September 10, 2009

Adam Laputz
Long-term Irrigated Lands Program
Central Valley Regional Water Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670
(916) 464-4848
awlaputz@waterboards.ca.gov

Re: Comments on 2nd draft ILRP proposed alternatives

Dear Mr. Laputz,

On behalf of California Rural Legal Assistance Foundation (CRLAF), Clean Water Fund (CWF), and Community Water Center (CWC), we appreciate the opportunity to submit comments on the draft alternatives for the Irrigated Lands Regulatory Program (ILRP).

Goals and Objectives

Proposed change:
Page 2, lines 10-12 – Goal 4) ensure that irrigated agricultural waste discharge to water designated as municipal supply is of sufficient quality to provide Central Valley communities a ~~sustainable~~ *safe and affordable* source of drinking water.

Page 2, lines 17-20 – Objective: Implement management practices that improve water quality…without….placing an undue *economic, social and public health* burden on rural communities to provide safe drinking water.

Discussion: it seems clear that the goal and objective pertaining to drinking water will not attain consensus approval from the stakeholder group, despite efforts to wordsmith the content. We recommend that you forward the current language to the Board, but also provide an alternative to the use of the word “sustainable”, as well as clarification of the term “burden”, both of which we agree lack appropriate legal definitions.

Stakeholder Process

Proposed change
Page 4, line 10 – please add 'environmental justice" to the list of stakeholder interests represented in the process.

Alternatives Screening

Page 5, line 21 – proposed addition after "Policy)" "as well as the state and federal Safe Drinking Water Acts."

Discussion: Porter-Cologne provides the Board with the authority to protect groundwater quality under the state and federal Safe Drinking Water Acts (California Water Code, Section 13169).

Adequate Anti-Degradation Analysis
Additionally, it is vital that the Regional Water Board take seriously its responsibility to implement the Anti-Degradation Policy in a meaningful way. In order to do this, the Regional Board should incorporate the analysis and findings into the CEQA process to ensure that the alternatives are consistent with that policy. It is vital, however, to understand that the anti-degradation analysis is not the same as CEQA and, in particular, uses a very different baseline to determine degradation. It also includes consideration of socio-economic impacts, such as the impacts of allowing degradation to occur.

Specifically, California's Anti-Degradation Policy requires that the Regional Water Quality Control Boards protect high quality waters, consistent with the maximum benefit to the people of the state, and requires dischargers to use the best practicable treatment or control of wastewater discharges. The policy provides 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) 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.

(State Board Resolution 68-16.)

In order to implement the Anti-Degradation Policy, the Regional Board must determine whether any degradation ***may*** occur as a result of issuing, reissuing, amending, or revising a permit to discharge waste into state waters. (APU 90-004.) If the proposed action may result in degradation of baseline water quality, the Regional Board must conduct a process known as an anti-degradation analysis. 1 (APU 90-004, p. 2-3.)

In contrast to CEQA, the baseline water quality for the purposes of the anti-degradation

[1] An anti-degradation analysis is also required if an existing discharge has reduced water quality since the facility was last permitted and the reduction is not authorized by the permit. (APU 90-004, p. 1.)

policy is the best water quality that has existed since 1968, unless subsequent lowering has occurred pursuant to regulatory action consistent with the anti-degradation policy.[2] (APU 90-0004, p. 4.) Water quality in the Central Valley has declined steadily since 1968, but assuredly not in a manner consistent with the anti-degradation policy. Therefore, use of a baseline that is the date of issuance of a permit, or a CEQA environmental baseline, is plainly incompatible with the requirements of the anti-degradation policy.[3]

To conduct an anti-degradation analysis, the Regional Board at the very least must: 1) determine the baseline water quality from which the Board can evaluate the extent of degradation that may occur as a result of the proposed action; and 2) determine the level of potential degradation above that baseline that may occur as a result of the proposed action, including any potential harm to beneficial uses.

If the Regional Board determines that the proposed action may lower water quality below baseline water quality, the Regional Board may only allow the action if, through a socio-economic analysis, the Board determines that the degradation is consistent with the maximum public benefit to the people of the State. (State Board Resolution 68-16; APU 90-004, pp. 4-5.) In order to allow a proposed action that may cause some reduction in baseline water quality, the Regional Board must make the following findings: 1) the proposed action is necessary to accommodate important economic or social development in the area; 2) the reduction in water quality is consistent with maximum public benefit; 3) the reduction in water quality below the baseline will not unreasonably affect actual or potential beneficial uses; 4) water quality will not fall below water quality objectives prescribed in the basin plan. (APU 90-004, pp. 4-5.) Rather than rote conclusions, these findings must be based on sufficient evidence and

---

[2] Appendix I-5 to APU 90-004 further explains this requirement, and highlights the negative implications of the Regional Board's failure to perform a baseline water quality analysis for the WDR:

> Repeated or multiple changes in water quality (such as those resulting from actions which do not require detailed analysis) can result in significant water quality degradation. To prevent such cumulative adverse impacts, a baseline of water quality must be established for each potentially affected water body, prior to allowing any action which would lower the quality of that water. This baseline should remain fixed unless some action improves water quality.
>
> Proposed actions to lower water quality should then be evaluated with respect to the baseline and the resultant change should be determined. This determination should include the cumulative impacts of all previous proposed actions and reasonably foreseeable actions which would lower water quality below the established baseline.

(APU 90-004, Appendix I-5, p. 5.)

[3] As explained by John Harleston, the original purpose of the use of a historical baseline underscores the importance of not basing levels of protection on current, *degraded* levels of water quality. "[T]he use of a historical baseline was necessary to explain how antidegradation would assume less importance over time. Waters were expected to eventually exceed the historic baseline quality levels, and treatment requirements were expected to guarantee that water quality would not retreat to pre-WQA levels. Otherwise, without a historical baseline, as water quality improved, more waters would exceed minimum quality requirements and more, rather than fewer, would be affected by antidegradation policy once the minimum quality criteria had been attained. The Secretary's original policy statement itself supports the use of some kind of historical baseline: 'Waters whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at their existing high quality.'" (Harleston, John. *What is Antidegradation Policy: Does Anyone Know?* 5 S.C. Envtl. L.J. 33, 43 (Spring 1996).

analysis. (APU 90-004, p. 3.) Therefore, it is vital that the Regional Board incorporate this analysis into the alternatives evaluation as it completes its CEQA screening to ensure it will be feasible and consistent with state policy.

Alternatives

Page 6, lines 17-18 – "the Central Valley Board would also develop a Basin Plan conditional prohibition of waste discharge from irrigated agricultural lands."

We are in support of this requirement.

General questions & comments for all alternatives:

We recommend that maps be included that will show Board members and the public which areas would or would not be regulated under each alternative. Additionally, it is important to define groundwater dischargers.

For all alternatives that will rely on outside studies or regional monitoring programs (i.e. GAMA program, etc.), the alternative requirements should specify this and ensure that dischargers or third parties participate in or otherwise financially support such programs.

For all alternatives, if phased implementation is necessary it should be specified and justified in each alternative.

Ultimately, it is important that the lead entity variable not be a reason for an alternative to be considered infeasible or more expensive if the same requirements detailed in the rest of the alternative could be carried out effectively with a different lead agency structure that ensures adequate transparency and enforceability. Instead, the general requirements of an alternative should be analyzed separately from the implementing entity structure to allow for flexibility and to ensure that the best requirements are incorporated, as well as the best structure. Also, it should be clarified that in each alternative there is the ability for individual dischargers to participate directly as individuals, rather than through groups or third-party entities.

Alternative 1 – no change (surface water only)

As part of the extensive list of groundwater programs currently underway in the Central Valley, it would be appropriate to identify which provide groundwater quality information that is or can be made available to the Regional Board. It would also be appropriate to show which areas are not currently covered by groundwater management plans that include groundwater quality from irrigated lands.

Alternative 2 - Third Party Lead entity

Page 11, lines 30-32; “Develop groundwater quality management plans…within 4 years of adoption of the ILRP….” Please provide an explanation for the delayed implementation of this effort. Implementation should be based on the Board’s ability to implement the program and farmers’ ability to comply. Yet this program, one of the less restrictive, has a longer lead-time than the more complex proposals 3-5. Is this implementation a critical piece of the CEQA review? If not, perhaps it should be left out for all alternatives; if needed for CEQA, we think the Board should provide some consistent information about the actual time needed to get the programs underway.

Page 14, lines 23-24; “Where a local groundwater management plan has been substituted for a GQMP monitoring would consist of groundwater quality monitoring for, at minimum, nitrates and salts.”

This seems confusing, in that groups that are already implementing groundwater management plans have to do water quality testing and those that are just creating such plans are exempt. If this is correct, it seems to be offering a disincentive for using existing plans. Can this be clarified?

Additionally, for those entities not substituting a local groundwater management plan for a Groundwater Quality Management Plan (GQMP), the alternative seems to have no means of monitoring whether GQMPs are resulting in improvements or degradation of water quality. Any focused studies to evaluate such practices are optional (Attachment C), and therefore it is unlikely that any third party would choose to incur the expense of a study when not required. Therefore, as currently configured, we would assume that this alternative would not meet the requirements of the Anti-Degradation Policy or the goals of the program.

Finally, it is unclear why the Regional Board would not conduct a specified number of grower site inspections annually, but rather rely solely on reports from third party entities (Attachment C). It seems that at least a minimal amount of inspections would help ensure adequate compliance and ensure there are not inadequate incentives to implement practices at the farm level.

Alternative 3 – Individual Farm Water Quality Management

Page 16, lines 4-5 “In an iterative process, require additional monitoring information, and/or management measures where applicable water quality objectives are not being met.

Can you please clarify for this alternative, where water quality monitoring will occur and who will be responsible for it? Specifically, how will the board evaluate whether the farm water quality management plans are improving water quality or allowing degradation to occur? Perhaps more clarity in Appendix F, the Farm Water Quality Management Plan (FWQMP) requirements, would answer this question.

Additionally, it would be helpful to know more details of how the FWQMPs are developed and updated in order to be able to evaluate this alternative.

Alternative 4 – Direct oversight with Regional Monitoring

Lead entities – the identification of lead entities for the different proposals seems misleading. For instance, Alternatives 1 & 2 both call for coalitions or 3rd parties as lead entities. But with both alternatives, a significant number of farms who are not part of a coalition will need to apply for individual permits. Conversely, Alternative 4 is listed as an individual permit process, even though it also allows 3rd party implementation.

Currently, Alternatives 3-5 all list the board as the lead entity for implementation. In order to sufficiently differentiate these alternatives, which already have a lot of similarities, we recommend that Alternative 4 be amended to allow implementation by coalitions as well as legal entities and individual farms.

Page 18, lines 6-7 – "[Vulnerable hydrologic environments would be defined by…]…(i) nitrate concentrations [are] greater than the maximum contaminant level.."

Our recommendation for this identification is to use the California Department of Public Health (CDPH) Action Level of one-half the maximum contaminant level for nitrates. At this level, additional notification and monitoring is triggered for public water systems, but the water remains potable. Because it can take years or even decades to reverse the increasing concentration of contaminants in groundwater, it makes sense [and also complies with the anti-degradation policy] to select a concentration of nitrates that, while serious, provides the opportunity to reverse the degradation before it reaches a level at which local water supplies, including domestic wells, are significantly impacted.

Page 21, lines 20-26. Certified Crop Specialist. We continue to have concerns about potential conflicts of interest, and request that the requirements for these agents include a conflict of interest clause that would, for example prevent an agent in the pay of a fertilizer company from certifying a nutrient management plan.

Page 22, lines 6-7 - Ratio of nutrients applied. The citations given, while more nuanced than the original alternative, still fail to provide a reasonable approximation of the factors that play into the computation of appropriate nutrient application. We think that for the purposes of the environmental review, a simple matrix could be developed that uses measurement of available soil nitrogen, nitrogen in irrigation water, and expected crop uptake to determine the proper amount of nutrient application. This matrix would use the same basic parameters as a crop specialist would in developing a nutrient management plan.

Alternative 5 – Direct Oversight with Farm Monitoring

Page 26, Monitoring provisions, line 21 – "soil nitrogen and phosphorus [tracking] every 5 years."

This requirement appears to be in conflict with the requirement for a Nutrient Management Plan (NMP), which would, to be effective, require more frequent soil testing. Can you supply the NMP model on which you're basing this monitoring requirement?

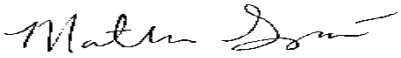
Conclusion

Thank you for the opportunity to provide comments and we look forward to working with the Regional Board staff to develop an effective long-term regulatory program for irrigated lands in the Central Valley.

Sincerely,

Laurel Firestone
Co-Executive Director & Attorney at Law
Community Water Center

Jennifer Clary, Water Policy Analyst
Clean Water Fund



Martha Guzman Aceves, Legislative Analyst
California Rural Legal Assistance Foundation