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9 STOP QIP TAX COALITION

10 BEFORE THE DEPARTMENT OF FOOD AND AGRICULTURE
11
12 STATE OF CALIFORNIA

13 In the Matter of the Public Hearing to Suspend
14 Chapter 3.5 of the Food and Agriculture Code.

15 OAH No. 2020020788

16 **PETITIONER STOP QIP TAX
17 COALITION'S MOTION FOR
18 RECONSIDERATION**

I. MOTION FOR RECONSIDERATION

2 Stop QIP respectfully moves the Hearing Officer for reconsideration of his Recommended
3 Decision issued July 24, 2020 (“Recommended Decision”) regarding a referendum on Stop QIP’s
4 Petition to Suspend Chapter 3.5 of the California Food and Agriculture Code pursuant to §62752
5 on two grounds. First, the Recommended Decision disregards Stop QIP’s challenges to the Fixed
6 Differential and Regional Quota Adjusters (RQAs) and its right for a vote on those challenges.
7 Second, the Recommended Decision conflates the process for suspending the *authorization* for
8 any quota program implemented by CDFA, found in Chapter 3.5, with the process for amending
9 or terminating *the current program in place*, (the Quota Implementation Program (“QIP”)), §200
10 to §1200. Third, the Recommended Decision does not comport with the statute’s plain language.

11 A. Judicial Efficiency is Served through this Motion for Reconsideration

12 Stop QIP files this Motion for Reconsideration within the 15 days permitted under
13 California's Administrative Procedures Act ("APA"). Recognizing that this proceeding is not
14 technically an APA action, but rather a hearing held pursuant to CDFA's own regulations, the
15 APA's 15-day rule should apply by analogy. Further, Stop QIP concludes that judicial efficiency
16 requires immediate review and reconsideration of manifest and obvious errors in the
17 Recommended Decision so that the Secretary may avoid compounding that error in any decision
18 she makes based upon the Recommended Decision.

19 B. The Recommended Decision directly contradicts the plain language of §62750 and
20 §62754 and nullifies an important right that the California Legislature gave to dairy
farmers to suspend the Fixed Differential.

First, clarifying a critical factual issue, Stop QIP's petition sought a referendum to suspend all parts of Chapter 3.5, including the Fixed Differential in addition to the authorization for the QIP. Stop QIP's Chapter 3.5 petition states that "we, the undersigned submit the following petition in support of immediately suspending Cal. Food & Agric. Code § 62750 to 62757 ("Chapter 3.5") ... The [QIP], established purportedly pursuant to Chapter 3.5, implements a fixed differential quota adjuster of \$0.195 per pound. This fixed differential quota assessment carried out through the [QIP] burdens California dairies and hurts both dairy families and the entire California dairy industry." Save QIP, Ex. 23 (emphasis added). Nowhere does the

1 Recommended Decision address the petition's challenge to the Fixed Differential. With this
2 failure, the Recommended Decision voids farmers' clear rights given by the California Legislature
3 to challenge the Fixed Differential and RQA's under a Chapter 3.5 petition. For that reason alone,
4 it cannot stand.

5 The plain language of the applicable statutory provisions gives dairy farmers the right to
6 vote out the Fixed Differential calculation found at §62750 pursuant to a simple majority vote.
7 The Recommended Decision acknowledges as much in its recitation of the history of the statutes:
8 "The Legislature also established that the fixed differential would remain in effect until such time
9 that the producers may vote to suspend the operation of the chapter pursuant to the simple
10 majority voting threshold set forth at section 62755..."). Recommended Decision, at 8. In its
11 petition, Stop QIP sought a vote to suspend the Fixed Differential. Save QIP, Ex. 23. At the
12 hearing, Stop QIP submitted extensive evidence that the Fixed Differential no longer served its
13 purpose and was hurting the industry. Chip English Opening Statement, at 3 ("The Fixed
14 Differential of \$1.70 per cwt... not only no longer serves a purpose, it harms non-quota holders.
15 Regional quota adjusters also are no longer necessary since California farmers joined the
16 [FMMO]."); Chip English Closing Statement at 2-7 (explaining how through the work of UDF's
17 expert "[d]airy farmers have also learned that the original justification for the Fixed Differential
18 established in 1993-1994 has evaporated."); Producer Declarations and Testimony (detailing the
19 negative impacts of the Fixed Differential). Notably, this uncontradicted evidence, while related
20 to challenges to authority for a QIP, also operated as an independent attack on the failures of the
21 Fixed Differential. Stop QIP's expert also provided evidence specific to the Fixed Differential
22 and its negative impacts. Dr. David Sunding Expert Report, at 5-16 (showing that "overbase
23 prices under the pre-1994 regime would have been 11 cents higher on average" than they were
24 under the Fixed Differential). Stop QIP explained in detail in its Post-Hearing Brief why its
25 challenge to the Fixed Differential warrants a referendum. Stop QIP Post-Hearing Brief, at 8-10.
26 While the Recommended Decision acknowledges that the parties presented "extensive testimony
27 and documentation regarding the costs and benefits of quota" and expert testimony on the same,
28 that evidence "did not factor into this decision which is based primarily on statutory requirements

1 for a referendum.” Recommended Decision, at 11. The Recommended Decision disregards both
2 the clear law that allows Stop QIP’s members to have a vote eliminating the Fixed Differential
3 and the overwhelming evidence that the Fixed Differential is a failure, necessitating such a vote.
4 This same argument extends to the RQA’s. Stop QIP Post-Hearing Brief, at 9–10.

5 The Recommended Decision also does not address that the only way for a petitioner to
6 challenge the Fixed Differential is via a petition to suspend the entirety of Chapter 3.5 pursuant to
7 §§62752–62754. Namely, the Recommended Decision does not address §62754, which requires
8 that the ballot for a petition challenging the Fixed Differential must read (“[t]he ballot form shall
9 be substantially as follows”) (emphasis added):

10 Shall Chapter 3.5 (commencing with Section 62750) of Part 3 of Division 21 of the Food
11 and Agricultural Code be continued in effect? Yes No.

12 The statute requires that a petitioner, like Stop QIP, challenge the Fixed Differential by seeking
13 suspension of the entirety of Chapter 3.5. Stop QIP complied. But under the conclusions of the
14 Recommended Decision, there is no way for the Secretary to issue this required ballot for a vote
15 on the Fixed Differential now or ever again because the Decision’s proposed interpretation of
16 §62757 would create an untenable contradiction. In other words, a decision that §62757 can
17 never be suspended pursuant to a suspension of Chapter 3.5 means that the Fixed Differential and
18 RQA’s can never be suspended pursuant to a suspension of Chapter 3.5. This interpretation
19 improperly voids all meaning of the other provisions of Chapter 3.5.

20 The Recommended Decision states that “[t]he law does not provide for the termination of
21 section 62757 by means of a Chapter 3.5 referendum.” Recommended Decision, at 23. However,
22 this conclusion (misquoting the statute, which says “suspension” not “termination”) stands in
23 direct conflict with the fact that the law *does* provide for the suspension of the Fixed Differential
24 and RQAs by means of a Chapter 3.5 referendum. The California Legislature requires that a
25 petitioner not piecemeal challenge portions of Chapter 3.5, but rather that any challenge would
26 have to be a straight up-or-down referendum on the entire Chapter. Stop QIP sought such a
27 referendum and Opponents provided no arguments against its right to the same in regards to the
28

1 Fixed Differential or the RQAs. The Recommended Decision fails to address this aspect of Stop
2 QIP's petition.

3 Stop QIP is entitled to a referendum on the Fixed Differential and RQAs. The only way,
4 legally and practically, to comply with the applicable statutes is to permit Stop QIP a referendum
5 on its petition challenging the Fixed Differential and RQAs with a ballot that calls for the
6 suspension of the entirety of Chapter 3.5.

7 **C. The Recommended Decision conflates the separate processes for suspending the
8 statutory authorization for CDFA to create any quota program under §62757(c) with
9 the regulatory processes for suspending or amending the specific QIP currently in
place.**

10 The Trailer Bill in Chapter 3.5 (found at §62757) is not the quota program. Rather,
11 §62757 has the limited function to authorize CDFA to adopt regulations implementing a quota
12 program. CDFA claims to have done so, and “adopted” the QIP. But the QIP is separate and
13 distinct from Chapter 3.5, the authorization that the California Legislature gave CDFA to adopt
14 the QIP. This distinction is critical, because the process for amending or suspending the quota
15 program currently in place (the QIP) is distinct and different from the process for suspending
16 CDFA’s authorization to adopt any quota program of any kind (as found at §62757).

17 Unfortunately, the Recommended Decision conflates Stop QIP’s challenge of the authorization
18 for any QIP program with a challenge to the specific QIP program adopted by CDFA.

19 As detailed above, the California Legislature set out a specific process by which to
20 suspend any and all provisions in Chapter 3.5. This process would include suspending the
21 statutory authorization to CDFA to establish a quota program per a simple majority vote, together
22 with all other aspects of Chapter 3.5. Notably, this process is separate and distinct from the
23 regulatory process that CDFA separately established for amending the specific quota program
24 currently in place, the QIP. But the Recommended Decision treats the statutory authorization for
25 any quota program as identical to the specific QIP in place. Considering the potential application
26 of the Recommended Decision is instructive in understanding how it conflated these two issues.

27 If the Recommended Decision were to stand, consider a scenario where farmers wish to
28 petition to put a quota program in place different from the QIP. Farmers could do so by bringing

1 a petition to terminate the QIP pursuant to the QIP’s §1103, leaving CDFA still with the authority
2 from the California Legislature under §62757(c) to replace it with a different program. Under this
3 scenario, the PRB could turn around and develop a new proposal for a new quota program, to be
4 voted on by farmers. CDFA may be entitled to deference in regards to the threshold it wishes to
5 establish for terminating or amending the QIP in this process. But a different scenario is at issue
6 here. Here, farmers wish to bring a petition that would suspend the authorization for any quota
7 program (including the current QIP), such that CDFA *cannot establish any quota program at all*.
8 Upon such a suspension, both the current QIP is suspended *and* CDFA is no longer authorized to
9 adopt a new quota program after the current QIP.

10 The Recommended Decision merges these two different scenarios. And as applied, it
11 would mean that even though the California Legislature set out that farmers could suspend
12 Chapter 3.5 (and the quota program authorization) on a simple majority, CDFA can override the
13 Legislature’s statutory simple majority by adopting provisions in the QIP requiring a
14 supermajority threshold. But CDFA cannot adopt a program in contravention of a governing
15 statute. *See Association of Irritated Residents v. San Joaquin Valley Unified Air Pollution*
16 *Control Dist.* (2008) 168 Cal.App.4th 535, 549 (granting a writ of mandate because an air
17 pollution control district failed to perform an assessment of its regulations when required by
18 statute to do so); *and Whitman v. Am. Trucking Ass’ns* (2001) 531 U.S. 457, 471 (barring the EPA
19 from considering costs in air quality guidelines when “the CAA [applicable statutory scheme] as a
20 whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends
21 the matter for us as well as the EPA”). The Legislature ceded no authority to CDFA to establish
22 new voting thresholds, and per the plain language of the entirety of Chapter 3.5, any provision
23 within that Chapter (including the authority for a CDFA-run quota program) must be subject to
24 that Chapter’s simple majority vote.

25 **D. The Recommended Decision Ignores the Plain Language of the Statute, Which Must
26 be Read as a Whole.**

27 It appears that Stop QIP’s petition to challenge the Fixed Differentials and RQAs is being
28 rejected because the language of the ballot – *as required by the California legislature* – would

1 result in the suspension of the authorization for the QIP. But no one can bulldoze the
2 Legislature's decision to set out specific wording for such a ballot and then to make §62757
3 subject to that ballot. In fact, the ballot wording contemplates that the Chapter 3.5 suspension
4 processes apply to the entire Chapter 3.5 and apply to any later-added sections (it reads
5 “*commencing* with Section 62750” as opposed to “Section 62750 to 62756”).

6 The Recommended Decision's reading allows Opponents to point to a conclusory result as
7 an excuse to ignore the plain language of the statute. But as the cited United States Supreme
8 Court and California Supreme Court authority made clear, it is the statute that dictates the results,
9 not the other way around. *See Bostock v. Clayton County, Ga.*, 2020 WL3146686, at *14 (U.S.
10 Sup. Ct., June 15, 2020); *Milner v. Dept. of Navy*, 562 U.S. 562, 574 (2011); and *Equilon*
11 *Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 59, 52 P.3d 685, 689 (2002). Opponents
12 cannot back-door in a full bar to farmers' statutory rights because the collateral consequences are
13 unfavorable to them.

14 In focusing solely on the impacts of a Chapter 3.5 referendum on §62757, the
15 Recommended Decision also creates an untenable contradiction between farmers' ability to
16 pursue a challenge of the Fixed Differential and a challenge of the authorization for the QIP. If it
17 stands, the Recommended Decision would mean that no farmer could challenge the Fixed
18 Differential because such a challenge would result in the suspension of the authorization for the
19 Quota Program. As stated in the Recommended Decision, “[i]t is not to be presumed that the
20 legislature in the enactment of statutes intends to overthrow long-established principles of law
21 unless such intention is made clearly to appear either by express declaration or by necessary
22 implication.” *Regency Outdoor Advert., Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 526, as
23 modified (Oct. 11, 206) (*quoting Los Angeles Cty. v. Frisbie* (1942) 19 Cal.2d 634, 643-44);
24 Recommended Decision, at 22. The Recommended Decision rests upon the conclusion that in
25 contravention of the plain language of the rest of Chapter 3.5 and the extensive legislative history
26 of Chapter 3.5, the California Legislature sought to abolish the farmers' longstanding right to
27 challenge the Fixed Differential and RQAs.

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1 In addition, the conclusion changes the voting thresholds and express wording of the rest
2 of Chapter 3.5 without discussion or language stating that, but merely relying on the word “be.”
3 It is not rational that the California Legislature would make such a drastic and dramatic change in
4 a way that requires such heavy and unartful reliance on a single passive verb overriding the rest of
5 Chapter 3.5. Furthermore, the operation of this one word is limited by the subsequent language
6 stating that the cited Chapter 3.0 provisions only apply to the *approval* process for the QIP. The
7 entirety of §62757(c) reads: “The stand-alone quota program shall be pursuant to a
8 recommendation by the review board established pursuant to Section 62719 and approved by a
9 statewide referendum of producers conducted pursuant to Sections 62716 and 62717.” (Emphasis
10 added). The Recommended Decisions finds that “sections 62719, 62716 and 62717 apply equally
11 to approval and termination of the QIP,” (Recommended Decision, at 21,) but such a reading
12 nullifies the presence of the word “approval” by making it mean “approval and termination.”
13 Neither the plain language nor the legislative history leave room for such an interpretation of the
14 plain language.

15 **E. Conclusion**

16 The California Legislature gave Stop QIP the right to a referendum on its petition to
17 suspend Chapter 3.5 through the challenge to the Fixed Differential and RQAs. The California
18 Legislature gave Stop QIP the right to such a referendum in accordance with the applicable
19 statutes, including pursuant to the wording of the ballot resulting in the suspension of the entirety
20 of Chapter 3.5. And Stop QIP is entitled to the application of the plain language of such a ballot,
21 resulting in both the suspension of the Fixed Differential and also the authorization to CDFA to
22 adopt any quota program whatsoever (including the QIP). Let them vote.

23
24 ///

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26 ///

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28 [Signature on following page]

1 DATED: August 5, 2020

DAVIS WRIGHT TREMAINE LLP
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4 By: /s/ Chip English
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1 | **DECLARATION OF SERVICE**

2 | **Case Name: Petition to Suspend Chapter**
3 | **3.5 of the Food and Agricultural Code**

4 | **OAH No.: 2020020788**

5 | At the time of service, I was over 18 years of age and not a party to this action. I am employed
6 | in the County of Los Angeles, State of California. My business address is 865 South Figueroa
7 | Street, Suite 2400, Los Angeles, CA 90017.

8 | On August 5, 2020, I served a copy of the following document(s) in the action entitled above:
9 | **PETITIONER STOP QIP TAX COALITION'S MOTION FOR RECONSIDERATION**
10 | to each of the person(s) named below at the addresses listed after each name by the following
11 | method(s):

9 Niall P. McCarthy, Esq. nmccarthy@cpmlegal.com 10 Brian Danitz, Esq. bdanitz@cpmlegal.com 11 Sarvenaz J. Fahimi, Esq. sfahimi@cpmlegal.com 12 Andrew F. Kirtley, Esq. akirtley@cpmlegal.com 13 COTCHETT, PITRE & McCARTHY, LLP 14 San Francisco Airport Office Center 15 840 Malcolm Road, Suite 200 16 Burlingame, CA 94010	17 Matthew J. Goldman, Esq. matthew.goldman@doj.ca.gov 18 Linda Gandara, Esq. linda.gandara@doj.ca.gov 19 <i>Leticia.aguirre@doj.ca.gov</i> 20 Office of the Attorney General 1300 I Street, Suite 125 Sacramento, CA 92422-2550 21 <i>Attorneys for California Dept. of Food & Agriculture</i>
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26 | **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be
27 | sent from e-mail address ellenduncan@dwt.com to the persons at the e-mail addresses listed in the
28 | Service List. I did not receive, within a reasonable time after the transmission, any electronic
message or other indication that the transmission was unsuccessful.

29 | I declare under penalty of perjury under the laws of the State of California that the foregoing is true
30 | and correct.

31 | Executed on August 5, 2020, at Riverside, California.

32 | */s/ Ellen Duncan*

33 | Ellen Duncan