Regional Water Quality Control Board
Central Valley Region
Board Meeting – 4/5 December 2014

Responses to Written Comments for the Malaga County Water District Wastewater Treatment Facility Fresno County Tentative Waste Discharge Requirements/NPDES Permit And Tentative Cease and Desist Order

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At a public hearing scheduled for 4/5 December 2014, the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) will consider adoption of Waste Discharge Requirements (WDRs)(NPDES Permit No. CA0084239), a Cease and Desist Order (CDO), and will also consider a proposed Alternative for Discharge Restrictions to Central Canal (Alternative) for the Malaga County Water District, Wastewater Treatment Facility. The final meeting agenda will be available at http://www.waterboards.ca.gov/centralvalley/board_info/meetings/#2014 at least ten days before the meeting. The agenda will provide the date the proposed WDRs/NPDES permit, proposed CDO, and proposed Alternative will be heard, indicate the anticipated order of agenda items, and may include staff revisions to the proposed WDRs/NPDES permit, proposed CDO, and proposed Alternative.

This document contains responses to written comments received from interested parties regarding the tentative WDRs/NPDES permit, tentative CDO, and Alternative circulated on 26 September 2014. Written comments from persons wishing to comment were required by public notice to be submitted to the Central Valley Water Board by 5:00 p.m. on 27 October 2014 to receive full consideration. Written comments were received by 27 October 2014 from:

- Malaga County Water District (Discharger, MCWD, or District), 27 October 2014
- Fresno Irrigation District, 24 October 2014

Written comments from the above parties are summarized below, followed by the responses of Central Valley Water Board staff. Based on the comments, changes were made to the proposed WDRs/NPDES permit, proposed CDO, and proposed Alternative. Central Valley Water Board staff also made changes to the proposed WDRs/NPDES permit, proposed CDO, and proposed Alternative to correct typographical errors, to improve clarity, and to update addresses for document remittance.

DISCHARGER COMMENTS

DISCHARGER COMMENT 1: The Discharger requests that the effluent flow limitation to the disposal ponds (Discharge Point 002) be increased from the proposed 0.49 million gallons per day (mgd) to the currently allowed flow of 0.85 mgd. The Discharger indicates that the disposal ponds have a capacity higher than 0.49 mgd and provides a memorandum from the Discharger's engineer that allegedly supports a higher effluent flow limitation. The Discharger also indicates that the proposed effluent flow limitation of 0.49 mgd to the disposal ponds (Discharge Point 002) would force the Discharger to discharge to Central Canal (Discharge Point 001), and that the effluent flow limitation would also interfere with the Discharger's ability to comply with portions of the proposed CDO. Additionally, the Discharger alludes to the proposed effluent flow limitation of 0.49 mgd being contingent on a 25 June 2014 letter from Fresno Irrigation District that pertains to discharges to Central Canal.

> **RESPONSE:** The proposed WDRs/NPDES permit and proposed CDO will not be revised and will retain the effluent flow limitation to the disposal ponds (Discharge Point 002) of 0.49 mgd, as

a monthly average. As stated in the proposed WDRs/NPDES permit and proposed CDO, the information available to Central Valley Water Board staff at the time the proposed WDRs/NPDES permit and proposed CDO were drafted indicated the disposal capacity of the ponds is approximately 0.49 mgd. Prior to drafting the proposed WDRs/NPDES permit and proposed CDO, Central Valley Water Board staff requested information from the Discharger via letter dated 19 August 2013 (August 2013 Letter). The August 2013 Letter requested the Discharger provide more information regarding a number of items relating to the disposal capacity of the ponds. The Discharger failed to provide detailed, useful information regarding the disposal capacity in its response to the August 2013 Letter. At that time, Central Valley Water Board staff had to proceed with the renewal process of the WDRs/NPDES permit in the absence of information because the Discharger's WDRs/NPDES permit was over six months past its expiration date.

The proposed WDRs/NPDES permit provides an opportunity for the Discharger to submit necessary and detailed information that demonstrates it has adequate disposal capacity for an effluent flow limitation higher than 0.49 mgd. The Discharger provided some of the necessary information with its comments in the form of a memorandum from its consulting engineer addressed to the Discharger. Central Valley Water Board staff is in the process of reviewing the information contained in the memorandum and informed Mr. James Anderson of the MCWD via telephone on 30 October 2014 that the memorandum should be resubmitted with the signature and seal of the engineer in responsible charge, and that the Discharger should transmit the signed and stamped report with a cover letter indicating whether it agrees with the engineer's report and if the Discharger intends on implementing the engineer's recommendations. Mr. Anderson was also informed that Central Valley Water Board staff may request additional information once the review is completed. If all the necessary information is submitted, the Executive Officer can authorize an increase in flow via a letter. Additionally, the proposed WDRs/NPDES permit will not become effective until 1 February 2015, which provides time for the Discharger to submit the information requested, and which may result in the Discharger not being subject to the 0.49 mgd effluent flow limitation.

It is unclear to Central Valley Water Board staff how the proposed effluent flow limitation of 0.49 mgd will interfere with the Discharger's ability to comply with tasks 2a through 2c of the proposed CDO given that the average effluent flow to the ponds was reported as 0.541 mgd during calendar year 2013.

Contrary to the Discharger's statement on page 2 of its comments, Central Valley Water Board staff is not relying on the 25 June 2014 letter from FID to "impose" the lower effluent flow limitation to the disposal ponds. As stated above, Central Valley Water Board staff relied on information provided by the Malaga County Water District, including its July 2008 study, which had the most complete information, to calculate the disposal capacity of the ponds under design conditions. The Discharger states in its comments that the proposed effluent flow limitation is based on outdated and irrelevant data and is not reflective of current conditions. As stated above, the Discharger was given an opportunity to provide current information but it failed to do so. Had the Discharger provided complete and up-to-date information in its response to the Central Valley Water Board August 2013 Letter, Central Valley Water Board staff would have used that complete and up-to-date information in drafting the proposed WDRs/NPDES permit.

DISCHARGER COMMENT 2a: The Discharger requests that Finding No. 3 in the proposed CDO be removed based on its objections to portions in the proposed WDRs/NPDES permit related to the proposed 0.49 mgd effluent flow limitation to the disposal ponds (Discharge Point 002).

> **RESPONSE:** The requested change has not been made. See Central Valley Water Board staff response to Discharger Comment 1.

DISCHARGER COMMENT 2b: The Discharger objects to Finding No. 5 of the proposed CDO and Provision VI.C.6.b of the proposed WDRs/NPDES permit because the Finding and Provision are based on information provided by FID in its 25 June 2014 letter to the Central Valley Water Board, which was the result of a meeting requested by Central Valley Water Board staff that did not include the Discharger. Additionally, the Discharger objects on the grounds that the Central Valley Water Board does not have the authority to interpret or enforce an agreement between the Discharger and FID. The Discharger requests that the requirement to cease discharging to Central Canal be removed from the proposed WDRs/NPDES permit and proposed CDO.

> **RESPONSE:** The Discharger's objections are noted but the requested change to remove the discharge restrictions to Central Canal has not been made. The Central Valley Water Board is not claiming that it has authority to enforce an agreement between the Discharger and FID. Although Central Valley Water Board staff is not recommending that the Discharger completely cease discharging to Central Canal, the requirement to cease discharging to Central Canal completely is one option that the Central Valley Water Board may consider and has been properly noticed for the Board's consideration. As provided in California Water Code section 13263, subdivision (g) "*No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.*" See also *In the Matter of the Petition of Robert James Claus*, 1985 WL 20016 at p. *5 (noting that compliance with the provisions of California Water Code Sections 13260 and 13264 does not give one a vested right to continue discharging wastewater and citing California Water Code section 13263, subdivision (g).)
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> Furthermore, a regional water board has the discretion to prohibit the discharge of waste that could affect the quality of waters of the State. As noted *In the Matter of the Petition of Foothill/Eastern Transportation Corridor* Agency, 2014 WL 5148275 at *6:
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>> Whether or not a discharge is authorized, the discharge of waste does not create any vested rights to continue the discharge; the discharge of waste is a privilege, not a right. It follows, then, that a regional water board has the authority to decline to issue WDRs for a specific discharge. When a regional water board declines to issue WDRs, it may also choose to give the project proponent an opportunity to revise its project and submit a revised report of waste discharge. In addition to the issuance or denial of WDRs, the Porter-Cologne Act also authorizes a regional water board to specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted. This may be done in a water quality control plan or in WDRs, and is a more enduring mechanism for protecting water quality.
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> Additionally, Central Valley Water Board staff met with FID to gain clarification regarding its 11 February 2008 letter to the Discharger, which states that it (FID) would like the Discharger to become independent of the canal discharge. The Discharger's response to the Central Valley

Water Board August 2013 Letter stated that recent discussions with FID indicated FID was willing to accept discharges into Central Canal during times when there were irrigation water deliveries in the canal, and included the 11 February 2008 FID letter as evidence of FID's stance. The 2008 FID letter, as previously stated, did not indicate that it was willing to accept discharges into Central Canal during the irrigation season, and in fact indicated it would prefer the Discharger move towards eliminating the discharge to the Canal. The 25 June 2014 FID letter, which supports the Discharger's statements that FID is willing to accept discharges into Central Canal, with some restrictions, was necessary because the Central Valley Water Board case file for the Facility included conflicting statements provided by the Discharger to the Central Valley Water Board in its 2008 study and its response to the August 2013 Letter.

DISCHARGER COMMENTS 2c, 2d, and 2e: The Discharger requests that Finding Nos. 6, 7, 20 through 24, 36, and 37 in the tenative CDO be removed because it claims the findings are based on outdated and inaccurate information and are irrelevant and improper, do not reflect current conditions, or are selective, out of context, and historical.

RESPONSE: The Findings in question have not been removed. The Findings in the proposed CDO are based on information from the Central Valley Water Board case file for the Facility and are, as the Discharger points out in its comments, historical facts. The Discharger did not present evidence that shows how or why the Findings are "inaccurate, irrelevant, improper, or out of context". Central Valley Water Board staff agrees that the Findings are historical, but they are nonetheless representative of the Facility's history.

DISCHARGER COMMENT 3: The Discharger requests that the proposed Alternative for Discharge Restrictions to Central Canal not be considered by the Board for reasons stated in its previous comments.

RESPONSE: The proposed Alternative has not been removed and will be included in the Agenda package for the Board's consideration. Adoption of the proposed alternative is within the Central Valley Water Board's authority. California Water Code section 13263(g) states, "*No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.*"

DISCHARGER COMMENT 4: The Discharger objects to the Notice of Public Hearing because it alleges "*the Notice is ambiguous and fails to define the nature of the proceeding and as such the District cannot adequately prepare for the proceeding or is otherwise being denied due process.*" The Discharger also indicates that the Notice does not have a comment deadline for designated parties and only has a comment deadline for interested parties, and as such the Discharger, who was listed as a designated party, may submit evidence and testimony at any time up to and including the hearing.

RESPONSE: The Discharger's comments are noted. The Notice of Public Hearing does not specify that comments are due only by "interested persons and other persons" by the specified deadline. The Notice states on page 2, "*Persons wishing to comment on these items must submit testimony, evidence, if any, and/or comments in writing to the Central Valley Water Board no later than **5 p.m.** on **27 October 2014**. Testimony, evidence, and/or written comments submitted after **5 p.m.** on **27 October 2014** will not be accepted and will not be incorporated into the administrative record absent a ruling by the Board Chair.*" Thus, if the Discharger intends to submit testimony, evidence, and/or additional written comments after the

comment deadline, which has already passed, it should note that the testimony, evidence, and/or additional written comments may or may not be incorporated into the administrative record.

Moreover, the Discharger's claim that it is being denied due process is misplaced. There is no mandatory legal requirement that a notice of public hearing specifically state whether a matter is contested or uncontested and the Discharger has provided no authority to the contrary. Adoption of a permit is a quasi-adjudicatory proceeding and governed pursuant to California Code of Regulations, title 23, section 648 et seq.

The Notice of Public Hearing specifically states, "*A party requesting to submit late materials must demonstrate good cause for the late submission, and the Board Chair must find that the late submission would not prejudice the Central Valley Water Board or any designated party.*" Again, this provision is not specific to interested persons as argued by the Discharger. Furthermore, pursuant to California Code of Regulations, title 23, section 648.4, subdivision (a), it is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits. Moreover, California Code of Regulations, title 23, section 648.4, subdivision (e) states that:

> Where any of the provisions of this section have not been complied with, the presiding officer may refuse to admit the proposed testimony or the proposed exhibit into evidence, and shall refuse to do so where there is a showing of prejudice to any party or the Board. This rule may be modified where a party demonstrates that compliance would create severe hardship.

In short, although it is true that the Discharger may seek to submit evidence and testimony at any time up to and including the hearing, whether the Discharger is allowed to do so is subject to the discretion of the Board Chair.

FRESNO IRRIGATION DISTRICT (FID) COMMENTS

FID provided comments indicating that it would like the Discharger to work towards completely eliminating the discharge to Central Canal in the future, and that the discharge from the Facility can at times be a significant nuisance. FID also notes that discharge during irrigation season is typically not an issue and provides that the irrigation season typically occurs from March to August during an average year but can vary from two to nine months every year. FID also notes that the Discharger may be allowed to discharge during storm water conveyances if capacity exists, but that would need to be handled on a case-by-case basis. FID also states that it is willing to allow the Discharger to discharge to Central Canal for up to five years while the Discharger works on developing other disposal alternatives. At the end of the five-year period, FID anticipates that the Discharger will be self-sufficient and/or will have other disposal alternatives available, but would still be open to accepting discharges during the irrigation season. FID notes that after the five-year period, discharges to Central Canal outside of the irrigation season must be eliminated.

RESPONSE: FID's comments are noted.