



## Westlands Water District

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*Submitted via email*

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State Water Resources Control Board  
P.O. Box 100  
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Re: Comments on Proposed Approval of an Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Diazinon and Chlorpyrifos Discharges

Westlands Water District (“Westlands”) appreciates the opportunity to submit comments on the State Water Resource Control Board’s (“State Board’s”) Proposed Approval of an Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Diazinon and Chlorpyrifos Discharges (“proposed Amendments”). Westlands is a water district established under California law. Formed in 1952, Westlands is the largest single agricultural water district in the United States, encompassing more than 600,000 acres of farmland in western Fresno and Kings counties. The District supplies water to serve farmers who produce dozens of high quality commercial food and fiber crops sold for the fresh, dry, canned and frozen food markets, both domestic and export, that generate more than \$3 billion annually in agricultural-related economic activity. Westlands also supplies water to families, businesses, municipalities, and industrial users in the Central Valley.

Westlands is committed to serving the agricultural interests of the Central Valley in a manner that maintains and supports the environmental resources of the Central Valley. Westlands has a number of concerns regarding the potential scope of the proposed Amendments, each of which were raised to the Central Valley Regional Board by agricultural interests, and which we feel bear repeating and further emphasis. First, we are concerned that the proposed water quality objectives could be applied to agricultural and storm water drains and urge the State Board to clarify that the water quality objectives will not be applied to such agricultural and storm water drains that are not deemed waters of the United States under the Clean Water Act. Second, we are concerned that the proposed Amendments and supporting documents do not properly consider the statutory factors included in Section 13241 of the California Water Code.

## 1. The Proposed Water Quality Objectives Should Not Be Applied To Agricultural and Storm Water Drains

The water quality objectives that the Central Valley Regional Control Board (“Regional Board”) is proposing for diazinon and chlorpyrifos (“proposed Amendments”) are based on the requirements of Section 303 of the Clean Water Act and the United States Environmental Protection Agency’s (“EPA’s”) implementing regulations. Because they are derived from the federal Clean Water Act, the proposed water quality objectives can only be applied to “waters of the United States.” See generally, *Rapanos v. United States*, 547 U.S. 715, 723-26 (2006). While the scope of waters of the United States has been the subject of significant debate, the plurality in *Rapanos* demonstrates that agricultural and storm water drains are not waters of the United States. Indeed, the Court expressly criticized two Ninth Circuit cases—*Community Ass’n for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002) and *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)—for concluding that “irrigation ditches and drains that intermittently connect to covered waters” were jurisdictional. *Rapanos*, 547 U.S. at 727. The plurality went on to explain that “[i]n applying the definition to ... storm sewers and culverts ... drain tiles, [and] man-made drainage ditches ... the Corps has stretched the term ‘waters of the United States’ beyond parody.” *Id.* at 734. In light of this precedent, it would be unlawful for the State Board to approve the proposed Amendments that would apply the Section 303 water quality objectives to irrigation and storm water drains that are not waters of the United States.

The proposed Amendments, however, leave open the possibility that the water quality objectives would be applied to agricultural and storm water drains. In developing the proposed Amendments the Regional Board staff evaluated which water bodies should be subject to the proposed water quality objectives and presented the Regional Board with four alternative approaches. Based on the staff’s recommendation, the Regional Board adopted applicability criteria that would apply the objectives to a specified list of water bodies, as well as “[w]aters with designated or existing WARM and/or COLD beneficial uses<sup>1</sup>....” *Proposed Basin Plan Amendment* at C-2. While the proposed Amendments do not specifically list agricultural and storm water drains, the Regional Board’s staff report expressly relies on data from these conveyances in developing the proposed water quality objectives. For example, the report separately evaluates water

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<sup>1</sup> The staff report defines WARM and COLD beneficial uses as follows:

**Warm Freshwater Habitat (WARM)** – Uses of water that support warm water ecosystems including, but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish, or wildlife, including invertebrates.

**Cold Freshwater Habitat (COLD)** – Uses of water that support cold water ecosystems including, but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish, or wildlife, including invertebrates.

samples from agricultural and urban storm drains and compares them to currently applicable water quality criteria for diazinon and chlorpyrifos developed by the California Department of Fish and Game. *Staff Report* at 51, T.1-10. Thus, it is clear that concentrations of diazinon and chlorpyrifos in these conveyances played an important role in the development of the proposed water quality objectives.

In view of the Regional Board's reliance on data from these conveyances in crafting the proposed Amendments, Westlands remains concerned the Regional Board may seek to apply the proposed water quality objectives to agricultural and storm water drains by designating WARM or COLD beneficial uses for the drains. In fact, the staff report touts the flexibility to do so as a key benefit of its preferred alternative. *See Staff Report* at 88 ("This alternative would leave the Board flexibility in terms of appropriate benefits use designations and water quality objectives *in constructed water bodies such a drains and canals ...*")(emphasis added); *see also id.* at 86 ("This alternative ... *would leave more flexibility for smaller constructed water bodies*, because WARM or COLD beneficial uses may not apply to some tributaries that are considered 'constructed.')(emphasis added). Further, after receiving comments on the 2013 proposal that argued that agricultural and storm water drains were not waters of the United States under the Clean Water Act, the Regional Board asserted that the distinction was not "clear cut" and suggested that at least some of those conveyances could be deemed waters of the United States and assigned beneficial uses at a later date.

In short, if approved, the proposed Amendments will create significant uncertainty for entities that use and manage agricultural and storm water drains. Rather than leaving open the possibility that the Regional Board may seek to subject these conveyances to the water quality objectives at some undisclosed, later date, we urge the State Board to clarify that the proposed Amendments will not and cannot be applied to agricultural and storm water drains that are not waters of the United States under the Clean Water Act.

## **2. Inadequate Consideration of Water Code Section 13241 Factors**

The proposed Amendments include adoption of water quality objectives for diazinon and/or chlorpyrifos. Adoption of such objectives must comply with certain provisions of the Water Code, and are specifically required to comply with Water Code section 13241. Section 13241 requires the regional boards to consider a number of statutorily specified factors prior to adopting water quality objectives that will "reasonably" protect beneficial uses. Among these required factors, subdivision (d) requires the regional boards to consider "economic considerations" as a factor under section 13241.

Although the Draft Staff Report includes tables and some narrative with respect to the factors specified in Section 13241, the analyses in the tables and the narrative

associated with each factor is limited at best. For example, with respect to economic considerations, the tables in the Draft Staff Report claim that for application of the CDFG/USEPA criteria and UC Davis criteria, the economic considerations are modest or have no negative impact. The narrative refers to section 9 but makes little attempt to actually quantify the cost except to say that costs could increase total production costs for agriculture by 1-9%. (Draft Staff Report, p. 113.) The narrative does not discuss what type of impact a 1-9% increase in production costs may have on agriculture.

The reality is that, for agriculture, increases in production costs of 1-9% can be significant. Such increases can mean the difference between a positive profit year or a negative one. Accordingly, the costs associated with meeting the water quality objectives in the Draft Amendment can be significant and should be more clearly discussed in the Draft Staff Report.

Water Code section 13245 provides that the State Water Board may “return [a Regional Board’s water quality control plan] to the regional board for further consideration and resubmission to the state board.” (Water Code, section 13245.) Given the lack of due consideration given to the economic impacts, as specifically required under Water Code section 13241, subd. (d), Westlands respectfully requests that the State Water Board return the Amendment to the regional board for adequate consideration of all the factors required to be considered under the Water Code.

Westlands appreciates the opportunity to comment, and the State Water Board’s attention to its concerns. Please contact Philip A. Williams at (916) 321-4207 or [pwilliams@westlandswater.org](mailto:pwilliams@westlandswater.org) with any questions or concerns.

Sincerely,



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