STAR PACKING
COMPANY, L.P.'S LEGAL, POLICY
AND TECHNICAL STATEMENT IN
OPPOSITION TO THE CENTRAL
VALLEY WATER BOARD
PROSECUTION TEAM'S CEASE AND
DESIST ORDER**

1 **I. INTRODUCTION**

2 The Morning Star Packing Company (“Morning Star”) files this statement and the
3 accompanying exhibits in opposition to the Tentative Cease and Desist Order No. R5-2016-
4 XXXX (“Tentative CDO”), issued on November 20, 2015 to The Morning Star Packing
5 Company, L.P. and Fred Gobel, Morning Star Tomato Packing Plant, Colusa County.

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7 Morning Star has operated a tomato processing facility (“Facility”) in Colusa County
8 since 1995. The Facility was originally governed by Waste Discharge Requirements Order No.
9 95-160 (“1995 WDRs”). In 2005, Morning Star submitted a Report of Waste Discharge for
10 updated waste discharge requirements, which Regional Board staff failed to take any action on
11 until 2012, when staff finally indicated an intent to prepare revised waste discharge requirements.
12 (Exh. B to Morning Star Exhibit (“MS Exh.”) 1.) After a seven year delay, Regional Board staff
13 then fast-tracked the waste discharge requirements, allowing very little opportunity for Morning
14 Star to provide input and comment on the proposed changes to the waste discharge requirements.
15 The waste discharge requirements were adopted in December 2013 as Waste Discharge
16 Requirements Order No. R5-2013-0144 (“WDRs”). (*Id.*) Morning Star timely filed a Petition for
17 Review of the WDRs with the State Water Resources Control Board. (MS Exh. 1.) The State
18 Water Resources Control Board has failed to act on the pending Petition for Review for two
19 years.
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22 The process by which the WDRs were developed and adopted resulted in WDRs that lack
23 clarity and, in some instances, do not accurately reflect the Facility and the operations. These
24 issues have resulted in differing opinions between Morning Star and Regional Board staff about
25 what the WDRs require. Morning Star should not be penalized for misunderstandings and
26 miscommunications that resulted from a faulty process to develop the WDRs.
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1 Morning Star is an industry-leading tomato food processor and recognizes its
2 responsibilities to comply with all regulatory requirements, including the WDRs. Morning Star is
3 particularly aware of California's drought conditions and the Governor's directive to reduce water
4 use. In response, Morning Star has implemented water conservation measures that significantly
5 reduce water use at the Facility by approximately one-third in the face of a 65% increase in
6 production. (Prosecution Team Evidence List Exhibit ("Prosecution Exh.") 26.) Additionally, in
7 2015 and as authorized in the WDRs, Morning Star increased its production by 65%. (WDRs, ¶
8 28.) As is typical when innovating process improvements, upsets can occur. In 2015, increased
9 production by 65% and initial start-up issues resulted in higher than normal organic material
10 entering the Cooling Pond and higher than normal tomato material entering the ditches. These
11 upsets have been corrected and procedures are in place to prevent recurrence in future seasons.
12 (Prosecution Exh. 26.) The characterization in the Tentative CDO that Morning Star is a repeat
13 offender and bad actor is outrageous. Rather, Morning Star is innovating water conservation and
14 energy saving techniques, while at the same time being mindful of the requirements in the WDRs.
15 Although Morning Star acknowledges that there were some one-time, start-up issues with
16 operations in 2015 as a result of the process modifications, such anomalous conditions do not
17 give rise to the significant requirements in the Tentative CDO. (Prosecution Exh. 26.)

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21 Additionally, Morning Star objects to several of the statements and allegations in the
22 Tentative CDO for the reasons stated herein. In particular, Morning Star objects to the allegations
23 that the Cooling Pond expansion, Settling Pond expansion, and reduction of Land Application
24 Area ("LAA") violate the applicable WDRs. Accordingly, Morning Star seeks modification of
25 the Tentative CDO provisions requiring restoring the Cooling Pond and Settling Pond to their
26 former size and requiring irrigation of all 695 acres of LAA. Additional objections are further
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1 detailed herein and Morning Star’s proposed revisions to the Tentative CDO are attached hereto
2 as Attachment A.

3 **II. ARGUMENT**

4 **A. Expansion of the Cooling Pond and Removal of Land Application Area Does Not**
5 **Violate the WDRs**

6 The Tentative CDO alleges that expansion of the Cooling Pond violates Discharge
7 Prohibition A.3 of the WDRs, which states: ‘Discharge of waste at a location or in a manner
8 different from that described in the Findings is prohibited.’” It is notable that the Tentative CDO
9 finds a violation based solely on the Prosecution Team’s interpretation of how the facility is
10 described in the Findings of the WDRs and does not allege any violation of a specific discharge
11 requirement or prohibition, or any actual impact to water quality as a result of the expansion of
12 the Cooling Pond. More important, however, is that the Cooling Pond expansion is specifically
13 contemplated by and accounted for in the WDRs, and the expanded Cooling Pond is not different
14 from that described in the Findings.
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17 **1. The Cooling Pond Expansion Is Contemplated in the WDRs**

18 In fact, the WDRs specifically state that “[t]he Discharger plans to increase production by
19 up to 65 percent in the future....” (WDRs, ¶ 28.) The Cooling Pond is part of the facility
20 production process. (See, 1995 WDRs ¶ 3; WDRs ¶ 16; and Attachment C (Process Flow
21 Diagram).) The expansion of the Cooling Pond from 60 acres to 100 acres represents a 65%
22 increase in the Cooling Pond size. Prior to issuance of the 2013 WDRs, Morning Star notified
23 Regional Board staff of its intent to increase production by 65% so that the production increase
24 could be accounted for in the 2013 WDRs. Morning Star’s intent was to ensure that the WDRs
25 accounted for a 65% increase in its entire production process, which includes the Cooling Pond.
26 Indeed, the Cooling Pond is a surrogate for cooling towers or some other mechanical method of
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1 cooling the process water prior to recycling it back into the process. (1995 WDRs, ¶ 3; WDRs
2 ¶ 16 and Attachment C; MS Exhs. K and O.) While the Cooling Pond has the potential to
3 discharge wastewater and is, therefore, regulated by the WDRs, it is not operated as a wastewater
4 disposal pond. (1995 WDRs, ¶ 3.)

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6 The Tentative CDO also asserts that the expansion of the Cooling Pond at the expense of
7 decreasing the size of the LAA is a “material change in the character, location, or volume of
8 discharge” requiring submittal of a new Report of Waste Discharge. (Tentative CDO, ¶ 20.) As
9 noted, the WDRs contemplated this expansion and, therefore, a new Report of Waste Discharge
10 was not required. Moreover, the Cooling Pond expansion does not represent a “material change
11 in the character, location, or volume of discharge.” The expansion of the Cooling Pond did not
12 change the character of the wastewater, nor did it change the volume of wastewater being
13 discharged. In fact, discharge volume to the LAA decreased by one-third. As to location, the
14 expanded Cooling Pond is located in an area that was previously used for land application and,
15 therefore, authorized to receive wastewater application. (Tentative CDO, ¶ 21.) In fact, the
16 quality of wastewater in the expanded Cooling Pond area is much better than the quality of
17 wastewater authorized by the WDRs to be applied to this land as part of the LAA. (MS Exhs. K
18 and O.)

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21 The Tentative CDO incorrectly assumes that expansion of the Cooling Pond and
22 associated removal of approximately 90.5 acres of LAA allowed for increased wastewater
23 discharges to the Cooling Pond and the potential to impact groundwater. (MS Exhs. J, K, N and
24 O.) This assumption is not supported by any evidence and groundwater data demonstrates that
25 the Cooling Pond Expansion does not impact groundwater. (MS Exhs. K, N and O.) Because the
26 Cooling Pond expansion was contemplated by the WDRs, does not result in a material change to
27 the character, location or quantity of discharge, and has no impact on water quality, expansion of
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1 the Cooling Pond does not violate the WDRs. The Cooling Pond attributes should improve
2 groundwater quality and current evidence is that this is the case.

3 **2. The WDRs Do Not Require Use of the Entire 695 Acres**

4 In addition, the Tentative CDO improperly requires Morning Star to apply wastewater to
5 the entire 695 acres of its facility. Paragraph 22 of the Tentative CDO asserts: “applying
6 wastewater to 485 acres rather than the entire 695 acres is a violation of Prohibition A.3 and
7 Standard Provision A.4 of the 2013 WDRs.” (Tentative CDO, ¶ 22, emphasis added.)
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9 Contrary to the statements in the Tentative CDO, there is nothing in the WDRs that
10 specifically requires Morning Star to apply wastewater to the entirety of the 695 acres of the
11 LAAs. Finding 19 of the WDRs states that “[a]pproximately 695 acres of LAAs are *available* for
12 irrigation with wastewater from the Settling Pond and/or Cooling Pond.” (WDRs, ¶ 19, emphasis
13 added.) Finding 60(f) also states, “[a]pproximately 695 acres of *LAAs are available*. Crops are
14 grown on the LAAs and will take up the nutrients found in the wastewater if wastewater
15 application rates are carefully controlled.” (WDRs, ¶ 60f, emphasis added.)
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17 In each of these references to the 695 acres of LAAs, the WDRs specifically state that the
18 entirety of the LAAs is *available for irrigation*. Nowhere in the Findings or elsewhere in the
19 WDRs is there a requirement that Morning Star irrigate **all** 695 acres of LAAs. Indeed, it is
20 standard for WDRs to cover all the area that might be used for wastewater disposal because
21 disposal in an area not identified in the WDRs would be a violation. Specifying all acreage
22 available for disposal, however, is not a mandate that every acre must be used for disposal.
23 Similarly, the Tentative CDO incorrectly states that the “Anti-degradation Analysis discussion in
24 the WDRs is based on the 60 acre Cooling Pond and application of wastewater to the entire 695
25 acres.” (Tentative CDO, ¶ 17.) This is a gross mischaracterization of the WDRs. The Anti-
26 degradation analysis in the WDRs does not specifically reference the 60 acre Cooling Pond or
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1 application of wastewater to the *entire* 695 acres of LAA. (WDRs, ¶¶ 55- 62.) The Anti-
2 degradation analysis in the WDRs discusses that there is no plan for *expansion* of the LAAs, but
3 does not address reduction of the LAA area. (WDRs, ¶ 58(b), (c), (d).) Moreover, the analysis
4 makes clear that the BOD loading rate is the means to achieve compliance with the Anti-
5 degradation policy with respect to manganese and nitrogen. (WDRs, ¶ 58 (c), (d), (e).) The
6 *availability* of 695 acres is one method to achieve the loading rates, but if loading rates can be
7 achieved with less acreage, there is nothing in the WDRs requiring use of all 695 acres.

9 3. The Tentative CDO Violates Water Code Section 13360

10 In addition to this factually incorrect assessment of the WDRs, the Board cannot require
11 irrigation of all available acreage because the Board has no authority to designate the manner of
12 compliance. Section 13360 of the Water Code states:

13 (a) No waste discharge requirement or other order of a regional
14 board or the state board or decree of a court issued under this
15 division shall specify the design, location, type of construction, or
16 particular manner in which compliance may be had with that
17 requirement, order, or decree, and the person so ordered shall be
permitted to comply with the order in any lawful manner.

18 Paragraph 22 of the Tentative CDO specifically describes the manner in which Morning
19 Star shall comply with the WDRs by specifying that all 695 acres must be used for land
20 application, regardless of whether Morning Star can meet the discharge requirements by irrigating
21 less land.

22 “Section 13360 of the Water Code is a shield against unwarranted interference with the
23 ingenuity of the party subject to a waste discharge requirement...it preserves the freedom of
24 persons who are subject to a discharge standard to elect between available strategies to comply
25 with that standard.” (*Tahoe-Sierra Preservation Council v. State Water Resources Control Board*
26 (1989) 210 Cal.App.3d 1421, 1438.) In this instance, Morning Star has successfully implemented
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