CALIFORNIA FARM BUREAU FEDERATION

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Sent via E-Mail
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August 10, 2012

David Sholes
Central Valley Regional Water Quality Control Board
1685 "E" Street
Fresno, CA 93706-2007

Re: Comments on the Tulare Lake Basin Area Draft WDRs/MRP for Discharges from Irrigated Lands

Dear Mr. Sholes:

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 more than 74,000 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 Tulare Lake Basin Area Draft Waste Discharge Requirements ("Draft WDR") and Monitoring and Reporting Program ("MRP") for Discharges from Irrigated Lands and respectfully presents the following remarks.

Upon reviewing the Tulare Lake Basin Draft WDR as well as the previously released Eastern San Joaquin River Watershed WDR, Farm Bureau is concerned that the general orders are not being individually developed and tailored, but rather are duplications of previously prepared orders. Each coalition represents unique geographic characteristics, including rainfall, hydrology, drainage, commodities grown, topography, etc. Given all of these vast differences, each general order should be individually drafted specific to the region it regulates.

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General Order Page 8, Finding 34—California Environmental Quality Act

Within this Draft WDR, adverse environmental impacts associated with potential compliance activities are listed. However, among those impacts "associated, directly and indirectly, with specific compliance activities growers may conduct in response to the Order's regulatory requirements," there is no mention of loss of productive farmland. The loss of productive farmland could occur either directly or indirectly due to the compliance activities and practices growers must conduct in response to the conditions of the Order, thus farmland should be included in this list of impacts. Given that this agricultural regulatory program impacts agriculture and agricultural lands, the WDR should be revised to acknowledge that "the loss of productive farmland may occur due to increased regulatory costs and management practices growers must implement to comply with the Order." (Draft WDR Order, p. 8, ¶ 34.)

General Order Pages 9-10, Finding 40—California Water Code Sections 13141 and 13241

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 Tulare Lake Basin Area WDR. (Wat. Code, § 13141.) Finding 40 incorrectly states that Section 13141 "does not necessarily apply in a context where an agricultural water quality control program is being developed through waivers and waste discharge requirements. (Draft WDR Order, p. 10, ¶ 40.) Nothing within Section 13141 provides such limitations. Rather, a proper reading of Section 13141 *requires* looking only at the plain meaning of the statutory language. (*Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126, ["we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction."].) Upon examining the plain language of Section 13141, it does not state or imply that an estimation of costs is only required if an agricultural water quality control program is adopted into a Basin Plan. Rather, the plain and straightforward language states that "prior to implementation of *any* agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan." (Wat. Code, § 13141.) Therefore, notwithstanding the fact that this agricultural water quality control program, the Long-Term Irrigated Lands Regulatory Program, is comprised of waste discharge requirements, the Regional Board is still statutorily obligated to conduct a cost estimation of the program. Given that this Draft WDR proposes new costly regulatory components not previously analyzed during the environmental review stage, the Regional Board must analyze, evaluate, and estimate all of the costs of these new regulatory requirements.

General Order Page 14, Finding 60—General Findings

Finding 60 contains incorporate numerous independent clauses in one paragraph. Specifically, the clause regarding the privilege to discharge waste into waters of the state needs to be separate and independent from clauses regarding coalition duties such as contact information of members, as well as access to private properties. Given that each of these topics is mutually exclusive, the clauses should not be merged into the same

Finding paragraph. Additionally, the first sentence of Finding 60 is redundant as it repeats the first sentence of Finding 59. (Draft WDR Order, p. 13, ¶ 59.)

General Order Page 15, 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, discharge limitations for both surface water and groundwater should be rewritten to state "wastes discharged from Member operations shall not cause an exceedence 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."

General Order Page 17, Provision IV. B. 7—Sediment and Erosion Control

As written, Provision 7 is unnecessarily broad and overly expansive, and creates edge of field discharge limitations for sediment, which is inappropriate as it is neither a receiving water limitation nor a proper waste discharge requirement. Rather than requiring all members who have any "potential to discharge surface water offsite" to develop Sediment and Erosion Control Plans, the language should be revised to require plans only when members "have the potential to cause erosion or discharge sediment offsite during irrigation or storm events."

General Order Page 17, Provision IV. B. 8—Nitrogen Budgets

Provision 8 requires all members to prepare and implement an annual nitrogen budget. Such a budget should analyze "nitrogen" application rather than "nutrient" application. (Draft WDR Order, p. 17, ¶ 8.) As seen in previous drafts, only members in high vulnerable areas where nitrate is a constituent of concern were required to prepare annual nitrogen budgets. Rather than requiring all members to prepare nitrogen budgets, as Provision 8 is currently written, the WDR should be revised to allow flexibility in the requirements for those areas that have no or a lower propensity to impact water quality.

General Order Page 17, Provision IV. B. 13—Access to Private Property for Inspections

Provision 13 is inconsistent with Water Code Section 13267 and hampers private property rights. Water Code section 13267(c) clearly states that any inspection "shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure." As currently drafted, Provision 13 ignores Section 13267 and attempts to allow inspections of private property at any time without notice to or consent from the landowner or obtaining a necessary warrant. Statements within the previous administrative draft for the Eastern San Joaquin WDR correctly summarized the law and should replace Provision 13:

> "The Member understands that pursuant to Water Code section 13267(c), the Central Valley Water Board or its authorized representatives, upon presentations of credentials at reasonable hours, may inspect the facilities of persons subject to this Order to ascertain whether the purposes of the Porter-Cologne Act are being met and whether the Member is complying with the conditions of this Order. The inspection shall be made with the consent of the Member or owner of the facilities, or if consent is withheld, with a duly issued warrant pursuant to the procedure set forth in Title 13 Code of Civil Procedure Part 3 (commencing with section 1822.50). However, in the event of an emergency affecting the public health and safety, an inspection may be performed without the consent or the issuance of a warrant."

General Order Page 17, Provision IV. B. 16—Settling Ponds, Basins, and Tailwater Recovery Systems

Provision 16 requires licensed civil engineers to design or modify settling ponds, basins, or tailwater recovery systems. No explanation is given as to why civil engineers now must certify such projects rather than the farmers and ranchers who have been doing such work for years on their own properties. Given that no explanation is given and no cost analysis has been conducted for the inclusion of such requirements, this new requirement should be deleted.

General Order Pages 22-23, Provisions B, C, and D; Pages 26-28, Attachment A, Information Sheet—Template Requirements for Farm Evaluation, Sediment and Erosion Control Plan, and Annual Nitrogen Budget

In previous discussions as well as previous drafts of the WDRs, templates for the Farm Evaluation, Sediment and Erosion Control Plan, and Annual Nitrogen Budget were to be developed by the coalitions and approved by the Executive Officer. The current Draft WDR substantially changes how these documents will be developed, as they will no longer be developed by the coalitions, but rather by the Regional Board and stakeholders. (See Attachment A, Information Sheet, pp, 26-28.) This change is problematic as all three of these documents need to be developed by those directly in agriculture, with the assistance of professionals that work with agriculture (for example, qualified agronomists and/or agricultural engineers). Further, by substantially changing the process, the development of the templates has become akin to new permit requirements that require action and adoption by the Central Valley Board. (See Wat. Code, § 13222(a) limiting the duties that may be delegated from the Regional Board to the Executive Officer.)

General Order Pages 22-23, Provisions C and D; Pages 27-28, Attachment A, Information Sheet—Certifications for Sediment and Erosion Control Plans and Annual Nitrogen Budgets

The Draft WDR requires Sediment and Erosion Control Plans and Nitrogen Budgets (in high vulnerability groundwater areas) to be prepared, approved, amended, and certified by qualified specialists. (Draft WDR, pp. 22-23; Attachment A, Information

Sheet, p. 27.) In certain cases, growers have the educational background, qualifications and experience to be classified as qualified specialists and the Order should reflect this. Hiring a specialist to prepare and certify such plans is a costly endeavor, the cost of which has not been analyzed by the Regional Board (see need for a proper cost estimation *supra*). Further, in an attempt to justify the need for such specialists, (as explained in Attachment A, Information Sheet for the Sediment and Erosion Control Plans, p. 27) it is pointed out that such requirements are used with the State Board's Construction Stormwater Program. An agricultural regulatory program is vastly different than a stormwater construction program. Although certain regulatory requirements may be appropriate for short-term construction programs, they are not necessarily appropriate for long-term agricultural activities. Thus, this certification requirement should be deleted.

Attachment B, MRP, Page 9, Provision III. C. 4—Toxicity Testing

inception of the Irrigated Lands Regulatory Program, surface water monitoring has occurred and has utilized acute aquatic toxicity testing. Given that the MRP contains no evidence to indicate that acute testing is no longer adequate, and since chronic testing is more costly, thus triggering the need for a new economic analysis of impacts, Farm Bureau respectfully requests that requirements for "chronic" testing be removed from the WDR, footnote 4 deleted in its entirety, and the continuation of the existing surface water acute toxicity testing be added in its place.

Attachment B, MRP, Pages 12-13, Provision IV. A—Groundwater Vulnerability Designations

The Draft MRP proposes an overly expansive definition of high vulnerability areas "as those areas that have been identified by the State Water Board Hydrologically Vulnerable Areas, areas covered by the California Department of Pesticide Regulation groundwater protection program, and areas identified by the board with exceedances of water quality objectives for which irrigated agriculture waste discharges may cause, or contribute to the exceedance." (Draft Attachment B, MRP, p. 12.) Throughout the region, not all groundwater vulnerability areas are vulnerable due to the use of farming practices. Rather than having an extremely open-ended definition of "high vulnerability areas," Farm Bureau suggests using the term to describe those areas deemed vulnerable to contamination by the Department of Pesticide Regulation. In addition to revising the definition of "high vulnerability areas," the definition of "low vulnerability areas" should

be revised to distinguish between those exceedances resulting directly from agricultural pesticide or toxicity uses as opposed to those resulting from various sources.[1]

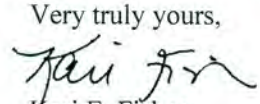
Compliance with the California Environmental Quality Act

The Draft WDR concludes that "this Order is based on elements of Alternatives 2 through 6 of the PEIR" and that "although 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. (Draft WDR Order, p. 8, ¶¶ 33-34.) The Draft WDR further finds that the PEIR "identified, disclosed, and analyzed the potential environmental impacts of the Order." (*Ibid.*) The contents of this Order do not fall within the range of alternatives analyzed within the PEIR nor have the impacts associated with the Order been properly analyzed.[2] These new components 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 that would have a significant and cumulatively considerable impact on the environment.

As seen from reviewing the administrative draft and tentative draft of the Eastern San Joaquin Order, as well as this Draft WDR, new conditions and requirements continue to be created and added to the Order long after the completion of the PEIR, such as edge of field discharge limitations. Given that the PEIR did not analyze many of the impacts associated with the Draft WDR, the Regional Board cannot rely upon the CEQA analysis conducted within the PEIR.

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 Tulare Lake Basin Area WDR and MRP for Discharges from Irrigated Lands.

Very truly yours,



Kari E. Fisher
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[1] A proper definition of high and low vulnerability areas is needed as the groundwater monitoring programs hinge upon such definitions. Further, within the groundwater monitoring programs, flexibility should be incorporated to allow coalitions the ability to create tailored programs. Thus, rather than treating all lands within a section plot as similar, lands should undergo ground-truthing so as to isolate those areas that have a higher propensity to impact water quality.

[2] Farm Bureau also questions the Regional Board's authority to require mitigation measures within the Draft 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).)