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Sent: Monday, September 27, 2010 2:02 PM
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Cc: Fisher Kari
Subject: Irrigated Lands Regulatory Program Comments on the Draft PEIR
Attachments: CFBF ILRP Draft PEIR Comments 9-27-10 FINAL.pdf

The attached comments are submitted by Kari Fisher of the California Farm Bureau Federation. If you have any questions, please contact her at (916) 561-5666 or kfisher@cfbf.com.

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CALIFORNIA FARM BUREAU FEDERATION

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September 27, 2010

ILRP Comments
Ms. Megan Smith
630 K St., Ste. 400
Sacramento, CA 95814

Re: Irrigated Lands Regulatory Program Comments on the Draft PEIR

Dear Ms. Smith:

The California Farm Bureau Federation is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home, and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 81,000 members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity provided by the Central Valley Regional Water Quality Control Board ("Regional Board") to participate in the Stakeholder Advisory Workgroup process to develop alternatives and partake in discussions regarding the development of the Long Term Irrigated Lands Regulatory Program ("LT-ILRP"). Farm Bureau further appreciates the opportunity to submit comments on the Regional Board's LT-ILRP Draft Program Environmental Impact Report ("Draft PEIR"), the Technical Memorandum Concerning the Economic Analysis of the Irrigated Lands Regulatory Program ("Economic Analysis"), and the Recommended Program Alternative ("RPA") contained within Appendix A. Farm Bureau has numerous reservations and comments about the PEIR, Economic Analysis, and Staff Recommended Program Alternative as currently drafted and offers the following specific comments contained

herein. These comments are in addition to the comments contained in a joint agricultural coalition letter submitted on September 27, 2010.¹

I. Draft Program Environmental Impact Report

A. Failure to Analyze the Recommended Program Alternative Under CEQA

The California Environmental Quality Act (“CEQA”) was enacted to address concerns about environmental quality in the State of California. CEQA establishes processes and procedures to ensure that California agencies complete an environmental analysis and consider and disclose to the public the environmental impacts of a proposed project. (Pub. Resources Code, §§ 21000 et seq; Cal. Code Regs., tit. 14, § 15000 et seq.) CEQA’s statutory framework sets forth a series of analytical steps intended to promote the fundamental goals and purposes of environmental review—information, public participation, mitigation, and governmental agency accountability. (Cal. Code Regs., tit. 14, § 15002.) Specifically, the basic purposes of CEQA review include: informing governmental decision makers and the public about the potential significant environmental effects of proposed activities; identifying ways that environmental damage can be avoided or significantly reduced; requiring changes in projects through the use of alternatives or mitigation measures when feasible; and disclosing to the public the reasons why a project was approved if significant environmental effects are involved. (See Pub. Resources Code, §§ 21001, 21001.1, 21002, 21003, 21006, 21064.)

The analysis of a project required by CEQA usually takes the form of an Environmental Impact Report which describes and evaluates the significant environmental effects of a proposed project, identifies alternatives, and discusses ways to reduce or avoid the possible environmental impacts. Unfortunately, the Draft PEIR contains numerous substantive and procedural CEQA flaws and fails to specifically and properly analyze the environmental impacts associated with the five alternatives as well as the RPA.²

Although an EIR need not consider all potential alternatives to the project and instead need only to consider a reasonable range of alternatives, the alternative preferred and recommended by the agency must be considered and examined within the EIR. (See Cal. Code Regs., tit. 14, § 15226.6(a).) Further, the EIR must contain sufficient information about *each alternative* to permit an evaluation of the relative merits of the alternatives and the project. (*Ibid.*) Here, the Draft PEIR analyzes five program alternatives. Within Appendix A, a separate document apart from the Draft PEIR, the

¹ Various agricultural organizations, including Farm Bureau, coalitions, and water districts submitted a joint agricultural coalition letter expressing significant comments and concerns on the Draft Program Environmental Impact, Economic Analysis, and Staff RPA.

² Please see the joint agricultural coalition letter for further in-depth review of CEQA compliance concerns.

Staff Report contains a section describing the Staff Recommended Program Alternative.³ This RPA is not one of the five alternatives analyzed within the Draft PEIR. Rather, it is a separate alternative. Although it contains a conglomeration of some elements presented in the five alternatives that are analyzed in the Draft PEIR, it also contains entirely new program elements and new combinations of existing elements. These new elements and new combinations have yet to receive CEQA review. Without proper evaluation of what would result when those elements are combined with each other, as they would be if “Alternative 6” or the Staff RPA alternative were to be selected for implementation, the Draft PEIR is substantively and procedurally flawed and the fundamental goals of CEQA are not met.

B. The Draft PEIR May Conflict with CEQA Functional Equivalency of the State’s Pesticide Regulatory Program

The Draft PEIR fails to analyze the interplay with and the duplicity between the State’s pesticide regulatory program and its proposed requirements. Prior to a pesticide being registered for agricultural use, a CEQA functional equivalent EIR must be performed. (See Cal. Code Regs., tit. 14, § 15251(i), “the pesticide regulatory program administered by the Department of Pesticide Regulation and the county agricultural commissioners insofar as the program consists of (1) The registration, evaluation, and classification of pesticides” has been certified as a review process functionally equivalent to a CEQA EIR.) The Department of Pesticide Regulations’ (“DPR”) actions in reviewing pesticides do not constitute a project in the classical CEQA context – there is not a one time environmental review of a specific action or activity that has a specific geographical location or temporal limit. Rather, DPR's regulatory scheme ensures continuous evaluation of the environmental impacts of registered pesticide products. Additionally, in completing the CEQA functional equivalency document, DPR is required to consider the full and reasonably foreseeable environmental context of its actions. The regulatory scheme also provides for re-registration and re-evaluation to ensure that the continued use of the pesticide is not going to have a significant effect on the environment.

Within the Central Valley region, farmers and ranchers use various products when growing food and fiber. Farmers and ranchers must comply with all applicable laws, regulations, and specific pesticide use requirements, complete pesticide use reporting, and fulfill educational and training requirements. Further requirements are mandated if a restricted material is used and/or the land is located within a groundwater management area. Since CEQA functional equivalency has occurred to allow those pesticides to be

³ The California Supreme Court has stated that essential elements of CEQA analyses cannot be buried within the appendices. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.) Not only should the Staff RPA be placed within the Draft PEIR, the Staff RPA should also undergo full CEQA analysis as a sixth alternative and be fully compared to the five alternatives currently within the PEIR.

used in those areas, the growers should not be now held liable under the LT-ILRP if those pesticides are detected in groundwater.

C. Use of the Draft PEIR as a “Program” EIR is Limited and Cannot be Used for Future Waste Discharge Requirements

Under the CEQA Guidelines, a program EIR is an EIR prepared for a series of actions that can be characterized as one large project and are related in a specific manner. (Cal. Code Regs., tit. 14, § 15168(a).) An agency may use a program EIR when it needs to consider broad environmental issues for a series of actions at an early state of the planning process. (*Id.*, § 15168(b)(4).) However, when conducting a series of actions at a later date, an agency may only rely on the program EIR if it contains a thorough analysis of the relevant environmental issues and evaluates the effects of the entire program in a specific and comprehensive manner. (*Id.*, § 15168(c)(5).) As stated above, the Draft PEIR does not evaluate the Staff RPA at all.

Additionally, the Draft PEIR does not evaluate the actual waste discharge requirements (“WDRs”) that will be developed in the future. The adoption of the eight to twelve WDRs, as discussed in Staff’s RPA, is a “project,” as defined in CEQA. (Pub. Resources Code, § 21065.) CEQA and its requirements apply to discretionary projects proposed by public agencies. (*Id.*, § 21080(a).) The Regional Board’s approval of WDRs is a discretionary decision, and therefore it is subject to CEQA. Thus, when the Regional Board develops and adopts the eight to twelve individual WDRs, it will be required to again consider the environmental impacts associated with the individual WDRs. If the Regional Board intends to rely on the Draft PEIR for its determination of environmental impacts associated with the WDRs, such reliance will be improper since the Draft PEIR provides insufficient analysis of the entire program as a whole and its environmental impacts.

D. CEQA Limits the Scope of Mitigation Measures That Can Be Required

Section 5.7.6 of the Draft PEIR, “Mitigation and Improvement Measures,” proposes mitigation measures for various vegetation and wildlife resources that could be affected by normal farming practices. These mitigation measures that would require avoidance of sensitive biological resources, riparian areas, and wetlands, require additional CEQA review if such resources cannot be avoided, and would compel agricultural landowners to conduct a U.S. Army Corps of Engineers’ approved delineation of affected wetlands “prior to implementing any management practice that will result in the permanent loss of wetlands.” Such mitigation measures are overreaching.

“A lead agency for a project has authority to require *feasible changes* in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as

the “nexus” and “rough proportionality” standards established by case law (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825, *Dolan v. City of Tigard*, (1994) 512 U.S. 374, *Ehrlich v. City of Culver City*, (1996) 12 Cal. 4th 854.).” (See Cal. Code Regs., tit. 14, § 15041(a), emphasis added.) However, CEQA confers no independent grant of authority to impose mitigation measures on a project. Mitigation measures, such as the ones described above, go beyond the powers conferred by law to the Regional Board and are legally infeasible. (Pub. Resources Code, § 21004; Cal. Code Reg., tit. 14, § 15040.)

II. Draft Staff Report

A. The Draft Staff Report Inappropriately Categorizes All Irrigated Agriculture as Waste Dischargers to Surface Water and Groundwater

The Draft Staff Report inappropriately presumes that all irrigated agriculture creates a discharge of waste to both surface and groundwater. The Draft Staff Report states that “[b]ecause all irrigated agricultural operations could affect groundwater quality, they have been considered in the scope of the long-term ILRP.” (Draft Staff Report at p. 143.) The Staff Report further presumes that all “operations associated with irrigated agriculture . . . may leach waste into groundwater, potentially causing degradation, or causing or contributing to exceedances of water quality objectives.” (*Ibid.*) This broad assumption is neither supported by evidence or any written documentation and unnecessarily burdens many growers who do not create a discharge of waste to various extensive reporting requirements.

It is recommended that within the LT-ILRP, agriculture should be presumed to be in compliance with water quality standards and water quality objectives if a grower is implementing management practices and other applicable requirements.

III. Recommended Program Alternative

A. A Groundwater Program Should Rely Upon Existing Groundwater Monitoring and Protection Programs

Farm Bureau has numerous concerns with the RPA’s regulatory requirements for groundwater. A groundwater program taken on by the Regional Board should first utilize existing monitoring programs before developing yet another costly program, particularly during these tough economic times when everyone is cutting back. The Regional Board should expand on partnership opportunities that rely upon the appropriate local entities and state agencies involved in groundwater monitoring and protection, including but not limited to the Department of Water Resources, Department of Pesticide Regulation, Department of Public Health, etc., to compile, analyze, and utilize existing groundwater data and protection programs, and identify gaps, prior to proceeding with the adoption, regulation, and enforcement upon potential dischargers of groundwater monitoring programs within the LT-ILRP. The appropriate local entities will vary throughout the

Central Valley and may include the coalitions, local public agencies, and integrated regional water management planning agencies.

Given the various agencies involved in current groundwater monitoring, reasonable time frames (no less than three years) must be established to develop local programs through the LT-ILRP that address prioritized groundwater quality problems. Additionally, sources of existing groundwater data should be fully utilized and include, but are not limited to: Groundwater Ambient Monitoring & Assessment Program (GAMA), Department of Pesticide Regulation, CV-SALTS, Department of Public Health, Department of Toxic Substances Control, and data compiled by local groundwater management agencies and the Integrated Regional Water Management Plan (IRWMP).

Proceeding in such a manner will allow for targeted identification, proposed determinations, and prioritization regarding and appropriate actions to take to address groundwater quality problems at the local level. Without such foundational steps, requirements within the LT-ILRP may be duplicative and conflict with other local and state programs managing groundwater.

B. The RPA Should Avoid Duplicative Regulation With Other Groundwater Programs

The California Water Code Section 10750, et seq., requires groundwater to be generally controlled at the local level, and many such programs are presently in place (see above). To further this directive, various codified Senate and Assembly bills authorize local agencies within groundwater basins to prepare and adopt groundwater management plans with numerous required components directed to preserve water quality. Within many areas of the Central Valley, local agencies have developed local groundwater management plans including AB 3030 plans, SB 1938 plans, and Integrated Regional Water Management plans. These programs require stakeholder involvement and groundwater monitoring and management in order to assess the basin management objectives established in the plan. In addition to these local groundwater management plans, the California Department of Pesticide Regulation (“DPR”) regulates the use of pesticides that may be found in or constitute risk to groundwater (Groundwater Protection Program). DPR’s Groundwater Protection Program requires that growers implement management measures to prevent pesticides from moving to groundwater.

If a grower in a groundwater management area has signed up with the agricultural commissioner, follows all applicable pesticide labels, and completes the necessary educational requirements, there should not be a de facto requirement that the grower has to join the applicable area coalition. Rather, the grower should be deemed to be in compliance and should not be subjected to an additional duplicative layer of regulation.

C. The Tiering Requirements Inappropriately Place All Growers Into Tier 2

Farm Bureau has some reservations and concerns regarding the Tier 1 (low priority) and the Tier 2 (high priority) approach as currently drafted within the Staff RPA. Upon review, an automatic default exists in which all growers will be placed in Tier 2 unless and until they can prove they meet the requirements of Tier 1 and are not a “high priority.” This tiering structure within Staff’s RPA creates confusion and alarm. Farm Bureau respectfully asks for further clarification of and revision to the tiering structure and recommends a de minimus exception for those with little to no groundwater discharge.

IV. Economic Analysis

The Economic Analysis within the Draft Staff Report cursorily projects the associated costs of the five alternatives within the Draft PEIR. Although this analysis is very disconcerting and flawed, a larger concern is the Draft Staff Report’s failure to analyze the economic impact of RPA. Notwithstanding the flaws in analysis of the five alternatives, the Economic Analysis fails to analyze any of the costs associated with the Staff Recommended Program Alternative. Without analyzing the actual proposed project, within the Draft PEIR, it is impossible for any economic analysis to be conducted on the project, thus making the true economic impact of the RPA an unknown.

Further, the Porter-Cologne Water Quality Control Act (“Porter-Cologne”) requires that both costs and economic impacts be considered when developing a new regulatory program for agriculture and such a requirement is absolute. (See Wat. Code, § 13141.) Water Code, section 13141 explicitly mandates:

State policy for water quality control adopted or revised in accordance with the provisions of this article, and regional water quality control plans approved or revised in accordance with Section 13245, shall become a part of the California Water Plan effective when such state policy for water quality control, and such regional water quality control plans have been reported to the Legislature at any session thereof.

However, 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.) Before a Regional Board can impose waste discharge requirements or conditioned water quality certification for discharges from irrigated lands, Porter-Cologne requires that it “shall take into consideration” the following factors: “the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.” (Wat. Code, § 13263.) Section 13241 in turn lists six “factors to be considered,” including “economic considerations” and “water quality

conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” (Wat. Code, § 13241.)

Anticipated program implementation costs to the agricultural community include increases in potential fees, management practice implementation, monitoring costs, report preparation, and cost for education, as well as other costs. Given that the impacts of water quality regulations frequently take years to materialize, the Regional Board should analyze the economic costs and impacts within a dynamic framework taking into account the projected changes in the economic situation *over time*.


In addition to direct costs imposed on the agricultural community, the Regional Board should evaluate indirect costs, including the economic consequences that are transmitted via market interactions to other groups, such as consumers. Water quality regulation, such as Staff’s RPA, increases the average cost of production and has a direct negative effect on the producer and the consumer through the resulting increase in variable costs and the output price. The propagation of the impacts of a regulation through the economy is well documented and can be quantified by economic analysis.

CONCLUSION

Farm Bureau appreciates the opportunity to submit comments on the Irrigated Lands Regulatory Program Draft PEIR. Farm Bureau urges the Regional Board to reassess the adequacy of the PEIR and the Recommended Project Alternative. Additionally, as evidenced in the Draft PEIR, Alternative 2 is clearly identified as the superior alternative.

Farm Bureau respectfully urges the Regional Board to support Alternative 2.

Sincerely,



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Associate Counsel

KEF:pkh

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