



# CALIFORNIA FARM BUREAU FEDERATION

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March 28, 2012

Chairman Charles Hoppin  
Attn: Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814



**Re: Comment Letter - Statewide Mercury Policy – CEQA Scoping Comments**

Dear Chairman Hoppin and Members of the Board:

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 74,000 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 California Environmental Quality Act (“CEQA”) scoping comments on a proposed Statewide Mercury Control Policy (“Policy”) and associated Control Programs, such as the Mercury Control Program for Reservoirs. Farm Bureau offers the following comments on the development of the Policy:

### **Scope of a Statewide Mercury Control Policy**

Any such Statewide Mercury Policy and associated Control Programs must be fair, must establish requirements in proportion with contributions to mercury impairments, and should not disproportionately burden agriculture. Throughout the state, many agricultural fields are unfortunate recipients of mercury that was transported from state lands and through state owned and controlled channels. These parties had no role in creating the mercury deposited on their lands and have no ability to block its deposition. As such, the expense potentially being assigned to these parties for monitoring, control,

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or load reductions of mercury is unreasonable. Instead, the level of effort and resources required for characterization and control studies should be linked to the relative magnitude of the source.

### **Development of Water Quality Standards Must Be Reasonable**

In enacting the Porter-Cologne Act, the Legislature laid out specific goals and objectives for the state's waters. The State Board and all Regional 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.) In a recent decision, the California Supreme Court discussed the Legislature's intent, confirming its goal "to attain the highest quality which is reasonable." (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal. 4th 613, 619.)

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, the Porter-Cologne Act expressly calls for reasonable actions throughout. Specifically, and of great importance, is the direct language in Section 13241, the very section that governs actions here. Section 13241 states:

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure *the reasonable protection of beneficial uses* and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.
- (f) The need to develop and use recycled water.

(Wat. Code, § 13241, emphasis added.)<sup>1</sup> Section 13050(h) further 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.” (Wat. Code, § 13050(h), emphasis added.) Thus, when analyzing impacts to water quality, establishing water quality objectives, and developing a Statewide Mercury Control Policy, the State Board must comply with and conform to the Legislative intent of the Porter-Cologne Act by applying the “reasonableness standard,” that is, evaluate if the activity or control limit will *reasonably* protect the beneficial uses.

### **Agricultural Resources Must Be Considered During Environmental Review**

When developing the Policy and conducting the associated environmental review, the State Board must consider any and all direct and indirect impacts to agricultural resources. Agricultural resources are an important feature of the existing environment of the state, and are protected under federal policies, such as the Farmland Protection Policy Act and National Environmental Policy Act (“NEPA”), state policies, and CEQA. Agriculture is the number one industry in California, which is the leading agricultural state in the nation.<sup>2</sup> Agriculture is one of the foundations of this State's prosperity, providing employment for one in 10 Californians and a variety and quantity of food products that both feed the nation and provide a significant source of exports.<sup>3</sup> In 1889, the State's 14,000 farmers irrigated approximately one million acres of farmland between Stockton and Bakersfield. By 1981, the number of acres in agricultural production had risen to 9.7 million.<sup>4</sup> More recently, the amount of agricultural land in the State has declined. From 1982 to 1992, more than a million acres of farmland were lost to other uses. Between 1994 and 1996, another 65,827 acres of irrigated farmland were lost, and this trend is expected to continue.

In order to preserve agriculture and ensure a healthy farming industry, the Legislature has declared that “a sound natural resource base of soils, water, and air” must be sustained, conserved, and maintained.<sup>5</sup> Prior to negatively impacting agricultural lands, decision makers must consider the impacts to the agricultural industry, the state as a whole, and “the residents of this state, each of whom is directly and indirectly affected by California agriculture.”<sup>6</sup>

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<sup>1</sup> Although Water Code section 13241 governs the establishment of water quality objectives by Regional Boards, Water Code section 13170 specifically states that the “state board may adopt water quality control plans in accordance with provisions of Sections 13240 to 13244...for waters for which water quality standards are required by the Federal Water Pollution Control Act.” Thus, the provisions of Water Code section 13241 apply to the State Board’s development of a Statewide Mercury Control Policy.

<sup>2</sup> Food & Agr. Code, § 802(a).

<sup>3</sup> CALFED Final Programmatic EIS/EIR, July 2000, pg. 7.1-1.

<sup>4</sup> Littleworth & Garner, California Water II (Solano Press Books 2007) p. 8.

<sup>5</sup> Food & Agr. Code, § 802(g).

<sup>6</sup> Food & Agr. Code, § 803.

One of the major principles of the state's environmental and agricultural policy is to sustain the long-term productivity of the state's agriculture by conserving and protecting the soil, water, and air that are agriculture's basic resources.<sup>7</sup> Overly expansive and duplicative regulations may conflict with this policy by leading to the conversion of agricultural lands to other uses. This conversion along with additional conversions throughout the state would add to the existing statewide decline of agricultural lands, and may conflict with adopted plans of many local governments, including cities and counties, and existing habitat conservation plans or natural community conservation plans. Such conversion will have a significant impact on the environment, including the agricultural environment.

CEQA requires analysis of significant environmental impacts and irreversible changes resulting from proposed projects.<sup>8</sup> These include unavoidable impacts; direct, indirect, and cumulative effects; irreversible and irretrievable commitment of resources; relationships between short-term uses and long-term productivity; and growth-inducing impacts to the environment. Pursuant to CEQA, the physical environment includes agricultural lands and resources. Given the national and statewide importance of agriculture and the legal requirements of environmental review, Farm Bureau urges the State Board to properly assess all direct and indirect effects on the agricultural environment resulting from the proposed project in its environmental analysis.<sup>9</sup>

Of particular relevance for such analysis of impacts on the agricultural environment, CEQA Guidelines Appendix G, section II, Agriculture and Forestry Resources, states the following:

In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. In determining whether impacts to forest resources, including timberland, are significant environmental effects, lead agencies may refer to information compiled by the California Department of Forestry and Fire Protection regarding the state's inventory of forest land, including the Forest and Range Assessment Project and the Forest Legacy Assessment project; and forest carbon measurement methodology provided in Forest Protocols adopted by the California Air Resources Board. Would the project:

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<sup>7</sup> Food & Agr. Code, § 821(c).

<sup>8</sup> In CEQA, "[s]ignificant effect on the environment" means, "a substantial, or potentially substantial, adverse change in the environment." (Pub. Resources Code, § 21068.) The CEQA Guidelines make it clear the "environment" in question encompasses, "any physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise and objects of historic or aesthetic significance." (Pub. Resources Code, § 21060.5.)

<sup>9</sup> Any and all adverse environmental effects on agricultural resources resulting from the project, as well as cumulative impacts that will occur over time, must be fully assessed and disclosed under CEQA, as well as avoided or mitigated as required by CEQA.

- (a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?
- (b) Conflict with existing zoning for agricultural use, or a Williamson Act contract?
- (c) Conflict with existing zoning for, or cause rezoning of, forest land (as defined in Public Resources Code section 12220(g)), timberland (as defined by Public Resources Code section 4526), or timberland zoned Timberland Production (as defined by Government Code section 51104(g))?
- (d) Result in the loss of forest land or conversion of forest land to non-forest use?
- (e) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use or conversion of forest land to non-forest use?<sup>10</sup>

### **Regulations Must Be Feasible**

In formulating a Statewide Mercury Control Policy and associated Control Programs, the State Board should seek to develop the most efficient and feasible program that accomplishes water quality goals.<sup>11</sup> Given the diverse array of geography, topography, local conditions, and agricultural commodities grown throughout the state, water quality, management, and monitoring programs must be flexible and allow for necessary adaptations, both for localized areas, watersheds, and regions. In addition to being flexible, future regulations and project alternatives must be feasible such that they are “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.”<sup>12</sup> All components of feasibility must be fully analyzed within the State Board’s environmental analysis of the regulations and its impacts to agriculture.

### **Specific Environmental Concerns That Must Be Analyzed in the State Board’s Environmental Review**

In order to aid the development of the Policy, Farm Bureau has identified several specific concerns relating to agricultural resources that should be analyzed in the environmental review, as follows:<sup>13</sup>

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<sup>10</sup> Cal. Code Regs., tit. 14, § 15000 et seq., (“CEQA Guidelines, Appendix G).

<sup>11</sup> Pub. Resources Code, § 21061.1.

<sup>12</sup> *Ibid.*

<sup>13</sup> Note: this list is not exhaustive.

- **Accurate and Complete Identification of Agricultural Resources:** The agricultural lands surrounding the Project must be accurately and completely depicted. The California Department of Conservation, through the Farmland Mapping and Monitoring Program (“FMMP”), monitors changes in Prime Farmland, Farmland of Statewide Importance, Unique Farmland, and Farmland of Local Importance. The environmental analysis should incorporate the FMMP Maps as a basis for its analysis. The acreage of farmland that will be converted and/or impacted from this project must be included in the environmental review. Additionally, any other changes in the existing environment due to the project which, due to their location or nature, could result in conversion of agricultural to nonagricultural use must also be examined.

Farm Bureau also recommends that any agricultural impact discussion for areas outside existing Important Farmland Map boundaries be based on the agricultural land definition in the Williamson Act.<sup>14</sup> This would also be in accordance with the definition of “agricultural land” in CEQA. Public Resources Code Section 21060.1 provides:

- (a) “Agricultural land” means prime farmland, farmland of statewide importance, or unique farmland, as defined by the United States Department of Agriculture land inventory and monitoring criteria, as modified for California.
- (b) In these areas of the state where lands have not been surveyed for the classifications specified in subdivision (a), “agricultural land” means land that meets the requirements of “prime agricultural land” as defined in paragraph (1), (2), (3), or (4) of subdivision (c) of section 51201 of the Government Code.

- **Accurate and Complete Analysis of All Impacts:** The impact analysis must not be limited to direct impacts from the regulations. The analysis should consider all direct, indirect, and reasonably foreseeable cumulative impacts.
- **A Full Range of Alternatives Must be Examined:** The State Board shall identify and rigorously examine all reasonable alternatives for the project.<sup>15</sup> The range of alternatives must be feasible and must avoid or substantially lessen the project’s significant environmental effects<sup>16</sup> “*even if these alternatives would impede to some degree the attainment of the project objectives or would be more costly.*”<sup>17</sup> A feasible alternative is one that is “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.”<sup>18</sup>

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<sup>14</sup> The California Land Conservation Act of 1965 (Gov. Code, §§ 51200 *et seq.*), commonly known as the “Williamson Act.”

<sup>15</sup> 40 C.F.R. §§ 1500.2 subd. (e), 1501.2 subd. (c), 1502.1, 1502.14 subd. (a), 1502.15 subd. (d).

<sup>16</sup> Pub. Resources Code, §§ 21002, 21001.1(a), 21100(b)(4), 21150.

<sup>17</sup> Cal. Code Regs., tit. 14, § 15126.6, subd. (b), *emphasis added*.

<sup>18</sup> See Pub. Resources Code, § 21061.1; Cal. Code Regs., tit. 14, § 15364.

- **All Impacts to Agricultural Resources Must be Fully Mitigated:** All feasible mitigation measures that are analyzed in the environmental review documents need to address the impacts to agricultural resources, must be fully described, and must mitigate for the impacts. A project of this magnitude has the potential to negatively impact agricultural lands, leading to the conversion of significant amounts of agricultural land to non-agricultural use.<sup>19</sup>
- **Social and Economic Impacts Must be Analyzed:**<sup>20</sup> Although impacts that are solely economic in nature do not constitute “significant effects on the environment,” economic or social impacts that will or have the potential to cause a physical change should be considered.<sup>21</sup> The term “significant effect on the environment” is defined in Section 21068 of CEQA as meaning “a substantial or potentially substantial adverse change in the environment.”<sup>22</sup> This focus on physical changes is further reinforced by Sections 21100 and 21151.<sup>23</sup> Despite the implication of these sections, CEQA does not focus exclusively on physical changes, and it is not exclusively physical in concern.<sup>24</sup> Thus, in certain situations such as the adoption of Statewide Mercury Control Policy and Control Programs, economic and social effects of the project must be used to determine the significant effects on the environment.<sup>25</sup>

Farm Bureau urges the State Board to base all conclusions, recommendations, and decisions regarding a Statewide Mercury Control Policy on sound scientific evidence and proper legal standards. We look forward to further involvement and discussion with the

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<sup>19</sup> The State Board should consult with applicable county and local governments to assess local agricultural mitigation measures. For example, San Joaquin County and Yolo County have adopted ordinances to preserve agricultural land through the use of agricultural easements for agricultural land lost to development. San Joaquin County requires a 1:1 mitigation ratio for any “General Plan amendment that changes the designation of any land from an agricultural to a nonagricultural use” or any “Zoning Reclassification that changes the permitted use from agriculture to a nonagricultural use, regardless of the General Plan designation.” (*San Joaquin County General Plan*, Section 9-1080.3(a),(c).) Yolo County requires a 1:1 mitigation ratio for any “conversion or change from agricultural use to a predominantly non-agricultural use....” (*Yolo County General Plan*, Section 8-2.2416(3).)

<sup>20</sup> CEQA requires analysis of a proposed project’s potential impacts to agriculture, but social and economic changes are not considered environmental impacts in and of themselves under CEQA, although they may be used to determine whether a physical change is significant or not. CEQA also permits discussion of social and economic changes that would result from a change in the physical environment and could in turn lead to additional changes in the physical environment (Cal. Code Regs., tit. 14, § 15064 subd. (f).)

<sup>21</sup> Cal. Code Regs., tit. 14, §§ 15064(e), 15131.

<sup>22</sup> Pub. Resources Code, § 21068.

<sup>23</sup> Discussion following Cal. Code Regs., tit. 14, § 15131.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal. App. 3d 151, 170, [“The lead agency shall consider the secondary or indirect environmental consequences of economic and social changes. . . . economic or social change may be used to determine that a physical change shall be regarded as a significant effect of the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment.”].

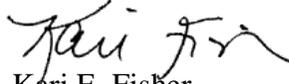
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State Board regarding potential controls of mercury and thank you for the opportunity to provide our comments and concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kari E. Fisher". The signature is fluid and cursive, with a prominent initial "K" and a long, sweeping underline.

Kari E. Fisher

Associate Counsel

KEF:pkh