



CALIFORNIA FARM BUREAU FEDERATION

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March 21, 2011

Adam Laputz
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Dr., #200
Rancho Cordova, CA 95670

Re: Comments on the Recommended Irrigated Lands Regulatory Program Framework

Dear Mr. Laputz:

The California Farm Bureau Federation (“Farm Bureau”) 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 agricultural and associate 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.

Farm Bureau appreciates the opportunity provided by the Central Valley Regional Water Quality Control Board (“Regional Board”) to participate in the Stakeholder Advisory Workgroup process to develop alternatives and partake in discussions regarding the development of the Long Term Irrigated Lands Regulatory Program (“LT-ILRP”). Farm Bureau further appreciates the opportunity to submit comments on the Regional Board’s LT-ILRP Recommended Irrigated Lands Regulatory Program Framework (“Regulatory Framework”) released in early March 2011. Farm Bureau has numerous reservations and comments on the Regulatory Program Framework as currently drafted and offers the following specific comments contained herein. These comments are in addition to the comments contained in a joint agricultural coalition letter submitted during the week of March 21, 2011.¹

¹ Various agricultural organizations, including Farm Bureau, coalitions, and water districts will be submitting a joint agricultural coalition letter during the week of March 21, 2011 expressing significant comments and concerns on the Regulatory Program Framework.

A. Failure to Properly Analyze the Regulatory Program Framework Under CEQA

Similar to comments submitted on September 27, 2010, the new recommended project proposed for Board adoption, now in the form of a Regulatory Program Framework, was not properly analyzed under California Environmental Quality Act (“CEQA”) as the Framework was not a program alternative nor was in existence during *any* of the stages of environmental review.²

The Draft PEIR analyzed the alternatives *in existence at that time*. However, the Regulatory Program Framework was not in existence since it was not released for public review until March 2011. Rather than recirculating the EIR with a new section containing the environmental analysis of the Regulatory Program Framework, the Final PEIR states: “The programmatic nature of the Final PEIR allows the Board to combine elements of the six analyzed alternatives into a Recommended ILRP Framework (Recommended Framework) not directly analyzed in the Final PEIR.” (Final PEIR, p. 1-4.) Further, the Staff Report states: “As long as the adopted program falls within the range of alternatives analyzed and the appropriate findings have been disclosed, the Board may adopt a program that is a variation on the alternatives analyzed without the need to conduct additional CEQA analysis.” (Staff Report, p. 7.) Such statements are improper.

Although an EIR need not consider all potential alternatives to the project and instead need only to consider a reasonable range of alternatives, the alternative preferred and recommended by the agency must be considered and examined within the EIR. (See Cal. Code Regs., tit. 14, § 15226.6(a).) Further, the EIR must contain sufficient information about *each alternative* to permit an evaluation of the relative merits of the alternatives and the project. (*Ibid.*) Here, the Draft PEIR analyzed five program alternatives and a separate document, Appendix A, contained a section describing the Staff Recommended Program Alternative.³ In conjunction with the release of the Final PEIR, a staff report was released in March, 2011 containing the Regulatory Program Framework, an entirely new alternative. This framework contains wholly new regulatory concepts and requirements, as well as a conglomeration of some elements presented in the five alternatives that were analyzed in the Draft PEIR. These entirely new program elements and new combinations of existing elements were merged together to create the Regulatory Framework alternative; as a new alternative it must receive full CEQA review. Reliance on existing environmental review which was completed *prior to* the

² Farm Bureau maintains the arguments made in its September 27, 2010 comment letter regarding the improper CEQA analysis of the 2010 Recommended Program Alternative and incorporates all such arguments into this comment letter.

³ The Recommended Program Alternative, contained within Appendix A, was not one of the five alternatives analyzed within the Draft PEIR. The California Supreme Court has stated that essential elements of CEQA analyses cannot be buried within the appendices. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.) Not only should the Staff Recommended Program Alternative have been placed within the Draft PEIR, the Staff RPA should have also undergone full CEQA analysis as a sixth alternative and be fully compared to the five alternatives currently within the Draft PEIR.

development of the Framework directly contradicts existing case law.⁴ (Pub. Resources Code, §§ 21000, *et seq.*; Cal. Code Regs., tit. 14, § 15000, *et seq.*) Without proper evaluation of what would result when those elements are combined with each other, the Final PEIR is substantively and procedurally flawed and the fundamental goals of CEQA are not met.

The Regulatory Framework substantially differs from the Draft Recommended Program (referred to as “Alternative 6”), as well as the other five alternatives evaluated in the Draft PEIR and Final PEIR. Specifically, the Regulatory Framework imposes new burdens on irrigated agricultural operations throughout the Central Valley, which will have significant and cumulatively considerable impacts on the environment. Such impacts must be analyzed. (See Cal. Code Regs., tit. 14, § 15130.) Further, the Regulatory Framework introduces a new tiering structure and associated requirements, including the submittal of a farm-specific evaluation. (See Staff Report, Attachment, p. A-16.) These new requirements are not merely a “variation” on the alternatives in the Draft and Final PEIRs but rather include elements that were not thoroughly considered previously. Given the likely significant and identifiable environmental impacts that will occur if the Regulatory Framework is adopted, including, but not limited to, impacts on agricultural resources, potential conversion and loss of agricultural land, and increased economic costs, any reliance on previous environmental review and economic analysis is inappropriate. Additional environmental review must be conducted and recirculated. (Pub. Resources Code, § 21092.1; Cal. Code Regs., tit. 14, § 15088.5.)

Changes to the proposed LT-ILRP, in the form of additions, have deprived the public of meaningful opportunity to comment on the impacts and to suggest feasible alternatives. The Regulatory Framework must be subjected to the same “critical evaluation” that occurs in the draft environmental review stages. (*See Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 822.) Further, by failing to prepare additional environmental review and recirculate the document, the public is denied an opportunity to “test, assess, and evaluate data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.” (*Ibid.*) Thus, given the significant new information, and the significant changes and additions to overall program, timeline, compliance, tiers, and monitoring, the environmental impact report must be revised to include a full analysis of the Regulatory Framework, and a new notice of availability must be issued allowing the public an opportunity to provide meaningful review and comment. (See Cal. Code Regs., tit. 14, §§ 15087, 15088.5.)

⁴ CEQA’s statutory framework 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.) Specifically, the basic purposes of CEQA review include: informing governmental decision makers and the public about the potential significant environmental effects of proposed activities; identifying ways that environmental damage can be avoided or significantly reduced; requiring changes in projects through the use of alternatives or mitigation measures when feasible; and disclosing to the public the reasons why a project was approved if significant environmental effects are involved. (See Pub. Resources Code, §§ 21001, 21001.1, 21002, 21003, 21006, 21064.) Adopting a project without complying with the above requirements violates CEQA.

B. The Revised Tiering Structure Contains Arbitrary Designations and Was Not Properly Reviewed Within the Draft PEIR

The Regulatory Framework proposes a tiering structure which will be based upon review of various factors, including overall threat to water quality, as well as threat posed by each constituent.

The requirements that will apply to discharges from irrigated agriculture will be based on an assessment of the relative threat to water quality in a given area and data availability. For a given area, an assessment will be performed for each constituent that could be in the waste discharge from irrigated lands. The assessment will be performed for discharge pathways to both groundwater and surface water. (Staff Report, Attachment, p. A-4.)

The tiering structure includes the addition of a new tier, Tier 2, which was not included in the Draft PEIR or proposed alternatives. Tier 2 applies when it is “unknown” whether the discharge of the constituent from irrigated agriculture poses a low or high threat in a particular area. A grower will now be characterized as having a Tier 2 threat to water quality even if “there is a known water quality threat, but it is unknown as to whether irrigated agriculture is causing or contributing to that water quality problem.” (Staff Report, Attachment, p. A-4.) The inclusion of Tier 2, the effects of which have not been thoroughly analyzed in any environmental review, greatly expands the breadth and scope of the program. Given that numerous operations may now fall under Tier 2 requirements, and thus, must comply with additional reporting and monitoring requirements, this newly revised tiering structure must undergo CEQA review and proper economic analysis.

C. Failure to Adequately Analyze the Economic Impacts of the Regulatory Framework Under Porter-Cologne

The requirement to consider economics under 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 the Regional Board “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.)

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While an economic analysis was conducted for the five alternatives contained within the Draft PEIR, no proper economic analysis has been conducted for the recently released Regulatory Framework. The brief reference estimating the total costs of the Framework within the Staff Report is insufficient and does not comply with Porter-Cologne. (Staff Report, pp. 10, 30-34.) Rather than a full analysis, these paragraphs within the Staff Report consist of conclusory statements which fail to properly acknowledge the total cost of an agricultural water quality control program and the potential sources of financing. 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 structure 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 Regulatory Framework, increases the average cost of production and has a direct negative effect on producer and the consumer through the resulting increase in variable costs and the output price. The propagation of the impacts of a regulation, such as this, through the economy is well documented and can be quantified by economic analysis. Further, such analysis shall be conducted prior to adoption or implementation of any program. (Wat. Code, § 13141.) Thus, a proper economic analysis of the Regulatory Framework, which by its very purpose is the implementing framework for the LT-ILRP, must be conducted immediately.

D. Intellectual Property, Trade Secrets, and Proprietary Information Must Remain Confidential

The Regulatory Framework indicates that confidential and proprietary information may be required to be submitted to the Regional Board without appropriate protections. As stated in the Staff Report, individual growers will have to complete farm-specific evaluations and such operation specific information may become public upon submittal to the Regional Board.

Farm Evaluation – All irrigated agricultural operations (in Tier 1, Tier 2, or Tier 3 areas) must complete a farm-specific evaluation and identification of their management practices and have the evaluation available for Board inspection. Per

the Board-issued Order for their geographic area, the irrigated agricultural operation must submit the management practice information to its representative third party (or Board) to provide the necessary information for the management practices summary and assessment for the geographic area or commodity. (Framework, p. A-16.)

Further, the Regulatory Framework acknowledges that water quality and nutrient management plans may also be required to be submitted to the Regional Board, thus, making these documents available for public review. (See Staff Report, Attachment, Section 6, pp. A-14-16.) Information within farm-specific evaluations contains intellectual property, trade secrets, and proprietary information, much of which has no correlation or nexus to the Regional Board's authority to regulate water quality. Prior to any request for the submittal of the entire farm evaluation, the Regional Board should make a finding showing the necessity of the data and information required to be submitted and how such data is related to water quality. Such information must remain confidential. The Porter-Cologne Act explicitly provides protection to growers for intellectual property, trade secrets, and proprietary information that may be within a farm plan or report:

When requested by the person furnishing a report, **the portions of a report that might disclose trade secrets or secret processes may not be made available for inspection by the public but shall be made available to governmental agencies for use in making studies.** However, these portions of a report shall be available for use by the state or any state agency in judicial review or enforcement proceedings involving the person furnishing the report.

(Wat. Code, § 13267(b)(2).) Thus, the Regional Board must acknowledge that farm-specific information, including pesticide application, irrigation practices, crop rotations, nutrient management plans, best management practices, etc., are intellectual property, trade secrets, and proprietary information that must remain confidential.

E. The Significant Revisions to the Management Plan Review and Approval Process Are Objectionable

The Regulatory Framework proposes to allow substantial and unlimited public input on the development and review of water quality management plans:

Public input on water quality management plans – Interested stakeholders will be provided an opportunity to provide input on water quality management plans submitted to the Board's Executive Officer for approval; requests for changes in water quality management plans requiring Board or Executive Officer approval; and periodic reviews of water quality management plans conducted by the Board or Executive Officer. (Framework, p. A-19.)

Allowing unfettered public input and involvement is unnecessary and counterproductive. Further, such involvement harms individual farmers, as confidential and proprietary information

may now be available for public inspection. (See Section C above regarding the necessity for intellectual property, trade secrets, and proprietary information to remain confidential.)

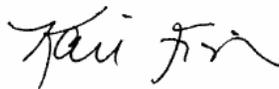
F. Unintended Consequences of Multiple Regulatory Mechanisms

As proposed, the Regulatory Framework outlines numerous differing types of regulatory orders that will be issued in order to encompass all of the varying constituent, surface water, and groundwater specific tiering requirements. (See Staff Report, Attachment, pp. A-7, A-8, A-9; ["Tiering requirements are constituent and surface water/groundwater specific."].) The numerous differing types of orders will cause confusion, unnecessary expensive, excessive paperwork, burdensome administrative oversight, and delays. A proper analysis of the resulting impacts, including the creation of small geographic regions, increased monitoring and reporting costs for a small subset of growers, and unintended resulting consequences must be conducted.

CONCLUSION

Farm Bureau appreciates the opportunity to submit comments on the LT-ILRP Regulatory Program Framework. Farm Bureau remains concerned that the Regulatory Framework imposes a number of requirements that are burdensome, unnecessary, and unsupported under Porter-Cologne. Further, the Regulatory Framework contains a number of provisions that were not analyzed in the Draft PEIR and the resulting impacts of which has not been properly and fully considered under CEQA. Farm Bureau urges the Regional Board to resolve those issues raised herein. We look forward to further involvement and discussion with the Regional Board on the development of the Long Term Irrigated Lands Regulatory Program.

Sincerely,



KARI E. FISHER
Associate Counsel

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