



CALIFORNIA FARM BUREAU FEDERATION

OFFICE OF THE GENERAL COUNSEL

2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 • PHONE (916) 561-5665 • FAX (916) 561-5691

Sent via E-Mail

AWLaputz@waterboards.ca.gov

August 6, 2012

Adam Laputz
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

Re: Comments on the Eastern San Joaquin River Watershed Tentative WDR and MRP for Discharges from Irrigated Lands

Dear Mr. Laputz:

The California Farm Bureau Federation (“Farm Bureau”) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California’s largest farm organization, comprised of 53 county Farm Bureaus currently representing 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 Eastern San Joaquin River Watershed Tentative Waste Discharge Requirements (“Tentative WDR”) and Monitoring and Reporting Program (“MRP”) for Discharges from Irrigated Lands and respectfully presents the following remarks.

General Order Pages 7-8, Finding 31—California Environmental Quality Act

Within this Tentative WDR, revisions include deleting a statement that expressed that the loss of productive farmland is an impact “associated, directly and indirectly, with specific compliance activities growers may conduct in response to the Order’s regulatory requirements.” (Administrative WDR Order, p. 7, ¶ 33.) 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

NANCY N. McDONOUGH, GENERAL COUNSEL

ASSOCIATE COUNSEL:

CARL G. BORDEN • KAREN NORENE MILLS • CHRISTIAN C. SCHEURING • KARI E. FISHER • JACK L. RICE

should not be deleted from this list of impacts. Given that this agricultural regulatory program impacts agriculture and agricultural lands, the WDR should 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.” (Tentative WDR Order, pp. 7-8, ¶ 31.)

General Order Page 9, Finding 36—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 Eastern San Joaquin WDR. (Wat. Code, § 13141.) Finding 36 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. (Tentative WDR Order, p. 9, ¶ 36.) 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 easily interpretable 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 Tentative 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 13, Finding 54—General Findings

Finding 54 has been significantly revised to now incorporate numerous independent clauses into 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.

General Order Page 15, Provisions III. A and III. B—Discharge Limitations

The addition 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

minus contribution. Thus, 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

The revisions to Provision 7 are unnecessarily broad and overly expansive. Previous drafts required Sediment and Erosion Control Plans when members “have the potential to cause erosion or discharge sediment offsite during irrigation or storm events.” By revising the language to include any “potential to discharge surface water offsite,” the requirement is not only overly expansive, but 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.

General Order Page 17, Provision IV. B. 7—Nitrogen Budgets

Provision 8 requires members to prepare and implement an annual nitrogen budget. Such a budget should analyze “nitrogen” application rather than “nutrient” application. As compared to the administrative draft, the Tentative WDR now requires all members to prepare annual nitrogen budgets. Previously, 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, the WDR should 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 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 was substantially revised from the administrative draft to now require 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—Template Requirements for Farm Evaluation, Sediment and Erosion Control Plan, and Annual Nitrogen Budget

In the administrative draft WDR, 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 Tentative 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. 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 (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 15-17, Attachment A-Information Sheet—Certifications for Sediment and Erosion Control Plans and Annual Nitrogen Budgets

The Tentative 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. 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) 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

As currently drafted, the Tentative MRP suggests that both acute and chronic toxicity testing is required for all toxicity tests. (See MRP, p. 9, footnotes 7 and 8 stating that chronic and acute toxicity testing should be completed in accordance with USEPA testing methods.) As stated in Farm Bureau’s previous comments on the administrative draft WDR, the MRP should be revised to only require acute toxicity testing. Since the 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 8 deleted in its entirety, and the continuation of the existing surface water acute toxicity testing be added in its place.

Attachment B, MRP, Page 12, Provision IV. C. 4—Groundwater Vulnerability Designations

Within the administrative draft WDR, groundwater vulnerability designations were defined in a broad manner as those deemed vulnerable by the Department of Pesticides/State Water Board. (Administrative Draft Attachment B, MRP, p. 14.) The Tentative MRP proposes to expand the already overly expansive definition to define 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 Regulations 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.” (Tentative 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

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 for problems.

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Compliance with the California Environmental Quality Act

The Tentative 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. (Tentative WDR Order, p. 7, ¶¶ 30-31.) The Tentative 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 the tentative draft, 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 Tentative 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 Eastern San Joaquin River Watershed WDR and MRP for Discharges from Irrigated Lands.

Very truly yours,



Kari E. Fisher
Associate Counsel

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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).)