CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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August 23, 2005

VIA FACSIMILE ONLY

Wendy Cohen
California Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Drive
Rancho Cordova, CA 95670-6114

Re: *Proposed Resolution To Amend Conditional Waivers Of Waste Discharge Requirements For Discharges From Irrigated Lands Within The Central Valley Region*

Dear Ms. Cohen:

This letter sets forth the comments of the California Farm Bureau Federation ("Farm Bureau") on the Resolution to Amend the Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands within the Central Valley Region (the "Amendment").

Missing Information

The Court asked the Regional Board to clarify "the extent to which the Waiver may rely upon the Tributary Rule" for the purpose of imposing water quality objectives upon "constructed agricultural drains and other non-stream tributaries." The Amendment provides a partial clarification in Section 3, which discusses the "determination of applicable beneficial uses of water bodies that receive discharges from irrigated lands, including application of the Tributary Rule." However, the Amendment does not include information from past decisions and policy statements of the State Board that are directly relevant to this issue.

For example, in its decision in *Vacaville's Easterly Wastewater Treatment Plant*, No. WQO 2002-0015 (Oct. 3, 2002), the State Board stated that:

> While basin plan provision assigning a downstream water's uses to its upstream tributaries are valid as a general rule, their application in particular cases can lead to unreasonable results. In general, the Board agrees that, where a Regional Water Quality Control Board (Regional Board) has evidence that a designated use does not exist and likely cannot be feasibly attained, it is unreasonable to require a discharger to incur control costs to protect that use. *Id.* at 31.

Second, Central Valley Board and State Board have stated that:

> [T]he beneficial uses of [agriculture dominated waterbodies] should be evaluated. Possible alternatives to consider are a) designating site specific beneficial uses, b) using "warm" and "cold" designations on a case by case basis rather than applying the tributary rule, c) developing an agricultural dominated . . . beneficial use . . ., d) adopting site specific objectives, or e) developing provisions for granting variances from compliance with water quality objectives.

Watershed Management Initiative Chapter at II-4.

Further, the Regional Board stated in its 2002 Triennial Review of the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins that it intends to:

> develop[] a strategy to specifically address agriculture dominated water bodies. This may include evaluation of . . . which water bodies are agricultural dominated[,] . . . appropriate beneficial uses[,] . . . site specific objectives or develop basin-wide objectives.

2002 Triennial Review at 22.

In fact, at the March 18, 2005 Triennial Review Workshop, the Regional Board reiterated its intent to have this issue addressed:

> [T]he notion of developing a plan on effluent dominated waterways and ag waterways, I do think makes sense, ... I think it is such a critical issue for so many significant dischargers in the region, it forces what I think is a lot of irrational or at least irrationally expensive outcomes...

2005 Triennial Review at 43.

These statements clarify "the extent to which the Waiver may rely upon the Tributary Rule" for the purpose of imposing water quality objectives upon "constructed agricultural drains and other non-stream tributaries." The above-quoted language or language of similar import should be included in the Amendment.

<u>"Impacting" Downstream Water Bodies</u>

The final sentence of Section 4 of the Amendment states that: "Therefore, regardless of the beneficial uses that apply to the water body that directly receives the waste discharge, dischargers must also ensure that their discharges do not impact the beneficial uses of any downstream water bodies."

This statement does not accurately reflect current legal requirements. A discharger can be required to "comply" with receiving water limitations. *See*, Coalition Group Waiver, Attach. B, §C(2). A discharger can be prohibited from "causing" an exceedance of a water quality objective. *See*, Waiver at p.12.

However, there is no legal requirement that a discharger not "impact" beneficial uses. Virtually any human activity in relation to an upstream water body will "impact" beneficial uses of a downstream water body. These "impacts" could be positive, negative, or neutral. The final sentence of Section 4 should be deleted from the Amendment.

"Attributing" Beneficial Uses

Paragraph 3 of Section 3 of the Amendment states that one of the "many ways that beneficial uses can apply to waters of the state" is by being "attributed by operation of law." The Amendment then states that the federal Clean Water Act "requires that 'waters of the United States' be protected for the beneficial uses of fishing and swimming." The last sentence on page 3 contains similar language.

Paragraph 3 of Section 3 of the Amendment is an incorrect statement of the law. The Clean Water Act does not require that surface waters be protected for the beneficial uses of fishing and swimming. What the Clean Water Act says is that "it is the ***national goal*** that ***whenever attainable***, an interim ***goal*** of water quality which provides for the protection of fish, shellfish, and wildlife and provides for recreation" shall be achieved. 33 U.S.C. § 1251(a)(2) (emphasis added). The Clean Water Act does contain provisions that require that fishing and recreational uses be considered. *See,* 33 U.S.C. § 1313(c)(2) (water quality "standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes"). However, requiring that fishing and swimming uses be "taken into consideration" is not the same as requiring the such beneficial uses be designated.

In addition, there are two basic mechanisms for the establishment of beneficial uses. First is the adoption of water quality standards, which consist of the designation of beneficial uses and water quality criteria based on those uses. 33 U.S.C. § 1313(c)(2). In California, beneficial uses can be established in basin plans or statewide plans. Water Code §§ 13140-44, 13170. Second, existing uses (as of the effective date of November 28, 1975) are required to be maintained and protected. 40 C.F.R. § 131.12(a)(1). There is no provision for the establishment of beneficial uses "by attribution." Paragraph 3 of Section 3 and the last sentence on page 3 should be deleted from the Amendment.

Receiving Water Limitations

The Amendment states that:

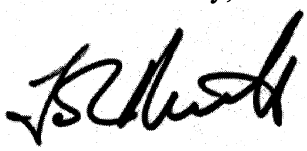
> The Conditional Waivers include Receiving Water Limitations that implement the applicable water quality standards for all surface waters of the state within the Central Valley Region. Because agricultural dominated waterways and constructed agricultural drains are waters of the state, Receiving Water Limitations in the Conditional Waiver apply to them. Amendment, § 2.

This formulation differs from what is set forth in the Waiver itself. The Wavier states that:

> This Resolution and Attachments require persons who obtain coverage under the Waivers to comply with ***applicable*** water quality objectives, protect beneficial uses, and prevent nuisance by implementing monitoring and reporting programs, evaluating the effectiveness of management practices, and where water quality exceeds water quality objectives by identifying and implementing additional management practices to comply with water quality objectives. Resolution No. R5-2003-0105, ¶ 13 (emphasis added).

The second paragraph of Section 2 of the Amendment should be deleted in its entirety and replaced with the language quoted above, which is taken directly out of the Waiver. Farm Bureau respectfully requests that the above changes be incorporated into the proposed Amendment. If there are any questions regarding this matter, please feel free to contact me either by telephone, (916) 561-5614, or by electronic mail, jhewitt@cfbf.com.

Sincerely,



John Hewitt

cc: Regional Water Quality Control Board Members