

December 22, 2017

Via Email
(commentletters@waterboards.ca.gov)
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State Water Resources Control Board
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Re: Comments to A-2239(a)-(c)
(SWRCB Own Motion Review of the Eastern San Joaquin Waste Discharge
Requirements General Order R5-2012-0116)

Ms. Townsend:

This letter is submitted on behalf of the Kaweah Basin Water Quality Association ("Kaweah Coalition") and the Tule Basin Water Quality Coalition ("Tule Coalition"), both of which are members of the Southern San Joaquin Valley Water Quality Coalition ("SSJWQC"). The SSJWQC, on behalf of its members, is a named party to the San Joaquin County Resource Conservation District et al. Petition for Review of East San Joaquin General Order Petition for Reconsideration of Order R5-2012-0116 filed on January 7, 2013 (the SJCRCD Petition). That Petition has been in abeyance while other processes in this matter have proceeded. We are writing now to comment on the second draft of the extensive proposed rewrite of the East San Joaquin General Order ("Second Draft Proposed Order") as proposed by the State Water Resources Control Board (the "Board") on its own motion.

The SSJWQC is also a party to a Petition for Review of the Tulare Lake Basin General Order (R5-2013-0120, Petition filed October 18, 2013, SWRCB Petition No. A-2278(c)). That Petition is also being held in abeyance.

As the Proposed Order expressly states on page 8 that many of its findings and directions are intended to apply statewide, our comments apply to the East San Joaquin Order and to the Tulare Lake Basin General Order. See Draft Order, at 8 ("[O]ur conclusions in this precedential order apply statewide.").

The membership and management of the Kaweah Coalition and the Tule Coalition believe that the Tulare Lake Basin General Order, in its current form, should be given an opportunity to produce results before significant changes to that Order are made. The Proposed Order, if applied to the Tulare Lake Basin General Order, would upend four years of significant and challenging work that is currently being performed by the

Coalitions, and would undermine landowner trust in the Coalitions and in the entire Coalition-Based regulatory system.

For this reason alone, the Proposed Order should not be adopted by the State Board. In addition, as explained in further detail below, the Proposed Order contains severe procedural and substantive flaws. Adoption of the Proposed Order as a precedential order with statewide application raises serious due process concerns, particularly with respect to members of the SSJWQC, whose petition of the Tulare Lake Basin Order is currently being held in abeyance. Moreover, the Proposed Order introduces costly redundancies that threaten the continued viability of a carefully-balanced regulatory program developed over 10 years of stakeholder collaboration.

We are also concerned about the timeline for making a final decision on this order, which the Board has set as January 23, 2018. Significant issues continue to be raised in workshops and hearings, some of which were held as recently as mid-December, as well as in these comment letters. Those issues deserve a greater opportunity to be answered, rather than rushing to a decision within 30 days, particularly considering the intervening holiday period. We request that a much later date for a final decision be established.

I. GENERAL SUBSTANTIVE CONCERNS

1. Progress Under the Current Tulare Lake Basin General Order Should Not Be Disturbed.

The local Coalitions, including the Kaweah Coalition and the Tule Coalition who submit these comments, have worked for the past four years at complying with the existing Tulare Lake Basin Area General Order. This effort has required a difficult and sustained effort at building trust and participation amongst the served property owners and growers in the service areas of the Coalitions. The local Coalitions have not supported every feature of the current order; however, they have been able to work effectively with Central Valley Regional Board staff in implementing the order despite differences. For example, the Kaweah Coalition and Tule Coalition have achieved levels of grower participation of 90 percent of the potential landowner base, or more.

The result of this type of participation is an unprecedented level of grower education, data collection, and improvements in general nitrogen management practices, none of which would have occurred but for the creation of the Coalitions for the purpose of implementing the existing General Order. The Coalitions have continued to complete significant achievements under the General Order, including work toward the groundwater trend monitoring reports, and the Management Practices Evaluation Programs (“MPEP”), which will further improve nitrogen management practices in the Coalition areas. The MPEP has

been conditionally approved, and the Coalitions are scheduled to begin groundwater trend monitoring through a collaborative effort in the fall of 2018.

All of this work would be threatened if the Proposed Order is adopted, because the Proposed Order features recommendations that would force the Coalitions to return to the growers with an all-new set of reporting forms, and to undertake an all-new grower education effort to inform them of the new level of on-farm reporting requirements. All of this would be coming immediately after the Coalitions have successfully implemented the original General Order requirements, and will be viewed by the grower/members with a high degree of frustration and distrust.

We expressed these concerns in comments to the initial draft of the Proposed Order (see our letter dated June 1, 2016), and provided additional grounds for those concerns. Although the Second Draft Proposed Order qualifies and limits, in a minor way, which of its “findings and directions” are intended to be precedential, in the end, nearly every aspect of the Second Draft Proposed Order remains precedential. Therefore, we repeat this serious concern, and refer to the specific additional concerns, with attachments, discussed in our June 1, 2016, comment letter.

II. SPECIFIC SUBSTANTIVE CONCERNS

1. Lack of Cost/Economic and Environmental Impact Evaluation

In our June 1, 2016, comment letter, we referred to facts and evidence of the anticipated impacts to members of coalitions such as ours, which had been completely ignored in the initial draft of the Proposed Order. Although the Second Draft Proposed Order (see page 73 et seq.) contains significant new discussion regarding the economic burden created by the proposed increases in monitoring, reporting and data collection and creation requirements, it stops short of providing the full economic impact analysis we suggested was necessary. As a result, the Second Draft Proposed Order continues to fall short of statutory requirements related to full assessment of the relationship of the burden of the regulation to the benefits created by the regulation.

In addition, the Second Draft Proposed Order considers fairly expensive testing, monitoring and reporting requirements that rest directly with the farmer as inconsequential, but does not differentiate between burdens to large enterprises (for whom such costs may in fact be inconsequential) and small family farms (for whom such costs may be very consequential). Small family farms contribute to local communities and have a vested interest in the viability and success of rural areas. Small family farms are diminishing in number. Coalition enrollment data prove the widely held assumption of small farm consolidation and general movement towards larger, more corporate farms. To preserve small family farms, careful consideration needs to be given to the total regulatory burden. Increased costs due to the

proposed revisions, considered negligible for larger farms, may equal the total annual net profit for many small farms.

The revised draft order attempts to defer some costs to growers by requiring farm evaluations to be submitted once every five years instead of annually. The coalitions appreciate the attempt of staff to consider costs, however this change is essentially rendered ineffective because small LVA growers under current ILRP regulation are already required to submit farm evaluations once every five years. Additionally, the requirement to submit (annually or more frequent basis) the newly proposed Management Practices Implementation Report (MPIR) is another increased cost to the grower.

2. Reporting Individual Farmer Field Data, at the Field Level, to the Board and Posting Such Specific Data to the Public Domain

The initial draft of the proposed order compels the filing of all raw nitrogen field data with the Regional Board and further compels that it all be posted to public databases. The Second Draft Proposed Order appears to significantly change this approach by instituting a “unique anonymous identifier” system for submitting field level data to the Central Valley Water Board. This does not alleviate our previously-voiced concerns because it upends the aggregation method of nitrogen application monitoring. (See our June 1, 2016 letter.) Also, and most importantly, the proposed approach still provides a mechanism by which the general public can tie field-level data to specific property owners, even property owners who are never out of compliance with any best practice guidelines or other terms of the third party coalition permit or program.

Under the Existing Order, information such as that contained in the Nitrogen Management Plans are summarized by the growers in the Nitrogen Summary Report, then submitted to the coalitions who aggregate the data on a township basis. Using this data, coalitions will engage targeted follow-up with outlier operations to audit the data for accuracy and work with the grower to bring his operation into the norm. In this way, the regulatory process effectively induces best management practices to improve water quality. Furthermore, the Regional Board currently has the authority to call up specific data information if needed. Thus, regional oversight is already in place to review individual farm performance as well as coalition follow-up.

The coalitions have lifted direct regulatory burdens from individual growers, thus providing valuable interface between the growers, regulatory agencies, and litigious environmental plaintiffs. The coalitions have been performing the monitoring, data analysis and summary, advising growers accordingly, and submitting data summaries. In addition, coalitions have been aggressively pursuing their membership outreach, submitting GARs, developing the MPEP work plans, and coordinating with many scientific professionals in crafting those reports so as to make those reports meaningful and effective.

The Second Draft Proposed Order requires all raw data to be submitted to the Regional Boards and to the public domain (including potential environmental plaintiffs). It also requires coalitions to summarize the raw data for reporting to the Regional Boards. This arrangement completely alters (1) the present and 12-year long regulatory structure, (2) relationship between the coalitions and the Regional Board, and (3) the relationship between members and the coalitions.

Directly submitting all this raw data would jeopardize farm operations in several respects. Environmental plaintiffs have been clamoring for years for this site- and farmer-specific data so they can directly sue farmers. At a time when the Central Coast Region and the State Board Office of Enforcement are actively pursuing growers with debilitating clean-up and abatement orders, the coalitions should not be forced to facilitate generating additional liability for their constituents.

The Tule and Kaweah Coalitions' growers have asserted that, if the regulatory program is not restructured, they will revoke the coalitions' authorization to deal with either data collection or reporting. If this occurs, the Regional Board will have to deal directly with the land operators in not just well monitoring, but also in all the data reporting, and will be forced to do all the summarizing and analysis and follow-up with the growers.

The Regional Board itself has recognized that the coalitions may no longer be able to provide this assistance to the Regional Board if the Proposed Order is implemented as presently drafted:

"Coalitions are "voluntary." The draft Order undermines the usefulness and benefit of coalitions in the eyes of growers by requiring duplicate reporting and fostering a lack of confidence in coalition summaries. Consequently, growers may decide that participation in a coalition is not worth the higher fees that coalitions will have to impose to implement the draft Order. Coalitions very well may fold altogether, setting the ILRP back a decade and possibly requiring the CVWB to start over with a different framework entirely.

The Second Draft Proposed Order, at page 53, acknowledges the importance of confidentiality. However, it also acknowledges that the system it proposes is intended to create more transparency, which would appear to contradict the commitment to confidentiality. The members of the Kaweah and Tule Coalitions are concerned by this contradiction.

Direct submittal requirements of the Proposed Order are redundant, and even with the Anonymous Member ID approach, will remove the willingness of growers to participate in coalitions, and should be deleted from the Proposed Order.

3. Nitrogen Applied Less Nitrogen Removed

The Second Draft Proposed Order continues to introduce the mathematical equation of subtracting the nitrogen removed from the nitrogen applied (A-R) (Appendix MRP4, Section 35), and requires these data points to be supplied directly by the grower/operator/landowner.

Our concern with this requirement, and the discussion about it in the Second Draft Proposed Order, is that it creates a false expectation that such information establishes how much nitrogen is being added to groundwater. This does not take into account deductions of nitrogen from a multitude of other sources, including microbial breakdown, take-up by plants in later years, storage in woody materials, or long-term retention in soil root zone. Such refinement is not expressed by or accounted for in the simplistic formula that is being proposed, and would likely be ignored by members of the public looking to use this data for other purposes.

4. Domestic Well Testing

The Second Draft Proposed Order calls for monitoring and reporting on the quality of all drinking water wells, although it postpones this requirement until January 1, 2019, and allows this provision to lapse if a statewide measure is adopted. The Kaweah and Tule Coalitions remain opposed to these provisions.

For growers with reported nitrate values above or approaching the MCL, public review and scrutiny would subject them to costly defense and undue explanation of current management practices. There is legitimate fear among growers that drinking water testing as an ILRP requirement, will lead to false accusations and remediation as a result of a non-point source issue. These potential accusations threaten the livelihood of growers and participation in the irrigated lands program. It important to note that the intent of growers to avoid unjustified litigation should not be confused with the awareness of growers regarding the importance of clean drinking water.

Additionally, the requirement to monitor drinking water wells does not consider the contractual limits of landowner and lessee agreements which pertain to many parcels enrolled with the ILRP. Testing wells and notifying users of exceedances lie outside of the roles and responsibilities of the lessee, who may not have authorization to access domestic wells within the enrolled parcels.

The issue of ensuring that drinking water meets water quality standards is a landowner and tenant issue and is outside of the purview of the ILRP. If monitoring drinking water quality at the farm level is a statewide priority, then legislation establishing that requirement should

be considered by the state Legislature, which is best equipped to consider the relative burdens of such a requirement, together with the appropriate private property safeguards. It should not be enacted as a boot-strap to the Irrigated Lands Regulatory Program.

5. Order's Direction to Create a "Panel of Experts" on Surface Water Monitoring (New Issue Raised by Second Draft Proposed Order)

The Second Draft Proposed Order requires the establishment of a Panel of Experts to review surface water monitoring practices that are currently built in to existing orders, with the potential of redefining monitoring requirements. The Kaweah and Tule Coalitions oppose this requirement as unnecessary.

Currently employed representative surface water monitoring strategies have been demonstrated to be effective and should continue to be implemented as structured. Surface water monitoring as part of the Agricultural Waiver began in the Central Valley in 2003 and has progressively moved forward and continues to be an adaptive part of the program. Adaptive changes to the program have occurred and will continue to be modified by the CVRWQCB. For instance, the pesticide protocol evaluation process was developed, and proposals were submitted in 2017.

A surface water expert panel is not needed. Recommendations from an expert panel would apply to all regions where many different monitoring strategies are implemented. An expert panel, charged to review a spectrum of monitoring conditions would need to consider the implications of recommending a standardized approach to representative monitoring.

The Regional Board has carefully considered monitoring costs in the development of current monitoring programs and evaluated the balance between using limited resources for additional monitoring against the benefits of increased grower outreach, education and management practice implementation. Potential costs associated with increased monitoring to be incurred by coalitions are not limited to laboratory analytical costs. Surface water monitoring costs also include monitoring equipment, travel expenses, labor costs, and significant reporting costs. Reporting of data is required by the CVRWQCB to be in a CEDEN comparable format. Tracking and reporting of data are also significant costs to the coalitions. These costs are anticipated to increase with any expansion of surface water monitoring activities.

Qualified Regional Board staff, coalitions, consultants and others have extensively worked together to develop current surface water monitoring plans. To establish an expert panel evaluation at this time would be duplicative of the collaborative effort currently underway. The coalitions respectfully request that in lieu of an external expert panel, third-party groups should continue to work with Regional Board staff to review regionally specific monitoring

needs. This process would allow for consideration of hydro-geologic conditions, temporal intensity for specific areas, and regional cultural practices. To effectively determine monitoring approaches a localized evaluation, working directly with Regional Board staff is critical to maintain monitoring costs and appropriately evaluate previously collected monitoring data.

6. Certification of INMP for all growers, including those in low vulnerability areas. (New Issue Raised by Second Draft Proposed Order)

The proposed changes remove the distinctions between HVAs and LVAs. Prioritization of vulnerability areas is an important tool in effectively implementing management practices and maximizing resources. The proposed order doesn't support prioritization, by requiring all growers to obtain certification for nitrogen management plans. Resources are limited and need to be focused on areas in greatest need of improved management practices and monitoring data. Issuing the same requirements, for every area is not effective use of resources.

Certification of nitrogen management plans is an enormous undertaking with many barriers to achieve certifications. Challenges are posed to coalitions who provide education opportunities for growers to self-certify. Education equivalent to basic chemistry and intermediate math is required. Additionally, language and age pose barriers to completing the required NMP Self-Certification test. Certified Crop Advisors (CCAs) are needed to teach self-certification classes as well as complete nitrogen management plans for growers not pursuing self-certification. The availability and willingness of CCAs to certify NMPs is limited and would be further strained if all growers were required to certify nitrogen management plans.

Not all agricultural operators who apply fertilizer should be deemed polluters of groundwater. More work and research is underway to understand the causes and risk of increased nitrate concentrations in groundwater. The current program is equipped and designed to find farm management practices that will address these water quality problems.

IV. LEGAL AND PROCESS ISSUES

The Second Draft Proposed Order does not address the significant legal and procedural issues identified in our June 1, 2016, comment letter related to the initial draft of the Proposed Order, which are summarized below:

1. The Second Draft Proposed Order creates new CEQA claims beyond those that had been raised as part of SSJVWQC's prior pending petition, without addressing them.

2. Issues pertinent to the pending Tulare Lake Basin Petitions are being determined without benefit of the factual record from those Petition proceedings.
3. The precedential nature of the Second Draft Proposed Order is confusing and inappropriate; the Central Valley Regional Board should be given discretion to make different determinations based on tailored factual determinations.

Please see our June 1, 2016, letter for detailed discussion of the above concerns.

V. CONCLUSION

The Second Draft Proposed Order has the potential for doing serious damage to the coalition-based Irrigated Lands Regulatory Program that has been carefully (and painfully) established over the past several years. The breadth of changes that are being recommended, the serious procedural due process problems underlying the Proposed Order, and the additional significant costs all threaten to undermine the willingness of coalition participants to continue to participate. The Kaweah and Tule Coalitions are hopeful that the State Board will reconsider the major points outlined above and restore a level of trust and cooperation to the coalition-based regulatory approach.

Respectfully Submitted

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