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File No. 82231.00003

August 3, 2012

VIA EMAIL TO:  
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Jon Costantino, Vice Chair  
Katherine Hart, Board Member  
Sandra Meraz, Board Member  
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Carmen Ramirez, Board Member  
Robert Schneider, Board Member  
Pamela Creedon, Executive Officer  
Joe Karkoski, ILRP Program Manager  
Adam Laputz  
Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive, #200  
Rancho Cordova, CA 95670-6114

**Re: Comments re Eastern San Joaquin River Watershed Tentative  
WDRs and MRP for Discharges from Irrigated Lands on Behalf of  
the Southern San Joaquin Valley Water Quality Coalition**

Dear Board Chair, Vice Chair, Members, Ms. Creedon, Mr. Karkoski and Mr. Laputz:

The Southern San Joaquin Valley Water Quality Coalition (SSJWQC) submits these comments on the proposed East San Joaquin Water Quality Coalition (ESJWQC) General Order for the Irrigated Lands Regulatory Program. The agricultural waiver which has been in existence since 2004 pursuant to California Water Code section 13269 is now being bifurcated into six or more separate general orders, as driven by the staff alternative which was adopted by the Board, even though this alternative had not been reviewed pursuant to either the EIR or the associated Economic Analysis.

The Board staff has been engaged in informal negotiations with three of the water quality coalitions, namely, ESJWQC, SSJWQC and the Rice Water Quality Coalition on their general orders. Other coalition negotiations will follow. The SSJWQC has recently concluded our informal negotiations with the Regional staff and our proposed general order is now subject to “interested party” review and will soon be presented for public review, and thereafter be before the Regional Board for action.



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We have been advised by the Board and staff that the new general orders are being advanced pursuant to CWC § 13263, and are to follow similar formats (with the likely exception of Rice); however, the operational sections will likely be significantly different to reflect the considerable differences between the coalitions in respect to commodities, rainfall, hydrology, groundwater, Delta drainage, etc. However, upon reviewing the ESJWQC proposed General Order it appears very similar to the SSJVWQC draft now out for interested party review, despite considerable differences in conditions between the two coalition areas. Therefore, we feel compelled to provide these comments with respect to the ESJWQC proposed General Order for whatever precedential value it may have with the Board.

Follows are some significant issues and potential problems with this proposed ESJWQC General Order—this is just a summary of some of the key concerns we have identified with limited time available, and we will undoubtedly have considerably more comments on the SSJVWQC draft.

**1. Page 1, Section 1, Footnote 1**

Section 1 references that the general order applies to “waste” discharges. Footnote 1 references Attachment E as defining “waste”. Attachment E appropriately references that the CWC defines “waste” in section 13050(d). The attachment goes beyond this statutory definition and therefore is not the definition used in the general order.

Water Code, Section 13050(d): “Waste” includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

The Proposed Order, however, expands that definition of “waste” so as to include “earthen materials, inorganic materials, organic materials such as pesticides and biological materials ... such water may directly impact beneficial uses or may impact water temperature, pH and dissolved oxygen.”

What is the basis and authority for departing from this specific legislative direction? We have repeatedly sought this authority from the Regional staff and staff has always refrained from answering, apparently because there is no such authority.

**2. Page 2, Section 8 – Landowners/Land operators**

We support and appreciate the amendment to avoid the duplicative membership requirement as had been in the preceding draft.



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**3. Page 3, Section 11 – Growers Regulated Under This Order – Sign Up**

A 120-day period to convert old members and to sign up new members is inadequate even in this relatively small coalition, and it will be totally inadequate in the SSJVWQC, which is nearly eight times larger. Moreover, due to limited surface water drainage, the SSJVWQC will have to sign up nearly two million additional acres (four times the total ESJVWQC area) which have not previously been subject to the water quality regulatory world. This needs to be at least 180 days to sign up new members.

**4. Page 7, Section 31 – California Environmental Quality Act (CEQA)**

The language incorrectly states that there were “2-6 alternatives in the EIR”. This is expressly false, as only five alternatives were advanced and reviewed. This fact is well known by staff, however, they insist on continually advancing this falsehood.

**5. Page 8, Sections 34, 35 - State Water Resources Control Board Resolution 68-16 - Antidegradation**

In 1968, the State Board wanted to provide special protection for the state’s pristine “high quality waters” as distinct from mere “quality waters”, which would be those represented by waters meeting the Basin Plan standards. For those pristine high quality waters, the antidegradation policy provided for specific regulatory efforts. This general order should identify those waters which are classified as high quality, and those which are only quality waters.

**6. Page 15, Section I.1. - Coverage**

This section clarifies that the existing waiver terminates with the adoption of this general order. There is no continuation or extension provision for continuation of existing obligations (i.e., development of management plans, etc.). This should be fully understood by the Regional Board and clarified.

**7. Page 17, Section 13 – Unlawful Access**

The preceding waivers properly conformed the waiver to the controlling Water Code section 13267(c) clarifying that access to private property would be by permission or inspection warrant. With no prior discussion, this general order now is set up that such important private property rights are sacrificed. The right to enter must be in accordance with the Code and Constitutional constraints, and not as written where staff attempts to authorize their private property entry to get around the statute by this section.



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**8. Page 18, Section C.8. and Page 18, Section 9 - Requirements of Members of Third-Party Group**

This provision requires that each member shall annually participate in third-party outreach events. There are two significant problems with the language. First, these events will not be held only by the third party, but also by Farm Bureau, water districts, RCDs, commodity groups, University Ag Extension, and many other delivery methods. All these efforts will be in addition to the more traditional farm and water outreach mechanisms. There is absolutely no way to keep track of all such outreach and participation in each delivery.

**9. Page 19, Section 9 – Report Compliance**

This section inappropriately compels coalitions to become enforcement agencies – a concept clearly agreed as far back as 2004 would never be required of coalitions.

The requirement to inspect and report farmers who did not provide certain information, employ some specific potential management practice is inappropriate. Similarly, providing lists of those who did not respond to a regional board request for information is inappropriate. Further, the requirement to report if the grower’s water or groundwater “failed to achieve compliance with water limitations” is a totally unjustified requirement of coalitions and is the responsibility of the Regional Board.

**10. Page 19, Section V.2 and 3, and Page 21, Section VII.A.1 and 2 - Required Reports and Notices – Member; Notice of Confirmation/Notice of Intent/Membership Application**

The time lines are unreasonable to obtain membership. The 120 days should be extended to at least 180 days as explained in Section 3 above.

**11. Page 22, Section B.2. and page 27 – Requirements for Members in High Vulnerability Areas or subject to a SQMP**

Requiring an annual update of a farm plan is needlessly burdensome on each farmer and the coalitions to which it is to be submitted. It is also needless as these thousands of annual recasts of virtually the same information will merely fill dozens of file storage boxes. These documents will not be routinely reviewed by staff in the absence of an investigation when those documents could be individually and specifically demanded by the Board. Thus, this is a needless and burdensome requirement.

**12. Page 22, Section C – Sediment and Erosion Control Plan**

The Sediment Control Plan was only discussed at the very last meeting with staff relative to our Southern San Joaquin Water Quality Coalition general order. This section states that it



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must be written and certified by a “Certified Developer.” It is uncertain as to the availability of such experts and this is yet another unnecessary additive expense.

**13. Page 23, Section D – Annual Nitrogen Budget**

The requirement that all farmers must submit nitrate budgets is overreach. This should only be required if farming in a high vulnerability area.

**14: Attachment A, Page 10 and 11 – Groundwater Monitoring**

The representative monitoring provisions are so uncertain they cannot be effectively responded to as vague, uncertain and arbitrary. We have asked for clarity on this requirement, and staff has intentionally secreted this requirement, which is improper for regulation notice and development. We were originally told this requirement would be limited and could mostly be satisfied with monitoring existing wells. Recently, however, we have been told that they may require from 200 to 500 all new monitoring wells. It is also noteworthy that on Page 11 of the Eastern San Joaquin order it references the ability to utilize existing wells for monitoring, but we are being told differently in the Southern San Joaquin Valley Water Quality Coalition.

This is unreasonable, uncertain, and is overkill. On balance, this is exactly the “unreasonable” regulation foreclosed by the Water Code.

**15. Overall, the Draft GO Fails as a Reasonable Regulation of Water Quality**

Throughout the Porter-Cologne Act, there is an underlying requirement of reasonableness to the regulation of water quality in the state. For example, under Section 13300, the State may only regulate water quality “reasonably], considering all demands being made and to be made on those waters.” Similarly, under Section 13050, “pollution means any alteration of the quality of water which may unreasonably affect” the waters of the state. While each Regional Board is required to ensure the “reasonable protection of beneficial uses,...it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses.” (§ 13241 [setting forth the Act’s water quality objectives].) These multiple references to reasonableness indicate the legislature’s desire for moderation and balance.

As evidenced by the comments above, the draft General Order for the ESJWQC fails to meet this legal standard.

**16. Non-compliance with the California Environmental Quality Act (CEQA)**

As you know the Environmental Impact Report (FEIR) which provides in large part the basis for the Regional Board to consider approving the proposed Eastern San Joaquin order is being challenged by both the environmental community and some coalition groups, including our Coalition. Our Complaint and Petition in *San Joaquin County Resource Conservation*  
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*District, et al. vs California Regional Water Quality Control Board, Central Valley Region*, which we assume is part of the record, speaks for itself as to the many inadequacies of the FEIR. Prudence and common sense dictate that your Board defer adopting the proposed East San Joaquin order until the merits of the CEQA challenges are heard and determined by a court.

We respectfully request that the Board not approve the draft General Order and provided direction to its staff to develop a more reasonable and realistic approach with ESJWQC and other affected coalitions and report back to the Board,

Sincerely,

A handwritten signature in blue ink, appearing to read 'W. J. Thomas', with a long horizontal line extending to the right.

William J. Thomas  
for BEST BEST & KRIEGER LLP

WJT:lmg