



# CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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*Via US Mail and Email*

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**Re: *Comments in Response to Draft Order, Monitoring and Reporting Program, Staff Report, and Subsequent Environmental Impact Report for the Regulation of Waste Discharges from Irrigated Lands***

Dear Mr. Young:

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 approximately 76,500 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") respectfully presents the following concerns regarding the Draft Order, Monitoring and Reporting Program, Staff Report, and Subsequent Environmental Impact Report for the Regulation of Waste Discharges from Irrigated Lands (hereinafter "Staff Draft Order" of "2011 Draft Order") released on November 19, 2010. Farm Bureau has many concerns with Staff's Draft Order, Staff Report, and accompanying documents.<sup>1</sup>

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<sup>1</sup> The Staff Draft Order and Staff Report consist of many different parts, all of which are objectionable. The actual "waiver" is set forth in the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated

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 of the Central Coast agricultural community recognizes agriculture's importance and necessary role in the State and Region. Additionally, they value recognize that the quality of agricultural water discharges can and will improve through implementation of on-farm practices.

The true goal of the Conditional Ag Waiver program is to improve water quality over time. The State Water Code and the Regional Board Basin Plan provide authority for the Regional Board to impose regulations on dischargers to improve water quality. Farmers are equally concerned about water quality and the environment. However, there is no need for the Regional Board to impose arbitrary restrictions on commercial agriculture so long as farmers take necessary steps to demonstrate water quality improvement over a scientifically feasible timeline with intermediate milestones.<sup>2</sup> In order to reach this goal, the primary focus of maintaining and improving water quality over time should remain. To aid in reaching this goal, the Regional Board should evaluate water quality data collected and use such data to implement and adjust management practice implementation. The process of designing and adopting a new ag discharge program will not be simple or quick. Further collaboration between the Regional Board and agriculture will be necessary to develop a workable long term solution.

Staff's Draft Order contains stringent new conditions that will subject growers in the Region to the most rigorous regulatory program in the state. The 2011 Order contains duplicative regulations concerning existing perennial, intermittent, and ephemeral streams along with riparian and wetland area habitat. It includes strict controls for the use of pesticides which is already regulated by the Department of Pesticide Regulation and the California Department of Food and Agriculture. Riparian and wetland area habitat is already being regulated by a variety of different regulatory agencies including, but not limited to, the U.S. Fish and Wildlife Service, the Department of Fish and Game, the Army Corp of Engineers, and local land use regulations already in place. The Draft Order also contains numerous provisions that are improper, illegal, and exceed the Regional Board's statutory authority. Additionally, Farm Bureau is concerned that the Regional Board may fail to recognize that agricultural lands are a part of the physical environment, thus consideration of impacts to agricultural resources must be included as part of a proper California Environmental Quality Act environmental review.

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Lands, Order No. R3-2011-0006 and consists of 87 pages and 293 findings and definitions. The inaccuracy and unlawfulness of the findings are too many to identify here. Farm Bureau reserves the right to provide additional comments and concerns in the future. Farm Bureau also incorporates by reference those comments submitted by Tess Dunham (Somach, Simmons and Dunn) and William Thomas (Best Best & Krieger).

<sup>2</sup> The agricultural community has been taking necessary steps to demonstrate water quality improvements.

**I. THE 2011 STAFF ORDER FAILS TO COMPLY WITH CEQA REQUIREMENTS**

The Regional Board has failed to comply with the provisions of the California Environmental Quality Act (“CEQA”), Pub. Resources Code §§ 21000 et seq. CEQA was enacted to address concerns about environmental quality in the State of California. CEQA establishes processes and procedures to ensure that California agencies complete an environmental analysis and consider and disclose to the public the environmental impacts of a proposed project. (Pub. Resources Code, §§ 21000 et seq; Cal. Code Regs., tit. 14, § 15000 et seq.) CEQA’s statutory framework clearly sets forth a series of analytical steps intended to promote the fundamental goals and purposes of environmental review—information, public participation, mitigation, and governmental agency accountability. (Cal. Code Regs., tit. 14, § 15002; see also Pub. Resources Code, §§ 21001, 21001.1, 21002, 21003, 21006, 21064.) CEQA’s intent and purpose foster informed public participation and decision-making. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 404.)

To date, the process and the development of the Staff’s Draft Order has not been an open, collaborative, or transparent process. The lack of detail, supporting evidence, proper environmental analysis, and proper evaluation of alternatives effectively bars the public from providing meaningful and necessary information on the development of future agricultural discharge programs. Such action and inaction has not satisfied the intent of CEQA.

**A. Reliance on the 2004 Negative Declaration is Improper**

An attempt to review the environmental impacts of the 2011 Draft Order is included within the Draft Subsequent Environmental Impact Report (“SEIR”). Unfortunately, a full CEQA review and environmental analysis has been avoided due to the SEIR’s improper reliance on the Negative Declaration prepared for the 2004 Conditional Waiver. Specifically, the SEIR states that possible impacts to agricultural lands “were previously evaluated in the Negative Declaration for the 2004 Agricultural Order and were found at that time not to be significant.” (SEIR, p. 6.) The SEIR relies upon this analysis to conclude that the 2011 Draft Order will also not have any significant impacts to agriculture. For numerous reasons, such conclusions are improper. The 2004 Agricultural Order is a separate project from the 2011 Draft Order. In addition, the conditions, restrictions, and regulations within the 2011 Draft Order are different from, more extensive than, and entirely brand new from those contained in the 2004 Agricultural Order. Mere reference to and reliance upon an environmental analysis conducted at least six years previous is not only inappropriate, it is also flawed and violates CEQA.

Staff’s 2011 Draft Order deviates significantly from the 2004 Conditional Waiver. Although both waivers are conditional waivers of waste discharge limited to 5 year periods of time and regulate discharges from irrigated lands, the two waivers are extremely different in scope, regulatory focus, requirements, breadth, enforcement, intent, types and contents of monitoring, types of discharges to be regulated, reporting requirements, as well as other differences. Thus, reliance on the 2004 Negative Declaration to fully determine and analyze the new environmental impacts of Staff’s 2011 Draft Order is inappropriate and improper.

In addition to significantly altering the scope of the waiver, significant new information has been gathered and is now available since the completion of the 2004 Conditional Waiver. Given this significant information and substantial changes to the current Conditional Waiver, which should constitute a new project under CEQA, the Regional Board cannot rely upon the environmental analysis that was completed in 2004. Notwithstanding the fact that reliance on a previous project that is distinct from the project at hand is improper, any changes to the “project” after environmental analysis constitute “significant new information” that requires additional environmental analysis. (Cal. Code Regs., tit. 14, 15088.5(a).)<sup>3</sup>

**B. The 2011 Draft Order is a Separate Project from the 2004 Conditional Waiver under CEQA**

As defined in CEQA, a “project means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Cal. Code Regs., tit. 14, § 15378(a).) “The term ‘project’ refers to the activity which is being approved.” (Cal. Code Regs., tit. 14, § 15378(c).)

Within the 2011 Staff Draft Order, the “description of the project” is defined as:

The proposed draft 2011 Agricultural Order groups farm operations, or dischargers, into three tiers, each tier distinguished by four criteria that indicate threat to water quality: size of farm operation, proximity to an impaired watercourse, use of chemicals of concern, and type of crops grown. Dischargers with the highest threat have the greatest amount of discharge control requirements, monitoring and reporting. Conversely, dischargers with the lowest threat have the least amount of discharger control requirements, individual monitoring and reporting. For example, the proposed draft 2011 Agricultural Order proposes the following implementation and reporting requirements:

- Implement pesticide management practices to reduce toxicity in discharges so receiving waterbodies meet water quality standards;
- Implement nutrient management practices to eliminate or minimize nutrient and salt in discharges to surface water so receiving waterbodies meet water quality standards;

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<sup>3</sup> CEQA Guidelines section 15088.5(a) states that “significant new information” includes:

- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
- (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
- (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project's proponents decline to adopt it.
- (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

- Implement nutrient management practices to minimize fertilizer and nitrate loading to groundwater to meet nitrate loading targets ;
- Install and properly maintain back flow prevention devices for wells or pumps that apply fertilizers, pesticides, fumigants or other chemicals through an irrigation system;
- Implement erosion control and sediment management practices to reduce sediment in discharges so receiving water bodies meet water quality standards;
- Protect and manage existing aquatic habitat to prevent discharge of waste to waters of the State and protect the beneficial uses of these waters;
- Implement stormwater runoff and quality management practices.
- Develop, implement, and annually-update Farm Water Quality Management Plans.
- Submit an Annual Compliance Document (for higher threat dischargers) that includes individual discharge monitoring results, nitrate loading risk evaluation and, if nitrate loading risk is high, irrigation and nutrient management plan, verification of irrigation and nutrient management plan effectiveness.
- Submit a water quality buffer plan (for higher threat dischargers), if operations contain or are adjacent to a waterbody identified on the Clean Water Act Section 303(d) List of Impaired Waterbodies as impaired for temperature or turbidity.

Water Board staff developed this order to address the documented severe and widespread water quality problems in the Central Coast Region, predominately unsafe levels of nitrate in ground water used for drinking water and toxicity impairing communities of aquatic organisms. (SEIR, pp. 3-4.)

The “description of the project” for the 2004 Conditional Waiver is defined in the 2004 Initial Study and Negative Declaration as:

The Regional Board proposes to adopt a conditional waiver of WDRs for discharges from irrigated lands, including tailwater, subsurface drainage, and stormwater runoff, and to waive the requirement to submit reports of waste discharge. Irrigated lands include nurseries and soil-floored greenhouses as well as lands planted to row crops, vineyards, tree crops, and field crops. This waiver would be in effect for five years beginning July 8, 2004.

The conditions of the proposed waiver would require all owners and operators of irrigated lands in the Central Coast Region to: 1) enroll with the Regional Board by submitting a Notice of Intent, 2) complete fifteen hours of water quality education, 3) develop a farm water quality management plan that addresses, at a minimum, erosion control, irrigation management, nutrient management and pesticide management, 4) implement management practices in accordance with

the farm plan, and 5) conduct individual monitoring or participate in a cooperative monitoring program. (SEIR Attachment, 2004 Initial Study and Negative Declaration, p. 4.)

A quick read of the two project descriptions above illustrate two separate and wholly distinct projects. Although each project describes a conditional waiver of waste discharges for irrigated lands, the similarities end there. The 2011 Draft Order includes new regulatory concepts, increases the scope of regulatory coverage, has been expanded to cover all irrigated lands growing commercial crops, requires new monitoring and reporting requirements, and encompasses regulation of all discharges to surface waters and groundwater, including tile drains and storm water. Given the distinct nature of each conditional waiver, the 2004 Order and the 2011 Draft Order are separate projects under CEQA and require independent environmental review. Thus, reliance on the 2004 Negative Declaration is improper and the SEIR contravenes the requirements of CEQA.

### **C. The SEIR's Analysis of Impacts is Improper<sup>4</sup>**

The SEIR fails to properly analyze the potential impacts associated with the project. Specifically, the SEIR lacks proper review of impacts such as the loss of agricultural lands taken out of production due to proposed requirements and the cost of compliance, loss of agricultural lands through regulatory takings for the installation of riparian buffers, and the impacts from restrictions on the use of tile drains rendering farm land virtually unproductive and thus unusable.

Rather than conducting a thorough analysis of all potential impacts to agricultural lands, agricultural vitality, agricultural production, and agricultural resources, the SEIR briefly concludes, "the Water Board can only speculate with respect to the extent there could be adverse environmental effects because it is not known with specificity what actions dischargers may take to comply. There is not sufficient information to determine the scope of any changes in environmental effects and any potential impacts are very speculative." (SEIR, p. 8.) Based on these statements, the SEIR surmises, "the adverse environmental impacts may be less than significant." (*Ibid.*)

CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to potential discharges to waters of the state from agricultural lands. (*Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 167.) Rather, decision makers and the public must be presented with sufficient facts to evaluate the pros and cons of a conditional waiver of waste discharge. (Cal. Code Regs., tit. 14, §§ 15002(a), 15121; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, overruled on other grounds; *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 160 Cal.App.4th 715.)

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<sup>4</sup> Assuming, for arguendo, a new EIR is not required, the SEIR contains numerous fatal flaws as described in the following subsections below.

“Mere conclusions simply provide no vehicle for judicial view.” (*Citizens Assn. for Sensible Development of Bishop Area, supra*, at p. 171.) By failing to disclose all data and evidence relied upon, the Regional Board is abusing its discretion and failing to comply with CEQA. (*Ibid.*, [“Section 1094.5, subdivision (b), states that ‘[abuse] of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.’ The Supreme Court has elaborated that ‘. . . implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.” (*Topanga Assn. for a Scenic Community v. County of Los Angeles, supra*, 11 Cal.3d at p. 515; see *Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413, 429-431 [129 Cal.Rptr. 902].)”

Conclusory comments in support of environmental conclusions are generally inappropriate. (*Laurel Heights Improvement Assn., supra*, at p. 404.) The SEIR is fundamentally and basically inadequate and conclusory in nature, precluding meaningful public review and comment. (*Mountain Lion Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1043, 1051; *Laurel Heights Improvement Assn., supra*, at p. 404; Cal. Code Regs., tit. 14, § 15063(c); see Cal. Code Regs., tit. 14, § 15088.5, [regulations apply substantially to initial studies and negative declaration thresholds for recirculation as well].)

These conclusory statements within the SEIR provide “no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.” (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842, quoting *Silva v. Lynn* (1973) 482 F.2d 1282, 128; see also *Laurel Heights Improvement Assn., supra*, at p. 404, [“but neither can we countenance a result that would require blind trust by the public, especially in light of CEQA’s fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials” (emphasis added)]; *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 415, [“The County’s conclusory evaluation of the amendments fail to support its decision to adopt a negative declaration.”].)

Even if a full discussion leaves some uncertainty regarding actual impacts of the anticipated project, CEQA requires some discussion of probable impacts, project alternatives, and the environmental consequences of those contingencies. (See SEIR, p. 2; *Vineyard Area Citizens for Responsible Growth, Inc. supra*, 412.) Such discussion must also be supported by substantial evidence and allow for public participation and review.<sup>5</sup> (Pub. Resources Code, § 21091(d)(2); Cal. Code Regs., tit. 14, §§ 15088, 15121, 15384.) By failing to analyze probable impacts and merely concluding that impacts are speculative, the SEIR is improper and the error is prejudicial.

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<sup>5</sup> By relying on conclusory language, lack of evidence, unidentified and unsubstantiated claims, and unlike comparisons to support its findings that no significant environmental affects will occur, the public’s ability to provide input, to collaborate with, and to aid in finding solutions to maintain and/or improve water quality is largely restricted and makes it impossible for the public, many of whom have actively asserted a keen and sophisticated interest in the development of revised/new discharge requirements, to fully participate in the assessment of project impacts and alternatives associated with the project. (See *Mountain Lion Coalition v. Fish & Game Comm.* (1989) 214 Cal. App. 3d 1043, 1051.)

#### **D. The SEIR Contains an Inadequate Assessment of Significant Impacts and Effects on the Environment**

The CEQA Guidelines define a “significant effect” as: “... a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant.” (Cal. Code Regs., tit. 14 § 15382; see also Pub. Resources Code, § 21068.)

The CEQA Guidelines further state that, “An ironclad definition of significant effect is not possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.” (Cal. Code Regs., tit. 14 § 15064.) Appendix G of the CEQA Guidelines describes impacts that the California Resources Agency has determined are *normally considered significant*. These guidelines require that physical changes in the environment be evaluated based on factual evidence, reasonable assumptions supported by facts, and expert opinion based on fact. Given that many factors have to be analyzed and significant effects and impacts should be determined on a case-by-case basis, the Regional Board cannot rely on previous antiquated environmental analysis to conclude possible potential impacts to Staff’s 2011 Draft Order. Rather, the Regional Board must review all scientific data and facts, especially information collected since the initiation of the 2004 Conditional Waiver, prior to determining the 2011 Draft Order’s potential to significantly effect or impact the environment.<sup>6</sup>

#### **E. The SEIR’s Analysis of Project Alternatives is Improper**

An environmental impact report must describe a range of reasonable alternatives to a project which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. (Cal. Code Regs., tit. 14, § 15126(d); *Laurel Heights Improvement Assn., supra*, at p. 400; [“The foregoing CEQA provisions and Guidelines make clear that ‘One of its [an EIR’s] major functions . . . is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.’ (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197 [132 Cal.Rptr. 377, 553 P.2d 537].)”.]) It must contain sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. The statutory requirements for consideration of alternatives must be

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<sup>6</sup> Water quality regulations that aim to improve environmental quality can have unintended consequences that harm the environment and natural resources. The reallocation of water from one location to another, to meet water quality regulations, may reduce the well-being of fish and wildlife dependent on the water in the source region. Reduction of use of chemical pesticides that reduce farm productivity may lead to an increase in utilized land use and expansion of the utilized land base to wilderness areas. Diversion of water resources to meet environmental quality objectives may reduce the capacity to utilize this water in provision of environmental amenities. Thus, proper environmental analysis is needed.

judged against a rule of reason. A public entity may decide that a proposed alternative which reduces significant impacts is infeasible provided it gives a rational explanation supported by substantial evidence. (Cal. Code Regs., tit. 14, §§ 15151, 15384; *Vineyard Area Citizens for Responsible Growth, Inc., supra*, at p. 412.)

Given CEQA's clear requirements, the Regional Board *shall* identify and rigorously examine all reasonable alternatives for the project. (Cal. Code Regs., tit. 14, § 15126.6.) The range of alternatives must be feasible and must avoid or substantially lessen the project's significant environmental effects "*even if these alternatives would impede to some degree the attainment of the project objectives or would be more costly.*" (*Id.* at § 15126.6(b), emphasis added; Pub. Resources Code, §§ 21002, 21001.1(a), 21100(b)(4), 21150.) A feasible alternative is one that is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Cal. Code Regs., tit. 14, § 15364; Pub. Resources Code, § 21061.1.)

The SEIR's analysis of project alternatives is inadequate and improper and does not fulfill CEQA's mandates. Such "brief" treatment of so called alternatives is legally deficient, as no project alternatives are fully analyzed, described, evaluated, or provided in detail to allow the public to provide meaningful comments. (*Laurel Heights Improvement Assn., supra*, at p. 404; ["The key issue is whether the selection and discussion of alternatives fosters informed decisionmaking and informed public participation."]; Cal. Code Regs., tit. 14, § 15126(d)(5).) This failure to properly consider project alternatives cannot be upheld under CEQA and the "rule of reason" for considering alternative project components and regulatory requirements. Additionally, no reasonable range of alternatives to the 2011 Draft Order are discussed or analyzed. Instead of analyzing actual alternatives to the 2011 Draft Order, the SEIR cursorily reviews the three preliminary alternatives submitted in April 2010. These preliminary alternatives were alternatives to the Preliminary Staff Draft Order dated February 1, 2010. Review of these documents as "alternatives" to the 2011 Draft Order do not meet the requirements of CEQA as these documents are not alternatives to the current proposed project, the 2011 Draft Order, currently under review.

Analysis of the April 1, 2010 Ag Alternative as an alternative to the 2011 Draft Order is improper as it was merely a preliminary draft alternative submitted in response to staff's conceptual ideas included in Staff's February 1, 2010 Preliminary Staff Draft Order. Staff's February 1, 2010 Preliminary Order has since been abandoned and replaced with a new alternative, the 2011 Draft Order. As such, the February version and corresponding comments and alternatives are inapplicable for alternative analysis under CEQA. Rather, new reasonable alternatives to the 2011 Draft Order *must* be developed and properly reviewed within the SEIR, including the Agricultural Alternative Conditional Waiver. As such, a new environmental analysis should be prepared to assess the potential environmental benefits and impacts, if any, feasibility, economic costs, etc associated with the new alternatives. Thus, the SEIR must be revised and recirculated prior to any Board action on this project.

## **F. The SEIR Fails to Consider Significance of Social and Economic Impacts and Cumulative Effects**

Although impacts that are solely economic in nature do not constitute “significant effects on the environment,” economic or social impacts that will or have the potential to cause a physical change should be considered. (Cal. Code Regs., tit. 14, §§ 15064(e), 15131.) The term “significant effect on the environment” is defined in Section 21068 of CEQA as meaning “a substantial or potentially substantial adverse change in the environment.” (Pub. Resources Code, § 21068.) This focus on physical changes is further reinforced by Sections 21100 and 21151. (See discussion following Cal. Code Regs., tit. 14, § 15131.) Despite the implication of these sections, CEQA does not focus exclusively on physical changes, and it is not exclusively physical in concern. (*Ibid.*) Thus, in certain situations such as the adoption of an expansive regulatory irrigated lands discharge program, economic and social effects of the project *must* be used to determine the significant effects on the environment. (*Citizens Assn. for Sensible Development of Bishop Area, supra*, at p. 170, [“The lead agency shall consider the secondary or indirect environmental consequences of economic and social changes.”].) Since such effects were not considered in the SEIR, the document is incomplete and flawed.

In *Citizens Association for Sensible Development of Bishop Area v. Inyo*, the court held that “economic or social change may be used to determine that a physical change shall be regarded as a significant effect of the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment.” (*Ibid.*)

The 2011 Draft Order proposes dramatic and severe impacts on the agricultural industry, which will have a significant effect on the economic and social environment of the Region. Such impacts include negative economic consequences, the possibility of eliminating agricultural crops produced in the area, loss of jobs, loss of food supply, loss of prime agricultural lands, economic collapse of local communities, changes the landscape and land uses, loss of wildlife habitat, loss of groundwater recharge areas, as well as other social and economic impacts. In addition to direct impacts, indirect impacts and consequences, these cumulative<sup>7</sup> social and economic consequences are reasonably foreseeable and must be analyzed.

## **G. Agricultural Resources Must Be Considered During Environmental Review**

Agricultural resources are an important feature of the existing environment of the State, and are protected under federal policies, such as the Farmland Protection Policy Act and National Environmental Policy Act (“NEPA”), State policies, and CEQA. Agriculture is the number one industry in California, which is the leading agricultural state in the nation. (Food & Agr. Code, § 802(a).) Agriculture is one of the foundations of this State's prosperity, providing employment

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<sup>7</sup> “Cumulative impacts” are “two or more individual effects which, when considered together, are considerable or....compound to increase other environmental impacts. (Cal. Code Regs., tit. 14, § 15355.)

for one in 10 Californians and a variety and quantity of food products that both feed the nation and provide a significant source of exports. (CALFED Final Programmatic EIS/EIR, July 2000, pg. 7.1-1.) In 1889, the State's 14,000 farmers irrigated approximately one million acres of farmland between Stockton and Bakersfield. By 1981, the number of acres in agricultural production had risen to 9.7 million. (Littleworth & Garner, California Water II (Solano Press Books 2007) p. 8.) More recently, the amount of agricultural land in the State has declined. From 1982 to 1992, more than a million acres of farmland were lost to other uses. Between 1994 and 1996, another 65,827 acres of irrigated farmland were lost, and this trend is expected to continue.

In order to preserve agriculture and ensure a healthy farming industry, the Legislature has declared that “a sound natural resource base of soils, water, and air” must be sustained, conserved, and maintained. (Food & Agr. Code, § 802(g).) Prior to negatively impacting agricultural lands, decision makers must consider the impacts to the agricultural industry, the State as a whole, and “the residents of this state, each of whom is directly and indirectly affected by California agriculture.” (Food & Agr. Code, § 803.)

CEQA require analysis of significant environmental impacts and irreversible changes resulting from proposed projects. These include unavoidable impacts; direct, indirect, and cumulative effects; irreversible and irretrievable commitment of resources; relationships between short-term uses and long-term productivity; and growth-inducing impacts to the environment. Pursuant to CEQA, the physical environment includes agricultural lands and resources. Given the national and statewide importance of agriculture and the legal requirements of environmental review, Farm Bureau urges the Regional Board to properly assess all direct and indirect effects on the agricultural environment resulting from the proposed Staff Draft Order. As currently drafted, the SEIR fails to meet this requirement.

1. Agricultural Resources Must be Considered In a Legally Defensible CEQA Review

One of the major principles of the State’s environmental and agricultural policy is to sustain the long-term productivity of the State’s agriculture by conserving and protecting the soil, water, and air that are agriculture’s basis resources. (Food & Agr. Code, § 821(c).) As currently proposed, Staff’s Draft Order goes beyond its intent to maintain and improve the quality of waters of the state, and instead, imposes a highly burdensome, enforcement driven program, many aspects of which are beyond the Regional Board’s authority, that will negatively impact the ability to produce food and fiber and will lead to possible changes in the physical environment. It is foreseeable that such impacts have the potential to convert agricultural lands to other uses. This conversion would add to the existing statewide conversion of substantial amounts of agricultural lands to other uses, and may conflict with adopted plans of many local governments, including cities and counties, and existing habitat conservation plans or natural community conservation plans.

2. Analysis under CEQA Guidelines Appendix G is Cursory and Flawed

Of particular relevance is CEQA Guidelines Appendix G, section II, Agricultural Resources, which states the following:

In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agriculture Land Valuation and Site Assessment Model (1997) prepared by the California Department of Conservation as an optimal model to use in assessing impacts on agriculture and farmland. Would the project:

- (a) Convert prime farmland, unique farmland, or farmland of state-wide importance . . . to non-agricultural use?
- (b) Conflict with existing zoning for agricultural use or a Williamson Act contract?
- (c) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of farmland to non-agricultural use?

(Cal. Code Regs., tit. 14, Appendix G, section II, Agricultural Resources.)

Upon “reevaluation” of impacts on agriculture and farmland, the SEIR concludes that the 2011 Draft Order will have a “less than significant impact with mitigation” on farmland conversion. The SEIR then proposes “mitigation measures to make this potential impact less than significant” for various vegetation and wildlife resources that could be affected by normal farming practices. However, the accompanying conclusory statements outlying possible mitigation measures a grower may take are inappropriate and infeasible. These mitigation measures would require avoidance of sensitive biological resources, riparian areas, and wetlands, require additional CEQA review if such resources cannot be avoided, and would compel agricultural landowners to conduct a U.S. Army Corps of Engineers’ approved delineation of affected wetlands “prior to implementing any management practice that will result in the permanent loss of wetlands.” Such mitigation measures are overreaching.

“A lead agency for a project has authority to require *feasible changes* in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the “nexus” and “rough proportionality” standards established by case law (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825, *Dolan v. City of Tigard*, (1994) 512 U.S. 374, *Ehrlich v. City of Culver City*, (1996) 12 Cal. 4th 854.)” (See Cal. Code Regs., tit. 14, § 15041(a), emphasis added.) However, CEQA confers no independent grant of authority to impose mitigation measures on a project. Mitigation measures, such as the ones described above, go beyond the powers conferred by law to the Regional Board and are legally infeasible. (Pub. Resources Code, § 21004; Cal. Code Reg., tit. 14, § 15040.)

Furthermore, all four “mitigation measures” still lead to the conversion of agricultural lands, the very thing the mitigation measure attempts to avoid. In addition to the proposed mitigation measures, the SEIR includes vague statements that conclude that the 2011 Staff Order’s impacts will be less than significant. Statements such as “staff does not conclude that the costs are going to be so high that it will force agriculture out of business” and “the [economic] effects should be manageable” are not supported by any evidence. (SEIR, pp. 13-14.) As discussed *infra*, mere conclusions not supported by evidence violate CEQA.

Any and all adverse environmental effects on agricultural resources resulting from the project, as well as cumulative impacts that will occur over time, must be fully assessed and disclosed under CEQA, *as well as avoided or mitigated as required by CEQA*. The 2011 Draft Order neither avoids impacts to agricultural lands nor mitigates any such impacts. Thus, proper environmental analysis of agricultural impacts has not occurred.

#### **H. The SEIR May Conflict with CEQA Functional Equivalency of the State’s Pesticide Regulatory Program**

The SEIR fails to analyze the interplay with and the duplicity between the State’s pesticide regulatory program and its proposed requirements. Prior to a pesticide being registered for agricultural use, a CEQA functional equivalent EIR must be performed. (See Cal. Code Regs., tit. 14, § 15251(i), “the pesticide regulatory program administered by the Department of Pesticide Regulation and the county agricultural commissioners insofar as the program consists of (1) The registration, evaluation, and classification of pesticides” has been certified as a review process functionally equivalent to a CEQA EIR.) The Department of Pesticide Regulations’ (“DPR”) actions in reviewing pesticides do not constitute a project in the classical CEQA context – there is not a one time environmental review of a specific action or activity that has a specific geographical location or temporal limit. Rather, DPR’s regulatory scheme ensures continuous evaluation of the environmental impacts of registered pesticide products. Additionally, in completing the CEQA functional equivalency document, DPR is required to consider the full and reasonably foreseeable environmental context of its actions. The regulatory scheme also provides for re-registration and re-evaluation to ensure that the continued use of the pesticide is not going to have a significant effect on the environment.

Within the Central Coast region, farmers and ranchers use various products when growing food and fiber. Farmers and ranchers must comply with all applicable laws, regulations, and specific pesticide use requirements, complete pesticide use reporting, and fulfill educational and training requirements. Further requirements are mandated if a restricted material is used and/or the land is located within a groundwater management area. Since CEQA functional equivalency has occurred to allow those pesticides to be used in those areas, the growers should not be now held liable under the 2011 Draft Order if those pesticides are detected in groundwater.

## **II. THE 2011 STAFF DRAFT ORDER IS IMPROPER**

### **A. The 2011 Draft Order Inappropriately Presumes that All Irrigated Agriculture Creates a Discharge of Waste**

The 2011 Draft Order inappropriately presumes that all irrigated agriculture creates a discharge of waste. This presumption is the basis of the entire Order, in spite of the fact that the staff acknowledges that “there are numerous and varying irrigated agricultural operations within the Central Coast Region that have varying degrees of impact on water quality.” (Draft Order, p. 11.) While the Regional Board may have the authority to regulate irrigated agriculture that creates a discharge of waste under a conditional waiver, the Regional Board does not have the unfettered regulatory authority to regulate all agricultural practices, especially those practices that do not create such discharges. A fundamental limitation to the Regional Board’s authority is that an activity must result in a “discharge of waste” that impacts water quality in order for that activity to be subject to regulation. Simply because it may be difficult to determine whether individual irrigated lands are creating a discharge to waste does not eliminate the Regional Board’s statutory authority and obligation to regulate only those activities that create a discharge of waste. Further, the Regional Board provides no evidence to support its inaccurate conclusion that all irrigated agriculture discharges waste to waters of the State.

### **B. The Tiering Structure is Improper**

The 2011 Draft Order groups farm operations, or dischargers, into three tiers with each tier distinguished by four criteria: size of farm operation, proximity to an impaired watercourse, use of certain chemicals, and type of crop grown. (See SEIR, p. 3; Draft Order, pp. 9-11, ¶¶ 9-16.)

The four criteria used to distinguish the tiers are arbitrary designations not based on sound science and not supported by evidence. All of these factors have little bearing on relative risk to water quality: size does not equate to water quality problems;<sup>8</sup> proper use of two types of approved pesticides does not equate to water quality problems; crop types do not equate to water quality problems; and proximity to a 303(d) listed waterbody does not equate to water quality problems especially since mere location is the trigger.<sup>9</sup> Additionally, by merely triggering the criteria above, the tiering structure creates a false premise of polluting water unless grower can prove otherwise.

The tiering structure is arbitrary and essentially flawed since it does not look at actual ways to analyze relative risk to water quality. Rather, the tiering structure improperly focuses the program on arbitrary designations associated with agricultural production rather than scientifically sound and proven factors causing water quality impairments.

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<sup>8</sup> The use of 1,000 acres is an arbitrary designation and no evidence is provided to support this criterion.

<sup>9</sup> Thus, even if a property does not drain into that watercourse but is nevertheless within 1,000 feet, the operation falls within the higher tier.

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

Within the 2011 Draft Order, numerous monitoring reports and technical reports are required to be submitted to the Regional Board. (See Draft Order, pp. 15, 16, 18, 22 [annual compliance document], 27 [water quality buffer plan].) 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.)

Although various monitoring reports and technical reports are referenced in the 2011 Draft Order and accompanying appendices, no nexus as to the burden, costs, need, or benefits is found. Furthermore, no concrete evidence is provided that supports requiring farmers to provide such reports. Mere unsupported assertions that a need or nexus exists fail to validate a 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 and are invalid.

### **D. The Regional Board Cannot Prescribe Management Practices**

The Regional Board has the authority to adopt water quality control plans, water quality objectives to “ensure the reasonable protection of beneficial uses,” and waste discharge requirements. (Wat. Code, §§ 13240, 13241, 13242.) However, the Regional Board does not have the authority to mandate or dictate specific management and business practices undertaken by a landowner to reach the applicable discharge goal. (Wat. Code, § 13360(a).) Specifically, the Water Code states:

*No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.*

(*Ibid.*, emphasis added.) Within the SEIR, it states that “the proposed draft 2011 Agricultural Order does not specify the manner of compliance; dischargers may comply in any lawful manner.” (SEIR, p. 12.) Unfortunately, this statement is incorrect since numerous times within the 2011 Draft Order and accompanying documents, specific types of management practices are mandated.

Under the 2011 Draft Order, certain specific management practices are required, such as, but not limited to, riparian habitat buffers of at least 30 feet, vegetation within the buffer zone, mitigation measures to lessen the impact of the riparian habitat buffers, as well as management practices to control erosion and sediment, including maintaining crop residue or vegetative cover

on the soil. However, the Regional Board has no authority to mandate or require the use of integrated pest management by individual growers or the use of specific types of crop covers. Therefore, these provisions should not be included within the conditional waiver.

**E. The Time Schedule for Achieving Compliance with Water Quality Standards and Milestones is Improper and Unrealistic**

As set forth in the 2011 Draft Order, the milestones and time schedule for achieving compliance with water quality standards are improper and unrealistic. No evidence or a feasibility analysis is provided to determine whether such milestones can be reached. Further, the milestones themselves as well as the time schedule is confusing and contradictory.

The 2011 Draft Order states: “General time schedules for key compliance dates and milestones related to Order Conditions are identified in Table 4 (All Dischargers) and Table 5 (Tier 2 and Tier 3 Dischargers). *Dischargers must achieve compliance with requirements by dates specified.*” (Draft Order, p. 28, ¶ 97, emphasis added.) The italicized statement requires all dischargers to meet all water quality standards within the applicable time frame (two years for pesticides and toxicity, three years for sediment and turbidity, and four years for nutrients and salts.) (Draft Order, p. 29, ¶¶ 98-100.) If a grower does not meet the water quality standard in the applicable time frame, the grower will be in violation of the conditional waiver even if the grower is making substantial progress toward compliance. As discussed with staff, certain management practices, such as collective treatment systems that growers are encouraged to implement (see Draft Order, p. 14, ¶ 38), may take time to construct and put into use. Thus, a grower utilizing such management practices may not meet the limited time frame outlined above but may be making substantial progress toward compliance. A grower should not be penalized for complying with the intent of the Order even if the applicable water quality standard is not met in the time frame listed, as the time frames are arbitrary and unrealistic.

In addition to being unreasonable, an internal inconsistency exists regarding water quality standards and tile drains. The 2011 Draft Order provides:

Within four years from the adoption of this Order, Tier 3 Dischargers must demonstrate that they are not causing or contributing to exceedances of water quality standards for nutrients and salts in surface waters of the state or of the United States. Dischargers may have to implement best management practices, treatment or control measures, or change farming practices to achieve compliance with this Order. (Draft Order, p. 29, ¶ 100.)

With regard to the same milestone, the Time Schedule provides in relevant part:

Demonstrate that discharge (not including subsurface drainage to tiledrains) is not causing or contributing to exceedances of nutrient water quality standards in the waters of the State or Unite States. ... Within four years... (Draft Order, Time Schedule, p. 3.)

The internal inconsistency between the two milestones is confusing. Correspondence with staff has indicated that it has not been the intent to include tile drains in the timeline for elimination of nutrient discharges. In order to reflect this intent, it is suggested that paragraph 100 of the Draft Order be rewritten to include the phrase “not including subsurface drainage to tiledrains” following “Dischargers” in the first line of the paragraph.

#### **F. 2011 Draft Order Causes Foreseeable Negative Consequences to the Environment**

While attempting to “protect the environment,” the 2011 Draft Order will cause foreseeable negative consequences to the environment. One such negative consequence is seen in the following general condition and provision for all dischargers:

Dischargers who choose to utilize containment structures (such as retention ponds or reservoirs) to achieve treatment or control of the discharge of wastes, must construct and maintain such containment structures to avoid percolation of waste to groundwater that causes or contributes to exceedances of water quality standards, and to avoid surface water overflows that have the potential to impair water quality. (Draft Order, p. 14, ¶ 34.)

Throughout the Central Coast, numerous agricultural entities and individuals have retention ponds for individual use or for water reclamation projects. In fact, these projects are encouraged by the Regional Board and the Porter-Cologne Act due to their ability to recharge groundwater basins. However, the provision above would require all such retention ponds to be lined to prevent any and all water from leaving the structure, thus preventing all groundwater recharge. If groundwater recharge is precluded throughout the Central Coast, numerous negative environmental consequences will occur and must be evaluated.

#### **G. The Regional Board’s Use of the Nitrate Hazard Index is Flawed**

A large portion of the requirements contained within the 2011 Staff Draft Order are based on the Nitrate Hazard Index (“NHI”) developed by University of California, Riverside. The Draft Order describes the NHI as:

The University of California Center for Water Resources (WRC) developed the Nitrate Groundwater Pollution Hazard Index (Nitrate Hazard Index) in 1995. The Nitrate Hazard Index identifies agricultural fields with the highest vulnerability for nitrate pollution to groundwater, based on soil, crop, and irrigation practices. Based on the Nitrate Hazard Index, the following crop types present the greatest risk for nitrate loading to groundwater: Beet, Broccoli, Cabbage, Cauliflower, Celery, Chinese Cabbage (Napa), Collard, Endive, Kale, Leek, Lettuce, Mustard, Onion, Spinach, Strawberry, Pepper, and Parsley. (Draft Order, Attachment A, p. 13, ¶ 50.)

However, upon review of Staff's Nitrate Loading Risk Factor Criteria (Draft Order, Table 2, p. 33), the NHI was not used. The University of California, Riverside Nitrate Hazard Index utilizes various factors in order to calculate the NHI, including crop type, irrigation, and soil type. The "Nitrate Hazard Index" as outlined in the 2011 Draft Order, rather, attempts to utilize only bits and pieces of the actual index and incorporates other factors, such as nitrates in groundwater. Such additions (irrigation water nitrate concentration rating) and deletions (soil type) manipulate the index as well as over-simplifying the index, making its value questionable. Given that Staff's revised NHI is not based on sound science or peer reviewed, it should not be used to determine the Nitrate Loading Risk Factor Criteria, a fundamental component of the 2011 Draft Order.

#### **H. 2011 Draft Order is Internally Inconsistent, Unclear, and Overly Expansive**

The 2011 Draft Order seeks to greatly expand the current 2004 Conditional Waiver, venturing from a waiver that aims to improve water quality to a waiver that is unlawful, exceeds Regional Board authority, and contains significant and prescriptive requirements that gravely impact growers and agriculture in the Central Coast. In addition to being overly expansive, the 2011 Draft Order is internally inconsistent and unclear. Given that the 2011 Draft Order aims to regulate agricultural discharges, the scope of the program should be limited to *actual agricultural dischargers*. As currently drafted, the 2011 Draft Order attempts to regulate every acre of agriculture within the Central Coast, whether or not the operation discharges or even has the potential to discharge to waters of the State. Furthermore, given the nature of this order, the focus should be on agriculture. Provision 44 requires monitoring of both private domestic wells and agricultural supply groundwater wells. (Draft Order, p. 15, ¶ 44.) This order should only encompass agricultural wells, as private domestic wells are under the authority of public health departments and county and local municipalities.

#### **III. PROVISIONS RELATIVE TO PESTICIDE REGULATION EXCEED THE REGIONAL BOARD'S AUTHORITY**

The discharge prohibitions within the 2011 Draft Order are unlawful and exceed the Regional Board's authority. Although the Regional Board has the statutory authority to regulate and protect water quality, that authority is not without limitations. (See Wat. Code, § 13243; compare to Wat. Code, § 13269 which does not allow blanket prohibitions of discharges as part of conditional waivers.) As such, the Regional Board cannot prohibit the manner of use or amount of certain pesticides. The Regional Board has no authority to regulate pesticides. Rather, the California Legislature has established a comprehensive body of law to *control every aspect of pesticide sales and use* and has deemed the California Department of Pesticide Regulation ("DPR") the entity with authority protect the public health and environment by regulating pesticide sales and use and by fostering reduced-risk pest management. (Food & Agr. Code, §§ 11454, 11454.1, 12981.)

The California Food and Agriculture Code, division 7, chapter 2 and implementing regulations promulgated at title 3 of the California Code of Regulations, division 6 establish a strict and

comprehensive program under which DPR regulates the manufacture, distribution, sale and use of pesticides. The program seeks to provide for the proper, safe, and efficient use of pesticides essential for production of food and fiber, and to protect the public health and safety, as well as the environment, from harmful pesticides by ensuring proper stewardship of those pesticides. (*Californians for Alternatives to Toxics v. California Department of Pesticide Regulation* (2006) 136 Cal. App. 4<sup>th</sup> 1049, 1057, citing Food & Agr. Code, § 11501.)

DPR oversees a multi-tiered enforcement infrastructure. While the Department has primary responsibility for enforcement of pesticide laws, the Pesticide Enforcement Branch and the Pest Management and Licensing Branch work with the County Agricultural Commissioners to enforce regulations at a local level, including the proper application and use of pesticides. (California Department of Pesticide Regulation, *A Guide to Pesticide Regulation*, p. 45 <<http://www.cdpr.ca.gov/docs/pressrls/dprguide/dprguide.pdf>> [as of Jan. 3, 2011].)

Given the need for proper and effective oversight of pesticide use, pesticide regulation is a matter of “statewide concern” that must be regulated from the state level. (Food & Agr. Code, § 11501.5(a).) The Legislature made this *unmistakably clear* by commencing the section with “this division and Division 7 (commencing with Section 12501) are of statewide concern and occupy *the whole field of regulation*.” (*Ibid.*) The plain meaning of the words within this sentence illustrates the Legislature’s intent for state regulation of pesticides and such regulation to be conducted by the Department of Pesticide Regulation and not the Regional Water Quality Control Boards. Thus, the imposition of pesticide use is improper and exceeds statutory authority.<sup>10</sup>

#### **IV. PROVISIONS RELATIVE TO RIPARIAN BUFFERS, AQUATIC HABITAT, AND VEGETATIVE COVER EXCEED THE REGIONAL BOARD’S AUTHORITY**

The aquatic habitat, riparian buffer, and vegetative cover provisions within the 2011 Draft Order are unlawful and impractical for many reasons. The provisions result in an unconstitutional taking of private property, unlawfully dictate the manner of compliance, impede the authority of the Department of Fish and Game, prevent waterway maintenance activities for flood control, prohibit growers from complying with buyer specifications that may be necessary for food safety reasons, unlawfully require federal permits under the Clean Water Act for activities that are specifically exempt, and attempt to regulate land use. Regulating land use is not within the purview of the Regional Board. The Water Code and the Basin Plan focus on water quality and activities which may impair water quality. As discussed within, while the Regional Board has authority to prohibit an act which may result in a discharge, the Board does not have authority to require an act which is unrelated to discharges to waters of the state. (Wat. Code, § 13360.) In addition to exceeding its jurisdiction, such requirements deprive farmers from the economic benefit and use of their private property. Additionally, such deprivation constitutes a regulatory

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<sup>10</sup> Additionally, the prescription of pesticide application limitations, besides not being within the Regional Board’s jurisdictional authority, equates to a mandate of a specific management practice. Such mandates are not within the Regional Board’s authority.

taking of land by restricting its use without any relationship to water quality under both state and federal law. (See U.S. Const., 5th Amendment, [private property shall not be taken for a public use, without just compensation]; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104.)

**V. DISCHARGES FROM AGRICULTURE MUST BE TREATED AS A NON POINT SOURCE**

Any such regulatory program designed to regulate agricultural discharges must be a non point source regulatory program. Agriculture is a non point source and shall not be treated as a point source discharge. Thus, any regulatory program's scope, focus, breadth, and enforcement shall remain a non point source program. Comparisons to point source programs, such as municipal wastewater treatment plants, are inapplicable as there is a fundamental difference between point source discharges and non point source dischargers. Further, any agricultural regulatory program must not incorporate regulations beyond the Regional Board's jurisdiction; the Regional Board's jurisdiction arises only when there has been a discharge to waters of the state and the discharge point is the *edge* of the field (not on the field).

**VI. THE 2011 DRAFT WAIVER FAILS TO EVALUATE ECONOMIC COSTS**

The requirement to consider economics under Porter-Cologne Water Quality Control Act ("Porter-Cologne") is absolute. Water Code, section 13141 explicitly mandates:

State policy for water quality control adopted or revised in accordance with the provisions of this article, and regional water quality control plans approved or revised in accordance with Section 13245, shall become a part of the California Water Plan effective when such state policy for water quality control, and such regional water quality control plans have been reported to the Legislature at any session thereof.

However, prior to implementation of any agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan.

(Wat. Code, § 13141.) Before a Regional Board can impose waste discharge requirements or conditioned water quality certification for discharges from irrigated lands, Porter-Cologne requires that it "shall take into consideration" the following factors: "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." (Wat. Code, § 13263.) Section 13241 in turn lists six "factors to be considered," including "economic considerations" and "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." (Wat. Code, § 13241.)

Anticipated program implementation costs to the agricultural community include increases in potential fees, management practice implementation, monitoring costs, report preparation, and

cost for education, as well as other costs. Given that the impacts of water quality regulations frequently take years to materialize, the Regional Board should analyze the economic costs and impacts within a dynamic framework taking into account the projected changes in the economic situation *over time*.

In addition to direct costs imposed on the agricultural community, the Regional Board should evaluate indirect costs, including the economic consequences that are transmitted via market interactions to other groups, such as consumers. Water quality regulation, such as Staff's Draft Order, increases the average cost of production and has a direct negative effect on the producer and the consumer through the resulting increase in variable costs and the output price. The propagation of the impacts of a regulation through the economy is well documented and can be quantified by economic analysis. The economics analysis prepared by the Staff is flawed and does not take into account actual costs that will be imposed upon agriculture due to the 2011 Draft Order.<sup>11</sup>

## **VII. AGRICULTURE ALTERNATIVE CONDITIONAL WAIVER PROPOSAL**

### **A. The Agriculture Alternative Conditional Waiver Protects Water Quality**

Agricultural representatives submitted an Agriculture Alternative Conditional Waiver Proposal in response to Staff's November 19, 2010 release of the 2011 Draft Order. The Agriculture Alternative Conditional Waiver represents a fair, reasonable, and legally sound approach to improving water quality while maintaining agricultural viability throughout the Region. The Agriculture Alternative Conditional Waiver requires growers to:<sup>12</sup>

- Submit an updated Notice of Intent.
- Participate in a region-wide cooperative monitoring program that will conduct monitoring and report annually on monitoring results, including the identification of water quality benchmark exceedances.
- Develop a confidential, proprietary farm water quality management plan (Farm Plan), which identifies management practices that will address water quality benchmark exceedances that stays on the farm.
- Include within the Farm Plan a nutrient management plan, sediment management plan, and pesticide management plan.
- Implementation of the Farm Plan and management practices to improve and protect water quality.
- Complete a verifiable grower survey, Farm Water Quality Survey, to determine what general practices farmers are using to improve surface water and groundwater quality. This document will serve as an educational tool for each grower in order for individuals to make direct changes in order to protect water quality and will also be submitted to the Regional Board.

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<sup>11</sup> Reliance on economic analysis of the Feb. 1, 2010 Preliminary Staff Draft Order is improper since that draft order is fundamentally different from the current 2011 Draft Order.

<sup>12</sup> Note: this list is not exhaustive. Please see the Agriculture Alternative Conditional Waiver Proposal for additional requirements and details.

- Assess the effectiveness of implemented agricultural management practices in attaining water quality benchmarks and, when necessary to attain water quality benchmarks, identify, implement, or upgrade management practices.
- Be subject to a verification review of a statistically significant sample of Farm Water Quality Surveys per year by a third-party entity or the Regional Board to determine where educational and management practice implementation efforts should be focused;
- Participate in a Water Quality Coalition for Agriculture or conduct individual on farm monitoring to address crops with high nitrate loading potential and irrigated water runoff and sediment.
- The Coalition will audit Farm Water Quality Survey and management practices through a multi-phase audit program.
- The Coalition will work directly with farmers to address issues of concern and find solutions.
- Complete 5 hours of Farm Water Quality Education.
- Conduct annual groundwater sampling of one primary groundwater well on their operation for nitrates, TDS or EC, and pH.
- Comply with reasonable and achievable milestones and timelines in order to achieve water quality improvements.<sup>13</sup>

The Agriculture Alternative Conditional Waiver proposes a more effective and feasible approach to regulating and improving water quality. Through the use of best management practices, education, Farm Water Quality Surveys, verification reviews, and audit reviews of management practices, growers will be directly contributing to water quality improvements tailored to each farm, crop, and geographic area.

#### **B. The Alternative Conditional Waiver Submitted by Agriculture Must be Properly Analyzed**

The Agriculture Alternative Conditional Waiver proposes an alternative approach to regulating agricultural discharges. This alternative is not merely an alternative approach to regulating water quality on the Central Coast. Rather, this document is a superior alternative that deals with the true goal of any conditional waiver—improving water quality. As a feasible and achievable approach, the Agriculture Alternative Conditional Waiver must be reviewed under CEQA as a possible alternative. Therefore, additional environmental review must be completed prior to any Regional Board action on the 2011 Draft Order.

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<sup>13</sup> Benchmarks include: Reduce organophosphate toxic units at current CMP sites (by 50% in 4 years); meet water quality objectives for diazinon and chlorpyrifos (within 8 years); Decrease sediment loads from current CMP sites by 20% (within 5 years); Decrease nitrate loads from current CMP sites by 10% (within 10 years).

### **VIII. CONCLUSION**

The agricultural community is committed to being stewards of the land and has attempted to work with the Regional Board on this matter since 2003. The agricultural community is fundamentally interested in ensuring the long term improvement of water quality in the region.

Given the diverse array of geography, topography, soil, microclimates, local conditions, and agricultural commodities grown in the Central Coast, water management and monitoring programs must be flexible and allow for necessary adaptations, both for localized areas and throughout the Central Coast. A one-size-fits-all approach to regulating all types of discharges from irrigated lands does not work in this Region due to the diversity of the Region that supports a corresponding variety of plant and animal communities and crop types. As currently drafted, Staff's 2011 Draft Order and accompanying documents contain numerous flaws, areas of concern, exceedances of authority, and infeasible and improper regulations. In light of these concerns, Farm Bureau urges the Regional Board to adopt the Agriculture Alternative Conditional Waiver in lieu of the 2011 Draft Order as it is a superior option that achieves the Regional Board's goal in protecting water quality.

Sincerely,

A handwritten signature in black ink, appearing to read "Kari Fisher", written in a cursive style.

Kari E. Fisher  
Associate Counsel

KEF:pkh