



CALIFORNIA FARM BUREAU FEDERATION

OFFICE OF THE GENERAL COUNSEL

2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 • PHONE (916) 561-5665 • FAX (916) 561-5691

Sent via E-Mail

AWLaputz@waterboards.ca.gov

January 10, 2013

Adam Laputz
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

Re: *Comments on the Draft WDR and MRP for Discharges from Irrigated Lands for Individual Growers*

Dear Mr. Laputz:

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 comments on the Draft Waste Discharge Requirements (“Draft WDR”) and Monitoring and Reporting Program (“MRP”) for Discharges from Irrigated Lands for Individual Growers and respectfully presents the following remarks.

General Order Page 1, Finding 1—Definition of “Waste”

The Draft WDR seeks to regulate discharges of “waste” from irrigated lands. As referenced in the footnote to Finding 1, Attachment E defines the term “waste” to not only include the statutory definition found in Water Code section 13050(d), but also adds additional language to include the regulation of “earthen materials, inorganic materials, organic materials such as pesticides and biological materials ... such water may directly impact beneficial uses or may impact water temperature, pH and dissolved oxygen” as waste. (Draft WDR, Attachment E, p. 5.) No rationale is provided for the overly broad

NANCY N. MCDONOUGH, GENERAL COUNSEL

ASSOCIATE COUNSEL:

CARL G. BORDEN • KAREN NORENE MILLS • CHRISTIAN C. SCHEURING • KARI E. FISHER • JACK L. RICE

expansion of a statutorily defined term; as such, the term “waste” should be limited to its definition found in Water Code section 13050(d).

General Order Pages 7-8, Findings 28-32—Compliance with the California Environmental Quality Act

The Draft WDR relies upon the environmental analysis conducted in the Program Environmental Impact Report (“PEIR”) and concludes that “[a]lthough the Order is not identical to any of the PEIR alternatives, the Order is comprised entirely of elements of the PEIR’s wide range of alternatives.” (Draft WDR, p. 7, ¶ 29.) Relying on such analysis, the Draft WDR further concludes “the PEIR identified, disclosed, and analyzed the potential environmental impacts of the Order” and the “potential compliance activities undertaken by the regulated Dischargers...fall within the range of compliance activities identified and analyzed in the PEIR.” (*Id.* at pp. 7-8.) Notwithstanding the current pending court actions challenging the adequacy of the PEIR, the Draft WDR is not within the realm of alternatives analyzed within the PEIR, but rather goes beyond those alternatives as it includes provisions substantially different from elements in those alternatives, especially alternatives 3 through 5. These new components do not represent merely a “variation” on the alternatives in the PEIR but rather are elements that were not thoroughly considered previously and are likely to result in the imposition of new burdens on irrigated agricultural operations that that would have a significant and cumulatively considerable impact on the environment.

Given the vastly new provisions in the Draft WDR, such as provisions creating end-of-field discharge limitations as well as the farm management performance standards, not all potentially adverse environmental impacts of the Draft WDR have been identified, disclosed, and analyzed in the PEIR. Thus, reliance on the PEIR for CEQA compliance is inappropriate.¹

General Order Page 9, Finding 35—California Water Code Sections 13141 and 13241

Pursuant to the Water Code, the Regional Board is obligated to consider costs associated with the entire Long-Term Irrigated Lands Regulatory Program, as well as each individual general order, such as the Individual WDR. (Wat. Code, § 13141.) Finding 35 incorrectly states that Section 13141 “does not necessarily apply in a context where an agricultural water quality control program is being developed through waivers and waste discharge requirements. (Draft WDR, p. 9, ¶ 35.) Nothing within Section 13141 provides such limitations. Rather, a proper reading of Section 13141 *requires* looking only at the plain meaning of the statutory language. (*Riverview Fire Protection Dist. v. Workers’ Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126, [“we first look

¹ Farm Bureau also questions the Regional Board’s authority to require mitigation measures within the Draft WDR for farm level activities. Implementation of management practices at the farm level, which is the heart of the WDR, is not subject to a discretionary approval by the Regional Board. (See Pub. Resources Code, § 21080, CEQA generally applies only to discretionary projects.) Mitigation measures that cannot be legally imposed need not be proposed or analyzed. (CEQA Guidelines, § 15126.4(a)(5).)

to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.”].) Upon examining the plain language of Section 13141, it does not state or imply that an estimation of costs is only required if an agricultural water quality control program is adopted into a Basin Plan. Rather, the plain and easily interpretable language states that “prior to implementation of *any* agricultural water quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan.” (Wat. Code, § 13141.) Therefore, notwithstanding the fact that this agricultural water quality control program, the Long-Term Irrigated Lands Regulatory Program, is comprised of waste discharge requirements, the Regional Board is still statutorily obligated to conduct a cost estimation of the program at large and the individual WDRs. Given that this Draft WDR proposes new costly regulatory components not previously analyzed during the environmental review stage, the Regional Board must analyze, evaluate, and estimate all of the costs of these new regulatory requirements.

General Order Page 14, Provisions II. A and III. B—Discharge Limitations

The use of “shall not cause *or contribute*” to an exceedance of applicable water quality objectives is overly expansive and creates an unreasonable standard that is undefined, ambiguous, and holds farmers and ranchers liable for even the smallest de minimus contribution. To remedy this, discharge limitations for both surface water and groundwater should be rewritten to state “wastes discharged from Member operations shall not cause an exceedance of applicable water quality objectives in surface water [or the underlying groundwater], unreasonably affect applicable beneficial uses, or cause a condition of pollution or nuisance.”

General Order Page 15, Provision III. A. 8—Settling Ponds, Basins, and Tailwater Recovery Systems

As currently written, Provision 8 requires the construction of settling ponds, basins, and tailwater recovery systems, thus dictating the manner in which individual growers minimize sediment and erosion. Given that the Water Code does not provide the Regional Board with the authority to mandate or dictate specific management and business practices to be undertaken by a landowner to reach the applicable discharge goal, (Wat. Code, § 13360(a)), it is recommended that Provision 8 be deleted or the words “where applicable” be added to the beginning of Provision 8.

General Order Page 16, Provision III. A. 17—Access to Private Property for Inspections

Provision 17 is inconsistent with Water Code Section 13267 and hampers private property rights. Water Code section 13267(c) clearly states that any inspection “shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure.” As currently drafted, Provision 17 ignores Section 13267 and attempts to allow inspections of private property at any reasonable time without notice to or consent from the

landowner or obtaining a necessary warrant. In order to be consistent with the Water Code and other WDRs, Provision 17 should be revised to state:

The Discharger understands that pursuant to Water Code section 13267(c), the Central Valley Water Board or its authorized representatives, upon presentations of credentials at reasonable hours, may inspect the facilities of persons subject to this Order to ascertain whether the purposes of the Porter-Cologne Act are being met and whether the Discharger is complying with the conditions of this Order. The inspection shall be made with the consent of the Discharger or owner of the facilities, or if consent is withheld, with a duly issued warrant pursuant to the procedure set forth in Title 13 Code of Civil Procedure Part 3 (commencing with section 1822.50). However, in the event of an emergency affecting the public health and safety, an inspection may be performed without the consent or the issuance of a warrant.

General Order Page 18, Provision VI. B / MRP Page 8, Provision C—Farm Water Quality Plans

The Draft WDR and its attachments are internally inconsistent regarding the requirements for Farm Water Quality Plans (“FWQP”). Provision VI. B in the General Order requires growers to develop a FWQP “and submit the plan to the Central Valley Water Board.” (Draft WDR, p. 18.) In contrast, the MRP states “FWQPs shall be maintained onsite by the Discharger and available for Central Valley Water Board inspection upon request.” (Draft WDR, Attachment B, p. 8.)

Farm Bureau is concerned about maintaining the confidential nature of the FWQPs, as information within these plans contains 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 FWQP to be submitted, the Regional Board must make a finding showing the necessity of the data and information required to be submitted and how such data is related to water quality. Even upon submittal, such information must remain confidential. The Porter-Cologne Act explicitly provides protection to growers for intellectual property, trade secrets, and proprietary information that may be within a FWQP, 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.

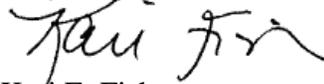
(Wat. Code, § 13267(b)(2), emphasis added.) Thus, the Regional Board must acknowledge that farm specific information, including pesticide application, nutrient management, irrigation practices, crop rotations, best management practices, etc., are intellectual property, trade secrets, and proprietary information that must remain confidential. As such, FWQPs must remain on farm, as is the norm in other irrigated lands regulatory programs, available for inspection by the Regional Board as provided by in the Water Code.

General Order Page 21, Provision X—Time Schedule for Compliance

Within the time schedule for compliance, individuals are given 6 years to comply with surface water limitations and 10 years to comply with groundwater limitations. (Draft WDR, p. 21.) In order to be consistent with the WDRs developed for coalitions, the Draft WDR should be revised to allow a 10 year time schedule for both surface water and groundwater compliance.

Thank you for the opportunity to provide our comments and concerns. We look forward to further involvement and discussion with the Regional Board on the Draft Waste Discharge Requirements and Monitoring and Reporting Program for Discharges from Irrigated Lands for Individual Growers.

Very truly yours,



Kari E. Fisher
Associate Counsel

KEF:pkh