



CALIFORNIA FARM BUREAU FEDERATION

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January 6, 2017

Jean-Pierre Wolff, Chair
Central Coast Water Resources Control Board
895 Aerovista Place, Ste. 101
San Luis Obispo, CA 93401

Re: Comments on Proposed Conditional Waiver of Waste Discharge Requirements
for Discharges from Irrigated Lands (Ag Order 3.0)

Dear Chairman Wolff and Members of the Central Coast Water Resources Control
Board:

The California Farm Bureau Federation is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 48,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

On behalf of the Santa Barbara County Farm Bureau, the San Luis Obispo County Farm Bureau, the Monterey County Farm Bureau, the San Benito County Farm Bureau, the Santa Cruz County Farm Bureau, the Santa Clara County Farm Bureau, and the San Mateo County Farm Bureau, the California Farm Bureau Federation ("Farm Bureau") appreciates the opportunity to comment on the Central Coast Regional Water Quality Control Board's ("Central Coast Regional Board") Proposed Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands ("Ag Order 3.0") and associated Monitoring and Reporting Program Orders ("MRPs") released on November 11, 2016. Farm Bureau respectfully presents the following comments:¹

¹ The Proposed Ag Order 3.0, Attachment A, and MRPs for each tier consist of numerous documents. Given the volume of the Ag Order 3.0 in its entirety, Farm Bureau reserves the right to provide additional comments and concerns in the future, especially with regard to compliance issues with the California Environmental Quality Act ("CEQA") and the Porter-Cologne Water Quality Control Act.

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A. Goal of the Program

Agriculture is one of the most important industries in the Central Coast Region because of the ability to produce large quantities of readily available food and fiber, the substantial economic benefits it provides to the region and the state, and the number of workers it employs which leads to significant positive impacts to both the region's and state's labor force. Farm Bureau members within the Central Coast agricultural community not only value agriculture's importance and necessary role in the state and region, but also value and protect natural resources, such as water quality, through stewardship, training, and implementation of on-farm practices, in addition to others.

The true goal of waste discharge requirements for agricultural commodities is to improve water quality over time. In order to reach this goal, the primary focus of maintaining and improving water quality over time should remain without burdensome or duplicative regulations.

B. The Proposed Ag Order 3.0 Substantially Differs From the Current Ag Order (Ag Order 2.0)

As originally described, Ag Order 3.0 was to be "largely unchanged from [Ag Order] 2.0" apart from "necessary date changes." (See Central Coast Regional Board Ag Order Renewal Discussion Powerpoint, August 2016, slides 7, available at: <http://www.waterboards.ca.gov/centralcoast/water_issues/programs/ag_waivers/docs/ag_order-wrkshp_july2016.pdf>.) Specifically, due to pending court cases and regulatory proceedings that will not be finalized prior to the expiration of the current conditional waiver (Ag Order 2.0), Ag Order 3.0 was to be adopted as a placeholder three-year conditional waiver with only minimal "housekeeping" changes made to the requirements of Ag Order 2.0. (See Central Coast Regional Board Ag Order Renewal Discussion Powerpoint, August 2016, slides 5, 7, 13.) In reality, Ag Order 3.0 contains fundamental and substantive changes beyond those that simply update reporting deadlines. Significant substantive changes include, but are not limited to, changes in monitoring requirements, additional reporting requirements, expansion of total nitrogen applied reporting, and procedural and process changes. These substantive changes increase compliance costs and burdens, further complicating the regulatory compliance process for many farm operators, and hinder the best pathway forward to achieving water quality objectives.

C. The Proposed Ag Order 3.0 Must Consider Reasonableness

In enacting the Porter-Cologne Water Quality Control Act, the Legislature laid out specific goals and objectives for the state's waters. The State Water Resources Control Board and Regional Water Boards must conform to all such statutory mandates, including the Legislature's objective:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to *attain the highest water quality which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Wat. Code, § 13000, emphasis added.) As explained throughout these comments, requirements within the Proposed Ag Order 3.0 are not reasonable and do not properly consider all values involved, including economic and detrimental values to the agricultural community.

D. The Proposed Ag Order 3.0 Significantly Increases Costs and Threatens the Cooperative Coalition Structure

The Proposed Ag Order 3.0 will impose substantial additional costs to growers.² Due to the proposed changes, not only will reporting costs increase, but surface water monitoring and groundwater monitoring costs will increase. Central Coast Water Quality Preservation, Inc., who conducts the surface water quality monitoring through the Cooperative Monitoring Program, has estimated that Cooperative Monitoring Program will require a 69% fee increase in order to account for the analytical costs associated with the additional toxicant surface water monitoring.

Additionally, groundwater monitoring costs will increase due to additional groundwater well monitoring requirements and an increased frequency of sampling. These additional costs could jeopardize the viability of the groundwater cooperative. With the addition of groundwater monitoring requirements within the current conditional waiver, Ag Order 2.0, groundwater cooperatives were formed to assist farmers in complying with the requirements; the groundwater cooperatives have developed coalition monitoring plans in which grower members may meet their groundwater monitoring requirements in a more cost effective manner than conducting individual monitoring. The third party cooperative/coalition structure is invaluable to the irrigated lands regulatory programs, not only within the Central Coast, but statewide. The coalition approach for implementing the

² The Central Coast Regional Board relies upon a cost analysis conducted pursuant to CEQA requirements for the Ag Order 2.0, which did not include any of the new requirements or expanded requirements contained in the Proposed Ag Order 3.0. Without analyzing the new requirements proposed in Ag Order 3.0, the Ag Order 2.0 analysis could not and does not consider all of the demands being made on the waters and all of the “total values involved, beneficial and detrimental, economic and social, tangible and intangible.” (Wat. Code, § 13000.) Therefore, any reliance on a previous economic analysis is inappropriate given the fundamental changes made to the Central Coast’s irrigated lands regulatory program, and the Central Coast Regional Board should analyze, evaluate, and estimate all of the costs associated with the Proposed Ag Order 3.0’s new regulatory requirements.

monitoring goals of the irrigated lands regulatory programs, whether through conditional waivers of waste discharge requirements or waste discharge requirements, is legally sound³ and effective at improving and protecting water quality. The purpose of coalitions is to put forward a program that focuses on the need to implement management practices to improve and protect water quality. By collecting and analyzing data submitted by growers, coalitions are able to identify water quality issues and implement effective outreach and education to address the issues. Additionally, the coalitions' mechanism for implementation allows for more efficient communication between Regional Water Board staff and the grower community on the effectiveness of management practices, and the need to implement such practices to protect water quality.

The potential impacts of the Proposed Ag Order 3.0 on the already successful cooperative coalition-based irrigated lands regulatory program are not only significant and costly, but also compromise the proactive structure of the program as cooperative coalition programs may no longer remain cost effective. The new and expanded reporting requirements increase costs not only for the coalition, which are then passed down to individual members, but also directly increases costs for individuals due to increased monitoring and reporting requirements, such as groundwater well monitoring and reporting. Further, in order to deal with the increase in data analysis and reporting, the coalitions may have to hire additional staff in order to implement the proposed requirements, which further adds costs to individual growers while removing the focus of the coalitions from improving and protecting water quality.

The Proposed Ag Order 3.0's increasing costs, along with a recent court decision eroding cornerstones of the coalition program, such as confidentiality, threatens the longevity of the successful cooperative coalition approach for implementing the goals and requirements of the irrigated lands regulatory program, and hindering the focus on

³ The language of Water Code section 13269 states that waste discharge requirements may be waived for "a specific discharge or type of discharge if the state board or a regional board determines, after any necessary state or regional board meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest." (Wat. Code, § 13269.) A State Water Resources Control Board precedential order states that it does not believe there to be a legal requirement that "all dischargers subject to a waiver must be individually listed." (In the Matter of the Petitions of Agricultural Water Quality Coalition, et al., Order WQO 2004-0003.) The Nonpoint Source Policy ("NPS Policy") also recognizes the legality of third party groups. "Implementation programs for NPS pollution control may be developed by a RWQCB, the SWRCB, an individual discharger or by or for a coalition of dischargers in cooperation with a third party representative organization, or government agency." (NPS Policy, p. 8.) These State Water Board findings and its NPS Policy clearly support the notion that third party groups are legal, and may be used to implement requirements of an irrigated lands regulatory program.

protecting and improving water quality. As costs for surface water monitoring and groundwater monitoring continue to increase and additional burdensome regulations are imposed, such requirements will make it difficult for cooperatives to create enough of an incentive for farmers to participate in a cooperative coalition over individual compliance. With the Ag Order 3.0's substantial changes and resulting impacts, the future relevance of any cooperative efforts on the part of the regulated community to meet Ag Order 3.0 requirements will be questionable.

E. The Proposed Ag Order 3.0 Significantly Expands the Total Nitrogen Applied Requirements

Under the Proposed Ag Order 3.0, all Tier 2 and Tier 3 growers growing any crop with a high potential to discharge nitrogen to groundwater must now record and report total nitrogen applied on the Total Nitrogen Applied Report form. (Ag Order 3.0, Provision 68.) Previously, only Tier 2 and Tier 3 growers growing crops with a high nitrate loading risk had to report total nitrogen applied on the Annual Compliance Form. Further, Ag Order 3.0 expands the Total Nitrogen Applied requirements to cover *any portion* of the farm, regardless of the crop's risk. Thus, a farmer growing non-high risk crops would be required to report the total nitrogen applied for those crops if high risk crops are also being grown on the same farm. Under these requirements, prioritization has been removed and more farms, regardless of their risk to water quality, will be required to report their total nitrogen applied. By expanding the total nitrogen applied requirements to apply to farms that have already demonstrated that their risk to water impairments is low and by eliminating prioritization and the use of risk units, the Ag Order 3.0's total nitrogen applied reporting requirements do not commensurate with potential risk.⁴

In addition to improper expansion, the new total nitrogen applied requirements improperly apply retroactively. Growers have been diligently working to improve water quality, implement best management practices, and reduce application rates prior to the adoption of the first Ag Order in 2003. However, with the proposed new total nitrogen applied reporting requirements, the Central Coast Regional Board will only start receiving data in 2018 or 2019. The data received at this time will present an incomplete picture of what growers have been doing on the Central Coast and the benefits to water quality that have resulted from decades of implementation of best management practices. In other words, given that reductions in application rates are finite, using 2018 or 2019 data as a baseline is inappropriate and ignores years of improvements. Further, how will the Ag Order 3.0 account for the substantial improvements and reductions over the past thirteen or more years? In addition to data collected now not properly reflecting past improvements and management practices to maintain and improve water quality, how will the data reflect anomalies? Crop seasons and the types of crops grown on the Central Coast are unique,

⁴ In addition, the total nitrogen applied requirements contradict the State Water Board's WQ Order 2013-0101 as well as the conclusions within the Ag Expert Panel's recommendations.

given the wide variety of soil types, planting timing and seasons, crop varieties, planting depths, crop rotation cycles, and weather attributes. With all of these variations, Farm Bureau questions how the Central Coast Regional Board will utilize total nitrogen applied data for regulatory purposes.

Additionally, farms must track total nitrogen applied from January 1 through December 31 of each year. Data collected in 2017 will be reported in the first report, due March 1, 2018. However, given that the Ag Order 3.0 is not scheduled to be adopted until March 2017, there will be gaps in data collection. Since the Ag Order 3.0 expands total nitrogen applied requirements, some growers have not been previously required to track this information and thus will not have data for a portion of the 2017 reporting period. The Ag Order 3.0 should not include retroactive reporting requirements requiring growers to report from periods prior to the adoption of the Order.

F. The Proposed Ag Order 3.0's Expansive Requirements Will Require Additional Technical Professionals

With the Ag Order 3.0 requiring more growers to comply with the newly expanded reporting and monitoring requirements,⁵ additional technical advisors and professionals will be needed which will be problematic given the lack of technical capacity to assist all the growers. In addition to the substantial cost associated with utilizing a technical advisor, there is insufficient technical assistance available to assist growers in complying with the Ag Order 3.0's requirements. For example, few professionals have been certified to develop and implement an INMP. Farm Bureau respectfully requests the Regional Board to address the lack of technical capacity to assist all the growers in complying with the requirements of the Ag Order 3.0 and make necessary revisions to the requirements.

G. The Proposed Ag Order 3.0 Substantially Expands the Monitoring and Reporting Program (MRP) Requirements

Farm Bureau has concerns with the changes to the Monitoring and Reporting Program Orders made in August 2016 and within the Proposed Ag Order 3.0. Specifically, on August 22, 2016, the Executive Officer adopted revisions to the Monitoring and Reporting Program Order Nos. R3-2012-0011-01 (Revised Tier 1 MRP),

⁵ In addition to the expansion of the total nitrogen applied reporting requirements discussed *ante* as well as the broadening of the surface water and groundwater monitoring requirements discussed *infra*, the requirements for the Irrigation and Nutrient Management Plan ("INMP") have expanded. Under the Proposed Ag Order 3.0, Tier 3 growers who are required to develop and implement an INMP must verify the overall effectiveness of the INMP annually by submitting an INMP Effectiveness Report as required by the MRP. (Ag Order 3.0, Provision 73). Previously, only Tier 3 dischargers that have farms with high nitrate loading risk to groundwater were required to submit an INMP Effectiveness Report.

R3-2012-0011-02 (Revised Tier 2 MRP), and R3-2012-0011-03 (Revised Tier 3 MRP) (collectively, “Revised 2016 MRP Orders”). The specific actions and inactions of the Central Coast Water Board Executive Officer in adopting the Revised 2016 MRP Orders include:

- Failure to comply with applicable legal procedures in adopting Revised 2016 MRP Orders, including the reasonableness factors of Water Code section 13267(b)(1);
- The unlawful adoption of the Revised 2016 MRP Orders by the Central Coast Water Board’s Executive Officer with no public notice or opportunity for parties to provide public comment or rebuttable testimony with respect to its content and application to Petitioners’ members;
- Revised 2016 MRP Orders at Section A of Part 1 paragraph 10, Surface Receiving Water Quality Monitoring Parameters, which requires dischargers, individually or through a cooperative monitoring program to monitor for neonicotinoid pesticides;
- Revised 2016 MRP Orders at Section A of Part 1 paragraph 10, Surface Receiving Water Quality Monitoring Parameters, to conduct water column toxicity tests for chironomus;
- Revised 2016 MRP Orders at Section A of Part 1 paragraph 10, Surface Receiving Water Quality Monitoring Parameters, to monitor pyrethroid pesticides more frequently than previously required;
- Revised 2016 MRP Orders, Section A of Part 2, Groundwater Monitoring and Reporting Requirements, which requires dischargers to sample groundwater wells that are located within the property boundary of an enrolled parcel number regardless of the dischargers’ control over the groundwater well located within the property boundary; and,
- Revised 2016 MRP Orders, Section A of Part 2, Groundwater Monitoring and Reporting Requirements, which deletes all reference to dischargers participating in a cooperative groundwater monitoring program.

Farm Bureau, along with other Central Coast agricultural entities petitioned the State Water Board on September 21, 2016, asking for review of the actions and inactions of the Central Coast Regional Board Executive Officer in adopting the Revised 2016 MRP Orders. Although the Ag Order 3.0 incorporates the Revised 2016 MRP Orders and makes additional changes, Farm Bureau feels the arguments made in its September 21, 2016 petition are still pertinent and applicable to the draft Ag Order 3.0, and thus incorporates all such arguments within this comment letter.

1. Groundwater Monitoring and Reporting

In the Revised 2012 Tier 3 MRP, groundwater well testing requirements included the sampling of the primary irrigation well and “all wells that are used or may be used for drinking water purposes.” (Revised Ag Order 2.0, 2012 Tier 3 MRP, p. 8.) The Ag Order 3.0 MRP changes these requirements, now requiring “Dischargers must sample all wells that are used or may be used for domestic use purposes and the primary irrigation well.

For the purposes of this MRP, a well that is used or may be used for domestic use purposes is defined as any groundwater well that is connected to a residence, workshop, or place of business that may be used for human consumption, cooking, or sanitary purposes.” (Ag Order 3.0, Tier 3 MRP, Part 2, p. 9 (track change version).)

Additionally, the Ag Order 3.0 changes which groundwater wells are to be sampled. Under the Revised Ag Order 2.0’s MRP, “Dischargers must sample at least one groundwater well for each farm/ranch on their operation. For farms/ranches with multiple groundwater wells, *Dischargers must sample the primary irrigation well and all wells that are used or may be used for drinking water purposes.*” (Revised Ag Order 2.0, 2012 Tier 3 MRP, p. 8, emphasis added.) The Ag Order 3.0 changes this requirement to: “Dischargers must sample at least one groundwater well for each farm/ranch on their operation, *including groundwater wells that are located within the property boundary of the enrolled county assessor parcel numbers (APNs).*” (Ag Order 3.0, Tier 3 MRP, Part 2, pp. 8-9, emphasis added.)

These changes are concerning and further clarification is required on the use of Assessor Parcel Numbers rather than the primary irrigation well per farm or ranch ownership since a single farm or ranch can have numerous APNs. If requirements are included to sample all wells on a farm or ranch, each farm would be required to monitor all wells, even landowner or tenant wells that the farmer may not have legal authority to access, creating a landlord/tenant and trespass issue. Clarification is also needed on the change from sampling “all wells that are used or may be used for drinking water purposes” to wells that “may be used for domestic use purposes.” Collectively, these changes go far beyond gathering information to protect drinking water and fail to recognize or allow for site-specific considerations already in place, such as onsite treatment, signage, and/or the availability of alternative drinking water supplies. For these reasons, Farm Bureau respectfully asks that these requirements be revised.

2. Surface Water Monitoring and Reporting

The Proposed Ag Order 3.0 MRPs states that the “surface receiving water monitoring and reporting requirements described herein are generally a continuation of the surface receiving water monitoring and reporting requirements of Monitoring and Reporting Program Order No. 2012-0011-03, as revised August 22, 2016, with the intent of uninterrupted regular monitoring and reporting during the transition from Order No. R3-2012-0011-03 to Order No. R3-2017-0002-03.” (Ag Order 3.0, Tier 3 MRP, Part 1, p. 2.) Unfortunately, the surface receiving water monitoring and reporting requirements differ greatly from those adopted in 2012 as the Executive Officer substantially changed the 2012 MRPs on August 22, 2016.⁶ The proposed Ag Order 3.0 MRPs “significantly increase pesticide monitoring frequency requirements relative to the previous MRPs.” (Central

⁶ See previous discussion regarding Farm Bureau’s concerns with the Executive Officer’s substantial revisions with the 2012 MRPs.

Coast Regional Water Quality Control Board, Staff Report for Regular Meeting of December 8-9, 2016, Item No. 12, *Status of Draft 2017 Agricultural Order, Order No. R3-2017-0002, also known as Ag Order 3.0*, p. 4.) With the changes made in 2016, the Ag Order 3.0 MRPs now require, in addition to core monitoring, twice a year testing for pyrethroid pesticides (11 types) and chlorpyrifos in sediment, neonicotinoid pesticides (6 types), organophosphate pesticides (13 types), herbicides (8 types) and metals (9 types), along with phenolic compounds and carbon in water. Toxicity sampling, occurring four times each year, was changed to add *Chironomus* in water, which are sensitive to neonicotinoids, retaining *Hyalella* in sediments along with *Ceriodaphnia* and algae in water, while eliminating minnows.

Prior sampling has not indicated that these new additions are constituents of concern or that increased frequency is warranted. Further, the expanded constituent sampling (such as the addition of neonicotinoids and more pyrethroid testing) and increased frequency of monitoring have created a program where the benefits gained from the monitoring do not bear a reasonable relationship or outweigh the burden, including costs, of these additional monitoring requirements. (Wat. Code, § 13267(b)(1).) Specifically, the revisions included in the Ag Order 3.0 MRPs are not supported by findings that show the burden of compliance is reasonable in light of the benefit to be conferred, and findings are lacking to support the need for monitoring certain insecticides or pesticides or for increased monitoring frequencies for these products, also in violation of Water Code section 13267. Further, as discussed *ante*, due to the increase in monitoring mandated by Regional Board, the invoices for just surface water monitoring will be 69% higher than last year. This increase, which does not include groundwater monitoring or costs associated with reporting or compliance with other requirements, is burdensome and does not bear a reasonable relationship to any potential benefit to be obtained.

3. The Monitoring and Reporting Provisions Exceed the Regional Board's Authority Since No Nexus is Provided

Although the Regional Board has the authority, pursuant to Water Code section 13267, to require monitoring reports and technical reports, “the burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.” (Wat. Code, § 13267(b)(1).) Additionally, the Regional Board *shall* provide each person “with a written explanation with regard to the need for the reports, and *shall* identify the evidence that supports requiring that person to provide the reports.” (*Ibid*, emphasis added.)

Various monitoring reports and technical reports are referenced in the Proposed Ag Order 3.0 and accompanying appendices, however, no nexus as to the burden, costs, need, or benefits is found. Although the December 8-9, 2016 Staff Report states, “[T]he benefits to be obtained from this data outweigh the burden, including costs, of these additional monitoring requirements,” this statement is not supported by any concrete evidence or data that supports requiring growers to provide such reports. (See Central Coast Regional Water

Quality Control Board, Staff Report for Regular Meeting of December 8-9, 2016, Item No. 12, *Status of Draft 2017 Agricultural Order, Order No. R3-2017-0002, also known as Ag Order 3.0*, p. 5.) Mere unsupported assertions that a need or nexus exists fail to validate a Water Code section 13267 request. Thus, as drafted, the provisions requiring monitoring reports and technical reports exceed, in whole or in part, the Regional Board's statutory authority.

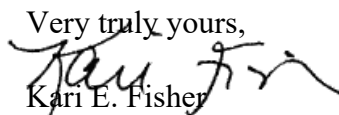
H. Unintended Consequences May Arise with the Removal of Certified Vineyards from the Ag Order 3.0

Farm Bureau is encouraged to see the Sustainability in Practice ("SIP") Certified Program retained (although now in another regulatory order) with regard to the regulation of certified irrigated vineyards, as this robust third party certification program with independent verification represents vineyards with a low risk to water quality, justifying a lower regulatory burden. Given the benefits of sustainable certification programs, other orders regulating agricultural commodities should recognize certification and sustainability practice programs for all crops, in addition to certified sustainable vineyards.

Although Farm Bureau appreciates and supports the continued recognition of the SIP Certified Program, the regulation of certified irrigated vineyards in the Winery Waste WDR rather than remaining part of the Ag Order 3.0 raises some concerns as unintended consequences may emerge due to the integration of two separate types of operations. Irrigated vineyards and processing facilities (wineries) differ in types of waste, manner of production, and use of best management practices. Additionally, unintended increases in costs will occur for those in the Ag Order 3.0 due to the removal of certified vineyard acreage from the Ag Order 3.0's water quality monitoring program. Given these concerns, further dialogue is needed regarding the removal of the SIP Certified Program from the Proposed Ag Order 3.0.

I. Conclusion

Farm Bureau appreciates the opportunity to provide comments on the Central Coast Regional Board's Proposed Ag Order 3.0. Farm Bureau remains concerned that the Proposed Ag Order 3.0 imposes a number of requirements that are burdensome, unnecessary, and unsupported under Porter-Cologne. Farm Bureau requests the Central Coast Regional Board to resolve those issues raised herein. We look forward to further involvement and discussion with the Central Coast Regional Board on the Ag Order 3.0 and subsequent orders.

Very truly yours,

Kari E. Fisher
Associate Counsel