



January 1, 2011

Mr. Jeffrey Young,  
Chairman  
Regional Water Quality Control Board  
895 Aerovista  
San Luis Obispo, CA 93446

Dear Chairman Young:

Western Growers represents approximately 500 individual growers, packers, shippers of fresh fruits, nuts and or vegetables in the Central Coast area regulated by the Region 3 Water Quality Control Board. Any conditional agricultural waiver established in this region will impact every operator and landowner to varying degrees. Draft Order No. R3-2011-0006 is currently written such that the majority of Western Growers members will be categorized as “high risk” and consequently bear the burden and costs of increased controls and regulation simply because of the commodities they produce, where they are located and the amount of land they farm. This being the case, Western Growers is acutely interested in working with the Regional Board and it’s staff to develop a “conditional waiver” that appropriately prioritizes risks, provides flexibility for operators and landowners to address those risks and establishes appropriate performance standards and timelines by which to measure improvements in water quality. In working with staff and other stakeholders to improve regional water quality we seek an effective and collaboratively developed Order that will:

1. Recognize that water quality objectives may not be achievable within five years and so identifies milestones for realistic progress over longer periods.
2. Appropriately prioritize water quality concerns as well as areas of greatest concern.
4. Ensure that the costs to growers are outweighed by the benefits to regional water quality
5. Ensure that regional staff, appropriately and timely, analyzes data and communicate trends.
6. Provide credit, flexibility and incentives for grower success and innovation.

By empowering owners and operators to act in concert with oversight from the CCRWQCB, as is embodied in the agricultural alternative proposal, producers are effectively positioned to provide solutions to the regions most pressing water quality concerns. Throughout our comments, Western Growers will juxtapose our concerns with the draft Order with the benefits of the agricultural alternative. We firmly believe that the agricultural alternative is a consensus proposal that has broad buy in from regional producers and as such is uniquely positioned to foster success and water quality improvements as opposed to a staff driven proposal that is rife with problematic requirements and certain for much controversy and contention.

*Specific Concerns with the staff proposed Draft Order No. R3-2011-0006*

***Overly confusing/ unarticulated documentation of proposed requirements.***

First and foremost – the “Draft Order” encompasses several different documents, is hundreds of pages long and requires exhaustive analysis to even begin to understand what might be required of an owner or operator to “comply” with the new Order. As an example, an operator must evaluate and determine what

“tier” they would fall into based on several criteria including types commodities grown, proximity to impacted waters, size of operation and use of select agricultural chemistries – yet certain of these factors may vary within an operation, may change over time and by themselves are only part of the risk equation. An operational risk assignment (“tier”) may in fact unfairly ascribe high risk to land parcels that are in fact low risk just because the broader operation identifies some of the “triggers” for placement in a higher tier. If you can effectively navigate and assign a tier to your operation, it is subject to reclassification by the Executive Officer based on criteria that are not enumerated in the Draft Order.

Once you have established your placement in one of three Tiers, you are required to observe several prohibitions, implement a variety of best practices and process controls, and conduct various monitoring and reporting functions each of which is dependent on the “tier” your operation falls into and all of which are scattered between several documents. While this may be appropriate and intuitive for many – Western Growers finds that the proposed drafts are not well articulated and the diverse requirements for growers are not clearly and definitively communicated in a manner that allows for thorough understanding and feedback from the stakeholder community.

### ***Tiering***

As previously stated, the proposed system of “tiers” which appears to be an effort to prioritize operations which present higher orders of risk by categorizing an operation based on the waste they appear to discharge or the perceived potential to cause or contribute to exceedances of water quality is inexact at best. The size of an operation, the proximity to impacted water, the commodities grown and other factors including whether or not water with priority wastes actually leaves an operation, all must be taken into account when evaluating and assigning risk. In addition, to categorize an entire operation as high risk, based on a trigger that is applicable to a minority area within the operation seems arbitrary and capricious. It is only that discreet area that may present risk and then only if other key criteria are met such as the presence of waste materials in water moving off the operation and into waters of the state.

When establishing a tiering system it is important to clearly define the criteria by which one is classified as well as the criteria by which one may change tiers. In this regard the CCRWQCB is establishing several criteria that may be beyond an operators or owners control such as proximity to impacted water and size of operation. Again these are only portions of a full risk evaluation/equation. An operator may be directly adjacent to impacted waterways but with good engineering and controls in place may have little or no potential to cause or contribute to exceedances of water quality standards. The fact that size and proximity place them into a high risk category with no opportunity to mitigate that placement is arbitrary and not science based. In addition to a tiering process that is not grounded in actual risk, the lack of clear criteria to move from a higher to lower tier provides little incentive for improvement and in fact the broad authority for the Executive Officer to elevate an owner or operator absent any clear criteria for how that determination might be made results in even more ambiguity and less confidence in the tiering proposal.

While Western Growers is appreciative of the CCRWQCB’s efforts to develop a program that prioritizes based on risks we remain concerned that the proposed tiering approach does not appropriately assess risks and unfairly places many owners and operators in higher tiers regardless of the risk they actually present and similarly may categorize higher risk operations in lower tiers based on the limited criteria utilized.

### ***Scope***

To effectively improve water quality in the central coast region, Western Growers is convinced that efforts need to be prioritized such that the most pressing constituents and the most significant impairments are addressed first. The proposed draft covers thousands of miles of creeks, sloughs, ditches and other water

bodies throughout the region and includes many constituents of concern or risk from temperature to pesticides. In addition, groundwater concerns add another layer of complexity and management for all operators/landowners in the region. While it is important over time to address these issues comprehensively, Western Growers believes a functional narrowing of the scope of the waiver gives regional operators/landowners and others committed to improved water quality in the region the best opportunity to coalesce in a focused fashion and address unique and high priority issues. An example of how this might be applied would be to focus on key constituents of concern such as chlorpyrifos, diazinon and nitrate identify discrete water bodies where there are consistent exceedances and focus on those areas and operators that contribute to those waters. Coupled with a more effective tiering system that required owners/operators who were contributors in these areas to implement more controls, the RWQCB would effectively achieve a prioritization system that would allow for focused energy and resources in areas of key concern. Such system has been proposed in the agricultural alternative which asks (as a component of risk analysis or “tiering”) if an operator is discharging water rather than where, how large and what crops are grown as criteria for risk.

This question, “is there discharge” is an important question never or not effectively asked in the draft Order – yet monitoring of “tailwater” becomes a key compliance factor for those owner/operators in Tier 3. It seems much more prudent, efficient and likely to show improved water quality in the region if the RWQCB would first prioritize a manageable number of areas of concern based on key constituents of concern and then within those areas allow and incentivize owner/operators to make improvements based on their unique needs. This would mean operators who discharge would be free to coalesce to reduce their contributions to pollutant loads using BMPs, collective treatment or other creative and valid solutions that actually improve water quality. The agricultural alternative is structured to facilitate this as it prioritizes based on individual risk including whether there is a discharge, what is potentially in the discharge and then fostering collective action through coalition.

### ***Prohibitions and Conditions***

Western Growers is concerned with the repeated use of the phrase “...reasonable potential to cause or contribute to an exceedance of water quality standards...” throughout the prohibitions and conditions sections of the Draft Order. This phrase without further definition or explanation is wide open to interpretation and when used in the prohibitions/conditions sections could conceivably prohibit or place conditions on any reasonable farming practice or subject owner/operators to violations and enforcement based on unclear and undefined verbiage. Western Growers firmly believes that prohibitions should be specific and clearly articulated so that owners/operators throughout the region understand their responsibilities and obligations under the Order. We also believe that prohibitions must be science based and that the economics of farming and other beneficial uses must be evaluated in conjunction with the development and implementation of any prohibition.

An example of the potential for miss-interpretation may be the prohibition on the application of fertilizer such that it “...contributes to exceedances of water quality standards”. This could in fact be interpreted as a prohibition on the application of fertilizer. “Contributes” needs to be clearly and specifically defined. Without that definition this is a defacto demand for 100% efficiency in fertilizer applications which is likely impossible to achieve. A second example may be in the prohibition of bare soil in areas where it may “contribute to exceedances” while it makes sense to support vegetation over bare soil for erosion control there are areas where it may be impractical or undesirable and other mitigation strategies may make more sense for the owner/operator rather than a prohibition. There is more appropriate language in latter

sections of the document ("pollutant specific conditions") that states that "dischargers must minimize the presence of bare soil" that seems more practical than a potential prohibition such as could be interpreted in this section. That said, the term minimize should be further defined or balanced by the "extent practical" to ensure flexibility for owner/operators.

Another concern is when the RWQCB mandates through conditions that waters received by an owner/operator be cleaned or treated to a higher quality prior to its release. This places the onus on owner/operators to invest in treatment of water to a higher quality than when they received it. It is punitive to growers who receive lower quality water and may have no options for alternative sources. An example is in the conditions section when dischargers are required to ensure that the water quality from their operation that percolates into groundwater meet all beneficial uses (including drinking water) at the point where it enters the ground. If they receive waters that do not meet all beneficial uses it becomes a condition that they treat/clean that water prior to release. In effect this obligates them beyond control of their own operation to further dealing with operations or historical conditions beyond their control. In the agricultural alternative proposal there may be some ability for operators to work cooperatively on these types of issues but it is still unfair to hold owners/operators liable for events conditions outside the scope of their operation

Western Growers also questions the requirement that growers comply with TMDLs as worded in the conditions sections of the Draft Order. It is our understanding that TMDLs are established for receiving waters and that they should be measured and evaluated at that point. To require that TMDLs be met at discrete operations is an overreach of authority for the RWQCB

The Draft Order states that the Executive Officer may require dischargers to develop an inventory and conduct sampling of private domestic wells in or near areas with high nitrate in groundwater. This again makes individual owner/operators potentially liable (subject to the undefined discretion of the EO) for structures, sources, supplies that may not be part of their operation and outside their control. Western Growers firmly believes that any agricultural order must not hold growers or other responsible, liable for those constituents, contributions, structures, events etc that are not within their purview and direct control. The proposed agricultural alternative again provides a mechanism for coordinated activity amongst owner/operators and should be looked at with regard to facilitating common action in high priority areas.

Western Growers is concerned with the potential requirements to protect aquatic habitat. These conditions are comprehensive and could be a full time undertaking for owners/operators beyond their livelihood of farming. The conditions require maintenance of riparian functions, maintenance of native vegetation and in some cases, implementation of water quality buffer plans for a wide variety of water bodies including ephemeral and intermittent waters. This condition again potentially extends requirements beyond an owner/operators purview and certainly will require significant investment of resource, time and talent to comply. While we recognize and applaud that the RWQCB encourages growers to act in concert on these activities we respectfully suggest that this condition diverts owner/operators attention from reducing and improving the quality of discharges to a broad and diffused effort to improve riparian conditions in areas that may or may not be priorities.

There are additional examples of prohibitions and conditions that may be problematic for owners/operators within the region but Western Growers is focused on similar concerns throughout this section. Those concerns include:

- 1) Clear, precise, specific wording where prohibitions are enumerated along with a cost (how will the prohibition impact a grower)/benefit (how will the prohibition improve water quality) analysis for each specific prohibition.

- 2) Prohibitions and conditions must be within the owner/operators control and should not require an owner operator to extend controls beyond their operation.
- 3) Collaboration should be encouraged particularly in areas where there are common problems that could be best mitigated by collective action. We recognize the RWQCB has allowed for this in certain ways but would point to the agricultural alternative as a model that holds collective action as a center piece for improving water quality.

### ***Milestones and Timelines***

Setting appropriate and achievable milestones and timelines is imperative in the issuance of any new agricultural order for the region. Water quality improvements, particularly as they relate to groundwater, will occur in geologic timeframes not overnight or even in the next five years. Western Growers believes any finalized/adopted agricultural order must allow for agriculture to demonstrate continuous improvement and not hold owner/operators to unachievable standards/timelines. We believe the timelines and milestones outlined in the agricultural alternative proposal have consensus support as being achievable and will allow for the RWQCB to verify that continual progress to improved water quality is being made by agriculture. To that end we again call upon the RWQCB to review and adopt those timelines in lieu of those in the Draft Order.

### ***Science***

Finally, Western Growers reiterates our concerns relative to the underlying science and assumptions made in conjunction with this Draft Order and the rationale that support sweeping regulation of the region's most progressive, dynamic and economically important industry. In prior correspondence with the RWQCB we submitted a letter outlining our concerns with the science associated with preliminary staff recommendations for an agricultural order. In that letter we questioned the relative source contributions attributable to agriculture, the occurrence and risk of nitrates in the regions waters, the assumptions built into the evaluation of agricultural impacts on aquatic organisms, and endangered species and agriculture's impact on surface water and groundwater quality. While Western Growers remains concerned that there are many flaws and erroneous assumptions made in the development of rationale to support the Draft Order – we do not contest that agriculture should do its part to improve water quality in the region and we will work with the RWQCB to develop an effective order that will allow owner/operators in the region to demonstrate their progress towards improved water quality while maintaining their economic vitality and the vitality of agriculture in the region.

### ***Agricultural Alternative***

To this end, we strongly support the Revised Ag Alternative and its tenets which address both surface and groundwater quality with measurable and meaningful milestones and timelines. These tenets include:

- Prioritization based on water quality risk (tailwater, high nitrate hazard index) (Revised Ag Alternative, p13)
- Addressing discharge quantity and quality as related to potential water quality risk, (Revised Ag Alternative , p13)
- Providing for collaboration through coalitions which adopt best practices that affect water quality
- Requiring specific actions of owner/operators with higher potential risk to water quality
- Providing mechanisms for technical support to growers (Revised Ag Alternative, p17)
- Ensuring accountability through auditing of coalition membership (Revised Ag Alternative, p14)

As we move forward in working with the RWQCB to develop a program that will improve water quality in the region, promote agricultural vitality and be more than an administrative exercise Western Growers strongly

encourages both the staff and the Board to draw heavily from the agricultural alternative proposed by an overwhelming number of agricultural organizations throughout the region. We believe that this alternative provides a credible, consensus proposal from agriculture that will garner much support and buy in if adopted. If it cannot be adopted, the RWQCB should strive to use this alternative proposal as a template for an order that is simplified, prioritized on areas of greatest concern, justifies the costs to agriculture versus the benefits to water quality, provides clarity and predictability for regional owners/operators and encourages flexibility, innovation and incentives for collective action on the part of regional owners/operators and their supporting trade organizations. This type of collaborative approach will ensure that stakeholders have broad ownership and investment in the outcome, remain focused and committed to water quality improvements and provide for accountability and verifiability by regional staff.

For questions, comments or concerns regarding these comments, please contact Hank Giclas, Senior Vice President, Western Growers at [hgiclas@wga.com](mailto:hgiclas@wga.com) or 949 885 2205.

Respectfully

A handwritten signature in black ink, appearing to read 'Hank Giclas', written in a cursive style.

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