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August 23, 2005

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VIA FACSIMILE AND U.S. MAIL

Kenneth D. Landau
Assistant Executive Officer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive
Rancho Cordova, California 95670

Re: *Proposed Resolution To Amend Conditional Waivers Of Waste Discharge Requirements For Discharges From Irrigated Lands Within The Central Valley Region("Proposed Resolution")*

Dear Mr. Landau:

We are writing to comment on the Proposed Resolution. In particular, we urge you to delete the second paragraph of Section 2 of the Proposed Resolution in its entirety. That paragraph states:

The Conditional Waivers include Receiving Water Limitations that implement the applicable water quality objectives and water quality standard for all surface waters of the state within the Central Valley Region. Because agricultural dominated waterways and construction agricultural drains are waters of the state, the Receiving Water Limitations in the Conditional Waivers apply to them.

This language is inconsistent with the Waivers and inconsistent with the position the Central Board took in the matter captioned, *California Farm Bureau Federation v. State Water Resources Control Board*, No. 04CS00264 (Sacramento Co. Super. Ct.) (the "Lawsuit"). We represented petitioner California Farm Bureau Federation in connection with that Lawsuit.

In these comments, we set forth relevant portions of the brief we submitted in the Lawsuit, the opposition brief filed by the California Attorney General's Office on behalf of the

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State Water Board and the Central Valley Board, the decision of the Sacramento County Superior Court, and the Proposed Resolution. We then suggest changes to the Proposed Resolution.

Brief Submitted in the Lawsuit

In October 2004, we submitted our brief in the Lawsuit. Section IV(B)(2) of that brief stated as follows:

The conditional waivers contain a requirement that farmers must not violate "any applicable water quality objective in the Regional Board's Basin Plans." SWB-015942, 015981. More than a dozen Water Quality Objectives have been taken directly from the Basin Plans and expressly listed in the conditional waivers. *Id.* at 015970-75. These are the Water Quality Objectives that specifically pertain to beneficial uses for the 96 stream segments that the Regional Water Board actually designated in the 1975 Basin Plan. The conditional waivers seek to apply these Water Quality Objectives at one fell stroke to every stream segment in the Central Valley into which run-off from irrigated land flows. The apparent basis for this action is the application of the Tributary Rule. The State Water Board upheld these requirements.

However, at about the same time the State Water Board was upholding these requirements, it was taking a diametrically opposite position in litigation over a permit appeal. RJN Exh. Q (*In the Matter of Vacaville's Easterly Wastewater Treatment Plant*, No. WQO 2002-0015 (SWRCB Oct. 3, 2002) 2002 Cal. Env. Lexis 29, *writ pending sub nom. City of Vacaville v. State Water Resources Control Board et al.*, No. CIV MSN03-0956 (Contra Costa Cty. Super. Ct.)). In the Vacaville litigation, the State Water Board has taken the position that beneficial uses cannot be applied by "rote" to tributaries, but must be applied "on a case-by-case basis" based on a careful examination as to whether the beneficial uses are appropriate. (Footnote omitted.)

The City of Vacaville owns a wastewater treatment plant that discharges to Old Alamo Creek, "an ephemeral stream that is effluent-dominated." RJN Exh. Q at 1. As the State Water Board explains, "in the arid west, natural stream flow may be very low or intermittent due to infrequent storm events and the lack of recharge from groundwater Frequently, public agencies discharge treated sewage effluent into these normally dry streams. As a result, stream flow during all or part of the year can be dominated by treated effluent. These streams [are] called . . . effluent-dominated [waterbodies] (EDWs)." *Id.* at 2.

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Pursuant to the Tributary Rule, Old Alamo Creek, into which Vacaville's treatment plant discharges, was deemed to have the following beneficial uses: drinking water supply ("MUN"), contact recreation ("REC-1"), cold water aquatic habitat ("COLD"), and agricultural supply ("AGR") because these are the uses of the Delta, the first downstream waterbody for which the Regional Water Board actually designated uses. *Id.* at 7. The State Water Board conceded, however, COLD and MUN "are likely inappropriate uses for Old Alamo Creek." *Id.* at 10. In other words, Old Alamo Creek cannot actually be used for drinking water supply and cold water aquatic habitat.

Effluent-dominated waterbodies are similar to agriculture dominated waterbodies. It is often impractical for these waterbodies to attain Water Quality Objectives deemed to apply to them by operation of the Tributary Rule. In both cases, this is because the water in these waterbodies is significantly different from the water in the first downstream waterbody for which the Regional Water Board has actually designated a use. The Regional Water Board has recognized the similarity between EDWs and ADWs and often discusses them together. *See, e.g.,* RJN Exh. N at II-4 (under the main heading: "Regional Concerns And Issues" is the subheading "Agricultural Dominated and Effluent Dominated Water Bodies;" the WMI Study concludes that: "The beneficial uses of both ADWs and EDWs should be evaluated.").

In the Vacaville case, petitioners argued that the Regional Water Board had "mechanically applied" the Tributary Rule to determine that Old Alamo Creek had the same beneficial uses as the Delta. The State Water Board disagreed, finding that the:

"Central Valley Regional Board understood that they had to apply the tributary language in the Current [1998] Basin Plan. Rather than applying the Delta's beneficial uses by rote, the Central Valley Regional Board carefully examined whether these uses were appropriate for Old Alamo Creek. The Central Valley Regional Board included detailed findings in the permit on the disputed uses and tailored permit provisions based on these findings. In so doing, the Central Valley Regional Board evaluated Old Alamo Creek's uses 'on a case-by-case basis.'" RJN Exh. Q at 20-21.

The foregoing quote is a fair description of everything that the Regional Water Board did not do here. Here, the Regional Water Board applied beneficial uses and Water Quality Objectives by rote to all waterbodies in the Central Valley into which run-off from irrigated land flows. The Regional Water Board did not examine whether these beneficial uses or Water Quality Objectives were appropriate for any of these waterbodies. The Regional Water Board did not

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include detailed findings in the conditional waivers with regard to these uses. The Regional Water Board did not tailor any provisions of the conditional waivers to actual conditions in the tributary waterbodies into which run-off from irrigated land flows. And, the Regional Water Board did not evaluate any of the tributary waterbodies on a "case-by-case" basis.

In the Vacaville case, the State Water Board also determined that a regional water board cannot require compliance with Water Quality Objectives where the beneficial use foisted on the waterbody in question by operation of the Tributary Rule does not actually exist:

"While basin plan provisions assigning a downstream water's uses to its upstream tributaries are valid as a general rule, their application in particular cases can lead to unreasonable results. In general, the Board agrees that, where a Regional Water Quality Control Board (Regional Board) has evidence that a designated use does not exist and likely cannot be feasibly attained, it is unreasonable to require a discharger to incur control costs to protect that use. This is true at least in the interim until the Regional Board either successfully amends the basin plan to de-designate the use or determines that the use cannot be legally de-designated. At a minimum, where a Regional Board has evidence that a use neither exists nor likely can be feasibly attained, the Regional Board must expeditiously initiate appropriate basin plan amendments to consider de-designating the use."
Id. at 31-32.

Here, the Regional Water Board is requiring farmers to meet Water Quality Objectives applied to tributaries by rote application of the Tributary Rule in a situation where the Regional Water Board has evidence that certain designated uses do not exist. The Regional Water Board has known for years that the ADWs do not have the beneficial uses ascribed to them by rote application of the Tributary Rule. The Regional Water Board identified just that problem in its 2001 WMI Study. RJN Exh. N at II-3 (ADWs "lack the habitat and physical flow characteristics" required to meet beneficial uses). The Regional Water Board again discussed the problem in its 2002 Triennial Review. RJN Exh. O at 21-22. Further, despite the State Water Board position that the Regional Water Board "must expeditiously initiate appropriate basin plan amendments" under these circumstances, no such amendments have been initiated—expeditiously or otherwise.

Even if state law allowed the Regional Water Board to require compliance with Water Quality Objectives as a condition to a waiver—which it does not—the State Water Board has taken the position in on-going litigation that to do so, the Regional Water Board must carefully evaluate the imposition of Water Quality

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Objectives and initiate Basin Plan amendments to ensure that the Water Quality Objectives being imposed pertain to beneficial uses that actually exist for the waterbodies in question. Because the Regional Water Board has not done this, it cannot require compliance with Water Quality Objectives. In particular, the Regional Water Board cannot require compliance with Water Quality Objectives for beneficial uses that simply do not exist in many of the waterbodies into which run-off from irrigated land flows. The Regional Water Board cannot require farmers "to incur control costs" to protect uses that "do not exist." *See* RJN Exh. Q (*In Re Vacaville*) at 31.

Section IV(B)(3) of our brief stated that:

In December 2002, the State and Regional Water Boards published a study entitled The Watershed Management Initiative Chapter (the "WMI Study"). The WMI Study states that over 4,000 waterbodies in the Central Valley are constructed channels designed to carry agricultural supply water and drainage. The WMI Study goes on to say that these "constructed and artificial channels lack the habitat and physical flow characteristics of natural channels required to sustain the full range of aquatic life and other beneficial uses." RJN Exh. N at III-3. The 2002 Triennial Review Workplan states that in agricultural areas, "a complex network of modified natural and constructed channels convey irrigation supplies to farms and export drainage water to natural streams." RJN Exh. O at 21-22. The Triennial Review Workplan puts the number of such waterbodies at over 4,100 and indicates that these waterbodies cannot meet beneficial uses that would be applied to them by application of the Tributary Rule. *Id.*

The California Department of Food and Agriculture has stated that these modified and wholly-constructed channels provide some incidental benefits, but that there are limitations to the benefits that can be provided by channels that have been straightened and deepened and that they cannot fulfill all of the beneficial uses that would be assigned to them by rote application of the Tributary Rule. SWB-013648, 013650-51.

Both the WMI Study and the Triennial Review Workplan contain strategies for addressing this issue and both state that beneficial uses for agriculture dominated waterbodies should be designated consistent with their actual uses. The Regional Water Board has described the current regulatory situation of ADWs as a "special situation" and has stated that some sort of basin-wide solution is necessary to address it. RJN Exh. O at 22; RJN Exh. N at iv, II-3, II-4. The WMI Study goes so far as to recommend that a way be developed to *grant variances from compliance with Water Quality Objectives* in agriculture dominated waterbodies. RJN Exh. N at II-4.

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In sum, the Regional Water Board has studied ADWs and knows that Water Quality Objectives cannot be achieved in many of these waterbodies. Yet, in the face of this knowledge, the Regional Water Board has promulgated conditional waivers requiring that all farms in the Central Valley comply with Water Quality Objectives. Nothing could be more arbitrary or more capricious.

And, finally, Section IV(B)(5) of our brief stated that:

Water Code Section 13241 provides that:

"Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

"(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) Economic considerations. . . ."

Thus, California law requires a multi-factored analysis before Water Quality Objectives are established for any waterbody. Federal law, on the other hand, requires that Water Quality Objectives be provided for every waterbody in the state. 33 U.S.C. § 1313. The Regional Water Board has responded to these legal requirements by adopting the 1995 Basin Plan version of the Tributary Rule. The current Tributary Rule states that:

"The beneficial uses of any specifically identified water body generally apply to its tributary streams. In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Water Board's judgment will be applied.

"It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a

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case-by-case basis." RJN Exh. A (1998 Basin Plan) at II-2.00 (1998 Basin Plan language is unchanged from the 1995 edition)."

The Regional Water Board is trying to pull off a balancing act: adopting Water Quality Objectives for every waterbody through operation of the Tributary Rule to satisfy federal law, and leaving the door open for the multi-factored analysis required by state law by including a "case-by-case" exception. The State Water Board has openly acknowledged that the Tributary Rule was re-crafted in the 1995 Basin Plan to create sufficient ambiguity to make this balancing act possible. RJN Exh. Q (*In re Vacaville*) at 23 (Regional Water Board felt compelled in 1995 Basin Plan to replace "clear and unambiguous" Tributary Rule "with language that was more equivocal").

However, by requiring farmers to comply with Water Quality Objectives that are clearly and unambiguously being assigned to tributaries by rote application of the Tributary Rule, the Regional Water Board has lost its balance. Requiring farmers to comply with these standards violates the multi-factored analysis set forth in Water Code § 13241. Except for the 96 streams that were actually studied back in 1975, none of the waterbodies to which run-off from irrigated land discharges has been studied in the manner prescribed by state law. Water Code § 13241(a).

Opposition Brief filed by the Attorney General's Office

On January 7, 2005, the State Attorney General's Office submitted its opposition brief to our brief on behalf of the State Water Resources Control Board and the Central Valley Board. Footnote 94 in Section IV(3)(B)(2) of the opposition brief states, in part, that:

[i]t should be noted that the Tributary Rule applies only to 'streams' and not to constructed agricultural drains. Therefore, for many farmers, the Rule is not applicable.

Decision of the California Superior Court

On May 9, 2005, Judge Judy Holzer Hersher of the Superior Court of the State of California for the County of Sacramento affirmed the Court's tentative ruling with a few minor changes. In Section IV(A)(1) of the ruling, beginning at page 23, the Court states as follows:

Even if the Board complied with the requirements of Water Code section 13241 in adopting the existing WQOs, Farm Bureau contends that the Waiver improperly applies these WQOs to agriculturally dominated waterbodies ("ADWs") for which the Board has not designated beneficial uses. Farm Bureau maintains that the water in ADWs is often significantly different from the water in designated downstream waterbodies. According to Farm Bureau, the Regional

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Board has recognized this as well. Farm Bureau points to a December 2002 Watershed Management study prepared by the Regional and State Boards. The Study states that over 4,000 water bodies in the Central Valley are constructed channels "designed to carry agricultural drainage and supply water." (Farm Bureau RJN Ex. "N" at II-3.¹) According to the Study, "many of these constructed and artificial channels lack the habitat and flow characteristics of natural channels required to sustain the full range of aquatic life and other beneficial uses." (*Id.*) Also in 2002, the Regional Board conducted its Triennial Review of Basin Plans, in which the Regional Board noted that more than 4,100 waterbodies in the Central Valley "are constructed facilities designed to carry agricultural drainage and supply water," (Farm Bureau RJN Ex "O" at 21), and an additional 200 waterbodies that are specifically "agriculture dominated." (*Id.*) The Triennial Review provides that "[m]any of the constructed and artificial channels lack habitat and physical flow characteristics of natural channels required to sustain the full range of aquatic life and other beneficial uses. Additionally, in natural channels whose flow is dominated by agricultural drainage, water quality may be less than needed to protect aquatic life and other beneficial uses." (*Id.*)

Nevertheless, under the Basin Plan and, in turn, the Waiver, the beneficial uses of downstream water bodies are assumed to upstream tributaries (including, apparently, at least some ADWs) by virtue of the "Tributary Rule," even if such beneficial uses do not actually exist in such waterbodies. The reason for this is that the Regional Board is required by federal law to designate water quality standards for all surface waters in the state. (33 U.S.C. § 1313.) Because WQOs are defined by beneficial uses, and because Respondents had identified beneficial uses for only a limited number of water bodies, Respondents adopted the Tributary Rule. The Tributary Rule provides that streams that do not have specifically designated beneficial uses in the Basin Plan are assumed to have the same beneficial uses as the first downstream waterbody which does have specifically designated beneficial uses. Application of the Rule means that a designated downstream waterbody's WQOs generally will be applied to all of its undesignated tributaries.

Farm Bureau claims that the problem with the Tributary Rule is that the downstream uses assigned to a tributary are not necessarily accurate, especially in

¹ Respondents object to the Court taking judicial notice of the WMI Study and Triennial Review. The Court rejects this challenge, but notes that the documents were not necessary or critical to any of its findings in this matter.

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the case of ADWs. (AR 13649, 13731.) The Board itself has recognized that application of the Tributary Rule to ADWs may not be appropriate. (AR 13688; *see also* Farm Bureau RJN Ex. "N" at II-3, Ex. "O" at 21.) For example, in *Matter of Vacaville's Easterly Wastewater Treatment Plan*, No. WQO 2002-0015 (SWRCB Oct. 3, 2002) 2002 Cal. Env. Lexis 29, *writ pending sub nom. City of Vacaville v. State Water Resources Control Board et al.*, No. CIV MSN03-0956 (Contra Costa Sup. Ct.) (hereinafter "*Vacaville*"), the State Board decided that beneficial uses cannot be applied by rote to all upstream tributaries, but must be applied on a case-by-case basis based on a careful examination as to whether the beneficial uses are appropriate.

The *Vacaville* decision involves the discharge of sewage effluent into a normally dry stream, resulting in an effluent-dominated waterbody (or EDW). However, pursuant to the Tributary Rule, the stream was deemed to have the beneficial uses of the Delta, the first downstream waterbody for which the Regional Board actually designated beneficial uses. In its decision, the State Board conceded that the stream cannot actually be used for all of these beneficial uses. The State Board concluded that a regional water board cannot require compliance with WQOs where the beneficial use applied to the waterbody in question by operation of the Tributary Rule does not actually exist:

"While basin plan provisions assigning a downstream water's uses to its upstream tributaries are valid as a general rule, their application in particular cases can lead to unreasonable results. In general, the Board agrees that, where a Regional Water Quality Control Board (Regional Board) has evidence that a designated use does not exist and likely cannot be feasibly attained, it is unreasonable to require a discharger to incur control costs to protect that use. . . . At a minimum, where a Regional Board has evidence that a use neither exists nor likely can be feasibly attained, the Regional Board must expeditiously initiate appropriate basin plan amendments to consider de-designating the use."

It was largely for this reason that the Board had modified the Tributary Rule in its 1994 Basin Plan, adding the following clarifying language (which also exists in the 1998 Basin Plan):

"The beneficial uses of any specifically identified water body generally apply to its tributary streams. In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Water Board's judgment will be applied. It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis." (AR 13731.) (Respondents' RJN Ex "1" (1998 Basin Plan) at II-2.00.)

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Farm Bureau argues that it is an abuse of discretion to require farmers to meet WQOs applied to tributaries by application of the Tributary Rule when the Regional Board knows that use of the Tributary Rule will assign beneficial uses to certain waterbodies (ADWs in particular) that may not actually support those uses. By proceeding in this manner, the Waiver may hold agricultural dischargers to a higher standard than may be justifiable. Farm Bureau contends it is unreasonable to require a discharger to incur control costs to protect a beneficial use that does not actually exist. Thus, if the Waiver is going to require compliance with the WQOs specified in the Basin Plans, Farm Bureau argues the Board must initiate Basin Plan amendments to ensure that the WQOs being imposed pertain to beneficial uses that actually exist for the waterbodies in question.

Respondents argue that Farm Bureau's argument overgeneralizes the evidence before the Board. According to Respondents, the evidence relied upon by Farm Bureau might establish that some ADWs do not have the beneficial uses ascribed to them by rote application of the Tributary Rule, but the evidence does not establish that all ADWs lack the beneficial uses assigned to them by virtue of the Tributary Rule. This distinction is important because the Basin Plans carve out an exception to the Tributary Rule in those cases where a beneficial use may not be applicable to the entire body of water. Accordingly, Respondents contend, should an individual farmer determine that beneficial uses established through the Tributary Rule are not appropriate, the farmer may prepare a site specific study of the water body and request the Regional Board to revise the beneficial uses and WQOs.

This argument might limit the nature of the problems caused by the Tributary Rule, but it does not necessarily resolve the matter. Presumably, any such site specific study will involve costs, and perhaps substantial costs. An issue that ultimately must be decided, therefore, is whether the Regional Board can require farmers to incur the costs of a study to show that such uses do not exist; i.e., can the Board put the burden on the farmer to prove that the ADW does not have the beneficial uses assumed to it by virtue of the Tributary Rule?

Before the Court can consider whether the Board can put the burden on the farmer to prove that the ADW does not have the beneficial uses assumed to it by virtue of the Tributary Rule, the Court first must determine if the Tributary Rule even applies. Respondents have raised a question as to whether the Tributary Rule applies to many of the ADWs. (Respondents' Opposition Brief, p. 83, fn. 94.) Respondents contend the Tributary Rule applies only to "streams," and not to "constructed agricultural drains," meaning that the Rule is not applicable for many farmers. (See Respondents' Opposition Brief, p. 83 fn. 94.) This raises a

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troubling issue because the Waiver does not appear to be limited to "streams."² The Waiver purports to apply to all discharges from irrigated lands (AR 15930), which conceivably includes "constructed agricultural drains."

Since the Board has not designated the beneficial uses for constructed agricultural drains, and the Tributary Rule apparently does not apply to automatically assign beneficial uses to them, the question arises whether there are any beneficial uses that might apply to these water bodies. If not, then there is an apparent flaw in the Waiver because it purports to impose receiving water limitations upon all "surface waters that received discharges from irrigated lands." (AR 15976, 15986.)

Factors to be considered in establishing WQOs must include the "past, present, and probable future beneficial uses of water." Without the benefit of beneficial use assessments, it is unclear whether the Board has established WQOs -- or how it properly could have established WQOs -- for many of the agricultural channels that receive discharges from irrigated lands. For this reason, it seems ambiguous whether the Waiver truly applies to all surface waters that receive discharges from irrigated lands.

In sum, while the Court finds that the Regional Board has the discretion to require compliance with WQOs as a condition of the Waiver, there are serious questions about the specific WQOs that are being used to assess and measure the impact of discharges of waste to surface waters from irrigated lands. The record shows that these questions were raised below but were not explicitly addressed by Respondents. (AR 15262.) This is problematic because these questions raise doubts about the legitimacy of the Board's effort to hold farmers responsible for complying with WQOs in certain water bodies that carry agricultural drainage or are dominated by agricultural drainage. On the other hand, the Court is cognizant that the Board's findings come before the court with "a strong presumption of their correctness," and the Court is wary of substituting its judgment for that of the agency in technical and scientific matters in which the agency has particular expertise. The Court therefore finds it is necessary to remand this action so that

² For example, the initial focus of the Waiver's monitoring and reporting program is to assess the impact on any water bodies that carry agricultural drainage or are dominated by agricultural drainage. (AR 15952.) Monitoring sites must be initially on the water bodies carrying agricultural drainage into natural waterbodies. (AR 15951.) But if results indicate that WQOs are exceeded, monitoring must be expanded upstream in a systematic search for the sources of the constituents of concern. (AR 15951.)

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Respondents may clarify the extent to which the Waiver purports to impose receiving water limitations upon constructed agricultural drains and other ADWs. (See *Keeler v. Superior Court of Sacramento County* (1956) 46 Cal. 2d 596, 600.)

Proposed Resolution

The Proposed Resolution states that:

The Conditional Waivers include Receiving Water Limitations that implement the applicable water quality objectives and water quality standards for all surface waters of the state within the Central Valley Region. Because agricultural dominated waterways and constructed agricultural drains are waters of the state, the Receiving Water Limitations in the Conditional Waivers apply to them.

Proposed Resolution, § 2 at 2.

Suggested Changes to the Proposed Resolution

In light of all of the foregoing, we respectfully request that the second paragraph of Section 2 of the Proposed Resolution be deleted in its entirety for several reasons. First, Section 3 of the Proposed Resolution covers this same subject matter in more detail. Second, the second paragraph of Section 2 conflicts with the litigation position of the Central Valley Board. Third, the second paragraph of Section 2 conflicts with the Waiver itself. See, Resolution No. R5-2003-0105, ¶ 13.

Sincerely,



Clifton J. McFarland

CJM/lab

cc: Deborah Barnes
Brenda Jahns Southwick
John Hewitt