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Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Subject: Comment to A-2239(a)-(c)

Dear Chairman Marcus and Members of the Board:

Thank you for the opportunity to comment on the State Water Resources Control Board (Water Board) Second Draft Order (Draft Order) for Waste Discharge Requirement for Growers within the Eastern San Joaquin River Watershed. The precedential nature of this Regulatory Permit will have long-term impact on the future of agriculture in the State of California. We appreciate the Water Board's serious consideration of the impacts of this permit to Irrigated Lands Regulator Programs throughout the state and recognize the difficulty of creating a balanced approach that protects water resources and the sustainability and viability of California Agriculture.

**Nitrogen Applied versus Nitrogen Removed for Central Coast Crops:**

From a Central Coast perspective, it is interesting to review the Draft Order in light of Water Board comment letters and testimonies, as well as Agricultural Expert Panel testimonies, letters and deliberations. There is substantial administrative record addressing variable production factors, crop diversities, and intricacies of the agricultural industry on the Central Coast.

Climatic gradients and variable soil types throughout the area influence fertilizer and irrigation water inputs so that inputs are not directly comparable from one small growing region to another (e.g. Hollister, San Juan Bautista, Pajaro, Blanco, Eastside-Salinas Valley, Mid-Salinas Valley, South Salinas Valley, Edna Valley, Arroyo Grande, Santa Maria, Guadalupe, Los Alamos, Buellton, and South Coast). Thus, this variability defeats using the proposed formulas for standardized comparative purposes.

Quite simply, the proposed nutrient reporting requirements in the Draft Order may not be implementable for crops such as cool season vegetables such as head lettuce, romaine, implementable to such crop as head lettuce, Romaine, leaf lettuce, baby greens, spinach, kale, kohlrabi, Broccolini, rapini, radicchio, cilantro, parsley celery, asparagus, anise, artichokes, Brussels sprouts, broccoli, Napa cabbage, snow peas, cauliflower, strawberries, caneberries, transplant houses, cut flower/potted nursery crops, herbs and specialty plant crops. These coastal crops are geographically transient, grown in small sub-lots and/or plantings, and often have multiple crops per year. Many of the growers have very small, albeit intensively farmed, operations, and subsets of growers have communication challenges.

Operationally, cool season vegetables are harvested based upon containers (or counts) rather than yield. To accommodate the yield reporting requirements of the A/R and A-R formulas would necessitate an overhaul of the harvest industry. Since many crops are custom harvested, growers have little control over this part of the industry.

Furthermore, final harvested SKUs or contracted product deliverables vary depending on markets. The amount that a product is field-trimmed is what determines the deliverable. Therefore, field-trimmed plant residue must be considered as part of any nitrogen management program and/or loading estimate program. Additionally, growers not only field-trim crops, but they may field-wash crops, too. It is unclear how water weight from potable wash-water would be factored into loading estimates.

Correlations between initial planting schedules and harvested crops don't always occur. The Draft Order's mandated requirements for projected yield estimates and final yield reporting sound good on paper, but may be virtually impossible to comply with in practice.

When one considers the factors above, it is perplexing why Water Board Staff did not facilitate direct discussions with Central Coast producers or include more flexibility and exceptions in the precedential components of the Draft Order. This is particularly true since Staff has been exposed to a fairly extensive administrative record of Central Coast request for exceptions over the past five years.

The following comments are in addition to the joint letter written with Monterey County Farm Bureau, Grower Shipper Associations, and California Strawberry Commission.

### **Nitrogen Removed is not the same thing as Nitrogen-Required**

N-removed is that part of nitrogen in the crop that is removed during harvest or with other cultural practices. For specialty crops, this may be a fraction of N-Required, which is the nitrogen necessary to actually grow a harvestable crop. While there is definitely room to improve nitrogen use efficiency, it is an agronomic fallacy (if not fantasy) to believe that N-required and N-removed will be equal. The Draft Order is silent on this issue, which could lead to erroneous discussions. A simple clarifying statement to this effect would be helpful.

### **Baselines**

The Draft Order discusses the need to establish baselines. However, the proposed nitrogen reporting modifications actually destroy Central Coast baselines for over 600 ranches that began reporting Total Nitrogen Applied (TNA) in 2014.

There are concerns that the Draft Order's baseline will not be established until 2019 or 2020. In that event, grower nitrogen and irrigation water management improvements will not be documented and the baseline is established AFTER improvements have already been implemented. The Draft Order needs to include a mechanism for incorporating previous reporting baseline information into the analysis. Grower improvements should not be lost. Reactionary regulatory development is disruptive to grower data collection systems, creates unnecessary costs and prevents the development of meaningful trend analysis. It creates uncertainty, which makes it very difficult to make business investment decisions.

It is unclear whether a 501(c)(5) Agricultural Tax-exempt Corporation, such as the East San Joaquin Watershed Coalition, is able to implement semi-regulatory requirements contained in the Draft Order.

The East San Joaquin River Watershed Coalition's Mission is "To support research on farming practices, monitoring of local waterways, and Stewardship of the environment with respect to the use of various agricultural inputs by proactively communicating environmental issues and disseminating information."

The Draft Order adds quasi-regulatory tasks (i.e., followup with outliers and designating "Outliers" to the Regional Water Board.) These additional quasi-regulatory tasks may not be congruent with IRS-approved charters.

It appears that the California UCC and IRS test of a 501(c)(5) tax-exempt corporation are identical, even though case law may add nuances to the application of the legal test in California. In general, a 501(c)(5) agricultural organization should have the purpose of:

- The betterment of the conditions of those engaged in agriculture,
- The improvement of their products, AND
- Their occupational efficiency.

While improving water quality is a laudable mission, some of the Draft Order's newly imposed, quasi-regulatory mandates do not necessarily meet the tests outlined above. The requirements imposed by the Draft Order should be reviewed in light of these tests to determine appropriateness of imposed requirements on Third Party Groups which are 50 ( c ) ( 5 ) corporations.

### **The Draft Order's mandates are confusing with respect to individual WDR requirements.**

This Draft Order does not rescind Order R5-2013-0100, which is the Waste Discharge Requirement for a grower not participating in a Third Party Group. Yet, this Draft Order imposes precedential requirements on growers who elect not to participate in a Third Party Groups. It is unclear whether the precedential requirements replace or overlay existing monitoring, tracking, and reporting requirements that are found in R5-2013-0100.

Clearly, the Draft Order and the SWRCB fee structure are both designed to "encourage" growers to participate in Third Party Groups. However, the disparity between costs and compliance requirements for growers who are not in a Third-Party Group versus those who are in a Third Party Group can hardly be called an incentive. From a grower's perspective, there is no choice at all. To put it politely, growers feel strong-armed into joining a Third Party Group, which is not always in their best interest.

### **Third Party Groups do not always provide benefits as presented in the Draft Order**

Economies of scale, technical assistance with management practice implementation, aggregation of data, and anonymity of field-reported data are touted as some of the benefits of Third-Party Groups. On the Central Coast, Third Party Groups have not always provided these benefits.

### Economies of Scale

For example, in 2017, it was less expensive for most growers to take their own drinking water and irrigation well samples under the individual groundwater sampling program rather than as a member of the Central Coast Groundwater Coalition.

### Anonymity

In another example, the Central Coast Regional Water reneged on the Central Coast Groundwater Coalition's workplan, which allowed data to be reported on an aggregated basis. Additionally, individual well sample data and landowner information was supposed to be blocked with anonymous identifiers. However, that information was released in 2017.

Consequently, growers doubt assurances in the Draft Order that field-reported data will be kept anonymous. Conversations with State Water Board Staff in 2015 lend further weight to grower doubts. Staff commented that Tier 2 and Tier 3 growers "should get used to divulging information for public review" in light of legislation that made well construction data public.

My 2016 letter commenting on the ESJ first Draft Order outlined 14 concerns with divulging grower input and operational data to the public. They ranged from national security to trade secret protection to possible demonization of individual growers by environmental activists. The concerns remain.

### Technical Services

I have concerns about grower self-certification. Conceptually, this approach seems like a great idea. However, it is questionable whether growers will truly obtain the necessary skills to implement this Draft Order across the board, even with this training. Is it possible that self-certification is political band-aid to cover up the fact that there are underdeveloped technological solutions, insufficient technical capacity, and an inadequate number of technical service providers to implement this Draft Order? f

### **Irrigated Lands Regulatory Program (ILRP) Permits do not give growers credit for implemented management practices**

This has been a recurring theme in comment letters and testimony from the Central Coast over the past five years. Nevertheless, the request for credit has had little impact on past or current policy and regulatory development.

The lack of credit for grower water quality protection is especially concerning in the Monterey Bay area, where growers have been implementing agricultural water quality management practices since the 1990s prior to the adoption of the first Irrigated Lands Regulatory Ag Waiver in 2000. Neither this Draft Order nor previous ILRP permits provide regulatory incentives for past, present or future water quality protections. All growers are subjected to standardized regulatory requirements. Agricultural interests encourage the Water Board to consider regulatory mechanisms that take into consideration past and present proactive implementation of practices to provide some regulatory relief of this expensive Draft Order.

**The Draft Order lacks incentives.**

Meaningful regulation should promote desired positive societal outcomes and agriculture production changes and not consist solely of ever-escalating and elaborate monitoring and reporting requirements, which are too complicated for the average grower to understand, much less implement. In other words, please build more incentives into the program.

**Outliers**

Funding for Third Party identification, followup and reporting

Growers, who have been expending money, time and energy to comply and adopt every increasing beneficial management practices, are concerned about using Third Party Group resources to address “Outliers”. Proactive growers question whether “Outliers”, who may not have invested management practices to date, should receive gratis benefits of Third Party Group services. Or should Outliers be required to pay individual followup service fees? Of course, assistance for small, undercapitalized or disadvantaged growers should be provided through grant-funded or tax-funded resources.

Growers who are identified as “Outliers” need a formal appeal process

Currently, the Draft Order does not establish a formal appeal process for growers identified as “Outliers” except that the Third Party Group will follow up with them and report repeated outliers to the Regional Board. Growers would like to see a formal process for challenging the public designation of “Outlier” since it carries potential stigma in the community, with the public, and with clients.

**Costs**

In general, the cost analysis could be improved in the Draft Order. The proposed scope and precedential breadth of the Draft Order is sufficiently different from the PEIR to warrant a thorough and new analysis of costs at all levels. Data used for cost estimates should be contemporary, rather than using 10+ year-old PEIR data.

The Draft Report considers partial costs for administrative, implementation of management practices, monitoring, reporting, and tracking costs. Costs are tabulated as follows:

	<b>Order</b>	<b>Current program</b>	<b>Change</b>
Administration	0.84	0.77	0.07
Farm plans	0.71	--	0.71
Monitoring/reporting/tracking	3.66	1.18	2.48
Management practices	113.34	112.50	0.84
State Fees	0,56	0.56	0.56
<b>Total</b>	<b>118.55</b>	<b>114.45</b>	<b>4.50</b>

\* Totals may not sum due to rounding. Estimated cost figures are from Tables 2-18, 2-19, 2-20, 2-21, and 2-22 of the Economics Report for the San Joaquin River Watershed. Per acre costs have been developed using the acres in the San Joaquin River Watershed (est. 2,126,028, Table 3-3, Economics Report).

\*\* These costs are an estimate of *potential*, not required costs of implementing specific practices.

According to calculations made by Staff, potential costs are only increased by an estimated 5%. However, if one were to conclude that State fees and management practice costs will be incurred no matter if this Draft Order were adopted, then, an evaluation of increased costs should only include those items which change with this Draft Order. The calculations, would then be:

	<b>Order</b>	<b>Current program</b>	<b>Change</b>
Administration	0.84	0.77	0.07
Farm plans	0.71	--	0.71
Monitoring/reporting/ tracking	3.66	1.18	2.48
<b>Total</b>	<b>5.21</b>	<b>1.95</b>	<b>3.26</b>

\* Totals may not sum due to rounding. Estimated cost figures are from Tables 2-18, 2-19, 2-20, 2-21, and 2-22 of the Economics Report for the San Joaquin River Watershed. Per acre costs have been developed using the acres in the San Joaquin River Watershed (est. 2,126,028, Table 3-3, Economics Report).

\*\* These costs are an estimate of *potential*, not required costs of implementing specific practices.

If management practice costs and fees are removed from cost calculations, costs increase by 160%, not 5%.

Below is a Summary of the Draft Order requirements that will incur costs for Central Coast growers. Many of these costs would not fall in the cost categories in the calculations above.

- Enrollment Costs
- Third Party fees
- Farm Evaluation writing/updating/reporting,
- Implementation of management practices,
- Attending educational events
- Risk/Liability/Threat management. This could include, but is not limited to, additional insurance coverage, additional credit requirements, changes to/loss of leases, hiring attorneys, hiring specialized consultants, updating policies, and dedicating time to stay abreast of policy and regulatory development.
- Erosion management: planning, implementation and reporting costs
- INMP (include a A/R and A-R reporting) data collection, tracking, reporting, and followup
- Costs associated with being labeled an “outlier”.
  - This includes the costs for a grower to prove he is NOT an outlier
  - This includes followup costs if it is determined that a grower IS an outlier
  - Note: there are potential exposure costs and lost opportunity costs if it is determined that a grower is an Outlier
- Surface Water Monitoring, Data Analysis and Reporting Costs
- Groundwater Water Monitoring, Data Analysis and Reporting Costs

- Monitoring Program followup costs
- Research Costs
- Managing consistency among reports
- Costs of losses of productive farm land
- Staffing costs. All of the requirements create staffing needs
- Transportation costs: Field implementation means more people are needed in the field taking measurements.
- Records Retention Costs

A Central Coast *Third Party Group* costs would include, but are not limited to the following. Many of these costs would not fall in the cost categories in the calculations above.

- Managing enrollment
- Being integral part of the management practice implementation infrastructure.
- Aggregating and summarizing Farm Evaluation information in an annual report.
- Aggregating INMP information
  - Calculating a 3-year running average for each member and each field
  - Comparing A/R and A-R calculations across among growers, across regions or watersheds, between crops
  - Communicating A/R and A-R information back to growers
  - Reporting -level information to Water Boards
  - Submitting an annual INMP Summary Report
- Preparing and submitting field-level information to Water Board
- Creating and conducting educational events (which includes all the languages of growers in the area)
- Tracking educational event attendance and reporting lack of attendance to Water Board
- Creating report templates (i.e. Farm Evaluation, Sediment and Erosion Control Plans, INMP with A/R and A-R reporting information)
- Identifying “Outliers”
- Creating and conducting self-certification training for “Outliers”
- Following up with “Outliers”
- Identifying and reporting repeat “Outliers” to the Board
- Manage Surface Water and Groundwater Monitoring Programs
- Submit quarterly Surface Water monitoring reports
- Submit annual Groundwater Monitoring Reports
- Determining, through N-removed testing, literature-review, and research the most appropriate N-removal coefficients
- Conducting other research that pertains to improving water quality
- Creating milestones to insert in the following templates: farm evaluations, INMP, INMP Summary Report and Sediment/Erosion Plan
- Legal Assistance costs
- Increased Staffing costs
- Costs for defending lawsuits
- Office equipment
- Records Retention costs
- As yet unidentified costs associated with ever-escalating legal and political pressures.

Regional Water Board costs would consist of evaluating and acting upon reports, tabulating field-level reported data, and tracking overall progress of this Draft Order. This will likely include needs for increased staffing, transportation, computer equipment, and legal costs.

SWRCB Costs associated with increased staffing needs, legal costs, and the costs to facilitate expert Panels.

Based on the above, one could surmise that cost estimates in the Draft Order are partial and underestimated. Therefore, it is unknown whether the imposed costs are reasonable when compared to derived water quality benefits. The nexus between increased costs and estimated water quality benefits has not been established.

Because the magnitude of the Draft Order is temporally, spatially, and culturally far-reaching, ALL costs should be considered and use up-to-date and contemporary data. This should occur regardless of whether such cost estimates are required by the Water Code. It is socially irresponsible to move forward with the Draft Report without an earnest attempt to understand the statewide societal costs and benefits of this program.

If an updated cost estimate would cause undue delay to adoption, at the very least, the Adopted Order should require an updated *professional* cost estimate of cost/benefit within a specified period of time following adoption. The cost-estimate requirement provision should include mechanisms for amendment of the adopted waiver, if the nexus between cost and benefit are not reasonable or aligned.

At this point in the discussion, agencies, conservationists, and environmental activists often point to the costs of pollution externalities such as the costs of treating drinking water or loss of environmental services. That point is correct. External costs should be included in cost/benefit analyses. However, a true cost/benefit analysis does not only consider selected costs to prove the need for regulation. All social costs should be tabulated such as impacts to communities, job losses, loss of land values, loss of tax revenues and associated losses of governmental services, lost opportunity costs, business re-investment reductions, etc. Either conduct a full accounting of the external costs or eliminate the external costs completely from the analysis. A complete cost analysis to determine impacts to rural communities would be preferable. A partial cost analysis misleads the public.

### **Concern about the proposed and future scope of Third Party Group Requirements.**

In general, Growers are concerned about the overwhelming number of tasks that Third Party Groups are required to do under this Draft Order. Central Coast growers see the proposed Draft Order as the first step in creating a non-governmental, quasi-regulatory organization that contains no checks and balances with respect to demands that may be imposed in the future. In laymen's parlance, growers are concerned that the Draft Order creates an "open-checkbook for endless regulatory mandates".

### **Conclusion:**

It is apparent that Water Board Staff has seriously considered the recommendations of the Agricultural Expert Panel and has engaged and solicited considerable input from stakeholders in the San Joaquin Valley. Unfortunately, they did not reach out to the Central Coast, and the program doesn't fit Coastal farming systems or organizational infrastructure. The Draft Order needs to be tweaked in order to make it work for the Central Coast.



In spite of critique above, there is room for optimism. It is possible that this Order actually creates a unique opportunity for the Agricultural Community, SWRCB and the Central Coast Regional Water Board to create an Irrigated Lands Regulatory Program that actually addresses water quality on the Central Coast. However, the process of customizing an ILRP to fit the Central Coast, while meeting SWRCB reporting needs, will take some time. My clients and the Trade Associations with whom I work, are requesting that the adopted Irrigated Lands Regulatory Program for Growers in the East San Joaquin River Watershed include provisions that allow further work on the Central Coast in conjunction with SWRCB and the Central Coast Region.

Thank you for your consideration of these comments and your dedication to addressing known water quality issues in California.

Most Sincerely,

A handwritten signature in black ink, appearing to read 'Kay Mercer', with a long horizontal line extending to the right.

Kay Mercer  
President, KMI