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[SENT VIA EMAIL: [COMMENTLETTERS@WATERBOARD.CA.GOV](mailto:COMMENTLETTERS@WATERBOARD.CA.GOV)]

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**Re: Second Draft Water Quality Order In the Matter of Review of Waste Discharge Requirements General Order No R5-2012-0116 for Growers Within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group, SWRCB File A-2239(a)-(c)**

On behalf of the undersigned organizations, as well as the Asociación de Gente Unida por el Agua (the "AGUA coalition") and Protectores del Agua Subterránea ("Protectores"), we submit comments on the Second Draft Order referenced above (the "Order"), as well as the attached Appendix A to the Order, entitled Modified Eastern San Joaquin Agricultural General WDRs, Second Staff-Proposed Draft Order (October 10, 2017) (the "WDR").

While the Order contains certain improvements to both the 2012 Waste Discharge Requirements and first draft of the Order, we are very disappointed with the lack of improvement in several respects. First, the field-level reporting requirements in the Order cannot protect groundwater quality, because the reporting is done anonymously with no information regarding the location of the field. Without knowing the location of likely discharges on a field level, the State Water Resources Control Board ("State Board"), Central Valley Regional Water Quality Control Board (the "Regional Board"), and the public have no way to determine whether loading will likely lead to exceedance of the water quality objective for nitrate.

Second, in contrast to surface water monitoring, the Groundwater Quality Trend Monitoring Program does not require sufficient spatial or temporal density to properly identify degradation due to nitrate discharges.

Third, the Order and WDR fail to set enforceable standards or limits for nitrate discharges, focusing instead on "iterative" improvements in management practices for specific crops. Without an enforceable target or limit on nitrogen loading (A/R or A-R), crop-specific management practice improvements will not ensure protection of groundwater. Targets for nitrogen loading should be set based on site-specific variables (irrigation water use, precipitation, soil and hydrogeological factors, etc.) regardless of the crop grown in a given location.

Fourth, we believe that the timelines for setting crop-specific A/R targets are too long, especially given that this Order was issued in review of a 2012 WDR, and that the 2003 conditional waivers set a goal of compliance with water quality objectives by 2013.

Finally, we note that these organizations on behalf of the AGUA coalition have spent considerable time and effort attempting to reach consensus with certain agricultural stakeholders in areas where compromise was possible. Those efforts, which took place both privately and during ex parte conversations with State Board and Regional Board staff and a State Board member as described in disclosures, resulted in a compromise proposal that was shared with the State Board. We presented the compromise proposal as a package deal, where AGUA agreed to compromise to an extent on anonymous reporting of nitrogen loading in exchange for<sup>1</sup> the inclusion of township-level nitrogen loading targets, taking into consideration township-specific conditions. Unfortunately, the Order does not reflect that compromise proposal on these critical points. However, we continue to discuss these issues with certain agricultural stakeholders, and remain open to discussing modification of the Order to reflect the components of the compromise.

We have included additional information about the status and direction of our discussions with agricultural representatives in Attachment A,<sup>2</sup> as well as guidance about where and how the current Order could be amended to incorporate requirements for Groundwater Protection targets.

As many of the issues with the prior draft order persist in the present draft, we incorporate by reference the arguments contained in our June 1, 2016 letter.

## **I. BACKGROUND**

The Regional Board adopted Resolution R5-2003-0105, entitled “Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands within the Central Valley Region” on July 11, 2003. The Resolutions attached two (2) waivers as exhibits: a waiver for members of coalition groups, and a waiver for those who opt to proceed individually. As relevant here, both of the 2003 waivers state that they set forth an “interim program ... in order to meet the goal of compliance with water quality objectives within 10 years.” The conditional waivers were renewed with certain revisions on July 1, 2006.

On December 7, 2012, the Regional Board issued Order R5-2012-0116, entitled “Waste Discharge Requirements General Order For Growers Within The Eastern San Joaquin River Watershed That Are Members Of The Third Party Group” (the “2012 WDR”).

On January 7, 2013, Leadership Counsel for Justice & Accountability and Community Water Center filed a petition for review by the State Board on behalf of the AGUA coalition.<sup>3</sup>

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<sup>1</sup> The compromise proposal required field-level reporting of nitrogen loading to include location information at least approximating the location of the field. The Order unfortunately does not require reporting of field location, as described below.

<sup>2</sup> Please note that this guidance is provided for the sole purpose of engaging in a collaborative and amicable process, and the guidance should not be interpreted as a final analysis of the legal requirements with respect to these issues, nor should omissions be interpreted as our approval of other sections of the Order or WDR.

<sup>3</sup> The petition was also filed on behalf of Fairmead Community and Friends, and Planada en Accion, both of which are represented by California Rural Legal Assistance.

The State Board issued the first draft of the Order on February 8, 2016. After the second of two public hearings, the State Board directed staff and stakeholders to engage in conversations to explore whether the draft could be improved, and to determine what areas of compromise were available. Since that time, the State Board has held a series of workshops, and certain environmental justice and agricultural stakeholders have had discussions regarding possible areas of compromise. The results of those discussions were presented to the State Board at workshops and during disclosed ex parte communications.

## **I. STANDARD OF REVIEW**

The SWRCB reviews an act or failure to act by a regional board to determine whether the action or inaction was “appropriate and proper.” (Water Code § 13320(c).) Thus, even where the action or inaction of a regional board is “legally defensible,” the SWRCB should direct appropriate and proper action(s) that will result in more effective regulation of discharges. (*See* WQO 91-03, p. 71; 23 CCR 2052.)

## **II. DISCUSSION**

### **A. The Order Fails To Comply With The Porter-Cologne Water Quality Control Act.**

Water Code § 13263(a) requires that the regional board prescribe waste discharge requirements, which “shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.” The requirements “may contain a time schedule, subject to revision in the discretion of the board.” (Water Code § 13263(c).)

#### ***i. The Order Fails To Implement The Water Quality Control Plan.***

The water quality control plan relevant here is the Water Quality Control Plan for the California Regional Water Quality Control Board Central Valley Region, Fourth Edition (Rev. July 2016) (the “Water Quality Control Plan”).

It states that, with respect to the numeric water quality objective for nitrate in groundwater, that “[a]t a minimum, ground waters designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels (MCLs) specified in the following provisions of Title 22 of the California Code of Regulations, which are incorporated by reference into this plan ... Tables 64431-A (Inorganic Chemicals) ...” (III-10.00.) Table 64431-A sets the MCL for nitrate at 10 milligrams per Liter (measured as nitrogen). The Water Quality Control Plan states that the Regional Board can “apply limits more stringent than MCLs” to protect beneficial uses, but it does not permit the Regional Board to set less stringent limits. (III-10.00.)

It further states that, “[w]here the Regional Water Board determines it is infeasible for a discharger to comply immediately with such [water quality] objectives or criteria, compliance shall be achieved in the shortest practicable period of time (determined by the Regional Water Board), not to exceed ten years after the adoption of applicable objectives or criteria.” (See also pp. III-2.00 “[water quality] objectives are to be achieved primarily through adoption of *waste discharge requirements* (including permits) and cleanup and abatement orders.” [emphasis added], III-1.00 [“Controllable factors are not allowed to cause further degradation of water quality in instances where uncontrollable factors have already resulted in water quality objectives being exceeded.”].)

Additionally, the Water Quality Control Plan incorporates the Nonpoint Source policy (p.-IV 10.01), which states under Key Element 4 that “[a]n NPS control implementation program shall include sufficient feedback mechanisms so that the [Regional Boards], dischargers, and *the public* can determine whether the program is achieving its stated purpose(s).” (emphasis added.)

Neither the Order nor the WDR requires, in any real sense, either immediate compliance with the numeric water quality objective for nitrate in groundwater, or compliance in the “shortest practicable period of time” not to exceed ten years “after the adoption of applicable objectives or criteria.” As eloquently noted in *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255 (hereinafter “*AGUA*”), the “wish is not father to the action.” This is to say that a stated prohibition is insufficient without provisions to require compliance with the prohibition.

The WDR states that “[w]astes discharged from Member operations shall not cause or contribute to an exceedance of applicable water quality objectives in the underlying groundwater, unreasonably affect applicable beneficial uses, or cause or contribute to a condition of pollution or nuisance.” (p. 8; see also p. 18 [The WDR “...Order authorizes limited degradation of high quality waters, not to exceed water quality objectives, threaten beneficial uses, or cause a condition of pollution or nuisance.”].) However, nothing in the WDR actually prevents the exceedance of the water quality objective for nitrate in groundwater, or provides the “feedback mechanisms” required by the Nonpoint Source policy.

#### 1. Field-Level Reporting Does Not Include Field Location.

As an initial matter, the anonymous field-level reporting requirements in the Order and WDR are not tied to any location. This means that neither the State and Regional Boards nor the public will be able to determine where nitrogen loading is occurring on a field-level. Without location information, there is no way to determine whether any discharger is causing an exceedance of the nitrate water quality objective, or contributing to pollution or nuisance. A relatively low nitrogen load may cause an exceedance, where the underlying groundwater is close to the MCL. In short, the State and Regional Boards must — at a minimum — know where nitrogen loading is occurring in order to prevent exceedances of water quality objectives, as well as to enforce the prohibition against causing or contributing to pollution or nuisance.

Without this information, the WDR cannot implement the Water Quality Control Plan. Along these lines, Staff recognized in the prior draft that:

The most direct manner in which to link management practice implementation at the field level with water quality data is to use location as the common identifier. In particular, identifying field-level data by location allows for location-based analyses, enabling layering of multiple sets of data geographically within the watershed, including water quality monitoring data and other data such as the nitrogen application data that we will discuss extensively in Section II.A.5 of this order. When such correlation of management practice implementation data and surface water and groundwater quality data is completed at a watershed, regional, or even statewide level, the water boards will be able to identify effective and ineffective management practices under a variety of conditions. Use of the complete, correlated data sets makes it possible to identify effective management practices under a variety of conditions, unlike field studies conducted under location-specific conditions. Use of the complete, correlated data sets additionally enables the water boards and others to study the effect of management practice implementation on trends in water quality throughout the entire watershed. This will be critical for the ongoing development and improvement of the irrigated lands regulatory program to appropriately protect water quality.

This language is stricken in the current Order. (pp. 32-33.)<sup>4</sup> The prior draft further recognized that location data is valuable to achieving compliance with receiving water limitations, listing as part of a verification that management practices are effective: “[t]he Central Valley Water Board correlates the field-specific management practice implementation data, the AR data, and available water quality monitoring data using the location identifier.” (Order p. 81.) This language is stricken in the current draft because the Board can no longer correlate field specific management practice and A/R data with available water quality monitoring data as reporting is done anonymously with no location identifier.

We agree with the reasoning of the prior draft, that location data for field level reporting is critical to “the ongoing development and improvement of the irrigated lands regulatory program to appropriately protect water quality.” (*Id.*) It is further necessary to compare reporting with groundwater quality data, in order to determine whether nitrogen loading from a field is causing an exceedance or causing or contributing to pollution or nuisance. This requires that nitrogen loading reports include a location identifier.

Further, the prior draft of the Order recognized that field-level reporting was intended to serve as a “proxy” for groundwater monitoring for nitrate. (*See* p. 69 [“The Multi-Year A/R Ratio ~~as a proxy for groundwater monitoring for nitrate...~~”] [striking in the Second Draft Order redline].) Without location data, the field-level reporting requirements cannot hope to be a

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<sup>4</sup> All citations to the Order and WDR are to the redline version.

substitute for proper groundwater monitoring, and cannot support implementation of the Water Quality Control Plan or serve as the feedback mechanism required by the Nonpoint Source policy.

2. Township Reporting Is Not A Substitute For Field-Level Reporting With Field Location.

This conclusion is not altered by the township-level reporting required by the WDR. Township level data is helpful to gaining a rough understanding about where loading is occurring. However, it is insufficient for at least three reasons: (1) township level nitrogen loading data does not permit enforcement, given that enforcement must be taken against a discharger; (2) township data does not permit identification of “hot spots” of nitrate contamination that are not captured by averaging loading across a township; and (3) by failing to tie any individual or entity to the loading, the WDR creates a tragedy of the commons, wherein no individual discharge is held responsible through enforcement or even identification for the impacts of their operations. Even coupled with the anonymous field level-reporting, township reporting is not enough to prevent the tragedy of the commons problem as the problem is merely masked through aggregation and the problems with field-level reporting discussed above.

3. The Order Does Not Require Auditing Or Verification Of Reporting.

The anonymous field-level reporting requirements are insufficient for an additional reason: there is no requirement that the State or Regional Boards audit or otherwise verify that the field-level data is accurate. During workshops, State Board staff had presented various options for verification of the accuracy of nitrogen loading reports. Unfortunately, none of the audit or verification proposals were included in the Order. We strongly believe that verification of the accuracy of reporting is necessary, especially given that the Order now permits anonymous reporting of field-level data. While self-certification may reduce intentionally false reporting, it will not be as effective as a strong audit policy and will not capture the (likely more common) situation in which a discharger unintentionally reports inaccurate nitrogen loading data. Without any consistently applied method of verifying field-level reporting is accurate, the State and Regional Boards cannot safely rely on that reporting to ensure compliance with Porter-Cologne or the Nonpoint Source policy, or as a “proxy” for groundwater monitoring.

4. The Groundwater Quality Trend Monitoring Program Is Not Representative.

The problems associated with the lack of location information for field-level reporting are exacerbated by the failure to require a representative groundwater monitoring program. Or, stated differently, stronger groundwater monitoring is required to the extent that field-level reporting does not include the location of nitrogen loading and is unverified.

The 2012 WDR adopted by the Regional Board required that the Coalition develop a Groundwater Quality Trend Monitoring Workplan, to be submitted to the Executive Officer. (R5-2012-0116 p. 32.) The stated purpose of Groundwater Quality Trend Monitoring was to “determine current water quality conditions of groundwater relevant to irrigated agriculture and develop long-term

groundwater quality information that can be used to evaluate the regional effects of irrigated agricultural practices.” (*Id.*)

The requirements for a Groundwater Quality Trend Monitoring Workplan were stated in Attachment B, Section IV of the 2012 WDR. (p. 17.) It clarified that Trend Monitoring is not intended to be “site-specific.” (*Id.*) It also states that a groundwater trend monitoring network will “employ shallow wells, but not necessarily wells completed in the uppermost zone of first encountered groundwater” and “shall consist of a sufficient number of wells to provide coverage in the third-party geographic area so that current water quality conditions of groundwater and composite regional effects of irrigated agriculture can be assessed according to the trend monitoring objectives.” (*Id.*) No other criteria for a Workplan was provided by the 2012 WDR. (*Id.*)

These provisions have not been significantly changed in the State Board’s current Order. (*See* WDR, pp. 35; WDR Att. B, pp. 21.) The WDR attached to the current Order now states:

The Trend Monitoring workplan must include a discussion of the rationale for the number of proposed wells to be monitored and their locations. The rationale needs to consider: (1) the variety of agricultural commodities produced within the third-party’s boundaries (particularly those commodities comprising the most irrigated agricultural acreage), (2) the conditions discussed/identified in the GAR related to the vulnerability prioritization within the third-party area, and (3) the areas identified in the GAR as contributing significant recharge to urban and rural communities where groundwater serves as a significant source of supply.

(WDR Att. B, pp. 21.)

On the other hand, the Order contains no requirement that the workplan provide for the development of a network that is statistically representative of groundwater conditions. (*Id.*) While acknowledging differences between surface water monitoring and groundwater monitoring, it is illustrative to consider the significant difference in how the Order treats surface water. With respect to surface water, the Order states “having now carefully reviewed the particular surface water monitoring framework established in the Eastern San Joaquin Agricultural General WDRs, we cannot find that it is, in fact, ‘of sufficient density (spatially and temporally) to identify general locations of possible pollution.’” (Order p. 59.) It further states that “it is not clear that, even collectively, the core and represented monitoring sites have sufficient spatial density or distribution to be able to reasonably identify exceedances throughout the watershed.” (*Id.*) As a result of the lack of spatial and temporal density, the Oder concludes that the surface water monitoring requirements in the 2012 WDR do not appear to meet the mandates of the Nonpoint Source policy that the “implementation program must ‘include sufficient feedback mechanisms so that the [regional water board], dischargers, and the public can determine whether the program is achieving its stated purpose(s)’” (Order p. 60.)

In contrast with the surface water monitoring discussion, the Order contains no analysis regarding how a much less robust monitoring program (in terms of spatial and temporal density requirements) for groundwater quality trend monitoring can meet the feedback requirements of the Nonpoint Source policy or the requirement that the WDR implement the Water Quality Control Plan.

We believe that the groundwater trend monitoring program fails to meet these requirements, especially when considered in the context of unverified field-level reporting without location data. (*See* subsection i.1., *supra*.) As noted above, field level reporting was originally intended by the State Board as a “proxy” for proper groundwater monitoring. (*Id.*) This necessarily implies a recognition that the groundwater trend monitoring program in the WDR is not itself capable of sufficiently detecting nitrate discharges.

Additionally, the Order does not require any monitoring of first encountered groundwater, or the construction of new monitoring wells. One problem with this is noted in the Order itself is that: “many groundwater wells are screened so that they extract groundwater from multiple aquifer levels. Because the different aquifer levels are recharged from different areas over different time intervals, different aquifer levels will have different concentrations of pollutants. Thus, many groundwater wells necessarily induce some mixing of the groundwater they extract.” (Order p. 12.) By not requiring the construction of monitoring wells, the Order relies primarily on results from drinking water and agricultural wells which provide results averaged across different aquifer levels.

*AGUA*, 210 Cal.App.4th at 1255 is instructive. In *AGUA* the court found that “[t]he monitoring program set forth in the Order is inadequate to identify groundwater degradation because ... monitoring is from supply wells, which are not located in the proper areas to detect degradation.” (*Id.* at 1275.) The Court also cited a report from the University of California at Davis which described why relying on existing supply wells is inadequate,

“Unlike monitoring wells, domestic/milkbarn supply wells and especially agricultural supply wells are typically screened well below the water table and across substantial vertical distances. The source area of these wells may extend over several thousand feet upgradient of the well location, depending on hydrogeologic conditions and well design. Water pumped from these wells is typically a mix of younger (shallower) and older (deeper) water.” (*Id.*)

Similarly, compared to irrigation wells, domestic wells generally draw from shallower portions of the aquifer. On average, shallow groundwater contains higher levels of contaminants, which may not harm agricultural uses but does pose a significant public health risk.

Because the Groundwater Trend Monitoring Program does not require the spatial or temporal density to be representative of groundwater conditions generally or first encountered groundwater,



the WDR does not properly implement the Water Quality Control Plan or comply with the feedback mechanism requirements of the Nonpoint Source policy.<sup>5</sup>

#### 5. The Order And WDR Lack Enforceable Limits.

Waste discharge requirements regulating discharges of nitrate to groundwater cannot “implement” a water quality control plan as required by Water Code § 13263 without setting enforceable targets or a limit on nitrate discharges. Yet this is exactly what the Order and WDR purport to do here.

With respect to limits or targets, the Order and WDR now contain two concepts — neither of which are enforceable against any individual discharger. First, the Order and WDR require that the Regional Board develop “acceptable ranges for multi-year A/R ratio target values.” (Order p. 85; WDR p. 35.) These target ranges for A/R are to be crop-specific, and should be developed within three (3) years of “the availability of the nitrogen removed coefficient for that crop.” (Order p. 79.)

However, crop-specific A/R target ranges will not necessarily even be used as a regulatory tool under the Order and WDR. The Order states that “[i]t is premature at this point to project the manner in which the multi-year A/R ratio target values might serve as regulatory tools. That determination will be informed by the data collected and the research conducted in the next several years. If we move forward with a new regulatory approach in the future, we expect to do so only after convening an expert panel that can help evaluate and consider the appropriate use of the acceptable ranges for multi-year A/R ratio target values in irrigated lands programs statewide.” (Order p. 79-80.)

More fundamentally, even if an A/R target range for a crop were used as a regulatory tool, it cannot ensure protection of groundwater. The target A/R range for each crop will be different, taking into consideration the nitrogen requirements for the crop at issue. There is no requirement in the Order or the WDR that the range be set at a level that will be protective of groundwater in all locations and under all circumstances. The corollary of this observation is that it may be that certain high nitrogen crops cannot be grown in some locations without degrading groundwater, causing an exceedance of the nitrate MCL, and/or causing or contributing to pollution or nuisance. The A/R target range does not prevent these impacts, even if used for enforcement.

Moreover, as we have consistently noted, we do not believe that the nutrient ratio represents an enforceable standard that will achieve water quality objectives. While we understand that this value was recommended by the Expert Panel, these values are not appropriate for regulatory purposes because they 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 (A-R). It is this number that must be reduced in order to meet water quality objectives. While irrigation management plays a large role in N loading, the presence of N in the soil column is the critical ingredient for N leaching. Three acres of corn planted and

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<sup>5</sup> This conclusion is not altered by the inclusion of provisions requiring on-farm drinking water well monitoring. We support such monitoring, but it is not intended or designed to serve as a “feedback mechanism” to evaluate management practice requirements.

harvested with a nutrient ratio of 1.2 will almost certainly result in greater N loading than 10 acres of grapes with the same nutrient ratio; therefore, Board oversight of these crops should not be the same.

Second, the Order and WDR directs the East San Joaquin Coalition to identify A/R “outliers” based on reported data. (Order p. 55, WDR p. 24.) Neither the Order nor the WDR defines the term. (Order p. 55.) Rather, the Coalition is to initially propose a list of outliers to the Regional Board for approval, either by application of a standard or not. (Order p. 55.) Once A/R target ranges are developed, the State Board’s “expectation” is that outliers will be identified by reference to the target range, presumably meaning that a grower that is far enough outside of the target range would be considered an outlier. (*Id.*)

Three problems with the “outlier” concept, at least insofar as they are intended to serve as a replacement for enforceable limits on nitrogen use, are: (1) the term is not defined; (2) depending on the crop and specific circumstances (including site-specific conditions), a discharger well within the average for A/R may be causing an exceedance; and (3) the repercussions of identification as an “outlier” are relatively minor. With respect to the first issue, there is nothing in the Order or WDR that restricts the Coalition from proposing a standard for determining “outliers” that only picks out only the worst offenders in terms of nitrogen loading, or preventing the Executive Office from approving that standard. As for the second issue, an outlier for one crop may be discharging far less nitrate to groundwater than an average discharger for another crop. And as for the third issue, a discharger that is identified as an outlier need only receive more training from the Coalition, possibly comply with more frequent reporting requirements at the discretion of the Executive Officer.<sup>6</sup> (Order pp. 28 n.80, 80.) Nothing in the Order or WDR requires an outlier to reduce nitrogen loading to levels that are protective of groundwater quality.

In addition to crop-specific A/R target ranges and outliers, the Order contains a reference to a proposal by these Organizations and certain agricultural stakeholders for a township-level nitrogen loading target. (Order p. 71.) We believe that such a target is a necessary condition for compliance with Porter-Cologne and the Nonpoint Source policy, in that without an enforceable limit on nitrogen loading in a geographic area, cumulative impacts from multiple dischargers will likely cause exceedances of the nitrate MCL in groundwater, and cause or contribute to pollution or nuisance.

While we appreciate the apparent recognition from State Board staff that township-level nitrogen loading targets may be worth pursuing, the Order does not require their development. Rather, the Order states that the State Board “welcome[s the] input” and directs the Coalition to develop a “project scope and timeline” for approval within two (2) years. (*Id.*) The Order does not require that the targets themselves be adopted at any specific time, or that they ever be adopted, and does not contain any criteria or description to aid in their development. (*Id.*) Moreover, the WDR does not mention township-level nitrogen loading targets at all. To aid the State Board in evaluating

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<sup>6</sup> At some point in the future, the State Board may also consider implementing a trigger to remove anonymity for consistent outliers, but the Order and WDR do not contain such a trigger now. (Order pp. 55-56.)

the township-level nitrogen loading target proposal, we provide more specific direction regarding this concept in Attachment “A”.

In addition to township-level nitrogen loading targets to prevent cumulative impacts from multiple dischargers, the Order must also require the development of field-level A-R targets. While the township-level targets we have proposed are necessary to prevent cumulative impacts, they will not on their own prevent a discharger from causing an exceedance or causing or contributing to pollution or nuisance. “Hot spots” of nitrate discharges may occur within a township due to high nitrogen loading on a field level. As a result, the Order must also include a limit on nitrogen loading on a field level. Without limits on loading, the Order relies only on iterative management practice improvements that, depending on the crop and site-specific factors, hold no promise of requiring compliance with water quality objectives.

6. The Order And WDR Do Not Require Compliance In The Shortest Practicable Period Of Time.

Even assuming for sake of argument that the Order and WDR are sufficient to require compliance with the nitrate water quality objective, it does not do so in the “shortest practicable period of time...not to exceed ten years after the adoption of applicable objectives or criteria.” For example, the current Order requires that the Coalitions publish nitrogen removal coefficients for crops that cover 95% of total acreage by March 1, 2021, and 99% of acreage by March 1, 2023. (Order p. 44.) Crop-specific A/R target ranges are to be developed within three (3) years of the availability of the coefficient for each crop. (Order p. 79.) This means that no target ranges are required to be developed until March 1, 2024, with compliance potentially required at some undefined time after that. This WDR was first adopted in 2012, and much of the research required for proposing nitrogen removal coefficients has been done already or is already incorporated into existing workplans.<sup>7</sup> Faster implementation is thus practicable, and must be required.

***ii. The Draft Order Does Not Adequately Take Into Consideration The Beneficial Uses, The Water Quality Objectives Reasonably Required To Protect Beneficial Uses Or The Need To Prevent Nuisance.***

As demonstrated above, though the Order and WDR purport to require dischargers to protect the MUN beneficial use in groundwater by complying with the nitrate MCL, the Order and WDR lack the reporting, monitoring and limitation requirements necessary to implement such a restriction. As such, the Order does not adequately take into consideration beneficial uses, the water quality objectives reasonably required to protect those uses, or the need to prevent nuisance.

***iii. The Draft Order Does Not Adequately Take Into Consideration The Provisions Of Section 13241.***

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<sup>7</sup> The East San Joaquin River Coalition draft Management Practices Evaluation Workplan already incorporates development of nitrogen removal coefficients in Phase I of its July 29, 2016 draft workplan (page 15).

Water Code § 13241 states that, in setting water quality objectives, factors to be considered by the regional board “shall include but not necessarily be limited to, all of” the following:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.

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These factors must also be considered when adopting WDRs. (*City of Burbank v. State Water Resources Control Bd.*, 35 Cal.4th 613, 627 [Regional board must consider § 13241 factors when issuing waste discharge requirements pursuant to § 13263, except where State restrictions are exceeded by Federal requirements inapplicable here].)

As noted above, the Order and WDR do not adequately take into consideration the beneficial uses of water. (Section A.i., *supra*.) Further, as discussed more fully below, the Order and WDR fail to analyze the quality of water available to the hydrographic unit. (Section C.ii., *infra*.)

With respect to economic considerations, the State and Regional Boards have failed to give proper consideration and weight to economic considerations of beneficial users of groundwater, including but not limited to the cost of drinking water treatment, the purchase of replacement water, and the health impacts of reliance on drinking water contaminated with nitrate. (*See* Section C.iii., *infra*.)

Further, regarding the need for developing housing within the region, the WDR states only that it “is not intended to establish requirements for any facilities that accept wastewater from residences or stormwater runoff from residential areas. This Order will not affect the development of housing within the region.” (p. 49.) The conclusion does not follow from the premise. The Order may affect housing without regulating wastewater from residences or stormwater runoff in residential areas. For example, the cost of treating contaminated groundwater may make the development of affordable housing in the region infeasible. (*See also* Section G, *infra*.) Without taking into consideration these potential effects, the WDR fails to comply with §§ 13263 and 13241.

**B. As Drafted, The Anonymity Provisions Are Impermissible.<sup>8</sup>**

California law strongly favors transparency regarding information of public interest. The California Constitution states that “[t]he people have the right of access to information concerning the conduct of the people's business” and that thus in furtherance of that right “[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.” (Cal Const, Art. I § 3.)

Similarly, Porter-Cologne recognizes that the “people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state.” (Wat. Code, § 13000.) Consistent with this “primary interest” and the above-referenced Constitutional mandate, Porter-Cologne requires public access of reporting and monitoring data in a manner easily understandable by the general public. (See, e.g., Water Code §§ 13167 [SWRCB must “implement, with the assistance of the regional boards, a public information program on matters involving water quality, and shall place and maintain on its Internet Web site, in a format accessible to the general public, an information file on water quality monitoring, assessment, research, standards, regulation, enforcement, and other pertinent matters,” which includes “monitoring data and assessment information” presented in a manner “easily understandable by the general public.”], 12406 [“The department, in consultation with the California Water Quality Monitoring Council, the state board, and the Department of Fish and Wildlife, shall develop protocols for data sharing, documentation, quality control, public access, and promotion of open-source platforms...”]; 10781 [duties of the State Board includes “[i]dentifying the means by which to make monitoring information available to the public.”].)

Of particular note here is the Nonpoint Source Policy, which states under Key Element 4 that “[a]n NPS control implementation program shall include sufficient feedback mechanisms so that the [Regional Boards], dischargers, and *the public* can determine whether the program is achieving its stated purpose(s).” (emphasis added.)

The anonymous reporting provisions in the Order are impermissible, first because they conflict with California law and Porter-Cologne provisions strongly favoring transparency. Second, the Draft Order does not include sufficient feedback mechanisms to allow the public to determine whether the program is achieving its stated purposes, as required by the Nonpoint Source policy. Specifically, the Order permits all field-level data on nitrogen loading to be reported under an anonymous pin. Further, the data is not tied to any location, meaning that there is no way for the Regional or State Boards, or the public, to determine where field-level nitrogen loading is

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<sup>8</sup> These organizations, representing the AGUA coalition, discussed a compromise with certain agricultural stakeholders and the SWRCB that would permit limited anonymity in exchange for the inclusion in the Draft Order of enforceable groundwater quality targets for nitrogen loading. As explained above in Section A., *supra*, enforceable targets were not included in the Draft Order. As such, though the AGUA coalition remains open to further discussions with agricultural stakeholders and the State Board regarding groundwater quality targets, AGUA is not bound by the compromise proposal. Further, the anonymity provided by the Order is much broader than AGUA ever discussed in that it does not tie reporting to any location information.

occurring within the Coalition's boundaries. Without connecting nitrogen loading reporting to (a) a specific discharger and (b) a location, neither the public nor the SWRCB can determine whether the program is adequately regulating nitrate in groundwater.

As a result, we believe that Porter-Cologne and the Nonpoint Source policy require, at a minimum, field-level reporting that includes the township(s) in which the field is located.

**C. The Antidegradation Analysis Is Inadequate.**

The State Antidegradation Policy is set forth in Resolution 68-16, which states in part that high quality waters shall "be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies."

Resolution 68-16 further states that "[a]ny activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with the maximum benefit to the people of the State will be maintained."

In *AGUA*, 210 Cal.App.4th at 1258-59, the court held that a general waste discharge order issued by the Central Valley Regional Water Control Board in 2007, which purported to prohibit further degradation of groundwater from existing dairy farms, was inconsistent with the antidegradation policy. The court noted that a conclusory prohibition on further degradation was not sufficient to comply with the antidegradation policy. (*Id.* at 1259.) Instead, the *AGUA* court held that the Regional Board, in order to comply with the Antidegradation Policy, must affirmatively "demonstrate" compliance with the Policy. (*Id.* at 1278.)

This affirmative requirement is accomplished through a "two-step process" for "determining whether a discharge into high quality waters is permitted." (*Id.* at 1278, 1282.) The first step of the process is for the Regional Water Board to make three (3) "specified findings," that the "change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies..." (*Id.* at 1278.)

The second step of the *AGUA* process is a finding "that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State." (*Id.*)

The Order and WDR do not comply with these requirements.

***i. The Antidegradation Analysis Applies The Wrong Legal Standard.***

The *AGUA* decision is binding in this proceeding with respect to interpretation of the requirements of the Antidegradation Policy. (*AGUA*, 210 Cal.App.4th at 1267-68 quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1988) 19 Cal.4th 1, 12 [It is the court, rather than the agency, that has ““final responsibility for the interpretation of the law.””].)

There is nothing in *AGUA* that would suggest that it should be limited to point source discharges, and in fact the case does not even use the phrase “point source.” Thus, the State and Regional Boards applied the wrong legal standard when they determined that *AGUA*’s interpretation of the Antidegradation Policy and its requirements were inapplicable to this WDR. (See, e.g., Order p. [“The diffuse, landscape level groundwater discharges regulated under the Eastern San Joaquin Agricultural General WDRs are unlike the concentrated discharges from dairy retention ponds and corral areas that were the subject of” *AGUA*.].)

***ii. The Antidegradation Analysis Does Not Make The Proper Baseline Comparison.***

“When undertaking an antidegradation analysis, the Regional Board must compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives.” (*AGUA*, 210 Cal.App.4th at 1270.) Then, “[i]f the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved” and “the antidegradation policy is not triggered.” (*Id.*) On the other hand, “if the baseline water quality is better than the water quality objectives, the baseline water quality must be maintained in the absence of findings required by the antidegradation policy.” (*Id.*)

The State and Regional Boards have not conducted this baseline analysis, though they acknowledge that the watershed are of high quality. (Order p. 82; WDR p. 38.) This does not comply with the requirements of the Antidegradation policy as discussed in *AGUA*. While we acknowledge that reliable data regarding groundwater conditions since 1968 is not always available, the State and Regional Boards were required to analyze available data and make a reasonable effort to analyze water quality since 1968.

***iii. The “Maximum Benefit” Finding Is Not Supported.***

The finding that a change in water quality will be “consistent with the maximum benefit to the people of the State” must be made on a “case-by-case basis...based on considerations of reasonableness under the circumstances at the site.” (*Id.* at 1279.) In making this “case-by-case” finding, the Board must consider the following factors “(1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods.” (*Id.*)

The Order states that the Regional Board “appropriately found [in the 2012 WDR] that the degradation allowed by the General WDRs is consistent with the maximum benefit to the people of the state.” (p. 84.)

Turning to the 2012 WDR, the Regional Board stated a total of six (6) reasons for its “maximum benefit” finding:

- At a minimum, this Order requires that irrigated agriculture achieve and maintain compliance with water quality objectives and beneficial uses;
- The requirements implementing the Order will result in use of BPTC where irrigated agricultural waste discharges may cause degradation of high quality waters; where waters are already degraded, the requirements will result in the pollution controls that reflect the “best efforts” approach. Because BPTC will be implemented, any lowering of water quality will be accompanied by implementation of the most appropriate treatment or control technology;
- Central Valley communities depend on irrigated agriculture for employment (PEIR, Appendix A);
- The state and nation depend on Central Valley agriculture for food (PEIR, Appendix A);
- Consistent with the Order’s and PEIR’s stated goal of ensuring that irrigated agricultural discharges do not impair access to safe and reliable drinking water, the Order protects high quality waters relied on by local communities from degradation of their water supplies by current practices on irrigated lands. The Order is designed to prevent irrigated lands discharges from causing or contributing to exceedances of water quality objectives, which include maximum contaminant levels for drinking water. The Order also is designed to detect and address exceedances of water quality objectives, if they occur, in accordance with the compliance time schedules provided therein. Therefore, local communities should not incur any additional treatment costs associated with the limited degradation authorized by this Order; and
- The Order includes performance standards that would work to prevent further degradation of surface and groundwater quality.

(p. 45.)

Beginning with the requirement to consider the beneficial uses of water, the Order and WDR state irrigated agriculture is required to achieve and maintain compliance with water quality objectives. (p. 45.) However, as noted above, the Order and WDR do not, in an practical or enforceable sense, require irrigated agriculture to achieve and maintain water quality objectives. (*See* Section A., *supra*.) Thus, the finding is not supported by the evidence, and beneficial uses of water have not been adequately analyzed.

Turning to economic and social costs, the Order and WDR fail to apply the proper legal standards. In considering “economic” costs, the Regional Board must consider “both costs to the discharger and the affected public,” and in doing so, “[c]ost savings to the discharger, standing alone, absent a demonstration of how these savings are necessary to accommodate ‘important social and economic development’ are not adequate justification” for permitting degradation. (*AGUA*, 210 Cal.App.4th at 1279.) In considering “social” costs, consideration must be given to whether a lower water quality can be abated through reasonable means. In other words, the lower water quality should not result from inappropriate treatment facilities or less-than-optimal operation of treatment facilities.” (*Id.*)



The Order and WDR here rely crucially on only two findings with respect to economic and social costs: (a) that Central Valley communities rely on agriculture for employment; and (b) that the state and nation depend on Central Valley agriculture for food. (p. 45.) There is no finding or comparison regarding the economic or social costs to the segment of the public that will be affected by nitrate discharges. Moreover, there is no “site-specific” analysis of the economic and social costs to the discharger of stricter protections against nitrate discharges to groundwater within the coalition (e.g., costs of better reporting or groundwater monitoring, how much employment would be lost as a result, the extent to which the State relies on agriculture within the watershed for food, etc.) compared to the economic and social costs in the watershed in terms of increased treatment costs and resulting health impacts.

The economic and social costs of “limited degradation” to the general public will be substantial, and thus should have been considered. “95% of the [San Joaquin] valley’s population relies on groundwater for drinking.” (CAROLINA BALAZS ET AL., SOCIAL DISPARITIES IN NITRATE-CONTAMINATED DRINKING WATER IN CALIFORNIA’S SAN JOAQUIN VALLEY (Environmental Health Perspective 2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3230390/>.) Further, as recognized in the Water Quality Control Plan, the Antidegradation Implementation Policy applies when the Regional Board issues a permit. (IV-15.01.) It also states that “Implementation of this policy to prevent or minimize surface and ground water degradation is a high priority for the Board. In nearly all cases, preventing pollution before it happens is much more cost-effective than cleaning up pollution after it has occurred. . . . cleanup of ground water is costly and lengthy due, in part, to its relatively low assimilative capacity and inaccessibility. The prevention of degradation is, therefore, an important strategy to meet the policy's objectives.” (IV-15.01-16.00.)

The Order and WDR contain no analysis of the environmental aspects of the proposed “limited degradation” of existing high quality waters, and thus does not contain an adequate “maximum benefit” finding.

Finally, with respect to implementation of feasible alternative treatment or control methods, the Order and WDR state that BPTC and Best Efforts are required pursuant to a “process of becoming aware of effective management practices; evaluating their practices; and implementing improved practices.” However, neither the Order nor the WDR require that management practices actually achieve practices which are “best practicable.” Rather, the Order and WDR require an “iterative planning approach” with two steps: “1) establishment of a baseline set of universal farm water quality management standards combined with upfront evaluation, planning and implementation of management practices to attain those goals, and 2) additional planning and implementation measures where degradation trends are observed that threaten to impair a beneficial use or where beneficial uses are impaired (i.e., water quality objectives are not being met).” (WDR p. 39.)

As the Order and WDR fail properly analyze whether the “limited degradation” permitted is consistent with the maximum benefit to the people of the state, the Antidegradation analysis is inadequate.

*iv. The Findings That The Change In Water Quality Will Not Unreasonably Affect Present And Anticipated Beneficial Uses Or Result In Water Quality Less Than That Prescribed In State Policies Are Not Supported.*

As discussed more fully in Section A., *supra*, the requirements in the WDR cannot properly identify where discharges are occurring through reporting or monitoring, and does not set any enforceable limits or targets for nitrogen loading. Therefore, the Order permits degradation that will unreasonably affect beneficial uses.

*v. The Finding Of Best Practicable Treatment Or Control Is Not Supported.*

For the reasons stated in Section A., above, the Order and WDR do not require BPTC.

**D. We Support The Domestic Well Testing Requirements, But They Should Be Strengthened.**

The Order requires growers to test all domestic wells located on their property for nitrates. We support the testing requirements and subsequent submittal to GeoTracker. Residents of the agricultural operation have a right to know if the water they depend upon for domestic needs meets drinking water standards. Also, the data will permit better tracking of water quality issues.

There are a few ways this requirement can be further strengthened. First, provision of replacement water supplies must be a requirement for wells which test above the MCL. The Order states: "...if monitoring of drinking water supply wells indicates that MCLs are being exceeded, we expect dischargers that are causing or contributing to the exceedance to provide replacement water to the affected population." (Order p. 84) Second, the notices that must go out if a well is found in violation of the nitrates MCL must be in the well user's primary language. These notices can be form letters that the State or Regional Water Board staff can assist in providing to growers. Third, the Order should direct the Regional Water Board to require testing of additional contaminants including those which are expressed and made more hazardous due to interactions with agricultural operations, and contaminants attributable to legacy loads that current operations move toward drinking water sources. This includes contaminants previously applied by agricultural operations which still exist in the soils such as 1,2,3-TCP, DBCP, and naturally occurring contaminants which are moved by current practices such as arsenic and uranium. These are contaminants which should be monitored under a GQMP and thus the same triggers should apply as for nitrate mitigation. Finally, the well testing requirements need to be expanded to include agricultural supply wells. This is already required on the Central Coast and it provides additional data about groundwater quality conditions at different depths. Additionally, while wells providing drinking water are typically taken out of production when nitrate standards are exceeded, agricultural wells are not, and can therefore provide a more accurate representation of groundwater

**E. The Order Must Require Mitigation of Nitrate Impacts on Beneficial Users**

As noted in prior correspondence, given that the Order allows continued discharge of waste which will likely result in the exceedance of water quality objectives, it must require that dischargers mitigate their impacts to water sources used for beneficial uses. Though an "expectation" that

dischargers will provide replacement water is stated in the Order, it does not actually require the provision of replacement water or other mitigation requirements. Dischargers must ensure that communities impacted by nitrates and other contaminants associated with agricultural operations have access to safe, clean, and affordable drinking water in line with the Human Right to Water. This can include both emergency options (bottled and tanked water) and longer term solutions (treatment systems including operations and maintenance costs, new wells, etc.), depending on the extent of the contamination and the timeframe during which the contamination will persist. Furthermore, there are other costs borne by residents faced with nitrate contamination. This includes paying higher water rates to systems forced to treat water in order to provide potable water, or private well owners who have already installed a POU/POE system in their home. Dischargers must mitigate these impacts as well.

**F. The Public Trust And Reasonable And Beneficial Use Doctrines Apply.**

The “reasonable and beneficial use” doctrine is codified in the California Constitution, requiring that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” (Cal Const, Art. X § 2; see also *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105 [“...superimposed on those basic principles defining water rights is the overriding constitutional limitation that the water be used as reasonably required for the beneficial use to be served.”].)

Along the same lines, the “public trust” doctrine applies to the waters of the State, and states that “the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders” and that thus “no one has a vested right to use water in a manner harmful to the state's waters.” (*United States v. State Water Resources Control Bd.*, 182 Cal.App.3d at 106; *Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 426 [“before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”].) The “public trust” doctrine has recently been applied to groundwater, at least where there is a hydrogeological connection between the groundwater and a navigable surface water body. (*Envtl. Law Found. v. State Water Res. Control Bd. No. 34-2010-80000583* (Cal. Super. Ct July 15, 2014).)

The Order and WDR do not mention, let alone analyze or apply, either the “reasonable and beneficial use” or “public trust” doctrines. Further, if it had, the acknowledged degradation of “high quality waters of the State” as defined by the State Antidegradation policy would be inconsistent with those doctrines, especially to the extent that the Order and WDR permit in practice degradation beyond the water quality objective for nitrate in groundwater and the contamination of sources of drinking water.

**G. The Order Will Have Disparate Negative Impacts On Protected Classes.**

State law provides that no person shall, on the basis of race, national origin, ethnic group identification, and other protected classes, be unlawfully denied full and equal access to the

benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state. (Gov. Code § 11135). Furthermore, the state's Fair Employment and Housing Act guarantees all Californians the right to hold and enjoy housing without discrimination based on race, color, or national origin. (Gov. Code § 12900 et seq.)

As we stated in our petition, small, majority-Latino communities within the San Joaquin Valley are disproportionately impacted by nitrate contamination of groundwater from agricultural waste. Latinos are more likely to have higher levels of nitrates in their drinking water than the population at large. (*See, e.g.,* Carolina Balasz et al., *Social Disparities in Nitrate Contaminated Drinking Water in California's San Joaquin Valley, Environmental Health Perspectives*, 19:9 (September 2011), pp. 1272-78.) The Balasz study finds that with other variables held constant, in communities served by small water systems, increases in the percentage of Latinos were associated with increases in nitrate levels. (*Id.* at 1276). For example, Balasz studied a sample size of almost 3 million people on small water systems and found that of the 5,000 people who relied on water that exceeded the MCL for Nitrates, 50% were Latino while less than 40% of the sample size as a whole was Latino. (*Id.* at 1276.) Moreover, Latino and low-income communities are less likely to have access to adequate healthcare, water treatment, and substitute water sources, which further aggravates these disparate impacts. (*Id.* at 1273; *see also* Harter Report at 17.) We disagree with the Order's assertion that by adding in the requirement of drinking water supply well testing, the Order "will not disproportionately impact or discriminate against Latino and low-income communities, or deny their enjoyment of their residences, property, or tenancy." (Order p. 65) While an important step, merely requiring testing without any enforceable requirement for water which exceeds drinking water standards does not actually allow one who is impacted to have full and equal access to their accommodations. Nor does it address those who may not live on the farm, but work there or live nearby and rely upon the, potentially contaminated, drinking water supply wells while upon the property.

The WDR, by authorizing waste discharges with no requirement to mitigate nitrate impacts to drinking water sources, disparately and negatively impact communities of color, are discriminatory and, as such, violate state law. The Order finds that, with the addition of the monitoring and reporting requirements discussed above, the WDR will not disproportionately impact or discriminate against Latinos and low-income communities. However, for the reasons discussed above, the WDR is inadequate to protecting groundwater for these communities. For one, the WDRs explicitly authorize pollution and nuisance for more than 10 years. For another, there is no requirement that the dischargers must pay for the impacts nitrate contamination has on drinking water sources, leaving the burden on those low-income residents living in nitrate-impacted communities. The negative impacts of these inadequacies will continue to disparately burden low-income, communities of color. The Government Code renders null and void any action undertaken by a local governmental agency that denies to any individual or group of individual the enjoyment of their residence, landownership or tenancy. (Gov. Code § 65008). The Order, if it fails to protect the drinking water for California's most vulnerable communities, is null and void.

Moreover, the failure to adequately protect groundwater violates California's Fair Employment and Housing Act, California Government Code 12900, et seq., which guarantee all Californians the right to hold and enjoy housing without discrimination based on race, color or national origin.

(See also Gov. Code § 65008 [Any discriminatory action taken “pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state...”]; Government Code §§ 12955, subd. (1) [unlawful to discriminate through public or private land use practices, decisions or authorizations].)

#### **H. The Order May Have A Significant Impact To Small-Scale Growers**

The Order institutes a number of important requirements to protect water quality. While larger-scale operations may have the means to comply with all the provisions of the Order through hiring help or attending educational opportunities put on by the Coalitions, the same may not be the case for small-scale growers, in particular those who grow a diversity of crops, often on the same field. A substantial number of small growers either do not speak English or English is not their primary language. Without adequate resources to assist these growers in understanding what is required of them under the Order, they are limited in their ability to comply with the order and therefore are subject to enforcement actions that they are ill-equipped to defend or settle. The Coalitions have failed thus far to provide for these growers for a number of reasons, including lack of knowledge of how to put on culturally, and lingually, specific trainings for a diverse number of growers. Furthermore, many small-scale growers may not have the financial means to quickly come into compliance with the Order, especially since they do not have the resources like other growers do in terms of educational opportunities.

We would like to incorporate into our comments the definition put forth by the University of California Cooperative Extension in their comments of a diversified, socially disadvantaged grower to mean a farm that is less than 45 acres, a farm income of less than \$350,000 of gross annual sales, crop diversity greater than or equal to 0.5 crops per acre (1 crop for every 2 acres) OR 30 acres or less of a specialty crop for which the N coefficient/uptake is not known, and is classified as a socially disadvantaged farmer as defined by the Farmer Equity Act (AB 1348). We request that the Board, in cooperation with the Department of Food and Agriculture, identify and target find the resources available to assist such growers comply with the Order and to provide a time-limited measure of flexibility in compliance, provided that their operations are not shown as impacting water quality.

#### **I. OTHER ISSUES**

Our organizations recognize and support the following improvements to the order:

1. The incorporation of nitrogen loading data (A-R) into the order requirements. As stated above, our organizations support the reporting of this information as the basis for determining compliance with receiving water limitations. However, the requirements for A-R reporting should be clarified to show that nitrogen applied in irrigation water is not to be used for determining compliance with best practices or Groundwater Protection Targets.
2. The requirement for growers subject to a Groundwater Quality Management Plan to provide a Management Practices Implementation Report. We have noted in prior comment letters that the current level of practice reporting is insufficient because it a) fails to connect

applied practices to a specific geographic area, and b) lacks information on whether and where best practices are not being implemented.

We would like to suggest that the references in the WDR to Nitrogen Tracking and Reporting Task Force and the Agricultural Expert Panel (Item 47, page 14) be expanded to include the 2012 UC Davis Nitrate Report, which has been essential to our understanding of the movement of nitrogen in groundwater.

Finally, we would like to state our support for the designation of high vulnerability areas in the Central Valley Board order. While we agree with the State Board's contention that all growers need to implement best practices and be subject to educational requirements, we want to ensure that those areas where other beneficial users of groundwater are most impacted by agricultural are clearly prioritized for monitoring, reporting and enforcement.

### **III. CONCLUSION**

Thank you for your consideration of these comments. If you have any questions or concerns, please do not hesitate to contact us. We look forward to continuing to work with staff and the Boards and agricultural stakeholders to develop an effective irrigated lands regulatory program.

Respectfully submitted,



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## **ATTACHMENT A**

### **GUIDANCE ON DEVELOPMENT OF GROUNDWATER PROTECTION TARGETS**

Clean Water Fund, Community Water Center and Leadership Counsel for Justice and Accountability, the latter two organizations representing Asociación de Gente Unida por el Agua (the “AGUA coalition”) began meeting after the close of the comment period for the First Draft Order in May 2016 with representatives of the East San Joaquin River Coalition and other Central Valley coalitions. The shared objective of agricultural and environmental justice representatives was to identify potential areas of consensus in the Draft Order and share the outcome of our discussions with the Board. Those outcomes were shared with the Board at a series of disclosed ex Parte meetings in the spring of 2017.

A key outcome of these discussions for the environmental justice organizations was an agreement that the Order should require development of water quality targets – identified as “Groundwater Protection Targets” - that could demonstrate compliance with the requirements of the Order at the local (township) level. This concept formed part of the agreement presented to the State Board during ex parte meetings. However, the Second Draft Order, while providing a placeholder (page 71 of Second Draft, redline version) for the development of such targets, does not require their development or incorporate them into the Waste Discharge Requirements.

As written, the East San Joaquin Order consists of the development of a series of reports that cumulatively comprise compliance with the Order. These reports are not outlined in detail, but instead required outcomes are identified. The environmental justice advocates believe that the required development of groundwater protection targets must be provided at a similar level of detail in the Board’s Second Draft Order.

The environmental justice and agricultural representatives have had some discussions about specific language edits that could be included in the Order, but lacked time prior to the comment deadline to reach consensus on precise language. Our two sides will continue to work on consensus language after the comment deadline and will continue talking with staff regarding our proposals. However, we have general agreement on the following:

1. Changes to the Monitoring and Reporting Program (Attachment B to the Order) can provide the necessary authority for development and application of Groundwater Protection Targets.
2. In Section IV.C., the Management Practices Evaluation Program (MPEP), language already exists requiring the development of agronomic targets for nutrient efficiency (A/R); the same data can be used to generate optimal nutrient loading values (A-R).
3. The scope of the MPEP would be expanded to require development of a formula that can provide locally specific nutrient loading values that are protective of groundwater quality (“Groundwater Protection Targets”). Groundwater Protection Targets would be developed for each township located in a high vulnerability area. (The environmental justice organization anticipate that these targets would be expressed in pounds of nitrogen per acre).

4. Groundwater Quality Management Plan requirements as identified in Order Appendix MRP-1 would be expanded to include incorporation of Groundwater Protection Targets and progress towards achievement of those targets as part of annual reports.

As part of continuing discussions, the environmental justice organizations would propose the following additional elements:

1. Compliance With Groundwater Protection Targets. At a township level, compliance would be achieved when the Groundwater Protection target is attained. Operations within a township that have not met or made progress towards meeting the target would be subject to additional monitoring, reporting and subsequent enforcement. This, in conjunction with individual compliance with water quality objectives, would address a concern expressed by environmental justice organizations that individual operations within a township could exceed the target, creating “hot spots” of contamination and potentially impacting drinking water sources.
2. Timeline. We anticipate development of Groundwater Protection targets by July 1, 2020.
3. Amendment of Item 23 of the Waste Discharge Requirement (WDR) to incorporate Groundwater Protection Targets.
4. Amendment of Section VIII.E. of the WDR to incorporate Groundwater Protection Targets.