



ENVIRONMENTAL LAW FOUNDATION

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February 1, 2022

Via E-mail

Patrick Pulupa
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Central Valley Regional Water Quality Control Board
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**Re: Request that Central Valley Regional Water Quality Control Board
Immediately Establish Waste Discharge Requirements for New and
Expanded Dairies**

Dear Mr. Pulupa:

The undersigned organizations write to request that the Central Valley Regional Water Quality Control Board (“Regional Board”) immediately ensure that all Central Valley dairy concentrated animal feeding operations (“dairy CAFOs”) are covered by water quality permits. The Regional Board has allowed dozens of new dairy CAFOs and dairy CAFO expansions over the past fifteen or more years without undertaking the required permitting. The continued discharges from these facilities in the absence of any permit violate numerous laws, policies, and orders, including but not limited to:

- The terms of the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2013-0122 (“2013 Order”);
- The Porter-Cologne Water Quality Control Act (“Porter-Cologne”), specifically Water Code sections 13263 and 13264;
- The State Water Resources Control Board’s (“State Board”) Statement of Policy with Respect to Maintaining High Quality of Waters in California (“Antidegradation Policy”);
- The State Board’s Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (“Nonpoint Source Policy”); and
- The California Environmental Quality Act (“CEQA”).

Pursuant to Water Code section 13320, subdivision (a), we formally request that the Regional Board take action to bring new and expanded dairies within permit coverage by immediately commencing required CEQA review, drafting a permit that complies with the law, prohibiting further dairy CAFO expansions and/or establishments, abating ongoing unpermitted pollution, and requiring reporting of unlawful discharges.

Background

The 2007 Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order No. R5-2007-0035 (“2007 Order”), applied only to “existing Milk Cow Dairies.” (2007 Order at p. 2.) The same language appears in the 2013 Order, which the Regional Board adopted following the Court of Appeal’s ruling that the 2007 Order violated the Antidegradation Policy. (2013 Order at p. 2; *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255.) Both orders define “expansion” as an increase in herd size greater than 15%. (2007 Order at p. 3.)

The 2013 Order prohibits dairy expansions. The 2013 Order reads: “Under this General Order, the expansion of the existing milk cow dairy beyond the level as defined under the term ‘Expansion’ is prohibited.” (2013 Order at p. 14.) A footnote to that sentence states, “Dischargers must submit a ROWD, document compliance with CEQA, and obtain coverage under individual waste discharge requirements before any material facility expansion.” (*Ibid*; see also *id.* at p. IS-4.)

Nonetheless, the Regional Board has not prohibited new dairies or dairy expansions during this time. And the Regional Board has failed to adopt a General Waste Discharge Requirements (“WDR”) for new or expanded dairies.¹ Instead, it has simply accepted Reports of Waste Discharge (“ROWD”) from new or expanded dairies and allowed those facilities to operate, in direct contravention of the law and the Regional Board’s own Orders.²

Meanwhile, pursuant to the 2013 Order, the Central Valley Representative Dairy Monitoring Program (“CVDRMP”) was required to submit its Summary Representative Monitoring Report (“SRMR”) in 2019. (2013 Order at p. 6.) The SRMR adds to the substantial body of evidence showing that dairy operations are contributing to an imminent and substantial endangerment in the Central Valley due to widespread nitrate contamination of the aquifer—an aquifer that is relied upon by hundreds of thousands of

¹ Attachment A to the Monitoring and Reporting Program of the 2013 Order refers to a “Waste Discharge Requirements General Order for New or Expanded Milk Cow Dairy Facilities.” (2013 Order at p. MRP-17.) But a review of the Regional Board’s website does not reveal the existence of any such order. This reference appears to be in error.

² It appears that some individual waste discharge requirements have been issued since 2007. These are available at https://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/#stanislaus. But the last individual WDR for a private dairy was issued in 2010.

Californians as their sole source of drinking water.

Key findings of the SRMR include:

- Nitrogen concentrations underlying dairies averaged 48 mg/L nitrate-N in shallow groundwater and 29 mg/L nitrate-N in deeper groundwater. (SRMR at p. 6.) These concentrations greatly exceed the maximum contaminant level for nitrate of 10 mg/L. (Cal. Code Regs., tit. 23 § 64431.) Consumption of water that is polluted with nitrates causes a host of medical ailments, including methemoglobinemia, also known as “Blue Baby Syndrome.”
- Dairy lagoons load nitrogen to groundwater at a mean rate of 1,045 lbs./ac/year. (SRMR at p. 7.) This loading rate exceeds even NRCS guidance, which are not designed to prevent groundwater contamination and have not been updated in years. (*Ibid.*)
- Dairy corrals load nitrogen at an average rate of 121 lbs./ac. (*Id.* at p. 8.)
- Dairy cropland loads nitrogen at an average rate of 368 lbs./ac. (*Id.* at p. 9.)
- Dairy cropland comprises roughly 430,000 acres in the Central Valley. (*Ibid.*) Total nitrogen loading thus approximates 1,582,400,00 lbs./year.
- There are serious problems with current methods for measuring nitrogen loading to groundwater, including a “substantial amount of ‘unaccounted-for’ manure nitrogen....” (SRMR at pp. 10, 45, 51.) This dynamic means there is a serious risk that dairy CAFOS apply even more nitrogen to their fields than reported.

In sum, existing dairies are significant sources of groundwater pollution, pollution that renders hundreds of thousands of Central Valley residents without safe drinking water and threatens the water sources of hundreds of thousands more.

Importantly, the 2013 Order requires collection of that information *only* for the dairy CAFOs that are subject to that Order. A large number of dairy CAFOs—those that are new or who have expanded since 2005—are not covered by the 2013 Order and not subject to its requirements.³ Those requirements include monitoring and reporting of

³ On December 20, 2021, ELF requested documents under the Public Records to establish the number of dairy operations currently operating without a permit. It is ELF’s understanding that the number of dairies unlawfully operating without a permit is on the order of 60-70 operations. Whether some new or

numerous parameters related to discharges of waste from the dairy. (See generally 2013 Order Monitoring and Reporting Program.) Dairy CAFOs must prepare a Nutrient Management Plan and implement management practices regarding application of manure to cropland. (2013 Order at p. 9.) The Order also requires lagoons to be maintained and constructed to certain standards. (2013 Order at pp. 15-19.) And while ELF is challenging these requirements because it believes that they are insufficiently stringent,⁴ having *some* permit requirements are better than no permit whatsoever: Dairies not subject to 2013 Order are not subject to any of these requirements, meaning they operate without any Regional Board oversight. And should the State Board or the courts direct that the 2013 Order be revised, those revisions will not apply to the newest and biggest dairies—those that have been established or expanded since 2005.

The fundamental problem with dairy CAFOs is these industrialized operations have too many cows for the available land area. This results in overapplication of manure to cropland, causing excess nutrients beyond what crops utilize as fertilizer to pollute groundwater. Dairy CAFO expansion exacerbates this issue—adding more cows to already oversubscribed cropland increases the nitrate loading to the aquifer. Nitrate contamination of this type is extremely difficult to remediate, which is why source controls are critically necessary to protect existing groundwater quality. The SRMR recommends that dairy CAFOs achieve “whole farm balance”—a ratio between the total amount of nitrogen produced by cows on the one hand, weighed against the total nitrogen anticipated to be removed by crops, exported, or lost to chemical processes on the other. (SRMR at p. 10.)⁵ Dairy CAFOs are currently not in “balance,” and expanding them will make the problem worse by increasing production of nitrogen without any requirement to increase cropland or export.

Discussion

1. Dairy CAFO Expansions that Lack Individual WDRs Violate the 2013 Order

expanded dairies have volunteered some or all information required by the 2013 may be clarified by these or future document requests.

⁴ ELF is a party to State Board Water Quality Petition SWRCB/OCC File A-2283(b), which challenges the 2013 Order’s failure to comply, *inter alia*, with the Antidegradation Policy. The State Board is considering this petition on its own motion.

⁵ We note that this “whole farm balance” is an imprecise methodology for securing agronomic rates of nutrient applications that are protective of the environment. In practice, the “whole farm balance” can be improperly calculated by dairy CAFO operators. The SRMR notes that current nitrogen accounting methodologies have serious limitations. (SRMR at p. 45.) Indeed, the currently reported nitrogen figures imply dramatically higher atmospheric losses than is reflected in the relevant literature, implying that nitrogen loading may be higher than it appears. (SRMR at p. 51.)

Prohibition 15 of the 2013 Order prohibits dairy expansions: “Under this General Order, the expansion of the existing milk cow dairy beyond the level as defined under the term ‘Expansion’ is prohibited.” (2013 Order at p. 14.) A footnote to that prohibition reads: “Dischargers must submit a ROWD, document compliance with CEQA, and obtain coverage under individual waste discharge requirements before any material facility expansion.” (*Ibid.*)

All dairy expansions that lack individual WDRs therefore violate the Order. The Order is clear that submitting a ROWD and showing CEQA compliance are not alone sufficient for compliance with the 2013 Order. The Order requires that dairy CAFOs also “obtain coverage” under a WDR *before* any expansion takes place. The Regional Board is not enforcing these requirements, meaning it unlawfully and inappropriately ignores its own Order.

Discharges made in violation of a WDR are subject to Cease and Desist Orders (“CDOs”) and Cleanup and Abatement Orders (“CAOs”). (Wat. Code §§ 13301, 13304, subd. (a).) As discussed below, we request that the Regional Board immediately move to issue orders so that no further pollution is caused by these unpermitted discharges and that existing contamination be cleaned up.

2. *Water Code Section 13263 Requires the Regional Board to Adopt Waste Discharge Requirements or Waivers for New or Expanded Dairies*

Water Code section 13263 provides that after a regional board receives a ROWD, it “shall,” “after any necessary hearing,” “prescribe requirements as to the nature of any proposed discharge.” This is a mandatory duty. (See *Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 481 [upon filing of ROWD, there is a “corresponding right and duty in the Regional Board to prescribe [Waste Discharge R]equirements”].)

By failing to issue waste discharge requirements—individual or general—to any new or expanded dairy for more than ten years, the Regional Board is in violation of its clear duties under section 13263. These WDRs must conform with Porter-Cologne and state water policy by, *inter alia*, achieving water quality objectives, avoiding degradation, making all required findings, and performing sufficient and publicly available monitoring.

3. *Water Code Section 13264 Does Not Justify the Regional Board’s Inaction on New and Expanded Dairy CAFOs*

The Regional Board and the dairy CAFO industry appear to have taken the position that new and expanded dairy CAFOs may continue to operate without WDRs pursuant to Water Code section 13264. This section provides in relevant part:

(a) No person shall initiate any new discharge of waste or make any material changes in any discharge, ... prior to the filing of the report required by Section 13260 and no person shall take any of these actions after filing the report but before whichever of the following occurs first:

(1) The issuance of waste discharge requirements pursuant to Section 13263.

(2) The expiration of 140 days after compliance with Section 13260 if the waste to be discharged does not create or threaten to create a condition of pollution or nuisance and any of the following applies:

[(A)-(B): the applicant complies with CEQA]

(Wat. Code § 13264.) The dairy CAFOs and the Regional Board seem to assume that once a new or expanded dairy CAFO submits a ROWD, it need only perform a CEQA analysis associated with its county land use permit and then allow 140 days to expire before it can begin discharging waste.

This interpretation ignores the full language of section 13264, subdivision (a)(2), which is clear that the 140 day period only applies if the discharge “does not create or threaten to create a condition of pollution or nuisance.” Here, it has been known for decades, and is undeniable after the release of the SRMR, that dairy CAFOs are a significant source of nitrate pollution. For the purpose of a finding that a discharge “create[s] or threaten[s] to create a condition of pollution or nuisance,” a Regional Board need not find that any discharge is the sole or even substantial cause of pollution or nuisance, but only that “a causal link or connection between a named responsible person and an actual or threatened discharge of waste” exists, which in turn “threatens to create” a “condition of pollution or nuisance.” (*San Diego Gas & Electric Co. v. San Diego Regional Water Quality Control Bd.* (2019) 36 Cal.App.5th 427, 440.) “Pollution” means “an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects” beneficial uses, including domestic use. (Wat. Code § 13050, subd. (l).)

Under this standard, it is clear that new and expanded dairy CAFOs “threaten to create a condition of pollution or nuisance.” (Wat. Code § 13264, subd. (a)(2).) The SRMR confirms what has been clear for decades: that all dairy CAFOs pollute groundwater by loading nitrogen into fields at unacceptable rates and through seepage from ponds and corrals. There is a clear “causal connection” between any given dairy and a “discharge of waste.” (*San Diego Gas & Electric Co., supra*, 36 Cal.App.5th at 440.) And it is undeniable that these discharges have already contaminated drinking water

wells to the point where they violate water quality objectives. The Water Code section 13264 procedure is therefore unavailable to these polluting industrialized facilities. Based on this information, the Regional Board must find that new and expanded dairy CAFOs are threatening to cause nuisance and pollution and must prohibit further expansions or new dairy CAFOs until it has issued valid WDRs.

4. *Failing to Issue WDRs for New and Expanded Dairy CAFOs Violates the Antidegradation Policy*

The Antidegradation Policy states that the quality of existing high quality waters “shall be maintained” unless the state finds that any degradation is “consistent with maximum benefit to the people 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.” (Antidegradation Policy at p. 1.) The Regional Board has not made these findings with respect to new and expanded dairies.

The Antidegradation Policy further requires the Regional Board to establish WDRs that result in the “best practicable treatment or control” (“BPTC”) for “any activity which produces or may produce a waste or increased volume or concentration of waste.” (*Ibid.*) Such BPTC must “assure” that “nuisance and pollution will not occur” and that the “highest water quality consistent with maximum benefit to the people of the State will be maintained.” (*Ibid.*)

The Regional Board has not complied with any of its duties under the Antidegradation Policy with respect to new and expanded dairy CAFOs. It has neither made the required findings, nor issued WDRs, nor analyzed or prescribed BPTC. This has led and will continue to lead to continued degradation of high-quality waters. (*AGUA, supra*, 210 Cal.App.4th at 1268.) This violates the Antidegradation Policy.

5. *The Regional Board’s Failure to Issue Permits for New and Expanded Dairy CAFOs Violates the Nonpoint Source Policy*

All programs for control of nonpoint source pollution must comply with the Nonpoint Source Policy. (State Water Resources Control Board’s Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (“Nonpoint Source Policy”) at p. 3.) The Nonpoint Source Policy extends to any activity or factor that may affect water quality, including both point source and nonpoint source discharges. (*Ibid.*) All nonpoint source discharges “must be regulated” under WDRs, waivers, or a basin plan prohibition. (*Ibid.*)

Courts have confirmed that a Regional Board must comply with the Nonpoint Source Policy as it is written. In *Monterey Coastkeeper v. State Water Resources Control Board* (2018) 28 Cal.App.5th 342, the Court of Appeal held that a waiver of WDRs for

agricultural discharges in the Central Coast violated the Nonpoint Source Policy because it improperly substituted Key Element 3's requirement of specific time schedules for a "vague requirement of 'improved' management practices and a 'conscientious' effort." The court held that this substitution constituted unlawfully "rewriting—or amending" the Nonpoint Source Policy. (*Ibid.*) The court went on to conclude that it owed no deference to the State Board's interpretation of the Policy that "flies in the face of the clear language and purpose of the interpreted provision." (*Ibid.*, quotation omitted.)

Even more so than the waiver challenged in *Monterey Coastkeeper*, the Regional Board's failure here to undertake any permitting for new and expanded dairy CAFOs violates the Nonpoint Source Policy's requirement that all nonpoint source discharges must be regulated under WDRs, waivers, or a basin plan prohibition.

Further, this lack of permitting violates the Nonpoint Source Policy's Key Elements 1 and 2 by failing to commit to meeting Water Quality Objectives or to describe and verify that management practices are effective in addressing pollution. (Nonpoint Source Policy, at p. 11.)

6. *The Regional Board's CEQA Procedures Are Problematic*

The Regional Board appears to have made false or misleading statements to several counties in connection with CEQA reviews associated with dairy CAFO's land use permitting.

For instance, a Stanislaus County Initial Study for the S&S Dairy expansion references an email from the Regional Board stating that "the project requires individual Waste Discharge Requirements."⁶ A Merced County Initial Study for the Martins View Jersey Dairy Expansion Project states: "The project applicant has submitted a Report of Waste Discharge for the proposed dairy expansion. The CVRWQCB will be issuing Individual WDRs for the Martins View Jersey Dairy Expansion."⁷ And a Merced County Initial Study for the Hillcrest Dairy expansion states that the "CVRWQCB will be issuing

⁶ S&S Dairy Initial Study (2019) at p. 22, available at https://files.ceqanet.opr.ca.gov/82957-2/attachment/_9TG4dLc8CZ-Ka4V3deJ5jbQ6ARuU1i8EqEiGY3J5edYcBEzk0lxTnlxx6699HcIYU1yZis6I6t7Cs4w0 (accessed January 26, 2022).

⁷ Merced County Initial Study for the Martins View Jersey Dairy Expansion Project (2021) at p. 21, available at https://web2.co.merced.ca.us/pdfs/env_docs/initial_studies/MartinsViewJerseyDairy/Martins_View_ISMND_031221.pdf (accessed January 26, 2022).

Individual WDRs for the Hillcrest Dairy Expansion.”⁸

In none of these cases, nor in any other case for more than a decade, did the Regional Board issue a WDR, in direct violation of applicable law and the Board’s own representations. The Regional Board is demonstrating a clear pattern. It has been giving counties the impression that first, individual WDRs are required for expanded dairy CAFOs, and second, that the Regional Board will in fact issue those WDRs. But the Regional Board has not issued any WDRs nor does it appear that the Regional Board ever intends to issue them. This pattern raises serious questions about the Regional Board’s participation in county CEQA processes.

Further, it is not clear that the Regional Board is fulfilling its duty as a “responsible agency” under CEQA. A responsible agency has discretionary approval over all or part of a project. (*RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1205-06.) Indeed, if an agency “could, in its discretion, deny approval, then that agency is a responsible agency under CEQA.” (*Ibid.*) Here, the Regional Board has discretion to deny dairy CAFO expansions and new dairy CAFOs pursuant to the 2013 Order, Water Code sections 13263 and 13264, the Nonpoint Source Policy, and the Antidegradation Policy. As a responsible agency, the Regional Board should have been undertaking CEQA review of each of these projects, including the cumulative effects of the pattern of dairy CAFO expansions over the Central Valley. It is not clear whether or to what extent this review is taking place.

We intend to submit further document requests to investigate whether the Regional Board is fulfilling its CEQA obligations both with respect to county review of dairy CAFO expansions/new dairy CAFOs and with respect to its own CEQA review of those operations.

7. *Request for Action*

We make the following requests pursuant to Water Code section 13320.

1. **Begin CEQA Review Within 60 Days.** Any general order for new or expanded dairy CAFOs will require CEQA review. (Wat. Code § 13389.) We request that the Regional Board begin this process—possibly by preparing an Initial Study (Cal. Code Regs. tit. 14, §§ 15060, 15063) or a Notice of Preparation of an EIR (Cal. Code Regs. tit. 14, § 15082) within 60 days of the date of this letter.

⁸ Merced County, Initial Study - Hillcrest Dairy Expansion CUP20-013, at p. 22, available at https://web2.co.merced.ca.us/pdfs/env_docs/initial_studies/CUP20-013_HillcrestDairyExpProject/CUP20-013_HillcrestDairy_NO_IS_092021.pdf, accessed January 26, 2022.

2. **Issue Draft WDRs for New and Expanded Dairies Within 60 Days.** We request that the Regional Board issue draft WDRs—either individual or general—for new and expanded dairy CAFOs within 60 days. Such draft WDRs must comply with, *inter alia*, Water Code § 13263, the Antidegradation Policy, and the Nonpoint Source Policy. We expect a final permit or permits to be adopted within a year of this letter.
3. **Prohibit Any Future or Currently-Proposed Expansions or New Dairy CAFOs Until A Permit Authorizing Discharge of Waste at Such Dairy or Dairies Is Adopted.** As detailed in this letter, new dairy CAFOs and expansions of dairy CAFOs are unlawful without permit coverage. The Regional Board must not allow any future or proposed dairy CAFO expansions or establishments until a permit is in place.
4. **Issue Cease and Desist Orders For Unlawfully Expanded or Established Dairy CAFOs within 60 days.** As discussed above, dairy CAFO expansions and new dairy CAFOs violate the 2013 Order and are thus subject to CDOs pursuant to Water Code § 13301 as discharges in violation of a WDR.
5. **Issue Cleanup and Abatement Orders For Unlawful Dairy Expansions and New Dairy CAFOs Within 60 Days.** We request that the Regional Board issue CAOs under Water Code § 13303 requiring abatement of the endangerment to groundwater caused by unpermitted discharges since any unlawful expansion or establishment of a new dairy occurred and during the CEQA and permitting process.
6. **Issue Information Orders Pursuant to Water Code § 13267 for All Unlawfully Expanded or Established Dairy CAFOs Within 60 Days.** We request that the Regional Board use its investigative authority under Water Code section 13267 to issue information orders requiring public reporting of at least the following parameters for unlawfully expanded or established dairy CAFOs: 1) herd size, 2) crop acreage available for manure application, 3) amount of manure exported off-farm, 4) Nutrient Management Plans, if they exist, 5) well-testing data for nitrate; 6) soil-testing data for nitrate.

We note that an aggrieved party is entitled to petition the State Board over the failure of a Regional Board to act within 30 days after a refusal to act or 60 days after the request is made. (Wat. Code § 13320, subd. (a).) We intend to file such a petition should the Regional Board not act on the requests made in this letter. We also do not foreclose the possibility of taking additional further actions before 60 days elapses should, for example, further documents reveal additional or different legal violations.

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If the Regional Board decides to seek funding from the Legislature or any other source for the required CEQA review, we would be happy to discuss joining any such request.

We look forward to engaging further on this issue.

Sincerely,



Nathaniel Kane
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Environmental Law Foundation

/s/ Michael Claiborne
Directing Attorney
Leadership Counsel for Justice and
Accountability

/s/ Sean Bothwell
Executive Director
California Coastkeeper Alliance

/s/ Brent Newell
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