



1201 L Street Modesto, CA 95354  
[www.esjcoalition.org](http://www.esjcoalition.org)

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August 6, 2012

***Via Electronic Mail Only***

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

Attn: Mr. Adam Laputz  
[AWLaputz@waterboards.ca.gov](mailto:AWLaputz@waterboards.ca.gov)

*RE: East San Joaquin Water Quality Coalition Comments on Tentative Waste Discharge Requirements General Order for Growers Within the Eastern San Joaquin River Watershed That Are Members of the Third-Party Group*

Dear Mr. Laputz:

The East San Joaquin Water Quality Coalition (ESJWQC) appreciates the opportunity to work with Central Valley Regional Water Quality Control Board (Central Valley Water Board) staff on the development of the tentative Waste Discharge Requirements General Order for Growers Within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group (Draft WDR), and its associated attachments, which include as follows: Attachment A to Order R5-2012-XXXX, Information Sheet (Draft Information Sheet); Attachment B to Order R5-2012-XXXX, Monitoring and Reporting Program Order (Draft MRP); Attachment C to Order R5-2012-XXXX, CEQA Mitigation Measures; Attachment D to Order R5-2012-XXXX, Findings of Fact and Statement of Overriding Consideration; and, Attachment E to Order R5-2012-XXXX, Definitions, Acronyms and Abbreviations. As you know, the ESJWQC is the existing third-party assisting growers in the Eastern San Joaquin River Watershed area, and as of this writing the entity that will submit a Notice of Intent to continue as the third-party to assist its Members in this watershed area.

Our comments are organized to address the following key issues:

- Representative Groundwater Monitoring Program
- Annual Nitrogen Budget and Farm Evaluation Reporting Requirements
- Template Development and Reporting Requirements
- Sediment and Erosion Control Plan Requirements
- Annual Nitrogen Budget Requirements

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- Determination of Member Compliance With Terms of the Order by the Third-Party
- Surface Water Toxicity Testing Requirements
- Groundwater Vulnerability Designations
- Groundwater Quality Management Plan Triggers
- Time Schedules for Compliance
- Compliance with the California Environmental Quality Act (CEQA)
- Improper Incorporation of Mitigation Measures
- Compliance with the State's Policy to Protect High Quality Waters

In addition to our comments on the key issues identified here, Attachment 1 includes other comments and requested amendments to the Draft WDR and its associated documents.

#### **I. Representative Groundwater Monitoring Program**

In general, the ESJWQC is not opposed to the concept of a Representative Groundwater Monitoring Program (RGMP) in order to evaluate the effectiveness of management practices under various conditions to determine if they are protective of groundwater. However, the ESJWQC is concerned with the inclusion of the RGMP into the Draft WDR at this time. For the following reasons, it is not appropriate to include the RGMP in the Draft WDR. First, there are current discussions occurring between the coalition groups, commodity organizations, and Central Valley Water Board staff with respect to how best to develop an appropriate and coordinated RGMP so that the coalitions and commodity organizations do not duplicate efforts, and unnecessarily expend limited resources. However, such discussions have not yet resulted in consensus on the scope and breadth of the RGMP, and how a RGMP would be implemented region-wide.

Second, the ESJWQC is required to submit a RGMP workplan within two years of receiving its Notice of Applicability (NOA), regardless of the Central Valley Water Board's proposed schedule for adopting WDRs for the other coalition areas. (Draft WDR, p. 25.) Implementation of the RGMP will be required upon approval by the Executive Officer. (Draft WDR, p. 25.) This means that if the ESJWQC receives its NOA in early November of 2012, it must then submit its workplan for the RGMP by November 2014, which is soon after the Central Valley Water Board's proposed adoption of a WDR for the Westside San Joaquin River Water Quality Coalition and San Joaquin County and Delta Coalition. It is unknown how long it will take the Executive Officer to approve the workplan. However, there is nothing within the terms of the Draft WDR that would prevent or require the Executive Officer to withhold approval until after all of the coalitions had submitted workplans. In other words, the requirements for the RGMP as applied to ESJWQC are operable requirements on the ESJWQC that are independent from similar requirements being placed on other coalitions.

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Considering that there is significant discussion with respect to coordinating such efforts, it is inappropriate to create an independent requirement on the ESJWQC. Rather, it would be more appropriate for the Central Valley Water Board to adopt a RGMP specific monitoring and reporting program for all coalitions (with the exception of the California Rice Commission) after or at the end of the coalition WDR adoption process. This would ensure that all of the coalitions are on the same schedule for development of a region-wide RGMP workplan, or at the very least, on the same schedule for development of coalition-specific RGMP workplans that are coordinated with each other.

Further, the development of a Central Valley RGMP needs to be coordinated with commodity organizations, fertilizer industry representatives, the University of California Cooperative Extension (UCCE), California Department of Pesticide Regulation (DPR), California Department of Food & Agriculture (CDFA), and Natural Resource Conservation Service (NRCS). All of these other entities have specialized expertise to assist in developing an appropriate RGMP that addresses the priority commodities grown throughout the Central Valley. It would be inefficient to make each third-party group develop and implement its own RGMP. Accordingly, the ESJWQC recommends that all the specific requirements with respect to the RGMP be removed from the Draft WDR, Draft MRP, and all other associated documents at this time so that the ESJWQC can work collectively with the Central Valley Water Board and other coalitions to develop an appropriate and effective RGMP.

## **II. Annual Nitrogen Budget Reporting and Farm Evaluation Reporting**

The ESJWQC does not generally oppose the idea of Annual Nitrogen Budget and Farm Evaluation requirements. Our comments on the specific provisions for each are provided in section IV below. However, the Draft MRP includes summary reporting requirements with respect to Annual Nitrogen Budgets and Farm Evaluations that are of great concern. Specifically, the MRP requires that the third-party provide summary reports for Annual Nitrogen Budgets and Management Practices that provide data for each in an electronic format, compatible with ArcGIS, identified to at least the section (TRS) level. (Draft MRP, p. 22.) The ESJWQC is opposed to this requirement because reporting such information on a TRS (township, range, section) level is inappropriate and unnecessary.

The section levels of TRS are basically 640 acre blocks of land that are not dependent on ownership, assessor parcel number, geographic features, watersheds, or groundwater basins. Based on this, for the ESJWQC, there are likely over 1,300 different sections throughout the estimated 835,000 acres that may ultimately be enrolled under the Draft WDR. Reporting Annual Nitrogen Budget and Farm Evaluation data on this scale will place an extraordinary burden on the ESJWQC that will be extremely costly. More importantly, this will create a significant burden on the ESJWQC and is unreasonable as compared to the need for such information at this scale. (Wat. Code, § 13267(b)(1) [“The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.”].)

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The Draft Information Sheet alleges that reporting at this level is necessary because: (1) this is a consistent scale with respect to the DPR's pesticide use reporting system; (2) it allows the Central Valley Water Board to be able to easily identify Members that require potential compliance and enforcement activities; and, (3) helps to facilitate independent analysis by the Central Valley Water Board and other interested parties. (Draft information Sheet, p. 17.) The ESJWQC responds to each of these reasons as follows.

With respect to consistency with the DPR's pesticide use reporting system, ESJWQC contends that use reporting for pesticides at the section level is practical because the primary concern is directly related to the application of pesticides to the land itself. Moreover, pesticide use data must to be considered by the DPR in setting priorities for food monitoring, pesticide use enforcement, farm worker safety programs, environmental monitoring, pest control research, public health monitoring and research, and similar activities by the department, or by the department in cooperation with other state, regional, or local agencies with appropriate authority. (Food & Ag. Code, § 12979.) In comparison, Annual Nitrogen Budget and Farm Evaluation data is about the implementation of management practices to protect nearby surface water quality, or groundwater quality that may or may not be directly below the property in question. Providing such information on a section level does not provide any relative or correlated information with respect to surface water or groundwater quality. Thus, the value in reporting at this level in this program is questionable.

Next, as a practical matter, the level of effort for compiling such data at this level is far greater on the ESJWQC as compared to the local county agricultural commissioner (CAC). For example, the local CACs are each responsible for only ONE county. In comparison, the ESJWQC geographic area encompasses all, or parts of, at least five different counties. The pesticide use reporting system reports only a few variables such as the pesticide use, crop type, application rate, and number of acres. In comparison, the summary reporting requirements in the Draft MRP would include crop type, soil type, specific management practices, crop ratios, and more. The CAC also established its system of reporting on TRS more than 20 years ago and continues to receive data in this format. Conversely, coalition membership is based on APNs and asking Members to provide field information by TRS would necessitate creating a duplicate and complicated Member database. Thus, the level of work placed on the ESJWQC as compared to the local CACs, is extensive.

With respect to the reason for easy identification of Members that require compliance and enforcement activities, this is especially problematic as it relates to the Annual Nitrogen Budget information. The ESJWQC has consistently stated that nitrogen consumption ratios are a tool and are inappropriate as a regulatory end-point. Specifically, the ratio is an estimate of anticipated crop consumption in comparison to total applied nitrogen through sources including fertilizers, manures, composts, nitrates in irrigation supply water, and other sources. However, appropriate ratios vary from crop to crop, and in some cases the age of the crop (e.g., orchard crops). Because ratios are estimates, they are useful tools to inform the third-party and its Members with respect to the need for new and/or additional management practices. However, they are inappropriate as a regulatory end-point for determining compliance with water quality standards, or the terms of the Draft WDR. Unfortunately, based on the language in the Draft Information Sheet, the Central Valley Water Board

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clearly intends to use this information for enforcement purposes. Moreover, the Draft Information Sheet suggests that such information would be used if there are identified water quality problems, however, the Draft Information Sheet fails to consider that identified water quality problems in groundwater may be associated with practices from decades ago, and not associated with practices in place today.

The third reason contained in the Draft Information Sheet implies that the third-parties do not or would not appropriately analyze the information at a larger scale. (Draft Information Sheet, p. 17 [“Also, summarizing the data to a larger scale may make it difficult for the board or any other interested group to check the analysis of the third-party or conduct additional analysis.”].) Such statements are offensive and inappropriate. The third-parties in this program play a very vital role in taking the information collected, and then directly communicating with growers when problems occur. Due to these efforts, there have been substantial improvements in surface water quality. One would expect that such extraordinary efforts would continue based on information garnered from the Annual Nitrogen Budgets and Farm Evaluations. In contrast, the Central Valley Water Board appears to want the information available at the section level so that it and others can conduct their own “independent analysis.” Unfortunately, by allowing this level of access, there is no guarantee that the use of such information by others would result in an “objective,” independent analysis versus being twisted in a manner that distorts the truth and value of the information provided. Distortion of this information by others, whether purposeful or unintended, could greatly harm growers in a section, and make them targets for threats, or potentially, environmental terrorism. Moreover, inaccurate characterizations of data and information by others would undermine the program in its entirety by sending a signal to participants that the reporting of Annual Nitrogen Budget information to the ESJWQC provides no assurance that the information is protected from public disclosure, and in fact, will result in the public reporting of such information at a level that will allow members of the public to, in some cases, readily match the information to a grower directly. This public disclosure defeats the purpose of having the information reported to the third-party versus the Central Valley Water Board directly. Rather, the third-party is no more than the Central Valley Water Board’s “data-gatherer,” and there is little benefit provided to the growers in having the third-party play this role.

Considering the level of effort and cost associated with reporting Annual Nitrogen Budget and Farm Evaluation data at the section level, and the Central Valley Water Board’s intended purposes for obtaining information at this level, these reporting requirements are inappropriate and must be removed from the Draft MRP. In the alternative, the ESJWQC believes that appropriate reporting levels for this information are variable based on the depth, quality, flow direction and rate, and size of the groundwater below. Once these are known (as they will be after the GAR), the ESJWQC can then identify an appropriate size and location for reporting and for focusing its outreach efforts. Having to report on the arbitrarily small section level does not help the ESJWQC move forward with its Members and conduct the outreach needed to improve groundwater quality. In fact, it diverts resources away from efforts to work with growers. By reporting based on some appropriate hydrologic system, the information will be far more useful in attempting to match management practices to water quality.

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Please be assured that the ESJWQC understands the Central Valley Water Board's need to be sure that Members are properly considering and managing nitrogen applications on the farm in order to protect vulnerable groundwater areas specifically, and to protect surface and groundwater in general. To that end, the ESJWQC anticipates working with Central Valley Water Board staff to ensure reports on a watershed or basin level provide adequate accountability and assurances that efforts will be taken when appropriate as has been the case for problems the ESJWQC identified and addressed in its surface water program. The ESJWQC is committed to conducting significant outreach and education on this when issues have been identified. However, the public reporting of individual Member's nitrogen use does not further the Central Valley Water Board's purpose of ensuring that Members are implementing effective management practices to protect surface and groundwater. Rather, it is more appropriate for the ESJWQC to work with its Members, based on information submitted to the ESJWQC.

### **III. Template Requirements for Annual Nitrogen Budget, Farm Evaluation, and Sediment and Erosion Control Plan**

In the previous version of the Draft WDR (i.e., the Administrative Draft), templates for the Annual Nitrogen Budget, Farm Evaluation, and Sediment and Erosion Control Plan were to be developed by the ESJWQC and approved by the Executive Officer. Now, the Draft WDR indicates that the templates would be prepared by Central Valley Water Board staff, working with the third-parties, technical service providers, commodity groups, and other interested stakeholders, and would then be provided to the ESJWQC upon Executive Officer approval. The ESJWQC has concerns with this approach, and in fact, believes that it is more appropriate for the ESJWQC to prepare the templates associated with these requirements.

The ESJWQC's first concern is the potentially broad spectrum of interests that would be involved in template development. By developing templates through a "stakeholder" process, the Central Valley Water Board is turning what should be technical documents into political documents. All three of these documents need to be developed by those in agriculture, with the assistance of professionals that work with agriculture. Specifically, all three of these documents need to be developed with the assistance of qualified agronomists and/or agricultural engineers – not interested party advocates. It is inappropriate to suggest that others outside of the third-party coalitions and their advisors should be able to participate in the development of these templates. Again, these are technical documents that should not rise to the level of "policy," which is likely to occur if their development is subject to a stakeholder-like process.

Next, the ESJWQC contends that if the template documents are prepared in this proposed stakeholder-like process led by Central Valley Water Board staff, these documents then become new permit requirements, and are essentially permit amendments. Amendments to a WDR are not delegated to the Executive Officer and require full Central Valley Water Board action. (Wat. Code, § 13223(a) ["Each regional board may delegate any of its powers and duties vested in it by this division to its executive officer excepting only the following: . . . (2) the issuance, modification, or revocation of any . . . waste discharge requirement . . ."].) Thus, before the Central Valley Water Board staff could require ESJWQC Members (or Members of any other coalition) to report

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information on the developed templates, such templates would need to be subject to the appropriate noticing requirements, be available for public comment and review, be adopted by the Central Valley Water Board, and, potentially be subject to petition to the State Water Resources Control Board (State Water Board) if an interested party has concerns with requirements contained in the templates.

For these reasons, the ESJWQC recommends that the Central Valley Water Board remove the stakeholder process for template development, and rather, make it a requirement that the ESJWQC, in coordination with the other coalitions and their collaborators, develop the templates as appropriate for the ESJWQC.

#### **IV. Substantive Provisions for Sediment and Erosion Control**

As compared to the administrative draft of the WDR released this spring, the Draft WDR includes new Sediment and Erosion Control provisions that are of concern to the ESJWQC. The ESJWQC has advocated throughout this process that Sediment and Erosion Control Plans are important and necessary for those growers that have the potential to discharge to surface waters. Further, over the years of this program, the ESJWQC has gained extensive knowledge of its geographic area and is well aware of the parcels and/or areas that are most likely to have runoff to surface waters. Accordingly, the ESJWQC has recommended that it identify and notify those growers with certain parcels or in certain areas that should be required to prepare and implement sediment and erosion control plans in order to protect water quality. However, the Draft WDR proposes to not rely on the ESJWQC for making this determination, and rather propose that, “[m]embers that have the potential to discharge surface water offsite shall develop a Sediment and Erosion Control Plan as specified in section VII.C below or as directed by the Executive Officer.” (Draft WDR, p. 17.)

This proposed requirement is problematic for several reasons. First, this expands the requirement from those that could potentially discharge to surface water, to anyone that has irrigation return flow or stormwater moving offsite of its property, regardless of the potential of this runoff discharging to a surface water. In other words, the Central Valley Water Board is creating end-of-field discharge limits for sediment. This requirement fails to take into account that growers in some areas may have collective management practices at the end of a drain, or systems that collect and return runoff, even though the irrigation return flow moves offsite first. As indicated previously, the ESJWQC is very familiar with its coalition area, and can easily identify the parcels and/or areas where such plans are necessary. Second, the requirement as proposed is broad and confusing. It provides no explanation or direction to the ESJWQC or its Members as to the category of individuals that are in fact required to prepare a Sediment and Erosion Control Plan. For these reasons, provision IV.B.7 should be revised to reflect that Sediment and Erosion Control Plans are required of those Members that are notified by the ESJWQC of the requirement to do so.

Next, the Draft WDR adds a substantial new requirement to development of Sediment and Erosion Control Plans. Previously, Sediment and Erosion Control Plans were to be prepared in accordance with a template developed by the ESJWQC and approved by the Executive Officer. The Draft WDR requires that such plans now be “written, amended, and certified by a Qualified Sediment

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and Erosion Control Plan Developer . . .” (Draft WDR, p. 22.) A Qualified Sediment and Erosion Control Plan Developer is one that fits within the categories specified in the Draft WDR, which essentially includes professional engineers or certified storm water quality specialists. The reason given for this requirement in the Draft Information Sheet is because it is consistent with “the State Water Board’s Construction Stormwater Program.” (Draft Information Sheet, p. 15.) In attempting to soften this requirement, the Draft WDR states that such plans can be prepared under request from service providers such as the NRCS, or UCCE.

The requirement with respect to development of such plans by a certified professional is problematic for a number of reasons. First, such a requirement creates a new expense and cost to those growers subject to this requirement. Professional engineers and/or certified specialists are paid consultants, which must then be hired to prepare such plans. Depending on the size of the grower’s operation, the expense may be significant. Second, the intended reason for requiring preparation by a professional has no relevance to the irrigated lands program. Just because the construction stormwater program requires preparation of plans by professionals does not mean that such a requirement is appropriate for agriculture. Agricultural systems are different from construction projects. Construction projects are typically short-term projects that move extensive amounts of sediment, and typically clear project areas of all vegetation, at least for a short time. In comparison, agricultural systems are on-going operations that disc or plow the soil to prepare for planting either annually in the case of field crops, or when establishing an orchard or vineyard. Moreover, the construction stormwater program is a federal National Pollutant Discharge Elimination System (NPDES) program; the irrigated lands program is adopted under state law only.

With respect to references to service providers for assistance, this too is problematic. The NRCS and UCCE do not have enough resources available to assist a large sub-set of growers in developing Sediment and Erosion Control Plans. Further, NRCS or UCCE service providers are not “certified” professionals, and they do not have the authority to “sign-off” on such plans.

Accordingly, the requirement that Sediment and Erosion Control Plans need to be developed by a certified professional, and reference to service providers, need to be removed from the Draft WDR.

#### **V. Substantive Requirements for Annual Nitrogen Budget**

As compared to the administrative draft, the Draft 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. The ESJWQC believes that it is unnecessary to require all Members to prepare Annual Nitrogen Budgets. Rather, the ESJWQC recommends that the Draft WDR be revised to state that “all Members are encouraged to prepare” Annual Nitrogen Budgets versus making it a requirement of the Draft WDR. (See Draft WDR, p. 23.)



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Next, the ESJWQC reiterates its concerns with the Annual Nitrogen Budget requirements as proposed in the Draft WDR. The ESJWQC has always supported the concept of Annual Nitrogen Budgets as long as the development and use of such budgets is clearly understood and put into proper context. However, the language of the Draft WDR fails to provide the necessary safeguards with respect to the development and use of the Annual Nitrogen Budgets. First, in developing the draft provisions with respect to the Annual Nitrogen Budget process, the ESJWQC provided specific language to the Central Valley Water Board outlining the process, the annual reporting provisions, and the appropriate context for such requirements. The information and language provided by the ESJWQC has not been included in the Draft WDR. Specifically, the ESJWQC provided the following language for inclusion in the Draft WDR:

[t]he third-party will aggregate information from Final Annual Nitrogen Budget Worksheets to adequately characterize the input, uptake, and loss of nitrogen fertilizer applications by specific crops for the significant crops in the Eastern San Joaquin River Watershed. This information may include a summary of nitrogen consumption ratios by crop or other equivalent reporting units. The ratio is an estimate of anticipated crop consumption in comparison to total applied nitrogen through sources including fertilizers, manures, composts, nitrates in irrigation supply water and other sources. However, appropriate ratios vary from crop to crop, and need to account for site-specific conditions. Ratios shall be used as a tool to inform the third-party and its members with respect to the need for new and/or additional management practices; ratios are not, and shall not be used as a regulatory end-point for determining compliance with water quality standards, or the terms of this Order.

While some of this language has been incorporated, the reporting provisions have been expanded, and the explanatory language has not been included. As a result, the Annual Nitrogen Budget Reporting requirements are extensive and expensive, and Annual Nitrogen Budgets may be used as regulatory end-points for determining compliance with the terms of the Draft WDR. (See section II above.) The Draft MRP reporting requirements must be revised to reflect the language provided immediately above.

Moreover, to ensure that the Annual Nitrogen Budget is put into the proper context with respect to the Draft WDR, language that clearly describes the intended use and purpose of Annual Nitrogen Budgets is essential for inclusion in the Draft WDR, and in the Draft Information Sheet. With respect to the Draft WDR, the ESJWQC recommends that a new finding be added that states as follows:

This Order encourages all Members to prepare Annual Nitrogen Budgets, and requires Members in highly vulnerable groundwater areas where nitrate is found to be a constituent of concern to prepare Annual Nitrogen Budgets. In general, Annual Nitrogen Budgets are a worksheet that may include the calculation of a nitrogen consumption ratio. The ratio as calculated on the Annual Nitrogen Budget Worksheets is an estimate of anticipated crop consumption in comparison to total

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applied nitrogen through sources including fertilizers, manures, composts, nitrates in irrigation supply water and other sources. Ratios are tools to be used to inform the third-party and the Members with respect to the need for new and/or additional management practices; ratios are not, and shall not be used as regulatory end-point for determining compliance with water quality standards, or the terms of this Order.

Without the inclusion of the above-identified language, Annual Nitrogen Budgets and the information contained therein, may be misused and improperly conveyed by Central Valley Water Board staff and others. Thus, it is essential that such language be added to the Draft WDR, Draft MRP, and Draft Information Sheet.

#### **VI. Determination of Member Compliance With Terms of the Draft WDR by the Third-Party**

Finding 22 of the Draft WDR and other associated provisions suggest that the third-party may be ordered to conduct field specific studies to identify sources of water quality problems. (See, e.g., Draft WDR Finding 22, p. 6 [“ . . . this Order requires the third-party to provide technical reports, which may include field specific special studies, at the direction of the Executive Officer.”].) As the entity that will implement the third-party provisions of the Draft WDR, the ESJWQC is concerned with the collective impact of these provisions. As currently proposed, it appears that the ESJWQC could be put in the position of inspecting and monitoring individual Member discharges from irrigated agricultural operations to surface waters and groundwater. The ESJWQC does not believe this to be an appropriate role for the third-party. As indicated in the Draft WDR, the role of the third-party is to assist Members and to be responsible for fulfilling regional requirements, which include monitoring, development of regional or watershed-based water quality management plans, and tracking Member compliance with certain identified management plan and reporting requirements. (See Draft WDR Finding 10, p. 3.) The third-party does not replace the role of the Central Valley Water Board and has no legal standing to determine if an individual Member’s discharge is in compliance with water quality standards.

Further, the Draft MRP includes provisions to suggest that the Central Valley Water Board may require the ESJWQC to conduct site-specific field studies of an identified Member’s operation. (See Draft MRP, p. 10.) The ESJWQC is opposed to such provisions. If the Central Valley Water Board determines that individual site operations need to be monitored, then the Central Valley Water Board’s Executive Officer has the authority to issue an inspection and monitoring order directly to the Member under Water Code section 13267. Such a directive or order to the ESJWQC is inappropriate as it would require the ESJWQC to divert its resources and funding that is collected to meet regional requirements to be expended on one individual. Moreover, the ESJWQC contends that such an order issued to the ESJWQC would not comply with Water Code section 13267. Water Code section 13267 specifically provides the Central Valley Water Board with the authority to “investigate the quality of any waters of the state within its region.” (Wat. Code, § 13267(a).) In doing so, the statute further provides the Central Valley Water Board with the authority to require “any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge . . . [to] furnish, . . . technical or monitoring program reports which the regional board requires.” The ESJWQC is *not* a discharger, thus the Central Valley Water Board

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cannot compel the ESJWQC to furnish technical or monitoring reports, except to the extent as agreed upon by the ESJWQC. Moreover, under this statutory authority, “the burden of the report, including costs of these reports, must bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.” (Wat. Code, § 13267(b)(1).) Here, the burden on the ESJWQC to monitor and prepare reports on an individual farm basis would not be reasonable. As indicated above, the role of the third-party is to conduct regional or watershed-based monitoring, conduct education and outreach, and develop and implement watershed or subwatershed water quality management plans. To support these efforts, the ESJWQC assesses all of its Members in an equitable manner. Requiring the ESJWQC to use its limited resources to monitor an individual farm would not be a reasonable use of funds, and it would deflect limited resources from its watershed and subwatershed obligations to inspect just a few. Based on these concerns, the Central Valley Water Board needs to remove these provisions from the Draft WDR.

To the extent that the ESJWQC has developed a water quality management plan that includes the need for field studies to verify the effectiveness of management practices, then such studies may be appropriate. But in all cases, the use of field studies must be at the discretion of the ESJWQC – not mandated by the Central Valley Water Board. Accordingly, the Central Valley Water Board must revise Draft WDR Finding 22, and the special project monitoring provision in the Draft MRP.

## **VII. Surface Water Toxicity Testing Requirements**

As currently drafted, the Draft MRP suggests that both acute and chronic toxicity testing is required for all toxicity tests. Specifically, the aquatic toxicity testing is required to follow footnoted U.S. Environmental Protection Agency (USEPA) testing methods, which includes the methods for both acute and chronic toxicity testing. (Draft MRP, p. 9.) Although the trigger requirements for a toxicity identification evaluation (TIE) are specific to acute toxicity (i.e., mortality), the language of the Draft MRP does not clearly indicate that only acute toxicity testing is required. The ESJWQC is opposed to chronic toxicity testing for several reasons. First, chronic toxicity testing is significantly more expensive than acute toxicity testing, which is the current requirement. Specifically, implementing chronic water column toxicity testing for *Ceriodaphnia dubia* and *Pimephales promelas* will result in an increase in toxicity costs of two times the current acute toxicity testing costs. All costs will double, including the initial toxicity test of the sample, the reference toxicity tests, and any subsequent TIEs. Based on current ESJWQC toxicity testing costs for three species (algae, fat head minnow, and water flea), the increase in costs for a single sample will be \$3,250. If a TIE is required, the cost increase is estimated to be \$2,780 for each TIE. These increases are in addition to the current costs associated with toxicity testing. Assuming that the ESJWQC would conduct toxicity tests for 12 months at 6 sites under the Draft MRP, the increase in costs are estimated to be a minimum of \$234,000 annually when compared to current toxicity costs. The addition of TIEs and additional sampling to meet management plan requirements increases this amount further. The ESJWQC estimates that if chronic toxicity testing is required, the toxicity analytical cost would increase from \$381,000 to \$690,000 annually. This increase in cost directly contradicts the surface water monitoring discussion contained in the Draft Information Sheet, which claims that changes are being made “to improve the cost-effectiveness of the surface water monitoring effort.” (Draft Information Sheet, p. 7.)

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Second, for this program there is no scientific or technical reason that would justify the significant increase in cost for the change from acute toxicity testing to chronic toxicity testing. As discussed further below, the Draft MRP will require chemical-specific monitoring in ambient surface water. The cost of analysis for the multiple new chemicals (that are ultimately agreed upon as being appropriate) will result in a substantial increase in the cost of chemical analysis. Monitoring for specific chemicals in surface waters coupled with the establishment of trigger limits will be protective of aquatic life in waterways of the Eastern San Joaquin River Watershed. Requiring chronic toxicity testing will not provide additional protection above that already provided by agreed upon chemical-specific monitoring and the establishment of trigger limits. Acute toxicity testing is sufficient to identify additional contaminants such as ammonium that could cause toxicity but are not discharged from irrigated agriculture. Moreover, the Draft WDR, the Draft MRP, and the Draft Information Sheet provide no reason or basis for the proposed change. Thus, chronic toxicity testing requirements, or any implication of a chronic toxicity testing requirement must be removed.

#### **VIII. Groundwater Vulnerability Designations**

The Draft MRP proposes to define high vulnerability areas as those areas that have been identified by the State Water Board, areas covered by the DPR groundwater protection area, and areas identified by the Central Valley Water Board as having exceedances of water quality objectives for which irrigated agriculture may cause or contribute to the exceedance. (Draft MRP, p. 12.) The ESJWQC is then allowed to refine this area during the development of the Groundwater Assessment Report (GAR). (*Ibid.*) The ESJWQC does not agree with the creation of a “default” definition of vulnerable area in advance of the development of the GAR. The approach as proposed here defeats the purpose of conducting a GAR, and identifying vulnerable areas based on appropriate data and information.

Moreover, the Draft MRP proposes that management practices should be used in identifying vulnerable areas. We contend that this type of information is not appropriate for determining vulnerability, and in fact would require an excessive amount of information. It implies that vulnerability determinations should be made on a field scale, which is not the envisioned or intended purpose of the GAR. Accordingly, the Draft MRP needs to be revised to remove the default definition of vulnerable area, and needs to remove reference to management practices as information for which vulnerability decisions would be made.

#### **IX. Discharge Limitations**

The Draft WDR improperly characterizes what should be receiving water limitations as discharge limitations. (See Draft WDR, p. 15.) Specifically, by characterizing the limitations as “discharge limitations,” the Central Valley Water Board is transforming receiving water limits into end-of-field discharge limits. This means that all irrigation and stormwater leaving a field, or discharging to groundwater must comply with water quality objectives instantaneously – unless there is a management plan that includes a time schedule for compliance. Such requirements are unreasonable, and well beyond the scope of the irrigated lands program as analyzed in the Programmatic Environmental Impact Report.

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Further, the Draft WDR states that Member operations “shall not cause or contribute” to exceedances of applicable water quality objectives. This creates an extremely broad and impossible standard that suggests one molecule of a constituent may “contribute” to an exceedance, and therefore a grower may be liable even for de minimus contributions. The ESJWQC believes that the “or contribute” standard is inappropriate and may subject growers to unwarranted liability and enforcement actions. At the very least, the “contribute” requirement should be limited to situations where the Member has significantly contributed to a violation of a water quality standard.

#### **X. Time Schedule of Compliance**

The limitations expressed in section III of the Draft WDR should be receiving water limitations that clearly indicate that discharges from irrigated agricultural operations shall not cause or significantly contribute to violations of applicable water quality standards in waters of the state. In other words, irrigated agriculture is in compliance with these limitations if its discharges are not the cause, or do not significantly contribute to water quality objective exceedances even if the surface water or groundwater in question does not meet applicable water quality standards. (Draft WDR, p 15.) Likewise, the time schedules for compliance in section XII of the Draft WDR must also be specifically related to causes or significant contributions from irrigated agriculture and not compliance in the receiving water itself. (Draft WDR, pp. 29-30.) As proposed, the Draft WDR suggests that discharges at the edge-of-the field are subject to time schedule provisions – not that irrigated agriculture no longer causes or significantly contributes to exceedances of water quality objectives. Further, it is important to note that the ten-year timeframe for some constituents and some practices is an aggressive timeframe. Thus, it is essential that the Central Valley Water Board’s authority for modifying these schedules be maintained.

#### **XI. Groundwater Quality Management Plan General Requirements**

The Draft WDR and Draft MRP-2 propose to require Groundwater Quality Management Plans (GQMPs) within 45 days after a triggering exceedance. (Draft WDR, p. 26; Draft MRP, Appendix MRP-1, p. 2.) The program proposed is very similar to that for surface water. The ESJWQC had initially thought that this process would also work for groundwater. However, after careful evaluation and consideration, the ESJWQC has now concluded that surface water and groundwater are very different, and the same process that has been employed for surface water may not work well in conjunction with groundwater. In general, Surface Water Quality Management Plans (SQMPs) are designed to be reactive to the observed condition, identify the source of the condition, address the condition, and then for a prescribed, relatively short time period demonstrate completion of the action(s) outlined in the SQMP. The third-party could then request completion of the management plan, and pending approval by the Executive Officer, the third-party may revert to regular ongoing monitoring requirements.

Unlike the circumstances described above for surface water, groundwater quality conditions, especially those contributed to by widespread nonpoint sources, do not lend themselves to the same “management approach.” Since an alternative groundwater monitoring approach, i.e., a Central

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Valley scale RGMP, is proposed for the Central Valley Water Board's consideration, a different approach to groundwater quality management planning for the Draft WDR needs to be considered.

As recognized by Central Valley Water Board staff, the Draft Information Sheet describes the Trend Groundwater Monitoring Program as "designed to determine baseline quality of groundwater in the third-party area, and to develop long-term groundwater quality information that can be used to evaluate the regional effects (i.e., not site-specific effects) of irrigated agriculture and its practices." Notably, trend monitoring as defined by Central Valley Water Board staff recognizes the relatively longer time periods and also larger regional scale associated with the purpose of the trend monitoring. Long time periods may mean many years or even many decades depending on the hydrogeologic setting. The relatively greater depth of the trend monitoring wells (i.e., typically water supply wells which would not be constructed with a short screen section at the water table) means groundwater flow paths to the trend monitoring wells are much longer (potentially miles) and the contributing source areas more diffuse. Groundwater trend monitoring describes water quality results collected over a long period that are symptomatic of practices associated with regional land uses. Where irrigated agriculture is the predominant land use in the monitored area, it may be indicative of the effect of long time agricultural operations contributing to the observed trends. However, representative monitoring, rather than trend monitoring, is the preferred method for: (1) determining more definitively which agricultural practices are contributing to effects on water quality, and (2) more quickly and effectively demonstrating practices that control the effects on, and result in improvements to, water quality, which should occur on a valley-wide scale.

The GAR will include a determination of higher and lower hydrogeologically vulnerable areas. When establishing priorities for monitoring in high vulnerability areas, the third-party will also consider (among other factors) identified exceedances of water quality objectives for which irrigated agriculture waste discharges are the cause, or a contributing source. This means where sufficient existing groundwater quality data are available in the third-party area, particularly hydrogeologically sensitive areas, they are likely to show the regional effects of long time agricultural practices. Similarly, trend monitoring can also be used to show long time improvements to groundwater quality, on a regional scale, due to changed practices. As noted above, representative monitoring is the preferred method for more quickly measuring whether changed practices are effective in improving water quality.

As an alternative to the GQMP approach currently proposed in the Draft WDR, the ESJWQC proposes that the ESJWQC's monitoring and reporting requirements already encompass the elements that would be included in a GQMP. Specifically, the ESJWQC in its Monitoring Report will already address the following:

- Annual Nitrogen Budgets submitted by Members to the third-party;
- Farm Evaluations submitted by Members to the third-party;
- Education and outreach conducted by the third-party; and

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- Ongoing groundwater monitoring to assess trends.

Additionally, in coordination with a proposed Central Valley RGMP, the third-party can provide and receive information directed toward furthering the collective efforts of the agricultural community to improve grower's practices.

Thus, rather than having GQMPs triggered in the way as proposed in the Draft WDR, the ESJWQC recommends that the GAR identify areas where the ESJWQC should concentrate its efforts on education and outreach to its Members, as well as identifying appropriate management practices for implementation. These efforts would be supported with information obtained from the proposed valley-wide RGMP. These areas would be prioritized in the GAR based on a number of factors, including but not limited to, groundwater monitoring information, proximity to urban areas, constituents of concern, and others. Accordingly, the ESJWQC recommends that the GQMP trigger requirements be deleted, and instead have such requirements be based on information obtained in the GAR, and reported in the third-party's Monitoring Report. Additional actions related to improved irrigation and fertilization practices would be developed through the RGMP. The results and actions stemming from that program would then be reported under that program as well as the Monitoring Report. Moreover, with this proposed approach, time schedules should be included in the GAR or a GQMP. Thus, the time schedule provision for groundwater would also need to be revised to include GAR. (See Draft WDR, p. 30.)

## **XII. Compliance With the California Environmental Quality Act (CEQA)**

The Draft WDR finds that "[a]lthough the Order is not identical to any of the PEIR alternatives, the Order is comprised entirely of elements of the PEIR's wide range of alternatives." (Draft WDR, p. 7.) It then further finds that the PEIR "identified, disclosed, and analyzed the potential environmental impacts of the Order." (*Ibid.*) Putting aside the adequacy of the Program Environmental Impact Report (PEIR) in general, the ESJWQC contends that the Draft WDR goes beyond the alternatives analyzed in the PEIR, and therefore, not all potentially adverse environmental impacts of the Draft WDR have been identified, disclosed, and analyzed in the PEIR.

Specifically, the Draft WDR includes provisions that create end-of-field discharge limitations, and farm management performance standards that were not part of any of the alternatives under the PEIR, and were therefore not adequately analyzed. For example, the Draft WDR includes farm management performance standards that require implemented management practices to: (1) minimize waste discharge offsite in surface water; and, (2) minimize percolation of waste to groundwater. (Draft WDR, p. 18.) In other words, to comply with the performance standards, and to meet water quality objectives at the end of the field, growers under the Draft WDR will most likely need to avoid having any irrigated return flow or stormwater leaving the field, and will need to avoid irrigation applications that result in groundwater recharge. With respect to surface waters, this will result in a dramatic decrease in water available for aquatic life, especially in water bodies dependent on agricultural drainage for all or parts of the year. For groundwater, this will mean a dramatic decrease in groundwater recharge in all groundwater basins, and in particular in over drafted basins.

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The PEIR did not adequately analyze these impacts. (See Irrigated Lands Regulatory Program Draft PEIR (July 2010), pp. 5.9-15 - 5.9-18.) At most, the PEIR stated that tailwater recovery systems might reduce the amount of flows, “slightly altering hydrologic patterns, but the amount of alteration is not considered a significant hydrologic impact.” (*Id.*, p. 5.9-15.) However, nowhere does the Draft PEIR discuss universal application of farm management practices that minimize (or eliminate) irrigation return flows and groundwater recharge. Accordingly, the PEIR is inadequate as applied to the Draft WDR, and the Central Valley Water Board must at least prepare a supplemental EIR to address these unanalyzed impacts. This has not occurred here.

### **XIII. Improper Incorporation of Mitigation Measures**

The Draft WDR improperly incorporates mitigation measures that cannot be legally imposed. (Draft WDR, p. 8, and see Attachment D thereto; see also CEQA Guidelines, § 15126.4(a)(5).) For example, vegetation and wildlife mitigation measures require avoidance of sensitive biological resources, additional CEQA review if such resources cannot be avoided, and force agricultural landowners to conduct a delineation of affected wetlands “prior to implementing any management practice that will result in the permanent loss of wetlands.” In delineating wetlands, the mitigation measures require it to be conducted in accordance with current U.S. Army Corps of Engineer (Corps) methods. (Draft WDR, Attachment D, pp. 20-21.) The mitigation measures imposed here cannot be legally imposed in all cases.

First, we question the requirement to undertake additional CEQA review when an adverse effect on a sensitive biological resource cannot be avoided. While we agree that impacts to such sensitive areas should be avoided, we are concerned that the mitigation measure imposes a new CEQA requirement on agricultural landowners and operators when no discretionary project may actually be triggered by the action. For example, in some jurisdictions, and depending on the construction activity, grading permits may be required for installation of certain management practices (e.g., detention basins). However, in many jurisdictions, the act of constructing a management practice may not rise to the level of activity subject to a grading permit. Further, the implementation of management practices at the farm level, which are required by the Draft WDR, is not subject to a discretionary approval by the Central Valley Water Board. Thus, there is no universal trigger for additional CEQA review. At most, such review may be necessary if the construction activity constitutes a discretionary project under the local jurisdiction’s authority.

Similarly, the Draft WDR incorporates a mitigation measure that requires additional CEQA review if construction of a management practice cannot be altered to avoid effects on special-status fish. (Draft WDR, Attachment D, p. 22.) For the same reasons expressed above, there is unlikely to be a “discretionary” project associated with such activity, and therefore additional CEQA review is being improperly required when there is no legal requirement for such a review. Thus, the Draft WDR improperly incorporates mitigation measures that cannot be legally imposed.

Next, we are concerned that the mitigation measure for wetland loss is too broad and fails to recognize that implementation of management practices is most likely to occur on irrigated agricultural land currently in production. The Central Valley Water Board does not have the



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authority to order the delineation of affected wetland areas identified as converted croplands because such agricultural areas do not fall within the jurisdiction of the Corps. The federal]Clean Water Act (CWA) and the authority of the Corps to perform operations under the CWA apply only to “waters of the United States.” The regulatory definition of waters of the United States specifically states that, “Waters of the United States do not include prior converted cropland . . . .” (33 C.F.R. § 328.3(a)(8).) Furthermore, guidance issued by the USEPA in 2008 clarifying CWA jurisdiction following the Supreme Court case of *Rapanos v. United States* (2006) 547 U.S. 715, made no mention of and had no effect on this exemption for ongoing agricultural operations. As such, cropland continues to be exempt from the Corps’ CWA jurisdiction. If it is not within the authority of the Corps to conduct a delineation because the area to be examined is not a water of the United States as defined by federal law or regulation, then it follows that it is not within the authority of the Central Valley Water Board to order individual agricultural operations to undertake such an action as a mitigation measure.

Accordingly, the Draft WDR improperly incorporates mitigation measures that cannot be legally imposed, and such measures must be removed.

#### **XIV. Compliance With the State’s Policy to Protect High Quality Waters**

The Draft WDR incorrectly characterizes application of the state’s anti-degradation policy. Specifically, the Draft WDR implies that application of the anti-degradation policy is triggered by “any activity which discharges a waste to existing high quality waters.” (See Draft WDR, p. 8.) However, this characterization and application of the anti-degradation policy to the Draft WDR is inappropriate. As indicated in State Water Board orders and guidance documents, the anti-degradation policy is triggered when the Central Valley Water Board is taking an action that may cause degradation to high quality waters. It is not applicable if the Central Valley Water Board’s action will not cause degradation.

For example, State Water Board Order No. WQ 86-17 clearly states, “[b]efore approving any reduction in water quality, or any activity that would result in a reduction in water quality, the Regional Board must first determine that the change in water quality would not be in violation of State Board Resolution No. 68-16 or the federal antidegradation policy.” (*In the Matter of the Petition of Rimmon C. Fay* (Nov. 20, 1986) Order No. WQ 86-17, at p. 17.) More recently, the State Water Board opined that, “[t]he federal antidegradation policy and State Water Board Resolution 68-16 apply to reductions in water quality.” (*In the Matter of Petitions for Reconsideration of Water Quality Certification for the Re-operation of Pyramid Dam for the California Aqueduct Hydroelectric Project Federal Energy Regulatory Commission Project No. 2426* (Aug. 4, 2009) Order WQ 2009-0007 (*Pyramid Dam*), p. 12.) By its own admissions in the Draft WDR, the Central Valley Water Board finds that the order will achieve and maintain water quality. (Draft WDR, p. 8.) Thus, because adoption of the Draft WDR will not result in a reduction in water quality, the federal and state anti-degradation policies are not applicable.

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Furthermore, even though application of the anti-degradation policies may be triggered for changes that have already occurred, such an application only occurs when the changes have not already been reviewed for consistency with those policies. (See *Pyramid Dam*, p. 12.) That is not the case here. The Draft WDR incorrectly states that, "any activity which discharges a waste to existing high quality waters must meet waste discharge requirements which will result in best practicable treatment or control (BPTC) of the discharge . . ." (Draft WDR, p. 8.) In other words, the Central Valley Water Board is claiming that anti-degradation is triggered for any permitting action, regardless if the activity has been previously permitted. In fact, irrigated agriculture has been subject to Central Valley Water Board regulation since adoption of the original waivers in 1982 when the Central Valley Water Board adopted Resolution No. 82-036. To adopt waivers pursuant to Water Code section 13269, the Central Valley Water Board was required to find that the waivers were consistent with any applicable regional water quality control plan (i.e., Basin Plan). The water quality control plans for the Central Valley region (for both the Tulare Lake Basin and the Sacramento and San Joaquin River Basins) have included and contained State Water Board Resolution No. 68-16 since the plans were adopted in 1975. Thus, to adopt the waivers, the Central Valley Water Board needed to find that adoption of the waivers was consistent with Resolution No. 68-16. In other words, discharges from irrigated agriculture were found to be consistent with Resolution No. 68-16 in 1982, and therefore only a Central Valley Water Board action that would degrade water quality is subject to the state and federal anti-degradation policies. As already indicated, the proposed action would not degrade water quality but would improve water quality. Accordingly, the action taken here does not trigger application of the state or federal anti-degradation policies.

Thank you for the opportunity to comment. Should you or your staff have any questions with respect to these comments and the information contained in Attachment 1, please do not hesitate to contact me at (559) 646-2224.

Sincerely,



Parry Klassen  
Executive Director

Attachment 1

cc (*via email only*): Secretary Karen Ross, Department of Food and Agriculture ([karen.ross@cdfa.ca.gov](mailto:karen.ross@cdfa.ca.gov))  
Charles Andrews, Department of Pesticide Regulation ([candrews@cdpr.ca.gov](mailto:candrews@cdpr.ca.gov))

## Attachment 1

### ***East San Joaquin Water Quality Coalition's Additional Comments on Tentative Waste Discharge Requirements General Order for Growers Within the Eastern San Joaquin River Watershed That Are Members of the Third-Party Group***

#### **Draft WDR**

*Finding 5, p. 2:* The language of this finding attempts to clarify what the Draft WDR is not intended to regulate. However, by omitting other agricultural facilities within this list, it is implying that the Draft WDR is intending to regulate water quality in other parts of agricultural facilities, and in particular, as it leaves the field. In other words, the Draft WDR is intending to regulate water quality at the end of the field, regardless if the return flow or stormwater runoff causes or contributes to violations of receiving water quality standards. Such regulation at the end of the field is inappropriate and exceeds the Central Valley Water Board's authority. First, the Porter Cologne Water Quality Control Act (Porter-Cologne) states that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all 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.) Regulating water quality directly at the end of the field is NOT reasonable and directly violates the legislative intent with respect to Porter-Cologne. Second, waste discharge requirements must be related to the conditions in the receiving waters upon or into which the discharge is made, or is proposed. (Wat. Code, § 13263(a).) Irrigation return flows or stormwater leaving a field may or may not discharge to or affect a water of the state. Accordingly, it is inappropriate to set forth requirements that specifically apply to water leaving the field. Rather, the Draft WDR must be limited to regulating discharges of waste that may affect waters of the state.

*Finding 14, p. 4:* The next to last sentence is confusing. It should state, "Depending on the frequency of application and the amount applied, certain soluble compounds, such as nitrate, may share common pathways to groundwater with soluble pesticides." Nitrates should not generally be classified as contaminants unless they cause or contribute to an exceedance of a water quality objective in waters of the state.

*Finding 21, p. 6, and Provision IV.B.2, p. 16:* This finding states that Members of the coalition must comply with an individual monitoring and reporting program, as specified by the Central Valley Water Board or Executive Officer. As written, this finding implies that by being subject to the terms of the order that a Member is automatically subject to any individual monitoring and reporting program issued by the Central Valley Water Board or Executive Officer. Such an implication is inconsistent with Porter-Cologne. Under Porter-Cologne, the Central Valley Water Board, or the Executive Officer through its delegated authority, has the authority to require technical reports, as necessary, under Water Code section 13267. However, section 13267 is not without limits. When the Central Valley Water Board is issuing such an order, section 13267 requires the Central Valley Water Board to show "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports." (Wat. Code, § 13267(b)(1).) To ensure that the issuance of any individual monitoring and reporting program is in compliance with section 13267, the ESJWQC recommends that finding 21 be amended to reflect that compliance with an

individual monitoring and reporting program is based on an understanding that the individual monitoring and reporting program has been ordered pursuant to and in accordance with the provisions of Water Code section 13267.

*Finding 36, p. 9:* Finding 36 states that section 13141 of the Water Code does not apply to agricultural water quality control programs developed through waivers and/or waste discharge requirements. We disagree. The language of section 13141 does not state or imply that it is limited only to application of an agricultural water quality control program that is adopted into a Basin Plan. To the contrary, the 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.) The fact that the long-term irrigated lands regulatory program is being implemented through a series of waste discharge requirements does not negate the applicability of section 13141 of the Water Code. Regardless, the costs of this program are significant and need to be considered by the Central Valley Water Board in its adoption of the Draft WDR and all its requirements. As we indicated in the cover letter, there are many costly requirements contained herein that are unreasonable and should be eliminated.

*Finding 44, p. 11:* This finding recognizes the Department of Pesticide Regulation’s (DPR) Groundwater Protection Program. In this finding, the Draft WDR suggests that the “Groundwater Protection Program can provide valuable information on potential impact to groundwater from agricultural pesticides.” The ESJWQC believes that mere reference to the DPR’s program is not sufficient. Rather, the Draft WDR should defer in its entirety to the DPR’s Groundwater Protection Program with respect to controlling agricultural pesticides in groundwater. The DPR’s program is well-established, and includes a regulatory scheme that controls agricultural pesticide use in areas that may be vulnerable. It is not necessary or appropriate for the Central Valley Water Board to require duplicative efforts with respect to pesticides here.

*Finding 45, p. 11:* This finding refers to nutrients in a generic manner. The primary issue with respect to agricultural fertilizer use and potential groundwater impacts is specific to nitrogen – not nutrients. Thus, this finding, and others, needs to be revised to refer specifically to nitrogen management.

*Finding 48, p. 12:* In conjunction with our previous comments with respect to discharge limitations, this finding regarding enforcement clearly indicates that the Central Valley Water Board intends to hold growers responsible for meeting water quality objectives at the end of the field, and that the failure to do so will result in a priority enforcement action. End-of-field discharge limitations are not, nor have they ever been, appropriate waste discharge requirements. Such limitations are unreasonable and fail to comply with the Legislative intent of Porter-Cologne. By creating such limits here, the Central Valley Water Board is embarking on a completely different regulatory program than that which was evaluated in the programmatic environmental impact report, or as is conveyed publicly to growers and Central Valley Water Board members. Accordingly, the Draft WDR is fundamentally flawed. If the central premise of the Draft WDR is not changed from end-of-field discharge limitations to receiving water limitations, the program may fail due to concerns by many growers that they will be subject to immediate liability even though return flows or stormwater runoff may not affect waters of the state.

*Provisions IV.A.3 and IV.B.6, p. 16:* As proposed, this would require Members to implement management practices that do more than achieve compliance with water quality standards. It states that Members must implement management practices to “improve and protect water quality” in addition to achieving compliance with water quality objectives. (Draft WDR, p. 16.) Such a requirement exceeds the Central Valley Water Board’s regulatory authority. The Central Valley Water Board is to adopt waste discharge requirements that implement water quality control plans. (Wat. Code, § 13260(a).) Such plans include water quality standards. There is no statutory authority that gives the Central Valley Water Board the authority to require individuals to go beyond achieving compliance with applicable water quality standards. Accordingly, the references to “improve and protect water quality” must be removed.

*Provision IV.B.4, p. 16:* As expressed in our previous communications, the ESJWQC is concerned with the requirement that Members be required to participate annually in an outreach event, and that therefore, the failure to do so would constitute a violation of the Draft WDR, and may subject a Member to enforcement action. While the ESJWQC believes that all Members should be encouraged to attend such events, requiring participation is a high bar. For a plethora of reasons, Members may not be able or available to attend an outreach event on the day that it is scheduled by the ESJWQC. Likewise, it would be impossible for the ESJWQC to schedule such events in a manner that ensures all Members are available to attend. Considering the difficulty in making sure that all Members have the ability to attend an outreach event on the day or days that they are scheduled, it is unreasonable to require participation. Rather, the ESJWQC recommends that the language be changed to encourage such participation, or that participation be required to the extent feasible.

*Provision IV.B.8, p. 17:* As commented previously, the correct reference should be to nitrogen – not nutrients. Thus, this provision should be revised accordingly.

*Provision IV.B.13, p. 17:* This provision is inconsistent with the provisions of Water Code section 13267, as well as trial court’s findings with respect to the Conditional Waiver and its similar provisions. In short, as proposed, this provision would require Members to automatically consent to on-site inspection activities. This is an unreasonable requirement. Under Water Code section 13267, such inspections must occur either with the consent of the owner or operator of the facilities, or after a warrant has been duly issued pursuant to appropriate procedures. (Wat. Code, § 13267(c).) Agreeing to be subject to the terms of the order does not waive an individual’s constitutional right against improper search and seizure without a warrant. This provision must be revised to be consistent with the provisions of Water Code section 13267(c).

*Provision IV.B.16, p. 17:* This provision has just recently been added to the Draft WDR, and creates a new and additional unnecessary expense with respect to complying with the terms of the order. Under provision 16 as proposed, a Member would need to hire a licensed civil engineer to design and construct settling ponds, basins, and tailwater recovery systems. Like many other provisions in the Draft WDR, this provision is unreasonable, and more importantly, unnecessary. First, the Draft WDR fails to provide any findings or reasons to support the inclusion of this expensive, and unnecessary provision. Farmers have for decades designed and constructed settling ponds, basins, and tailwater recovery systems. There is no information to suggest that farmer created facilities are problematic with respect to water quality, and that farmers are unable to continue to competently develop such facilities. Second, the cost of hiring a professional engineer is unreasonable, and provides no added water quality benefit. Accordingly, this provision must be removed from the Draft WDR.

*Provision IV.B.20, p. 18:* This provision attempts to establish performance standards for management practices. However, such performance standards in fact may create unintended environmental impacts that were not evaluated in the programmatic environmental impact report. Specifically, the performance standards suggest that the answer to all problems is to eliminate return flow and the percolation of irrigation water. However, this fails to recognize that the elimination of return flows and percolation of irrigation water may eliminate water for aquatic life in surface waters, and eliminate groundwater recharge in over-drafted basins. Considering the unintended environmental impacts, the ESJWQC recommends that the farm management performance standards be eliminated. Moreover, the inclusion of such standards here in the long-term irrigated agricultural program is unprecedented, and duplicative of other requirements.

*Provision IV.C.8.a, p. 19:* Under this provision, the ESJWQC will be required to maintain attendance lists for outreach events. Because some outreach events may be held by others outside the control of the ESJWQC (e.g., commodity organizations), the ESJWQC recommends that this provision be revised to only require the ESJWQC to maintain such attendance lists for “its” outreach events.

*Provision IV.C.10, p. 19:* There are no subwatershed groups within the ESJWQC. Thus, this provision does not apply and should be deleted.

*Provision VII.B, p. 22:* The proposed 90-days for completion of Farm Evaluations is not an adequate amount of time, and is unreasonable. Rather, Members should be given six months for completion of Farm Evaluations. This additional time will allow the ESJWQC to work with its Members to ensure that Farm Evaluations are properly conducted.

*Provision VII.C, pp. 22-23:* The Sediment and Erosion Control Plan provisions here are cumbersome and confusing. As indicated previously, the ESJWQC recommends that it identify and notify its Members if Sediment and Erosion Control Plans are required. This will help to avoid the confusion set forth here with respect to trying to segregate low vulnerability versus high vulnerability. It will be more efficient if the ESJWQC identifies the areas where such plans are required, and then notifies those Members, rather than trying to have Members determine which category they fit within.

*Provision VII.D.1, p. 23:* As proposed, the first Annual Nitrogen Budget Worksheets could be required to be submitted by March 1, 2013. Considering that the Draft WDR is not scheduled for adoption until October of 2012, March 1, 2013, sets forth an unreasonable deadline. Rather, Annual Nitrogen Budgets should not be due any sooner than March 1, 2014. Also, as indicated previously, all references with respect to information related to the Annual Nitrogen Budgets should be to nitrogen – not nutrients. In this provision, there are several improper references to nutrients that need to be deleted.

*Provision VIII.C, p. 24:* This provision would require the ESJWQC to develop a membership list that includes the township, range, and section (TRS) number for each parcel, and the Member’s name associated therewith. Clearly, the Central Valley Water Board is requesting this information so that it can match summary Annual Nitrogen Budget and Farm Evaluation reports with individual Members. For the many reasons stated previously, the ESJWQC is very much opposed to requiring TRS information in its membership list, as well as for summary reporting for the items identified. Such a reporting scheme undermines the purpose of only reporting such information to the third-party as opposed to the Central Valley Water Board. It means that all such information will now be open and available to the public, and that growers may become the target of threats, nuisance claims, and potentially environmental

terrorism, even if they are implementing management practices in good faith. Accordingly, the TRS information must be removed from the membership list requirement.

*Provision VIII.F, p. 25:* The ESJWQC appreciates the additional time provided for submittal of the workplans for groundwater quality monitoring (i.e., trend and representative). However, as expressed previously, the timing of submittal of such workplans should start from Executive Officer approval of the GAR and not the Notice of Applicability. Until the GAR is approved by the Executive Officer, it will be difficult for the ESJWQC to develop the monitoring workplans. Further, and as indicated previously, all requirements with respect to the Groundwater Representative Monitoring Program should be removed in their entirety and be deferred to a separate monitoring and reporting order that is adopted for all coalitions after the consensus with respect to the program has been reached between the coalitions and Central Valley Water Board staff.

*Provision VIII.I.1, p. 26:* The ESJWQC believes 60 days is a more reasonable deadline for submitting newly triggered surface water quality management plans.

#### **Draft Information Sheet – Attachment A to Order R5-2012-XXXX**

*Surface Water and Groundwater Monitoring, p. 6:* The last paragraph on page 6 lists five basic questions to be answered by the third-party surface water monitoring program. Question 4 should be updated to the following: “Are irrigated agricultural operations of *Members* in compliance with the provision of the WDR?”

*P. 8, item 2:* The sentence states, “Board staff will work with DPR to develop a list of pesticides for monitoring by the third-party.” The sentence should read, “Board staff will work with DPR and the third-party to develop a process for selecting the list of pesticides for monitoring by the third-party.” This statement needs to be consistent with section II.C.2 (p. 6) of the Draft MRP.

*Surface Water Management Plans, p. 8:* To be technically correct, please change the sentence that contains “algae toxicity, sediment toxicity, minnow toxicity, and water flea toxicity” to “sediment toxicity to *Hyalella azteca*, and water column toxicity to algae (*Selenastrum capricornutum*), fathead minnows (*Pimephales promelas*), and water fleas (*Ceriodaphnia dubia*).”

*Surface Water Management Plans, Table 2, p. 9:* The trigger limit for pH should be updated from “6.5-8.5” to “< 6.5 or > 8.5”.

*Implementation of Water Quality Objectives, p. 19:* The Draft Information Sheet refers to federal regulatory provisions that are not applicable to the Draft WDR. Specifically, the provisions cited apply only to NPDES permits and not state-issued WDRs. When interpreting narrative objectives for state-issued WDRs, the Central Valley Water Board must rely on associated provisions in the Basin Plan – not federal NPDES permit provisions. Accordingly, all references to 40 CFR § 122.44(d) and its provisions must be deleted from the Draft Information Sheet.

#### **Draft MRP - Attachment B to Order R5-2012-XXXX**

The Draft MRP references QAPP Guidelines on pages 19, 20, 21, 23 and 24. Since QAPP Guidelines are not included in the Draft WDR as an attachment, it is assumed that the QAPP Guidelines referenced are from MRP Attachment C (Irrigated Lands Conditional Waiver Program Quality Assurance Project Plan Guidelines) under Monitoring and Reporting Program Order No. R5-2008-0005. The Draft MRP also

states on page 23 that the East San Joaquin Water Quality Coalition's existing QAPP ". . . is acceptable for use by the third-party" (sixth paragraph, line 2). It is recommended that the reference to QAPP Guidelines be updated to reference the approved East San Joaquin Water Quality Coalition's existing QAPP.

*Provision III.A.2, p. 3:* In the last paragraph of this section, the first sentence should be revised as follows: "Any watershed areas where irrigated lands discharge to surface waters that do not contain a monitoring site . . ."

*Provision III.B, Table B, p. 4:* The third row of Table B lists a Site Name of "TBD<sup>1</sup>" with the 1 as a footnote reference. There is no footnote associated with Table B. The superscript should be deleted or a footnote added.

*Provision III.C.4.b, Sediment Toxicity, p. 10:* The first sentence of the third paragraph states that pesticide analysis should be performed on sediment samples that exhibit a "≥ 20% reduction in organism survival compared to the control . . ." However, the trigger limit for *Hyalella* toxicity is < 80% organism survival compared to the control. (See Draft Information Sheet, Table 2.) Therefore, a sample that has 80% survival of the organisms compared to the control would be required to have pesticide analysis but would not exceed the water quality trigger limit. It is recommended that pesticide analysis be performed when the organisms exhibit a > 20% reduction in survival to be consistent with the water quality trigger limit.

*Provision IV.D.1, Table 3, p. 17:* Annual monitoring of total kjedahl nitrogen should be removed from the trend-monitoring program. It is unnecessary and provides no useful information.

*Provision IV.D.2, p. 18:* The statement on line 7 of the top paragraph should read "groundwater monitoring data are collected . . ."

*Provision V.C, Monitoring Report, p. 20:* The Draft MRP indicates that the monitoring report is on a two-year frequency with the first report due May 2014. With respect to groundwater, the May 2014 start date does not work. The earliest, pending approval of workplans and implementation of workplans, that a groundwater report could be provided with actual groundwater data, would be sometime in 2016. The Draft MRP needs to be revised to reflect the actual timelines associated with groundwater monitoring.