



April 7, 2017

[SENT VIA EMAIL: CHARLENE.HERBST@WATERBOARDS.CA.GOV]

Charlene Herbst
Chief, Confined Animal Facilities Unit
Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Drive, Ste 200
Rancho Cordova, CA 95670

Re: **Comments On Waste Discharge Requirements General Order For Confined Bovine Feeding Operations**

Dear Ms. Herbst,

Thank you for the opportunity to comment on the draft General Order for Confined Bovine Feeding Operations. We are pleased that the Regional Board is proposing to adopt a permit to regulate these facilities. We have requested that the Regional Board adopt permits to regulate other types of animal operations since we began working on dairies over nine years ago. Furthermore, we appreciate the opportunity to work with staff on making the operations both feasible and protective of groundwater, surface water, and, most importantly, the health of the people in communities who depend on groundwater for their drinking water.

When considering operations which have the capability to discharge nitrates and other contaminants that are hazardous to public health, a particular concern is that 90 percent of the communities in the Central Valley obtain their drinking water from groundwater. The continued leaching of nitrates and salts into groundwater aquifers from largely unregulated facilities has, over time, degraded the Central Valley's high-quality groundwater basins, which serve these communities. As a result, a growing number of drinking water supplies are now unable to meet drinking water standards for nitrates. Many wells have been closed, and many more face the prospect of closure. Thus, we view regulations on groundwater pollution from animal operations as vital to the livability of the Central Valley.

There are facets of the draft Order that we believe will improve water quality around confined bovine feeding operations, such as the requirement for flow meters, groundwater monitoring at first encountered groundwater, acknowledgement of the importance of the human right to water, and the composting provisions. However, we have concerns regarding compliance with Resolution 68-16 (the State Anti-Degradation Policy), continued use of unlined existing wastewater retention ponds, monitoring requirements, time schedules, and enforcement.

A. The Order Does Not Comply With Federal Or State Antidegradation Policy.

CWC 1 The State Antidegradation Policy derives from Resolution 68-16 issued by the State Water Resources Control Board ("SWRCB"), which states in part that high quality waters shall "be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people

CWC 1 of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.” Resolution 68-16 further states that “[a]ny activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with the maximum benefit to the people of the State will be maintained.”

In order to comply with the State Antidegradation Policy, the Regional Board must affirmatively “demonstrate” compliance with the Policy. (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1278.) Thus, “[w]hen undertaking an antidegradation analysis, the Regional Board must compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives.” (*Id.* at 1270.) “If the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved” and “the antidegradation policy is not triggered.” (*Id.*) On the other hand, “if the baseline water quality is better than the water quality objectives, the baseline water quality must be maintained in the absence of findings required by the antidegradation policy.” (*Id.*)

Once it is determined that the Antidegradation Policy is triggered, the Regional Board must conduct a “two-step process” for “determining whether a discharge into high quality waters is permitted.” (*Id.* at 1278, 1282.) The first step of the process is for the Regional Water Board to make three (3) “specified findings” that: the “change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies...” (*Id.* at 1278.) The second step of the AGUA process is a finding “that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.” (*Id.*)

The finding that a change in water quality will be “consistent with the maximum benefit to the people of the State” must be “affirmatively demonstrated” and made on a “case-by-case basis...based on considerations of reasonableness under the circumstances at the site.” (*Id.* at 1279.) In making this “case-by-case” finding, the Board must consider the following factors “(1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods.” (*Id.*)

The Order here does not comply with the Antidegradation Policy as it has been judicially construed. First, “[w]hen undertaking an antidegradation analysis, the Regional Board must compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives.” (*AGUA*, 210 Cal.App.4th at 1270.) The Order does not contain a proper baseline analysis.

Second, rather than considering these factors, the Order simply contains the conclusory statement that because the bovine feeding-operation industry is economically significant, allowing degradation to high-quality waters is consistent with the maximum benefit to the people of the state. However, this finding is conclusory and includes neither an analysis of how much degradation is actually permitted, nor a cost-benefit analysis that takes into account the social and economic costs and benefits not only to

CWC 1 dischargers, but to communities who rely on groundwater for drinking water and other beneficial uses. This is inconsistent with the “economic and social costs” factor, which requires consideration of “both costs to the discharger and the affected public,” and under which, “[c]ost savings to the discharger, standing alone, absent a demonstration of how these savings are necessary to accommodate ‘important social and economic development’ are not adequate justification” for permitting degradation. (*Id.*) The consideration of only the economic significance of an industry as a whole does not establish maximum benefit of a discharge, especially without a finding that resulting cost savings are necessary to accommodate important social and economic development.

Further, the Order states that its requirements “will assure that pollution or nuisance will not occur outside of any time schedule for improvements established pursuant to this Order.” However, the Anti-Degradation Policy not only prohibits pollution and nuisance, it requires the maintenance of the highest quality of water consistent with maximum benefit to the people of the State. Without a finding that the Order will prevent degradation to high quality waters, or a compliant and factually supported finding that any resulting degradation will be consistent with the maximum benefit to the people of the State, the antidegradation analysis is insufficient.

Moreover, the conclusory statement that pollution or nuisance will not be permitted is not compliant. As one example, the Order allows existing wastewater retention ponds to comply with design standards that are generally acknowledged to not be protective of groundwater. Thus, these standards are not best practicable treatment or control, and authorization of such is also inconsistent with the Antidegradation Policy.

B. The Order Does Not Comply With The Porter-Cologne Water Quality Control Act.

CWC 2 Waste discharge requirements are governed by Water Code § 13263, which mandates that waste discharge “requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.” Section 13241, in turn, provides that the Regional Board shall prescribe water quality objectives that will “ensure the reasonable protection of beneficial uses and the prevention of nuisance...” and sets forth certain factors that must be considered by the regional board in establishing objectives.

Thus, waste discharge requirements like the Order at issue here shall “implement” basin plans and water quality objectives. For the reasons stated above with respect to the Order’s antidegradation analysis, as well as those that follow, the Order does not comply with the “implementation” requirement.

C. The Order Contains Insufficient Economic And Technical Justifications

CWC 3 The phrase “as short as practicable” is one that is rarely followed with any sort of qualification, so we appreciate that the time schedules for compliance must include appropriate technical and economic justification. However, we are always concerned when dischargers are tasked with showing economic justification or doing cost-benefit analyses – no matter how informal.

Dischargers are unlikely to give proper consideration to the economic impacts to nearby communities which are impacted with a current or impending nitrate contamination of their drinking water source.

CWC 3 Communities currently impacted with nitrates often spend upwards of 10% of their income on water for a number of reasons such as high water rates caused by their system’s need to treat, acquire replacement water, and/or conduct additional testing of the water, or an individual’s need to buy replacement bottled water. Furthermore, there is a public health concern since communities dependent upon private domestic wells or state small water systems are not subject to testing requirements and may not know or have the ability to regularly test their water. This means far too often private well owners may be unaware they are drinking contaminated water. These consequences violate the Human Right to Water (Water Code §106.3) which requires that all Californians have access to safe and affordable water for basic needs. Thus, the discharger’s economic justification must include an analysis of the impacts to nearby communities, either on private wells or a water system, and regarding whether those communities are currently impacted or may be impacted in the future (this could mean including communities with nitrates above 7.5mg/L). If nearby communities are already impacted then a protracted timeline for compliance should be subject to a higher level of scrutiny.

D. The Order’s Does Not Protect Groundwater From Degradation Caused By Limited Population Operations.

a. Limited Population Operations Should Be Subject To More Stringent Monitoring Requirements.

CWC 4 We appreciate that the Order regulates down to six (6) Animal Units (AU). However, operations that fall within 6-99 AU (Limited Population) are subject to far fewer requirements than Full Coverage operations. Since it is unknown how many operations currently fall within this range, we are concerned with the potential for impacts to groundwater from these operations. We understand staff plans to use information collected from NOIs to get a better understanding of the scope of Limited Population operations. Once this data is collected, the Order could be amended at a later date. However, if these operations are not subject to any type of monitoring requirement, then it will be harder to argue the necessity for additional requirements which are protective of groundwater. We recommend that, at a minimum, Limited Population operations must annually test any wells on property and store the testing results with the rest of their documentation for review by Regional Board staff. While this is not as effective at showing that on property practices are impacting groundwater, coupled with the data coming from the Dairy Representative Monitoring Program and from other Bovine Feedlots, it may help guide staff as to what additional requirements should be applied to bovine feedlots.

CWC 5

b. “Facility” Should Be Defined To Prevent Gamesmanship.

CWC 6

There is presently no language in the Order that could prevent operations from fragmenting to avoid falling within the Full Coverage classification. On the Central Coast under the Irrigated Lands Regulatory Program, farmers have split their land so family members “own” different parcels to avoid falling under the highest tier for coverage (coverage is based upon acreage) and thus being subject to the most stringent of requirements. This is an unacceptable circumvention of the regulatory process and should be avoided where possible. We propose that the Order include language to prevent such actions, such as clarifying what the Board considers a single operation or facility (e.g., contiguous operations operated by the same person or their spouse, shared structures, etc.) and requiring that operator(s) swear under penalty of perjury that they are not jointly operating contiguous operations.

E. The Compliance Timeline Must Be Shortened.

CWC 7

The Order grants a compliance timeline (pgs. 34-39) that is far too drawn out to protect groundwater quality from degradation and pollution. The Order states that discharges which exceed water quality objectives shall not be allowed, and yet it can be up to 20 years before operations must fully implement practices which are protective of water quality. We understand that some necessary improvements will take time to develop and implement, however, there are many practices we already know to be protective of groundwater. For example, while the Dairy Representative Monitoring Program is not yet complete, it has produced data on some practices which are or are not protective of groundwater quality. This includes data from the seepage reports which further suggest the ineffectiveness of unlined ponds. Thus, these improvements must be implemented on a more accelerated timeline than what is set forth in the Order.

CWC 8

In general, the timelines for reporting requirements need to be shortened, with extensions being granted only for a showing of good faith efforts to comply. Moving up the “default” deadlines for dischargers would provide greater incentive for prompt compliance, while still allowing flexibility in the event that a discharger needs more time.

There is no reason existing operations cannot submit their NOI within six months of adoption of the Order.

Additionally, it is not clear why existing operations need 18 months after adoption of the Order to prepare and submit an Operations and Maintenance Plan. An Operations and Maintenance plan should be submitted within 12 months after adoption of the Order.

Further, on page 33, the Order states that Annual Reports are due every July 1, starting on July 1, 2018. However, in the table on page 35, it states that the first Annual Report is not due until 18 months after adoption of the Order. Considering this Order will not be adopted until, at the earliest, June 2017, that would make annual reports due about 13 months after adoption of the Order. We support keeping the first annual report date at July 1, 2018 and instead accelerating the timeline laid out on page 35.

Similarly, dischargers should be required to determine if they will comply with the Order as part of a representative monitoring program or through individual monitoring prior to 18 months after adoption of the General Order. Allowing 18 months unnecessarily extends the timeline for compliance and eventual protection of groundwater. We propose this requirement be added into a discharger’s NOI or no later than 12 months after adoption of the Order.

Finally, looking at the timeline for compliance it appears that it may be nearly 20 years before we see significant results from the groundwater monitoring program – both at the representative and individual levels. At both levels, dischargers have 30 months after adoption of the Order until they have to finish monitoring well installation, then dischargers have 6 years until the Summary Report is due. Already this is nearly 10 years out after adoption of the Order. Next the Summary Reports must be reviewed and approved by the Regional Board. Finally, dischargers may be allowed 10 years in order to meet water quality objectives through implementing management practices that are protective of groundwater. These timelines must be backed by economic and technical justification as to why the timeline proposed is “as short as practicable.” As stated above, we are concerned that the timelines for compliance submitted by the dischargers which must include economic and technical justifications, will not include

economic impacts to communities facing current and impending nitrate contamination. This timeline allow dischargers two decades to come into compliance. Meanwhile, communities continue to be impacted by nitrate contamination. Even if, at the end of these two decades, dischargers are able to ensure their discharges meet water quality objectives, this may be too late to prevent basins from exceeding water quality objectives, and in any event will result in higher costs to remediate and clean-up the basins.

F. We Support The Connection to Dairy Representative Monitoring Program

CWC 9

We appreciate the stated connection to the Dairy Representative Monitoring Program (DRMP). The DRMP is a program that, while not perfect, has already begun monitoring and has produced data showing how certain practices on dairies, including certain pond specifications, are not protective of groundwater. Many operational practices are similar between dairies and bovine feedlots and thus there is no reason to duplicate efforts and further delay implementation of best management practices.

G. The Order's Wastewater Retention Pond Provisions Must Be Amended.

The previous Title 27 pond specifications have been found to not be protective of groundwater quality. However, the Order allows these ponds to continue to be used, in many cases, indefinitely rather than requiring that they be replaced or upgraded. Multiple studies, and even the Regional Board itself, have acknowledged the inefficacy of current pond designs in protecting groundwater. The Appellate Court in *AGUA* criticized the Regional Board for failing to address the issue of existing ponds in the Dairy Order (*AGUA* at 1278), and thus this Order is an opportunity to move forward in a way that protects groundwater supplies.

CWC 10

In this Order, the Board considers BPTC for existing ponds to be an iterative process whereby ponds are evaluated (either under an individual or representative monitoring program) to determine whether they are protective of groundwater. If demonstrated to not be protective, the ponds must be upgraded or replaced on a time schedule that is as short as practicable. However, an iterative process that allows degradation to occur cannot be BPTC. Additionally, it is not clear at what point in the monitoring process a pond will be considered insufficiently protective of groundwater such that it must be upgraded or replaced. Preliminary data from the DRMP is already showing that unlined ponds leak, impacting groundwater supplies. If the Order allows operations to continue using the ponds for the duration of the monitoring process, these inefficient ponds could continue to be in operation for 10 or more years before they upgraded or replaced to protect water quality. We understand some time must be given to upgrade ponds, but more guidance on when ponds will be determined to be out of compliance with the Order should be given to ensure leaky ponds do not continue to operate for another decade or more.

CWC 11

Furthermore, Limited Time and Limited Population Operations are not subject to any monitoring requirements other than if they are directed by the Executive Officer. Since the Order lays out the criteria for when ponds should be replaced based off the results of individual or representative monitoring programs, it is unclear at what point these operations would have to replace any leaky or out of date ponds. While these operations, by definition, do not have the herd sizes or the continued impact that Full Coverage Operations have upon the land, improper maintenance, or use of practices not compliant with BPTC or Best Efforts, can still result in impacts to surface and groundwater. We ask staff to revise the Order to ensure that Limited Time and Limited Population operations which use

wastewater retention ponds built under the old standards will have to upgrade or replace their ponds on a similar time schedule as Full Coverage operations.

H. The Order's Record Keeping Programs Are Inconsistent With The Monitoring Programs.

CWC 12 The Order requires that records are kept on site for only five years, yet the monitoring programs are to last six years. This appears to in all likelihood be a drafting error as it would not make sense to require dischargers to participate in a multi-year monitoring program, and yet not have to maintain their records for the entire duration of the program, including for a period of time after the conclusion of monitoring. Records should thus be required to be maintained for *longer* than the length of the monitoring program in order to allow the Regional Board time to review records from the entire time groundwater was being monitored.

I. Reporting Periods Should Be Shortened. (pgs. 33-34)

CWC 13 The Order grants dischargers 30 days to provide any documentation requested by the Board, including records the discharger is required under the Order to keep. We see no reason dischargers should be granted such leniency, which can negatively impact Regional Board staff's ability to do its job and ensure adequate protection of groundwater. We propose the language to be revised to state "... shall furnish to the Central Valley Water Board within two weeks, unless the discharger can show that they are acting in good faith and need more time to gather records, not to exceed 30 days total."

* * * * *

CWC 14 We are pleased that the Regional Board have chosen to regulate Confined Bovine Feeding Operations.
CWC 15 We are especially pleased by the new requirements for flow meters and the annual cropland soil sampling. However, we are very concerned about the implications of this draft General Order on the State Antidegradation Policy, and we strongly suggest the inclusion of better monitoring, shorter time schedules, and stronger enforcement mechanisms. Furthermore, we recommend including stronger requirements that will ensure the adequate containment of waste, as well as stronger requirements regarding management practices for existing ponds.

Thank you again for the opportunity to comment on the draft General Order. Should you have any questions about our comments, please feel free to reach out to us.

Respectfully submitted,



Deborah Ores
Attorney & Legislative Advocate
Community Water Center



Michael K. Claiborne, Attorney
Leadership Counsel for Justice and Accountability