



SAN JERARDO COOPERATIVE, INC.

September 3, 2013

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Via electronic mail to commentletters@waterboards.ca.gov

Re: Comment Letter – September 10th Hearing on Central Coast Agricultural Order Files
A-2209 (a)-(e)

Dear Members of the State Water Resources Control Board,

On behalf of Clean Water Action (“CWA”), Community Water Center (“CWC”), California Rural Legal Assistance Foundation (“CRLAF”), California Rural Legal Assistance, Inc. (“CRLA”), Environmental Justice Coalition for Water (“EJCW”), and Leadership Council for Justice and Accountability (“Leadership Council”), we respectfully submit these comments in advance of the September 10th Board meeting regarding the Central Coast Agricultural Order (“Order”).

As representatives of environmental justice communities, our organizations work extensively at the local, regional, and state level to ensure that all communities have equitable access to safe, affordable, and accessible drinking water. Nitrate due to agricultural use of fertilizers is the single greatest contributor to groundwater contamination in the Central Coast. Communities reliant on shallow drinking water wells disproportionately bear the brunt of this contamination, and often lack the technical, financial, and political wherewithal to seek remedies. As such, several of us have been engaged in the development of this Central Coast Agricultural Order since before the Central Coast’s original Draft Order in February of 2010.

We thank the Board for granting us with the opportunity to express our concerns as advocates and to provide more background on the lived experiences of Central Coast communities impacted by contaminated drinking water at the July 23rd Workshop. We appreciate your consideration of our comments and subsequent accommodations in the language of the revised Ag Order to meet our concerns, specifically in reference to domestic well monitoring. Unfortunately, we still have with regard to the revised Draft Order. In an effort to mitigate these concerns and further strengthen the Order, please consider the following revisions to more effectively control the continued impacts to groundwater quality.

Provision 51: Groundwater Monitoring

Groundwater Monitoring of All Domestic Wells

Our organizations strongly supported this order; in large part, because it finally institutes regular groundwater quality monitoring. The State Board, even though it voted in September to stay some parts of this order pending review, refused to stay the groundwater monitoring requirement, essentially agreeing with the Central Coast Board's stated imperative to address the severe drinking water issues in the region. We commend the Board's decision to require sampling of *all* domestic wells and notification of domestic well users after a sample has exceeded any Primary or Secondary MCL. This requirement is invaluable to the protection of public health.

Additionally, we also commend the Board's clarification on the requirement to conduct two sampling rounds (one in Fall, one in Spring). Several communities, including San Jerardo, have documented seasonal fluctuations in the concentration of nitrates in their well corresponding to above ground agricultural practices.

Up to 25% of Central Coast residents rely on domestic wells for their drinking water, and as stated above, many lack the resources or awareness to do their own well testing. Residents reliant on these wells are isolated in many respects: by geography, language, education, and economics. We have stressed to the Central Coast repeatedly that disadvantaged community advocates simply do not have the capacity to reach every domestic well user at risk for drinking water contamination. By requiring sampling of all domestic wells, the State Board will ensure that at least 942 households will now have accurate information about their water quality.

Annual Monitoring for Tier 3 Discharges

We must point to the inconsistency between the Board's acknowledgement of the value of annual groundwater monitoring and the Board's failure to require it. As stated in the revised Order, "[W]e cannot rule out the possibility that water quality in a well may change drastically within a year, and, particularly, in the context of health concerns with drinking water quality, find that annual monitoring for the highest risk discharges is reasonable (Order, p.30)."

Monterey County’s own sampling of state and local small wells reveals that water quality can change dramatically from year to year, impacting both the number of communities that are found to be out of compliance and the effectiveness of potential mitigation measures. Monitoring between 2011 and 2013, just two years, reported an increase of almost 20% in the number of systems found to be out of compliance. Any justification to delay another round of groundwater monitoring for Tier 3 discharges should be considered negligible in light of the potential impacts.

Recommendation: Require annual groundwater monitoring for Tier 3 dischargers

Provision 76-78: Nutrient Balance Ratios

We must insist that striking the requirement to report nutrient balance ratios undermines the Central Coast Board’s ability to evaluate practice effectiveness. The significant changes proposed to Provisions 76-78 provide insufficient information to enforce the order or to evaluate the relationship between farm practices and water quality. We appreciate the requirement to report applied nitrogen, but that in itself is insufficient to provide an estimate of nitrogen loading to groundwater.

The Board recommendations state that the numbers used to develop the nutrient ratio are unreliable. However, the information that is required for the calculation of these ratios is the same information used to develop a nutrient management plan. This information is used by the Regional Board to establish priorities for inspection and/or enforcement. In addition, the requirement to report a nutrient balance, in conjunction with information about total nitrogen applied, provides an estimate of nitrogen loss to the environment that is more valuable than just the amount of nitrogen applied. When combined with groundwater quality data, this figure will allow the Regional Board to develop correlations between on-farm practices and changes in water quality.

Instead, the State Board has opted for much the much more subjective “conscientious effort to implement appropriate controls” by which to measure compliance and deferred quantifiable reductions to the “long-term,” even though increasing impacts to communities are evidently clear *now*. Amended provisions 22 and 23 set targets for the Central Coast Order – discharges shall not cause or contribute to exceedances of applicable water quality standards; shall protect the beneficial uses of the waters of the State; and shall prevent nuisance as defined in Water Code Section 13050. Unfortunately, these targets provide no target or incentive for *remediation* of contaminated groundwater. Additionally, the only enforcement tool for these inadequate targets is the implementation of management practices whose effectiveness is not adequately measured under the revised order.

Additionally we would like you to consider the following changes to the Order:

Provision 11: The executive officer’s ability to waive the TAC requirement should be limited

The current draft Order appears to allow the Executive Officer (EO) to “waive the requirement for TAC review of a project or program if [...] the specified representatives are unavailable for serving on the TAC.” (Order, pg. 15.) As written, the requirement to form a TAC and consider

their input in the review of a project or program can easily be waived by the nonparticipation of two of the six representative categories.

The draft Order provides that the Technical Advisory Committee (TAC) should include the following:

- (2) Researchers/Academics
- (1) Farm advisor
- (1) Grower representative
- (1) Environmental representative
- (1) Environmental Justice/Environmental Health representative
- (1) Regional Board staff member representative

Given the inherent flexibility of having six broad categories of representatives and the importance of considering input from various perspectives, we recommend that the language of the Order be modified to better assure the convening of a TAC and their review of projects. The EO should have the authority to waive the TAC requirement only where three or more of the seven representatives specified in the Order are unavailable to serve on the TAC. The TAC must at all times include two (2) researchers/academics and one (1) Regional Board staff member. Moreover, the EO should document efforts to convene representatives from each category provided in the draft Order.

The following proposed changes are intended to prevent the nonparticipation of any two representatives, as described above, from creating the conditions that would allow the EO to waive the TAC requirement:

The Executive Officer has discretion to approve any third party water quality improvement project or program or third party monitoring and reporting program after receiving project or program evaluation results and recommendations from the committee. ~~If the Executive Officer denies approval, the third party group~~ The Executive Officer may waive the requirement for TAC review of a project or program only if the Executive Officer determines that three or more of the seven specified representatives are unavailable for serving on a TAC. The TAC shall consist of at least the two (2) researchers/academics and the Regional Board staff member. The EO will document efforts to convene representatives from each category. Third party projects or programs specifically allowed elsewhere in this Order are not subject to the requirements of Provision 11. (Order, pg. 15.)

Additionally, the State Water Board should clarify to what the following language refers: “Third party projects or programs specifically allowed elsewhere in this Order are not subject to the requirements of Provision 11.” (Order, pg. 15.)

Provision 33: Accountability in containment structure monitoring

While we are pleased to see that the Order was revised to require monitoring of containment structures to clarify that such structures should be monitored “if the water is not being reused for irrigation,” we recommend that accountability measures be put in place to better guide the Regional Water Board to determine if and when to require monitoring results. (Order, pg. 37.)

Specifically, we suggest that water reuse from containment structures be documented in Farm Plans as a management measure so that the Regional Water Board is able to determine whether to expect water monitoring results from containment structures. As written on page 28, the Farm Plan “must describe tile drain discharges and the management measures Dischargers have implemented or will implement to minimize impacts to water quality.” This standard could also serve as the standard for judging whether a Discharger should conduct or should have conducted water monitoring. In other words, if the Regional Board checks a farm plan and there is no indication of reusing water in a containment structure, then there should be documentation of monitoring that water in the containment structure.

The proposed language reads as follows:

We will also strike revise the requirement to monitor containment structures to clarify that such structures should be monitored only if the water is not being reused for irrigation.⁹² The water in some containment structures is generally re-applied to the fields, and there is no significant benefit to characterizing the quality of that water unless it will reach surface waters or is retained in the structure to percolate to groundwater.⁹³ Where water is reapplied, Dischargers will document such management measures and the rates of reuse in the Farm Plan. (Order, Pg. 36-37.)

Human Right to Water

As noted in our previous comment letter, effective January 1, 2013, AB 685 declared it the “policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes”. (Water Code section 106.3(a).) The Human Right to Water policy creates an ongoing obligation of relevant State agencies to consider the Human Right to Water “when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water” described in section 106.3(a). (Water Code section 106.3(b).)

In this instance, the State Water Resources Control Board has rightly concluded that it is a "relevant agency" within the meaning of AB 685 and, notwithstanding the Board’s draft statement that “section 106.3, by its terms, does not apply to the issuance of a water quality order”, has taken steps to consider the human right to water policy as articulated in and required by section 106.3. However, we believe that the Order here at issue is rightly subject to the requirements of section 106.3, as follows:

Govt. Code section 11342.600 defines regulation as follows:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Here, per section 11342.600, the present Order is an amendment, supplement, and/or revision of an order adopted by a state agency to implement, interpret, and/or make specific the law enforced and administered by it and to govern its procedure.

As such, the language of the current draft Order should be amended as follows:

With regard to our action in adopting this Order, section 106.3, by its terms, does not apply to the issuance of a water quality order. Therefore, Nonetheless, we recognize recognizing the important, basic human right expressed in Water Code section 106.3, subdivision (a), and the importance of this Order to a large number of residents throughout the Central Coast Region. We we find that it is appropriate to address consider the human right to water established by section 106.3 in adopting the Order.

Additionally, while the State Water Board finds that the Order is consistent with the Human Right to Water policy and sites to provisions of the Order to support its finding, our letter contains recommendations for how the Order could be improved to do more to advance the Human Right to Water. We urge the Board to adopt the recommendations contained in our written comments to more effectively implement the Human Right to Water policy (Section 106.3).

Conclusion

In 1988, the Director for the California Department of Food and Agriculture (CDFA) appointed a twelve-member Nitrate Working Group consisting of a diverse set of stakeholders, including agriculture, academia, and government. Soon after, both CDFA and the State Board released independent reports, *Nitrate and Agriculture in California* and *Nitrate in Drinking Water: Report to the Legislature*, respectively, which documented the extent of nitrate contamination and provided recommendations to reduce its impact. We hope that advocates and communities do not have to wait another twenty five years to see effective mitigation and trends of nitrate contamination of drinking water sources actually reversed. We appreciate and thank you for the opportunity to provide you with comments on the revised Order.

Sincerely,



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