



CALIFORNIA FARM BUREAU FEDERATION

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Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100



Re: Comments to A-2239(a)-(c) Second Staff Proposed Order

Dear Chair Marcus and Board Members:

The California Farm Bureau Federation (“Farm Bureau”) 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 more than 40,000 agricultural, associate, and collegiate 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 to provide comments on the State Water Resources Control Board’s (“State Water Board”) second draft proposed order revising the Waste Discharge Requirements General Order No. R5-2012-0116 For Growers Within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group (“Second Staff Proposed Order”).

Farm Bureau, along with San Joaquin County Resource Conservation District on behalf of the San Joaquin County and Delta Water Quality Coalition, and the Southern San Joaquin Valley Water Quality Coalition, petitioned the Central Valley Regional Water Quality Control Board’s (“Central Valley Regional Water Board”) adoption of the Eastern San Joaquin Waste Discharge Requirements (“East San Joaquin WDR”) due to concerns with compliance with the California Environmental Quality Act (“CEQA”), an improper

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economic analysis, as well as concerns with regulation of non-waste and non-discharges outside the Central Valley Regional Water Board's jurisdiction.¹

However, the Second Staff Proposed Order does not address the concerns raised by Farm Bureau, but rather includes new requirements that are concerning to both members within the East San Joaquin watershed as well as throughout the state. The Second Staff Proposed Order goes beyond nitrogen management recommendations from the statutorily mandated Nitrogen Tracking Task Force and Agricultural Expert Panel, mischaracterizes recommendations, and unnecessarily incorporates the State Water Board's own views and judgment. It imposes new requirements that are costly, burdensome, create privacy concerns for individual members statewide, and may threaten successful and effective irrigated lands regulatory programs throughout the state. Farm Bureau is concerned with the statewide application of the conclusions and requirements within the Second Staff Proposed Order and respectfully presents the following comments.²

A. Acknowledgment of Changes within the Second Staff Proposed Order

Farm Bureau acknowledges and appreciates some of the changes made within the Second Staff Proposed Order, especially with regard to anonymous reporting of A/R data as well as the decrease in the frequency of Farm Evaluation reporting. Anonymity for individual grower data is and should remain an essential part of this program and all irrigated lands regulatory programs statewide. Additionally, reasonable monitoring and reporting requirements are equally essential since the "burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." (Wat. Code, § 13267(b)(1).)

Although A/R data should not be reported with grower names and locations, and thus, the Second Staff Proposed Order's change is appreciated, Farm Bureau is still concerned with the level of reporting required and the reporting of data by field rather than aggregated by township. (*See*, Section F, Section H, and Section I, *infra*.) Additionally, Farm Bureau appreciates the decrease in reporting frequency of the Farm Evaluations. Notwithstanding this needed/necessary decrease, the collective reporting requirements are still burdensome. (*See*, Section F, *infra*.)

¹ The Revised Proposed Order dismissed the claims raised in Farm Bureau et al.'s petition, asserting that the issues were resolved through a Sacramento Court ruling, issued May 21, 2013, and a State Water Board precedential order, WQ 2013-0101, decided after the petition's submittal. (Revised Proposed Order, p. 9.)

² To the extent that the Revised Proposed Order violates the terms of the Porter-Cologne Water Quality Act or the California Environmental Quality Act, these claims are not waived. Farm Bureau's comments within this letter focus on policy-level comments.

B. The Precedential Nature of the Second Staff Proposed Order Will Significantly Impact Irrigated Lands Regulatory Programs Statewide as a One-Size-Fits-All Approach is Not Appropriate

The Second Staff Proposed Order indicates that almost all of its requirements are precedential in nature and will apply statewide. Specifically, the Second Staff Proposed Order would give direction to the Central Valley Regional Water Board and all other regional water boards to update (or develop) their irrigated lands regulatory programs to be consistent with the Second Staff Proposed Order. For this reason, the Second Staff Proposed Order still has significant implications for irrigated agriculture statewide and would directly affect and impact all growers whether enrolled in coalitions or complying as individual dischargers.³

By mandating a one-size-fits-all program, the irrigated lands regulatory programs cannot be individually developed and tailored to address water quality concerns specific to that area of the state. Each regional water board region, as well as portions within the regions, represent unique geographic and hydrologic characteristics, including, but not limited to, rainfall, drainage, commodities grown, topography, reliance on surface water and groundwater, presence or absence of groundwater basins, and specific water quality concerns. Further, specifically with regard to groundwater basins, not all groundwater basins of the state are impacted similarly by waste discharges, whether they be from agricultural operations or other sources. For example, areas such as San Diego County have very little groundwater, various portions of California do not have nitrate issues, and areas such as the Central Coast have numerous crops per season with frequent crop rotations and changes in harvesting methods due to market demands, making yearly and three-year A/R averages extremely difficult to impossible to calculate. Additionally, climate and soil gradients affect input requirements, resulting in different required input amounts for the same crop.

Given all of these vast differences, rather than applying uniform requirements statewide, the State Water Board should afford each regional water board the flexibility to individually draft an irrigated lands regulatory program, if one is needed, specific to the region it regulates, and determine the level of reporting and management requirements necessary given its specific local conditions.

C. Use of a Coalition or Third Party For Data Collection and Reporting

For various regions throughout the state, the coalition structure is invaluable to the region's irrigated lands regulatory programs. The coalition approach for implementing the goals of the irrigated lands regulatory programs, whether through conditional waivers of waste discharge requirements or waste discharge requirements, is legally sound⁴ and

³ See letters submitted by County Farm Bureaus throughout the state highlighting the different circumstances found in each region and resulting impacts from the Second Staff Proposed Order's precedential nature.

⁴ See Wat. Code, § 13269; *In the Matter of the Petitions of Agricultural Water Quality Coalition, et al.*, Order WQO 2004-0003, and Nonpoint Source Policy, p. 8.) The Water Code, State Water Board findings, and its

effective at improving and protecting water quality. The purpose of coalitions is to put forward a program that focuses on the need to implement management practices to improve and protect water quality. By collecting and analyzing data submitted by growers, coalitions are able to identify water quality issues and implement effective outreach and education to address the issues while garnering growers' trust and maintaining the confidentiality of growers' proprietary information. Additionally, the coalitions' mechanism for implementation allows for more efficient communication between regional water board staff and the grower community on the effectiveness of management practices, and the potential need to implement such practices to protect water quality. The use of coalitions should be available for those regions in which such a program is feasible and warranted.

The potential impacts of the Second Staff Proposed Order on the already successful cooperative coalition-based irrigated lands regulatory program, which has been in place for over a decade in the Central Valley, are not only significant and costly, but also compromise the proactive structure of the program.

Confidentiality of information and working with coalition experts are the keys to a successful program and effectively working with the agricultural community to improve water quality. Although the Second Staff Proposed Order now allows for some level of anonymity for individual grower data, other proprietary business and private economic data is required to be publicly reported. Additionally, the new and expanded reporting requirements increase costs not only for the coalition, which are then passed down to individual members, but also directly increases costs for individuals due to increased monitoring and reporting requirements, such as drinking water well monitoring and reporting. Further, in order to deal with the substantial increase in raw data analysis and reporting, the coalitions and the regional water boards will have to hire additional staff in order to implement the proposed requirements, which further adds costs to individual growers while removing the focus of the coalitions and the regional water board from improving and protecting water quality.

By increasing costs and eroding cornerstones of the longstanding coalition program within the Central Valley, the Second Staff Proposed Order may threaten the longevity of the cooperative and successful coalition approach for implementing the goals and requirements of the irrigated lands regulatory programs statewide.

D. Vulnerability Designations Should Be Maintained in Order to Prioritize Areas with Groundwater Quality Issues or the Potential for Groundwater Quality Issues

The East San Joaquin WDR, as well as similar WDRs adopted by the Central Valley Regional Water Board, prioritizes reporting requirements with risk to surface and

NPS Policy clearly support the notion that third party groups are legal, and may be used to implement requirements of an irrigated lands regulatory program.

groundwater quality. In order to best utilize limited resources and improve areas in most need, the WDRs focus on those activities and conditions that constitute the highest risk to water quality through increased monitoring, management implementation, and certification of plans in order to address water quality impacts, including nitrate contamination in groundwater.

Specifically, areas are designated as high or low vulnerability based on the groundwater quality assessment report (“GAR”), which was undertaken by each coalition to provide the most recent study of the groundwater basin including “an assessment of all available, applicable and relevant data and information to determine...where discharges from irrigated lands may result in groundwater quality degradation.” (Second Staff Proposed Order and Revised Eastern San Joaquin Agricultural General WDRs, Attachment B, MRP, section IV.B., p. 15.) Areas designated as high vulnerability have stricter requirements which allows the coalition, individual growers in those areas, and the Central Valley Regional Water Board to focus on those areas with known or potential groundwater quality impacts that constitute the highest risk in order to protect water quality and public health.

The First Draft proposed eliminating vulnerability designations resulting in all the requirements within the Proposed Order applying to all farms regardless of current or past threats to water quality, vulnerability designation, or implementation of best management practices. Although the Second Staff Proposed Order proposes to retain the vulnerability designations, the draft states that the State Board: “will not rely on that distinction in the Eastern San Joaquin Agricultural General WDRs because, in light of our revisions to impose many of the same requirements in high and low vulnerability areas for groundwater, the categories for surface water are left with little utility in the General WDRs.” (Second Staff Proposed Order, p. 24.) Thus, although existing vulnerability designations will remain, its utility for prioritization is null by requiring all growers to comply with all of the WDR’s conditions and requirements.

By drafting a one-size-fits-all WDR, growers are not recognized for positive contributions to maintaining and improving water quality. Additionally, smaller growers unfairly bear the burden of the WDR’s administrative requirements and may be driven out of business. In order to maintain the goals of the irrigated lands regulatory program while maintaining a viable agricultural industry, flexibility and prioritization should be included within the WDR.

E. The Second Staff Proposed Order Must Consider Reasonableness

In enacting the Porter-Cologne Water Quality Control Act, the Legislature laid out specific goals and objectives for the State’s waters. The State Water Board and regional water boards must conform to all such statutory mandates, including the Legislature’s objective:

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to *attain the highest water quality which is reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

(Wat. Code, § 13000, emphasis added; see also *id.*, § 13240 [“Each regional board shall formulate and adopt water quality control plans for all areas within the region. Such plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000) of this division and any state policy for water quality control.”].) In its decision in *City of Burbank v. State Water Resources Control Bd.*, the California Supreme Court discussed the Legislature’s intent, confirming its goal “to attain the highest water quality which is reasonable.” (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619 (*City of Burbank*).)

The use of the term “reasonable” and the “reasonableness” standard is not limited to the express goals laid out in Water Code section 13000. Rather, Porter-Cologne expressly calls for reasonable actions throughout. (See, e.g., Wat. Code, § 13241 [calling for water quality objectives that will provide “the reasonable protection of beneficial uses” upon mandated review of specific factors including economics (emphasis added)]; *id.*, § 13050(h) [defines “water quality objectives” as “the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area” (emphasis added)]; *id.*, § 13263 [requiring regional water boards to take into consideration “water quality objectives reasonably required” to protect beneficial uses as well as all provisions of section 13241 when prescribing discharge requirements]; *id.*, § 13267(b)(1) [requiring technical or monitoring program reports for WDRs or conditional waivers to “bear a reasonable relationship to the need for the report and the benefits to be obtained”].) Thus, when analyzing impacts to water quality and adopting waste discharge requirements, the State Water Board and the regional water boards must comply and conform with Porter-Cologne’s “reasonableness standard”; that is, evaluate if the activity or control limit will reasonably protect the beneficial uses. As explained throughout these comments, requirements within the Second Staff Proposed Order are not reasonable and do not properly consider all values involved, including economic and detrimental.

F. The Burden of the Second Staff Proposed Order’s New Monitoring and Reporting Provisions Is Not Reasonably Related to the Benefit

Within the Second Staff Proposed Order, numerous monitoring reports and technical reports, such as management practice evaluations, irrigation and nitrogen management plans and summary reports, management practice and implementation reports, reporting of nitrogen applied and nitrogen removed values and ratios, and surface water, groundwater, and drinking water supply well monitoring, are required to be submitted to the regional water board. Although the regional water board has the authority, pursuant to Water Code section 13267, to require monitoring reports and technical reports,

“the burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.” (Wat. Code, § 13267(b)(1).) Given that reporting must bear a reasonable relationship to the need and benefit of the information required, reporting must also bear a reasonable relationship to the threat to water quality. Potential impacts to water quality differ throughout the state, calling into question the reasonableness of a one-size-fits-all precedential program.

The proposed revisions creating uniform statewide reporting requirements exceed the threshold of necessary and reasonable data required to improve nutrient management and protect groundwater quality. In many areas of the state, such uniform requirements are not appropriate or reasonable as there are no underlying groundwater basins, irrigated agricultural operations pose no risk to groundwater quality, or groundwater basins have adequate assimilative capacity to handle potential loads without causing exceedances of applicable groundwater quality objectives. Therefore, the burden, including the substantial increase in costs and time to expand the scope and scale of nitrate analysis and reporting as well as farm evaluation data to the field level, does not bear a reasonable relationship to the benefit of the information. Farm Bureau respectfully urges the State Water Board to reject the provisions requiring reporting of all raw data.

1. Field Level Reporting is Not Necessary for the East San Joaquin WDR to Comply with the Law

The Second Staff Proposed Order increases the scope and scale of the data required to be reported and the monitoring to be required. For example, the submittal of farm evaluation data and nitrogen application and management data at a field level (including the three-year running average for the A/R ratio, the A-R difference, and the development of nitrogen removed coefficients), and drinking water supply well monitoring and reporting are costly and time-consuming burdens for both individuals as well as coalitions, and the necessity of that information does not match the burden. Aggregating management practice and nitrogen application information at the township level, rather than the Second Staff Proposed Order’s requirements for the submittal of all raw data at the field level, provides useful and adequate information and bears a reasonable relationship to the need for the reports, all while providing the regional water boards with proper oversight and the ability to verify the accuracy of the information and effectiveness of the program.

The Second Staff Proposed Order suggests that field-level reporting is necessary to ensure that the East San Joaquin WDR complies with the law, especially the Nonpoint Source Policy. However, field level reporting is not necessary to ensure compliance with the Nonpoint Source Policy given the Central Valley Regional Water Board’s legal authority to provide for regulatory oversight of the current program, as well as specific conditions within the WDR that allow for verification of adequacy and effectiveness and provide feedback mechanisms. In order to maintain a program that is reasonable, cost effective, not burdensome, and protects grower specific information all while providing adequate data to the public and the regional water board, the irrigated lands regulatory program should continue to require aggregated data rather than field-level reporting.

2. Certification Requirement for Low Vulnerability Growers

The Second Staff Proposed Order requires *all members* to have a certified Irrigation and Nitrogen Management Plan (“INMP”) and submit the INMP Summary Report to the third party/coalition. The requirement to certify INMPs is costly, not only to farmers, but also to coalitions who train farmers to self-certify. For those areas determined to be of low vulnerability and who now must certify their INMPs for the first time, the certification burden is greater than the need or benefit obtained. In low vulnerability areas, the threat to water quality is low and thus the need and benefit for various reporting and monitoring information is far less. In fact, the burden and costs of additional reporting being imposed on those in low vulnerability areas, including a requirement for certification of the INMP, runs counter to the mandates of Water Code section 13267 and cannot be supported.

G. Proposed Changes to the Surface Water Monitoring Program are Improper

The Second Staff Proposed Order concludes that the East San Joaquin WDR’s surface water monitoring program is not “of sufficient density (spatially and temporally) to identify general locations of possible pollution” and “it does not appear to be comprehensive enough to identify problem areas throughout the watershed.” (Second Staff Proposed Order, p. 59.) Farm Bureau disagrees with the Second Staff Proposed Order’s conclusions as the current surface water monitoring program is working and gives a clear representation of water quality in the individual watersheds both spatially and temporally, and is adequate to verify the adequacy and effectiveness of the Order’s conditions, while balancing needs and requirements within the Water Code. (See Wat. Code, §§ 13000, 13241, 13267.)

Although the Second Staff Proposed Order does not make any specific revisions to the surface water monitoring provisions, and instead calls for “conven[ing] a panel of experts to make recommendations on the framework for surface receiving water monitoring to inform irrigated lands programs statewide,” which will then be used by the Executive Director of the State Water Board to issue a new monitoring and reporting program, fundamental changes to the surface water monitoring program are not warranted. (Second Staff Proposed Order, pp. 61-62.)

Within the current East San Joaquin WDR, the receiving water monitoring requirements allow the Central Valley Regional Water Board to gather more reliable and useful data than would be available through different monitoring requirements; the Regional Water Board is not only able to analyze the data in order to directly compare the monitoring results to the water quality objectives, but can also conduct follow-up analysis to verify management practice effectiveness. Considering the level of watershed-based water quality monitoring, which has proven to be effective, along with reporting requirements, the current East San Joaquin WDR meets, and well exceeds, the statutory requirements to provide verification of the adequacy and effectiveness of the WDR’s

conditions while also including sufficient feedback mechanisms to verify if purposes are achieved and if additional management practices are needed.

The Second Staff Proposed Order's conclusions and call for an Expert Panel would result in fundamental changes to the surface water monitoring program. Any such change in the surface water monitoring program would greatly impact both farmers who comply with irrigated lands regulatory programs through a coalition and those who comply individually, statewide. Further, any change to the surface water monitoring program could have broad implications beyond the ILRP, impacting programs and regulations regarding forestry, grazing, food processing, wineries, etc. Given the lack of need to change an effective existing program, the Second Staff Proposed Order's conclusions regarding the surface water monitoring program are improper and should be stricken.

H. The Second Staff Proposed Order's Expansion Requiring All Raw Data is Unnecessary and Burdensome

The Second Staff Proposed Order seeks to dramatically change the reporting requirements by requiring the coalitions to submit all raw farm evaluation data and nitrogen application data by field. Within the current East San Joaquin WDR, individual members submit information to the coalition, which then analyzes the information and aggregates it on a township level prior to submitting the data to the Central Valley Regional Water Board. Through this format, the coalition and the Regional Water Board are able to effectively implement the program with an appropriate amount of useful data that allows for proper Regional Water Board oversight and verification of accuracy without unwarranted and unnecessary amounts of data points that is burdensome or resource prohibitive. Further, the Regional Water Board retains the authority to inspect and audit the coalition's records and individual farmer's records if questions arise or to simply further verify accuracy. This system provides all appropriate access necessary for a legally sound and successful program with verification of accuracy and proper feedback mechanisms.

Although the use of anonymous identifiers is a positive change, the reporting of raw field-level data will generate significant amounts of raw data points that will need to be reviewed, validated, and aggregated to determine trends in water quality improvement. The coalitions are the appropriate entity to review the data given their expertise and relationship with the growers. Transmitting a vast number of raw data points for growers and crops, especially in areas of the state with multiple growing seasons per year, to the regional water boards will lead to data overload and increased risk of misinterpretation of data while not providing meaningful information to illustrate trends in water quality.

By making individual member's data points public, even if anonymous, the risk of misinformation and misinterpretation of the data rises, thus increasing risk and threat of litigation by private citizens and the jeopardy of food safety and security. Data points, such as the A/R ratios, do not detail unforeseen circumstances or variations in water availability, harvest method, climate variants, and soil conditions. Further, there is no relationship between the public release of individual data and the evaluation of water quality. Thus,

reporting and analyzing farm evaluation data and nitrogen applications by crop at the township scale is an appropriate feedback mechanism; reporting raw data for the sake of gathering data is inappropriate and does not benefit water quality.

Also, it is clear that the current reporting requirements within the existing irrigated lands regulatory program, provide the regional water boards with more than enough information needed to verify the accuracy of the data and determine the effectiveness of the program regarding water quality concerns in compliance with the Water Code and the State Board's Antidegradation Policy and Nonpoint Source Policy.⁵ The collection of individual field-level raw data records under the Second Staff Proposed Order is neither necessary, reasonable, nor useful. For certain farming operations such as in the Central Coast, any given year could have in excess of 3,000 samples and ratio calculations per operation, a daunting and overly burdensome recordkeeping exercise for the farmer. Additionally, the regional water boards do not have the capacity to utilize or analyze this volume of data. The costs and time to be able to develop that capability would be astronomical. Rather than dramatically increasing the reporting and analysis requirements to now require farm evaluation data and nitrogen application data at the field-level, the irrigated lands regulatory program should continue to allow coalitions to report data in aggregate at the township level rather than by field-level. Farm Bureau respectfully requests that the State Water Board maintain the current reporting for management practice and nitrogen application information aggregated at the township level rather than the Second Staff Proposed Order's requirements for the submittal of all raw data at the field-level.

I. The Second Staff Proposed Order's New Metric for Nitrogen Application Management Is Problematic

A fundamental component of the Second Staff Proposed Order is the multi-year ratio of nitrogen applied to the field to nitrogen removed from the field, or the A/R ratio.⁶

⁵ For example, the Central Valley Regional Water Board's audit compliance program provides an adequate feedback mechanism that allows the State Water Board and the Regional Water Board to verify the efficacy of the program without the need for the reporting of all farm evaluation and nitrogen application raw data. Through audits, the Regional Water Board has reasonable oversight to verify accuracy of all aggregated information reported and can evaluate if growers are implementing appropriate management practices that are designed to protect water quality. Additionally, the audit program allows the Regional Water Board to inspect upon request not only those with water quality issues, but also those in good standing to verify the program's effectiveness. Given an audit compliance program's reasonable alternative to the submittal of all raw data, Farm Bureau requests that the Second Staff Proposed Order be modified to maintain the current township level of reporting for aggregated management practice and nitrogen application data.

⁶ The Second Staff Proposed Order relies on the Agricultural Expert Panel as the basis for the nitrogen application management and reporting. Specifically, the Second Staff Proposed Order states: "The Agricultural Expert Panel found that the AR data needed to be tracked at a field level to be meaningful, but the Panel did not specifically speak to whether the field-level data should be reported to a third-party group or to the regional water board." (Second Staff Proposed Order, p. 49.) The Second Staff Proposed Order mischaracterizes the Expert Panel's recommendations. With regard to tracking and reporting A/R data, the Expert Panel spoke directly on reporting units and the need to be able to report by crop basis:

Additionally, the Second Staff Proposed Order directs the Central Valley Regional Water Board to determine acceptable multi-year A/R ration target values. The Second Staff Proposed Order's direction to develop A/R ratio target values for regulatory purposes is concerning and inappropriate given questions linking groundwater quality and nitrogen uptake ratios, and limitations with the A/R ratios.⁷ The A/R and A-R values are misleading indicators of effective management practices since the numbers standing alone can be misinterpreted and do not account for numerous factors impacting crop growth and the growing season, such as soil variants, weather patterns, climate, etc.

Given the precedential nature of the Second Staff Proposed Order, the field-level nitrogen application data reporting requirements will apply statewide. California's agricultural abundance includes more than 400 commodities, made up of permanent crops to crops that are only in the ground for a few weeks. Given the wide variety of crops as well as the variation within the same crop, determining yearly A/R ratios and three-year A/R averages will be extremely problematic, overly burdensome, and costly. For example, along the Central Coast, 150 crops and varieties are grown each year, typically with a four-year cycle of crop rotations. Given the variable coastal climatic gradient, over 45 different soil types with naturally occurring elements, groundwater quality variability, and more, nitrogen applications vary by crop, season, soil type, and deliverables (market demands). This will result in different A/R ratios for the same crop but grown in different sub-areas. Further, given the average farm operation will result in over 3,000 data points per year, data capture for a single year will be a significant burden to farm operators. Calculating a three-year A/R average for any one crop on the same field will be extremely difficult and problematic, if not impossible, given crop rotations and other variables, and could lead to false outliers. The Second Staff Proposed Order does not account for or address these issues, leading to overly burdensome and costly statewide regulations.

"The Panel recommends that the "reporting unit" be defined in one of two ways: (i) on a crop basis, which could include multiple fields that have similar soils, irrigation methods, irrigation water nitrate levels (not defined by the Panel), and irrigation/nitrogen management styles; alternatively, (ii) a reporting unit could be defined as an individual field. The Panel's recommendation for grouping of multiple fields is more restrictive than the "nitrate loading risk unit" [Q2b] [Q13], or "management block" defined by Region 3.

The recommended reporting unit provides the flexibility to farmers to group fields in a customized manner so that it makes operational sense in part because multiple fields may receive nitrogen applications simultaneously but without the infrastructural means to separate their applications. It gives the flexibility to vary the field sizes between crops and seasons. It does not necessitate mapping or farm-scale spatial analysis." (Expert Panel Final Report, pp. 37-38, emphasis added.)

Furthermore, the Expert Panel also spoke directly on whether or not grower's individual data should be reported directly to the Regional Water Board or to a coalition. The Expert Panel, recognizing the benefits of the coalitions, not only in its ability to gather, aggregate, and analyze data, but also in its relationship with growers built on trust and protection of confidential information, recommended reporting to the coalitions and not directly to the Regional Water Boards:

"The Panel emphasizes that reporting by growers and any data collection requirements should be coordinated by third-party coalitions where feasible, rather than having farmers report directly to the Regional Water Boards." (Expert Panel Final Report, p. 36.)

⁷ The Agricultural Expert Panel strongly recommended that A/R ratios **not** be used for regulatory purposes. (Expert Panel Final Report, p. 38.)

J. The Second Staff Proposed Order Must Maintain Confidentiality of Grower Information

Although Farm Bureau appreciates various changes in the Second Staff Proposed Order, such as the reporting of A/R and Farm Evaluation raw data tied with an anonymous member identification rather than with the grower's name and location, in general, grower specific information required to be reported by the Second Staff Proposed Order must be protected and remain confidential. The irrigated lands regulatory program in the Central Valley has been developed to attempt to balance growers' privacy against the public's right to information. However, provisions within the Second Staff Proposed Order seek to upset this balance.

In addition to the protection of proprietary information afforded by Water Code section 13267(b)(2), state statutes, federal laws such as FOIA, and state marketing orders provide protection for grower specific information, including intellectual property, trade secrets, individual crop yield data, and proprietary information, from public disclosure.⁸ In opposition to the protection of grower specific information, some commenters point to a superior court case, *Carmen Zamora and Environmental Law Foundation vs. Regional Water Quality Control Board, Central Coast Region* (San Luis Obispo County Superior Court, Case No. 15CV-0247), to argue that all grower information should be made public. For numerous reasons, those arguments are legally incorrect and inapplicable here. First, the *Zamora* case pertained to the Central Coast Groundwater Coalition cooperative monitoring program, specifically the collection of domestic well data and associated information. The Second Staff Proposed Order's requirements pertaining to grower specific information that should be afforded protection are not related to domestic well data. Second, a superior court decision not only has no precedential value on other courts,⁹ it also carries no weight on the State Water Board's consideration of the Second Staff Proposed Order on the East San Joaquin WDR. Therefore, such arguments calling for public disclosure of proprietary information should be dismissed.

Legal obligations of verification of accuracy and effectiveness can be and are currently being achieved without violating grower's privacy rights. The current East San Joaquin WDR, as adopted by the Central Valley Regional Water Board, allows for the inspection and audit of any document submitted by a member of a coalition as part of an investigation, as well as the review of membership lists, lists of members who are not in

⁸ See, e.g., Food & Ag Code § 58781; 7 U.S.C. § 8791(b)(2); Gov. Code § 6254 (e).

⁹ It is well settled that superior court opinions have no precedential value and may not be cited. (*Santa Ana Hasp. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 831; see also *TBG Ins. Services Corp. V. Superior Court* (2002) 96 Cal.App.4th 443,447, fn. 2 (noting that under predecessor to CRC 8.115 it is improper to cite to an unpublished superior court decision.) Further, according to the California Rules of Court, Rule 8.1115, unpublished court opinions are not to be cited, and since superior court opinions are not published, they must not be cited. Additionally, citing to an unpublished or depublished opinion is not only improper, but can result in serious consequences, such as grounds to strike a brief or to impose monetary sanctions. (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885.)

good standing, and detailed monitoring reports, monitoring results, and data analysis. Thus, the need for public reporting of all raw data is unwarranted. Therefore, the Second Staff Proposed Order should afford agriculture with the same protections provided to others and shield the public release of grower specific proprietary business and economic information.

K. The Second Staff Proposed Order's Requirement to Sample All Domestic Wells is Outside the Scope of This Program

Although the Second Staff Proposed Order made some revisions to the requirements pertaining to drinking water well monitoring, individual farmers are still required to annually monitor all on-farm drinking water supply wells on their property for nitrate concentrations, upload results directly into GeoTracker, and notify water users if the well water exceeds the drinking water standard for nitrates.

The inclusion of requirements to monitor all drinking water supply wells within the irrigated lands regulatory program is problematic.¹⁰ Each farm would be required to monitor all drinking water supply wells, even landowner or tenant wells that the member may not have legal authority to access. In order to properly protect drinking water wells, legislation is needed to allow for the development of quasi-regional approaches to address areas where groundwater is shown to have nitrate levels that may exceed the drinking water standard.

L. A New Economic Analysis of the Second Staff Proposed Order is Warranted

The precedential Second Staff Proposed Order will impact agricultural operations throughout the state and will dramatically increase costs. The new and expanded reporting and monitoring requirements directly increases costs for individuals due to increased monitoring and reporting requirements, such as drinking water supply well monitoring and reporting, preparation and certification of INMPs, collection and reporting of nitrogen application data at the field-level, and creation of additional new reports, such as the Management Practice Implementation Report. Coalition costs, which are then passed down to individual members, will also rise due to increased reporting and monitoring requirements, such as the development of nitrogen removed coefficients, analysis of thousands of additional data points, development of new databases, and the evaluation of farm evaluation data and nitrogen application data at the field-level.

When taking into account economic considerations, the Central Valley Regional Water Board's analysis of costs for the East San Joaquin WDR did not include any of the new requirements or expanded requirements contained in the Second Staff Proposed Order.

¹⁰ In addition to the problematic nature of drinking water supply wells requirements within the irrigated lands regulatory program, comments seeking to also include replacement water provisions are similarly problematic. The regional water board's authority to issue a WDR, such as the Eastern San Joaquin WDR, is found in Water Code section 13263. Only clean up and abatement orders issued pursuant to Water Code section 13304 provide the regional water board with the authority to require replacement water.

Nor did the Central Valley Regional Water Board's analysis consider the costs of such a program applying statewide. Nor did the analysis consider all of the statewide demands being made on the waters and all of the "total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code, § 13000.) Therefore, any reliance on a previous economic analysis is inappropriate given the fundamental changes made to the East San Joaquin WDR, and its expansion to apply statewide. Although the Second Staff Proposed Order included a section outlining some costs associated with the proposed revisions (see Second Staff Proposed Order, pp. 75-78), the discussion is superficial and does not adequately capture costs to growers throughout the Central Valley or statewide. Thus, the State Water Board should analyze, evaluate, and estimate all of the costs associated with the Second Staff Proposed Order's new regulatory requirements, not only as they apply to the East San Joaquin Coalition, but also the statewide implications. (See Wat. Code, § 13241.)

M. Responses to Arguments Raised by Others

Arguments were raised in various environmental and environmental justice comment letters alleging that the first draft of the Proposed Order does not comply with the Nonpoint Source Policy and the Antidegradation Policy and has disparate impacts on protected classes. In light of the fact that similar comments were made at the December 6, 2017 workshop regarding the Second Staff Proposed Order, the following comments are made herein in response.

1. The Second Staff Proposed Order Complies with the Nonpoint Source Policy

Various environmental and environmental justice groups allege that the Second Staff Proposed Order does not comply with the Nonpoint Source Policy because the surface water monitoring scheme is insufficient to determine compliance with water quality standards. Specifically, these groups take issue with the representative monitoring program, alleging that the program, on its own, is not sufficient to determine compliance with water quality standards and thus, edge-of-field monitoring should be required. Conversely, the Second Staff Proposed Order is consistent with the Nonpoint Source Policy for numerous reasons.

As discussed *ante*, the current surface water monitoring program, along with groundwater quality monitoring, farm evaluations, nitrogen application reporting, and the additional and substantial requirements of the WDR, are more than sufficient to provide a feedback mechanism and verification of accuracy and effectiveness of the WDR's conditions consistent with the Nonpoint Source Policy. In reaching their adverse conclusion, the environmental and environmental justice groups generally misconstrue representative surface water monitoring along with the Proposed Order's verification and effectiveness provisions, and collective monitoring provisions, as well as the application of Water Code section 13269, subdivision (a)(2) and the Nonpoint Source Policy.

The environmental and environmental justice groups' interpretation of Porter-Cologne and the Nonpoint Source Policy ignores the nature of nonpoint source pollution, and the Central Valley Regional Water Board's expressed approach for addressing nonpoint source pollution. The environmental and environmental justice groups' views also ignore the practical and economic considerations that the Central Valley Regional Water Board and State Water Board must employ in their regulatory programs. Most importantly, the environmental and environmental justice groups' arguments ignore the evidentiary record and the substantial discretion afforded to the Regional Water Board and State Water Board in employing their technical expertise, and in implementing the law.¹¹

Thus, considering the level of ambient water quality monitoring, as well as other types of monitoring and reporting, both individual and coalition-based, the Second Staff Proposed Order meets, and well exceeds, the statutory and State Water Board's policy requirements.

2. The Second Staff Proposed Order is Consistent with the Antidegradation Policy

Contrary to claims made by environmental and environmental justice groups, the Second Staff Proposed Order is consistent with the Antidegradation Policy. The Antidegradation Policy expresses the goal of maintaining the state's "high quality" waters, i.e., waters with quality that exceeds the WQOs in the applicable Basin Plan.¹² (State Water

¹¹ The Nonpoint Source Policy recognizes that feedback mechanisms involve a variety of tools, rather than just water quality monitoring. Nonpoint Source Policy Key Element 4 provides various examples but such examples are not mandatory or exhaustive. (State Water Resources Control Board, Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (2004) p. 14.) Rather, the determination of the monitoring program and the verification of feedback mechanisms is left to the water boards, who have the technical expertise and the statutory authority to protect water quality. The Nonpoint Source Policy recognizes the technical expertise of the regional water board and the State Water Board in establishing a nonpoint source pollution control program, such as a WDR, including "[d]esigning the appropriate types and frequency of verification and feedback measures (e.g., reporting, inspection, monitoring, etc.)" for such a program. (*Id.* at p. 13.) As with the methodology for monitoring, the State Water Board and regional water board's technical judgment regarding frequency and type of monitoring is entitled to a presumption of correctness. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 879, quoting *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

¹² The Policy reflects the Legislature's intent to attain the highest water quality that is "reasonable" in light of important economic, societal, and other non-water quality factors. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625-626.) This Policy is consistent with the Porter-Cologne Act, which requires that regional boards setting waste discharge requirements under state law consider and account for social and economic hardships resulting from water quality regulation, considerations that are not permitted when issuing federal NPDES permits. (*Ibid.* [citing Wat. Code, §§ 13241(e) and 13372].) When a regional water board issues a permit to allow a discharge of waste into existing high quality water, it must engage in the mandated weighing process to ensure the discharge is utilizing the best practicable treatment or control to ensure pollution or nuisance will not occur, and that the highest water quality consistent with maximum benefit to the people of the state will be maintained. (*Ibid.*) Additionally, it should be noted that this Policy was developed in 1968 to address surface water issues. In light of the application of the Policy now to groundwater, the Second Staff Proposed Order should be revised to distinguish the application of the Antidegradation Policy and the Nonpoint Source Policy to agricultural dischargers, especially agricultural discharges to groundwater.

Resources Control Board, Resolution No. 68-18.) However, the Antidegradation Policy is not a “no degradation” or “no discharge” policy. The Policy provides three criteria for reducing the quality of high quality waters: (1) the change is consistent with maximum benefit to the people of the state; (2) the change will not unreasonably affect present and anticipated beneficial use of such water; and, (3) the change will not result in water quality less than that prescribed in the policies. (*Ibid.*) When a regional water board issues a permit to allow a discharge of waste into existing high quality waters, it must ensure the discharge is utilizing the best practicable treatment or control (“BPTC”) to ensure pollution or nuisance will not occur, and that the highest water quality consistent with maximum benefit to the people of the state will be maintained. (*Ibid.*) The Central Valley Regional Water Board made the required findings when adopting the East San Joaquin WDR and the State Water Board made numerous additional findings detailing how the Second Staff Proposed Order complies with the Antidegradation Policy. (Second Staff Proposed Order, pp. 81-85.) Various environmental and environmental justice groups take issue with those findings and allege that the Second Staff Proposed Order does not comply due to two court cases.

First, reliance on the court in *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255 (*AGUA*) is improper as that case distinguishable from the current situation. In *AGUA*, the court found the dairy general order (not a general order regulating irrigated agriculture which is at issue here) did not comply with the Antidegradation Policy because the regional water board made findings stating that the order did not “authorize degradation,” and that the order required actions to “assure that degradation does not occur.” (*AGUA, supra*, 210 Cal.App.4th at p. 1264.) Specifically, the regional water board in *AGUA* argued that it was not required to perform an analysis under the Antidegradation Policy “because the Order prohibits further degradation.” (*Id.* at p. 1271.) With respect to this issue, the court found the order in general, and the monitoring program specifically, to be inadequate to support the regional water board’s claims that the Antidegradation Policy was not triggered. (*Id.* at p. 1278.) Additionally, the uncontroverted evidence in the record indicated that the specific dairy groundwater monitoring program was not sufficient to detect any groundwater degradation. (*Id.* at pp. 1267, 1274-1275.) The regional water board did not dispute this, nor was there *any evidence* in the record to show that other provisions of the dairy order would protect groundwater quality. (*Ibid.*) Given this situation, the court, as a matter of law, found that the monitoring program was inadequate and did not comply with the Antidegradation Policy. (*Id.* at p. 1275.)

Here, neither the Central Valley Regional Water Board nor the State Water Board has taken such a position that the Antidegradation Policy does not apply with respect to the adoption of the ESJ WDR or the Second Staff Proposed Order. Rather, both the Regional Water Board and the State Water Board, the agencies statutorily charged with protecting water quality, concluded that the Antidegradation Policy did apply. Findings were made by the State Water Board that the Second Staff Proposed Order implemented the requirements of the Antidegradation Policy through inclusion of performance standards that work to prevent future degradation of surface and groundwater, that it would result in

implementation of best practicable treatment or control, and that the highest water quality consistent with maximum benefit to the people of the state would be maintained. (*Contra, AGUA, supra*, 210 Cal.App.4th at pp. 1273, 1271 fn. 11.)

Second, reference to and reliance on *Monterey Coastkeeper et al. v. State Water Resources Control Bd.* (Super Ct. Sacramento County, 2015, No.34-2012-80001324) (Sacramento Superior Court Ruling) is improper as discussed in Section J, *ante*. Not only does the superior court decision have no precedential value, the subject matter in that case dealt with a vastly different conditional waiver adopted by the Central Coast Regional Water Board and is not applicable here. Further, the superior court decision is also currently stayed while on appeal.

For these reasons, allegations that the Second Staff Proposed Order does not comply with the Antidegradation Policy are erroneous.

3. Claims of Disparate Impacts Fails Because No Causal Connection Is Made

Various environmental and environmental justice groups claim in a conclusory fashion that the Second Staff Proposed Order disproportionately impacts low income and Latino communities in violation of Government Code section 11135, the California Fair Employment and Housing Act (“CFEHA”), and Government Code section 65008, a housing discrimination statute. The WDR, however, does not disparately impact these communities, nor does it engage in discrimination. The environmental and environmental justice groups have not met their burden to show a causal connection between the WDR and any disparate impacts.

California Government Code section 11135 prohibits a state agency program from discriminating on the basis of race, ethnicity, national origin, and color, among other characteristics. For a plaintiff to have a successful disparate impact claim under section 11135, the plaintiff must show that “the defendant’s facially neutral practice causes a disproportionate adverse impact on a protected class.” (*Darensburg v. Metro. Transp. Comm’n* (9th Cir. 2011) 636 F.3d 511, 519.) The environmental and environmental justice groups have not met this burden and do not articulate how the WDR will cause further degradation in a manner that will have a disproportionate adverse impact on the Latino community. Stating that the WDR will lead to nitrate contamination and that Latino communities in the Central Valley are more likely to have higher nitrate levels in their drinking water does not show a sufficient causal connection. The environmental and environmental justice groups present no specific evidence that shows the WDR’s provisions will cause the contamination of groundwater in a disproportionate manner. As the WDR complies with all provisions of the Water Code, the Basin Plan, and the Antidegradation Policy, it monitors and protects all groundwater throughout the Eastern San Joaquin watershed equally. As such, the WDR applies equally to all people in the region, regardless of race, ethnicity, national origin, or color.

The environmental and environmental justice groups also claim the WDR will violate the CFEHA and Government Code section 65008, yet do not describe how it will do so. The CFEHA prohibits discrimination in housing, and section 65008 prohibits a local government from interfering with an individual's enjoyment of his or her housing because of certain characteristics, such as race. Section 65008, however, applies to local governments, not bodies of the state such as the State Water Board or regional water board. In addition, the environmental and environmental justice groups do not explain how the WDR threatens the housing opportunities of and discriminates against the Latino community. There is also no evidence that the WDR treats the Latino community differently from others when it comes to the enjoyment of housing or landownership. Again, as the WDR applies to all groundwater equally, it applies to all people in the region equally. The environmental and environmental justice groups have not shown a violation of the CFEHA or Government Code section 65008.

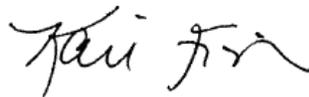
N. Support For Revisions Offered by the East San Joaquin Water Quality Coalition

In its comment letter dated December 22, 2017, the East San Joaquin Water Quality Coalition offered revisions to the Second Staff Proposed Order to clarify why it is legally appropriate to allow the confidential protection of grower specific information, removal of the revision to apply the certification requirement to all growers, and changes to the surface receiving water monitoring revisions. Farm Bureau supports those revisions and incorporates them by reference.

Conclusion

Farm Bureau appreciates the opportunity to provide comments on the State Water Board's Second Staff Proposed Order revising the Waste Discharge Requirements General Order No. R5-2012-0116 For Growers Within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group. Farm Bureau remains concerned that the Second Staff Proposed Order imposes a number of requirements that are burdensome, unnecessary, and unsupportable under Porter-Cologne. Farm Bureau requests the State Water Board to resolve those issues raised herein. We look forward to further involvement and discussion with the State Water Board on the East San Joaquin WDR.

Very truly yours,



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