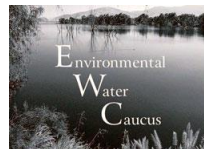




ENVIRONMENTAL LAW FOUNDATION



EcoRights



June 1, 2016

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comments to A-2239(a)-(c).

Dear Chair Marcus and Board Members:

On behalf of the 53 undersigned organizations, representing environmental, environmental justice, fishing, and tribal interests, we appreciate the opportunity to comment on the Eastern San Joaquin River Watershed Agricultural Order SWRCB/OCC Files A-2239(a)–(c). While we recognize the State Water Board’s effort to resolve numerous deficiencies in the Waste Discharge Requirements (WDRs), the Draft Order fails to adhere to the Porter-Cologne Act, the Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program (Nonpoint Source Policy), and the Statement of Policy with Respect to Maintaining High Quality Waters, State Water Board Resolution No. 68-1626 (Antidegradation Policy). The Draft Order makes significant strides toward conforming the General WDRs with basic data transparency standards across the state, but it does not require performance standards that are linked to achieving water quality objectives, nor does it place strong requirements on ensuring communities have access to clean, safe drinking water.

California lacks consistent and effective regulations to ensure that agricultural production meets water quality standards and to prevent harm to nearby communities. Agricultural pollution in the Central Valley, in particular, is ubiquitous. The Central Valley Regional Board’s assessment of data collected at 313 sites by U.C. Davis and agricultural monitoring coalitions revealed that: toxicity to aquatic life was present at 63 percent of the monitored sites; pesticide water quality standards were exceeded at 54 percent of sites; one or more metals violated criteria at 66 percent of the sites; human health standards for bacteria were violated at 87 percent of monitored sites; and more than 80 percent of the locations reported exceedances of general parameters (dissolved oxygen, pH, salt, TSS). The Central Valley Regional Board is unable to identify which agricultural management practices are working effectively to meet water quality standards because the 2012 Agricultural Order lacks the feedback verification necessary to ensure compliance. The lack of feedback verification to ensure compliance with water quality standards is a systematic management failure by Regional Water Boards throughout the state. To date, Water Boards have been unwilling to require individual growers to take accountability by demonstrating individual compliance.

The vast majority of San Joaquin Valley community water systems rely on groundwater as a drinking water source. Groundwater that residents depend on is heavily polluted by agricultural discharges. According to the State Water Board’s own draft report “Communities Reliant upon Contaminated Groundwater” 300,000 residents of Stanislaus and Merced Counties rely upon contaminated groundwater. Up to 100,000 people in these two counties rely upon domestic wells. The 2008 Existing Conditions Report states that nitrate concentrations in groundwater in the eastern San Joaquin Valley exceeded drinking water standards in approximately 25 percent of domestic water supply wells, and different pesticides were detected in 41 of 60 percent of the groundwater samples collected.

The Draft Order does not remedy the deficiencies of the East San Joaquin Agricultural WDRs with respect to the Porter-Cologne Act, the Nonpoint Source Policy, and the Antidegradation Policy. Nor does

it create a framework to rectify disproportionate pollution impacts to disadvantaged communities and communities of color. We have conferred with numerous environmental, environmental justice, fishing, and tribal groups to agree on the following key points. This list is not intended to serve as an exhaustive list of issues—only the top priorities we need to see resolved.

(1) The Draft Order fails to achieve compliance with the Basin Plan water quality objectives because it lacks specific, enforceable standards against which to measure existing management practices. The Draft Order does not provide enforceable standards because, under the Order, it is not possible to determine where receiving water violations are occurring. The *Monterey Coastkeeper* decision found that the Waiver’s monitoring program did not ensure compliance with water quality standards because “neither the Board, nor the cooperative monitoring group, nor (in many cases) the grower, can identify where the pollution is coming from or whether the grower’s management practices are effectively reducing pollution and degradation.” The Draft Order contains the same illegal flaw. There is no effective feedback mechanism to ensure that each grower is complying with the Basin Plan’s water quality objectives. And even if exceedances were detected, there is no requirements that water quality benchmarks will become enforceable effluent limitations. As such, the Draft Order does not provide specific, enforceable standards to ensure compliance with water quality objectives.

- ❖ *Request 1-1:* Acknowledge that representative monitoring – without individual monitoring – is insufficient to protect beneficial uses as required by Water Code §13263.
- ❖ *Request 1-2:* Include a finding that management practice implementation may never be a substitute for meeting water quality standards.
- ❖ *Request 1-3:* Following a water quality exceedance, require that water quality benchmarks become enforceable effluent limitations measured at the edge-of-field.
- ❖ *Request 1-4:* Require that management practices be designed and engineered to attain Basin Plan water quality objectives, and that such design must be supported by an accompanying reasonable assurance analysis that demonstrates the management practices implemented are in fact designed to ensure compliance with Basin Plan water quality objectives.
- ❖ *Request 1-5:* Set enforceable performance standards based on nitrogen loading.

(2) The Draft Order violates Water Code §13263 and the Nonpoint Source Policy because the surface water monitoring scheme is insufficient to determine whether growers are achieving water quality standards. To ensure the protection of beneficial uses in the Central Valley Basin Plan, the Draft Order must contain adequate surface water quality monitoring to detect and resolve water quality objective exceedances. Representative monitoring – on its own – is not sufficient to determine compliance with water quality standards. Management practices do not ensure that water quality standards are being met.

- ❖ *Request 2-1:* After a receiving water violation has been detected by representative monitoring, require all growers upstream of the watershed exceedance to begin conducting edge-of-field monitoring until the responsible parties are identified and the exceedance is corrected.
- ❖ *Request 2-2:* Require representative edge-of-field monitoring with the presumption that the site’s water quality is the same for the other growers the site represents. If a representative site has an exceedance, all growers under that representative class must perform additional management practices until the exceedance is corrected, or until the grower conducts individual monitoring to demonstrate their field is not degrading the beneficial uses of the Basin Plan.
- ❖ *Request 2-3:* Require all growers that are discharging into impaired waterways where benchmark exceedances have been detected to conduct edge-of-field monitoring until the grower demonstrates achievement of discharge effluent limitations.

(3) The Draft Order fails to establish enforceable limits on nutrient application to protect water quality objectives. We agree that the nutrient ratio is a useful metric that allows raw data to be

distilled into figures that can be used to compare the nutrient efficiency of growers producing the same crop. However, we disagree that the nutrient ratio represents an enforceable standard that will achieve water quality objectives. These values are comparative, rather than direct measurements. What is needed is an estimate of the nitrogen applied in excess of crop need that has the potential to leach to groundwater – the nitrogen loading. It is this number that must be reduced in order to meet water quality objectives.

- ❖ *Request 3-1:* Set an enforceable nitrogen loading standard to determine compliance with water quality objectives.
- ❖ *Request 3-2:* Provide oversight to Third Party development of nitrogen removal coefficients with public input and review by the Regional Board.

(4) The Proposed Order Fails to Comply with the State Antidegradation Policy. The General WDRs fail to meet the requirements of the Antidegradation Policy by failing to (1) establish a water-quality baseline to determine authorized alterations in water quality and their impacts on beneficial uses, (2) conduct an adequate maximum-benefit analysis, and (3) establish Best Practical Treatment or Control to ensure that nuisance and pollution will not occur and that the highest water quality consistent with maximum benefit will be maintained.

- ❖ *Request 4-1:* Establish a numeric baseline – with the data available - for the purpose of determining the level of authorized alteration to water quality and conducting a maximum benefit analysis.
- ❖ *Request 4-2:* The maximum-benefit analysis must assess all of the economic, health, and environmental costs and benefits of the authorized degradation, not just the costs to the discharger.
- ❖ *Request 4-3:* Ensure activities resulting in discharges to high-quality waters meet state standards and BPTC by requiring enforceable standards tied to water quality objectives.

(5) The explicit authorization in the Draft Order to violate receiving water limitations and to cause nuisance for more than ten years violates the Porter-Cologne Act. A ten year time schedule is an unreasonably long timeframe to achieve compliance with water quality objectives, particularly given that the Maximum Concentration Level for nitrate was established nearly forty years ago. The timeframe does not contain enforceable, quantifiable milestones and interim goals and deadlines. And finally, the timeframe is an unlawful delegation of authority by the Regional Water Board. Until these issues are addressed, the schedule will continually violate Porter-Cologne, as well as the Nonpoint Source Policy and the Antidegradation Policy.

- ❖ *Request 5-1:* Require all growers to comply with water quality standards from the shortest time possible following the effective date of this Draft Order – not once a violation has occurred.
- ❖ *Request 5-2:* Without deferring to the Third Party Coalition, the State Water Board should set a compliance time schedule, justify why the time schedule is as short as possible, and provide interim quantifiable milestones.
- ❖ *Request 5-3:* If individual irrigated agricultural lands represented by group monitoring sites are not attaining water quality standards based on one year of sampling, then the individual sites shall have one year to come into compliance before they are subject to enforceable effluent limitations equal to the water quality benchmarks at the point of discharge.

(6) Groundwater Quality Management Plans (GWMPs) need to be required for impacted groundwater basins and contain robust requirements. We appreciate that the Board has retained the requirement for GQMPS; however, we are concerned that the revisions to the process for designating areas as subject GQMPS may leave out impacted areas, and also that the Order continues to lack any significant requirements for the contents of those Plans.

- ❖ *Request 6-1:* Identify as subject to a GQMP those areas where nitrate concentrations exceed 50 percent of the drinking water standard.

- ❖ *Request 6-2*: Adjust language to allow the Central Valley Board to complete their review of Groundwater Quality Assessment Reports and identify additional regions that should be subjected to these plans.
- ❖ *Request 6-3*: Include aggressive source control measures as identified in the environmental justice comment letter.

(7) The Draft Order will perpetuate conditions which lead to degraded groundwater drinking water supplies for disadvantaged communities. Currently, the proposed order does not adequately address or mitigate impacts to beneficial uses where dischargers are contributing to pollution and nuisance. This leaves residents, rather than dischargers, to bear the cost of nitrate contamination.

- ❖ *Request 7-1*: Recognize, and incorporate by reference the Human Right to Water (Water Code Section 106.3) as well as the State Water Board’s recent resolution recognizing the human right to water and the Central Valley’s resolution.
- ❖ *Request 7-2*: Require provision for near-term emergency replacement water, and permanent drinking water solutions to all communities and residents whose drinking water source is contaminated by an agricultural discharger or dischargers.
- ❖ *Request 7-3*: Provide residents that need replacement water with a point of contact as a means of enforcement in case replacement water service stops unexpectedly or the residents have reason to believe the water is not of sufficient quality or quantity for domestic use.

(8) The State Water Board should require robust data collection and reporting and make it available to the public. The public has a right to all growers’ individual data. Under both State and Federal law, disclosure of water quality data to the public is of great importance. Anything less than individual grower data violates the Clean Water Act, the Porter-Cologne Act, and the Nonpoint Source Policy. We reject the contention that submission of field-level data in the Farm Evaluations and INMP Summary Reports would reveal trade secrets or satisfy any individual monitoring and reporting requirement. A “trade secret” is information that “[d]erives independent economic value ... from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use.” Civ. Proc. Code § 3426.1(d)(1). The data requested in the Farm Evaluation and INMP Summary Reports offer no such independent economic value, either for the farmers providing the data or for their competitors. Reporting data must be publicly accessible and include the name of the property owner and grower, and must be linked to the BMPs implemented on that field. Some growers farm many fields and field-level data without a grower name does not catalyze individual accountability.

- ❖ *Request 8-1*: Make data publicly accessible and include the name of the property owner and grower, and link the BMPs implemented on that field.
- ❖ *Request 8-2*: Provide accurate, transparent A/R data, linked to specific locations.
- ❖ *Request 8-3*: Require independent auditing or some other means of verification, which will allow the water boards, along with the public, to ensure accuracy.
- ❖ *Request 8-4*: Require submission of field-level data to begin during the first year of order adoption.

(9) The State Water Board should continue to support On-Farm Domestic Well Testing. On-farm domestic well testing is an important aspect of the new Order. Many farmers may not be aware of contamination in their wells. Domestic well testing is key to demonstrating that agricultural pollution of groundwater can affect everyone living in agricultural areas of California. Furthermore, the testing of on-farm domestic wells lends more data points to determine if exceedances are occurring, notifying the Regional Board that a review of overlying and upslope on-farm management practices are necessary. The Regional Board can then do a more thorough analysis of the farm’s practices and bring enforcement actions against those who are not using best management practices to prevent contamination of the groundwater. The Regional Board can also use this data to require remediation,

treatment, or replacement water, as appropriate, of the discharger.

- ❖ *Request 9-1: Retain On-Farm Domestic Well Testing*; and include testing for nitrates, 123 TCP, DBCP, and other contaminants in Title 22 known to be related to agriculture.

Transparency and accountability must become a cornerstone of California's agricultural management. It is time the State Water Board take meaningful action to address the persistent pollution problems caused by agricultural practices. We look forward to working with you to reform agricultural management.

Sincerely,

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