

San Joaquin County and Delta Water Quality Coalition

San Joaquin County Resource Conservation District
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January 17, 2014

VIA EMAIL TO Chris Jimmerson - Chris.Jimmerson@waterboards.ca.gov

Pamela Creedon
 Executive Officer
 Central Valley Regional Water Quality Control Board
 11020 Sun Center Drive, Suite 200
 Rancho Cordova, CA 95670

Re: Comments on San Joaquin County and Delta Area tentative WDR General Order

Dear Ms. Creedon,

The San Joaquin County and Delta Water Quality Coalition (SJC & DWQC) appreciates the opportunity to provide these comments on the tentative San Joaquin County and Delta Area Waste Discharge Requirements General Order.

A. The frequency of the reporting and attendance obligations in the tentative order are unduly burdensome and costly to growers and the third party.

Farm Evaluations

The tentative order requires every member to submit an initial detailed Farm Evaluation. (Tentative Order, VII.B., p. 26.) Members in high vulnerability area must continue to submit annually while other members submit every five years. (Tentative Order, VII.B., p. 26.) After three years, the Executive Officer may reduce the frequency of required reporting. (Tentative Order, VII.B., p. 26.)

Working with growers to obtain 100% compliance with this requirement from 2015-2018 is going to monopolize the resources of the Coalition, unnecessarily. Permanent Crops represent **half of the irrigated acreage** in our area. According to the USDA 2007 Census of Agriculture, San Joaquin County had **187,613 acres of orchards** and **104,893 acres of grapes**. These numbers have increased since 2007. There is also substantial alfalfa acreage in our area, which is a 5-7 year crop. Annual Farm Evaluation reports are going to show virtually identical information for permanent crops and alfalfa. Yet, they will take away precious resources and time from growers and the third party. The third party expects to have to hire full time staff to handle this task.

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A more reasonable approach would be to allow the third party to divide its membership into five groups and require 20% of members to complete a Farm Evaluation report at least once every 5 years. This would enable the third party to dedicate less than one full time staff person to this task and have a consistent work flow from year to year. Given the high percentage of permanent and semi-permanent plantings in our region, the Regional Board would continue to get virtually the same information that it will receive with annual reporting. The burden of the annual reporting requirement is simply not justified by the minimal benefit gained from requiring it.

We suggest that Section VII. B of the tentative order (following the opening paragraph) be replaced with the following:

By April 15, 2015, the third party shall divide its Membership list into five groups and notify each group of their reporting deadline for the Farm Evaluation. The third party shall include, to the extent feasible, all members in High Vulnerability Areas in the first three reporting groups. 20% of Members must submit a Farm Evaluation by June 15, 2015, 20% by June 15, 2016, 20% by June 15, 2017, 20% by June 15, 2018 and 20% by June 15, 2019. Each member must update their Farm Evaluation at least one every five years on the schedule set by the third party.

Nitrogen Management Plan and Summary Reports

The tentative order requires members to prepare a Nitrogen Management Plan (before the crop year) and a Summary Report (after the crop year). This duplicative requirement is unduly burdensome such that the cost of the duplication is not justified by the minimal benefit. Members should be required to learn about nitrogen budgeting. Our coalition fully supports this education and outreach effort but it is simply not achieved through a paperwork exercise. A single summary report, rather than a plan and a report in the same year, is enough reporting.

Outreach Events

The tentative order modifies the language of the first sentence of Section IV.B.4 to create an ambiguity regarding whether the member is required to attend one outreach event, or multiple events, each year. The order should be revised to use the prior language which clarified the obligation is to attend only one event per year.

We also still maintain that an annual event attendance requirement is overly burdensome and unreasonable. Advances in management practices do not happen so rapidly that there is enough new information to present annually in a meaningful outreach event. This is also very expensive for the third party and members. Attendance at an event every other year would be more reasonable and useful.

Small Farming Operations

The tentative order removes the distinction and varying reporting requirements for small farming operations. SJC & DWQC fully supports this change as it will streamline administration of the new order and help keep costs down. Thank you.

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B. It is Unnecessary and Counterproductive to Ask the Resource Conservation District to Facilitate Enforcement

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The Coalition has been particularly successful in helping farmers meet the requirements of the Irrigated Lands Regulatory Program because it is operated by the local Resource Conservation District (RCD) which is viewed by farmers as a non-threatening, neutral party. This encourages farmers to join the Coalition which boasts one of the highest member participation rates in the state and to be open about their practices, permitting the Coalition to implement programs that are more effective at protecting water quality. To our knowledge, the Coalition is the only one in the state operated by a RCD.

The tentative order, however, would significantly alter the relationship between farmers and the Coalition by requiring the Coalition and the RCD to act as an informant to facilitate Regional Board enforcement. The tentative order requires the third party to identify annually members who have (1) failed to implement improved water quality management practices within the timeframe specified by an applicable SQMP/GQMP; (2) failed to respond to an information request from the third party associated with any applicable SQMP/GQMP or other provisions of the WDRs Order; (3) failed to participate as requested in third party-studies for which the third party is the lead; (4) failed to provide confirmation of participation in an outreach event; or (5) otherwise failed to maintain good standing of their membership in the third-party group. (Tentative Order, p. 22.)

The Coalition and RCD cannot be as effective in their role in this program if farmers view them as part of the Regional Board's enforcement team. This is particularly so if the Coalition is required to identify all members not in good standing, an unclear phrase that is not defined in the tentative.

We previously requested that the Board remove the above requirement that the third party report lack of good standing for individual members and include, instead, an alternative requirement that required the Coalition to report members in good standing and those dropped for good cause which effectively would give the Regional Board the information it needed to identify growers for enforcement action, without requiring the RCD to be part of that identification process. The Coalition's request was granted, resulting in different language in prior version (August 2013) of this order.

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Unfortunately, the prior compromise language was discarded in this new version of the tentative order due to a desire for uniformity. This desire for uniformity must be tempered by the reality of having the RCD as the implementing agency for the third party under the order.

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cont.

We urge staff and the board to reconsider this issue and return to the prior agreed upon compromise language which required the third party to report to the Regional Board a list of members in good standing as well as a list of Members who were dropped for good cause (such as change in ownership). Specifically, the language in Section IV. C. 9 should read:

Members who have (1) failed to implement improved water quality management practices within the timeframe specified by an applicable SQMP/GQMP; (2) failed to respond to an information request from the third-party associated with any applicable SQMP/GQMP or other provisions of this Order; (3) failed to participate as requested in third-party studies for which the third-party is the lead; (4) failed to provide confirmation of participation in an outreach event (per section IV.B.4 of this Order); or (5) failed to submit required fees to the third-party shall be dropped from membership if the failure is not resolved within six months of notification by the third-party. The third-party shall report to the Board annually a list of current Members in good standing, as well as those Members that were dropped for good cause, if known to the third-party, and not one of the aforementioned failures (e.g., no longer irrigate the land; no longer own the property).

Similarly, we request that the Board remove the requirement that the third party identify growers who have had their membership revoked and members whose membership is pending revocation. (See Tentative Order, Section VIII.B., p. 31.) The third party's requirement to provide a membership list will permit the Board to determine which growers have had their membership revoked by comparing the current year's list to that of the previous year. The additional requirement that the third party expressly identify these growers for the Board will harm the third party's reputation among growers and members. The limited benefit this requirement provides does not justify its costs.

C. Unique Circumstances

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The tentative order recognizes that there are unique circumstances in our region that will need to be addressed, including characterization of groundwater underlying the Delta and treatment of unusable groundwater in other parts of the defined regulated area. We appreciate the Regional Board's recognition of these unique geographic attributes and the willingness to customize the regulation to address them.

D. Information Sheet

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Exhibit A to this letter contains a list of specific edits and comments to the Information Sheet Attachment.

E. Monitoring and Reporting

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Exhibit B to this letter contains a list of specific edits and comments to the MRP Attachment.

F. Nitrogen Crop Need v. “Consumption”

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The tentative changes the term “crop need” with respect to nitrogen, to “crop consumption.” See Information Sheet Section XIV. C. These are two different things and the distinction is going to be important in implementation of the order. Applied nitrogen cannot equal crop consumption due to a variety of factors (such as plant needs, cover crop needs, inability to use applied nitrogen due to chemical or biological conditions), therefore the amount of nitrogen that a crop may “need” is more than the amount the harvested crop will consume. This issue must be addressed in defining best nitrogen management practices.

G. Increased Geographic Area in the New Order

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The new order proposes to expand significantly the existing Coalition area boundaries to the east. The RCD that operates the SJC&DWQC does not anticipate that it will apply to be the third party for the expanded area covered by this new order to the east. Thus, the language in section IV of the information sheet should be modified accordingly.

H. “Exceedances” must account for source water

As written, the Monitoring and Reporting Program utilizes “exceedances” from water testing results to determine when additional monitoring requirements or management plans are triggered. (See e.g., Attachment B, Section III.) Water testing locations are designed to capture water discharged from irrigated fields. In many instances in our Coalition, discharge water will have an “exceedance” only because the source water diverted and applied to the farm started with the same “exceedance.” In these cases, resources are wasted by allowing the “exceedance” in the discharge water to trigger additional regulatory requirements because the “exceedance” was not caused by farming. We respectfully request that Attachment B be modified to clarify that when an “exceedance” in test results can be traced to source waters, rather than the activity of irrigated agriculture in the watershed area being tested, the test result will not be deemed an “exceedance” for purposes of triggering additional testing or management plan requirements.

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I. Use of Department of Pesticide Regulation Groundwater Protection Areas

The tentative order references DPR Groundwater Protection Areas in several places as a source of information relevant to designation of high vulnerability areas for groundwater. (See e.g., Tentative Order, pp. 4, 14.) While we agree that some information compiled by DPR may be useful in the Groundwater Assessment Report and monitoring plan design, significant care must be taken when using DPR data to generically characterize groundwater in an area as highly vulnerable or at risk of a discharge of waste from irrigated agriculture. DPR groundwater protection areas are designed for a specific constituent and are based on how that constituent travels through the soil and reacts with the soils types. To use these areas with a broad

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interpretation that any constituent applied in this area would have the potential to impact groundwater is inaccurate and unscientific. Just because this area might be susceptible to contamination by a certain constituent does not extrapolate into it being vulnerable to fertilizers or nitrates.

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cont.

With this in mind, we respectfully request that the second paragraph in Section IV-A-4 (on page 14 of Attachment B) be revised. As written, the order states that if the GAR is not submitted by the third party by the required deadline, the Executive Officer will designate default high/low vulnerability area using:

- 1) those area that have been identified by the State Water Board as Hydrogeologically Vulnerable Areas, 2) California Department of Pesticide Regulation groundwater protection areas, and 3) areas with exceedances of water quality objectives for which irrigated agriculture waste discharges may cause or contribute to the exceedance.

As written, this language suggests that the Executive Officer would use DPR Groundwater Protection Areas as a form of default "high vulnerability" area for purposes of the WDR. This would be unscientific and unreasonable. While our Coalition has no intention of missing the required deadline for submittal of the GAR, missing a deadline should not be an excuse to set "high vulnerability" in an unscientific manner. If the Executive Officer is required to determine "high vulnerability" areas for purposes of the WDR, the Executive Officer should be required to use all relevant information to make that determination in a scientifically justified manner, just as the third party would do. The DPR groundwater protection areas should not be allowed as an automatic default.

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J. Method for development of water quality trigger limits and establishing water quality testing methods

Our Coalition is concerned about how water quality trigger limits are set and testing methods determined in the tentative order. As stated in this order, water quality triggers for those pesticides that do not have a criteria already established will need to be developed by the Regional Board staff with "stakeholder input." (See Attachment B page 26 section VII.) This language is too vague because it could be interpreted to mean that stakeholders are merely given an opportunity to review and comment on the proposed trigger limits. The stakeholder input should be in the form of a technical committee comprised of stakeholder representatives with appropriate expertise and scientific background. We respectfully request that Attachment B be revised to reflect the use of such a committee to set water quality trigger limits.

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K. CEQA Compliance

We do not agree that the regulatory program included in the tentative order, or its estimated costs, is sufficiently within the range of the alternatives previously analyzed in the Programmatic EIR. To properly comply with CEQA, the Regional Board should prepare a supplemental EIR for this specific tentative order and should revise its costs estimates.

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L. Water Code sections 13141 and 13241

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Pages 11-12 of the tentative order discuss cost estimates as required by the Water Code. We continue to believe that these cost estimates are unreliable. A good portion of the increased cost of the new regulations will be the increased individual reporting that the third party must summarize and analyze for the Regional Board. The templates for this reporting, as well as the instructions as to how frequently these reports must be completed and compiled, was not available when the cost study was performed and could not have been accounted for in that study. In short, the prior cost study is wholly unreliable. The Regional Board should update the cost study with the specific requirements of the current tentative order before proceeding.

M. Other

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Section references in the text that should be double checked. For example, section VI, paragraph 5 (page 23) cross-references Finding 53. It appears this may be incorrect. The tentative order also includes several footnote references in the text, but the footnotes themselves are missing. This is the case for footnotes 5, 6, 15, 18, 22, 24, 25, 26, and 29.

N. Over-Arching Policy Concerns

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The tentative order should not assume that all water that leaves the crop root zone is a discharge or threatened discharge to groundwater that can and should be regulated.

On page 2, paragraph 5, of the tentative WDR it states, “This Order is not intended to regulate the water quality of soil pore liquid within the root zone.” The scope of the intended regulation of water quality that leaves the root zone, but does not reach saturated groundwater, is unclear and may be read by some to imply regulation of any water that leaves the root zone. Molecules of water moving past the root zone are not “waters of the state” subject to the permitting authority of the Regional Board unless water leaving the root zone could impact the water quality of groundwater (in the saturated zone). The concept that all water that leaves the root zone becomes groundwater and carries all the constituents that were applied to the field with it to the groundwater basin is inherently wrong. How water travel through the soil strata is determined by a myriad of factors that include but are not limited to soil types, soil layers (e.g., clay layers and hardpan layers), soil density, rainfall, percolation and plant uptake. Also, many factors determine which constituents actually travel to the groundwater basin; factors such as microbial activity, half-life of active ingredients, and plant uptake.

Paragraph 8 correctly states that the order regulates lands “from which there are discharge of waste that could affect the quality of any waters of the state.” We suggest that similar language be added to Paragraph 5 to remove any implication that (1) the Regional Board intends to regulate water as it moves past the root zone when there is not a threat to waters of the state, or (2) that movement of water below the root zone is a de facto discharge of waste “which it is not.

The tentative order should not assume that “best management practices” can be clearly identified at the onset of the program.

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Throughout the order there is an underlying assumption that the Regional Board and third parties will be able to identify the precise conditions in the groundwater basin and the management practices that are and are not protective of groundwater quality. The order needs to recognize that this is not an exact science, but will be an on-going cooperative effort to learn and improve. It is more likely that we will learn that "best practicable treatment and control" is not a precise set of operational criteria for farming operations, but rather continued cooperative research to learn more.

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cont.

The cost of complying with the new order must be controlled or we will lose members and the program will fail

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In many of our comments you will see a common theme of with minor modifications to the order the Regional Board can obtain the same information relevant to its water quality goals at a lower cost. The reason for these comments is simple. If the cost of this program on a per acre-basis doubles or triples we will lose too many members and this Coalition will no longer operate. We do not want the program to fail.

Thank you again for the opportunity to comment on the tentative order.

Sincerely,



Mike Wackman
San Joaquin County & Delta Water Quality Coalition

cc: San Joaquin County Resource Conservation District Board of Directors

EXHIBIT A: Specific Comments on Information Sheet Attachment A

Page 5. There is a reference to Figure 5 but Figure 5 is not included in the Information Sheet.

Page 13. *E. coli* should be italicized, i.e., *E. coli*.

Page 14. Table 3.

- The column heading of the third column is “Range of Detected Levels.” The entries in the column are often ND which does not make sense. A detected level cannot be a non-detected concentration. The Toxicity section does complicate the column heading. A suggested column heading is “Range of Observed Results.”
- The trigger limit for HCH is 0.0039 µg/L, not 0.95 µg/L as indicated in the table.
- Under the Toxicity section of the table, the row that describes *Selenastrum* indicates an endpoint of survival. The endpoint is growth and the range does not range from 0-100%.
- Under the Metals section of the table, the row for Lead is not specified as to dissolved or total. Arsenic, listed above, is only measured as total so clarification is not necessary. But both the total and dissolved fractions are measured for lead, so the fraction needs to be specified. Also, the superscripts (3) are incorrect. The trigger limits for the dissolved fraction of copper and lead are based on hardness. The trigger limits for total copper and lead are numeric values that are independent of any parameter such as hardness. The trigger limit for copper, total is fixed at 1300 µg/L.
- Footnote 4 does not appear to be relevant to entries in the table.
- Under the Nutrients and Salts section of the table, the trigger limit of ammonia is listed as variable with a footnote that should be 5 because the trigger limit is based on pH and temperature.
- Electrical Conductivity should be Specific Conductance.
- Under the Other section of the table, the trigger limit for dissolved oxygen is stated to be >5 or >7 mg/L. The trigger limit is <5 or <7 mg/L.
- The first footnote states that ND = Not detected at measurable levels. The more appropriate footnote is simply ND = Not detected. However, although it may have been missed, there appears to be no footnote 1 in the body of the table.

Page 15, Table 4. The table should include the 6th high priority site, Drain at Woodbridge Rd. The text in the following paragraph should also reflect the addition of the 6th high priority site.

Page 15. There is a statement that “The Coalition conducted approximately 166 individual outreach...” The correct number is 173.

Page 22. In the next to last paragraph, there is a reference to “see section IV.B.21 of the Order.” The last section in the Order is section 20, which references management practices. It is unclear what is being referenced here.

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EXHIBIT B: Specific Comments on MRP Attachment B

There are a number of minor typographical and grammatical corrections that need to be made prior to the release of the public draft. For example, there is inconsistent use of capitals in the use of “Section” and “section,” “Site” and “site,” etc. These are not included in the comments that follow.

Specific comments

P3. Section III A 1. There is a statement that “When a water quality objective or trigger limit at a monitored Core site is exceeded, the parameter associated with the exceedance must be monitored for a third consecutive year.” Does this apply to TMDL constituents or does a single exceedance of a TMDL constituent trigger a Management Plan eliminating the need for the third year of monitoring?

P3. In the next to last sentence the term “Core” should be replaced with “Represented.”

P4. Section III A 2. There is a statement that “Any applicable surface water quality management plan (SQMP) actions associated with the Core site must take place in these watershed areas (represented drainages without monitoring sites).” The statement should be qualified to state that “unless there is evidence that the constituent of concern is not present in the waterway (e.g., through the use of Pesticide Use Reports, previous monitoring).”

P5. Table 1. There is an asterisk in the table title that does not have a table footnote.

P6. Section III C 1 b. The reference in the parentheses to Section VIII should be Section VII.

Page 6. Section III C 2. The first sentence of the second paragraph states, “For metals,” The sentence should read “For metals applied by agriculture,”

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Page 6. Section III C 3. The third sentence of the paragraph states, “The pesticides identified as ‘to be determined’ (TBD) on Table 2 shall be identified as part of a process that includes input from qualified scientists and coordination with the Department of Pesticide Regulation.” The stakeholders involved in the process of determining pesticides the Coalition will monitor should include representatives of the Coalition.

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Page 7. Table 2. Table 2 lists constituents to be monitored. As part of the metals list, both total and dissolved phase analyses are required for cadmium, copper, lead, nickel, and zinc. There is no need to analyze for the total fraction of these metals. The dissolved phase is the bioavailable phase and is the phase on which a determination of an exceedance is made. Analyzing for the total phase adds cost to the analyses for no increase in information.

P9. Section III C 4 a. There is a statement that “If within the first 96 hours of the....” The statement implies that the test duration is greater than 96 hours, but the test duration for the three required tests is 96 hours. Eliminate the term “first.”

Page 10. Section III C 4 b. In the third paragraph there is a statement that “Sediment samples that show significant toxicity to *Hyaella azteca* at the end of an acceptable test and that exhibit < 80% organism

survival compared to the control will require pesticide analysis of the same sample in an effort to determine the potential cause of toxicity.” The handling of the sediment used for toxicity testing and the preservation requirements/hold time of the sediment used for chemical analyses preclude the use of the same sample for both analyses. The statement should read “Sediment samples that show significant toxicity to *Hyaella azteca* at the end of an acceptable test and that exhibit < 80% organism survival compared to the control will require pesticide analysis of a *sample collected at the same time and location* in an effort to determine the potential cause of toxicity.”

Page 10. Section III C 4 b. In the same paragraph there is a reference to a “practical reporting limit.” Is the term supposed to be “practical quantification limit”? We are unable to find any usage of the term practical reporting limit in the literature and recommend that the term be changed to “practical quantification limit” to avoid confusion.

Page 10. Section III C 5. There is a statement that “The studies shall be representative of the effects of changes in management practices for the parameters of concern.” It is not clear what this statement means. Studies are not representative of anything. If the goal is to develop studies that evaluate the effects of the change in management practices on water quality, the statement should be reworded.

Page 12. Section IV. At the end of the first paragraph there is a statement that “The third- party must collect sufficient data to describe irrigated agricultural impacts on groundwater quality and to determine whether existing or newly implemented management practices comply with the groundwater receiving water limitations of the Order.” Practices cannot comply with receiving water limitations. The sentence should be reworded to state “The third- party must collect sufficient data to describe irrigated agricultural impacts on groundwater quality and to determine whether *existing or newly implemented management practices will result in discharges that will comply with the groundwater receiving water limitations of the Order.*”

Page 12. Section IV. Remove the term “overall” from items 2 and 3 as the term is unnecessary in the context of the statements.

Page 13. Section IV A 2. Change the language from “alkalinity and acidity” to “alkalinity or acidity.”

Page 14. Section IV A 5. The last bullet point makes reference to “relative toxicity.” It is not clear what relative toxicity means and the term should be dropped.

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Page 19. Table 3. The table indicates “Nitrate as nitrogen” is the constituent to monitor. Although there is generally very little nitrite in groundwater, the constituent should be “Nitrate as nitrogen, or Nitrate+Nitrite as nitrogen.”

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Page 23. Report Component 17. There is a statement that “The summary of nitrogen management data must include a quality assessment of the collected information by township....” For clarity, the statement should read “The summary of nitrogen management data must include *an assessment of the quality of the collected information* by township”

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Page 23. Report Component 18. There is no footnote 12 so the numbering jumps from 11 to 13. Also, though there is a citation to footnote 13, there is no footnote 13 in the document.



CALIFORNIA FARM BUREAU FEDERATION

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Sent via E-Mail

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January 17, 2014

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Central Valley Regional Water Quality Control Board
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Rancho Cordova, CA 95670-6114

Re: *Comments on the San Joaquin County and Delta Tentative WDRs/MRP for Discharges from Irrigated Lands*

Dear Mr. Jimmerson:

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 nearly 78,000 agricultural, associate, and collegiate 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 to provide comments on the tentative draft of the San Joaquin County and Delta Waste Discharge Requirements and Monitoring and Reporting Program (collectively “Tentative WDR”) for Discharges from Irrigated Lands and respectfully presents the following remarks. Many of the comments raised in Farm Bureau’s previous letter, dated September 13, 2013, are still pertinent, and are incorporated and reiterated herein.

Upon reviewing the San Joaquin County and Delta Tentative WDR, as well as the previously adopted Eastern San Joaquin River Watershed WDR and the Tulare Lake Basin Tentative WDR, Farm Bureau remains concerned that the general orders are not being individually developed and tailored, but rather are duplications of previously prepared orders with *minor* revisions. Each coalition represents unique geographic characteristics, including, but not limited, to rainfall, hydrology, drainage, commodities grown, and topography. Given all of these vast differences, each general order should be

2-1

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Letter to Chris Jimmerson
 Comments on the San Joaquin County and Delta Tentative WDRs/MRP
 January 17, 2014
 Page 2

individually drafted specific to the region it regulates in order to properly reflect the unique circumstances of the area.

General Order Page 1, Finding 1—Definition of “Waste”

The Tentative WDR seeks to regulate discharges of “waste” from irrigated lands. As referenced in the footnote to Finding 1, Attachment E defines the term “waste” to not only include the statutory definition found in Water Code section 13050(d), but also adds additional language to include the regulation of “earthen materials..., inorganic materials, organic materials such as pesticides and biological materials” as wastes which “may directly impact beneficial uses...or may impact water temperature, pH and dissolved oxygen.” (Tentative WDR, Attachment E, p. 6.) No rationale is provided within the WDR for the overly broad expansion of a statutorily defined term; as such, the term “waste” should be limited to its definition found in Water Code section 13050(d). To provide clarity and conformance with Water Code section 13050(d), Farm Bureau offers revising the second sentence of the definition of “waste” to read (additions are underlined):

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“Potential examples of wastes from irrigated lands that may conform to this definition include, but are not limited to, earthen materials (such as soil, silt, sand, clay, rock), inorganic materials (such as metals, salts, boron, selenium, potassium, nitrogen, phosphorus), organic materials such as pesticides, and biological materials, such as pathogenic organisms.”

General Order Page 2, Finding 5—Regulation of Water Quality

The Tentative WDR amends the scope of regulatory coverage from the previous conditional waiver by deleting specific provisions limiting the regulation of water traveling through particular structures. (Tentative WDR, p. 2.) The current scope of coverage causes concern regarding the regulation of on-farm conveyances and between-farm conveyances, causing potential ambiguity regarding the point of demarcation for regulation; as currently written, the regulation could be read to regulate any water that leaves the root zone whether or not it reaches saturated groundwater. In order to provide clarity, Finding 5 should be revised.¹

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¹ Finding 5 could be potentially revised to state: “This Order is not intended to regulate water in agricultural fields, including, but not limited to, furrows, beds, checks, and ancillary structures, contained on private lands associated with agricultural operations. This Order is not intended to address the lawful application of soil amendments, fertilizers, or pesticides to land.” Additionally or in the alternative, the following phrase, “from which there are discharges of waste that could affect the quality of any waters of the state,” could be added to Finding 5 to clarify that the WDR is not regulating water that moves past the root zone when there is no threat to waters of the state or that the movement of water below the root zone is a de facto discharge of waste.

Letter to Chris Jimmerson
 Comments on the San Joaquin County and Delta Tentative WDRs/MRP
 January 17, 2014
 Page 3

General Order Page 10, Findings 33-37—Compliance with the California Environmental Quality Act

2-4

The Tentative WDR relies upon the environmental analysis conducted in the Program Environmental Impact Report (“PEIR”) and concludes that “[a]lthough the Order is not identical to any of the PEIR alternatives, the Order is comprised entirely of elements of the PEIR’s wide range of alternatives.” (Tentative WDR, p. 10, ¶ 34, *see also id.* at ¶ 35.) Relying on such analysis, the Tentative WDR further concludes “the PEIR identified, disclosed, and analyzed the potential environmental impacts of the Order” and the “potential compliance activities undertaken by the regulated Dischargers...fall within the range of compliance activities identified and analyzed in the PEIR.” (*Id.* at ¶ 34.) The Tentative WDR, or its estimated costs, are not within the realm of alternatives analyzed within the PEIR, but rather goes beyond those alternatives as it includes provisions substantially different from elements in those alternatives, especially alternatives 3 through 5. These new components, such as provisions creating end-of-field discharge limitations, as well as the farm management performance standards, in addition to the associated costs, do not represent merely a “variation” on the alternatives in the PEIR, but rather are elements that were not thoroughly considered previously and are likely to result in the imposition of new burdens on irrigated agricultural operations that would have a significant and cumulatively considerable impact on the environment. Thus, reliance on the PEIR for CEQA compliance is inappropriate.² In order to comply with CEQA, the Regional Board should prepare a supplemental EIR that analyzes the new elements along with revised cost estimates.

General Order Pages 11-13, Finding 40-41—California Water Code Sections 13141 and 13241

2-5

Pursuant to the Water Code, the Regional Board is obligated to consider costs associated with the entire Long-Term Irrigated Lands Regulatory Program, as well as each individual general order, such as the San Joaquin County and Delta WDR. (Wat. Code, § 13141.) Finding 40 incorrectly concludes that any new cost analysis is unnecessary given that “the Basin Plan includes an estimate of potential costs and sources of financing for the *long-term irrigated lands program*.” (Tentative WDR, p. 11, ¶ 40, emphasis added.) Although the Basin Plan was amended to include costs associated with the *long-term irrigated lands program*, the Basin Plan Amendment did not include specific costs associated with the San Joaquin County and Delta WDR as it was not in existence at the time nor were the specific program requirements analyzed (such as the templates and individual reporting summarized by the third-party). The templates, as well as the instructions as to how frequently these reports must be completed and compiled, were not available when the cost study was performed and could not have been

² Farm Bureau also questions the Regional Board’s authority to require mitigation measures within the Tentative WDR for farm level activities. Implementation of management practices at the farm level, which is the heart of the WDR, is not subject to a discretionary approval by the Regional Board. (See Pub. Resources Code, § 21080, CEQA generally applies only to discretionary projects.) Mitigation measures that cannot be legally imposed need not be proposed or analyzed. (CEQA Guidelines, § 15126.4(a)(5).)

Letter to Chris Jimmerson
 Comments on the San Joaquin County and Delta Tentative WDRs/MRP
 January 17, 2014
 Page 4

accounted for in that study. Given that this Tentative WDR proposes new costly regulatory components not previously analyzed during the environmental review stage or when adopted in the Basin Plan, the Regional Board must analyze, evaluate, and estimate all of the costs of these new regulatory requirements.

General Order Page 15, Provision 51—Nitrogen Management and Control

Farm Bureau appreciates the acknowledgement of the assessment of nitrogen management and control currently underway by the California Department of Food and Agriculture’s Task Force, as well as the soon to be convened State Water Resources Control Board’s Expert Panel. Given the assessments and recommendations to be made by both processes to determine appropriate nitrogen tracking and reporting systems and management practices, adjusting the nitrogen management plan deadlines to allow for the incorporation of future recommendations is both appropriate and appreciated.

2-6

General Order Page 19, Provisions III. A and III. B—Discharge Limitations

The use of “shall not cause *or contribute*” to an exceedance of applicable water quality objectives is overly expansive and creates an unreasonable standard that is undefined, ambiguous, and holds farmers and ranchers liable for even the smallest *de minimus* contribution. Accordingly, a qualifier should be added before “contribute” or the discharge limitations for both surface water and groundwater should be rewritten to state “wastes discharged from Member operations shall not cause an exceedance of applicable water quality objectives in surface water [or the underlying groundwater], unreasonably affect applicable beneficial uses, or cause a condition of pollution or nuisance.” Such proposed revisions will not impact the Regional Board’s program, but will provide regulatory clarity.

2-7

General Order Page 21, Provision IV. B. 8—Nitrogen Management Plans

Provision IV. B. 8 requires all members to prepare and implement an annual nitrogen management plan. Such plans should analyze “nitrogen” application rather than “nutrient” application. (Tentative WDR, p. 21, ¶ 8; see also Attachment A, Information Sheet, p. 36 stating “the Order requires that Members implement practices that minimize excess **nitrogen** application relative to crop need” (emphasis added).) As seen in previous drafts for other WDRs, only members in high vulnerable areas where nitrate is a constituent of concern were required to prepare annual nitrogen budgets and management plans. Rather than requiring all members to prepare nitrogen budgets and plans, as Provision 8 is currently written, the Tentative WDR should be revised to allow flexibility in the requirements for those areas that have no or a lower propensity to impact water quality.

2-8

General Order Page 23, Provision IV. C. 9—Membership (Participant) List

Farm Bureau joins the concerns raised by San Joaquin County and Delta Water Quality Coalition regarding reporting members who are not in good standing, thus placing the Coalition in the role as the enforcer. (See Comment Letter submitted by the San Joaquin County and Delta Water Quality Coalition dated January 17, 2014.)

2-9

Letter to Chris Jimmerson
 Comments on the San Joaquin County and Delta Tentative WDRs/MRP
 January 17, 2014
 Page 5

General Order Page 31, Provision VIII. C—Template Requirements for Farm Evaluations, Nitrogen Management Plans, and Sediment and Erosion Control Plans; Attachment A, Information Sheet, VII. D, p. 39

2-10

The Tentative WDR deletes the ability of the Coalition to provide modified templates and replaces it with the ability to solely provide comments. (Tentative WDR, p. 31; see also Attachment A, p. 39.) Although Farm Bureau understands the rationale for requiring standardized information, the Regional Board must allow for flexibility and variability depending on the geographic area, the commodities grown, known water quality impairments, the propensity to impact water quality, and the size and scale of farming operations. Such tailoring will allow the Regional Board to obtain the most relevant information specific to the area being regulated, while also allowing growers to minimize costs. Farm Bureau respectfully requests that the language in the previous Draft WDR allowing for modifications be reinstated and the last two sentences in section VII. D of Attachment A be deleted.

Attachment A, Information Sheet, Page 37—Spatial Resolution of Nitrogen Management Plan and Farm Evaluation Information; Attachment B, MRP, Page 26, Reporting Components 18 and 19

2-11

Reporting Components 18 and 19 outline the process in which a third-party will collect data from members and report the data to the Regional Board at the township level. As currently drafted, Farm Bureau supports the reporting at the township level. Reporting at the township level allows coalition groups to properly compare crop data, evaluate nitrogen management trends, and manage the data in an efficient and effective manner. The comparison of data at the field level, with or without the identification of a member’s parcel, is not supported and would not result in an efficient use of resources or the ability to assess and evaluate trends.

Reporting Component 19—Summary of Management Practice Information further requires a third-party to provide the individual data records to the Regional Board in addition to aggregating and summarizing information collected in the Farm Evaluations. (Attachment B, p. 23.) No explanation is provided in the MRP or WDR to support the necessity of needing the individual data records. Rather, the summary of management practices provided by the third-party will be more meaningful than the individual data records and will include the appropriate analysis needed by the Regional Board. Thus, Farm Bureau questions the need for third-parties to submit individual data records and suggests this addition to the management practices information reporting component be removed.

Attachment B, MRP, Pages 11-13, Provision III. C. 4—Toxicity Testing

2-12

As currently drafted, the Tentative MRP’s language could be interpreted that both acute and chronic toxicity testing is required for all toxicity tests. (See Tentative Attachment B, MRP, pp. 11-13, footnotes 6 and 7 stating that chronic and acute toxicity testing should be completed in accordance with U.S. EPA testing methods.) Since the

Letter to Chris Jimmerson

Comments on the San Joaquin County and Delta Tentative WDRs/MRP

January 17, 2014

Page 6

inception of the Irrigated Lands Regulatory Program, surface water monitoring has occurred and has utilized acute aquatic toxicity testing, with no evidence of any shortcomings. If there is no U.S EPA acute toxicity testing method of *Selenastrum capricornutum*, Farm Bureau recommends adding language to footnote 7 to specify that the use of chronic testing is appropriate *only* in this circumstance.

Thank you for the opportunity to provide our comments and concerns. We look forward to further involvement and discussion with the Regional Board on the San Joaquin County and Delta WDR and MRP for Discharges from Irrigated Lands.

Very truly yours,



Kari E. Fisher

Associate Counsel

KEF:pkh



SAN JOAQUIN FARM BUREAU FEDERATION

MEETING TODAY'S CHALLENGES / PLANNING FOR TOMORROW

January 17, 2014

VIA EMAIL TO Chris Jimmerson- cjimmerson@waterboards.ca.gov

Attn: Chris Jimmerson

Central Valley Regional Water Quality Control Board

11020 Sun Center Drive #200

Rancho Cordova, CA

95670

RE: San Joaquin County and Delta Area WDR Comments

Dear Mr. Jimmerson,

The San Joaquin Farm Bureau Federation (Farm Bureau) is a private, not for profit, volunteer organization that advocates on behalf of over 4,000 members in San Joaquin County. Agriculture is deeply woven into the fabric of the community and last year contributed over 2.8 billion dollars and many jobs to a recovering local economy. We have grave concerns regarding the draft waste discharge requirements order (WDR) set forth by the Central Valley Regional Water Quality Control Board (CVWB).

1. Duplicative Nitrogen Reporting

The draft WDR requires two types of nitrogen reports: (1) a plan and (2) a summary report. (Tentative Order, VII.D.,p.26). The requirement to generate both a nitrogen management plan and a summary is redundant. There is little information of any importance that could be gleaned from the management plan that would not also be included in the summary. The WDR should be revised to require only the summary as a more accurate representation of nitrogen application.

3-1

2. Nitrogen Plan Certification is Unnecessary and Unduly Expensive

The WDR requires growers to have a nitrogen plan certified. (Tentative Order, VII.D.1, p.27). Requiring that a grower not only create a nitrogen management plan, but that it must be certified as well is an expensive and time consuming requirement, that as explained above, serves no purpose that would be helpful in assessing risks to groundwater quality.

3-2

3. Self-Certification Requirements Should be Clarified.

The Farm Bureau appreciates the attention of the Board to the necessity of a self certification program. However, we are concerned that the only specific programs explicitly outlined in section VII-D-1 on page

3-3



SAN JOAQUIN FARM BUREAU FEDERATION

MEETING TODAY'S CHALLENGES / PLANNING FOR TOMORROW

27 of the DWDR lack adequate resources to either offer certification for every plan or to offer enough educational trainings so that growers may certify their plans themselves. While there are other opportunities available, those are subject to the discretion of the executive officer. We recommend that

the WDR include objective curriculum for all required classes set so that other local agencies and companies may offer self certification classes as well.

4. The WDR Should Not Require the RCD to Have an Enforcement Role

The Farm Bureau also has considerable apprehension regarding section IV-C-9, which requires the third party, as a part of membership list submittal, to turn in a list of names of noncompliant members. This is highly problematic for the Resource Conservation District (RCD) that serves as the third party coalition in San Joaquin County. The RCD board members are farmers, often neighboring the very people who could end up on such a list. They are not willing to act as agents of the Regional Board to assist with enforcement because (1) it causes tension in the community and (2) changes the image of the RCD from an agency that provides outreach and education to an agency that conducts enforcement. The information that is required in this section is information that could easily be obtained by CVWB staff looking over the list to compare membership from one year to the next. The implementation, oversight, and enforcement of the waste discharge requirements should remain the sole responsibility of the Regional Board.

The burden placed upon the third party by section IV-C-9 jeopardizes the existence of the third party group in San Joaquin County and that will have dire consequences for both the growers and for the Board. Historically, water quality has seen improvement through educational programs, rather than through regulatory action and the third party provides the education and outreach for the growers. To effectively dissolve this coalition that offers the educational aspect of such a program is not conducive to the mission of the CVWB and would not improve groundwater quality. Board staff should be exploring every opportunity to collaborate with the coalition for maximum program efficacy rather than risking that the RCD will no longer serve as the third party under the new WDR.

5. Maintenance of Plans on Site

The Farm Bureau was very concerned about the requirement to maintain the farm management plan, the nitrogen management plan, the nitrogen summary, and the sediment control plan on site, subject to inspection by CVWB staff. For many farmers, the principle place of business is their family home. We appreciate CVWB consideration of this issue in IV-B-13, page 20, footnote 23 of the tentative order that specifically excludes private residences. . We would be opposed to any change or modification to this order that would permit such an invasion of privacy.

3-4

3-5



SAN JOAQUIN FARM BUREAU FEDERATION

MEETING TODAY'S CHALLENGES / PLANNING FOR TOMORROW

3-6

6. The WDR Improperly Assumes Farmers are Guilty until Proven Innocent and Threaten the Health of the Agricultural Industry.

Farmers are, first and foremost, true stewards of environmental resources. The past two decades especially have seen major advancements to agricultural techniques that have improved water use efficiency and dramatically decreased runoff. However, drip and microdrip irrigation is very costly and the use of new irrigation technology is not a practical application for all crops. This regulation leaves growers who use flood or sprinkler irrigation vulnerable as "discharging to groundwater" is such a narrowly construed concept within the WDR.

Furthermore, the financial burden this places on growers leaves the most productive industry in the San Joaquin and Delta area in imminent danger of losing valuable acres due to the costs associated with complying with the WDR. The direct expenses of compliance such as paying for nitrogen management plan certification and increased coalition fees and indirect expenses such as altering irrigation techniques will undoubtedly lead to losses of family farms that our tenuous local economy simply cannot bear.

We appreciate the opportunity to comment on this program as it is one of the largest regulations on agriculture in many years in both scope and expense to growers. We hope to continue to be engaged in this process so that we may continue to educate the Board and staff of the major evolution in the agricultural industry that has led to technology and management practices that also serve the purpose of natural resource protection.

Sincerely,

A handwritten signature in blue ink that reads "Jack Hamm".

Jack Hamm

President, San Joaquin Farm Bureau Federation



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January 17, 2014

Chris Jimmerson
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114
cjimmerson@waterboards.ca.gov

Re: CSPA and CWIN Comments on Proposed Waste Discharge
Requirements for Growers Within the San Joaquin County and Delta Area
That are Members of the Third-Party Group

Dear Dr. Jimmerson,

Thank you for this opportunity to comment on the proposed waste discharge requirements for discharges from irrigated lands within the San Joaquin County and Delta Area (hereinafter the "Proposed WDRs"). These comments are submitted on behalf of California Sportfishing Protection Alliance ("CSPA") and California Water Impact Network ("C-WIN") (collectively "CSPA"). Once again, the Regional Board has proposed a water pollution control regimen that unrealistically relies on a convenient fiction that regional monitoring can provide a technically sound basis for curtailing and preventing widespread pollution discharges by the 5,865 farms discharging polluted irrigation water and storm water flows to the Delta and San Joaquin River and a number of its tributaries. The data collected thus far only proves the folly of a control program that relies exclusively on not looking directly at the individual discharges causing the problem and hoping to "regulate" from a distance. As expert hydrogeologist Steven Bond comments, despite years of monitoring of regional sample sites by the San Joaquin County Delta Water Quality Coalition, the Coalition in its annual reports consistently conclude that beneficial uses are not being protected, that the water quality exceedances can be attributed to any number of causes or sources, but no such causes have ever been identified. As Mr. Bond concludes, the newly proposed WDRs will not do any better:

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Given that discharges from irrigated agriculture are never directly measured, the existing stations, always distant points downstream, will never definitively identify the sources of pollution. Under the

existing program, the sources of pollution and impairment will likely remain undefined, and a matter only for speculation.

Comments of Steven Bond, p. 6 (Jan.16, 2014) (attached). This is indisputable evidence that downstream monitoring stations cannot and do not measure water quality occurring miles upstream. It also is indisputable that downstream stations cannot determine water quality either in-stream or from individual discharges for the many miles of surface waters upstream of these locations.

Staff proposes that the Regional Board continue to water down this critical regulatory program based on the unreasonable fears of this large and relatively well-off community of chronic pollution dischargers because they don't want to air the dischargers' dirty laundry in public or in response to an unreasonable fear of being sued by third-parties. One cuts against the basic tenet of every other water quality control program managed by the Board and the other indicates a profound misunderstanding of the enforcement opportunities presented by the Water Code. Likewise, perhaps similar to every other regulated industry in the State, Regional Board staff hides behind a rhetoric of poverty or the dischargers' refrain that they are "price takers" and not "price makers." The simple fact is that the massive amounts of pollution impairing this portion of the San Joaquin River watersheds are dumped into the State's waterways by a multi-billion dollar industry that has accrued substantial profits for the last decade even while bemoaning the modest costs of the current waiver program. Slightly more than 1,118 dischargers control 547,080 irrigated acres, or about 94 percent of the 582,000 acres of irrigated lands to be governed by the Proposed WDRs. These large farms on average are over 300 acres in size. And, although one must extrapolate from county-wide data because of the lack of information gathered by staff, these large farms likely generate billions of dollars in net profits within the WDR area. Staff has failed to articulate any evidence demonstrating that farm-specific monitoring and more direct control over the west-side dischargers involve unreasonable costs. Nor does staff present the Board with sufficient evidence to make the findings necessary to authorize, as staff proposes, degradation of every surface and groundwater throughout the WDR area, signaling the Regional Board's wholesale retreat from carrying out its duty to protect surface and ground water quality when well-heeled farmers are the polluters. CSPA requests that the Regional Board reject the Proposed WDRs and send the proposal back to staff to incorporate appropriate farm-specific discharge and receiving water monitoring, adequate groundwater monitoring, a commitment to preventing degradation of all high quality waters, and to make all reports and plans prepared pursuant to the WDRs available to the public and, in the case of key management plans, subjected to review and approval through the Regional Board's public, decision-making procedures.

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If the intent is for the Regional Board to maintain the waiver of reports of waste discharge (“RWD”), the Regional Board must comply with Water Code Section 13269, including circulating a proposed waiver to the public for review and comment and making sure the Board has sufficient evidence to make the requisite findings. Although the Regional Board “may prescribe requirements although no discharge report has been filed[,]” that provision does not exempt any discharger from submitting the report of waste discharge mandated by Water Code § 13260. Water Code § 13263(d).

The requirement to file a report of waste discharge is comprehensive:

(a) Each of the following persons shall file with the appropriate regional board a report of the discharge, containing the information that may be required by the regional board: (1) A person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.

Water Code § 13260(a)(1). The only exception to submitting a RWD for a person discharging waste is if the Regional Board issues a conditional waiver pursuant to Water Code § 13269:

(b) No report of waste discharge need be filed pursuant to subdivision (a) if the requirement is waived pursuant to Section 13269.

Water Code § 13260(b). Staff’s information sheet appears to assume that by issuing general WDRs, the dischargers within the covered area need not file the RWD required by Section 13260. Water Code § 13263(d) provides no such exemption. Indeed, by its plain terms, it merely emphasizes that the RWD requirement applicable to each discharger is separate and distinct from the WDR requirement applicable to the Regional Board. The distinctness of the two provisions is demonstrated by the waste discharge prohibitions set forth in Water Code § 13264. Section 13264 provides that:

(a) No person shall initiate any new discharge of waste or make any material changes in any discharge, or initiate a discharge to, make any material changes in a discharge to, or construct, an injection well, prior to the filing of the report required by Section 13260 and no person shall take any of these actions after filing the report but before whichever of the following occurs first:

- (1) The issuance of waste discharge requirements pursuant to Section 13263.
- (2) The expiration of 140 days after compliance with Section 13260 if the waste to be discharged does not create or threaten to create a condition of pollution or nuisance and any of the following applies: [describing various CEQA scenarios and associated timelines...]
- (3) The issuance of a waiver pursuant to Section 13269.

Water Code § 13264(a). Thus, it is clear that filing a RWD is a separate and distinct duty from the Board’s issuance of WDRs. Indeed, the discharge prohibition is complete prior to the filing of an RWD even where a WDR is issued. Second, the only way to avoid the discharge prohibitions **after the filing of a RWD** is the issuance of WDRs or a waiver. Given this requirement, WDRs cannot be read to exempt RWDs.

The only exemption to the RWD requirement is the issuance of a waiver pursuant to Water Code § 13269. Because the current action items do not propose to issue a waiver of the Section 13260 RWDs for any of the irrigated lands dischargers in the WDR Area, every discharger will still have to file an RWD, including the monitoring and other information already required by the Regional Board. CSPA believes that RWDs would go a long way toward curing the farm-specific data gap that the WDRs propose to maintain.

Despite the availability of electronic reporting and other efficient methods of handling large numbers of reports and data, Board staff once again propose that irrigated lands dischargers to be allowed to keep their management practices to themselves and the third-party coalition, rather than the Regional Board and the rest of the interested public. Proposed WDRs, p. 25.

The Farm Evaluation Reports (“FERs”) are one of the reports proposed by the WDRs pursuant to Section 13267 authority. *Id.*, p. 9. Water Code § 13267 does not authorize the Regional Board to order reports to be submitted to any entity other than the Board. Nor is there any authority in the Water Code authorizing the Regional Board to designate third parties to manage 13267 reports on behalf of the Regional Board. Section 13267 authorizes the Regional Board to require that dischargers “**shall furnish**, under penalty of perjury, technical or monitoring program reports which the regional board requires.” Water Code § 13267(b)(1) (emphasis added). “In requiring those reports, the regional board shall provide the 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.**” *Id.*, § 13267(b)(1) (emphasis added).

4-6



Lastly, Section 13267 expressly preserves dischargers' trade secrets when providing the reports to the Regional Board, emphasizing however, that "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.**" *Id.*, § 13267(b)(2) (emphasis added).

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 cont.

Nothing in Section 13267's provisions suggests or implies that the Regional Board can order a discharger to provide a report to a third-party, either for safe-keeping or any other reason. It is untenable that "furnishing" or providing a report under 13267 is intended to be to any other entity but a regional board. Perhaps most obviously, the language regarding trade secrets would hardly be relevant if Section 13267 anticipated that the authorized reports would be furnished to a private entity rather than a public agency, *i.e.* the relevant regional board. More importantly, by deputizing third-parties to retain 13267 reports like the FERs, the Regional Board frustrates Section 13267's plain intent to have the reports, even their trade secrets, available to the state or any state agency for enforcement. For these reasons, the FERs and other plans and reports earmarked for storage at the third-party coalition's office must be provided directly to the Regional Board and, with the exception of legitimate trade secrets, be accessible to the public.

Staff asks the Board to take the unprecedented action of authorizing degradation of an entire area of the Central Valley spanning several watersheds based on little more than a hope that 5,865 dischargers, about 1,818 of which consist of very large, generally very profitable farms spanning 94% of irrigated acres, will effectively volunteer to do the right things to protect water quality. And that proposal is based on evidence that is yet to be collected and, in the case of discharge data or meaningful receiving water data, may never be collected.

The Regional Board's decisions must be based on the weight of the evidence. That means, the Regional Board must gather in a preponderance of evidence in order to support its decisions implementing the High Quality Waters Policy. Staff proposes that the Water Board turn this standard on its head by suggesting that the Board should make a determination to allow every high quality water in the West San Joaquin Watershed area to be degraded without any evidence at all.

4-7

Staff tries to convince itself that a pollution discharge from an irrigated field is unique to the world of pollution regulation. It is not. Staff surmises, "Very little guidance has been provided in state or federal law with respect to applying the antidegradation policy to a program or general permit where multiple water bodies are affected by various discharges, some of which may be high quality waters and some of which may, by contrast, have constituents at levels that already exceed water quality objectives." Information Sheet, p. 44. Every waterbody in the state is affected by multiple dischargers. And, despite staff's effort to contrive complexity where none exists, no one discharger is emitting pollutants from any particular field to multiple waterbodies. Whether staff likes it or not, the high quality water policy, indeed the entire Porter-Cologne Act, applies to each discharge. Just because there are numerous discharges releasing large quantities of pollution to waterways, does not mean the high quality waters policy is complicated for any single discharger.

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cont.

State Board Resolution No. 68-16 provides:

Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.

The findings necessary to allow degradation under the Policy are stringent:

When the state's antidegradation policy is triggered, as here, Resolution No. 68-16 provides that the Regional Board is authorized to allow the discharge of waste into high quality waters only if it makes specified findings. The State Board has described these findings as a two-step process. "The first step is if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies (e.g. water quality objectives in Water Quality Control Plans). The second step is that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State."

Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd. (2012) 210 Cal.App.4th 1255, 1278-1279, citing (State Bd., Guidance Mem. (Feb. 16, 1995) p. 2.).

Applying the Policy for any given discharge requires that (1) data going back to 1968 from the receiving water be reviewed to determine whether it is a high quality water for the pollutants likely to be discharged; (2) data regarding the levels, presumably concentration levels that can be compared to the best receiving water concentrations, of pollutants being discharged by the farm; (3) identification for that farm of the levels of control, treatment, or management practices which would comply with the high quality water levels; (4) identification for that farm of the levels of control, treatment, or management practices which would comply with the applicable water quality standards for those pollutants; (5) the relative cost difference, if any, between those actions, and (6) a determination whether the cost of maintaining the high quality water level is so disproportionate to the mandatory cost of achieving standards that the discharger should be allowed to degrade the receiving water down to, but not lower than, the applicable standards because that would be consistent with the “maximum benefit to the people of the State.” This outline is how the Policy has been applied for four decades to individual dischargers. The Policy does not provide an exception to a category of dischargers simply because there are thousands of them. If anything, that fact warrants much more allegiance by the Regional Board to the Policy’s requirements, not, as staff is proposing, a dilution of those requirements to a meaningless self-fulfilling prophecy – we hope the dischargers will do the right thing, hence there won’t be degradation or, if there is, giving that particular discharge a break assumes a maximized benefit to the people of the State will result.

The only legal way to apply these mandatory criteria to farm dischargers in the WDR area is to require each farmer to submit a detailed farm evaluation report which contains sufficient monitoring of the farm’s discharges, representative monitoring of their local receiving water quality, and details about their existing and proposed discharge pollution controls and management practices, and the costs of such controls. If either existing data already in the Board’s database or the submitted receiving water data establish water quality higher than standards for any pollutant being discharged, the Board would then be in a position to decide whether the measures in place or being proposed will protect the highest quality of water in the farm’s receiving waters and, if not, whether the costs to that particular farmer of maintaining that highest water quality are not to the maximum benefit of the people of the State.

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In order to make a rationale decision to allow degradation of a high quality water, the Regional Board must first identify which of the waters within the WDR area are high quality waters. Neither the Board nor its staff have reviewed the available irrigated lands program data and determined which of the waterbodies within the watershed are high quality waters, *i.e.*, what is the highest water quality that has been achieved in any given stretch of water since 1968. Nor did they seek monitoring data from other agencies, like the U.S. Geological Survey, U.S. Fish and Wildlife Service or U.S. Bureau of Reclamation that, over many years, have been collecting water quality data in the subject area. This is despite staff's acknowledgement that plenty of data exists – much of which would identify that perhaps every waterbody within the Watershed is high quality waters. *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1271 (although data more recent than 1968 may not demonstrate a water body is not high quality, such data can demonstrate a water body is high quality). But they do not know if that is the case because, despite years of presumably reviewing all of that data and claiming to have designed an effective water monitoring program in the watershed, for purposes of the WDRs and the High Quality water policy, staff makes no effort to review the data for the waterbodies at issue. Information Sheet, pp. 43-44. It is a simple task, that could have been accomplished in the last three to four years, for a staff person to run a simple search of the data to determine the best water quality for every water segment in the watershed. Without knowing what level of water quality is necessary to protect high quality waters, it is an abuse of discretion for the Board to claim that it has considered the costs of achieving those concentrations by each of the relevant upstream dischargers, whether they can feasibly be achieved, and evaluated the cost to the public of not achieving them.

If staff claims it does not have the data for a particular waterbody or reach of a waterbody, then obviously the Board's past monitoring program and any proposed monitoring based on that effort are deficient and, thus, in violation of the Policy. This is particularly true for the vast stretches of waterbodies that lie upstream of the relatively few monitoring locations sampled by the Coalition or agencies over the years. If the Board cannot determine whether or not a water or a relevant stretch is high quality or not for lack of any data, then the Board is not in any position to make a finding that degradation in that waterbody is authorized consistent with the Policy. As CSPA's experts point out, this is the norm for most of the waters included in the WDR area. Bond Comments, Comments of Richard McHenry (Jan. 16, 2014). That means many miles of that creek drainage may or may not be high quality and may or may not be being degraded. That data gap is not evidence that the Board can even begin to apply

the High Quality Waters Policy's criteria and make the prerequisite findings. In order to apply the Policy based on the weight of evidence, the Board must first gather some relevant evidence by requiring the discharger(s) it is considering authorizing to degrade water quality to gather in the necessary data – whether collected in the past or anew – to determine whether the water is high quality or not and what costs might be associated to both the discharger(s) and the public by allowing degradation their receiving waters.

The Court of Appeal has spelled out the necessity of comparing the actual pollutant-specific, baseline water quality of a particular waterbody as compared to the applicable water quality standard as the first step in applying the High Quality Waters Policy:

When undertaking an antidegradation analysis, the Regional Board must compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives. If the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved. In that case the antidegradation policy is not triggered. However, if the baseline water quality is better than the water quality objectives, the baseline water quality must be maintained in the absence of findings required by the antidegradation policy.

Asociacion de Gente Unida por el Agua, 210 Cal.App.4th at 1270. The Court of Appeal found that even a single water sample from the receiving water that is above the applicable standard was sufficient to establish that a waterbody is a high quality water. *Id.*, 210 Cal.App.4th at 1271. Likewise, the Board has to identify which constituents qualify the water as high quality in order to rationally apply the Policy. *Id.* (“Water can be considered high quality for purposes of the antidegradation policy if it is determined to be so for any one constituent, because the determination is made on a constituent by constituent basis”). See Information Sheet, p. 43 (“The determination of a high quality water within the meaning of the antidegradation policies is water body and constituent-specific”).

Because the Board does not know which waters are high quality waters, the Board has no idea which farm or farms are discharging into those high quality waters. As a result, the Board has none of the requisite information necessary to apply the High Quality Waters Policy's balancing test. The Board does not know what the economic situation is for the discharging farmer or any affected users. The Board does not know what additional measures may be available to prevent the degradation staff is so willing to authorize. There is no information about what incremental cost might be required for any given farmer to achieve the highest quality water versus having to comply with standards. See *Asociacion de Gente Unida por el Agua*, 210 Cal.App.4th at 1270 (“The baseline quality of the receiving water determines the level of water quality protection”). Thus, there is

no evidence – nevermind a preponderance – to establish that relieving that farmer or many farmers of that incremental cost somehow maximizes benefit to all Californians.

Staff's information sheet attempts to expand the data required to assess the presence of high quality waters or otherwise apply the Policy. The information sheet, Appendix A, states that:

There is no comprehensive, waste constituent-specific information available for all surface waters and groundwater aquifers accepting irrigated agricultural wastes that would allow site-specific assessment of current conditions. Likewise, there are no comprehensive historic data.

Information Sheet, p 45. First, the Court of Appeal has rejected the need for "comprehensive" data or assessments to determine whether the Policy applies. 210 Cal.App.4th at 1270-71. There is plainly ample data to determine whether at least some water segments within the WDR area are high quality and whether they are already being degraded by numerous unidentified farm dischargers. Second, there is likely available monitoring data collected by other agencies over the years that could be evaluated if staff would only endeavor to collect it. Third, by conceding that staff does not have data, which is indeed true for many of the waterbody segments within the WDR area, that concession admits that the Board cannot support any finding that degradation by every discharger in those unmonitored areas of the WDR area is warranted.

To the extent the farms covered by the proposed WDRs are not degrading waters at least for a few pollutants where monitoring stations are located, there is obviously no legitimate rationale for the Regional Board to authorize degradation.¹ Yet that is precisely what staff proposes the Board do. The WDRs propose a blanket authorization for farms in the WDR area to degrade waters even for pollutants at the monitoring locations that they cannot show any reason degradation is necessary for the public benefit or any other reason. Yet a review of the data, even for a few of the core monitoring locations, shows that, at least for a few pollutants at those locations, although the waters are high quality, there is no degradation observed at those locations. Where there is no

¹ Because the only data is at the downstream monitoring locations, the fact that no degradation for several pollutants is observed at those locations does not preclude extensive degradation from discharges well upstream.

discernable discharge degrading water or any information on a discharger's potential costs available to compare to the general public benefit, there is no evidence on which to base an approval of future discharges causing degradation. This type of advance authority to degrade for any pollutant is entirely inconsistent with the Policy.

4-10

In order to authorize any degradation from high quality down to the applicable water quality objective, the Regional Board must be presented with evidence a discharge's degradation of high quality water will be consistent with maximum benefit to the people of California. "The first step is if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality (1) will be consistent with maximum benefit to the people of the State. *Asociacion de Gente Unida por el Agua*, 210 Cal.App.4th at 1278. The State Board has provided guidance, endorsed by the Court of Appeal, which makes clear that evaluating maximum benefit must be done for a specific discharge, not based on Central Valley wide generalities:

The State Board's guidance memorandum defines the term "maximum benefit to the people of the State" as follows: "Before **a discharge** to high quality water may be allowed, it must be demonstrated that any change in water quality 'will be consistent with the maximum benefit to the people of the state.' This determination is made on a **case-by-case basis** and is based on considerations of reasonableness under the circumstances **at the site**.

Id. (emphasis added) (quoting State Board, Guidance Mem. (Feb. 16, 1995) pp. 4–5). The State Board guidance lays out factors, making clear that they must be considered for a specific discharge, not thousands of discharges at once:

Factors to be considered include (1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of **the proposed discharge** compared to the benefits, (3) environmental aspects of **the proposed discharge**; and (4) the implementation of feasible alternative treatment or control methods. With reference to economic costs, both costs to **the discharger** and the affected public must be considered. 'Cost savings to **the discharger**, standing alone, absent a demonstration of how these savings are necessary to accommodate "important social and economic development" are not adequate justification' for allowing degradation. See [State Board] Order No. WQ 86-17, at 22, n. 10.

Id. (emphasis added). The Information Sheet acknowledges this fundamental aspect of the High Quality Waters Policy – “The determination of a high quality water within the meaning of the antidegradation policies is water body and constituent-specific.” Proposed WDRs, p. 44. Despite that understanding, staff has not evaluated any particular farm, any specific waterbody, or any given discharge within the WDR area to determine what improvements are necessary to its management practices (assuming it has any such practices), the costs of such improvements, or that farm’s discharges contribution to any degradation measured far downstream. Only close to a year after the Regional Board authorizes degradation, does staff propose any Farm Evaluation Reports be submitted, and then only to the third-party Coalition. The proposed WDR does not indicate what such reports will contain, so whether at that time they will provide the information relevant to applying the Policy is anybody’s guess. And, as the above highlighted text makes clear, the degradation evaluation is to be done on a site-specific, or in this case, farm-specific basis.

Likewise, staff provides no data whatsoever about what any specific farm operation may be discharging to groundwater. Although such discharges are clearly occurring, the Board is not yet in any evidentiary position to apply the factors relevant to maximum public benefit and to declare any degradation acceptable under the High Quality Waters Policy.

The economic impact analysis conducted on a region-wide basis does not provide any evidence relevant to whether authorizing a discharge from any particular farm in the WDR area will be consistent with the maximum benefit to the people of California. Staff relies upon the 2010 *Draft Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program* prepared for the PEIR. See Proposed WDRs, p. 12. Although that cost analysis may be sufficient to comply with Water Code § 13141, it is not sufficient to conduct a site-specific degradation analysis applying the High Quality Waters Policy. Indeed, the proposed WDRs expressly disavow any applicability of its Section 13141 region-wide economic analysis to any individual farmers’ costs or management measure decisions:

Any costs for water quality management practices will be based on a market transaction between Members and those vendors or individuals providing services or equipment and not based on an estimate of those costs provided by the board.

Proposed WDRs, p. 11. Thus, the Section 13141 economic analysis does not reflect “costs to the discharger” required to be considered by the High Quality Waters Policy.

Staff’s proposed rationales for the Regional Board to authorize wholesale

degradation of water quality in the WDR area identify two almost generic assertions. One, that “Central Valley communities depend on irrigated agriculture for employment,” and two, “[t]he state and nation depend on Central Valley agriculture for food...” Appendix A, p. 52. These generic assertions neither resemble the site specific factors identified by the State Board’s Guidance and endorsed by the Court of Appeal nor allow for any coherent comparison of costs to specific dischargers and any cogent reason why they should be authorized to degrade high quality waters based on maximum benefit to all Californians. *Asociacion de Gente Unida por el Agua*, 210 Cal.App.4th at 1278. Any cogent review of the actual economic conditions prevalent in the area to be governed by the WDRs would show that farms, and in particular the larger farms operating within that area, are economically robust, forming a significant portion of a multi-billion dollar industry in the region. See Jennings Comments. Because staff has not provided any evidence of the covered dischargers’ ability to pay for individual monitoring and management practices necessary to determine compliance with the WDRs and the Water Code, the Board is unable to make a determination of maximum benefit to the people of California.

Lastly, whether looking at surface water or ground water, the WDRs’ proposed monitoring is so far removed from any specific source, the monitoring will not be capable of discerning any change in water quality from hundreds, perhaps thousands of farms in the WDR area. McHenry Comments, Bond Comments. Because the WDRs do not include any monitoring that would detect any changes in water quality from a discharge, the Regional Board will not know what degree of change is or may occur and, hence, cannot make any rational finding that allowing such change is consistent with maximum benefit to the people of the State. *Asociacion de Gente Unida por el Agua*, 210 Cal.App.4th at 1280 (where monitoring plan inadequate to detect degradation of waters, cannot make finding that such degradation will be of maximum benefit to the people of California).

It is clear that the Board’s record currently is devoid of evidence necessary for it to consider whether any one discharger, nevermind thousands of dischargers, can be authorized en masse to degrade waters throughout a 582,000 acre swath of the Central Valley.

The current coalition program in the Delta and San Joaquin County has been in place since 2003. Despite ten years of implementing the program continued by the proposed WDRs, no discernable improvement is evident:

4-11



As is documented in Table 4 of the *SJCDWQC April 30, 2013 Management Plan Update Report*, sampling conducted in the area from 2004 through 2012 shows routine exceedance of water quality standards for: dissolved oxygen, pH, EC, TDS, ammonia, nitrate, e-coli, arsenic, boron, copper, lead, molybdenum, nickel, Azinphos methyl, carbofuran, chlorpyrifos, cypermethrin, DDD, DDE, Diazinon, Dieldrin, disulfoton, Diuron, endrin, HCH delta, linuron, Malathion, methidathion, methomyl, methyl parathion, paraquat dichloride, permethrin, thiobencarb, Simazine, and toxicity to ceriodaphnia dubia and capricornutum. Clearly, water bodies accepting discharges from numerous represented irrigated lands are not meeting water quality objectives and existing high quality waters are not being maintained.

McHenry Comments. "Since many of the water bodies in the area have been designated as impaired and sampling shows routine exceedances of water quality standards, the represented agricultural practices have been shown to be not protective of water quality." *Id.* The few tweaks to the program proposed in the WDRs will not dramatically change these results. Indeed, given the proposed 10-year compliance schedules for addressing the few pollutants that may be included in a SWMP, the WDRs are guaranteed to allow discharges to continue violating water quality objectives for the foreseeable future. As a result, the Regional Board cannot make the required finding that the irrigated lands discharges in the WDR area "will not result in water quality less than that prescribed in state policies (e.g. water quality objectives in Water Quality Control Plans)," as required to authorize degradation down to standards.

Although the proposed WDRs proposes to begin breaking down the barrier to identifying management practices and pollution sources on specific farms by providing for a Farm Evaluation Report (albeit the proposal does not disclose what information will be requested in the FERs and, thus, it is impossible to evaluate whether the FERs will provide sufficient information), the WDRs rely for the most part on continuing the coalition group program that has been in place for the WDR area since 2003. Thus, although the SWMP appears to provide some additional discretion to the Executive Officer that may be applied at some point in the future, the SWMP continues to rely on regional monitoring coupled with a management planning process mirroring the waiver program. This monitoring scheme does not detect violations of water quality objectives for large expanses of the watersheds upstream of the monitoring stations. See Bond Comments; McHenry Comments. And it will continue to detect violations of the objectives at the stations if individual farmers' discharges are not meaningfully monitored. *Id.* "To the extent that the Order allows historic practices to continue without change, degradation will continue." *Asociacion de Gente Unida por el Agua*, 210 Cal.App.4th at 1273.

Likewise, although groundwater is included in the WDRs, the process to address discharges to groundwater relies on existing monitoring wells that will not pick up degradation. This program will neither detect nor prevent violations of the nitrate objective for the foreseeable future. *See Asociacion de Gente Unida por el Agua*, 210 Cal.App.4th at 1273. The Proposed WDRs only trigger ponderous, multi-year management plans and more generalized receiving water monitoring upon multiple exceedances of a water quality objective and or a trend in degradation. This evidence does not provide evidence that the Board can rely on to find that discharges will not violate objectives.

The WDRs propose to allow 10-year long compliance schedules once a SWMP is triggered or requested. Proposed WDRs, p. 36. It is again entirely inconsistent with the High Quality Waters Policy for the Board to presume to allow degradation for dischargers who are not even complying with water quality objectives. The discharges will automatically result in water quality less than objectives, precluding any finding by the Board to the contrary. Likewise, such discharges are and will continue to “unreasonably affect present and anticipated beneficial use of such water.” Accordingly, the Board also cannot make a finding to the contrary, as is also required to allow degradation under the Policy.

The fact that, as designed, the Proposed WDRs will not ensure compliance with applicable objectives, also is inconsistent with the Water Code’s basic WDR requirements. WDRs “shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, [and] the water quality objectives reasonably required for that purpose,....” Water Code § 13263(a). Because the WDRs replicate existing waivers that have not implemented the applicable objectives, the Proposed WDRs fail to implement objectives.

4-12

Resolution No. 68-16 requires specific steps to protect high quality waters, including mandating the use of WDRs through specified technology-based effluent limitations. The High Quality Waters Policy provides, in relevant part, that:

Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control [“BPTC”] of the discharge necessary to assure that (a) a pollution or nuisance will not occur

and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.

To comply with Resolution No. 68-16's BPTC mandate, the Regional Board must require the discharger to demonstrate that the proposed manner of compliance constitutes BPTC. *Asociacion*, 210 Cal.App.4th at 1282 ("The second step of Resolution No. 68-16's two-step process for determining whether a discharge into high quality waters is permitted, is a finding that the discharge will be required to undergo the "best practicable treatment or control ... necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained").

"In determining BPTC, the discharger should compare the proposed method to existing proven technology; evaluate performance data (through treatability studies), compare alternative methods of treatment or control, and consider the method currently used by the discharger or similarly situated dischargers." See SWRCB Order No. WQ 2000-07.

The Board does not yet have evidence of what any particular discharger within the WDR area is actually discharging to surface or ground waters. Instead of having evidence of what practices are currently in place for the current members of the San Joaquin County and Delta Coalition, the Board relies upon future Farm Evaluation Reports based on templates the contents of which have not yet even been proposed. More than a year will pass after the Board issues the WDRs and, as proposed, the authorization of degradation, before any information about individual farms starts to flow into the Regional Board's files. Proposed WDR, p. 25. Without existing information about what each discharger within the WDRs area is implementing for management practices and data regarding the practices' effectiveness to control pollutants, there is no evidence upon which the Board can base a finding that each discharger is implementing BPTC.

There is no evidence in the record that a farm entity, especially a large farm, is any less economically capable of taking a few representative discharge samples as any small industrial business currently regulated by the industrial storm water permit. CSPA does not believe that any evidence has been presented that demonstrates there is a valid economic reason for not requiring every farmer to collect some water quality samples, expend funds necessary to have a pollution control plan, and expend funds to implement the necessary measures to assure that farm's pollution will neither degrade water quality nor violate standards. See Exhibit C.

Staff's proposed "Farm Management Performance Standards" do not provide staff evidence justifying a determination to authorize degradation

throughout the western San Joaquin watershed. See Proposed WDRs, p. 21. Even assuming the performance standards somehow provide more guidance than already is apparent on the face of the Basin Plan or even the existing waivers, the Board still cannot meaningfully evaluate or apply the High Quality Waters Policy as it applies to any given discharger in the Watershed by having them submit information after the decision to allow degradation is made and without any information about the actual pollution that farm is discharging or even which river or channel it is discharging to and the quality of that receiving water.

4-13

By proposing to abandon any effort to avoid degradation of high quality waters, Regional Board staff concedes that a program based on regional monitoring and third-party outreach to actual dischargers does not assure that waters will not be degraded. Because the Board cannot make the requisite findings to support a decision authorizing degradation, the WDRs as proposed will degrade high quality waters in violation of the High Quality Waters Policy.

Additionally, repeating the flaw in the existing renewed waiver that was rejected by the Sacramento Superior Court, the proposed WDRs again do not bother to link even the general management practice responses to degradation. Instead, in regard to both surface and ground water pollution, the proposed WDRs trigger the general management responses by the third party when objectives are exceeded or where the EO determines that “irrigated agriculture is causing or contributing to a trend of degradation of surface water that may threaten applicable Basin Plan beneficial uses.” Proposed WDRs, pp. 32-33. Moreover, even this possibility is made less likely by the very next provision which says the EO may relieve the third party of a SQMP or GQMP when members only meet the applicable water quality objectives and a management plan will not likely remedy the exceedance. *Id.*, p. 33. The proposed WDRs do not comply with the obvious flaw found by Judge Frawley that the requirements are not geared to address degradation, but rather exceedances of other water quality measures including the same objectives rejected by Judge Frawley and unidentified “trends” in degradation. Order, p. 19. The High Quality Waters Policy does not merely guard against adverse trends in degradation, but any degradation. Because once again the proposed WDRs blink in fully enforcing the

Policy, the proposed WDRs suffer from the same error as that found by Judge Frawley for the renewed waiver.

In addition, the Court of Appeal also has rejected a similar process attempted in the general dairy WDRs leaving future potential compliance with the degradation restrictions to the Executive Officer at his/her discretion. Thus, in addressing the Regional Board's contention in the General Dairy WDRs that water would not be degraded because the Executive Officer had authority to order additional monitoring, the Court of Appeal did not agree future action by the EO applying his/her discretion was, by itself, sufficient to prevent degradation. *Asociacion de Gente Unida por el Agua*, 210 Cal.App.4th at 1277. This was due, first, to the fact that such discretion was not applied to all dischargers governed by the general WDRs but "required only at the discretion of the executive officer." *Id.* Second, the Court rejected open-ended discretion as a stand-in for assurances that degradation would not occur because "there are no mandatory standards governing the exercise of the executive officer's discretion." *Id.* Lastly, the Court rejected mere discretion by the EO, because it was triggered by monitoring that, by its nature, already established that degradation had occurred. *Id.* The same is true by the monitoring triggers included in the proposed WDRs, which await exceedances of objectives and "trends" in degradation before the EO may act and, even then, the EO may choose not to require even the broad management plans.

For these reasons, the proposed WDRs allow degradation and, absent adequate findings by the Board authorizing degradation down to standards, no such degradation is allowed.

Although Judge Frawley did not choose to rule on whether the regional monitoring stations that were implemented pursuant to the renewed waiver were sufficient to comply with the High Quality Waters Policy, he did state:

It also is questionable whether the Renewed Waiver is sufficient to comply with the Antidegradation Policy since it is not clear that the Board has an adequate means of identifying and taking actions against dischargers who are violating water quality objectives when water quality objectives are being exceeded, or of ensuring that BPTC is being implemented when high quality water is being degraded.

Order, p. 19. The same inadequacies are present in the Proposed WDRs. The monitoring stations anticipated by the Proposed WDRs are essentially the same as those present pursuant to the renewed waiver. Those stations cannot and will not detect violations of water quality objectives or degradation more than a short distance upstream. McHenry Comments; Bond Comments. As a result, numerous upstream violations will go undetected. Even where the stations confirm a standard violation or serious degradation, the Board will not know which upstream farms are responsible. *Id.* Nor will a simple, yet-to-be-defined FER indicate whether or not BPTC is in place for every upstream farmer. The Board's reliance on regional monitoring in an effort to spare individual farmers the burden of making sure they are not degrading the State's waters will never be sufficient to detect pollution and degradation or violations of objectives occurring some significant distance upstream. As a result, the Proposed WDRs are inconsistent with the High Quality Waters Policy as well as Water Code § 13263(a) (WDRs "shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, [and] the water quality objectives reasonably required for that purpose,...").

In the past, Regional Board staff has admitted that general discharge requirements relying on regional monitoring will not produce monitoring able to detect violations of water quality standards for large expanses of upstream waters. Former Regional Board Program Manager for the Irrigated Lands Program, Bill Croyle, has testified that "main stem, downgradient monitoring ... is going to tell us a very limited amount of information with regards to what is going on upstream in the watershed." Testimony of Bill Croyle (March 5, 2003) (AR2776).

Watershed- or regional-based monitoring cannot detect water quality levels miles upstream. Previous expert testimony from three former Regional Board staff and two other experts has been presented to the regional Board clarifying this basic point. Former Regional Board staff engineers and managers Steve Bond, Joanne Kip and Richard McHenry each testified both orally and in writing that the renewed regional monitoring scheme would not detect most of the site-specific or area-specific water quality problems occurring in the Central Valley. Comments of Steven Bond, PG, CEG, CHG (Sept. 27, 2010); Written Testimony of Steven Bond (April 7, 2011) (AR101869); Written Testimony of Richard McHenry (April 7, 2011) (AR101871); Written Testimony of Jo Anne Kipps (April 7, 2011) (AR101870); Oral Testimony of Steven Bond, Jo Anne Kipps & Richard McHenry (April 7, 2011) (AR3029.225-.232); Comments of G. Fred Lee, Ph.D. (Sept. 25, 2010) (AR101943, AR101949); Comments of Matt Hagemann (Sept. 10, 2010) (AR101829). As Mr. Bond, a certified geologist and hydrogeologist, explained in 2010 during the proceedings on the current waiver:

You asked if the downstream water quality of a complex watershed composed of multiple sub-watersheds, is a valid measure of the water quality in any or all of the individual sub-watersheds. My answer is no. While gross average conditions may be observed downstream, the conditions of individual upstream sub-watersheds will remain unknown. Between the downstream monitoring station and the various upstream watersheds, mixing and dilution occurs and the conditions at any upstream point are obscure to the downstream location.

Comments of Steven Bond, PG, CEG, CHG (Sept. 27, 2010). See also Written Testimony of Steven Bond (April 7, 2011) (AR101869) (“My professional opinion is that in a complex watershed composed of multiple sub-watersheds, water samples from distant downstream locations, such as most of the monitoring locations in this program, are not valid representations of the water quality in any or all of the individual sub-watersheds”); Oral Testimony of Steven Bond (April 7, 2011) (AR3029.227-3029.228). Mr. Bond has prepared additional testimony specific to the proposed WDRs and confirmed that the WDRs’ continuation of regional monitoring will not be sufficient to detect violations of objections and degradation any significant distance upstream. Bond Comments.

Richard McHenry, former supervisor of the Regional Board’s Sacramento Valley NPDES permitting unit, explained that regional impacts could be caused “by any number of upstream dischargers or circumstances, and cannot be directly linked to any specific discharge point” by sampling at a regional location. Oral Testimony of Richard McHenry (April 7, 2011) (AR3029.231). “Based on the regional monitoring that is being proposed, I cannot see any reasonable means of taking enforcement against individual dischargers to effectively protect water quality.” *Id.* Mr. McHenry has prepared additional testimony specific to the proposed WDRs describing the inadequacy of the WDRs’ continued regional monitoring to detect violations of objectives and degradation for most parts of the 582,000 acre WDR area.

Jo Anne Kipps, a 12-year veteran of the Regional Board’s waste discharge regulatory program, also noted during the renewed waiver proceeding that the waiver “relies on an inadequate regional monitoring scheme that cannot and will not provide information to this Board necessary to characterize current conditions, let alone, monitor the effectiveness of best management practices as these are implemented.” Oral Testimony of Jo Anne Kipps (April 7, 2011) (AR3029.230-.231). Dr. G. Fred Lee, Ph.D., provided a thorough explanation of the monitoring gap extended into the proposed WDRs:

In our previous comments we stressed the need for monitoring at the edge-of-the-field and in nearby state waters to define the worst-case impacts of toxic and other chemicals discharged from

agricultural activities. In some waterbodies the worst case impacts could be detrimental to fish spawning/rearing areas that would not be detected by the current downstream at a single monitoring location as practiced in the current monitoring program. This type of monitoring is also essential to evaluate the effectiveness of management practices to control WQO violations in the states waters.

Comments of G. Fred Lee, Ph.D. (Sept. 25, 2010) (AR101943). Dr. Lee explained further:

The Lee and Jones-Lee April 13, 2007 comments focused on the unreliable approach that the staff had proposed for the basic monitoring approach of allowing the coalitions to satisfy the MRP requirements based on one grab sample per month at a downstream location. As Lee and Jones-Lee discuss; this monitoring approach cannot reliably provide the data needed to meet the MRP stated objective of detecting violations of CVRWQCB Basin Plan objective by agricultural runoff/discharges. Such a monitoring approach could readily fail to detect upstream adverse impacts of agricultural discharges that are not detected at downstream monitoring locations.

Id. (AR101949). Driving the point home even further, hydrogeologist Matt Hagemann commented during the waiver process that, “[b]ecause of the reliance on current management practices and because only regional monitoring is to be used, Alternative I [the Renewed Waiver] would not result in measureable improvement to water quality and in fact foster further degradation of water quality.” Comments of Matt Hagemann (Sept. 10, 2010) (AR101829).

Likewise, Regional Board staff also explained during the waiver proceeding that,

If the selected ILRP alternative’s monitoring program is regional in nature (i.e., individual field effects on receiving waters are not monitored), it is not possible to determine whether and how much each operation is contributing to the problem— water quality assessment and feedback mechanisms are based on the watershed-scale for multiple sources. Therefore, the ILRP requires that operations that potentially contribute sources to the problem implement management practices designed to minimize their contribution.

Irrigated Lands Regulatory Program FEIR, p. 3.2-39 (March 2011) (AR237). Only if a specific farm opts to exclude itself from a coalition program would the

Regional Board proceed to issue an order that assures that a particular farm would achieve water quality standards and comply with the Antidegradation Policy:

Agricultural operations that do not wish to participate in implementing practices under the ILRP have the option to file a report of waste discharge and obtain individual waste discharge requirements. These requirements would specify individual monitoring of effluent and/or receiving waters designed to ensure that the operations waste discharge does not cause or contribute to an exceedance of water quality objectives and that BPTC is implemented where there is degradation of a high quality water.

Id. If the regional monitoring scheme of the Renewed Waiver or the Proposed WDRs were truly sufficient to protect receiving waters adjacent to non-coalition farms, no such site-specific WDRs would be necessary.

The significant divide between the Proposed WDRs' regional monitoring locations and the miles of waterways and the hundreds of sources upstream of the monitoring locations is an example of the same faulty monitoring scheme recently rejected by the Court of Appeal in *Asociacion de Gente Unida por el Agua* as violating the antidegradation policy:

The crucial question of fact in this case is whether the monitoring system prescribed in the Order is adequate to ensure the Order's directive that no further degradation of groundwater shall occur. Appellants point to evidence in the record indicating the Order's monitoring method is inadequate. Regional Board cites no contrary evidence. Thus, there are no facts from which any court could determine the monitoring system is adequate to detect and prevent further groundwater degradation. The interpretation of the antidegradation policy and the Order are generally matters of law.

210 Cal.App.4th at 1267. Like the supply wells required to be monitored by the Regional Board in the general permit issued for dairy discharges that were located a significant distance from the source of the potential degradation (manure ponds), the Proposed WDRs' regional monitoring locations are "ineffective to accomplish the timely detection of a change in [water] quality." 210 Cal.App.4th at 1260. Like the vacated dairy WDRs, additional upstream monitoring of any sort is not required unless the regional, i.e. distant, monitoring sites already show an adverse impact. *Id.* The fact that follow-up management plans may be triggered does not cure the fact that the prescribed monitoring locations will not monitor localized areas that feel the full brunt of one or more irrigated land dischargers' pollution. Like the dairy WDRs, follow-up management plans by the coalition are only triggered after multiple violations of

water quality objectives already are detected or a “trend” in degradation, far downstream of most sources. Like the dairy WDRs management plan triggers, that triggering event already establishes that water quality objectives are being violated and beneficial uses unreasonably affected. See 210 Cal.App.4th at 1276-77. Thus, whatever discretion the Regional Board staff may have to require or review management plans by the coalitions does not “ensure ... that no further degradation of [Central Valley waters] shall occur.” *Id.*

A Regional Board order does not comply with the antidegradation policy where it relies on monitoring requirements that “are inadequate to detect ... degradation, much less prevent it.” *Id.* at 1272-73. Like the monitoring locations in the dairy WDRs, expert testimony in the record for the renewed Waiver and now the Proposed WDRs discloses that regional monitoring locations far downstream from almost all of the irrigated lands’ pollution sources “are not located in the proper areas to detect degradation,” or violations of objectives and, even after a decade of implementation, have not shown pollution during that time for any localized areas upstream, even if those areas exceed standards. *Id.* at 1275. Because the Proposed WDRs’ monitoring provisions “do[] not provide either an accurate or a timely indication of [water] degradation” or violations of objectives, the Regional Board cannot find, based on the weight of the evidence, that the Proposed WDRs comply with the antidegradation policy or Water Code § 13263(a) for all, indeed, the vast majority of waters it presumes to protect. *Id.*

The Proposed WDRs fail to comply with the Board’s duty to comply with the Nonpoint Source Policy adopted by the State Board in 2004. Water Code § 13146, 13247; Policy For Implementation and Enforcement of the Nonpoint Source Pollution Control Program (May 20, 2004). The Nonpoint Source Policy includes five key elements with which any nonpoint source program adopted by a Regional Board must abide. “Prior to developing an NPS control implementation program or recognizing an implementation program developed by dischargers or third-parties as sufficient to meet RWQCB obligations to protect water quality, a RWQCB shall ensure that the program meets the requirements of the five key structural elements....” Nonpoint Source Policy, p. 11. The Proposed WDRs are inconsistent with at least three of the five key elements.

4-15

The Nonpoint Policy’s Key Element 1 states that “[a]n NPS control implementation program’s ultimate purpose shall be explicitly stated. Implementation programs must, at a minimum, address NPS [nonpoint source]

pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.” Nonpoint Source Policy, pp. 11-12. “Before approving or endorsing a specific NPS pollution control implementation program, a RWQCB must determine that there is a high likelihood the implementation program will attain the RWQCB’s stated water quality objectives.” *Id.*, p.11.

An NPS control implementation program must be specific as to the water quality requirements it is designed to meet. For example, if the program relies upon dischargers’ use of MPs, there should be a strong correlation between the specific MPs implemented and the relevant water quality requirements. The program also should provide other information as required by the RWQCB, including but not limited to the identification of participant dischargers. The RWQCB must be able to ensure that all the significant sources of the NPS discharges of concern are addressed.

Id., p.12 (emphasis added).

Reviewing the current waiver, the Superior Court found that its general requirements were inconsistent with the High Quality Waters Policy, it also violated Key Element 1. Order, p. 20. Because the Proposed WDRs also run afoul of the Policy and do not assure compliance with objectives, they also are inconsistent with Key Element 1. As the Court explained:

Key Element 1 states that a nonpoint source control implementation program must, at a minimum, address nonpoint source pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements. [citations omitted.] For the reasons described above, the Court finds that the Renewed Waiver is inconsistent with applicable antidegradation requirements. Accordingly, the Renewed Waiver is inconsistent with Key Element 1 of the Nonpoint Source Policy.

Order, p. 20.

As discussed above, the weight of the evidence does not demonstrate that the Proposed WDRs address irrigated lands discharges within the WDR area in a manner that achieves and maintains water quality objectives and beneficial uses and complies with the High Quality Waters Policy. The Regional Board does not and, depending on the contents of the FERs, may not know the “specific MPs [management practices] implemented” anywhere in the WDR area. *See supra*. Indeed, the FERs will not include any maps of the respective dischargers. This

alone will render the FER largely an exercise in paperwork rather than a stepping-stone to effective management practices or water quality protection.

Moreover, the regional-based water quality monitoring does not allow the Regional Board to correlate “the specific MPs implemented and the relevant water quality requirements.” Nonpoint Source Policy, p. 12. Only within a portion of the WDR area in which water quality standards are violated in the downstream waters will there be any effort by third-parties to correlate some MPs on some farms to those exceedances. Even in an impaired watershed, under the Proposed WDRs, the coalitions need not disclose to the Regional Board which specific farms and specific MPs on those farms are at issue. And because the water quality is only measured downstream in a given watershed or sub-watershed, numerous upstream waters that may be in violation of standards from irrigated lands discharges will go undetected, allowing for no correlation whatsoever with MPs. Thus, the Proposed WDRs do not come close to addressing all of the significant irrigated lands pollution sources in the WDR area, as required by Key Element 1.

4-16

Key Element 2 of the NPS Policy provides that: “[a] nonpoint-source control implementation program must include a description of the management practices and other program elements that are expected to be implemented to ensure attainment of the implementation program’s stated purpose, the process to be used to select or develop management practices, and the process to be used to ensure and verify proper management practice implementation.” Nonpoint Source Policy, p. 12. “A RWQCB must be convinced there is a high likelihood the MP will be successful.” *Id.* “MPs must be tailored to a specific site and circumstances, and justification for the use of a particular category or type of MP must show that the MP has been successfully used in comparable circumstances. If an MP has not previously been used, documentation to substantiate its efficacy must be provided by the discharger.” *Id.*

If the evidence available to the Regional Board demonstrates anything, it is the opposite of what Key Element 2 requires – the current MPs used by irrigated lands dischargers within the WDR area have been unsuccessful in preventing violations of water quality standards. The Regional Board assumes that every discharger in the WDR area has some sort of management practices in place. According to the record, a large percentage of rivers, streams and channels in the WDR area are impaired by pollutants discharged by irrigated lands. Bond Comment; McHenry Comment. The Delta and San Joaquin coalition’s regional monitoring, even with the benefit of commingling with other waters, confirm that large quantities of pollutants are violating water quality

standards throughout the coalition area. *Id.* And, at least in those places where downstream violations have been detected, the coalition has surveyed for existing management practices and asked their members to perhaps employ additional management practices. However, there is no evidence, and certainly no “high likelihood,” that more of the same management practices will achieve compliance with standards, either at the downstream monitoring sites and certainly not in the local receiving waters. Because there is effectively no monitoring of receiving waters adjacent to where the farms are discharging, the water quality standard violations occurring in those waters will remain undetected and the Regional Board will continue to proceed with no evidence demonstrating any likelihood that any current management practices will achieve standards in those waters. Even at the downstream monitoring sites, the record is clear that neither the Board nor the coalition can say whether the management practices will work.

Nothing in the available evidence suggests that the Proposed WDRs’ regional monitoring requirement can detect violations of water quality standards in all upstream waters or evaluate the effectiveness of BMPs to prevent such violations well upstream of the regional monitoring locations. By omitting any measurements of what is happening in local waters adjacent to discharge locations, the Proposed WDRs cannot evaluate whether management practices are “tailored to a specific site and circumstances.” Nor is there any evidence upon which the Regional Board could determine that implemented management practices are “highly likely” to be successful and attain standards in those upstream waters. There is no evidence of any studies or data demonstrating the effectiveness of any management practices in the Central Valley to achieve discharges that comply with water quality standards. By avoiding any edge of field or BMP monitoring until some undefined moment at the EO’s discretion in the indefinite future, the Proposed WDRs assures the continuation of this information gap.

Key element 4 of the NPS Policy requires that “[a]n NPS pollution control implementation program must include sufficient feedback mechanisms so that the Regional Water Board, dischargers, and the public can determine whether the program is achieving its stated purpose, or whether additional or different management practices or other actions are required.” Nonpoint Source Policy, p. 13. “In all cases the NPS control implementation program should describe the measures, protocols, and associated frequencies that will be used to verify the degree to which the MPs [management practices] are being properly implemented and are achieving the program’s objectives, and/or to provide feedback for use in adaptive management.” *Id.* “[I]f the program relies upon

dischargers' use of MPs, there should be a strong correlation between the specific MPs implemented and the relevant water quality requirements." *Id.*, p. 12.

The Superior Court ruled that the existing waiver failed to achieve Key Element 4 for failing to include sufficient feedback mechanisms to protect both groundwater and high quality waters. Order, p. 21. There are no confirmed feedback mechanisms in the WDRs either. No mechanisms exist to either detect or react to violations of water quality objectives many miles upstream of the coalition's relatively few monitoring stations. Every potential future action by a discharger is first qualified by action by the executive officer only after trends in monitoring (even a violation of a standard does not assure this trigger is met). Nor is it clear how many violations must accrue before there is a trend. Nor is there any effort yet for the board to determine what the existing water quality is and identify the high quality water that has been achieved any time in the past.

As previously discussed, expert evidence shows that the Renewed Waivers regional monitoring requirements are indeed incapable of identifying the effectiveness of upstream management practices. Bond Comments; McHenry Comments. And the fact that, even after eight years of implementation, the San Joaquin County and Delta Coalition has not produced any information describing the locations of management practices actually in place in the coalition's area and the effectiveness of such practices, roundly demonstrates that the Proposed WDRs have no feedback mechanism to evaluate MPs, especially one designed to establish "a strong correlation between the specific MPs implemented and the relevant water quality requirements."

Nor do the truncated FERs proposed by the WDRs inform either the Regional Board or the public about the effectiveness of those management practices. No maps will certainly be provided of any specific farm and its discharges. The FERs will remain sequestered in the third-party's files unless and until the Regional Board staff chooses at its discretion to obtain a copy. Nor will those reports indicate any useful information about whether MPs are being properly implemented. Nonpoint Source Policy, p. 13. Thus, the Proposed WDRs do not contain feedback mechanisms by which either the Regional Board or the public could "determine whether the program is achieving its stated purpose, or whether additional or different management practices or other actions are required." *Id.*

4-18

The Proposed WDRs delegate considerable discretion to the Executive Director to review and approve third-parties and various plans. These include

the initial approval of one or more third-parties to implement the WDRs (Proposed WDRs, p. 28 (¶ VIII.A), Sediment and Erosion Control Plans (*Id.*, p. 26 (¶ VII.C)), Nitrogen Management Plans (*Id.*, p. 27 (¶ VII.D), Surface Water Quality Management Plans (“SQMP”) (*Id.*, p. 32 (¶ VIII.H.1), and Groundwater Quality Management Plans (“GQMP”) (*Id.*). The Proposed WDRs also would authorize the Executive Officer to waive the preparation of a SQMP or GQMP. *Id.*, p. 37 (¶ VIII.H.3). Each of these plans and approvals involve the election of waste discharge requirements and, as a result, cannot be delegated to the Executive Officer but must instead be reviewed and approved by the Regional Board itself.

Water Code § 13223(a) provides that “[e]ach regional board may delegate any of its powers and duties vested in it by this division to its executive officer excepting only the following: ... (2)the issuance, modification, or revocation of any ... waste discharge requirement....” Water Code § 13223(a)(2).

SQMPs and GQMPs plainly constitute waste discharge requirements. The Plans’ requirements including establishing time schedule, performance goals, and monitoring locations, which are the types of requirements included in WDRs. See Appendix MRP-1. In particular, there can be no dispute that time schedules are waste discharge requirements specifically identified by Section 13263(c): “The requirements may contain a time schedule, subject to revision in the discretion of the board.” See *also, e.g.* 33 U.S.C. § 1362(11) (in NPDES permits, WDRs also serve as effluent limitations which are defined as “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents..., including schedules of compliance”). Because the SQMP and GQMP both propose to incorporate compliance schedules set forth in the WDRs, both of those plans constitute WDRs that cannot be delegated by the Board to the Executive Officer.

Because the SQMP and GQMP are both WDRs, any decision to waive those requirements also cannot be delegated to the Executive Officer. That proposed provision must be brought to the regional Board for action. See Proposed WDRs, p. 33 (¶ VIII.H.3).

What sediment and erosion control measures may be applied and who may apply them is left to the as yet to be identified third party. (Proposed WDRs, pp. 25-26 (¶ VII.C)). This provision effectively delegates all WDRs associated with sediment discharges to the dischargers’ representative, subject only to the approval of the Executive officer. These sediment and erosion WDRs must be reviewed and approved or disapproved by the Regional Board. Water Code § 13223(a)(2).

CSPA Comments
January 17, 2014
Page 29 of 29

The Nitrogen Management Plan and Nitrogen Management Plan Summary Report plainly include WDRs that cannot be delegated to the Executive Officer. These are the primary mechanisms relied upon by the Proposed WDRs to control nitrate discharges to groundwater. The WDRs do not bother to adopt a template, instead leaving that of the Executive Officer. The plans themselves ask the third party to self-regulate subject only to the approval of the executive Officer. These substantive discharge requirements must be reviewed and approved by the Regional Board using their public decision-making process.

Consistency with Water Code § 13223(a)(2) is not achieved by merely authorizing discretionary review by the Regional Board of Executive Officer decisions that cannot be delegated to the EO in the first place. Discretionary review that need not be exercised by the regional Board for any or no reason still improperly delegates the above WDR decisions to the Executive Officer. All of the above identified decisions must be made by the regional Board itself.

CONCLUSION

Why is staff in such a hurry to have the Board make a determination to allow degradation of water quality throughout the Watershed? In effect, staff is asking the Board to erase the high quality waters policy from the irrigated lands program coalition-by-coalition. If the Board agrees that, despite the absence of any information about where the high quality waters may be or any details about any particular discharger in this entire watershed, everyone in the watershed can degrade waters down to standards, then all future renewals of the WDRs will be relieved of having to deal with high quality waters. Such a wholesale retreat from the purpose and goals of the Policy is simply unprecedented. The Board should reject the WDRs and request staff to prepare WDRs that address each of the above comments and prevent, rather than embrace, degradation of water quality.

Sincerely,



Michael R. Lozeau
Lozeau Drury LLP
Attorneys for California Sportfishing
Protection Alliance and California Water
Impact Network

EXHIBIT A



Date: 16 January 2014

From: Steve Bond

To: Michael Lozeau, Lozeau/Drury LLP
410 12th Street, Suite 250 Oakland, CA 94607
michael@lozeaudrury.com

Subject: Irrigated Lands Regulatory Program, Proposed Waste Discharge Requirements for discharges from irrigated lands within the San Joaquin County and Delta Area, Surface Water Monitoring and Sampling, 2008 through 2012.

The proposed Waste Discharge Requirements lack a representative monitoring program and as a result is not protective of the beneficial uses within the San Joaquin Delta Area watershed.

A-1

Because the protection of the beneficial uses of waters of the State is a function of the ability to monitor those waters to determine their quality, it is absolutely imperative that a representative monitoring program be in place. Yet, the proposed permit fails to provide basic protections of water quality. Contrary to the claim, the Order will not result in the implementation of best practicable treatment or control (BPTC) by those discharging to high quality waters because the Order lacks satisfactory monitoring requirements. Deficient monitoring

requirements precludes representative characterization of receiving water quality. This in turn prevents identification of high quality waters. It also restricts characterization of adversely impacted or impaired waters. Hence, protection of beneficial uses is made unfeasible if high quality waters cannot be identified.

A-2

Attachment A of the WDR's discuss the definition of 'high quality waters'. However, I have not found any documentation identifying high quality waters in the watershed covered under the subject WDR's.

The San Joaquin Delta Watershed region includes 965 square miles of watershed and is drained more than 480 linear miles of named surface water courses, 5000 linear miles of water courses that are, or could be, affected by discharges of waste from irrigated lands (WDR Findings 12 and 13). On average that amounts to about 100 square miles of land and more than 500 linear miles of water course per single core monitoring station.

Monitoring only the major watercourse at the downstream-most position of the watershed completely disregards the protection of the beneficial uses of all but the lowest elevations of these waterways.

Evaluating the effectiveness of a technology or a practice requires that the change in water quality attributable to the specific practice or technology be verified. To do

A-3



that a reference sample from the point of discharge and then a comparison sample taken from the same location after the technology or practice is implemented must be collected and analyzed. In actual practice, multiple samples over range of operating conditions must be collected to verify positive changes. It is not reasonable to think that the effectiveness of a technology or practice can be known without verifying it by testing the discharge water. This requires monitoring at the edge of the field by collecting and testing the water samples before the discharge water is mixed and diluted. The inability to identify and characterize pollution at its source invalidates any effort to verify or evaluate the effectiveness of pollution treatment or control at the source.

Reiteration of prior
comments

It is not possible to evaluate the effectiveness of a farm's water treatment system or of its management practice (BMP) from a distant downstream monitoring location. Between the point of discharge and the point of sample collection, the discharge water is mixed and diluted. Other waters from natural and industrial sources of unknown quality and character such as other agricultural discharges alter and mask the defining character of the discharge water. Any changes in water quality due to a particular management practice at farm is concealed within this soup of waters and pollutants, thus the performance of the BMP is essentially unknowable. The point of discharge is the only representative monitoring point for evaluating BMP performance.

The problem of determining the quality and character of distant upstream water conditions is made more difficult within a complex watershed composed of multiple sub-watersheds. In such cases like the San Joaquin Delta Area Watershed region, each watershed must be individually evaluated and each discharge separately monitored. The downstream water quality is not representative of the conditions in the sub-watersheds or of any point of discharge from the edge of the field. Downstream water quality may, at best reflect the gross average conditions of the dominant flows into the watershed; it will not provide information about small tributary streams, lesser flows, or conditions close to points of the individual agricultural discharge. The downstream water quality is not a valid measure of the water quality in any or all of the individual sub-watersheds. Given only downstream monitoring data, the specific conditions of individual upstream sub-watersheds are not effectively monitored, sources of pollution remain hidden, best practicable treatment or control of pollutants is unfeasible, and the beneficial uses of the upstream waters are left unprotected. The conclusions of the Annual Monitoring Reports for this region confirm that beneficial uses are not being protected and that the sources of pollutants cannot be determined.

A-4

Review Of Annual Monitoring Reports (AMR) 2008 through 2012:

To illustrate these points I refer to the statements, findings, and conclusions of the more recent AMR's.

Each year, the AMR's clearly state that the primary objectives of the monitoring program are to "characterize discharge from irrigated agriculture" and "determine if the implementation of management practices is effective in reducing or eliminating discharge and impairments to beneficial uses" (Monitoring Program Objectives, SJCDWQC March 1, 2013 AMR, SJCDWQC March 1, 2012 AMR, SJCDWQC March 1, 2011 AMR, SJCDWQC March 1, 2010 AMR, et al.). The AMR states that the objectives include assessing "the impact of waste discharges from irrigated agriculture to surface water. (Monitoring Objectives, SJCDWQC March 1, 2013 AMR, et al). However, sampling and/or monitoring of points of discharge from irrigated agriculture is not documented in these reports. Only sample results from distant downstream stations are reported. From these solitary, remote locations, hundreds of square miles of agricultural operations and thousands of miles of waterways are observed and the effects of waste discharges scores of miles distant are supposedly assessed.

Each year the AMR's conclude that beneficial uses are not being protected, that the water quality exceedances can be attributed to any number of causes or sources, but none have ever been identified. (Conclusions Section SJCDWQC March 1, 2013 AMR, SJCDWQC March 1, 2012 AMR, SJCDWQC March 1, 2010, Conclusions and Recommendations SJCDWQC March 1, 2011 AMR, et al.). Given that discharges from irrigated agriculture are never directly measured, the existing stations, always distant points downstream, will never definitively identify the sources of pollution. Under the existing program, the sources of pollution and impairment

will likely remain undefined, and a matter only for speculation. Further, identifying high quality waters will not be possible for the reasons stated above.

STEVEN R. BOND

Curriculum Vita

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Profile

Geologist / Engineering Geologist / Hydrogeologist / Aqueous-geochemist /

- More than twenty-five years applied experience in groundwater and engineering geology.
- Twenty years practical experience defining hydrogeologic flow systems in crystalline, fractured rock systems, and porous sedimentary aquifers.
- More than twenty years practical experience evaluating natural and contaminant water chemistry problems and issues.
- Eighteen years applying geochemical techniques to hydrogeologic situations in humid, and semiarid hydrogeologic regimes, including water supply, and contaminant fate and transport analyses.
- More than twenty years experience investigating and evaluating geologic and hydrogeologic hazards related to slope stability, seismic hazards, hazardous materials, mine wastes, and soil and groundwater contamination.
- Five years experience defining and modeling stream and river flow, flooding analyses, and sediment transport systems.
- Ten years experience evaluating industrial impacts to water quality

Professional	Registered Geologist, <i>California, USA</i>	# 5411
	Certified Engineering Geologist, <i>California, USA</i>	# 1841
Licenses	Certified Hydrogeologist, <i>California, USA</i>	# 0238

- Eleven years regulatory experience implementing California and U. S. water quality laws and regulations.

Professional Experience

January 1999 to Present

Steven Bond and Associates, Santa Cruz, CA, President, Principal Geologist

Conducted investigations and assessments of geologic hazards, threats to surface water and groundwater quality from various industrial and natural sources, and groundwater supply investigations. Performed litigation support in cases involving potential impacts of geologic hazards, groundwater supply and pollution, surface water pollution, and State water quality policy review. Examples of such activities and projects include the following:

- *Engineering Geology*: Conducted investigations of geologic hazards, foundation studies, liquefaction potential assessments, fault trace analyses, slope stability assessments and prepared the associated engineering geology investigation reports for development and industrial projects in Monterey, San Mateo, Mendocino, and Santa Cruz Counties. ◇ Conducted foundation suitability study, seismic evaluation, and fault trace study for resort development, Big Sur (Monterey Co.) ◇ Conducted analysis of debris-slide hazard potential of properties near Loma Mar (San Mateo Co.) ◇ Did technical analysis of slope stability and soil erosion potential of timber harvest operations, and evaluated surface-water monitoring practices (Humboldt Co.) for permitting dispute. ◇ Evaluated landslide activation hazard analysis of cliff side development in Brisbane (San Mateo Co.) ◇ Evaluated potential erosion hazards and drafted technical remedies from impacts of extrajudicial logging activities (Mendocino, Co.) ◇ Prepared engineering geologic reports for various residential development projects (Santa Cruz Co. , San Mateo Co.).
- *Groundwater Investigations, Modeling, and Remediation System Design*: Designed and implemented original subsurface investigation technics, and remediation systems for a complex hydrogeologic environment of

volcanic sediments, for Sierra Nevada Mt. community drinking water contamination (Volcano, CA). ◇ Did aquifer analysis and computer simulation (Modflow) of contaminant flow and remediation system design (groundwater extraction) for MTBE site in Turlock, CA. ◇ Did groundwater transport and pollutant fate analysis of landfill for litigation support. (Colma, CA)

- *Groundwater Supply*: Conducted groundwater use sustainability study for Sonoma Valley winery (Valley of the Moon). ◇ Did evaluation of sustainability potential and impacts from groundwater extraction in Sierra Valley (Sierra and Plumas Counties) for litigation support.
- *Policy Review and Regional Studies*: Conducted technical review and analysis of CA State water policy (State Implementation Plan, California Toxics Rule) for litigation support. ◇ Technical consultant and committee member for San Francisco Bay Copper-Nickel TMDL impairment studies (north and south).
- *Storm Water*: Conducted technical reviews, and did litigation support in cases of storm water pollution regarding the adequacy of monitoring programs, BMPs, and treatment technology application (Alameda, Humboldt, Placer, Sacramento, San Joaquin, San Mateo, San Francisco, Sonoma, Yuba counties) for the following types of industry: aggregate, cement, asphalt, metal fabrication, metal forging, steel casting, recycling, ship breaking, wood treatment, sawmills, CAFOs, vehicle maintenance, auto wrecking, POTW, precious and heavy metal mines, landfills, fueling facilities, and port loading facilities for ammonia, fertilizer and petroleum coke.
- *Mining Projects*: Evaluated drinking water quality hazards posed to confined prisoners at an operating copper mine (United Nations ICTY, Bosnia-Herzegovina). ◇ Evaluated geochemical potential to produce acid and release arsenic from re-activated gold mine (Sutter Ck. CA), acid mine drainage water quality impacts. ◇ Evaluated WQ pollution potential from abandoned mercury and gold mines (Coastal Mts, central & north CA, Sierra Nev. Mts) for litigation purposes.
- *Land Discharge Projects*: Evaluated compliance with CCR Title 23, Title 22, Chapter 15 (CA) regulations for Winery wastes (Amador County), dredging spoils disposal (Port of Stockton), Class III landfill (San Mateo Co., Shasta Co., Lake Co.). Designed monitoring programs and budgets.

March 1998 - January 1999

Fall Creek Engineering, Inc., Santa Cruz, CA, Principal Geologist

Evaluated the risk from surface and groundwater contamination to public groundwater supplies (Big Sur); performed computer simulations of flow and geochemistry of ground and surface water interaction using Modflow, Minteq. Did hydrologic studies to evaluate the flood stages, water surface profiles, and erosion potentials; constructed a computer -based hydraulic model of the river using HEC-RAS (Salinas River, Monterey Co.); prepared water quality and flood control management plans (Pajaro River). Designed and conducted soil and groundwater sampling analysis programs at various sites in Monterey and Santa Cruz Counties (leaky underground fuel tanks, wastewater disposal systems).

March 1997 - January 1998

Water For People, Denver Colorado, Consulting Hydrogeologist

Conducted a synoptic hydrogeological survey of the Bay Islands, Honduras, Central America for the Bay Island Environmental Project. Conducted a study of the islands' resources and made recommendations for a comprehensive water supply investigation of the three main islands comprised primarily of fractured metamorphic rock. Conducted local interviews, literature review and a reconnaissance level survey, field trued geology in selected areas. Evaluated island-available drilling technology, characterized water quality and supply issues for several of the island communities, prepared investigative criteria for future work, wrote report.

December 1986 - May 1998

California Regional Water Quality Control Board, Sacramento, CA. Associate Engineering Geologist

Conducted investigations of all aspects of pollutant transport in the vadose zone and groundwater and surface water. Reviewed and evaluated the geologic, hydrogeologic, geochemical, and geophysical content of professional reports. Evaluated thoroughness of surface and groundwater investigations, the completeness of remedial efforts, and validity of monitoring programs. Provided expert technical assistance to State and local agen-

cies on issues of geochemical fate and transport of pollutants, well-head protection strategies, abandoned mine investigation and remediation methods, and contaminated groundwater and soil cleanup technics. Examples of such projects include the following:

- Analysis of groundwater impacts from organic solvents and fuels in sedimentary and fractured rock terrain. Evaluated investigative methods including drilling techniques, soil, water, and vapor sampling methods, and in situ and ex-situ remedial technologies using vapor transport, groundwater capture, extraction and treatment. Did deterministic computer modeling. Technical advisor and regulator for hundreds of facilities under authority of Federal and State underground tank statutes in the counties of Alpine, Amador, El Dorado, Calaveras, Lake, Napa, Mariposa, Placer, Sierra, Solano, Stanislaus, and Tuolumne California, and in Yosemite National Park.
- Analysis of groundwater flow and pollutant transport characteristics of polluted, high density waste water (industrial acids and heavy-metals) at Davis, CA. Evaluated water quality impacts, effectiveness of groundwater extraction schemes using numerical modeling methodologies for flow, and chemical fate and transport. Co-developed in situ leaching methods of contaminated soils to accelerate cleanup rates.
- Analysis of the underlying, geochemical causes of acid mine drainage at the Penn Mine in Calaveras Co., CA. Identified and evaluated groundwater flow paths in a faulted crystalline-rock aquifer and the applicability of water quality and hazardous waste laws to the toxic discharges. Conducted a geologic and fracture mapping project and developed conceptual flow groundwater model. Evaluated acid-mine and acid-rock drainage remedial alternatives and made recommendations for their use. Developed and composed work plan for the investigation of fractured-rock hydrogeological transport, and aquatic geochemical fate of heavy metals from Penn Mine to the adjacent Camanche reservoir. Authored numerous reports and a series of successful grant proposals, prepared annual budget and obtained funding for detailed groundwater and remedial waste rock investigations.
- In companion project to the above mine waste project, developed a conceptual model for the transport mechanisms of heavy-metal laden sediment in the Camanche water-supply reservoir, developed the conceptual methodology of investigation, and managed the project. Assembled a team of limnologists from the University of California at Davis and fluid mechanical engineers specializing in sediment re-suspension from University of California at Santa Barbara. Wrote a successful Federal Clean Lakes Grant proposal, and implemented the investigation at Camanche reservoir, California.

May 1986 - September 1986

U.S. Army Corps of Engineers, Sacramento, California, Engineering Geologist.

Conducted geologic and hydrogeologic investigations preparatory to the design of Deer Creek Water Supply Reservoir, Utah. Drafted groundwater investigation plan. Conducted geologic mapping. Designed monitoring wells, supervised drilling crews and well construction, conducted aquifer pumping tests.

October 1983 - September 1984

Dames and Moore, Los Angeles, California, Sedimentary Petrologist.

Conducted sedimentological investigation of near-shore sediments in western Arabian Gulf. Characterized sediment transport systems in the Arabian Gulf area of United Arab Emirates for Abu Dabi National Oil Company.

May 1982 - April 1983

U.S. Army Corps of Engineers, Portland, Oregon, Engineering Geologist.

Conducted geologic, geophysical and hydrogeologic investigations in the Columbia Gorge near Bonneville, Oregon. Conducted geophysical borehole investigation of Bonneville New Navigation Lock. Did detailed mapping of landslides, and drill core logging. Designed passive de-watering systems, and monitoring wells. Supervised drilling crews and the construction of water supply wells and monitoring wells; conducted and interpreted aquifer pumping tests.

June 1981 - December 1981

XCO, Denver Colorado, Petroleum Field Geologist (Mud logger)

Did drill core logging, conducted field screening of chemical composition of drill cores, interpreted geologic strata, and prepared drilling reports in several depositional basins in North Dakota, Colorado, and Oklahoma.

September 1976 - September 1977

U. S. Geological Survey, Menlo Park, California. Geologic Field Assistant.

Conducted geologic mapping and did geochemical sampling for Continentally Unified Strategic Assessment Program.

**Education
&
Training**

Master of Science (ABT) in Hydrogeology, Special Studies Program, California State University, Chico, California, 1985-1986

Bachelor of Arts in Geology, Humboldt State University, California, 1979 - 1981

Annual NWWA courses in Aqueous Geochemistry, Fluid Flow through Fractured Rock, In situ Fluid Extraction Systems, Ground-Water Isotope Geochemistry. 1987-1991.

Computer Modeling. EPA CEAM: MINTEQ geochemical speciation, 1990, 1991; WASP surface water flow and transport, 1991. General Sciences Corp.: SESOIL vadose zone pollutant transport, 1994, 1996; AT 123D groundwater pollutant transport, 1994, 1996; NWWA: Visual Modflow, Flowtrans, groundwater flow and transport, 1996. WHI: Modflow 2000, MTD3, groundwater and contaminant transport, 2002.

Constructed Wetlands Workshop and Seminar Series, Humboldt State University, California, 2002.

Soil Slope Stabilization, Embankment Design, National Highway Institute, Vail, CO, 2007

40 hour OSHA Health and Safety for Hazardous Waste Operations and serial 8 hour refresher courses.

Evaluated economic potential of proposed Federal Wilderness areas and abandoned mines including the Kalmiopsis Wilderness of southwestern Oregon; an ophiolite suite and recent volcanic terrain.

Professional Associations

Association of Engineering Geologists; Groundwater Resources Association of California
Northern California MTBE and Fuel Oxygenates Committee

Non-Profit Affiliations

Valley Air Trust, Central Valley, Stockton California, Board Member 1993 - 1997

BayKeeper San Francisco Bay -Sacramento Delta, Technical Advisory Committee Member 1996 - present.

California Sportfishing Protection Alliance, Technical Advisory Committee Member 2000 - present

The Abandoned Mine Alliance, Sierra City, California, Board Member 2005 - present

Expert Testimony

- Before the United States Northern District of California Court, on issues of storm water pollutants associated with industrial ammonia and urea fertilizer production and storage operations in the case of California Sport Fishing Protection Alliance vs California Ammonia Company, September 2006.

Expert Testimony cont.

- Before the United States Northern District of California Court, on issues of surface water pollution associated with logging practices in the case of EPIC vs Pacific Lumber Company, May 2006.
- Before the United States Northern District of California Court, on issues of groundwater and storm water pollution associated with lumber milling and wood treatment operations in the case of Ecological Rights Foundation vs Sierra Pacific Industries, April, October, 2002.
- Before the United States Eastern California District Court, on issues of storm water pollution, confined animal feeding operations and industrial activities in the case of WaterKeeper of Northern CA. vs L. Vandhoef, Chancellor, University of California, Davis, June, August 2001.
- Before the CA State Water Resources Control Board hearing on the Appeal of Regional Water Quality Board's Actions regarding Pacific Lumber and the Elk Creek Timber Harvest Monitoring, July 2001.
- Before the United States Northern District of California Court, on issues of storm water pollution and ship-breaking in the case of WaterKeepers of Northern CA. et al, vs U.S. Dept. of Navy and Astoria Metals Corporation, June, August 2000.
- Before the California Superior Court on issues of groundwater pollution and crude oil in the case of Thompson Chevrolet vs Chevron Corporation et al., January, July, and November 1996.
- Before the California Superior Court on issues of acid mine drainage, water pollution, and groundwater flow through fractured crystalline rock in the case of California Sportfishing Protection Alliance vs State Water Resources Control Board, June 1994.
- Before the California Senate Natural Resource and Wildlife Committee Investigative Hearing on Conflicts of Interest in the California Environmental Regulatory System, June 1992.
- Before the California Senate Natural Resource and Wildlife Committee Investigative Hearing on Acid Mine Drainage, Water Pollution, and the California Regulatory Environment, Jan. 1992.
- Before the California State Water Resources Control Board hearing on the Appeal of Regional Water Quality Boards Actions regarding the Penn Mine, October 1991.

Public Speaking and Presentations

Presentations before the State Water Resources and Regional Water Quality Control Boards.

- Presented testimony and briefs before the State and Regional Boards on specific cases of regulatory enforcement actions, (1990 - 2007)
- Mediator of formal discussions regarding disputed technical issues about groundwater quality between responsible parties, (1988 - 1998)

Workshop Presentations before professional societies, and local and State regulatory agencies:

- The application and interpretation of discreet groundwater sampling methods and data collection.
- The use and interpretation of computer modeling simulations for vadose transport and mineral equilibria
- The effects and determination of vertical gradients on pollutant transport in groundwater.
- Contaminated soil cleanup criteria based on California State Water Code, regulations and policies.
- Acid Mine Drainage issues: the geology, mineralogy, and chemistry, the environmental effects, remediation, policies, and politics.

Writings

Author of scores of reports for private organizations, NGO's, Federal, State and local Agencies, on the subjects of (a. organic and inorganic pollutant transport in surface and groundwaters, (b. polluted groundwater remediation, (c. the investigation and analysis of the potential transport of soil contamination (metals, fuels, solvents) through the vadose zone, (d. unsaturated zone characterization including vapor-phase transport and cleanup technologies, (e. acid mine drainage causes, fate, and mitigation, (f. the logical elements of water quality monitoring, (g. regulatory compliance of state and federal environmental laws by federal, state and private parties, (h. metal mobility and mineral equilibria, (i. net-vertical transport of groundwater pollutants, (j. general surface water and groundwater resource protection, (k. water budget accounting in mixed geologic environments with multiple density fluid interfaces, (l. groundwater supply evaluations, (m. reconciliation of threats to water resources and risks to human health, (n. engineering geology, geological hazard analysis.

EXHIBIT B

Memorandum

16 January 2014

To: Michael Lozeau, esq.

From: Richard McHenry, PE

Subject: San Joaquin County and Delta Area Watershed, Proposed Waste Discharge Requirements (WDRs) Comments, Focused comments on Surface Water Sampling

The following are my findings and comments following review of the proposed waste discharge requirements (WDRs) General Order for growers within the San Joaquin County and Delta Area Watershed. I also reviewed the available monitoring data, management plans, CEQA documents and supporting information for the proposed WDRs.

Findings and Facts

The San Joaquin County and Delta Area has approximately 618,000 acres of cropland under irrigation and approximately 6,000 growers with “waste discharges from irrigated lands”. Approximately 5,865 growers and 582,000 associated irrigated acres including managed wetlands will require regulatory coverage under the proposed WDRs. (WDR Finding 12) Small farming operations, comprising 69% of growers, account for approximately 6% of the total irrigated lands. (Information Sheet, p. 33) Therefore, the 69% of small growers irrigate approximately 34,920 acres, or an average of 8.6 acres each, while the 31% of large growers irrigate approximately 547,080 acres, or an average of 300.9 acres each.

The San Joaquin County and Delta Area region has approximately 5,000 linear miles of surface water courses (including 480 linear miles of named surface water courses) that are, or could be, affected by discharges of waste from irrigated lands. (WDR Finding 13) Approximately 44 named water bodies, encompassing 1,715 linear miles of surface water courses and 262,159 surface water acres, have been listed as impaired pursuant to Clean Water Act section 303(d) within the third-party area. Agriculture is identified as the potential source of impairment for approximately 19 of the 303(d)-listed water bodies. The majority of the listed water bodies are within the legal Delta. (WDR Finding 16)

The water quality monitoring under the proposed WDR is “representative” in nature instead of and does not measure individual field discharge monitoring. (WDR Finding 23) It is argued that representative monitoring will allow the Board to determine whether wastewater bodies accepting discharges from numerous represented irrigated lands are meeting water quality objectives, to determine if existing high quality waters are being maintained, to determine whether farming

practices are protective of water quality and representative monitoring provides a significant cost savings since all surface waters or all groundwater aquifers that receive irrigated agricultural discharges are not monitored. The proposed Order, (Finding 23) does admit that: “*there are limitations to representative monitoring’s effectiveness in determining individual sources of water quality problems, the effectiveness of management practices, and individual compliance with this Order’s requirements*”. Monitoring under traditional WDR’s and NPDES permits require monitoring of the wastewater discharge as well as the receiving water and/or groundwater. While the proposed WDR requires “representative” monitoring, it allows the Executive Officer to require technical reports when monitoring or other available information is not sufficient to determine the effects of irrigated agricultural waste discharges to state waters.

In May 2004, the State Water Board adopted the Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Policy). The purpose of the NPS Policy is to improve the state's ability to effectively manage NPS pollution and conform to the requirements of the Federal Clean Water Act and the Federal Coastal Zone Act Reauthorization Amendments of 1990. The NPS Policy requires, among other key elements, an NPS control implementation program’s ultimate purpose to be explicitly stated. It also requires implementation programs to, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

“Monitoring was performed at 15 Management Plan Monitoring (MPM) sites; Duck Creek @ Highway 4, Lone Tree Creek @ Jack Tone Road, and Unnamed Drain to Lone Tree Creek @ Jack Tone Road (also known as Temple Creek), Grant Line Canal @ Clifton Court Rd, Grant Line Canal near Calpack Rd, Littlejohns Creek @ Jack Tone Rd, French Camp Slough @ airport Way, Mokelumne River @ Bruella Rd, Terminous Tract Drain @ Hwy 12, Kellogg Creek along Hoffman Ln, Mormon Slough @ Jack Tone Rd, Sand Creek along Hwy 4 Bypass, Bear Creek @ North Alpine Rd, Roberts Island @ Whiskey Slough Pump and Walthall Slough @ Woodward Ave. Based on the prioritization of constituents with exceedances, MPM was conducted for water column toxicity to *Ceriodaphnia dubia* and *Selenastrum capricornutum*, and sediment toxicity to *Hyalella azteca*, copper, lead, chlorpyrifos, diazinon, dieldrin, diuron, disulfoton, malathion and simazine.” (SJCDWQC April 30, 2013 Management Plan Update Report 3, page 3)

Fact Summary

The San Joaquin County and Delta Area region has approximately:

- 618,000 acres of cropland under irrigation.
- 6,000 growers with waste discharges from irrigated lands.
- The area has approximately 5,000 linear miles of surface water courses.

- 44 named water bodies, encompassing 1,715 linear miles of surface water courses and 262,159 surface water acres, have been listed as impaired pursuant to Clean Water Act section 303(d) within the third-party area.
- Monitoring is conducted at only 15 sites.

Comments

Clearly water bodies accepting discharges from numerous represented irrigated lands are not meeting water quality objectives and existing high quality waters are not being maintained as WDR Finding No 16 states that: *“Approximately 44 named water bodies, encompassing 1,715 linear miles of surface water courses and 262,159 surface water acres, have been listed as impaired pursuant to Clean Water Act section 303(d) within the third-party area. Agriculture is identified as the potential source of impairment for approximately 19 of the 303(d)-listed water bodies. The majority of the listed water bodies are within the legal Delta.”*

As is documented in Table 4 of the *SJCDWQC April 30, 2013 Management Plan Update Report*, sampling conducted in the area from 2004 through 2012 shows routine exceedance of water quality standards for: dissolved oxygen, pH, EC, TDS, ammonia, nitrate, e-coli, arsenic, boron, copper, lead, molybdenum, nickel, Azinphos methyl, carbofuran, chlorpyrifos, cypermethrin, DDD, DDE, Diazinon, Dieldrin, disulfoton, Diuron, endrin, HCH delta, linuron, Malathion, methidathion, methomyl, methyl parathion, paraquat dichloride, permethrin, thiobencarb, Simazine, and toxicity to ceriodaphnia dubia and capricornutum. Clearly, water bodies accepting discharges from numerous represented irrigated lands are not meeting water quality objectives and existing high quality waters are not being maintained

Since many of the water bodies in the area have been designated as impaired and sampling shows routine exceedances of water quality standards, the represented agricultural practices have been shown to be not protective of water quality.

2. Samples are collected at 15 Surface Water “Discharge Sites”. The region has approximately 618,000 acres of cropland under irrigation and 6,000 growers with waste discharges from irrigated lands. It is assumed that of the approximately 6,000 farms, discharges of wastewater occur at more than one point on each farm. Sample collection at 15 “representative” surface water locations is not capable of determining if any single discharge is the cause of downstream water quality standard exceedance, stream impairment, or whether agricultural management practices are effective. In order to determine if any single wastewater discharge exceeds water quality standards, it would be necessary to sample that discrete discharge. To determine if any single discharge degrades water quality and causes degradation of the beneficial uses of the receiving stream, it would be necessary to sample both upstream and downstream of the individual point of discharge.

B-1

B-2

3. Samples are collected at 23 Surface Water “Discharge Sites”. The Western San Joaquin River Watershed region has approximately 618,000 acres of cropland under irrigation and 6,000 growers with waste discharges from irrigated lands to 5,000 linear miles of surface water courses many of which have been listed as impaired pursuant to Clean Water Act section 303(d). One can only conclude that farm discharges may be many miles upstream from a “representative” sampling location and that interlying farm discharges would cause significant dilution to any pollutants discharged.

B-3

4. Sampling and toxicity test reporting for ceriodaphnia dubia, a water flea, shows only one end point, percent survival. This is an acute toxicity end point. Chronic toxicity testing would also include endpoints of growth and reproduction. Intermediate levels of pollutants, below acutely toxic levels, may cause sublethal toxic effects. Failure to analyze samples for sublethal effects precludes determination of compliance with the Basin Plan Water Quality objective for toxicity. It is also not possible to conclude any samples collected were not toxic since sublethal effects were apparently not analyzed.

B-4

5. The proposed WDR reports water quality objectives for hardness dependant metals as being “variable”. For permitting situations, the State Board ruled long ago that variability in limitations for hardness dependant metals was unacceptable. The toxicity of metals instream varies with hardness, which can vary significantly upstream and downstream of any given discharge. Use of the lowest observed hardness would result in the most protective evaluation of water quality.

B-5

6. Throughout the proposed WDRs and supporting documents, antidegradation and best practicable treatment and control of wastewater discharges is discussed. The proposed WDR contains no restriction on degradation of surface waters up to the point of meeting water quality standards. It is discussed throughout the mentioned documents that many of the streams in the area have been designated as impaired. The proposed WDR documents that the agricultural discharges routinely exceed water quality standards which degrade the beneficial uses of the receiving streams. Individual discharges are not regulated under the proposed WDR. The Regional Board apparently has no knowledge of the water quality discharged from individual farms and there is no knowledge of any treatment or control at any individual farm. There is knowledge however that the combined agricultural discharges have and continue to significantly degrade water quality. It would seem impossible to state that best practicable treatment and control of a discharge is being provided when water quality has, and is, significantly degraded and there is no knowledge of what “treatment or control”, if any, is being provided at any individual farm. Domestic, commercial and industrial wastewater dischargers are required to adequately treat their wastes to meet water quality standards and meet end of pipe limitations with strict monitoring of the actual discharge and receiving stream. It cannot possibly be in the interest of the people of California to have to trade the quality of their water for the interests of agriculture.

B-6

Conclusion

Reiteration of above

The region has approximately 618,000 acres of cropland under irrigation and 6,000 growers with waste discharges from irrigated lands. It is assumed that of the approximately 6,000 farms, discharges of wastewater occur at more than one point on each farm. Sample collection at 15 “representative” surface water locations, far downstream, is not capable of determining if any single discharge is the cause of a downstream water quality standard exceedance, stream impairment, or whether agricultural management practices are effective. It is also not possible to determine if any individual wastewater Discharger is providing best practicable treatment and control of their discharge. In order to determine if any single wastewater discharge exceeds water quality standards, it would be necessary to sample that discrete discharge. To determine if any single discharge degrades water quality and causes degradation of the beneficial uses of the receiving stream, it would also be necessary to sample both upstream and downstream of the individual point of discharge.

Pollutants will generally be diluted or volatilize as they flow downstream. If the sampling locations are at extreme downstream locations, which they appear to be, it can reasonably be assumed that the approximately 5,000 miles of waterways lying above the sampling location are of lower water quality. The lowest water quality would be immediately downstream of the point of discharge of the pollutant in question, which may be many miles upstream of the sampling location. The proposed WDR and the limited downstream sampling locations only allows the Regional Board to conclude that streams and waterways lying above the sampling location are of lower water quality with higher levels of toxicity and more pollutants exceeding water quality standards. The sampling as proposed, and as has been conducted, does not capture the worst case water quality conditions.

11934 Rising Sun Way, Gold River, CA. 95670 (916) 851-1500

Richard P. McHenry

- Experience**
- Civil Engineer consulting with environmental groups and non-government organizations, principally the California Sportsfishing Protection Alliance, regarding water quality and wastewater permitting issues. November 2008 through the present.
 - Senior Specialist Water Resources Control Engineer, State Water Resources Control Board, Office of Enforcement. May 2007 through October 2008. Assigned to conduct special investigations and enforcement of water quality problems, state wide.
 - Senior Water Resources Control Engineer – May 2006 through May 2007. Underground Storage Tank Cleanup Program – supervision of engineering and geology staff for oversight and enforcement of leaking underground storage tank projects.
 - Senior Water Resources Control Engineer – October 1999 through May 2006. National Pollutant Discharge Elimination System (NPDES), supervision of five to six engineering staff for all permitting and enforcement NPDES projects within a 10 county area of the Central Valley.
 - Water Resources Control Engineer – Central Valley Regional Water Quality Control Board – October 1987 through October 1999. NPDES and land disposal permit writing; compliance inspections; field investigations; enforcement through preparation of Cease and Desist Orders, Cleanup and Abatement Orders and Administrative Civil Liability Complaints; industrial pretreatment program oversight and inspections; stormwater inspections and enforcement. Assisted the State Water Board in developing WWTP and industrial pretreatment program training programs. Significant experience in public speaking and presentations before the Regional Board and the public.
 - State Water Resources Control Board, Sacramento – October 1986 through October 1987. Clean Water Grants, Technical Support Section.
 - Proficient in the use of Word, Excel and PowerPoint.
- Education**
- 1985 California State University Sacramento
- B.S., Civil Engineering
- License**
- P.E. Civil Engineering, State of California (C046739)
- Awards**
- Sustained Superior Accomplishment Award, Central Valley Regional Water Quality Control Board, April 1999
 - Customer Service Award, California EPA, November 2005

EXHIBIT C

Memorandum

15 January 2014

To: Michael Lozeau
From: Bill Jennings

Subject: Is Site Specific Monitoring for the San Joaquin County and Delta Area Coalition Reasonable and Affordable?

Summary

Various water quality experts have commented that representative water quality monitoring at downstream locations cannot identify water quality violations at upstream locations or assess the effectiveness of implemented management measures and therefore is not protective of water quality. The Central Valley Regional Water Quality Control Board (Regional Board) claims that requiring individual discharge monitoring would be unreasonably cost prohibitive for farmers. I reviewed the proposed Waste Discharge Requirements (WDRs), monitoring and reporting program and information sheet, as well as the various reports submitted by the San Joaquin County and Delta Water Quality Coalition to the Regional Board. I also reviewed the Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program from the Irrigated Lands Regulatory Program Environmental Impact Report (EIR). I further examined various reports prepared by county agricultural commissioners regarding the commodity values and the latest Statistical Abstract for California.

The value of agricultural production in the six counties comprising the San Joaquin County and Delta Water Quality Coalition is substantial. Farm net income in California was approximately 32.4% of gross income in the most recent Statistical Abstract (2008). The cost of monitoring/reporting/tracking in the proposed WDRs is \$4.58 per acre and represents approximately 3.7% of the total per acre cost of the order. The cost of a comprehensive individual monitoring program to determine compliance with water quality standards, the need for specific management measures or the effectiveness of implemented management measures for the 31% of large farming operations that comprise 94% of irrigated acreage would be less than 27% of the projected cost of implementing management measures.

I could find no analysis or discussion in the economic review of the EIR or the proposed WDRs that supports or justifies a conclusion that requiring individual farmers to monitor their discharge to determine whether or not they are violating water quality standards or whether or not management practices are needed or if implemented management practices are effective would be an unreasonable financial burden.

C-1

Discussion

The San Joaquin County and Delta Water Quality Coalition region has approximately 618,000 irrigated acres, of which approximately 36,000 acres are regulated under the General Order for Existing Milk Cow Dairies. WDR, p-4. There are approximately 5,865 growers that will require waste discharges from these 582,000 acres of irrigated lands. *Id.* Small farming operations, comprising 69% of growers, account for approximately 6% of the total irrigated lands. Attachment A - Information Sheet, p. 33.

A simple calculation reveals that the 69% of small growers irrigate approximately 34,920 acres, or an average of 8.6 acres each, while the 31% of large growers irrigate approximately 547,080 acres, or an average of 300.9 acres each.

The costs of the San Joaquin County and Delta Water Quality Coalition WDRs are estimated to be approximately \$72 million or \$123.56 per acre annually and this is approximately \$6.09 per acre greater than present costs under the conditional waiver. Information Sheet, p-53. The estimated potential costs per acre are broken down as \$1.46 for administration, \$1.83 for farm planning, \$4.58 for monitoring/reporting/tracking and \$115.69 for management practice implementation. *Id.*, p-55.

The cost breakdown for water quality monitoring is estimated to be \$1,890 for one sample per year of basic parameters and detailed chemistry, including collection, analysis and management. Two complete sampling events would cost \$3,745 and five per year would cost \$9,310. Basic parameter sampling would cost approximately \$390 for one event per year or \$1,810 for five. Table 2-10, Surface and Groundwater Monitoring Cost Breakdown for Use in All Alternatives, Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program, p-2-19.

The costs of monitoring basic parameters plus detailed chemistry for a single discharge point five times per year for each of the 31% of large farms that average 300.9 acres and comprise 94% of irrigated acres in the coalition would cost \$9,310 or \$30.94 per acre. As noted above, the estimated costs of the implementation of management practices is estimated to cost \$115.69 per acre. In other words, under the proposed WDRs, the potential costs of management practice implementation is more than 3.7 times the cost of monitoring to determine whether or not the management practices are working or even if they are necessary at a particular site.

A fundamental problem of the proposed WDRs is that the monitoring program cannot determine if management measures on a particular farm or for a particular discharge are necessary or if implemented management measures are effective. Such an approach penalizes farmers who are in compliance, not discharging pollutants and who may not need to employ new management practices and

Jennings Memorandum: Is Site Specific Monitoring Affordable for San Joaquin County/Delta Coalition
15 January 2014, page 3 of 4.

rewards those who haven't complied, are violating water quality standards and who have failed to institute effective management practices.

Agriculture in the Central Valley is a major industry. The San Joaquin County and Delta Water Quality Coalition comprises parts of five counties, including all of San Joaquin County and parts of Contra Costa, Amador, Calaveras, Alpine, Alameda and Stanislaus Counties. According to the annual reports by each County Agricultural Commissioner that must be submitted to the Department of Food and Agriculture in accordance with Section 2279 of the California Food and Agricultural Code, the value of agricultural commodities produced in 2012 in San Joaquin, Stanislaus, Contra Costa (2011), Amador, Calaveras, Alpine and Alameda counties was \$2.869 billion, \$3.278 billion, \$92.919 million, \$34.585 million, \$29.655 million, \$4.5 million, \$2.059 million and \$40.059 million, respectively. All of the counties reported record highs of agricultural commodity production, with the exception of Alameda and Alpine, which reported slight declines from the previous year. As only a small portion of Stanislaus County farmland is included in the present order, the vast majority of irrigated lands subject to the proposed WDRs are in San Joaquin County.

According to the most recently published California Statistical Abstract (2008), San Joaquin, Stanislaus, Contra Costa, Amador, Calaveras, Alpine and Alameda counties are the 7th, 6th, 39th, 48th, 53rd, 56th, and 45th leading agricultural producers, respectively. Table G-14, California Statistical Abstract 2008, p-130. The cash farm income in California was \$39.094 billion in 2007 and the net farm income that year was \$12.665 billion. Id, Table G-9 and Table G-12, pp-122 & 130. Consequently, net farm income was approximately 32.4% of gross income in 2007. Agriculture is not only a major industry but also a highly profitable industry in California.

The Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program, which was part of the draft Program Environmental Impact Report of the Waste Discharge Regulatory Program for Irrigated Lands within the Central Valley Region is not a comprehensive benefit/cost analysis. The analysis only examines the cost of monitoring, proposed alternatives and various management practices on agriculture. It does not evaluate the financial ability of various farmers to individually monitor their discharges or evaluate implemented management measures. It completely fails to disclose, analyze or discuss the costs of pollution from irrigated agriculture on the environment and society. These include increased water treatment costs; public health and environmental costs, including losses affecting public trust resources like ecosystem services, recreational and commercial fisheries, property values, esthetic enjoyment, etc. Further, ECONorthwest's An Economic Review of the Draft Irrigated Lands Regulatory Program Environmental Impact Report reviewed the Technical Memorandum and found it to be seriously flawed, containing "an incomplete, biased representation of the alternatives' overall costs" and that it "violated generally accepted standards of practice that apply to this type of economic analysis." ECONorthwest Report, p-2, 9.

Jennings Memorandum: Is Site Specific Monitoring Affordable for San Joaquin County/Delta Coalition
15 January 2014, page 4 of 4.

In reviewing the proposed WDR's, monitoring plans and information sheet; I can find no information or discussion in any of the documents that justifies any conclusion that requiring individual farmers to monitor their discharges and adjacent receiving waters to determine whether or not they are violating water quality standards or whether or not management practices are needed or are effective is an unreasonable financial burden. Indeed, requiring farmers to monitor and assess their discharges would not only be a giant and necessary step toward protecting water quality, it could also prove to be an economic benefit to many farmers in the long run because monitoring would reveal whether or not additional management practices are even needed for a specific location.



January 17, 2013

Attn: Chris Jimmerson
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

Re: Provisions under C. Requirements for the Third-Party Group in the San Joaquin County and Delta Water Quality Coalition Tentative Draft Waste Discharge Requirements released by the Central Valley Regional Water Quality Control Board, December 2013

Dear Mr. Jimmerson,

The Contra Costa Resource Conservation District would like to comment on the provision C.9 Requirements for the Third-Party Group in the San Joaquin County and Delta Water Quality Coalition Tentative Draft Waste Discharge Requirements (referenced at the end of this letter). Under this provision, it is our understanding that third-party groups would be required to identify why growers have failed to maintain good standing of their membership in the third-party group. While this new provision may not be an issue for organizations whose mission includes regulation, it is a serious concern for Resource Conservation Districts (RCDs). The reason for the success of RCDs in developing relationships with growers across California and the nation is the fact that we are a non-regulatory organization. Growers can discuss resource issues more freely with RCD staff and work to find solutions without the worry of being ticketed or fined.

5-1

Our request is that provision C.9 be modified to not require regulatory reporting by third-party groups.

The San Joaquin County Resource Conservation District (SJRCDD) who currently acts as the third-party group for the San Joaquin County and Delta area has made huge strides to improve water quality because of its great relationships with growers in the area. It would be unfortunate if the California Regional Water Quality Control Board (CRWQCB) stipulates that the third-party group take on this regulatory role. The result of this action would most definitely be the inability of the SJRCDD to serve as the third-party group. The SJRCDD is providing a great service to the CRWQCB by working directly with growers to improve water quality, coordinating water quality monitoring and education events, and submitting reports. In the absence of this service, the CRWQCB would definitely have an increase in workload.

CONTRA COSTA



RESOURCE
CONSERVATION DISTRICT

(925) 672-6522 | PHONE
(925) 672-8064 | FAX

5552 Clayton Road, Concord, CA 94521

We strongly recommend the CRWQCB consider the modification of this provision.

Sincerely,

Igor Skaredoff
Board President
Contra Costa Resource Conservation District

Referenced Provision, page 22 in Tentative Draft

C. Requirements for the Third-Party Group. *In order to remain eligible to serve as a third-party representative to Members, the third-party shall perform the following:*

9. Work cooperatively with the Central Valley Water Board to ensure all Members are providing required information and taking necessary steps to address exceedances or degradation identified by the third-party or board. As part of the Membership List submittal, identify the growers known by the third-party who have: (1) failed to implement improved water quality management practices within the timeframe specified by an applicable SQMP/GQMP; (2) failed to respond to an information request from the third-party associated with any applicable SQMP/GQMP or other provisions of this Order; (3) Failed to participate in third-party studies for which the third-party is the lead; (4) failed to provide confirmation of participation in an outreach event (per section IV.B.4 of this Order); or (5) otherwise failed to maintain good standing of their membership in the third-party group.



Lodi District Grape Growers Association, Inc.

January 17, 2014

Pamela Creedon
Executive Officer
Central Valley Regional Water Quality Control Board
11020 Sun Center Dr., St. 200
Rancho Cordova, CA 95670

Submitted via email

RE: San Joaquin County and Delta Area Tentative Waste Discharge Requirements General Order

Dear Ms. Creedon,

On behalf of the Lodi District Grape Growers Association Board of Directors and members, I thank you for the opportunity to comment on the Tentative Waste Discharge Requirements General Order for the San Joaquin County and Delta Area.

Our Association feels that the frequency of reporting outlined in the Tentative WDR General Order is excessive and costly to both growers and the Coalition. The Tentative WDR General Order requires, "By 15 June 2015, all Members within a high vulnerability area must prepare their Farm Evaluation and submit it to the third-party. An updated Farm Evaluation must be prepared and submitted to the third-party by 15 June and annually thereafter." (Page 26)

As proposed, the annual reporting requirement is excessive, especially for permanent crops (such as winegrapes). There are over 100,000 acres of winegrapes in San Joaquin County, in addition to numerous other permanent crops. These crops account for half of the irrigated acreage in the area. Farming practices for permanent crops vary little from year to year, therefore Farm Evaluation reports will show virtually the same information each year. We feel that the submission of this report every five years would be less of a burden on growers, as well as the Coalition.

If Coalition members were divided into groups, with 1/5 of the members scheduled to report each year, the Coalition's annual workload would be reduced and could be managed by a smaller staff, therefore reducing costs which are passed on to the grower. There would also be a reduction in the time and costs associated with preparation of the report by the grower.

Our Association will continue to be engaged in this process and will work with the Coalition to keep our members up to speed on the necessary steps to comply with the General Order.

The Lodi District Grape Growers Association was formed in 1952 and represents the interests of wine grape growers in California Crush District 11. Today, over 100,000 acres of wine grapes are grown in the district.

Sincerely,

Amy Blagg
Executive Director, LDGGA

David Avila
Western Dairy Design
316 West F Street, Ste 100
Oakdale, California 95361
209-848-8674

16 January 2014

California Regional Water Quality Control Board Central Valley Region, Order R5-XXXX-XXXX
Waste Discharge Requirements General Order
For
Growers in the San Joaquin County and Delta Area That are Members of a Third-Party Group
(Order)

As stated the scope attempts to address "irrigated lands" discharges of sort as "The discharges result from runoff or leaching of irrigation water and/or stormwater from irrigated lands."

This is a formidable effort to reduce water contamination of sort. Two issues come to mind. One, as you state in item 52 "The United States Department of Agricultural Natural Resources Conservation Service (NRCS) administers a number of programs related to water quality. Considering what the NRCS does, it would make sense for the State to cooperate with the NRCS to enhance the overall results of the NRCS efforts. Second, your department's efforts center about regulation with no remedy but to transfer money from the land owner as a form of a taking.

Considering the statement 57, "This Order does not authorize violation of any federal, state, or local law or regulation" under the GENERAL FINDINGS heading, how will this Order be implemented as it appears to violate a host of Federal law? Reference the following issues:

This Order is in direct conflict with a United States Act of Congress. Reference the Clean Water Act; Title 33 USC; Section 1362-Definitions; (14) The term "point source" means..... This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." That means it is not lawful for this Order to stand as written for it attempt to control what is exempted by Federal Law. The Congress of the United States has been consistent with the intent to protect "production" for they have historically recognized production as the foundation of our form of society and without it there is no society. The intent of Congress to protect agriculture from unlawful regulation is confirmed with Friends of the Everglades, Florida Wildlife Federation and Fishermen Against Destruction of the Environment v. South Florida Water Management District; "Congress even created a special exception to the definition of 'point source' to exclude agricultural storm water discharges and return flows from irrigation, despite their known, substantially harmful impact on water quality."

This Order also violates the US Constitution for the Order makes a crime of a Constitutional Right. These rights are with Amendment IV; V; VII; IX and XIV Section 1. As well, it violates the Clean Water Act as

mentioned. Several Supreme Court cases confirm the violations of this Order. Ref. *Miranda v. Arizona*, 384 U.S. 436 (1966) “Where rights secured by the constitution are involved, there can be no rule making or legislation which would abrogate them.” *Miller vs. U.S.*, 230 F. 486, 489 “The claim and exercise of a constitutional Right cannot be converted into a crime.”

Considering the Supremacy Clause, Article VI, Clause II of the US Constitution, what definitive position does the State of California take with this Oder?

The State of California can not own water for the water has been allocated for the beneficial use of the land owners prior to the California State Constitution of 1876. Ref. HR 365, Mining Law of 1866, Section 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owner of such vested rights, shall be maintained and protected in the same;

As well water from forest lands is designated to irrigation via the Organic Administrative Act of 1897; “No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.” “... All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder. Note, this relates to law prior to the Act. As well, these waters are not to have a reserved right for aesthetic, recreational, wildlife preservation, and stock watering purposes.” *United States v. New Mexico*, 438 U.S. 696 (1978). Land Patent allodial title also “grants” the water to the land owner, his heirs and assigns “forever” which is granted by the US Constitution’s Article IV, Section 3, Clause II known as the property clause and Acts of Congress.

Considering allodial title of properties by land owners via the constitutional contract known as the Land Patent as authorized in the US Constitution Article IV, Section 3, Clause II known as the property clause, a number of Acts of Congress which nullify all statutes and regulations implemented after the date of the Land Patents, where does the Order derive its “jurisdiction” over a Land Patent?

I noticed with in the introduction to your Order, Findings, SCOPE AND COVERAGE OF THEIS ORDER, (2) the word “may” is used numerous times. The Supreme Court’s decision with *City of Dallas v. Mitchell*, 245 S.W. 944, 945-46 (Tex. Civ. App. –Dallas 1922) establishes “The rights of the individual are not derived from governmental agencies, either municipal, state or federal, or even from the Constitution. They exist inherently in every man, by endowment of the Creator, and are merely reaffirmed in the constitution, and restricted only to the extent that they have been voluntarily surrendered by the citizenship to the agencies of government. The people’s rights are not derived from the government, but

the government's authority comes from the people...."; is this use of the word "may", not being mandatory but of a "voluntary" nature, an attempt to comply with Dallas v. Mitchell?

Considering the California Constitution, Article III Section 1 recognized the US Constitution as the supreme law of the land, please explain how this Order as written can stand in regard to each of the conflicts with the US Constitution as referenced in this notice.

I also question the "fee" and most sorely contest the potential unreasonable fines. These are no more than extortion. The agents of the Water Quality Control Board are already being paid by the farmers via taxation of many sources, too many to know. Considering the definition of "extortion" in the United State Code Title 18 Section 1951- Interference with commerce by threats of violence (2)- The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Money is considered the "property" of the person who earns it, any enforcement action taken in violation of the US Constitution while acting under the "color of law", (that is, the Order) and the threat of unreasonable fines can be defined as extortion as defined here. How do you relate the context of your Order to USC Title 18 Section 1951 as described here?

Having this notice, how will you defend any action taken by this agency under the color of law against a suit against the agency and or directly to an agent of the agency under the United State Code Title 42 Section 1983?

In conclusion, considering that the premise of identifying and reducing water pollution is laudable, if you started over with a new document based on the premise "how may we help you" versus "how may we stop you", the Order may receive a positive review. As it stands, the Order does not pass the smell test as it is held up to the light of freedom and the rights as recognized in the Declaration of Independence as preserved by the Founding Fathers with the most famous document ever penned by mankind, The Constitution of the United States, the contract as ratified between Government and the People.

Thanks you,



David Avila