Smith, Megan

From: Mark Mulkay [mulkay@kerndelta.org]
Sent: Thursday, 23 September 2010 10:44
To: ILRP Comments
Cc: Robert W. Hartsock; ngatti@kcwa.com; Bauer, Lauren
Subject: RE: Kern Delta Water District - ILRP CEQA Comments
Attachments: ILRP Comments 9-23-10.pdf

Ms. Smith,

Sorry, here is the attachment.

L. Mark Mulkay
General Manager
Kern Delta Water District
661-834-4656

From: Mark Mulkay
Sent: Thursday, September 23, 2010 10:42 AM
To: 'ILRPcomments@icfi.com'
Cc: 'Robert W. Hartsock'; ngatti@kcwa.com; 'Bauer, Lauren'
Subject: Kern Delta Water District - ILRP CEQA Comments

Ms. Smith,

Please find Kern Delta Water District's Comments regarding the ILRP CEQA. This package will also be placed in the US Mail today.

Thank you for your help in this matter.

L. Mark Mulkay
General Manager
Kern Delta Water District
661-834-4656

Kern Delta Water District
501 TAFT HIGHWAY
BAKERSFIELD, CALIFORNIA 93307-6247
TELEPHONE (661) 834-4656
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September 23, 2010

ILRP Comments
Ms. Megan Smith
630 K Street, Suite 400
Sacramento, CA 95814

Email: ILRPcomments@icfi.com
FAX: (916) 456-6724

RE: ILRP CEQA Comments

Dear Ms. Smith:

The Kern Delta Water District, a California Water District formed pursuant to, and operating under, Division 13 of the California Water Code (District), appreciates the opportunity to comment upon the Draft Program Environmental Impact Report for a Waste Discharge Regulatory Program for Irrigated Lands within the Central Valley Region.

Please be advised the District is concerned about the intended scope of the newly proposed Program, the anticipated costs associated with the Program, and the environmental analysis performed under the California Environmental Quality Act, which we believed is flawed, all as set forth and explained in the attachment entitled ANALYSIS OF THE INTEGRATED LONG RANGE LAND PROGRAM/AMENDMENT AND EXPANSION OF THE AG WAIVER, CEQA ANALYSIS, AND ECONOMIC EVALUATION, which is incorporated herein as though set forth in full. Please include these comments in the official record of proceedings.

Again, thank you for the opportunity to comment.

Sincerely,

L. Mark Mulkay
General Manager
Kern Delta Water District

Encl.

Cc: Robert W. Hartsock, esq.

ANALYSIS OF THE INTEGRATED LONG RANGE LAND PROGRAM / AMENDMENT AND EXPANSION OF THE AG WAIVER, CEQA ANALYSIS, AND ECONOMIC EVALUATION

The 2000+ page CEQA alternative document is long, unclear, disjointed, repetitive and has its meaningful components totally camouflaged by voluminous content. The document thoroughly analyzes the five alternatives that have been identified for over a year and which captured the broad extent of program options. These alternatives have been analyzed, vetted through the interested parties and have become familiar to Board members. They have also been evaluated under an economic analysis, unfortunately an analysis with significant flaws, to determine the economic impact of each alternative. The CEQA review did not evaluate what has become the preferred staff alternative. Similarly, the Economic Analysis also did not evaluate the recently developed staff alternative. The preferred alternative is actually a misnomer as it was not even referenced in either the CEQA or Economic Analysis, but instead was merely attached thereto as an Appendix. As discussed below we believe that is improper, however, because the staff is trying to reverse this entire process and focus only on the staff alternative, we will commence these comments with the staff preferred alternative and then discuss the Draft Programmatic Environmental Impact Report ("DPEIR").

I. Long- Term Irrigated Lands Regulatory Program Staff Report / Recommended Program Alternative

Notwithstanding the extensive environmental review and lengthy period of analysis, the Regional Board staff has recently come forward with what it envisions is their regulatory program to
be included under the Long-Term ILRP. In recent weeks staff has concentrated its efforts on what was first known as a "staff straw proposal." The "straw proposal" has been offered in multiple iterations during its short life and is now presented in Long-Term ILRP Staff Report ("Report") as the Recommended Program Alternative ("RP A") - even though it is not one of the five alternatives analyzed under the DPEIR. When it first emerged as a straw proposal, the agricultural, agribusiness, and ag water quality coalitions were in strong opposition to this late arriving alternative, and in particular voiced significant opposition to consideration of this proposal if it was not going to be subjected to a full CEQA analysis. Notwithstanding this strong opposition, Regional Board staff has persisted in their efforts to implement this "staff straw proposal" by selectively mixing and matching elements from identified alternatives to arrive at the RP A. This approach circumvents CEQA and violates the due process and public notice rights of landowners and agricultural operations subject to the regulations. The law does not allow a lead agency to avoid CEQA analysis by belatedly developing a program alternative, arbitrarily choosing and mixing certain elements from EIR proposed alternatives.

A. Groundwater

1. Staff seeks to have the Long-Term ILRP program expanded to include not only the existing surface water waiver, but also the very complex area of groundwater. The Staff Report wrongfully asserts that virtually all agricultural lands, including those that do not drain to surface waters of the state, shall be considered as discharging to groundwater. (Staff Report at p. 143 et seq.) As we have pointed out many times, this is simply factually incorrect. By example, lands that are farmed many hundreds of feet above groundwater and use drip irrigation

constituting only a few inches of irrigation water during the summer months coupled with annual winter rainfall of less than ten inches have absolutely no percolation or discharge to groundwater whatsoever, much less have the capability of carrying a contaminant from the surface many hundreds of feet to underlying underground water which itself may be decades or hundreds of years old, and may have originated dozens of miles away.

2. The incorrect position that all irrigated lands discharge to groundwater leads to the erroneous conclusion that the Regional Board has jurisdiction over all lands and, under that alleged jurisdiction, the Regional Board has the authority over all irrigators. This assertion of jurisdiction and requirement that all irrigators must comply with waiver restrictions ignores the limitations on Regional Board authority to discharges that affect the water quality of waters of the state. (Wat. Code § 13000 et seq.) This assumption of discharge attempts also to shift the burden of proof from the Regional Board to the farm owner or land operator to disprove the erroneous postulation (that all irrigated lands discharge waste to groundwater). This is also inconsistent with the burden expressly outlined in California Water Code section 13267, which states that the Board "shall provide a written explanation of the need for such reports and shall identify the evidence that supports requiring reports." (Wat. Code, § 13267, subd. (b)(l).)

3. The assumption that the act of irrigating a crop is considered a discharge to groundwater that causes the degradation of groundwater is not provable or even plausible. The general notion of groundwater vulnerability is not a surrogate for groundwater quality data and cannot be used as the basis for (1) assuming discharge to groundwater aquifers or (2) placing virtually all parcels in Tier 2. To do so would be unreasonable because landowners would be faced with the burden of trying to "prove" a negative, which if achievable at all, could only be done at unreasonable great expense.

4. The staff proposal indicates that the Regional Board anticipates that the authority to regulate discharges to groundwater would increase their regulatory jurisdiction over an additional two million acres. This is certainly an incorrect number as there are more than two million irrigated additional acres in the Southern San Joaquin Valley Water Quality Coalition alone, which do not drain to surface water. This error is indicative of the failure of the Staff Report to accurately address the realities of groundwater or reflect the actual impacts of proposed program.

5. The Regional Board has two overreaching related obligations in this regulatory process: (1) it must advance a factually correct waiver, and not merely allege improper facts just to satisfy a zeal for regulation; and (2) it must carry the burden to clarify for those who have had no previous connection to the ag waiver, that they may now have an exposure to this new regulatory program. The staff proposal fails to comply with the Porter-Cologne requirement of notifying the person potentially discharging. (Wat. Code, § 13263(f).) By not developing and publishing an applicable standard (where groundwater discharges occur) concerning the lands potentially affected under the proposed new program, there has not been effective regulatory notice, nor the required CEQA notice. (pub. Resources Code, § 2 1092, subd. (b)(l); CEQA Guidelines, § 15072, subd. (f)(1)-(6).)

6. In the Staff proposal, first encountered groundwater is identified as the basis by which tiers will be assigned. However, first encountered groundwater is an improper

standard to use when evaluating water quality impacts. It should not be used to judge water quality impacts because the term does not accurately reflect groundwater conditions in the Central Valley. First encountered groundwater in most areas is not and has never been of suitable quality for either drinking or agriculture use.

B. Grandfather Status

1. In the many meetings with Regional Board staff and with those responsible for crafting the CEQA document and the regulatory proposal, it has been indicated that existing grower participants in coalitions would be grandfathered in and not have to reapply under the new waiver. It has also been agreed to in principal that the new waiver would begin with the existing coalitions (should coalitions continue to be willing to implement the waiver on behalf of the Regional Board). The long-term ILRP program as presented in the staff proposal does express that members would be grandfathered in (Report at p. 144), but it fails to put in writing, what has been stated to us, that the waiver would commence with the existing coalitions. We find that problematic especially when contrasted with the language (Report at p. 145) that Regional Board staff believes there will be 8 to 12 new orders. This would not be consistent with the five major coalitions in existence today.

2. In contrast to the treatment of agricultural coalitions, the staff Report recommends that greenhouses and entities with operational spills (water districts) will be jettisoned from waiver coverage. (Report at pp. 142-156.) This provision as proposed will have a major impact on greenhouse operations and it does not appear that these amendments have yet been vetted back to greenhouse operators. Water districts have also been eliminated from coverage under the waiver without suitable replacement coverage.

3. The Report also confirms that managed wetlands (including federal refuges) are expressly covered by the waiver. However, this is a change from the dichotomy of how the Regional Board currently deals with refuges. Northern refuges participate in coalitions and are covered under the existing waiver, but the southern refuges are not. Regional Board staff should take appropriate steps to have a uniform policy regarding these managed wetlands.

4. The Southern San Joaquin Valley Water Quality Coalition does not have extensive water quality issues. The Report indicates that there are 686 waste water combination exceedances that resulted in management plans. The Report discusses total exceedances in the Central Valley and across the Tulare Lake Basin. It points out that there are only a total of 12 exceedances in the entire Tulare Lake Basin, and only five of those exceedances attributed to agriculture. Specifically, our coalition has only a couple of required management plans. The Report also indicates that across the entire Southern San Joaquin Valley Water Quality Coalition, there is only one water segment having a 303d listing. (Report at p. 20.) This data is supportive of the argument that the current waiver is working and that coalition participants are entitled to be grandfathered into any new program and any new regulatory requirements be moderate.

5. The Report states that most coalition groups have no regulatory authority over members. (Report at p. 9.) This is an inaccurate statement in respect to the Southern San Joaquin Valley Water Quality Coalition that is largely managed by water districts and water experts. Member water districts have a certain amount of regulatory authority over the delivery

of water and discharge of water in their districts. Member districts have been aggressive in removing agricultural drains to control discharges.

C. Unreasonable Timelines

1. In respect to timelines, the staff proposal indicates that (a) within the first three months of adoption there would have to be a declaration of involvement, (b) by 12 months the Regional Board would issue responses or approvals and (c) that within 30 months all that are to be required to do so would be enrolled.

2. These are unreasonable timelines. The regulatory expansion to include groundwater issues will require each coalition to struggle with and determine if they can possibly implement the terms of the new waiver. This evaluation process will certainly take more than three months to understand all the issues and ramifications. Thirty months is extremely optimistic for the coalition to be able to convince growers who have never been part of the waiver, that they may have to become part of the waiver if, in fact, there is a demonstrable potential that their irrigation water may percolate to groundwater.

3. Implementation will be further impeded and delayed because of the complexity associated with the proposed mix of general WDRs and waivers, a mix between groundwater and surface water regulations, a mix of low and high priority (tier 1, tier 2) areas, and the expansion of all these provisions to groundwater.

4. The Report appropriately indicates that Porter-Cologne authority allows some reasonable degradation of waters if the purpose behind the discharge has an over-riding "maximum benefit to the people of the State." (Report at p. 66.) Clearly, agriculture is the most important economic engine of the state and certainly of this region. Therefore, the significant and important public benefits associated with agriculture need to be factored in when assessing exceedances and developing timelines for achieving water quality objectives. For the reasons stated above, these time lines and the timelines for achieving objectives included in the staff proposal are unreasonable.

D. Internal Inconsistencies

1. The Report indicates that a coalition could be comprised of a mix of high and low priority areas. This mix would be based on exceedances and risks, and could vary independently between surface water and groundwater. Yet, there is one reference that indicates that if there is a mix of high and low priority that the area would be deemed "high priority" for all purposes. (Report at p. 151.) This seems to be internally inconsistent, and also inconsistent with the overall notion that low priority areas will have less regulatory rigor.

2. The three year phase-in referenced on Page 143 seems to be in direct conflict with other stated timelines of 18 and 30 months. (See point C. above)

3. See also Footnote 59, which further confuses what the timeline is for dealing with AB 3030, SB 1938 programs and Integrated Regional Plans.

E. Prohibition of Discharge

1. The Report advances the regulatory option that there would be a "prohibition of any discharge" if a farmer is not appropriately signed up under the waiver. Such a prohibition is essentially a death penalty not just to that farm operation, but any other farm operation situated down gradient that might rely on tail water from the targeted farm. Consequently, such a prohibition would in most every instance be a very inappropriate remedy. The problem is compounded when associated with the regulatory expansion to groundwater which raises the likelihood that it is going to take a multi-year process to convince even those growers that may actually have a potential to percolate to closely associated groundwater to sign up under the waiver, and there is very little chance to get those who have no such potential (and are therefore outside the jurisdictional scope of the Porter-Cologne), to subject themselves to this regulation. Consequently, it is easy to anticipate that there are going to be many farmers in this category, particularly relative to groundwater.

2. This also raises a second issue: how does the Regional Board impose the remedy of a prohibition to discharge if in fact the alleged discharge is by percolation to groundwater.

F. Low Threats to Water Quality

1. The Report indicates on page 149 that there would be a separate category for areas that have no or little impact to state water and it references the Existing Conditions Report which expressly indicates that there are areas that have no such impact. This raises the possibility of a no threat or low threat component. It seems that some areas of isolation from surface water with no reasonable connection to groundwater would qualify under this provision. This would also be true of mountain valley areas with limited agriculture that have either no, or very limited, potential impact to surface water. Therefore, it seems such areas need only advance to the Regional Board very modest monitoring proposals. This is expressly provided in Water Code § 13269(3), which states the Regional Board may waive monitoring requirements for discharges that do not pose a significant threat to water quality.

G. Tiering

1. We understand the staff alternative proposes to categorize lower risk areas as Tier 1 and higher risk areas as Tier 2. Presumably, Tier 2 will be limited only to areas which have management plan requirements. The relevant questions are how will the determination between areas be made and what is the process to determine the extent of those categories. In order to be able to appropriately evaluate this proposal, we need the opportunity to sit down with the Regional Board staff and determine the isopleths of what would be regarded as the nitrate groundwater area and the impact areas leading to our groundwater and affecting our two management plans.

a. It should also be clarified as to if general water constituent and characterizations such as DO, EC, pH, pathogen would be utilized to classify lands into Tier 2. We believe they should not.

2. Under the Long-Term ILRP Prioritization Scheme Example set forth in Figure 23 (Report p. 161.), it appears as though very few if any areas will be Tier 1. In the portion of the diagram marked "Area A" it refers to exceedances without distinguishing if these are irrigated agricultural related exceedances, which trigger management plan requirements, as it does in the "Area B" diagram. It simply says "Surface Water Objectives exceeded" and "trending degradation of surface water attributable to." First, this reverses what should be the regulatory burden - Tier 1 unless a demonstrated problem moves it to Tier 2. Under this scenario, multiple fecal coliform exceedances in surface water giving rise to a management plan that actually came from a wastewater treatment plant source would still compel a determination as a Tier 2 area.

H. Monitoring

1. Attachment C of the staff proposal deals with groundwater management plans and requires groundwater monitoring and further requires the evaluation of the effectiveness of any management practices that are employed to address an impairment. The proposal, however, does not make any attempt to clarify the level and intensity of such monitoring, nor how monitoring would be designed to track the effectiveness of 2012 management practices where problem constituents many have been applied in prior decades. This lack of detail on this major requirement is a fatal flaw in the proposal.

2. The Report indicates that Tier 2 groundwater monitoring would include establishment of baseline and trend data and evaluation of changes in management practices. The Report is silent on how staff believes this could possibly be achieved. In addition, the Economic Analysis omits any discussion of this issue including its significant cost.

3. The Report indicates that groundwater monitoring would be required, however, it is completely silent as to what would be considered the acceptable level of monitoring, therefore this provision is impossible to evaluate and, once again, the economic analysis did not evaluate how many new monitoring wells would be compelled by this provision. The Report is unclear as to the specifics of groundwater monitoring itself. It indicates that baseline, trend and impairment monitoring would all be required, particularly in respect to nitrates and pesticides, but does not state how this would be accomplished. In order to evaluate both the impact and the cost associated with this proposal, the Regional Board has to bring clarity to the questions regarding the adequacy of existing monitoring in what areas, and what additional monitoring would have to be engaged. It cannot be left to implementation on a "trust us" basis.

4. The proposal goes on to indicate that if there is "insufficient progress" on data, then the coalitions would be required to augment additional monitoring within five years. The document, however, is unclear as to what would constitute sufficient or insufficient monitoring. This uncertainty gives rise to problems as to reasonable notice as well as to make the Economic Analysis impossible if there is ever an economic analysis of the staff proposal.

5. Appendix B of the staff proposal deals with nitrates and suggests that there needs to be some means by which to identify the source of nitrate problems. It expressly recognizes that any leaching of nitrates is <u>not</u> exclusively related to the amount applied, but also

can be significantly influenced by irrigation methods, rainfall, soil, etc., and depth of groundwater. These realities need to be reflected in the program requirements.

6. On page 25 of Appendix B, it talks about nitrate impacted areas, and expressly evaluates Kern County. On page 33, it states that only two of 17 wells in Kern County had exceeded nitrate standards, and also indicates on page 34 that the Tulare study of nitrates shows an exceedance of the nitrate MCL value, however, it indicates that the study is presently being reevaluated. Further, clarification on the impact of these monitoring results is therefore needed.

7. Appendix B on page 43 sets forth the extreme position that up to 50% of nitrate applications can reach groundwater, but indicates that experts are highly divided in this area, so no particular conclusion can be reached. This language should be deleted from the Report.

1. State Anti-Degradation Policy

1. The Report references the State anti-degradation policy on page 57, and discusses its application to high quality waters of the state. However, the Report fails to address the many foundational issues associated with the policy before it determines how it will be applied. In place of a meaningful analysis the Report simply states that "[g]iven the complexity of determining baseline quality in the Long-term ILRP context ... any anti-degradation analysis ... will assume that at least some of the waters into which agricultural discharges occur are high quality waters because unpermitted degradation has occurred since 1968." (Report at p. 61.) The assumption made in the Report is conclusory, and lacks factual support. As a result, the application of the State's anti-degradation policy is improper and subject to challenge.

2. The Report seeks to apply the best practical treatment or control ("BPTC") of a discharges under a WDR. This attempt to force additional regulatory requirements on dischargers tails in application because even though the source of some Central Valley waters may be of high quality, the waters receiving ag discharges are not high quality waters as the term is used in State Water Resources Control Board Resolution 68-16. The resolution specifically states that "any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained." (SWRCB Res. No. 68-16.) The Report attempts to redefine "high quality waters" using the concept of "baseline condition." (Report at p. 60.) There is no legal basis for this approach. The Report admits as much when it states the "term 'baseline' is not used in the State of federal anti degradation policies but is a significant concept for application of the antidegradation law." *(Ibid)*

3. The anti-degradation policy of the ILRP must be consistent with SWRCB Resolution No. 68-16 in its application to high quality waters of the state. Policy requirements as to lower quality and impacted waters must reflect a different standard.

4. Further, even if BPTC of a discharge is required there are limitations to its application. The BPTC approach to pollution control is based on adopting the best technology for pollution control available at a reasonable cost and operable under normal conditions. BPTC is derived from the phrase "best practical control technologies" referred to in Sections 301 (b) and 304(b) of the Clean Water Act (which does not extend to agricultural non-point waters). In these sections, best practical control technologies is referred to when discussing the control of point source effluent from private operations. In application, BPTC refers to the best practical control technology currently available. The staff proposal on page 152 indicates that existing management objectives on Tier 1 lands will be considered as BPTC. Accordingly, The Report needs to clearly define the term and recognize that even though BPTC is the preferred approach, it has significant limitations on its application.

5. The associated tributary rule which has applicability in most other regions of the state, therefore, has limited application in our coalition area because our waters are tributary only to the valley floor sinks which are not sources of municipal water, and, therefore, the tributary rule has very limited application in our coalition area.

J. Groundwater Management Plans

1. The Report recognizes that current groundwater quality programs already in place. (SB 1938, Integrated Regional Programs, etc.). (Report at p. 88.) The Report also calls for groundwater management plans to be developed in 18 months. (Report at p. 154). This, like other timelines addressed above in section C, is wholly unreasonable. The Southern San Joaquin coalition is largely covered by SB 1938 or Integrated Regional Plans which the Legislature has codified in statute as being the means by which groundwater quality should be addressed. Therefore, the development of new groundwater management plans is unnecessary in most of our coalition area. At most, the upgrade of existing plans would be all that is needed to fully conform to any regulatory water quality program. Based on coalition experience in developing SB 1938 and Integrated Regional Plans, it is very clear that 18 months is a wholly insufficient time frame. Any Regional Board waiver program should be consistent with these existing provisions of law and based on a local realistic time frame for compliance.

2. It remains somewhat unclear if the Regional Board has the authority to go beyond the statutorily created multi-jurisdictional local plans (SB 1938 and IRMPs) in its water quality efforts. If it holds that the Regional Board does have some additional authority, some of the items discussed immediately below will need to be included into the Regional staff proposal. Any additional provisions required under the new waiver program will certainly take more than 18 months to go through the multi-disciplinary and multi-agency steps necessary to make amendments to these existing plans that took years to create.

K. Nutrient Budgeting and Irrigation Efficiency

1. The Report states that under certain situations groundwater programs would require nutrient budgeting and irrigation efficiency. (Footnote 60, at p. 154.) It is uncertain, whether the Regional Board has the authority to demand specific on-farm practices. The Regional Board is not the agronomic or fertilizer agency of the state as that authority is vested expressly in the California Department of Food and Agriculture. The application of

fertilizer is a necessary agronomic feature, and is entirely distinct from the dairy program which involves applying a waste product to the land, and, thus, offers a jurisdictional nexus to the Regional Board.

2. By way of example, the Regional Board is without authority to tell Chevron how to operate a refinery or a high tech firm how to manufacture or clean their equipment. Using the same line of reasoning the Regional Board does not have authority to dictate to a farmer what to grow or how to grow it. The Regional Board's jurisdictional authority starts at the discharge point.

3. Beyond these legal and jurisdictional questions, the Report does not define nor explain how nutrient budgeting would occur or how irrigation efficiency would be determined or a particular irrigation practice either prohibited or mandated (report at p. 154). The environmental effects from just these two major uncertain actions in the Recommended Alternative were not addressed under any alternative evaluated under the DPEIR. Correspondingly, the economic impacts from these major actions may be huge, but were not evaluated in the economic analysis completed as part of the CEQA requirements.

4. In respect to nitrogen, the Report identifies the total tonnage of nitrogen fertilizer applied by agriculture in California. However, this gross number is meaningless without: (1) limiting tonnage to that applied in the Central Valley; and (2) reflecting an appropriate agronomic calculation as to how much nitrogen was taken up by the crops it was applied to across the Valley. The Report on page 20 recognizes that there is a long lag time between the use of a soil amendment and its ultimate detection in the event that any is leached into a groundwater aquifer. The Report should delete any discussion of nutrient budgeting as it fails to cite any regulatory authority over nutrient applications and does not even attempt to address any of the CEQA requirements associated with such an action. The economic impacts associated with limiting a farmer's yield on a crop due to nutrient budgeting limitations or irrigation efficiency restrictions was totally ignored.

5. The EA indicates that annual agricultural production in the Central Valley region is approximately $9.866 billion. In 2008 the value of agricultural production in Fresno, Tulare, Kern and Kings counties alone was $16.48 Billion. The overall value of California agriculture in 2008 was $36.2 billion. Again, this type of inaccurate statement of facts is indicative of the weaknesses inherent throughout the CEQA documents. (EA at p. 3-6.)

L. Agricultural Management Practices

1. The Report indicates that there should be an identification of (a) existing agricultural practices and (b) identification of what agricultural practices would have to be amended or enacted in certain areas. (Report at p. *150.)* Any farm operation would involve several dozen to hundreds of separate management decisions during the course of the year for each field. Coalitions clearly cannot be obligated to identify the hundreds of thousands of management decisions and management practices that are involved across the millions of acres in the coalition. The scope of management practices should be limited to identification of particular management practices that are directly related to a water quality problem.

M. Compliance Timelines and Enforcement Actions

1. The proposal states that water quality exceedances should all come into basin plan objective compliance within five to ten years. (at p. 159). This (like other timelines discussed above in sections C and J) is wholly unrealistic even as to surface water. In areas where multiple issues exist in surface water like DO, Ph, pathogens, salinity, etc., and water quality improvement efforts are under way and have been for years, it is unrealistic to assume because the Regional Board creates another program that these issues are going to somehow magically improve under a new specified timeline.

2. The proposal states that if any objectives are not reached within the applicable five to ten year period, then all growers in the coalition would be compelled to prepare individual farm management plans. Such a policy would only be justified if certain conditions were found to exist. First, if it was determined that the individual farmer was directly responsible for causing the impairment. Second, if specific management practices were identified as causing the problems, and those identified practices could be modified to cure the problem. Third, that the required individual farm plan would be more effective than a collective, coordinated approach through the coalitions. (Report at p. 155). The staff proposal apparently makes the assumption that individual farm plans may be more effective than broader monitoring and management plans with the strength of the coalition behind it. That assumption is not supported in the Report, and likely cannot be supported. Instead, it is apparently offered merely as a retaliatory penalty.

3. The compliance timelines, as stated above, are problematic overall, but are especially troublesome when dealing with groundwater quality. Groundwater issues are typically years in the making and may be the result of legacy pesticides, or water constituents such as pH, DO, salinity.

N. Coordination of Existing Programs

1. The proposal states that there should be coordination between the irrigated land program, the diary program, SWAMP, DPR, etc. (Report at pp. 156-57.) Such coordination is meritorious and has been stressed for years by our coalition, particularly regarding coordination with the dairy program and other Regional Board programs dealing with E.coli/fecal coliform. The Regional Board has been reluctant to fully coordinate these programs, and this needs to happen.

2. The proposal at page 33 discusses E.coli, which has no basin plan objective level. Fecal coliform does have a 200 colonies per hundred milliliters objective. There have certainly been pathogen detections in some of the water column samples, but a University of California study indicated that much of the pathogen is not attributable to irrigated agriculture. This point was omitted from the proposal. The proposal also fails to acknowledge that there should be a high level of coordination between other Regional Board programs dealing with these pathogens and the ILRP.

3 The proposal infers that the bright/clear line between the dairy program

and the ILRP is going to be eliminated or significantly altered. The proposal, however, is unclear as to how this will occur, and does not address the confusion that could arise if it is not done properly.

O. Outside Party Participation

1. The language concerning "other interested parties" (Report at p. 154) appears to improperly open the door for negotiations on surface and groundwater management plans to other uninvolved parties. Management Plans and Monitoring and Reporting Program Orders have historically been approved by the Executive Officer and do not require multi-party negotiations. This language regarding public input also appears on page 155.

2. The proposal suggests that the public would be involved in determining the Tiering of an area. "Third-party groups and the Central Valley Water Board would identify low and high-priority areas in the development of watershed/area/commodity-specific implementation mechanisms during the 3-year transition period. The Central Valley Water Board intends to use existing information in this prioritization. However, there will be the flexibility for third-party groups and other interested parties to provide additional information during the process." (Report at p. 151)

3. Footnote 57 also appears to indicate that when the coalitions identify their priority areas within the first three years of transition, that there would be public input on those determinations as well. This type of input is not required under the law and is unnecessary. It will delay and complicate development of required documents and certainly cause even extended timelines to be missed. It may also detrimentally affect participation.

P. Tributary Rule

The Report indicates it will focus on waters that are tributary to areas having aquatic life and would treat these as priorities. Due to the tributary rule it asserts, that would transpose such standards to upper basin waters. We addressed the tributary rule above in Section 1., but it is noteworthy that this particular reference indicates that this would not involve "ag drains". The Regional Board needs to clarify what is considered an ag drain as it applies to this section and return ag flows.

II. Draft Programmatic Environmental Impact Report

A. The DPEIR Does Not Describe or Analyze the Proposed Alternative

1. The DPEIR includes five proposed alternatives. However, it does not include a description or analysis of the RPA discussed in the staff Report. The RPA apparently combines elements of the five identified alternatives to belatedly develop a staff preferred appendix which they are now calling an alternative. The RP A is now the proposed project and must be analyzed. The DPEIR does not make any attempt to analyze the environmental impacts that would result if all of the identified elements were combined with each other, which is how they would be implemented if the staff alternative RPA were selected.

2. A draft environmental impact report (EIR) must include a general

description of the proposed project's technical, economic, and environmental characteristics. (State CEQA Guidelines, § 15124(c).) The project description must be stable, accurate, and consistent throughout the EIR. "An accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient *EIR."* (County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 193.) "A curtailed or distorted project description may stultify the objectives of the [CEQA EIR] process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the "no project" alternative) and weigh other alternatives in the balance." (Id. at pp. 192 93.)

3. The DPEIR does not mention the staff RPA anywhere in its text. The RPA is only presented in the appendices. In *Vineyard Citizens for Responsible Planning* v. *City of Rancho Cordova* (2007) 40 Cal.4th 412, the Supreme Court reaffirmed that key pieces of the CEQA analyses cannot be buried in the appendices. Here, the RP A - *the proposed project itself* - staff is recommending that the Regional Board implement as the program - is presented *only* in the appendices. This is a blatant violation of *Vineyard,* and it results in serious errors in the environmental analysis. An EIR is required to analyze the environmental impacts associated with any proposed mitigation measures. (State CEQA Guidelines, § 15126.4(a)(1)(D).) Thus, the DPEIR suffers from both substantive and procedural flaws that are fatal.

B. Cumulative Impacts of the RPA Have Not Been Analyzed

1. The RP A is "a conglomeration of elements presented" in the five alternatives that are analyzed in the DPEIR. The RP A was not analyzed, whatsoever, in the DPEIR. Further, no attempt has been made to analyze the effects of the combined components of this alternative. Compounding this error, the DPEIR does not identify "any projects or programs adequately similar in nature, location, and type to result in a meaningful comparative analysis." "A cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." (State CEQA Guidelines, § 15130(a)(1).)

2. In contravention of State CEQA Guidelines section 15130, the DPEIR employs neither a list nor a summary of plans and projections approach to the cumulative impacts analysis. In fact, the DPEIR does not identify a single program, policy, plan, or project to be included in the cumulative impacts analysis. Instead of analyzing the cumulative effects of the project together with other projects causing related impacts, the DPEIR concludes that there are no other projects - and analyzes the cumulative impacts of the project, standing alone. This analysis cannot withstand scrutiny. Other programs and projects that have the potential to affect water quality in the program area include U.S. EPA's recent action banning pesticide application in certain areas, and numerous pending NPDES and other permit actions.

C. The Environmental Analysis is Flawed Due to Inaccurate Baseline Conditions

1. The Environmental Setting fails to describe accurately the existing environmental conditions, even at a programmatic level. "Knowledge of the regional setting [of the project] is critical to the assessment of environmental impacts . . .. The EIR must

demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." (State CEQA Guidelines, § 15125(c).) Toward that end, the DPEIR "must include a description of the physical environmental conditions in the vicinity of the project, ... from both a local and a regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Id. at § 15125(a).)

2. First, the "Existing Setting" chapter is, by its own admission, incomplete. For example, the description of the existing conditions related to surface water makes no mention whatsoever of the amount of surface water currently being diverted or the amount being used for irrigation by participants in the Irrigated Lands Regulatory Program (ILRP). Likewise, there is no indication of how much water is returned to stream systems after agricultural use, and how much of that water is derived originally from groundwater basins or surface water sources. Absent this information about the existing physical conditions, it is not possible to determine whether the proposed new regulatory program will cause significant impacts on water supplies, stream systems, or the fish, wildlife and plants dependent on those systems.

3. The DPEIR attempts to overcome the gaps in the "Existing Setting" chapter by adding a discussion of environmental setting to each of the impact analyses. This is confusing to the reader because these supplemental discussions of the "existing setting" are not entirely consistent with the description provided in the "Existing Setting" chapter. Moreover, even the supplemental discussions in the impact analyses are improperly truncated. For example,

4. To the extent the Draft PEIR relies on the "No Program" Alternative to represent the existing baseline conditions, this is improper in this case. The "No Program" Alternative misstates what will occur absent any Water Board action. Because neither this nor any of the other attempts in the EIR to describe the environmental setting is legally adequate, the EIR lacks any accurate baseline against which to judge the environmental impacts of the proposed program.

D. The DPEIR Fails to Evaluate the Reasonably Foreseeable Effects of the RPA on the Environment

1. "In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project." (State CEQA Guidelines, § 15064(d).) "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment." (State CEQA Guidelines, § 15064(d)(2).)

2. The DPEIR fails to achieve this charge. For example, the DPEIR acknowledges that, under the alternatives analyzed, the higher cost of irrigation would result in less water being used and some land going out of agricultural production. However, the

DPEIR's analysis stops there. It does not consider what impacts will be caused by the reasonably foreseeable result of less irrigation, such as less water returning to stream systems and diminished flows at certain times of year, and less irrigation water reducing the amount of groundwater recharge that would otherwise occur, particularly in the San Joaquin Valley where many of the surface water delivery systems were built with the intent to increase local groundwater basin recharge.

3. Similarly, the DPEIR acknowledges that the program will result in the conversion of agricultural lands to other uses, but it fails to analyze the reasonably foreseeable impacts associated with that conversion, such as increased valley temperatures (see Climate Change comments, infra), and conflicts with existing land use regulations and zoning (see Land Use comments, infra). All of these direct and indirect impacts resulting from the implementation of the program must be analyzed in the DPEIR.

4. The staff alternative was not analyzed whatsoever and raises the possibility of nutrient restrictions which will impact cropping patterns. It also suggests regulatory action to restrict certain irrigation practices (i.e., a 2 ac-ft limit or no row crop irrigation), which would have major environmental, economic and community impacts.

E. The DPEIR Fails to Address the Program's Potential Impacts on Land Use

1. A draft EIR must "discuss any inconsistencies between the proposed project and applicable general plans and regional plans," including habitat conservation plans and natural communities conservation plans. (State CEQA Guidelines, §15125(d).) While the DPEIR acknowledges the requirement to evaluate its consistency with General Plans and Habitat Conservation Plans (HCPs), it makes no attempt to analyze these impacts even in a qualitative manner. Its characterization as a programmatic document does not wholly excuse undertaking the required environmental analysis. The DPEIR should evaluate the extent to which adopted General Plans within the program area designate agricultural land uses that would be undermined by the increased irrigation costs imposed by the program and the resulting loss of agriculture. Likewise, the DPEIR must discuss whether and how adopted HCPs in the program area rely on agricultural land uses and how the increased irrigation costs imposed by the program, and the resulting loss of agriculture, would affect those plans.

2. Even more egregiously, the DPEIR utterly fails to analyze the program's land use impacts. The DPEIR acknowledges that agricultural lands are a resource that must be analyzed under CEQA, and it also admits that many jurisdictions have adopted land use plans, regulations, and zoning ordinances to protect agricultural uses. Yet the DPEIR completely fails to analyze, even at a programmatic level, whether the program will conflict with any of these land use plans, regulations, or zoning ordinances. Again, the DPEIR's status as a programmatic document is not an excuse to omit any discussion of these potentially severe impacts - which is the faulty path taken by the DPEIR.

F. The DPEIR Fails to Identify the Environmentally Superior Alternative

The DPEIR adopts a NEPA-like approach and analyzes each of the alternatives presented in detail. However, the DPEIR ignores the CEQA requirement to identify the

environmentally superior alternative. (See State CEQA Guidelines, § 15126.6(e)(2).)

G. Alternative 2

1. Among the five alternatives, Alternative 2 is the best option to strengthen the existing surface water waiver and expand the waiver to groundwater. The extensive CEQA review confirms that Alternative 2 is the superior alternative. The Report evaluates the proposed alternatives on pages 96 through 105 (and in other locations), and finds that Alternative 2 was superior to all other alternatives. The only issue raised in the Report concerning Alternative 2 dealt with groundwater. The Report stated, when discussing groundwater monitoring under Alternative 2, that "feedback mechanisms would not include groundwater quality monitoring to determine whether practices implemented would be maintaining and/or restoring beneficial uses or the highest reasonable groundwater quality." (Report at p. 112.) This criticism is inaccurate as the statutorily created local groundwater quality management plans specifically require such monitoring and Alternative 2 expressly calls for monitoring to be included in the newly created groundwater management plans. Therefore, Alternative 2, without reservation, is the superior alternative.

III. Economic Analysis

A. Economic Analysis is Flawed and Fails to Adequately Address Economic Impacts

1. The Economic Analysis ("EA") is extremely disappointing and inadequate. The analysis shows only very narrow differences in the economic evaluation between the five alternatives, and has no analysis of the RPA whatsoever. To begin with, the EA states that Alternative I's (misnamed the no project alternative) costs would include administration and the management of water quality information. (EA at p. 2-23.) Since it is the "no project alternative" it is assumed that existing programs would remain in place with no changes or additions. This assumption coupled with the fact that virtually all discharges have implemented the management practices necessary to satisfy current program requirements, one would expect the cost of Alternative 1 to be significantly lower than all the other alternatives. However, on management practice, costs for Alternative 1 are listed at $450,581,233. The costs for Alternative 2, 3, and 4, which are aggressive expansions of the program, are listed at $452,449,969 each. (EA Figures 2-18-2-21.) The analysis indicates only a cost difference of $1,868,736 between the current program and alternatives 2 through 4. Given the fact that any of the alternatives, including the RPA, would require significantly more practices than are currently being implemented, the costs of the alternatives and the RPA as compared to Alternative 1 have to be significantly higher. (EA at p. 2-3.) The economic impact between the alternatives is significant and this fact is not apparent from this analysis. Beyond that, the other alternatives also deal with groundwater, as opposed to Alternative 1 which does not. The costs associated with the monitoring and reporting of groundwater quality are significant, and will lead to total costs under the other alternatives significantly higher than those of Alternative 1, perhaps as much as four times higher.

2. The EA fails to satisfy CEQA because it does not contain an accurate discussion of the economic and social impacts of the proposed project. (See State CEQA Guidelines, § 15131, subd. (a), 15382.) Where an EIR identifies significant environmental

impacts, the related economic and social impacts are relevant. The requirement to consider secondary and indirect environmental effects is mandatory. *(Citizens Association for Sensible Development of Bishop Area* v. *County of Inyo* (4th Dist. 1985) 172 Cal.App.3d 151, 170.) When non-environmental factors are determined to be significant, the EIR must explain the reasoning used to reach its conclusions. Here the costs associated with the proposed alternatives, over $450,000,000 is significant. However, the EA fails to accurately analyze or explain the basis for is conclusions. (See State CEQA Guidelines, § 15131, subd. (b).)

3. Focusing only on groundwater, dealing with nutrients requirements, or imposing additional groundwater monitoring, or amending irrigation practices to meet new efficiency standards are just a few examples of components that vary between alternatives and have a huge impact on the cost of a given alternative and were totally ignored. These costs could easily reach into the dozens or hundreds of millions of dollars. These costs are apparently borne by the affected landowners. If only a thousand farmers had to drill only two monitoring wells at a cost of $200,000, the total cost for that component approaches one-half billion dollars. If 500 farmers had to restructure their irrigation system in only four of their 20 fields at a cost of $40,000 per field, that is $400,000,000. These impacts were totally ignored and when addressed to the environmental consultants at the field hearings, they affirmatively acknowledged these are potential requirements and costs, but said they could not address those impacts because the staff proposal was so imprecise as to what they would actually require. This reflects both regulatory notice problems and the inadequacy of the Economic Analysis.

4. Further, the Economic Analysis did not specifically analyze the RPA, even though they (the Regional Board staff - not the experts actually engaging the Economic Analysis) have selected a number of $492,000,000 in costs, and they assert an assumption of how much ag land would be required to be retired and how many jobs would be lost with the proposal. Yet, they do not deal with any of the big ticket items or set forth any of their assumptions which makes the environmental analysis nearly useless.

5. The EA indicates that annual agricultural production in the Central Valley region is approximately $9.866 billion. In 2008, the value of agricultural production in Fresno, Tulare, Kern and Kings counties alone was $16.48 Billion. The overall value of California agriculture in 2008 was $36.2 billion. Again, this type of inaccurate statement of facts is indicative of the weaknesses inherent throughout the CEQA documents. (EA at p. 3-6.)

6. The Report gives some approximation of the values to drill additional wells, and indicates that new wells would cost between $76,000 and $1,000,000. If the 45 communities that have impaired drinking water drilled new wells, that cost would be between $20 and $47 million to merely drill additional wells across these communities. (Report at p. 50.)

7. Appendix B addresses monitoring well costs, and indicates on page 21 that they anticipate 5,000 monitoring wells. If these 5,000 wells averaged only *$10,000* (absolutely the wrong cost) each, this would result in $50 million in additional costs. Actual well costs to deep aquifers may cost 10 to 20 times this amount.

8. The Report indicates that the Regional Staff proposes to augment their force and increase staffing to as many as a total of 48 staff members. Even Alternative 2 is

determined to lose five jobs in the Tulare Lake Basin, versus Alternative 4 which would cost $511 million with 12 jobs lost. As discussed above, the economic analysis is woefully inaccurate, and significantly under evaluates the cost of all the alternatives.

9. Neither the staff proposal nor the Economic Analysis makes any assumption on compliance, enforcement or other impact costs which will be significant.