

SAN DIEGO REGION

IRRIGATED LANDS GROUP

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2375 Northside Drive, Suite 100
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Comment – Tentative General Order No. R9-2016-0004 and Tentative Resolution No. R9-2016-0136

Dear Mr. Pulver,

Thank you for this opportunity to comment on the proposed General Waste Discharge Requirements for Discharges from Commercial Agricultural Operations for Dischargers that are Members of a Third-Party Group in the San Diego Region (Third-Party General Order).

The San Diego Regional Irrigated Lands Group Educational Corporation (SDRILG) is a California 501(c)(5) non-profit corporation. The stated purpose of SDRILG reads:

The purpose of this corporation is to provide for the protection of surface water by identifying, including through research, and promoting management practices to members of the Farm Bureau who are agricultural operators within the jurisdiction of the San Diego Regional Water Quality Control Board that, when implemented, may reduce the potential impact of irrigated agriculture on waters of the State of California. Within the context of the general purpose stated above, this Corporation is established for charitable, educational and public purposes to include, but not limited to, an educational and outreach program designed to inform agricultural operators on ways to manage their agricultural operations to benefit water quality in the watersheds within the jurisdiction of the San Diego Regional Water Quality Control Board.

SDRILG was formed in September, 2009, for the express purpose of giving producers a means to comply with Waiver No. 4 through a group effort. Upon adoption of the Third-Party General Order SDRILG will submit a letter of application for recognition as a Third-Party Group. We believe the letter will show that SDRILG has the ability to carry out the responsibilities of a Third-Party Group as required.

While we have a number of item-specific comments to offer, we do have two general comments and will begin with those.

Our first comment is that it was our observation under Waiver No. 4 well under one-half of the qualifying farm operations in the region were compelled to join a monitoring group. With that history we think it should be acknowledged that the Third-Party Groups may face challenges in

meeting the expectations and requirements of the Third-Party General Order. The Third-Party Groups will have no capacity or reach beyond their combined member base.

The second comment is in regards to wholesale nurseries. In the San Diego Region wholesale nurseries are under two layers of regulation. Nurseries are subject to a schedule of fees and periodic inspections by the Co-permittees under the Waste Discharge Requirements for Discharges from the Municipal Separate Storm System (MS4). Additionally, wholesale nurseries will be included for compliance with the Third-Party General Order. We believe the Third-Party General Order will protect the waters of the region and wholesale nurseries should be relieved of their obligation of fees and inspections under the MS4 when they can show their respective co-permittee that they are members of a Third-Party Group and in compliance with the obligations in the Third-Party General Order.

Please accept the following as our section-by-section comments on the Third-Party General Order:

I. FINDINGS

D. It is stated here that a property owner could be held responsible for failure by a tenant to comply with the General Order. We are concerned that the prospect for transferring compliance responsibility to the property owner as a result of an operator's failure would have a dampening effect on the availability of leased land for farming.

G.3. The following addition (shown as underline) is suggested in order to include those operators who have failed to obtain an Operation Identification Number though required by law:

3. The owner or operator of the Agricultural Operation holds or is required to hold a current Operator Identification Number/Permit from a local County Agricultural Commissioner for pesticide use reporting.

O. While it is understood that this Third-Party Order does not address dischargers who are not participating in a third-party group, we think it would be appropriate to mention here that a second order exists. If a discharger only referenced this order they would be made aware that not being a member of an approved Third-Party Group requires individual compliance.

III. MEMBER APPLICATION FOR COVERAGE UNDER THIS GENERAL ORDER

B.1. It is stated here that dischargers have 180 days from the effective date of the General Order in order to submit a completed Notice of Intent (NOI), which will come through the Third-Party Group. The 180 day timeframe will be very difficult to meet. From the effective date of the General Order the Third-Party Group must first apply for and receive a Notice of Applicability from the San Diego Water Board before any work can begin. The Third-Party Group must then launch the enormous task of enrolling members and assisting members to complete their individual Water Quality Protection Plans (WQPP). Creating electronically transmittable WQPPs will require the development of custom software. In this same timeframe the Third-Party Group is required to submit its Monitoring Program Plan. At best, we believe it will take 270 days for the Third-Party Group to be in a position to submit the NOI's for its members.

C.1. We are concerned about the requirement that the members' WQPP must be sent to the Regional Board. Information within WQPPs will contain intellectual property, trade secrets, and proprietary information, much of which has no correlation or nexus to the Regional Board's authority to regulate water quality. Prior to any request for the entire WQPP, the Regional Board should make a finding showing the necessity of the data and information required to be submitted and how such data is related to water quality. Such information must remain confidential. The Porter-Cologne Act explicitly provides protection to members for intellectual property, trade secrets, and proprietary information that may be within a WQPP, monitoring report, or technical submittal:

When requested by the person furnishing a report, **the portions of a report that might disclose trade secrets or secret processes may not be made available for inspection by the public but shall be made available to governmental agencies for use in making studies.** However, these portions of a report shall be available for use by the state or any state agency in judicial review or enforcement proceedings involving the person furnishing the report (Wat. Code, § 13267(b)(2).).

Thus, the Regional Board must acknowledge that farm specific information, including pesticide application, irrigation practices, mapping, crop rotations, best management practices, etc. are intellectual property, trade secrets, and proprietary information that must remain confidential.

Keeping information within WQPPs on farm rather than submitting them to the Regional Board does not hinder the Regional Board's ability to regulate water quality nor will it prevent the Regional Board from obtaining information it deems necessary. Water Code section 13267 specifically provides the Regional Board with the authority to "investigate the quality of any waters of the state within its region." (Wat. Code, § 13267(a).) In doing so, the statute further provides the Regional Board with the authority to require "any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge . . . [to] furnish, . . . technical or monitoring program reports which the regional board requires."

Our suggestion is to have the member submit the WQPP to the Third-Party Group for verification of completion and task the Third-Party Group with acknowledging in the NOI that the WQPP is complete and in possession of the member and available for inspection should an investigation be launched.

C.2. References XII.C. Should be VII.C.

C.3. We acknowledge that the State Water Board gives the San Diego Water Board authority to set a one-time application fee. Though it is a repeat of state statute, the mention here that fees don't apply to those who were members of a group before June 30, 2008, seems inappropriate to be placed in the Order in that the San Diego Water Board didn't even require membership in a group until well after that date. Making it appear relief from the fee was possible is misleading.

The imposition of an application fee by the San Diego Water Board would be a disincentive for participation. In essence, members are being asked to be funders of the oversight of the Third-Party General Order. It should be the responsibility of the San Diego Water Board to petition the State Water Board for sufficient funding to carry out the Third-Party General Order. We strongly believe this is an inappropriate transfer of responsibility. Members will face the costs of administering their Third-Party Group plus the ongoing cost of monitoring and WQPP enactment. It is imperative that the San Diego Water Board set aside the imposition of an application fee.

V. DISCHARGE SPECIFICATIONS

A. On this list of ten discharge specifications several are vague and leave room for interpretation. Even if complying with other aspects of the order, our concern would be that the Third-Party Group or members could be challenged. Specifically:

1. What would determine if a discharge is “contributing” to surface erosion in an arroyo (wash), which is basically an ephemeral stream channel that discharges after storms and is almost always eroding the streambed by definition?
3. As this is not drinking water, objectionable taste does not seem applicable as it is subjective.
9. Who is going to determine the amount of settleable material that degrades a benthic community?
10. Who determines how much natural light loss “significantly” degrades the communities?

B. This section prescribes 10 management measures that growers must follow. California Water Code Section 13360 prevents regional boards from prescribing management measures. Section V.B. should be stricken from the order. To memorialize this understanding the following could be added to the Third-Party Order:

The board is prevented by Water Code section 13360 from prescribing specific management practices to be implemented. However, it may set forth performance standards and require dischargers to report on what practices they have or will implement to meet those standards.

While we believe Section V.B. should be stricken, should the San Diego Water Board see fit to ignore Code Section 13360, the following amendments (shown as strikeout and underline) should be made:

1. ~~Not apply~~ Avoid as best practicable the application of fertilizers, pesticides, herbicides, algaecide, or fumigants within three days prior to a predicted rain event.

There are several reasons for this suggestion. First, greenhouse applications pose no threat from rain events. Second, use of constant feed fertilizer programs would be interrupted. Constant feed uses very small doses of fertilizer in irrigation water that minimizes any runoff threat and in itself is a preferred management practice. Third, crops could be placed at risk from pests and diseases when serial storms are predicted.

2.a. Municipal solid waste except for biodegradable waste when processed.

It is our understanding that the definition of municipal solid waste can include green waste and food waste. Processed green waste is important to agricultural operations as mulch, soil additive, and as an input to composting. Though only emerging, the composting of food waste for use on farms is seen as an important future step in reducing waste sent to landfills.

VI. RECEIVING WATER LIMITATIONS

A through H. The list of plans, policies, and regulations imply by reference responsibilities for Third-Party Groups that exceed the charts in Attachment A. We suggest a note mentioning the limits of responsibilities as detailed in the Monitoring Requirements.

VII. REQUIREMENTS - MEMBERS

A.4. We suggest allowing for web access for members to the requirements of this section. It is possible that the amount of data required will exceed the capacity of some member's computer systems. Third-Party Groups could store all the data and give members direct access.

B.1. The doubling of water quality training from the two hours under Waiver No. 4 to four hours is excessive and will be seen as punitive. In addition to the required training the Third-Party Group will be in regular communication with its members discussing water quality protection issues. Also, the record-keeping, WQPP, quarterly self-inspection, and annual self-assessment will act as education opportunities for members. The two-hour standard is adequate.

C.2. See comment IIIC.1. above.

C.4. "Periodically evaluate" is vague. A requirement exists for quarterly self-inspections on a defined schedule. We suggest elimination of C.4.

C.6.i. The agricultural chemicals used on a farming operation is in constant flux depending on the season, crops grown, environmental conditions, and pest or disease challenges. Requiring that the WQPP contain a list of chemicals would mean constant amendment of the WQPP. The WQPP is to be kept on site and made available to the San Diego Water Board upon request. We suggest that the requirement for disclosure of chemicals used only be required when the San Diego Water Board makes a request to review the WQPP.

C.6.k.ii. This mapping requirement is onerous and impractical. For a member to survey all properties within one mile of his or her property boundary for all items mentioned in this section is beyond the capacity of any individual. Also, to expect a member to report to the San Diego Water Board what is taking place on what could amount to hundreds of parcels is a possibly serious violation of privacy. We suggest an amendment that makes these mapping requirements apply solely to the member's property.

C.6.k.ix. Proposed monitoring locations will be a discussion between the Third-Party Group and the San Diego Water Board. One of the advantages of joining a Third-Party Group is the group monitoring. Location of the monitoring stations is not relevant to members. Also, every member would be required to have in their WQPP the identical map retained by every other member. We suggest that the Third-Party Group be required to make the map available upon request to members and that this requirement be stricken.

C.6.m and n. We suggest deletion of both requirements. Item C.7. that follows is in essence a duplication.

VIII. REQUIREMENTS – THIRD-PARTY GROUPS

B. As an overall comment on this section the Third-Party Group will be challenged to fulfill any portion of the Water Quality Restoration Program Plan if a minority of farms in the region are members of a group. In essence, the Third-Party Group, and its members, will be burdened with monitoring and testing for non-members in order to meet the requirement for showing that exceedances are attributable to non-members. This will serve as a major disincentive to remain in a group when members learn they carry the burden and cost of discovering the pollutant contributions of non-members.

D.3. See comment III.B.1. above.

IX. PROVISIONS

A.1. This paragraph should be revised to clarify that the Third-Party Group is not the discharger under the Third-Party General Order. Thus, certain enforcement actions and violations of the Third-Party General Order do not apply to the Third-Party Group.

A.3. The title of this provision should be changed as “Duty to Mitigate” is not appropriate. A possible title would be “Reasonable Compliance”

A.6. We suggest that members be given a minimum of five business days’ notice that consent will be requested for inspection. This will possibly avoid the initiation of the warrant process and avoid confrontational meetings.

D.2. The record retention requirement in this section seems appropriate for Third-Party Groups. However, asking members to retain all records and reports connected to the group monitoring process for five years, or even one year, is excessive and serves no purpose. Those records will be held by the Third-Party Group and readily available at any time to the members.

E.2, 3, and 4. Not allowing electronic signatures on document submittals will be a burden to Third-Party Groups and members. Five reports per year (four quarterly Self-Inspection Reports and one Annual Self-Assessment) must be completed by each member and submitted to the Third-Party Group. Each report carries a signature requirement. For a Third-Party Group with a reasonably to be expected 2500 members there would be a requirement to collect 10,000 physical signature pages annually which must then be scanned and submitted to the San Diego Water Board. Electronic signatures are in common use and should be allowed.

ATTACHMENT A – MONITORING AND REPORTING PROGRAM

III. CORE MONITORING REQUIREMENTS

B.2.a.-Table A-1. It should be Flow Velocity and Cross Sectional Area. Stream depth and width can be removed if cross sectional area is included. The calculation of cubic

feet per second flow comes from this information. We find cubic feet per day to be an odd requirement.

B.2.a.-Table A-1. We believe Chronic Toxicity should be removed as a monitoring requirement. We fear this testing could result in a very expensive endless loop of testing. Chronic Toxicity can be the result of a number of constituents that are not related to agriculture.

B.2.c. This section states dry season sample to be collected “after the site has applied pesticides or fertilizers and during an irrigation event.” This appears to be an error because Third-Party Groups are doing hydrologic unit level monitoring, not individual farm site specific. It is suggested the first sentence be deleted.

B.2.e. We do not believe that crop type or crop rotation are sufficient reason for an increase in the frequency of surface water sampling. San Diego is a region of permanent crops and crop changes occur over lengthy periods of time. Those two criteria should be eliminated.

IV. REGIONAL MONITORING REQUIREMENTS

B.2.c. This section states that Third-Party Groups shall “confer” and “coordinate” with the Southern California Stormwater Monitoring Coalition (SMC) on Regional Bioassessment Monitoring. A clear explanation of the San Diego Water Board’s scale and expectations of the Third-Party Group’s role in working with SMC is needed.

B.2.d. This section states dry season sample “shall be collected after the member(s) have (has) applied pesticides or fertilizers and during an irrigation event.” At the regional scale it would not be possible to time sample collection with applications because all farms are not on coordinated schedules. It is suggested the first sentence be deleted.

VI. SURFACE AND GROUNDWATER MONITORING PROGRAM PLAN

C. Agricultural Operation should be Agricultural Operations.

F. The monitoring team will undoubtedly change throughout the program. Keeping track of personnel not under their direct control would be a burden for Third-Party Groups. Stating the various qualified organizations in charge of monitoring should suffice instead of listing individuals.

VII. ANNUAL SURFACE WATER AND GROUNDWATER MONITORING REPORT

G.1. The term “applicable” puts the responsibility onto the Third-Party Group to determine what is applicable and what is not. It would seem VII.G.3 covers the benchmarks and VII.G.1 can be removed.

H.1. The Third-Party Group cannot say if the groundwater is safe to drink, it is only testing for one constituent. It can say that it does or does not contain nitrate as NO₃.

I. The requirement that data be reported by the Third-Party Group to CEDEN in addition to transmittal to the San Diego Water Board is an undue burden. We suggest the reporting to the San Diego Water Board satisfy all reporting requirements.

J. Geotracker can potentially provide specific location data of the wells being sampled on

a public forum. We are concerned about protecting well-privacy and suggest this requirement be eliminated.

L. See comment VI.F.

N. – Table A-4. Nitrate + Nitrate (as Nitrogen) should be Nitrate + Nitrite (as Nitrogen). Total Nitrogen should be Nitrite as Nitrogen.

N. – Table A-4. We believe Chronic Toxicity should be removed as a monitoring requirement. We fear this testing could result in a very expensive endless loop of testing. Chronic Toxicity can be the result of a number of constituents that are not related to agriculture.

ATTACHMENT B – FACT SHEET

I. BACKGROUND

D.2.a. Figure B-2. There is no relevance to the San Diego Region of Figure B-2 or the accompanying text. If such a chart is needed, it should be representative of the San Diego Region. The chart and text should be removed.

G.7.d. When fees and costs of compliance are discussed this section makes the assumption that 60,000 irrigated acres in the region will enroll in the Third-Party General Order. Regardless of the number of acres enrolled, the monitoring obligations and costs for Third-Party Groups will remain the same. Therefore, if less than 60,000 acres are enrolled the per acre cost of compliance will rise proportionally. It is our belief that the 60,000 acre estimation is overly optimistic based on our experience with Waiver No. 4. The prepared charts should be revised and it is our suggestion it show the costs that members should expect at enrollments of 30,000 acres, 40,000 acres, 50,000 acres, and 60,000 acres.

Again, thank you for this opportunity to comment. Should our comments raise questions that require further discussion, please feel free to call on us at your convenience.

Sincerely,



Eric Larson
Administrator