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Comments on the Conditional Waiver of Waste Discharge Requirements for Agricultural Operations in the Watersheds of the San Jacinto River and its Tributaries, Canyon Lake and Lake Elsinore and their Tributaries, Collectively, "The San Jacinto River Watershed", Riverside County, Order No. R8-2016-0003

Specific Comments/Question

WDR, p. 10, Provision 54—What will be considered appropriate characterization of waste discharges as well as appropriate efficacy?

WDR, p. 12, Provisions 61 and 62—With regard to AgNMPs, is there a template AgNMP or are there specific parameters the Regional Board will require within these plans?

WDR, p. 12, Provision 61—The Order requires the submittal by September 15, 2016 and annually thereafter, a BMP reporting program. Is there a template BMP reporting program report or are there specific parameters the Regional Board will require within these plans? Or is the BMP reporting program report just a subset of the AgNMP?

WDR pp. 14-15, Provision 70—Provision 61 requires AgNMPs to be developed by individuals or a Coalition Group. However, Provision 70 concludes that if "Agricultural operators… who are not members of WRCAC will be required to develop and implement…an individual AgNMP." These two provisions seem to be in conflict regarding a Coalition Group's ability to develop an AgNMP for its members within the San Jacinto Watershed.

WDR, pp. 19-20—Provision 91—This Provision was added in response to the State Water Board's release of the draft East San Joaquin WDR Order which is precedential on all Regional Boards. However, the Draft ESJ Order is just that, a draft order. No workshops have been held to date, the written public comment period does not end until May 18, 2016, and Board members have not heard any public comments on this issue. Additionally, State Board staff have publicly stated that this Draft Order will likely be revised once public comments have been received. Thus, it is premature to rely upon any component within the Draft Order as nothing is precedential until it has been adopted by the State Water Board. (Examples of components that are not set in stone yet are the nutrient application rates and removal efficiencies data.)

- Revisions to provisions C. 4 (pages 24-25) and C. 10 (page 26) were likely added in response to the Draft ESJ Order.

WDR, p. 37, Provision 57—Under the Inspection and Entry provision, it states that Water Code section 13267(c) mandates that a Discharger must allow the Regional Board to conduct certain activities. Water Code section 13267(c) does not mandate a landowner to allow entry. Rather, if a landowner does not give consent, the Regional Board must obtain a warrant. Water Code section 13267(c) states:

> "In conducting an investigation pursuant to subdivision (a), the regional board may inspect the facilities of any person to ascertain whether the purposes of

this division are being met and waste discharge requirements are being complied with. The inspection shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting the public health or safety, an inspection may be performed without consent or the issuance of a warrant."

In light of the actual requirements in the statute, Provision 7 should be revised to correctly reflect the law. Below is an example of the language used in the Central Valley Regional Board's current WDR:

> "The Member understands that the Central Valley Water Board or its authorized representatives, may, at reasonable hours, inspect the facilities and irrigated lands of persons subject to this Order to ascertain whether the purposes of the Porter-Cologne Act are being met and whether the Member is complying with the conditions of this Order. To the extent required by Water Code section 13267(c) or other applicable law, the inspection shall be made with the consent of the Member, owner or authorized representative, or if consent is withheld, with a duly issued warrant pursuant to the procedure set forth in Title 13 Code of Civil Procedure Part 3 (commencing with section 1822.50). In the event of an emergency affecting the public health and safety, an inspection may be performed without the consent or the issuance of a warrant."

General Comments

Public Notice and Comment

- Although the Regional Board utilized an Advisory Committee during the development of the CWAD, the public at large was not made aware of the changes in the latest draft CWAD and the public hearing date unless they went to the Regional Board website.
    - The Regional Board's actions shift the burden to the public and go against the Water Board's own guidance on public opportunities to participate
    - See: *http://www.waterboards.ca.gov/northcoast/publications_and_forms/available_documents/citizen_guide/pdf/03_public_involvement_guide.pdf*
- There was no formal written comment period for the Regional Board to receive comments on the latest draft of the CWAD
- The information was not distributed by the Regional Board's "Agricultural Waiver Program" email subscription created just for such purposes (aka "Lyris list serve")
- Advisory committees are beneficial and useful but do not replace notice to all (the public at large)
- Other Regional Boards as well as the State Board send out notices via their Lyris email subscription list serve upon each action (i.e.: postponement of a board hearing due to lack of a quorum; subsequent revisions to draft orders; each time the item is to come before the board at a public hearing; all opportunities for public comment; etc)

Reliance on other Region's Irrigated Lands Programs

- Documents on the Regional Board's website have been pulled directly from the Central Coast Regional Board's Ag Order, such as the NOI form. This Ag Order is currently in active litigation.

- Given that the CWAD includes adopted TMDLs, it may be beneficial for the Regional Board to look at a similar Ag Waiver program that includes TMLDs, such as the Colorado River Regional Board's Conditional Waiver of Waste Discharge Requirements for Agricultural Wastewater Discharges and Discharges of Waste from Drain Operation and Maintenance Activities within the Imperial Valley.

Manner of Compliance

A provision should be added to clearly acknowledge that the Regional Board cannot prescribe specific management practices or dictate the manner of compliance (Wat. Code, § 13360.) Examples of language used in other irrigated lands orders acknowledging this point include:

> "The board is prevented by Water Code section 13360 from prescribing specific management practices to be implemented. However, it may set forth performance standards and require dischargers to report on what practices they have or will implement to meet those standards."
>
> or
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> "This Order establishes on farm standards for implementation of management practices that all Members must achieve. The selection of appropriate management practices must include analysis of site-specific conditions, waste types, discharge mechanisms, and crop types. Considering this, as well as the Water Code 13360 mandate that the Regional Water Board not specify the manner of compliance with its requirements, selection must be done at the farm level."
>
> or
>
> "The Regional Water Board may not "specify the design, location, type of construction, or particular manner in which compliance may be had with [a] requirement, order, or decree" (Water Code 13360). However, the Regional Water Board still must require the discharger to demonstrate that the proposed manner of compliance constitutes BPTC (SWRCB Order WQ 2000-7)."

Note that the above are examples used in current WDRs. In comments to the Santa Ana Regional Board, portions of the above language can be recommended rather than the entire provision.

The Conditional Waiver's Use of Coalitions is Appropriate and Beneficial

The inclusion of a third-party group structure with coalitions as the intermediary is a vital component for increasing participation and efficiency in reaching water quality objectives. As seen in many other regions, such as the Central Valley, this structure builds trust and strengthens relationships with the grower, as well as with the Regional Board, and is successful in improving water quality, increasing participation, providing water quality education, and fulfilling regional requirements.

Submittal of Individual Information for Members Participating in a Coalition Group

The WDR requires that various reports be submitted for approval or annually to the Regional Board. CFBF highly recommends that these plans be kept on farm, available for inspection or submitted to the Coalition Group who can aggregate the information and then send it to the Regional Board. Below, please find a section of the comment letter CFBF drafted regarding the Imperial Valley Conditional Waiver (Colorado Regional Water Quality Control Board) followed by a section from a comment letter to the North Coast Regional Board regarding the same issue:

Farm Bureau Has Potential Concerns Regarding Submittals of WQMPs (Imperial Valley Conditional Waiver)

Notwithstanding the Conditional Waiver's use of coalitions and the mandate to submit Annual Reports for the Coalition Group, QAPP, SWMPR, and quarterly monitoring results, the Conditional Waiver requires the submittal of all individual Water Quality Management Plans ("WQMPs"). (See Provision D. 9, p. 21.) If WQMPs are revised in the future to require the reporting of more detailed and specific information, [1] Farm Bureau requests that this information remain on farm available for Regional Board inspection (see Wat. Code, § 13267(a) for the Regional Board's authority for inspections) rather than being sent to the Regional Board.

The protection of intellectual property, trade secrets, and proprietary information is a vital issue seen in agricultural regulatory programs throughout the state. Farm Bureau believes that for an agricultural regulatory program to be successful, proprietary farm-specific information should be kept on farm and reported only to the Coalition if necessary. Reporting directly to the Regional Board or to any other entity will diminish the Coalition group's effectiveness and purpose. Distortion of this information by others, whether purposeful or unintended, could greatly harm growers in a section, and make them targets for threats, or potentially, environmental terrorism. Moreover, inaccurate characterizations of data and information by others would undermine the program in its entirety by sending a signal to participants that the reporting of information to the third-parties provides no assurance that the information is protected from public disclosure, and in fact, will result in the public reporting of such information at a level that will allow members of the public to, in some cases, readily match the information to a grower directly. This public disclosure defeats the purpose of having the information reported to the third-party versus the Regional Board directly. Rather, the third-party is no more than the Regional Board's "data-gatherer," and there is little benefit provided to the growers in having the third-party play this role.

Keeping information within WQMPs on farm rather than submitting them to the Regional Board does not hinder the Regional Board's ability to regulate water quality nor will it prevent the Regional Board from obtaining information it deems necessary. Water Code section 13267 specifically provides the Regional Board with the authority to "investigate the quality of any waters of the state within its region." (Wat. Code, § 13267(a).) In doing so, the statute further provides the Regional Board with the authority to require "any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge . . . [to] furnish, . . . technical or monitoring program reports which the regional board requires."

Regional Boards throughout the state have adopted this approach. Within the Central Valley, instead of requiring the coalitions to submit each farm evaluation (similar to a WQMP) to the Regional Board, the coalitions use the data from the farm evaluations submitted by their members (each member must submit a farm evaluation to its respective coalition) and develop a summary, compatible with ArcGIS, identified to at least the township level. The Central Valley Regional Board found that this manner of reporting not only gives them an adequate amount of information to protect water quality (with the ability to inspect individual farm evaluations if necessary), but also protects intellectual property, trade secrets, and proprietary information.

1 Farm specific information, including pesticide application, irrigation practices, crop rotations, etc., are intellectual property, trade secrets, and proprietary information that must remain confidential. (See Wat. Code, § 13267(b)(2).)

Intellectual Property, Trade Secrets, and Proprietary Information Must Remain Confidential (North Coast Regional Water Quality Control Board)

Farm Bureau is concerned about the requirement that Farm Plans must be sent to the Regional Board. Information within Farm Plans contains intellectual property, trade secrets, and proprietary information, much of which has no correlation or nexus to the Regional Board's authority to regulate water quality. Prior to any request for the entire Farm Plan, the Regional Board should make a finding showing the necessity of the data and information required to be submitted and how such data is related to water quality. Such information must remain confidential. The Porter-Cologne Act explicitly provides protection to growers for intellectual property, trade secrets, and proprietary information that may be within a Farm Plan, monitoring report, or technical submittal:

When requested by the person furnishing a report, **the portions of a report that might disclose trade secrets or secret processes may not be made available for inspection by the public but shall be made available to governmental agencies for use in making studies**. However, these portions of a report shall be available for use by the state or any state agency in judicial review or enforcement proceedings involving the person furnishing the report.

(Wat. Code, § 13267(b)(2).) Thus, the Regional Board must acknowledge that farm specific information, including pesticide application, irrigation practices, crop rotations, best management practices, etc. are intellectual property, trade secrets, and proprietary information that must remain confidential.