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sFile No. 60984.00100

July 29, 2016

**VIA E-MAIL [BARRY.PULVER@WATERBOARDS.CA.GOV;
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David Gibson, Executive Officer
San Diego Regional Water Quality Control Board
c/o Barry Pulver
2375 Northside Drive, Suite 100
San Diego, CA 92108

Re: Comment – Tentative General Orders Nos. R9-2016-0004/R9-2016-0005, and Tentative Resolution No. R9-2016-0136.

Dear Mr. Gibson:

On behalf of the Rancho Guejito Corporation, we would like to thank you for this opportunity to provide written comments on the San Diego Regional Water Quality Control Board's ("Regional Board") Draft General Waste Discharge Requirements for the Commercial Agricultural Operations Regulatory Program ("WDRs"). Rancho Guejito owns approximately 22,500 acres of land east of Escondido and north of the San Pasqual Valley that is dedicated to irrigated agriculture and ranching.

As stated in previous comments on this issue, Rancho Guejito's primary concern with the WDRs remains the need to provide coverage for the maintenance of existing farm roads and water supply facilities. Inclusion of these maintenance activities is consistent with the Clean Water Act and the California Environmental Quality Act ("CEQA"). It is also essential to the continued viable operations of farming activities across the San Diego region.

We read Sections I.A – H of the WDRs, Section I.B. of the Fact Sheet, and Attachment C to the WDRs as providing coverage for all discharges of waste associated with qualified Agricultural Operations, including discharges from maintenance to existing farm roads and water supply facilities. If this is not the case, please confirm that the WDRs do not cover discharges from such activities, and provide an explanation as to why.

Rancho Guejito is submitting the following comments to highlight additional issues with the WDRs. Please note that, as previously stated, these concerns are junior to Rancho Guejito's primary concern about permit coverage for routine maintenance activities.



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Lastly, Rancho Guejito is aware that San Diego Regional Irrigated Lands Group Educational Corporation (SDRILG) is submitting written comments on the proposed WDRs. Rancho Guejito has been a member of the SDRILG since its formation in 2009, and will rely on SDRILG for compliance with the WDRs. Rancho Guejito fully supports SDRILG's comments and requests that the Regional Board give them special weight to reflect the entity's role as a regional coordinator that both the Regional Board and the farm community need to make the WDRs work. SDRILG's comments on the proposed monitoring plan are most concerning. SDRILG will be coordinating the monitoring plan for third party participants like Rancho Guejito and their concerns regarding the plan need to be addressed.

General Comments:

Continuing Education requirements are excessive

The WDRs will require agricultural operators to take a minimum of four hours of continuing education classes every year. This is too much of a burden for most farmers in the San Diego Region. They are busy taking care of their businesses and managing their operations and they have other continuing education requirements that they must also fit in. We request that the Regional Board consider revising this requirement to allow permittees who take continuing education for pesticide application to receive credit for this time. We further request that the Regional Board reduce the continuing education requirement to two hours every two years.

Reports should be submitted annually unless there are violations

The WDRs allow self-reporting for third party participants. This is a positive step forward and will go a long way toward making the WDRs successful for both the Regional Board and the agriculture community. However, the reporting requirements remain excessive. The WDRs require quarterly and annual reporting. We request that the Regional Board revise the WDRs to require an annual report with the information requested in the WDRs, and quarterly reporting if violations are found by the operator or the Regional Board.

The WDRs should include a Safe Harbor for self-reported violations

The California Department of Industrial Relations Division of Occupational Safety and Health (DOSH), has an inspection program that allows a farmer to request an inspection and if violations are found, the farmer will be required to correct them, but will not face enforcement. We request that the Regional Board consider a similar program for self-reported violations. This would encourage farmers to continually improve their management practices, and to work with Regional Board staff without fear of fines or other enforcement action.



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RWL requirements are counter-productive and should be removed

The WDRs include Receiving Waters Limitations (“RWL”) language that is borrowed from municipal stormwater permits issued under the Clean Water Act. This language has been interpreted by federal courts and the State Water Resources Control Board as creating numeric discharge limits for all water quality objectives that are expressed numerically in the Basin Plan, including TMDLs. The feasibility of complying with this prohibition is currently being challenged in Orange County Superior Court. (*See Cities of Duarte and Huntington Park v State Water Resources Control Board*, Orange County Superior Court Case No. 30-2016-00833614.)

It is inappropriate, and potentially unlawful for the Regional Board to include this requirement in the WDRs without explicit findings that the restrictions are necessary, and reasonably achievable. No existing state law or policy requires the Regional Board to include the proposed RWL language in the WDRs, and although both the WDRs and the Fact Sheet cite the State Board’s Non-point Source Policy for authority to include the RWL requirement, nothing in the Policy explicitly requires the language as written.

The Non-point Source Policy requires a tie between the management practices included in the WDRs and the water quality objectives and beneficial uses in the San Diego Basin plan. It does not require a discharge prohibition. Specifically, the Policy states that the WDRs must “address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses.” All that this requires is findings that the management practices in the WDRs will achieve and maintain the Basin Plan objectives. There is nothing in the Policy that could be reasonably interpreted as requiring an outright prohibition.

There are good reasons why the Regional Board should refrain from including the RWL language in the WDRs. For example, importing the numeric water quality objectives from the Basin Plan will interfere with development and use of recycled water for irrigation purposes. Recycled water has TDS at levels that often exceed the Basin Plan’s freshwater standard. Incidental runoff would be a violation of the WDRs. Additionally, in certain groundwater basins, simple use of the recycled or even imported water for irrigation could be a violation because it would exceed TDS limits assigned to the underlying aquifer. Under the “cause or contribute” language in the RWL prohibition, any amount of TDS discharged to a groundwater basin or surface water could be viewed as a violation.

The RWL requirement is tantamount to outlawing irrigation and needs to be significantly revised or removed.



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CEQA Comments:

The Initial Study and proposed Negative Declaration are inadequate CEQA because there is evidence in the record to support a fair argument that potentially significant environmental impacts may result from the WDRs and on that basis an environmental impact report must be prepared before the Regional Board can take action on the WDRs. (Pub. Resources Code, § 21080(d); 14 C.C.R., § 15064(a).)

First, under the heading, “Structural Management Practices,” the Initial Study states: “During inspections of Agricultural Operations in 2013, the San Diego Water Board found that 82% of the Agricultural Operations enrolled in the 2007 Waiver, and 58% of the Agricultural Operations not enrolled in the 2007 Waiver, had implemented [structural] management practices.” (Initial Study at 12.) Thus, the primary compliance methods with the WDRs’ predecessor regulations have been structural management practices, meaning “management practices that involve the installation of engineering solutions (e.g., physical structures or barriers) that divert, store, and/or treat waste.” (Initial Study at 4.) So past compliance has typically been accomplished via physical changes in the environment. This contradicts repeated inferences in the Initial Study that environmental impacts will be minimal because compliance with the WDRs can be attained via non-structural controls. (See e.g., Initial Study at 13 [“Furthermore, it is likely that the site-specific conditions may not require the construction of structural management practices.”].)

In fact, based on past experience, the WDRs will *likely* require structural management practices that cause *physical changes in the environment* in the *majority of cases*. Based on historical compliance methods, it is not speculative to evaluate how compliance with the WDRs will occur. The Initial Study must analyze the reasonably foreseeable compliance methods and associated physical impacts on the environment that can be expected as a result of the WDRs.¹ Only then can the true scope of the WDRs’ impacts be understood by the public. To do otherwise, is an improper attempt to piecemeal evaluation of the WDRs’ true impacts. (14 C.C.R., § 15063(a)(1); see *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325 [piecemeal review of development found improper].)

Second, the Initial Study appropriately concludes that the economic burden of implementing reasonably foreseeable management practices and the monitoring and reporting program may result in the cessation of agricultural activities. (Initial Study at 7.) The costs of compliance will put some farmers out of business. However, the Initial Study concludes that

¹ Although lacking details, there is indication that the expected compliance methods *are* reasonably foreseeable. (See e.g., Initial Study at 15 n.15 [“only a limited number of Agricultural Operations would likely require the construction of a sedimentation basin to comply with the General Orders”].)



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cessation of agricultural activities will not convert farmland into non-agricultural uses, reasoning:

These Agricultural Operations are likely to be small growers, commonly called hobby farms. These agricultural properties are located on parcels zoned as agricultural or residential with minimum lot sizes that would prevent increased residential densities or the conversion to non-agricultural or non-residential land use. The cessation of commercial activities would not result in the land being converted to non-agricultural land use. (Initial Study at 7.)

Cessation of agricultural activities qualifies as a conversion of farmland to non-agricultural uses. Any farmland that is not used for irrigated agricultural production during a four-year period does not meet the definition of “prime farmland,” “farmland of statewide importance,” or “unique farmland.” (Cal. Dept. of Conservation, 2015 California Farmland Conversion Report, 6; see also Initial Study at 9 [“Land must have been cropped at some time during the 4 years prior to the mapping date” to qualify as Unique Farmland.]) Mere cessation of agricultural activities thus converts entire categories of farmland into non-agricultural uses.

The Initial Study claims that: “Even where an individual Agricultural Operation determines that it would rather cease operating than comply with environmental regulations ... agricultural uses would likely be preserved because of land use restrictions.” (Initial Study at 5.) But the fact that applicable zoning may prevent a residential subdivision from being built on farmland does nothing to prevent the loss of farmland due to disuse or conversion to other uses, such as detention basins.

The Initial Study must consider and analyze the amount of farmland that will foreseeably be affected by the cessation of agricultural activities and the amount of farmland that will be converted to non-agricultural uses from the cessation. Currently, the Initial Study concludes that only a few small farms would cease their agricultural activities. (Initial Study at 11.) Yet, according to the Initial Study, “the majority of Agricultural Operations within the jurisdictional boundaries of the San Diego Water Board are relatively small, with the median size being approximately 4 acres.” (Initial Study at 5.) The fact that most agricultural operators impacted by the WDRs are small is evidence that the WDRs’ economic and subsequent indirect physical impacts on the environmental will be significant. It is reasonably foreseeable that the many small agricultural operations will cease under the burden of the WDRs’ new costs. Thus, this full economic and indirect environmental impact of the WDRs must be fully analyzed.

Aesthetics

The Initial Study states that the WDRs will have no impact on aesthetics. (Initial Study at 8.) However, as discussed above, this ignores the likelihood that many agricultural operations are



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likely to cease as a result of the compliance costs. It is reasonably foreseeable that fields once full of “cut flowers, fruit, vegetables, wine grapes, and nuts” (Initial Study at 5) will be replaced with weeds and detention basins. The Initial Study lacks any analysis of the aesthetic impacts associated with land fallowed (as a result of compliance costs) or converted to another use (as a result of compliance efforts) likely to be caused by the WDRs.

There is also no evidence to support the Initial Study’s conclusion that the WDRs will not adversely affect scenic vistas, scenic resources and visual character of the areas impacted by the WDRs, particularly since the Initial Study fails to describe where scenic vista and scenic resources are located in proximity to agricultural operations that may be impacted by the WDRs. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 940, 946 [CEQA’s purposes are subverted when a lead agency “omits material necessary to informed decisionmaking and informed public participation”].) Increased fallowing and decreased grazing can result in aesthetic impacts relating to the degradation of the visual character of the land if it is converted from verdant farmland to weed-choked, barren fields, belying the Initial Study’s conclusion of “less than significant effect” in this area. (Initial Study at 8.) The Initial Study needs to provide more information and details on the reasonably foreseeable aesthetic impacts caused by the WDRs.

Agricultural and Forest Resources

As previously explained, the Initial Study states: “Land must have been cropped at some time during the 4 years prior to the mapping date” to qualify as Unique Farmland. (Initial Study at 9.) That is, the Initial Study concedes that if agricultural operations cease for more than four years as a result of the WDRs, that land is no longer Unique Farmland. Yet, the Initial Study discounts the significance of such loss, claiming that “the impact is not expected to be significant as the majority [of] farmland in the San Diego Region does not qualify as ‘prime,’ ‘unique,’ or ‘farmland of statewide importance.’” (Initial Study at 11.) This discussion is inadequate.

First, there is no clear threshold in the Initial Study as to how much farmland loss *would* be significant—unless the Initial Study’s position truly is that no impact to farmland is significant so long as less than 50% of the farmland in the region fails to qualify as prime, unique or farmland of statewide importance. But even assuming this is the position, the Initial Study lacks any basis for such a threshold.

Second, there is no discussion of how much farmland qualifying as prime, unique or farmland of statewide importance may be impacted by the WDRs. In fact, aside from a reference stating that “only 6% of soils” in San Diego County meet the definition of prime agricultural land (Initial Study at p. 11), there is no indication as to how much land meets the definition of prime, unique or farmland of statewide importance. Furthermore, the fact that prime farmland is not prevalent in San Diego County actually cuts *against* the Initial Study’s conclusion that the



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impact is less than significant. The Initial Study's justification that the impact will be less than significant (i.e., because the majority of farmland in the San Diego Region does not qualify as 'prime,' 'unique,' or 'farmland of statewide importance') does not support the conclusion. Considering its scarcity, the loss of *any* prime farmland is a potentially significant impact and must be analyzed.

The amount of farmland that will foreseeably be affected by the cessation of agricultural activities and the amount of farmland that will be converted to non-agricultural uses from the cessation are not disclosed, much less analyzed, in the Initial Study. More details are required for the public to understand how much valuable and scarce farmland will be lost as a result of WDRs compliance methods and costs. The Initial Study must be revised to address these points.

Air Quality

The Initial Study states that "reasonably foreseeable management practices are not expected to be on a scale large enough to result in significant conflict or obstruction of an applicable air quality plan, or to expose sensitive receptors to substantial pollutant concentrations." (Initial Study at 18.) This conclusion is unsupported by evidence. Further, the Initial Study fails to disclose applicable air quality plans or quantify the air emissions expected from the management practices that even the Initial Study admits are "reasonably foreseeable." (*Ibid.*) The fact that toxic emissions and odors are only "short-term" (see Initial Study at 18 and 19) is not evidence that the impacts will be less than significant. (See *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732.)

Additionally, fallowed fields that cannot be otherwise developed (due to zoning restrictions) are likely to result in loose soil and worsened air quality conditions. Cessation of agricultural activities has been shown to result in indirect long-term air quality impacts and impacts to geology and soils due to loss of topsoil. (See, e.g., *Westlands Water Dist. v. U.S.* (E.D. Cal. 1994) 1994 U.S.Dist.LEXIS 6260, *7-8 [increased land fallowing has attendant increases in fugitive dust emissions]; *Westlands Water Dist. v. United States* (E.D. Cal. 1994) 1994 U.S.Dist.LEXIS 6276, *52 [finding lack of water for farmland could result in soil erosion and depletion of quality soil]; Sharratt et al., *Loss of Soil and PM10 from Agricultural Fields Associated With High Winds on the Columbia Plateau* (2006) 32 *Earth Surf. Process, Landforms*, 621-630 [fallowing leads to increased levels of soil erosion]; *Soil Erosion: A Food and Environmental Threat* (2006) 8 *Environment, Development and Sustainability* 119-137, 124 (2006) [leaving cropland unplanted exposes soil to erosion; soil erosion in the United States costs billions of dollars in loss of productivity].) The amount of fugitive dust emissions and loss of topsoil resulting from cessation of agricultural activities needs to be analyzed.



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Biological Resources

As elsewhere in the Initial Study, the Biological Resources analysis consists of bare conclusions, unsupported by substantial evidence. For example, the discussion of issues (c), (e), and (f) explains: “Reasonably foreseeable management practices are not expected to be on a scale large enough that would result in direct removal of filling of riparian habitat, wetlands, or any sensitive natural communities or conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance.” (Initial Study at 20.) This discussion fails to disclose any local policies or ordinances protecting biological resources or explain how no impact will occur. As discussed above, based on previous compliance practices, it is reasonably foreseeable that the WDRs will result in physical changes in the environment. Without adequate disclosure and analysis of the reasonably foreseeable compliance methods and impacts, the Initial Study lacks any basis to conclude that the WDRs will not impact wetlands, conflict with local policies or ordinances protecting biological resources, or conflict with a conservation plan.

The discussion of issues (a), (b), and (d) also lack adequate analysis and support for the less than significant impact conclusion. (See Initial Study at 21.) The discussion fails to disclose the presence of any species identified as candidate, sensitive, or special status species that exist and could be impacted by the WDRs. The Initial Study also fails to disclose the presence of any riparian habitat or other sensitive natural communities that exist and could be impacted by the WDRs. Although the Initial Study asserts that impacts will be less than significant, the conclusion is not supported. For example, the Initial Study admits that structural controls, “such as vegetated swales or buffer strips, could increase the diversity or number of species,” but forecloses further analysis by baldly asserting that this is assuredly “beneficial.” Without understanding which species currently exist and how the increased diversity or number of species will impact existing species (including potentially special status species), it is inadequate for the Initial Study to conclude that the WDRs’ reasonably foreseeable physical changes in the environment are “beneficial.” If special status species exist in areas where WDRs impacts will occur, an increase in the number or diversity of other species is reasonably likely to impact the special species, whether native or not.

The Initial Study’s concession that the WDRs may result in reduced stream flows and that the “reduction or elimination of irrigation return flows could result in a barrier to the migration or movement of animals ... by eliminating habitat dependent on those flows” (Initial Study at 21) is further evidence that species will be impacted. But without adequate analysis of which species exist and how they will be impacted, the public is left unaware of the WDRs’ true effects on the environment, in violation of CEQA.



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Additionally, because typical management practices include “catch basins and detention ponds” (Initial Study at 4), it is reasonably foreseeable that the WDRs will have significant effects in riparian areas or sensitive habitats. These impacts need to be disclosed and analyzed.

Cultural Resources

The Initial Study lacks adequate disclosure and analysis of the WDRs’ impacts on cultural resources. The single-paragraph discussion states that no impacts will occur “[a]t most sites.” (Initial Study at 22.) This raises the question as to which sites are not “most sites.” Unfortunately, the Initial Study does not disclose the answer to this question and fails to provide any further analysis. Considering detention basins are a reasonably foreseeable result of the WDRs, it is reasonably foreseeable that excavation will be required and cultural resources may be impacted by the WDRs. Thus, further analysis and disclosure of the WDRs’ impacts is necessary.

Greenhouse Gas Emissions

The analysis of greenhouse gas emissions concludes that the WDRs will not conflict with any applicable plan, policy or regulation of any agency adopted for the purpose of reducing the emissions of greenhouse gases. (Initial Study at 25.) But the Initial Study fails to disclose which plans, policies or regulations are applicable to the WDRs and its impacts. It is not possible to understand the WDRs’ consistency with applicable plans without knowing which plans are applicable. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 940, 946 [CEQA’s purposes are subverted when a lead agency “omits material necessary to informed decisionmaking and informed public participation”].)

And, as with the Air Quality discussion, the Initial Study’s reliance on the short-term nature of greenhouse gas emission impacts is insufficient to justify the conclusion that the WDRs’ impact is less than significant. (See *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732.)



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Rancho Guejito appreciates the opportunity to submit these comments on the WDRs and Initial Study. We look forward to working with the Regional Board on further development of the WDRs. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. G. Andre Monette', with a large, sweeping flourish extending to the right.

J. G. Andre Monette
of BEST BEST & KRIEGER LLP