CALIFORNIA FARM BUREAU FEDERATION
NATURAL RESOURCES AND ENVIRONMENTAL DIVISION
2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 · PHONE (916) 561-5665 · FAX (916) 561-5691

January 21, 2011

Sent via E-mail
commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: ***Comment Letter – Policy for Toxicity Assessment and Control***

Dear Ms. Townsend:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 76,500 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 comment on the State Water Resources Control Board's (hereinafter "State Board") Draft Policy for Toxicity Assessment and Control ("Draft Policy"). Farm Bureau has numerous concerns with the Draft Policy and its impacts to agricultural lands and agricultural dischargers throughout the state. The Draft Policy is a substantial policy shift in toxicity assessment and control, especially for agricultural dischargers. Application of numeric effluent limitations for toxicity would be a considerable departure from current regulation for most dischargers that would be subject to the Draft Policy.

The Draft Policy Negatively and Disproportionately Impacts Agriculture

Agricultural resources are an important feature of the existing environment of the State, and are protected under federal policies, such as the Farmland Protection Policy Act and National Environmental Policy Act ("NEPA"), State policies, and the California Environmental Quality Act ("CEQA"). Agriculture is the number one industry in California, which is the leading agricultural state in the nation. (Food & Agr. Code, § 802 subd. (a).) Agriculture is one of the foundations of this State's prosperity, providing employment for one in 10 Californians and a variety and quantity of food products that

both feed the nation and provide a significant source of exports. (CALFED Final Programmatic EIS/EIR, July 2000, pg. 7.1-1.) In 1889, the State's 14,000 farmers irrigated approximately one million acres of farmland between Stockton and Bakersfield. By 1981, the number of acres in agricultural production had risen to 9.7 million. (Littleworth & Garner, California Water II (Solano Press Books 2007) p. 8.) More recently, the amount of agricultural land in the State has declined. From 1982 to 1992, more than a million acres of farmland were lost to other uses. Between 1994 and 1996, another 65,827 acres of irrigated farmland were lost, and this trend is expected to continue.

In order to preserve agriculture and ensure a healthy farming industry, the Legislature has declared that "a sound natural resource base of soils, water, and air" must be sustained, conserved, and maintained. (Food & Agr. Code, § 802(g).) Prior to negatively impacting agricultural lands, decision makers must consider the impacts to the agricultural industry, the State as a whole, and "the residents of this state, each of whom is directly and indirectly affected by California agriculture." (Food & Agr. Code, § 803.) If adopted, the Draft Policy negatively and disproportionately impacts the State's agricultural resources.

Agriculture Should Not Be Regulated as a Point Source

The Draft Policy seeks to effectively regulate all discharges throughout the State as point sources subject to NPDES requirements. Agriculture is not, nor should it be, subject to NPDES regulations. (33 U.S.C. §1342(l).) As such, it is not appropriate to apply whole effluent toxicity ("WET") requirements to agricultural dischargers or to ambient surface waters. By definition and in practice, WET requirements have long been associated with determining the presence and level of toxicity in "effluent" – not in non-point source discharges or ambient waters. EPA's WET testing methodologies have been developed to apply to NPDES permit holders and not to non-point source discharges. Thus, in general, the Draft Policy should be revised to eliminate its application to agriculture, and the WET water quality objectives should be removed completely.

Creation of Channelized Dischargers Definition

The Draft Policy proposes to create a new definition for channelized discharges that would apply almost exclusively to agricultural dischargers. This definition is inappropriate. The definition is inconsistent with applicable state law and would apparently expand the WET monitoring requirements to discharges to agricultural conveyance facilities that are not waters of the United States or surface waters of the State. Specifically, the proposed definition defines agricultural dischargers as those that discharge through a directed channel that are not regulated under the NPDES permit program. Such a definition is highly problematic and erroneous since all channels are not necessarily surface waters of the State. Man-made agricultural conveyance facilities and channels are not surface waters of the state and therefore discharges to such channels are not subject to the Clean Water Act or the Porter-Cologne Water Quality Control Act.

Further, unless specifically identified in a Water Quality Control Plan (Basin Plan), constructed agricultural drains do not have designated beneficial uses and therefore the WET objectives, which are designed to protect aquatic life beneficial uses, would not apply. By including all non-point source discharges to channels as part of the definition of channelized discharges in this policy, the Draft Policy implies that all "channels" are surface waters of the State subject to this policy. That is factually and legally incorrect and thus the definition must be modified accordingly.

Whole Effluent Toxicity Objectives and Testing Requirements are Inappropriate

Under the Draft Policy, channelized dischargers would receive numeric effluent limitations for toxicity in conditional waivers or individual waste discharger requirements ("WDR"). Within the conditional waivers or individual WDRs, agricultural dischargers would have to comply with numeric chronic and acute toxicity water quality objectives based on a null hypothesis test. To show compliance with the objective, the null hypothesis has to be rejected. Thus, the proposed null hypothesis presumes that all water quality is toxic until sufficiently demonstrated that the water is non-toxic. This approach inappropriately shifts the burden to individual farmers for proving that the ambient water and discharges to the receiving water are not toxic versus proving that agricultural discharges are causing toxicity in the receiving water.

Further, the Draft Policy would require channelized dischargers to conduct at least four chronic WET tests per year. This requirement is unreasonable and inappropriate. First, chronic toxicity testing by individual agricultural dischargers is *not* currently required by the Regional Water Quality Control Boards in any of the current irrigated agricultural waiver programs because it is *not an appropriate measurement for agriculture*. Agricultural discharges are not constant but intermittent. It is unlikely that there would ever be a four-day continuous discharge from irrigated agriculture that contained constant levels of toxic pollutants. Because agricultural discharges are episodic, acute toxicity testing is a more appropriate methodology. Second, quarterly monitoring is arbitrary and does not reflect the seasonality of agriculture. It is inappropriate for the State Board to generically dictate the type and frequency of monitoring without consideration of any watershed specific information. The determination of monitoring requirements are best left with the Regional Boards as they have the information necessary to determine what is appropriate.

The Draft Policy is Not Reasonable

The fundamental principle of the Porter-Cologne Water Quality Control Act, Water Code sections 13000 et seq., states that water quality regulation is carried out appropriately "to attain the highest water quality that *is reasonable*, considering all the demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code, § 13000, emphasis added.) Beneficial use designations form the heart of the water quality regulation. (Wat. Code, §§ 13241, 13242.) In fulfilling its statutory imperative, the State

Board is required to "establish such water quality objectives ... as in its judgment will ensure the *reasonable protection* of beneficial uses ..." (Wat. Code, § 13241, emphasis added.) The State Board is required to identify the beneficial uses of water bodies based on actual past uses, actual current uses, and probable future uses. (Wat. Code, § 13241(a).) These designations then direct the regulatory activity necessary to protect the beneficial uses of the State's water bodies.

Given the importance of beneficial use designations, the State Board cannot arbitrarily adopt blanket beneficial uses unsupported by evidence for all waters of the State. Further, it is improper to extent these beneficial uses to channelized dischargers. Rather than proceeding in such a manner, analysis must be completed prior to each beneficial use designation as to the reasonableness of such a designation and whether such a designation is attainable.

The Draft Policy Fails to Evaluate Economic Costs

The proposed toxicity objectives and implementation procedures within the Draft Policy will have significant economic impacts and other consequences associated with compliance and enforcement. Prior to adopting the Draft Policy, extensive consideration of economic impacts to agriculture must be done.

The requirement to consider economics under Porter-Cologne is absolute. Water Code, section 13141 explicitly mandates:

> State policy for water quality control adopted or revised in accordance with the provisions of this article, and regional water quality control plans approved or revised in accordance with Section 13245, shall become a part of the California Water Plan effective when such state policy for water quality control, and such regional water quality control plans have been reported to the Legislature at any session thereof.
> However, prior to implementation of any agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan.

(Wat. Code, § 13141.) Before the State Board can impose waste discharge requirements or conditioned water quality certification for discharges from irrigated lands, Porter-Cologne requires that it "shall take into consideration" the following factors: "the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." (Wat. Code, § 13263.) Section 13241 in turn lists six "factors to be considered," including "economic considerations" and "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." (Wat. Code, § 13241.)

Anticipated program implementation costs to the agricultural community include increases in potential fees, management practice implementation, monitoring costs, report preparation, and cost for education, as well as other costs. Given that the impacts of water quality regulations frequently take years to materialize, the State Board should analyze the economic costs and impacts within a dynamic framework taking into account the projected changes in the economic situation *over time*.

In addition to direct costs imposed on the agricultural community, the State Board should evaluate indirect costs, including the economic consequences that are transmitted via market interactions to other groups, such as consumers. Water quality regulation, such as the Draft Policy, increases the average cost of production and has a direct negative effect on producer and the consumer through the resulting increase in variable costs and the output price. The propagation of the impacts of a regulation through the economy is well documented and can be quantified by economic analysis.

The Draft Policy proposes dramatic and serve impacts on the agricultural industry, which will have a significant effect on the economic and social environment throughout the State. Such impacts include negative economic consequences, the possibility of eliminating agricultural crops produced in the area, loss of jobs, loss of food supply, loss of prime agricultural lands, economic collapse of local communities, changes the landscape and land uses, loss of wildlife habitat, loss of groundwater recharge areas, as well as other social and economic impacts. In addition to direct impacts, indirect impacts and consequences, as well as cumulative consequences are reasonably foreseeable and must be analyzed.

The Draft Policy Does Not Comply with CEQA

Rather than conducting a thorough analysis of all potential impacts to agricultural lands, agricultural vitality, agricultural production, and agricultural resources, the "Environmental Effects of the Proposed Policy" briefly concludes the environmental impacts to agricultural dischargers and agricultural lands throughout the State are "purely speculative." (Staff Report, p. 62.)

CEQA's informational purposes are not satisfied when an environmental document simply ignores or assumes a solution to potential discharges to waters of the state from agricultural lands. (*Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 167.) Rather, decision makers and the public must be presented with sufficient facts to evaluate the pros and cons of changes to be made in conditional waivers of waste discharge. (Cal. Code Regs., tit. 14, §§ 15002(a), 15121; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, overruled on other grounds; *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 160 Cal.App.4th 715.) As currently drafted, the Staff Report and accompanying documents fail to adequately evaluate the impacts, risks, feasibility, cost, alternatives, and possible mitigation measures associated with the Draft Policy, and therefore, do not comply with CEQA.

Conclusion

Thank you for the opportunity to provide our comments and concerns. We urge the State Board to significantly revise the Draft Policy and eliminate the Policy's application to agricultural dischargers. Any regulations aimed at dischargers who are NPDES permittees should not also be aimed at irrigated agricultural dischargers. We look forward to further involvement and discussion with the State Board on the proposed Draft WET Policy.

Very truly yours,

Kari E. Fisher
Associate Counsel

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