

**California Aerial Applicators Association
California Citrus Mutual
California Cotton Ginners Association
California Cotton Growers Association
California Farm Bureau Federation
California Grape & Tree Fruit League
California Rice Commission
California Strawberry Commission
Sacramento Valley Water Quality Coalition
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association**

May 20, 2013

Via Electronically Only

Daniel McClure

Senior Engineer

California Regional Water Quality Control Board,

Central Valley Region

11020 Sun Center Drive, #200

Rancho Cordova, CA 95670

dmcclure@waterboards.ca.gov

RE: Comments on Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (the “Basin Plan”) for the Control of Diazinon and Chlorpyrifos

Dear Mr. McClure:

The agricultural and related organizations (“Organizations” or “we”) listed here appreciate the opportunity to submit comments on the draft Amendments to the Basin Plan for the Control of Diazinon and Chlorpyrifos (“Draft Amendments”) and the Draft Staff Report (March 2013) (“Draft Staff Report”) that accompanies and is intended to explain the Draft Amendments.

As a preliminary matter, these Organizations understand that the Draft Amendments presented here are not only applicable to the two specific pesticides included in the Draft Amendments (i.e., diazinon and chlorpyrifos), but are also intended to establish a precedent for future Draft Amendments for other pesticides. (See, e.g., Draft Staff Report, p. 17 [“The primary goal of these pesticide Basin Plan amendments is to provide a clear regulatory framework for the protection of water quality from pesticides in surface water in the Sacramento and San Joaquin River Basins, including the Sacramento-San Joaquin Delta.”].)

Considering the importance of the proposed Draft Amendments for the two specific pesticides included and for future pesticides, we find it necessary to include significant comments with respect to policy implications associated with the Draft Amendments.

I. Application of Aquatic Life Criteria to Agricultural and Urban Storm Drains and Agriculturally Dominated Waterways

Section 1 of the Draft Staff Report includes extensive background and discussion with respect to diazinon and chlorpyrifos use throughout the basin planning area. Included is discussion with respect to concentrations of diazinon and chlorpyrifos in agricultural drains and urban storm drains, and comparisons of water quality data from the agricultural drains to water quality criteria currently used by the Central Valley Regional Water Quality Control Board (“Regional Board”) to interpret narrative water quality objectives. (Draft Staff Report, pp. 50-52.) WPHA is concerned with these analyses.

Specifically, agricultural drains and urban storm drains should not be considered waters of the United States. As such, aquatic life beneficial use designations such as warm freshwater habitat (“WARM”) and cold freshwater habitat (“COLD”) would not be applicable. Further, such beneficial use designations would not be applicable through the tributary footnote in the Basin Plan because they are not streams but rather constructed conveyances. (See State Water Resources Control Board Order, City of Turlock, Order WQO 2002-0016, p. 5; see also Draft Staff Report, p. 88.) However, despite the fact that application of aquatic life beneficial uses (and associated water quality criteria/objectives) would not apply to these types of facilities, the Draft Staff Report evaluates water quality data from these types of facilities and compares it to water quality criteria calculated for the protection of aquatic life uses. Considering that such criteria/objectives are not applicable, such analyses contained in the Draft Staff Report are inappropriate and should be excluded.

Section 2 of the Draft Staff Report identifies four alternatives with respect to which water bodies the proposed water quality objectives for diazinon and chlorpyrifos should apply: (1) All water bodies in the Project Area; (2) All water bodies that have TMDLs established; (3) All water bodies in the Project Area with “WARM” or “COLD” aquatic life beneficial uses and all water bodies for which TMDLs will be established; or, (4) A specific list of water bodies that excludes the smallest water bodies and constructed conveyances. (Draft Staff Report, p. 83.) Ultimately, the Draft Staff Report recommends alternative 3, which would apply the objectives to any water body that is designated with the WARM or COLD beneficial use. Alternative 3 appears to leave open the question with respect to application of such beneficial uses to constructed facilities and defers to another Regional Board process that is supposed to address this issue.

However, with respect to this pivotal issue, the Draft Staff Report is confusing and otherwise suggests that WARM and COLD should be applied to agriculturally dominated waterways and/or constructed facilities. For example, in section 3, the Draft Staff Report

Daniel McClure

RE: Comments on Amendments to the Basin Plan

May 20, 2013

Page 3

states that “freshwater habitat exists as a beneficial use for constructed drains and canals.” (Draft Staff Report, p. 88.) Statements such as these are inappropriate as they presume a certain outcome for the other process currently underway, which we understand is intended to specifically evaluate what should be appropriate beneficial use designations for agriculturally dominated water bodies. Further, the Draft Staff Report’s specific use of the terms “constructed facilities” may be considerably more narrow than the term “agriculturally dominated waterways.” While it does not appear that it is the intent of the Draft Staff Report to limit determinations made ultimately through the other process, the language is confusing and needs to be clarified to clearly state that actual application of WARM and COLD beneficial uses to agriculturally dominated waterways is being determined in the other process and that this Basin Plan amendment is not intended to otherwise apply WARM and COLD to such waterways at this time.

As a final note with respect to this issue, WPHA cannot underscore enough the importance of the Regional Board properly recognizing that agricultural and urban storm drains are not waters of the United States and therefore are not subject to federal water quality standard determinations and requirements. Further, it is essential for the Regional Board to also properly determine what are appropriate beneficial uses for agriculturally dominated waterways that would otherwise be considered to be waters of the United States. The application of beneficial uses to these types of waters has been a longstanding issue before this Regional Board that must be resolved soon.

II. Consideration of Water Code Section 13241 Factors

The Draft Amendments include adoption of water quality objectives for diazinon and/or chlorpyrifos. Accordingly, adoption of such objectives is required to comply with relevant provisions of the Water Code, and specifically section 13241. Water Code section 13241 requires the Regional Board to consider a number of statutorily specified factors prior to adopting water quality objectives that will “reasonably” protect beneficial uses. Although the Draft Staff Report includes tables and some narrative with respect to the factors, the analyses in the tables and the narrative associated with each factor is limited at best. For example, with respect to economic considerations, the tables in the Draft Staff Report claim that for application of the CDFG/USEPA criteria and UC Davis criteria that economic considerations are modest or have no negative impact. The narrative refers to section 9 but makes little attempt to actually quantify the cost except to say that costs could increase total production costs for agriculture by 1-9%. (Draft Staff Report, p. 113.) The narrative does not discuss what type of impact a 1-9% increase in production cost may have on agriculture. For agriculture, who are price takers, such increases in production costs can be significant. Such increases can represent the difference between a positive year or a negative year concerning the slim profit margins that are typical for most commodities. Accordingly, the costs associated with meeting these objectives can be significant and should be more clearly discussed in the Draft Staff Report for the Regional Board to properly

Daniel McClure

RE: Comments on Amendments to the Basin Plan

May 20, 2013

Page 4

consider.¹ Considering the precedential nature of this Draft Amendment (we understand that it will be a template for future pesticide water quality objectives), the Water Code section 13241 analyses provided here needs to be more robust to accompany the adoption of water quality objectives.

III. Evaluation of Data

Section 1.5 of the Draft Staff Report evaluates and summarizes diazinon and chlorpyrifos to make impairment determinations. However, based on the data summary provided it is difficult to evaluate if determinations of impairment are in fact consistent with requirements contained in the state's Water Quality Control Policy for Developing California's Clean Water Action Section 303(d) List ("Listing Policy"). Specifically, the Listing Policy requires data to include temporal representation:

Samples should be representative of the critical timing that the pollutant is expected to impact the water body. Samples used in the assessment must be temporally independent. If the majority of samples were collected on a single day or during a single short-term natural event (e.g., a storm, flood, or wildfire), the data shall not be used as the primary data set supporting the listing decision. (Listing Policy, p. 23.)

In other words, diazinon and chlorpyrifos data collected during rain events cannot by themselves be the bases for finding impairment. The data evaluation in Section 1.5 does not provide sufficient information to show if the data being used is temporally representative.

IV. Draft Amendments

With respect to the Draft Amendments presented in Appendix C, WPHA provides the following specific comments:

- The Draft Amendments propose to specifically list a number of specific applicable water bodies and to include a generic category for waters with designated or existing WARM and/or COLD beneficial uses that are not upstream of major dams in Table Y. Considering the fact that the application of the proposed water quality objectives should only apply to water bodies that have designated aquatic life beneficial uses of WARM and/or COLD, it is unnecessary to list the specific water bodies identified. Further, some of the water bodies identified may be agriculturally dominated waterways that are being evaluated as part of the Regional Board's other process. As such, it would be inappropriate to pre-judge application of beneficial uses to all of these waterways by listing them specifically

¹ See, e.g., *City of Tracy v. CA State Water Resources Control Board*, Sacramento Superior Court Case Number 34-2009-80000392, p. 31, ". . . Legislature intended the Board to consider not just the economic benefits of controlling water pollution, but the economic costs of compliance with water pollution controls."

Daniel McClure

RE: Comments on Amendments to the Basin Plan

May 20, 2013

Page 5

in the Basin Plan amendment. Thus, WPHA recommends that the specific list of water bodies be eliminated.

- The Draft Amendments propose a discharge prohibition for discharges that exceed the water quality objectives unless such discharges are regulated by an adopted waiver or waste discharge requirement. However, the discharge prohibition is not limited to discharges that occur in water bodies with the designated beneficial use of WARM and/or COLD. As such, the discharge prohibition is too broad and needs to be narrowed to exclude discharges to waterways that do not have these beneficial use designations.
- The Draft Amendments propose a pesticide discharge control program that refers generically to “discharges of pesticides to surface waters.” The reference to “pesticides” and to “surface waters” in this context is overly broad and needs to conform to discharges of diazinon and chlorpyrifos to waterways with the beneficial uses of WARM and/or COLD.
- The Draft Amendments propose to require compliance with wasteload allocations (“WLAs”) and load allocations (“LAs”) within three years from the effective date of the amendments. Such a time frame for compliance is exceedingly short and is not supported by any evidence in the record with respect to the feasibility of such a time frame.
- The Draft Amendments state that the WLAs and LAs, and the requirement for management plans, apply to water bodies listed in Table X or their tributaries. (Draft Amendments, pp. C-6 – C-8.) As we understand it, Table X is intended to be the list of water bodies that have been specifically listed as being impaired for diazinon and/or chlorpyrifos. The Draft Amendments improperly include unlisted water bodies by extending application of the TMDL specific requirements to tributaries of water bodies identified on Table X. Although it has been recognized that water bodies may be added to a TMDL as being impaired, determination of impairments must still be made pursuant to application of the state’s Listing Policy. In other words, if the Regional Board determines it appropriate to add water bodies to a TMDL that are not currently listed as impaired, the Regional Board should first identify how the water body is impaired under the state’s Listing Policy. This has not occurred. Rather, the Draft Amendments propose to arbitrarily extend application of TMDL specific requirements to all tributaries without evaluating data or information to properly determine if the “tributaries” are in fact impaired for diazinon and/or chlorpyrifos. Considering the improper expansion of application of the TMDL specific requirements, the inclusion of “or their tributaries” must be deleted from the Draft Amendments.

Daniel McClure

RE: Comments on Amendments to the Basin Plan

May 20, 2013

Page 6

- The management plan requirements for nonpoint source dischargers are internally inconsistent. The Draft Amendments state that the Executive Officer “shall require nonpoint source dischargers of diazinon and chlorpyrifos . . . to submit management plans . . .” (Draft Amendments, p. C-8.) This provision implies that the Executive Officer will issue a Water Code section 13267 order, or some other specific mandate to nonpoint source dischargers when appropriate. However, at the end of the same provision, it states that the management plans “are due no later than [one year from the effective date of this amendment.]” (*Ibid.*, emphasis in original.) These two provisions are inconsistent with each other. The automatic requirement for management plans to be due one year from the effective date should be deleted. It is more appropriate for the Executive Officer to require such management plans, if appropriate. In fact, for many of the agricultural water quality coalitions, such management plans are already in existence. Accordingly, it is not necessary to automatically submit new management plans within one year from the effective date of the Basin Plan amendment.
- The Draft Amendments propose to include a “catch-all” provision for water bodies not included in Table X if they are to be out of “attainment” with the water quality objectives for diazinon and chlorpyrifos. (Draft Amendments, p. C-8, provision 9.) This provision is inappropriate for inclusion for several reasons. First, the Draft Amendments do not define what it means to be “out of attainment.” As worded, this could be interpreted to mean that there is one exceedance out of 500 samples, which would not be considered an impairment under the state’s 303(d) Listing Policy. TMDLs, and the associated TMDL specific provisions in the Draft Amendments, are applicable to water bodies and pollutants for which there is an impairment. It is improper to broaden application of the TMDL specific requirements if no impairment actually exists. Second, the inclusion of the catch-all provision appears to attempt to circumvent the state’s listing process, which is designed to ensure transparency in the state’s determination of what are impaired water bodies. Accordingly, provision 9 needs to be deleted as it improperly implies TMDL specific requirements to water bodies that are not determined as being impaired through a proper listing process, or at the very least, a proper impairment evaluation based on the state’s Listing Policy.
- The Draft Amendments would require all dischargers to include in their monitoring programs the requirement to collect information necessary to “determine whether alternatives to diazinon or chlorpyrifos are causing surface water quality impacts.” Such a requirement is inappropriate as applied to dischargers. It is not the role of dischargers to collect such information and make such determinations. This function is met by the Department of Pesticide Regulation when pesticides are registered. Accordingly, this monitoring provision must be deleted from the Draft Amendments.

Daniel McClure

RE: Comments on Amendments to the Basin Plan

May 20, 2013

Page 7

Again, we appreciate the opportunity to comment. Please contact Tess Dunham at (916) 446-7979 if you have any questions.

Sincerely,

California Aerial Applicators Association

California Citrus Mutual

California Cotton Ginners Association

California Cotton Growers Association

California Farm Bureau Federation

California Grape & Tree Fruit League

California Rice Commission

California Strawberry Commission

Sacramento Valley Water Quality Coalition

Western Agricultural Processors Association

Western Growers Association

Western Plant Health Association