

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION**

SUPPLEMENTAL SHEET FOR REGULAR MEETING OF JAN. 31 – FEB. 1, 2013

Prepared January 30, 2013

ITEM NUMBER: 8

SUBJECT: Agricultural Regulatory Program Update – Enrollment and Annual Compliance Form

This Supplemental Sheet includes additional information related to the Agricultural Regulatory Program. In coordination with the California Department of Food and Agriculture (CDFA), the Executive Officer and a few individual Board Members toured farming operations in the Castroville, Salinas, and Santa Maria areas in November and December 2012. The purpose of the tours was to provide the opportunity for CDFA and Water Board representatives to become more familiar with day to day farming operations and interact with growers. During the tours, growers provided specific comments related to the Annual Compliance Form. The comments are summarized below.

Additionally, on January 7, 2013, Ken Harris and Frances McChesney met with representatives from Grower –Shipper Association and Western Growers to discuss specific comments regarding the Annual Compliance Form. On January 8, 2013, Ken Harris and Angela Schroeter also made a presentation to the California State Board of Food and Agriculture and participated in a panel discussion with representatives of the Central Valley Regional Water Quality Control Board to discuss the Water Board programs regulating discharges from irrigated agriculture.

Farm Tour Comments Related to Annual Compliance Form

1. **Comment:** Nitrogen use data is proprietary. Nutrient management involves much work over time and experience, and trial and error to fine tune timing of application and amount applied. One uses different amounts to produce seeds versus edible portion of plants. What is the process for protecting proprietary information?

Response: The Annual Compliance Form does not include reporting related to the amount of nitrogen applied at this time; that information is due in October, 2014. The requirement to report total nitrogen applied to a crop does not apply to all growers; it applies to a subset of Tier 2 and Tier 3 Farms that are identified as having a high nitrate loading risk. Growers may consider some information required to be reported to the Water Board as proprietary, such as information related to fertilizer application practices.

Water Code section 13267, subdivision (b)(2) states that 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. Condition 65 of the Agricultural Order includes an explanation of how such trade secrets or secret processes are protected from public disclosure. In addition, the Agricultural Order provides the opportunity for growers to identify any information related to trade secrets or

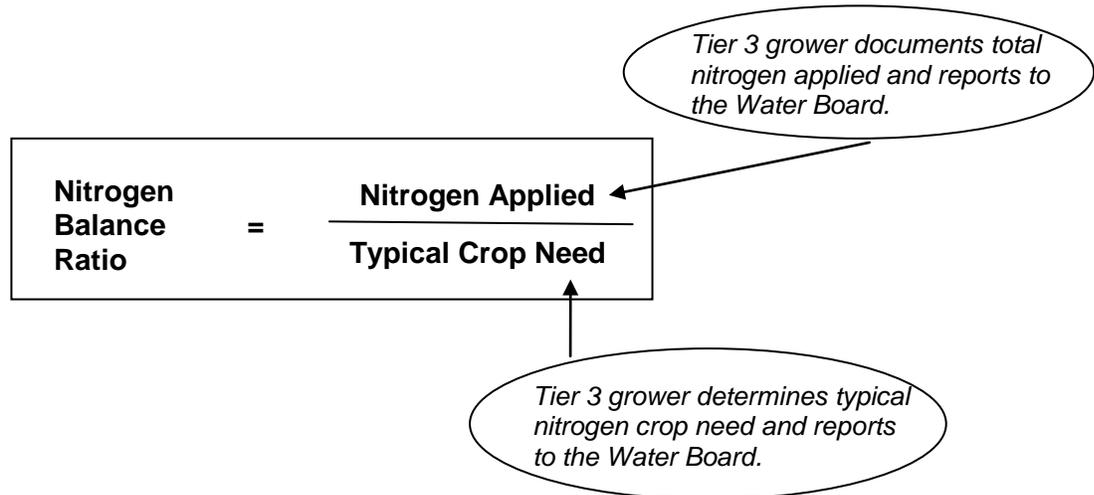
secret processes which are exempt from public disclosure pursuant to Water Code §13267, including an explanation of how those portions of the reports are exempt from public disclosure. As soon as a grower identifies the inclusion of trade secret or secret processes in the reported information, the Water Board can efficiently protect it from public disclosure. Upon receipt of a PRA request, the Water Board staff and attorney will determine whether any such report or portion of a report qualifies for an exemption from public disclosure. If the Water Board disagrees with the asserted exemption from public disclosure, the Water Board staff will notify the grower prior to making such report or portions of such report available for public inspection. To clarify this process, staff has developed an information sheet for growers to explain in detail how the Water Board handles information related to trade secret, secret processes, groundwater well locations, and other private information submitted by growers (Attachment 1 to Supplemental Sheet). This information sheet, along with other similar resources, is available on the Water Board's Agricultural Regulatory Program website under the heading "Grower Workshops and Resources" at the link below: http://www.waterboards.ca.gov/centralcoast/water_issues/programs/ag_waivers/index.shtml

2. **Comment:** Growers do not understand the Nitrogen Balance ratio milestones in the Agricultural Order.

Response: The Annual Compliance Form does not include reporting related to the Nitrogen Balance Ratio milestones at this time; that information is due in October 2015. The Nitrogen Balance ratio milestones in the Agricultural Order do not apply to all farms; they apply to a subset of Tier 3 Farms that are identified as having a high nitrate loading risk (<100 Farms).

The Nitrogen Balance ratio is a milestone that only the subset of Tier 3 growers must report progress towards; it is not an enforceable number. The ratio refers to the total number of nitrogen units applied to the crop (considering all sources of nitrogen such as fertilizers, soil nitrogen, nitrogen in irrigation water) relative to the typical nitrogen crop need. The Nitrogen Balance ratio milestones are 1.0 for crops in rotation (e.g. lettuce) and 1.2 for annual crops (e.g. strawberries). A ratio of 1.0 means that the total nitrogen applied is approximately equivalent to the agronomic nitrogen application rate for a particular crop. For example, UCANR research on lettuce recommends 120 – 140 lb./acre. Lettuce growers that apply between 120-140 lb./acre are close to the 1.0 ratio. Experts have determined that nitrogen losses may still occur, even when growers apply the agronomic rate. However, the closer the amount of nitrogen applied is to the agronomic rate, the less nitrogen is available for leaching to groundwater. Thus, the Nitrogen Balance ratio is an indicator of relative risk of nutrient loading to groundwater. The Agricultural Order requires growers to report progress towards these milestones.

The Water Board does not prescribe the amount of nitrogen to be applied or identify the typical crop need. Tier 3 growers determine the nitrogen crop need for their farm in consideration of available information (e.g. UCANR local guidelines and recommendations) and site-specific farm conditions, and practices necessary to protect water quality standards. Similarly, Tier 3 growers document the total amount of nitrogen applied to the crop, also considering site-specific farm conditions.



3. **Comment:** Growers have described that nitrogen in source water is not all available to the plant. It is better to use a cleaner source of water and add synthetic fertilizers

Response: The Annual Compliance Form includes reporting related to management practices, including nutrient management practices. Growers must implement practices to address relevant water quality issues but are not required to implement any specific management practice. Growers report the practices they are implementing in the Annual Compliance Form to demonstrate progress towards water quality improvement. One of the practices included in the Annual Compliance Form is “*Measurement of nitrogen concentration in irrigation water and adjustment of fertilizer nitrogen applications accordingly*”. Growers can choose to implement this management practice at their discretion based on farm-specific characteristics, including protecting water quality standards, and then report accordingly in the Annual Compliance Form.

With respect to the specific issue of availability of nitrogen in irrigation water for crop uptake, UCANR researchers and Certified Crop Advisors have indicated that this source of nitrogen is generally available for crop uptake. In addition, CDFA is currently funding grant projects to evaluate this concept, referred to as “pump and fertilize,” to better understand the availability of nitrogen in irrigation water as a plant nutrient source. More information about the CDFA grant project is available on the CDFA website at:

http://www.cdfa.ca.gov/is/ffldrs/pdfs/2012_FREP_Special_Request_for_Proposal.pdf

As stated above, the Water Board does not directly prescribe the amount of nitrogen to be applied or identify the typical crop need. In the case where the availability of nitrogen in irrigation water may affect the amount of total nitrogen applied to the crop, the grower can choose appropriate management practices and document fertilizer decisions based on the farm-specific characteristics.

4. **Comment:** Discing a crop puts nitrogen back into the soil but this practice counts against the nitrogen budget because the nitrogen does not show up in the soil right away. Discing is not done routinely.

Response: As stated above, growers must implement practices to address relevant water quality issues but are not required to implement any specific management practice. One of the practices included in the Annual Compliance Form is “*Measurement of soil nitrate or soil solution nitrate and adjusted fertilizer application and adjustment of fertilizer nitrogen applications accordingly*”. Growers can choose to implement this management practice at their discretion based on farm-specific characteristics and water quality standards, and then report accordingly in the Annual Compliance Form. In the case where discing may affect the amount of nitrogen in the soil, the grower can document fertilizer decisions based on the farm-specific characteristics.

5. **Comment:** Permit holders should be the grower (operator), not the landowner. Absent land owners frequently have little control or do not know what their tenants are doing. The lessee should be the only permit holder.

Response: Similar to the 2004 Agricultural Order, the current Agricultural Order regulates both landowners and operators of irrigated lands on or from which there are discharges of waste that could affect the quality of any surface water or groundwater.

Although some operators may lease land for long periods of time, many operators are transient, short term tenants. In most cases, the operator will have more direct control of the farming operations and management practices implemented to protect water quality. Conversely, landowners may have more control over permanent infrastructure such as groundwater well construction.

It is important that landowners and operators communicate regarding compliance with the Agricultural Order. The Agricultural Order requires either the landowner or the operator to submit the electronic-Notice of Intent (eNOI) to enroll in the program. In the case where an operator may be operating for a period of less than 12 months, the Agricultural Order requires the landowner to submit the eNOI. In some cases, landowners and operators document responsibility in lease agreements. In cases of non-compliance, both the landowner and operator are accountable for resolving any issues. In general, Water Board staff interacts primarily with the operator and the operator is the primary contact on the eNOI. Staff typically works first with operators to resolve compliance issues. However, when staff finds an operator in violation of the requirements of the Agricultural Order, they include the landowner in any related correspondence.

Issues can arise if the landowner is absent and takes no interest in ensuring that the tenants comply with applicable regulations. Similarly, issues can also arise if the tenant is not cooperative in providing the landowner information regarding their compliance. One potential solution is to make information about enrollment accessible to the landowner. To increase the accessibility of this information to landowners, staff is currently evaluating making enrollment information available to the public using GeoTracker.

All of the Conditional Waivers of Waste Discharge Requirements for irrigated lands in all the regions in the state hold both owners and operators responsible for discharge from irrigated lands that impact water quality and for complying with the requirements to address the dynamic nature of farming and changing tenants on many properties. State Water Board and Regional Water Boards have long had a policy of naming both landowners and operators/lessees in waste discharge requirements. A May 8, 1987 Memorandum from

William R. Attwater, Chief Counsel, to Regional Board Executive Offices entitled "Inclusion of Landowners in Water Discharge Requirements and Enforcement Orders" affirms the policy. The memorandum noted that there were several basic principles for naming landowners: 1) anyone who owns land on which a discharge is occurring is a discharger under Porter-Cologne; 2) any discharger can be named in waste discharge requirements and made generally responsible for what goes on which regard to the property; and 3) enforcement orders can be issued to a landowner only if the cleanup involves something about which the landowner knew or should have known and over which he or she had some measure of control. In the petition of South California Edison Company, the State Water Board again affirmed the right of the Regional Water Boards to name landowners in waste discharge permits, noting that there are several reasons to justify inclusion of a landowner in waste discharge requirements. Those reasons include the existence of nuisance conditions on the leased premises at the time the lease is made or renewed or the creation by the tenant of dangerous conditions on the premises of which the landlord has actual knowledge or the ability to abate may serve as bases for imposing liability on the landlord. Additionally, inclusion of the landlord in requirements serves to put the landlord on notice of the tenant's activities and will help to insure access to the site. (Southern California Edison Company, WQ 86-11, pg. 2-3; see also In the Matter of the Petition of Zoecon Corporation, WQ 86-2.)

Attachment:

1. Resources for Growers: Protection of Trade Secrets, Secret Processes, and Private Information, January 28, 2013