BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Adoption of Order No. R3-2012-0011, by the Central Coast Regional Water Quality Control Board for the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands. SWRCB/OCC File No. A-2209(a)

Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara & San Luis Obispo Counties, and Western Growers' Response to Monterey Coastkeeper, Santa Barbara Channelkeeper, and San Luis Obispo Coastkeeper's Petition Requesting Review of California Regional Water Quality Control Board Order No. R3-2012-0011

The Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara & San Luis Obispo Counties, and Western Growers (herein collectively referred to as "Grower-Shippers") hereby respond to the Petition Requesting Review of California Regional Water Quality Control Board Order No. R3-2012-0011 filed by the Monterey Coastkeeper, Santa Barbara Channelkeeper, and San Luis Obispo Coastkeeper (collectively referred to as "Coastkeeper Petitioners"). The Grower-Shipper response is filed in accordance with the State Water Resources Control Board’s (State Water Board) September 17, 2012 communication, as revised by the State Water Board’s communication dated September 25, 2012. Coastkeeper Petitioners challenge the Central Coast Regional Water Quality Control Board’s (Central Coast Water Board) decision to revise a proposed staff requirement. Specifically, the Coastkeeper...
Petitioners challenge the Central Coast Water Board's adoption of Nitrogen Balance ratios as targets versus regulatory endpoints. (Order No. R3-2012-0011, Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Conditional Waiver), p. 30.) The Coastkeeper Petitioners provide no legal or regulatory support with respect to why Nitrogen Balance ratios are required for adoption by the Central Coast Water Board. Accordingly, their Petition should be dismissed in its entirety by the State Water Board.

1. **The Challenged Provisions**

   The provisions at issue here are as follows:

   Dischargers producing crops in annual rotation (such as cool season vegetable in a triple cropping system) must report progress towards a Nitrogen Balance ratio target equal to one (1). A target of one (1) allows a Discharger to apply 100% of the amount of nitrogen required by the crop to grow and produce yield for every crop in the rotation. (Nitrogen applied includes any product, form or concentration, including but not limited to organic and inorganic fertilizers, slow release products, compost, compost teas, manure, extracts, nitrogen present in the soil and nitrate in irrigation water.)

   Dischargers producing annual crops occupying the ground for the entire year (e.g., strawberries or raspberries) must report progress towards a Nitrogen Balance ratio target equal to 1.2. A target of 1.2 allows a Discharger to apply 120% of the amount of nitrogen required by the crop to grow and produce a yield. (Conditional Waiver, p. 30.)

   According to the Coastkeeper Petitioners, having the requirements as progress goals rather than regulatory endpoints is inconsistent with the biostimulatory substance objectives and domestic drinking water standards contained in the Water Quality Control Plan for the Central Coast (Basin Plan), and therefore the requirements as progress goals are inconsistent with the Basin Plan, and by extension, Water Code section 13269. Such arguments fail for a number of reasons, including that the Basin Plan does not mandate, or even mention, that Nitrogen Balance ratios are required to implement water quality objectives contained in the Basin Plan. More importantly, the Nitrogen Balance ratios as contained in the Conditional Waiver (as either a progress goal or regulatory endpoint) are inappropriate because they are not supported by evidence in the record, and because such ratios are impractical to implement.
2. The Basin Plan Does Not Require the Central Coast Water Board to Adopt Nitrogen Budget Ratios

The Basin Plan sets forth a number of water quality objectives for various constituents, as is required by the Porter-Cologne Water Quality Control Act (Porter-Cologne). (Wat. Code, §§ 13050(j), 13240.) Water quality objectives are defined by Porter-Cologne to mean “the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.” (Id., § 13050(h).) When it adopts water quality objectives, the regional water quality control board is also required to adopt a program of implementation for achieving the objectives. The program of implementation is required to include:

(a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.
(b) A time schedule for the actions to be taken.
(c) A description of surveillance to be undertaken to determine compliance with objectives. (Wat. Code, § 13242.)

Coastkeeper Petitioners essentially allege that Nitrogen Balance ratios as regulatory endpoints are necessary to ensure that the Conditional Waiver is consistent with the Basin Plan. Grower-Shippers disagree. The Basin Plan includes a narrative water quality objective for biostimulatory substances and a numeric water quality objective for nitrate based on the primary maximum contaminant level (MCL). (Basin Plan, pp. III-3, III-5.) With respect to a program of implementation, the Basin Plan does not include specific identified actions for meeting these water quality objectives. Rather, the Basin Plan includes broader program language for the various types of discharges in the Central Coast region. For irrigated agriculture, which is considered to be a nonpoint source pollution, the Basin Plan includes a discussion with respect to best management practices, a Nonpoint Source Program, and agricultural water and wastewater management. (Basin Plan, pp. IV-5 to IV-7, IV-46.) Nowhere does the Basin Plan identify or require that Nitrogen Balance ratios must be met by dischargers that are considered to be irrigated agriculture to implement the nitrogen related water quality objectives.
3. The Central Coast Water Board Is Prohibited From Dictating the Manner of Compliance

Moreover, the Central Coast Water Board is prohibited from dictating the manner of compliance in any order. (Wat. Code, § 13263.) Rather, a discharger may comply with the order in any lawful manner. (Ibid.) The Conditional Waiver includes several provisions that require compliance with applicable water quality standards. (See, e.g., Conditional Waiver, Provision 22 ["Dischargers must comply with applicable water quality standards, as defined in Attachment A, protect the beneficial uses of waters of the State and prevent nuisance . . . "].) According to the Central Coast Water Board, it is understood that compliance with such standards will be achieved through the implementation of management practices, and that it will take years to achieve such compliance. (See, e.g., Transcript, Central Coast Water Board, March 15, 2012, Continuation of the Hearing on the Waiver of Waste Discharger Requirements Discharged from Irrigated Lands, p. 54:1-4 [statement of Frances McChesney: "... for nonpoint sources, compliance with Water Quality Standards means to implement management practices. If they aren't effective in reducing discharges to meet Water Quality Standards, that they revise or do new management practices."]; see also id., p. 137:8-19 [statement of Chair Jeff Young: "MR. YOUNG: Before I call for a vote on Dr. Hunter's motion, I just want to say to the Ag community and the public that I certainly don't expect to see possibly even immediate, you know, water quality changes ... I know that this is going to take in some regions -- some part of our regions years and years and years to get to where we want to be."].) However, although it is understood that management practices will need to be implemented, the Central Coast Water Board is limited in its ability to prescribe which management practices must be implemented. (See In the Matter of the Petition of the United States Department of Agriculture, Forest Service, Order No. WQ83-3 (April 21, 1983) ("Forest Service Order"), pp. 5-6 ["BMPs 9, 23, 13 and 14 [which prescribed erosion control provisions] go beyond the Regional Board's authority to limit discharges by specifying details on compliance."].) Requiring compliance with a specified Nitrogen Balance ratio to meet water quality objectives would likely constitute "dictating the manner of compliance," because it limits
discharges by specifying the details of compliance (e.g., apply only 100% of nitrogen required by the crop).

Rather than being a strict regulatory endpoint (or a specified progress goal in the Conditional Waiver itself), it is more appropriate that growers be required to generally develop and implement management practices that minimize runoff and leaching of nitrogen applied. (Forest Service Order, pp. 4-5.) Nitrogen Balance ratio guidelines might be part of such management efforts at a growers’ discretion, but are inappropriate as provisions in the Conditional Waiver.

4. Nitrogen Balance Ratios As Proposed Are Impractical and Unsupported by Evidence in the Record

To calculate Nitrogen Balance ratios, there must be scientifically valid uptake values established for the crops in question. At this time, such information does not exist. Specifically, as testified to by many, including the California Department of Food and Agriculture, most crops grown in the Central Coast have no scientifically valid uptake values. (May 4, 2011 Central Coast Water Board Transcript for Hearing on Conditional Waiver, p. 450:18-25 ["MR. HARD: This regulation as it currently stands, that’s in all tiers, would have growers trying to figure out what the nutrient uptake values are. There are 52, by our count, crops grown in this region, give or take one [or] two. Of those 52 crops only two have ever had scientifically evaluated uptake values. And those two that have been done are not scientifically valid."].) Accordingly, the lack of scientifically evaluated and valid information with respect to crop nitrogen uptake makes it impossible for producers to actually calculate a ratio for their farms/ranches.

Because such information does not exist, compliance with (or even progress towards) the Nitrogen Balance ratios contained in the Conditional Waiver is unrealistic, which makes the requirements impractical. Moreover, e.g., for crops such as cool season vegetables, the Central Coast Water Board presumes that producers can effectively and efficiently grow these types of crops by applying only the exact amount of nitrogen that the crop takes up. (Conditional Waiver, p. 30.) However, there is no information or findings in the record that support this requirement. Further, such an approach fails to consider many factors that influence the potential for nitrogen
leaching. Such factors include, but are not limited to, soil type, timing of application, and method of application. As a practical matter, with respect to application of nitrogen in agricultural systems, it is more important to apply nitrogen at the correct time for the crop using an appropriate method rather than focusing on total nitrogen applied.

Thus, not only are the Nitrogen Balance ratios impractical as a strict regulatory compliance endpoint, they are also inappropriate as an identified target within the Conditional Waiver. Accordingly, Coastkeeper Petitioners’ allegations must be dismissed.

CONCLUSION

Based on the foregoing, the State Water Board must dismiss the Petition and its claims as filed by Coastkeeper Petitioners. Further, the State Water Board needs to invalidate the challenged provisions as requested in the Petitions as filed by Grower-Shippers, as well as Ocean Mist and the California Farm Bureau Federation.

DATED: October 31, 2012

By: Theresa A. Dunham, Attorneys for Petitioners
Grower-Shipper Association of Central California, Grower-Shipper Association of San Luis Obispo and Santa Barbara Counties, and Western Growers
PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On October 31, 2012, I served a true and correct copy of the following documents:

Grower-Shipper Association of Central California, Grower-Shipper Association of Santa Barbara & San Luis Obispo Counties, and Western Growers' Response to Monterey Coastkeeper, Santa Barbara Channelkeeper, and San Luis Obispo Coastkeeper's Petition Requesting Review of California Regional Water Quality Control Board Order No. R3-2012-0011

XXX (electronically) On October 31, 2012, at approximately 2:00 p.m., by electronically transmitting a true copy to the person(s) at the electronic mailing addresses as set forth in the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 31, 2012, at Sacramento, California.

Crystal Rivera
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