

Waste Discharge Requirements  
for Rice Growers in the Sacramento Valley  
Order Number R5-2014-xxxx

**RESPONSE TO COMMENTS**

The California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board or “board”) has provided opportunity for the public to submit written comments on the tentative Waste Discharge Requirements for Rice Growers in the Sacramento Valley, Order R5-2014-xxxx (referred to as the “tentative Order” or “Order”). This document contains written responses to comments that were timely received on the tentative Order.

The tentative Order was released for public review on 17 January 2014 with the comment period ending on 18 February 2014. Four comment letters were received by the deadline. They were submitted by:

1. California Rice Commission
2. California Farm Bureau Federation
3. Sacramento River Water Protection Program
4. Western Dairy Design

Prior to circulating the tentative Order for public comment, the board circulated an “administrative draft” Order for public review. The administrative draft public review and comment process that the board engaged in is not required by law or policy, but was conducted to help the board work with dischargers and other interested parties to develop the best possible policies for the protection of water quality while maintaining the viability of the Central Valley’s agricultural industry. The draft review period began on 13 August 2013 and closed on 13 September 2013. The board staff did not develop written responses to comments on the administrative draft Order, however comments were taken into account and multiple changes to the Order have been made.

Received letters are itemized with the comment and associated responses. Any sections and/or page numbers noted refer to the tentative Order, not the track change document.

**SPECIFIC RESPONSES**

**Comment Letter 1 – California Rice Commission**

**1-1. WDR: Requirement to maintain copy of Order at place of business**

**Comment summary:** The commenter requested that Provision IV.B.16 be revised to allow a Regional Board approved summary of the Order be available rather than requiring the Order itself be maintained at the Grower’s primary place of business. The commenter also stated it was not feasible and practical for Growers to maintain such excerpts to be available at all times to operational personnel. The commenter states it is appropriate for the Order to be available at the shop or office, but not on a tractor, harvester, or other farm equipment.

**Response:** Staff agrees that a well-written summary of the Order can effectively convey the key concepts of the Order’s requirements. However, the Grower is being regulated based on the actual content of the Order, and not just the wording that may be provided in a summary of the Order. It is important for the Grower to have a copy of the entire Order, since the Grower bears ultimate responsibility for complying with the Order (see provision IV.A.1 of the WDR). The excerpts of the Order should be available to operations personnel to ensure the personnel who are actually implementing the practices understand the requirements of the Order. Staff also disagrees that the language requiring excerpts of the Order to be “available at all times to operations personnel” implies that the operations personnel must physically have a copy while operating farm equipment. The Grower can

comply with this provision by ensuring the excerpts of the Order are available in a location or locations where operations personnel have ready access to it.

1-2. WDR: Confirmation of notification

**Comment summary:** The commenter requests a revision to Provision IV.C.3 that requires the California Rice Commission, if it has received a notice of violation from the Central Valley Water Board, to provide confirmation to the board that it has notified Growers within the affected area. The wording in the tentative Order requires reporting to the board after each individual Grower is notified rather than when the notification required by the provision has been completed. A wording change was recommended.

**Response:** Staff agrees that Provision IV.C.3 requires the California Rice Commission to provide a confirmation to the board after notification of affected Growers has been completed. The intent is to notify the board when, for a given notice of violation, the notification of all growers affected by the notice of violation has been completed. The section has been modified to clarify the board's intent.

1-3. WDR: Provision IV.C.7

**Comment summary:** This provision states “[w]ithin 3 months of adoption of this Order, inform Growers of program requirements.” In conjunction with Comment 1-1, the commenter requests the following sentence in the administrative draft be re-instated: “If a summary of this Order is to be provided to Growers, the California Rice Commission shall submit the summary for approval by the Executive Officer during this period.”

**Response:** See Comment 1-1. Staff does not agree with the recommended change, since the Executive Officer will be providing the excerpts of the Order's requirements that the Grower must maintain. However, if the California Rice Commission (CRC) would like to prepare a summary of the Order to help educate its Growers and would like board staff to review the summary, there is nothing in the Order that prevents CRC from preparing a summary or the staff from reviewing the summary.

1-4. Information Sheet/MRP: Footnote regarding pesticide degradate monitoring

**Comment summary:** The commenter does not support footnote #37 as written in the Information Sheet (Attachment A) and footnote #6 in the MRP (Attachment B). The footnotes describe the pesticide degradates to be included in the monitoring program. The language suggested by the commenter would require both the parent compound and environmentally stable degradates to be monitored in all cases.

**Response:** Board staff does not propose to make the requested changes in the footnotes. Board staff believes the footnotes in the tentative Order are clear and convey the proper intent – that pesticide degradates that are stable in the environment be evaluated using the same process used for evaluating the parent compound. As proposed by the commenter, environmental degradates would always be monitored in conjunction with the parent compounds, even if analyzing for the degradate is not warranted and no commercial analytical methods are available. As proposed in the tentative Order, the footnotes for addressing pesticide degradates are consistent with language adopted by the board in other Orders.

1-5. Information Sheet: Omit date of Groundwater Assessment Report submission

**Comment summary:** The commenter regards the exact date of the Groundwater Assessment Report stated in the Information Sheet to not be relevant and recommends omitting the exact date.

**Response:** Staff has revised the date to reflect the July 2013 date indicated on the Groundwater Assessment Report.

1-6. Information Sheet: Editorial corrections

**Comment summary:** The commenter requested minor grammatical changes to Section F, page 38, on Groundwater Quality Management Plans.

**Response:** Changes have been made to the identified text.

1-7. Information Sheet: refer to MRP for groundwater monitoring wells

**Comment summary:** The commenter requests that the Information Sheet (Section 3, page 37) refer to the MRP table of the USGS shallow rice wells as the MRP is more accurate than the general discussion in the Information Sheet. Revised language was recommended for the Information Sheet.

**Response:** The requested changes have been made.

1-8. Information Sheet: Reference to water quality based effluent limitations

**Comment summary:** The commenter states that the reference [in Section XIV of the Information Sheet] to establishing effluent limitations using one of three specified sources comes directly from federal regulations that only apply to NPDES permits and do not apply to discharges from irrigated agriculture.

**Response:** Staff has changed the language to more clearly reference the “Policy for Application of Water Quality Objectives” and its applicability to evaluating compliance with narrative water quality objectives.

1-9. Information Sheet: Reference to rice fields rather than irrigated lands

**Comment summary:** Section XIX(c) should reference “rice fields” rather than “irrigated lands” since this Order is specific to discharges from rice growing operations.

**Response:** The requested changes have been made.

1-10: MRP: Date correction

**Comment summary:** The Groundwater Assessment Report (GAR) was submitted to the Regional Board in August 2013.

**Response:** The tentative Order has been revised to clarify the reference to the final Groundwater Assessment Report, which has a July 2013 date.

1-11. MRP: Add an evaluation of trends report

**Comment summary:** The commenter requested that a report component be added to the AMR requiring an evaluation of monitoring data to determine trends in degradation that may threaten beneficial uses. The commenter references a similar report component in the Sacramento River Watershed tentative Order. The commenter recommends an evaluation occur once every three years.

**Response:** The requested component has been added to the AMR.

1-12. MRP: Revise language

**Comment summary:** The commenter suggested revising Section C, page 22 as follows: “The evaluation ~~shall~~ should consider various factors, such as...” Without the edits, the commenter believes the language is confusing.

**Response:** The tentative Order has been revised to clarify the intent. The factors identified must be considered, if the factor is applicable to the evaluation.

1-13. MRP: Add footnote regarding Table 7

**Comment summary:** The comment requested adding a footnote to Table 7 stating other numeric water quality objectives may be applicable to the receiving waters.

**Response:** Board staff believes Table 7 in the MRP includes all constituents with Basin Plan numeric water quality objectives that are or may currently be discharged by rice operations. A footnote has been added to clarify this intent for Table 7 in the MRP, and does not foreclose the possibility that new information or practices may reveal additional constituents discharged by rice operations.

1-14. MRP: Remove degradate reference.

**Comment summary:** The commenter requested the removal of “degradates” from the sentence “Trigger limits for pesticides/degradates will be developed...” (Section VII, page 24)

**Response:** Staff agrees that the term pesticide as defined in MRP footnote #6 includes degradates. The change has been made.

**CRC Responses to the Sacramento River Source Water Protection Program’s Comments and Supplemental Information Provided**

CRC provided responses to the Sacramento River Source Water Protection Program’s (SRSWPP) Comments on the administrative draft Order. The SRSWPP has provided comments on the tentative Order that differ from its comments on the administrative draft and staff has prepared responses to those comments. CRC’s responses to the SRSWPP comments do not include any suggested changes to the tentative Order, so board staff has not prepared any additional responses to that portion of the CRC letter.

In addition, CRC has provided supplemental information, including several technical memoranda and papers, that describe: 1) the regulation of pesticides; 2) discussion of propanil, 3-4 DCA and drinking water risks; 3) a discussion of dissolved organic carbon in the Sacramento Valley; 4) a paper on “Seasonal Losses of Dissolved Organic Carbon and Total Dissolved Solids from Rice Production Systems in Northern California”; and 5) a discussion of sediment production and transport in and around Sacramento Valley rice fields. CRC does not suggest any changes to the tentative Order based on the supplemental information provided nor do the papers themselves include any suggested changes; therefore, staff has not responded to any of the discussion associated with the attachments to the CRC letter. Staff considered the supplemental information provided, but did not identify any needed changes to the tentative Order based on that information.

**Comment Letter 2 – California Farm Bureau Federation**

2-1. Definition of Waste

**Comment summary:** The commenter contends that the Tentative Order’s definition of waste is an overly broad expansion of a statutorily defined term and the term waste should be limited to its definition found in §13050(d) of the California Water Code. To provide clarity the second sentence (Attachment E.42) should be revised to “Potential examples of wastes from irrigated lands that may conform to ...”.

**Response:** Section 13050(d) of the Water Code specifies that “‘waste’ includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.” The definition of waste in the Tentative Order repeats this language word for word and also provides a citation to the Water Code §13050(d). For clarity purposes, the Tentative Order also provides examples of wastes that fall under the definition of waste in §13050(d). The commenters have not provided any evidence that the “wastes” potentially discharged from irrigated lands described in the Tentative Order would not fall within the Water Code §13050(d) definition of waste. All of the examples provided in the Tentative Order’s definition of waste are in liquid, solid, or gaseous form and could be discharged as a direct result of crop production, livestock production (i.e., irrigated pasture), or wetland management (i.e., the human “production” or creation of wetland habitat), which are all activities of human origin.

Staff does not agree with the proposed revisions. The commenter implies with the revisions that the examples provided may not conform to the statutory definition of waste and staff believes that they do. The introduction of uncertainty as to whether certain wastes from irrigated agriculture conform to the Porter-Cologne definition would imply that the board has no authority to regulate the discharge of those particular wastes. Such uncertainty would add confusion to the Order and potentially lead a regulated discharger to believe certain wastes are not subject to regulation, potentially leading the discharger to violate the Order.

#### 2-2. Regulation of water quality: Irrigation conveyance structures

**Comment summary:** The commenter believes that the language in Finding 3 of the Tentative Order should be revised to include specific provisions limiting regulation of water traveling within on-farm conveyance structures and between farm conveyance structures, and water that moves past the root zone. The commenter also believes that the Order should not address lawful application of soil amendments, fertilizers, or pesticides.

**Response:** The Tentative Order does not exempt water in conveyance structures that are operated by multiple rice growers and/or farmers or that run through or along multiple rice growers and/or farmers’ properties and such an exemption is not intended or described by Finding 3. A discharge of waste by a rice grower into a channel that is used by other farmers may result in a negative impact to the beneficial uses of that water for those other farmers, or to other designated beneficial uses.

Once the water and any wastes associated with the water are out of the control of the rice grower or not being beneficially used by the crop, it is consistent with Porter-Cologne and appropriate for the board to subject that waste discharge to the requirements of the Order. The request to state that the Order is not intended to address soil amendments, fertilizers, and pesticides suggests that the discharge of those constituents to surface water and groundwater should not be regulated. Board staff disagrees. The purpose of the Tentative Order is to regulate discharges of waste that could affect water quality.

Staff believes the finding provides clear limitations on the application of the Order and does not agree with the changes that would effectively severely limit the scope of the Order.

#### 2-3. Compliance with the California Environmental Quality Act (CEQA)

**Comment summary:** The Tentative Order is not sufficiently within the range of the Program Environmental Impact Report (PEIR) because it includes provisions substantially different from elements in the PEIR alternatives, such as end-of-field discharge limitations, farm management performance standards, and associated costs. The commenter believes that

reliance on the PEIR for CEQA compliance is inappropriate and that a supplemental EIR should be prepared.

**Response:** As described in the Information Sheet to the Tentative Order (Attachment A), the requirements of the Order include regulatory elements that are also contained in the six alternatives analyzed in the PEIR; therefore, Staff believes that the Tentative Order is sufficiently within the range of alternatives evaluated in the PEIR.

As a preliminary matter, Board staff disputes the commenter's contention that the Tentative Order's receiving water limitations would establish water quality objectives as "end-of-field" discharge limitations. The Tentative Order does not include "discharge limitations," but includes "receiving water limitations." The limitations establish that discharge from the field must not cause or contribute to exceedance of water quality objectives in receiving waters, unreasonably affect applicable beneficial uses, or cause or contribute to a condition of pollution or nuisance. For example, consider a field discharging directly to a surface water body. If the field's discharge contains waste at a level greater than a water quality objective, but the surface water receiving the waste remains below the water quality objective, the limitation is not violated. However, if the same discharge causes the receiving water to exceed a water quality objective, the receiving water limitation would be violated. Similarly, if the same discharge is above water quality objectives and the receiving water is above objectives, that discharge is contributing to an exceedance of the water quality objective and, therefore would be violating the receiving water limitation. In the scenario where the waste discharge is below the water quality objective and the receiving water exceeds objectives, the receiving water limitation would not be violated.<sup>1</sup>

The potential environmental effects of implementation of receiving water limitations in the ILRP have been evaluated in the PEIR. Regulatory requirements for Alternatives 2-5 of the PEIR, on which the Tentative Order is based, include the requirement that dischargers prevent nuisance conditions and/or exceedance of water quality objectives in state waters associated with waste discharge from their irrigated agricultural lands. This requirement is similar to the Tentative Order's receiving water limitations.

Even assuming, for the sake of argument, that the performance standards were not already analyzed in the PEIR, the commenter still has not demonstrated that reliance on the PEIR is improper. A public agency may rely on a program EIR for CEQA compliance, for subsequent program activities if it "finds pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required." CEQA Guidelines § 15168(c). Board staff has proposed the required finding in Attachment D of the tentative Order, along with a listing of potential environmental impacts, the written findings regarding those impacts consistent with CEQA Guidelines, and the explanation for each finding. The commenter provides the general concern that environmental impacts have not been adequately addressed, but provides no substantive information on why it disagrees with the proposed finding (e.g. the types of unaddressed impacts or additional mitigation measures that may be necessary).

The remaining concern that the tentative Order's farm management performance standards would apply requirements not analyzed in the PEIR, potentially leading to additional environmental impacts, is also unfounded. The commenter does not provide justification or examples supporting the claim that farm management performance standards are outside of the scope of the PEIR and that costs associated with farm management performance standards were not considered during the economic analysis portion of the PEIR.

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<sup>1</sup> Note that this scenario could be more complicated for certain cases, such as a bioaccumulative substance, for which the concentration of the discharge may not be as important in determining whether beneficial uses are protected as the mass discharged

Finally, the commenter provides the concern that the board does not have the authority to require certain CEQA mitigation measures under the Tentative Order. These very mitigation measures are identified in the PEIR and were unsuccessfully challenged on the same grounds in Sacramento Superior Court. On 21 May 2013, the Superior Court issued a final ruling that rejected the claim that the identified mitigation measures were legally deficient, on the stipulation that “additional CEQA review” means that “if a future discretionary approval by the Board would require additional CEQA review, such review will be undertaken.” The Tentative Order relies on those lawful mitigation measures, which have been clarified consistent with the final ruling. The Board staff continues to rely on the PEIR’s mitigation measures, absent a final court ruling that they are legally deficient. *Kriebel v. City Council* (1980) 112 Cal.App.3d 693, 702.

2-4. California Water Code Section 13141 and 13241

**Comment summary:** Section 13141 of the California Water Code states in part 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.” The commenter states that Finding 36 incorrectly concludes that a new cost analysis is unnecessary given that the Basin Plan includes an estimate of potential costs and sources of financing for the Long-term ILRP. The commenter contends that the Tentative Order proposes new costly regulatory components not previously analyzed during the environmental review or when adopted in the Basin Plan.

**Response:** Board staff disagree that the Tentative Order proposes new regulatory components that were not considered during the environmental review. The economic analyses completed within the PEIR and subsequent incorporation of these cost estimates into the Basin Plan sufficiently addresses §13141 and §13241 of the California Water Code.

The State Water Board recently concluded that Water Code section 13141 is “applicable only to an agricultural water quality control plan that is adopted within a water quality control plan.”<sup>2</sup> Since staff is proposing that the Board adopt the agricultural water quality control plan within waste discharge requirements as opposed to the Board’s Basin Plan, the tentative Order cannot violate Water Code section 13141 here, as the statute is not applicable.

Nevertheless, the Central Valley Water Board prepared a cost estimate for the long-term irrigated lands regulatory program, and added it to its Basin Plans prior to implementation of this Order. The State Water Resources Control Board approved these Basin Plan amendments on 17 July 2012. To estimate costs for the tentative Order, the Board staff used the same study used to develop the Basin Plan amendments and supplemented the study based on the tentative Order’s requirements. Finally, Board staff has confirmed that the estimated costs of the tentative Order fall within the range included in the Basin Plan estimate. Adoption of the tentative Order would not violate Water Code section 13141.

In addition, the Information Sheet includes a discussion of how costs were considered (see Section XVIII) and how those costs were derived from costs associated with elements of the PEIR alternatives. These costs include estimated costs associated with the plans and reports that are required from members and provided to them as templates to be completed. No further cost analysis is required by Water Code section 13241 and no evidence has been provided to demonstrate where the cost estimates are deficient.

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<sup>2</sup> See State Water Board Order WQ 2013-0101, *In the Matter of the Review of Conditional Waiver of Waste Discharge Requirements Order No. R3-2012-0001*, at p. 15

2-5. Discharge Limitations

**Comment summary:** The use of “shall not cause or contribute” to an exceedance of applicable water quality objectives is overly expansive and can create an unreasonable standard holding growers liable for even the smallest de minimus contribution. The commenter proposes the addition of a qualifier before the word “contribute” in Provisions III.A and III.B of the Tentative Order. Alternatively the commenter suggests a wording for a description of discharge limitations.

**Response:** The commenter titled this comment as “Discharge Limitations.” The tentative Order does not have “discharge limitations,” but “receiving water limitations”, which is an important distinction. In light of the discussion in Response 2-3, board staff disagrees that the receiving water limitations makes growers accountable for de-minimus discharges. Only discharges causing or contributing to the exceedance of a water quality objective would be in violation of the receiving water limitation. De-minimus discharges (e.g., below water quality objectives) can actually improve receiving water quality for the constituent of concern.

2-6. Reporting of individual management practice data records

**Comment summary:** MRP section V.A, Report Component 22, Summary of Management Practice Information, requires the California Rice Commission to provide the individual data records to the Regional Board in addition to aggregating and summarizing information collected in the Farm Evaluations. The commenter suggests this requirement be removed because it would not result in an efficient use of resources or the ability to assess and evaluate trends

**Response:** Individual data records of management practices information are needed to verify that growers are implementing relevant management practices to protect water quality. Submittal of farm evaluations will provide information on individual grower implementation of practices to protect water quality, in lieu of water quality sampling of individual farming operations. The third-party's aggregation of the management practice data at the township level will allow for summary level analysis and will help identify those geographic areas requiring follow-up. Staff does not agree with the commenter's assertion that summarizing data at the township level and providing individual data records is not an efficient use of resources. Each individual data record can be provided in one GIS data layer with the data record associated with the township where the farming operation is located. This does not require an additional data management system, but only an additional data field in the database. Further discussion of the basis for this requirement can be found in the Information Sheet in the section “Spatial Resolution of Farm Evaluation Information”.

**Comment Letter 3 – Sacramento River Source Water Protection Program (SRSWPP)**

3-1. MRP: Request for additional monitoring

**Comment summary:** The commenter requested staff to add requirements to the assessment and modified assessment monitoring program to collect information during the winter drainage period (typically mid-February or March). The commenter's concern is that total organic carbon (TOC) content in the water column after winter flooding will not be measured. Organic carbon may present a problem during disinfection of municipal and domestic water supply due to the creation of chlorinated by-products which may pose health risks. The commenter believes this additional monitoring will fill an important data gap for organic carbon and related constituents.

**Response:** The Sacramento Valley Water Quality Coalition (SVWQC) area, which will be regulated under a separate irrigated lands regulatory program Order, overlaps with the area

subject to the Tentative Order. The SVWQC has been monitoring water quality year-round at several of the primary monitoring sites identified in the Tentative Order. Data from SVWQC monitoring for TOC is available through the California Data Exchange Network (CEDEN) from years 2006 to 2013 for the mid-February and mid-March time period. Board staff will work with SRSWPP and CRC to discuss the available information, as well as the ongoing monitoring conducted under other irrigated lands Orders. If the review of the information suggests a potential problem with TOC and the formation of chlorinated by-products due to rice discharges, the MRP can be modified by the Executive Officer, or a special study can be required. However, based on available information, board staff does not believe a change to the MRP is needed at this time.

3-2. MRP: Review for trends of degradation

**Comment summary:** The commenter requests that the AMR include a review for trends of degradation two years out of every five years and discussion to ensure protection of beneficial uses and to protect the high quality of the Sacramento River water supply, similar to other ILRP WDRs.

**Response:** The tentative MRP has been revised to include the requested trend analysis, although staff recommends a frequency of once every three years, which is the frequency recommended by the CRC (see response to comment 1-11).

3-3. MRP: Applicable water quality criteria

**Comment summary:** The commenter understands that MRP Table 7 is not meant to be a comprehensive list of all the water quality objectives applicable to constituents discharged by agricultural operations, but recommends that a sentence be added to state that there are other constituents with numeric water quality objectives that could be present in the discharge and that those objectives apply as well.

**Response:** See response to Comment 1-13.

3-4. Antidegradation

**Comment summary:** The commenter requested the inclusion in the record of three pages of antidegradation policy discussion from their 13 September 2013 comment letter on the administrative draft Order.

**Response:** Staff understands from discussions with the Commenter that the request for inclusion in the record did not necessitate a response to the issues raised. Comments on the administrative draft are part of the administrative record for this Order. Therefore, the comments on antidegradation will be a part of the record.

3-5. Request for additional public comment period

**Comment summary:** The commenter requested that another public comment period be allowed if there are significant changes made to the Order or its attachments prior to the March 27 or 28 public hearing.

**Response:** The proposed WDR will be posted at least 10 days prior to the scheduled Board hearing for adoption. Public comments on that posted Order, including a request for an additional public comment period if significant changes are made to the Order, can be made during the Board hearing.

## **Comment Letter 4 – Western Dairy Design**

### 4-1. Cooperation with NRCS

**Comment summary:** The Board should cooperate with the Natural Resources Conservation Service (NRCS) to enhance the overall results of their efforts.

**Response:** One of the objectives of the Irrigated Lands Regulatory Program, as stated in the Program EIR, is to “promote coordination with other regulatory and non-regulatory programs associated with agricultural operations to minimize duplicative regulatory oversight while ensuring program effectiveness.” As explained in findings 48 through 52, the Board has identified other agencies, including the NRCS, whose work directly or indirectly serves to reduce waste discharges from irrigated lands to waters of the State. Those efforts will continue, and will be supported by implementation of the Order. The Board will continue to cooperate with the NRCS to enhance the results of their efforts, and NRCS efforts will continue to enhance the results of the Order if adopted.

### 4-2. Takings

**Comment summary:** The Tentative Order, if adopted, would amount to a form of an unconstitutional taking without just compensation because the farmer has no remedy but to spend money to comply with its provisions.

**Response:** The Tentative Order, if adopted, would not amount to a taking of the Member’s property. While the Tentative Order would apply to owners and operators of irrigated lands that discharge to waters of the State, the Tentative Order in no manner aims to have the Board take ownership of those properties. Because of that, the Board is not required to provide any compensation to the landowners.

The commenter asserts that it has no remedy but to spend money to comply with the Tentative Order’s programs. This is factually inaccurate. The Member could choose to enroll under the Board’s General Order for Irrigated Lands that are Not Participating in a Third-Party Group (Order R5-2013-0100), or could apply for individual waste discharge requirements. Alternatively, landowners could stop discharging wastes to waters of the state, in which case they would not be subject to the terms of the Tentative Order or the Water Code. In any event, even if costs are unavoidable, the commenter has not established that a taking of property has occurred. Ample federal and state constitutional law case authorities support the principle that regulations do not amount to takings unless the regulations deprive all economically beneficial or productive use of property. See, e.g. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015. Nothing in the comment indicates that the Tentative Order, if adopted, would represent a regulatory taking.

### 4-3. Violation of Federal Clean Water Act

**Comment summary:** The Tentative Order violates the federal Clean Water Act because it would regulate discharges excluded from regulation under that act as “non-point source discharges.”

**Response:** Board staff agrees with the commenter that the Tentative Order would regulate non-point source discharges, discharges which are not subject to regulation under the federal Clean Water Act’s National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. section 1342 et seq. While the discharges from irrigated lands are not subject to the NPDES program because they are not “point source discharges,” the federal Clean Water Act preserves the rights of States to prevent, reduce, and eliminate water pollution. 33 U.S.C. section 1251(b). Further, the federal Clean Water Act contemplates that non-point source discharges to waters of the United States will be regulated by the States pursuant to

their required Non-Point Source Control Programs. (See 33 U.S.C. 1329). Regulation of irrigated lands discharges does not violate the federal Clean Water Act.

4-4. Violation of federal Constitutional rights

**Comment summary:** Adoption of the Order would make it a crime for dischargers of waste from irrigated lands to exercise rights guaranteed by the Fourth, Fifth, Seventh, Eighth, Ninth, and Fourteenth Amendments to the federal Constitution. In particular, creation of a “control” program for non-point source discharges violates the U.S. Constitution because it consists of control and punishment.

**Response:** Without more information, Board staff is unable to provide a detailed response to this comment. The commenter has not pointed to any particular language in the Tentative Order stating that violations of the Order are considered to be a crime. Similarly, the commenter has not explained how adoption of the Tentative Order would violate any of the enumerated constitutional rights, or how the creation of a control program for non-point source discharges, a program specifically contemplated by the Federal Clean Water Act (see response 4-3), violates the U.S. Constitution.

4-5. Water rights

**Comment summary:** The Tentative Order infringes on the landowner’s rights to use water for agricultural purposes. The State of California does not own the Waters of the State.

**Response:** The Tentative Order does not regulate the quantity of surface water a landowner may be entitled to use. Generally speaking, such decisions are made by local water districts, local agencies, or the State Water Resources Control Board, as the case may be. Similarly, the Tentative Order does not assert that the State or the Regional Board owns the Waters of the State

Instead, the Tentative Order regulates the discharge of waste to Waters of the State, and is intended to protect the beneficial uses of those Waters as specified in the Board’s Basin Plan. See Findings 24 and 25. In terms of a landowner’s right to discharge waste to waters of the State. The Legislature has stated clearly: “All discharges of waste into waters of the state are privileges, not rights.” Water Code section 13263(g). Accordingly, the Tentative Order does not infringe on any right that landowners may have to discharge waste.

4-6. Jurisdiction

**Comment summary:** The commenter asks the Board to explain its jurisdiction to issue the Tentative Order.

**Response:** As explained in Finding 18 of the Tentative Order, the Board derives its jurisdiction to regulate the discharge of waste that could affect the quality of waters of the state from the Porter-Cologne Water Quality Control Act (California Water Code section 13000 et seq.)

4-7. Question if Order is voluntary or mandatory

**Comment summary:** The commenter asks whether the Tentative Order is mandatory or voluntary and if mandatory to cite all law that that is not unconstitutional that authorizes it to be so.

**Response:** The Tentative Order is voluntary in the sense that rice growers may choose to enroll under the Order, or alternatively to obtain coverage under the Board’s General Order for Irrigated Lands that are Not Participating in a Third-Party Group or apply for individual discharge requirements. However, once the grower enrolls under the Order, it must comply

with the Order's terms and conditions. In that sense, the Tentative Order includes mandatory elements. While staff is confident that a mandatory control program of discharges from agricultural lands is constitutional, the Board is not required to prove a negative – that the Order is not unconstitutional. The commenter has not established that a mandatory control program for discharges from irrigated rice lands violates the U.S. Constitution.

4-8. Fees as a form of extortion

**Comment summary:** The regulatory fees contemplated to be collected by the State Water Resources Control Board amount to extortion within the meaning of 18 U.S.C. 1951.

**Response:** The annual fees to be collected by the State Water Board are established by regulations. In California, regulations may be established if done so in compliance with the Administrative Regulations and Rulemaking Chapter of the California Government Code (Government Code sections 11340 et seq.). California law explicitly authorizes the State Water Board to assess annual fees from persons subject to waste discharge requirements, as long as the “total amount of annual fees collected pursuant to this section shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.” Water Code, Section 13260(d). The annual fees are remitted to the State Water Board, not to any particular employees of that board.

The claim that the State Water Board's collection of annual fees constitutes the crime of federal extortion is without merit. That crime applies to individual public officials that take money not due to them for the performance of official duties. *Evans v. United States* (1992) 504 U.S. 255. Since the annual fees are legally required, and because employees of the State Board do not individually receive annual fees, there cannot possibly be any claim for criminal extortion against any of the State Water Board's employees for collection of annual fees.

4-9. Right to discharge.

**Comment summary:** The commenter states finding 53 alludes to discharging into water of the State as a privilege. The commenter believes that this finding implies that the State owns all waters of the state. Also, since the federal Clean Water Act does not regulate agricultural stormwater discharges and return flows from irrigated agriculture, agricultural growers have a “right to discharge”.

**Response:** The Tentative Order does not assert or imply that the Regional Water Board or the State Water Board owns the waters of the State. (See response 4-5). In addition, the Board disagrees that the federal Clean Water Act gives agricultural dischargers a “right” to discharge to waters of the United States. To the contrary, the federal Clean Water Act contemplates State regulation of non-point sources such as irrigated lands. See response 4-3.

4-10. Requiring access is unlawful

**Comment summary:** .The commenter references US Constitution Amendment IV for unlawful search and seizure, stating access to property should be voluntary.

**Response:** The tentative Order's provisions regarding inspections of facilities and rice lands are consistent with the Fourth Amendment of the U.S. Constitution because they specify that an inspection of facilities will either be made with the consent of the grower, or pursuant to an administrative search warrant. Specifically, Section IV.B.14 reads: “To the extent required by California Water Code section 13267(c) or another applicable law, the inspection

shall be made with the consent of the Grower, owner or authorized representative, or if consent is withheld, with a duly issued warrant issued pursuant to the procedure set forth in Title 13 Code of Civil Procedure Part 3 (commencing with section 1822.50).” These procedures mirror provisions in the Fourth Amendment, which reads, “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” There is no reason to believe that inspections to enforce the conditions of the Order will violate the U.S. Constitution,

4-11. Question regarding possible litigation against the Board or its agents under 42 U.S.C. 1983

**Comment summary:** The commenter asks Board staff how it would defend the agency against a lawsuit alleging violation of 42 U.S.C. 1983 (Civil Action for Deprivation of Rights).

**Response:** The Board generally does not discuss pending or current litigation outside the courtroom or the pleadings. It is not appropriate to discuss how the board might respond to this hypothetical action. If such an action were brought, it is would be discussed by the Board members and the Board’s attorneys. Such discussions would be protected by the attorney/client privilege and are not appropriate for discussion in this response to comments document.